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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1903, AND JANUARY TERM, 1904.

VOLUME LXX.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1903.

GEORGE GOFF V. BYERS BROS. & CO.

FILED OCTOBER 7, 1903. No. 13,107.

1. **Chattel Mortgages:** VALIDITY. Where mortgaged stock are described as being upon a certain farm owned by the mortgagor in the county of his residence, the mortgage is not void for uncertainty, if the description of the animals is not applicable to any others kept on such farm.

2. **Promissory Note:** EVIDENCE. A promissory note in the hands of the payee is, even after maturity, evidence of the existence of a debt.

3. **Herd Law:** AWARD: NOTICE. A mortgagee of cattle can not, in a proceeding under the herd law, be bound by an award made without giving him a hearing or an opportunity to be heard.

4. ———: NOTICE. Notice to the owner of cattle in such a proceeding is not notice to the mortgagee.

5. ———: OWNER: MORTGAGEE. The remedy by distress under article 3, chapter 2, Compiled Statutes, is given to enforce in a summary manner a claim for damages against the owner of cattle who is charged with the duty of keeping them off the cultivated lands of others. A mortgagee, without possession, is not an owner within the meaning of the statute.

ERROR to the district court for Pierce county: JAMES F. BOYD, JUDGE. *Affirmed.*

William W. Quivey, for plaintiff in error.

Clarence B. Willey, contra.

SULLIVAN, C. J.

This was an action brought by Byers Bros. & Co., a partnership, against George Goff to recover possession of four cows, two heifers and four steers. These cattle were seized damage feasant and were held by the defendant, a constable, under an execution issued by a justice of the peace for the enforcement of an award made in accordance with the provisions of the herd law. The plaintiff's claim is based upon a chattel mortgage executed to it by McBride, the owner of the cattle, to secure an indebtedness which had matured before the seizure, and is still unpaid.

The jury in the district court found in obedience to a peremptory instruction that the right of possession was in the plaintiff, and judgment followed the verdict.

Several questions raised by the assignments of error are entirely free from difficulty and will be noticed only to give assurance that they have not been overlooked. On the question of whether the chattel mortgage created a lien the evidence is, we think, capable of but one construction. McBride, who testified for plaintiff, and seemed rather eager to serve it, was apparently uncertain whether he ought to claim or disclaim ownership, but, notwithstanding his shifts, shuffles and evasions, it is evident that he was the sole and absolute owner of the property when it was mortgaged. The facts are conclusively proved, and it was only with respect to their legal effect that the witness wavered.

The claim that the mortgage is void for uncertainty of description rests upon no reasonable foundation. The animals are described with great definiteness and particularity; and there is nothing in the record to indicate that the descriptions given are applicable to any other cattle owned by McBride and kept upon his farm in Pierce county.

It is said that the evidence does not show that the original indebtedness due from McBride to plaintiff had not been paid when the note, which the mortgage was given to

secure, was executed. As men rarely give notes and mortgages to evidence and secure extinguished obligations, it may, we suppose, be presumed that the new note was given as a renewal of the old.

The question next to be considered is, whether plaintiff is concluded by the proceedings had under the provisions of the herd law. The first and second sections of the act are as follows:

"Sec. 1. That the owners of cattle, horses, mules, swine, and sheep in this state, shall hereafter be liable for all damage done by such stock upon the cultivated lands in this state as herein provided by this act.

"Sec. 2. That all damage to property so committed by such stock running at large, shall be paid by the owners of said stock; and the person whose property is damaged thereby, may have a lien upon said trespassing animals, for the full amount of damages and costs, and may enforce the collection of the same by the proper civil action."

Other sections provide that any person may take up stock found trespassing upon his cultivated lands and may, after notifying the owner, have the damages fixed by arbitration and the cattle sold for satisfaction of the award. In this case the mortgagee was not given notice of the distraint and, consequently, could not be bound by the proceedings which resulted in the award and the execution for its enforcement. No person can be deprived of his property without due process of law. Every one, before being deprived of any valuable right by the exercise of judicial or other governmental power, must be given a hearing or, at least, an opportunity to be heard. Any proceeding in which these are denied is not due process of law. *McGavock v. City of Omaha,* 40 Neb. 64, 76; *Horton v. State,* 60 Neb. 701. Obviously notice to the owner of the mortgaged cattle that they had been seized and were being held under the provisions of the herd law was not notice to the mortgagee. It was given no opportunity to controvert by proof the claim of the distrainor and, therefore, on principles of natural justice, it could not be bound by the award. But there

is another reason why the court was right in directing a verdict in favor of the plaintiff. The remedy by distress is given to enforce in a summary manner a claim for damages against the owner of cattle who is charged with the duty of keeping them off the cultivated lands of others. 2 Am. & Eng. Ency. Law (2d ed.), 358. No such duty rests upon a mortgagee. Having no control over the cattle he is guilty of no actionable wrong when the owner or person having them in charge suffers them to trespass. An agister is an owner within the meaning of the statute (*Laflin v. Svoboda*, 37 Neb. 368), but this is because, when a trespass is committed, the fault is his. The statutory lien is given to the person injured to enable him to obtain satisfaction from the person through whose fault or omission of duty the injury was occasioned. A mortgagee without possession could not, of course, be sued in a case of this kind; and it would be an anomaly in the law, if his property could be taken for the satisfaction of a claim upon which he was not personally liable. Under the statute of Alabama giving a lien for damages upon trespassing stock, it was held that the statutory lien was subordinate to the lien of a prior mortgage executed by the owner. The court in *Lehman, Durr & Co. v. Farrell*, 71 Ala. 458, say:

"We think the lien the statute gives on the stock doing the damage, can only be commensurate with the ownership of the person by whose voluntary permission the stock runs at large. Ballard was the person sued. * * * The lien can only extend to such title and interest as he was the owner of."

This view is, in our opinion, entirely sound. When this action was commenced, plaintiff was, by the terms of his mortgage, entitled to the possession of the cattle and its right of immediate possession was not impaired by the proceedings against McBride. The judgment is

AFFIRMED.

SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD V. VACLAV HRUBY ET AL.

FILED OCTOBER 7, 1903. No. 12,441.

1. **Review**: VERDICT: EVIDENCE. The finding of a jury will be set aside when there is not sufficient evidence to support it, as where the clear weight of testimony is against the verdict, so that it is apparent that it is wrong.

2. **Question of Law.** Frequently, the necessary inference from an undisputed state of facts is so certain that it is ruled upon as a question of law.

3. **Verdict.** A verdict of a jury whose finding is based upon conjecture and not on the evidence, can not be permitted to stand.

4. ———: EVIDENCE. Record examined, and the verdict of the jury *held* to be unsupported by and against the evidence.

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

H. C. Brome and *A. H. Burnett,* for plaintiff in error.

Frank Dolezal and *Clark C. McNish, contra.*

HOLCOMB, J.

An action was begun in the court below by the plaintiffs, defendants in error here, for the recovery of the amount named in a beneficiary certificate issued by the plaintiff in error corporation, defendant below, on the life of Joseph Hruby, shortly prior thereto deceased. The beneficiary certificate sued upon contained the following provision:

"If the member holding this certificate should die by his own hand or act, whether sane or insane, this certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited without notice or service."

In the answer of the defendant association, among other things, it was alleged that the said Joseph Hruby did die by his own hand, whereby, by the terms of said beneficiary

certificate, the same became and was absolutely null and void and the plaintiffs could acquire no rights thereunder. The reply denied the affirmative matter contained in the answer. The cause was tried and submitted to a jury on the issue thus raised, which returned a verdict for the plaintiffs for the amount prayed for in their petition. A motion was filed asking for a new trial on the ground that the court should have directed, as requested, a verdict for the defendant, and because the verdict returned by the jury was not supported nor sustained by the evidence. The motion being overruled, judgment was entered on the verdict and the defendant prosecutes error, relying principally on the ruling of the court on the motion for a new trial on the two different grounds mentioned to secure a reversal of the judgment. It may here be said that the deceased Joseph Hruby came to his death from a pistol shot, the weapon being held in his own hand; and the question for consideration is narrowed to the proposition, solely, as to whether his death was accidental or the result of an intentional taking of his life. It is earnestly insisted on the part of the defendant that, under the evidence, the court should have directed a verdict in its favor, and that the verdict returned is not sustained by and is contrary to the evidence. The decisive question to be determined, and the one to which we are disposed to confine and limit our inquiry and examination of the record is with reference to the sufficiency of the evidence to sustain the verdict. Joseph Hruby was a man thirty years of age, who had resided with his parents on a farm in Cuming county for a number of years, until shortly prior to his death. He was unmarried, apparently in good health in both body and mind, and, with the one exception which will hereafter be noted, it is difficult to glean from a careful examination of the record any reason for the taking of his own life. The beneficiary named in the certificate sued on was one Mary Vlach, who, it appears, had taken her own life just prior to the death of the insured. His next of kin were his father and mother who are plaintiffs in this action. The plaintiffs and most

of the witnesses were, when classed as to their nationality, Bohemians, and some points in the testimony, having possibly a material bearing on the issues, are left in some uncertainty, attributable no doubt to the witnesses' inability to understand and speak the English language perfectly. In the certificate and the application for it, it was represented that Mary Vlach was a cousin of the insured. From the testimony taken it appears that she was not thus related, although her mother and the father of Joseph Hruby, deceased, thus speak of the relationship of the two, but they can give no intelligent explanation of the kinship thus said to exist. It appears that the families of the Hrubys and the Vlachs were intimate from their early days, and it may be probable that their ancestors were in some way related. It appears, however, that there was a very warm attachment existing between the deceased and Mary Vlach, more nearly resembling that of the marriage engagement than of near relationship, although it is denied by the parents that any such engagement existed. For some months just prior to his death, Joseph Hruby had found employment in South Omaha, where he was working. Mary Vlach, it appears, was almost, if not quite, an invalid, and had suffered two surgical operations for her ailment. A third one, it seems, was regarded as necessary, rather than undergo which she took her life. Joseph Hruby was informed by telegraph of her death, but not of the cause, and immediately went from South Omaha to the home of her parents in Cuming county, where her remains lay. He arrived at the home of the parents about 11 o'clock in the forenoon, and remained in the room, where the body of the deceased girl lay, almost continuously until time for the afternoon meal, when, while he was alone in the room, a pistol shot was heard, and he was found immediately after in a dying condition, with a revolver in his hand, one chamber of which had been emptied. Mrs. Vlach, the mother of the deceased girl, testifies that after he came he cried a "good deal" and paced up and down the room, and that during the afternoon he was walk-

ing back and forth in the room where the body lay. The mother and Hruby remained in the room, conversed together more or less until she left him to prepare the evening meal. He was, at first, under the impression that the girl's death was from natural causes. When she informed him of the true cause of her daughter's death and showed him the self-inflicted wound producing it, he was greatly shocked and grieved, and expressed much surprise that she should thus end her life. Mrs. Vlach was the last to see him before his death, and the first person who saw him after the shot was fired which terminated his life. She had left him but a few minutes before for the purpose of preparing his supper. She testifies:

Q. Where was Joseph Hruby the last time you saw him alive?

A. He was sitting on my bed joining that of my daughter.

Q. Was that the same room the body of your daughter was in?

A. Same room.

Q. And that was in that bedroom in the north end of the house?

A. Northeast corner.

Q. What was he doing the last time you saw him?

A. Last I saw of him he was in the kitchen, he was walking up and down, I went into the pantry and I then volunteered to make the supper for him. Well, I was preparing supper, I heard an alarm, and heard a report of some kind, and I ran into the room, and found Hruby standing up by the bed, and reeled around and fell face down toward the bed; right next to the body of the deceased girl.

Q. Did he have anything in his hand?

A. He had a revolver.

Q. In what hand?

A. In the right hand.

Q. Was he standing up when you went into the room?

A. That is before he reeled, he made a turn, and then fell down, and held the revolver in his right hand.

Q. Where were you when you heard the revolver shot?
A. In the kitchen.
Q. Who else was in the kitchen?
A. I was in the kitchen, alone.
Q. Where was Mrs. Joseph Vlach, Jr.?
A. She was in the kitchen.
Q. Where was Miss Barta?
A. In the kitchen.
Q. Who else was there?
A. No one else.
Q. Where was your son Joseph Vlach?
A. My son was on the premises.
Q. Well, whereabouts on the premises?
A. Well, now, he was in the yard.
Q. What was the next thing that was done after you saw him fall?
A. Why, I knelt down, and tried to remonstrate with him, why he had done the deed, and he simply rolled up his eyes, and quite a large amount of blood ran from him, and he died instantly afterwards.

Another witness, a doctor who was called after the death of Hruby had occurred, found him where he lay after he had fallen to the floor, the revolver lying by the body with one chamber discharged, a bullet-hole where the bullet had entered the right temple an inch and a half above and slightly forward from the lobe of the right ear, and his scalp powder burned at the point where the bullet entered. No other evidence is in the record more directly to the point as to the cause of death than which we have quoted, nor is there any conflict or contradiction. All of the other testimony buttresses and supports the essential features just referred to. If any reason is disclosed for the intentional taking of his own life by the deceased, Hruby, and it seems there must be one to account for his self-destruction, if such be the case, it must, we think, be found in the very strong attachment existing toward the deceased, Mary Vlach, and his grief and affliction because of her tragic end. That there was a most intense affection ex-

isting between them is clearly disclosed by the whole record and, more especially, by a letter written to her by him while in South Omaha a short time before her death, which can not well be disregarded in this connection. He addresses her in the fondest and most endearing terms; tells her how he is progressing in his new work, and of his plans and prospects for the future. He speaks of having obtained a number of shares in a gold mining company that he believes and asserts are very valuable; what his yearly income would probably be, and asks if that is not pretty good for "us two." He asks her to keep the information to herself, and offers to transfer his certificates of stock to her name and have it sent to her, charging her for the second time to say nothing about the matter but to keep it between them. It is quite evident, from a perusal of the missive, that the same reasons which caused him to take out the policy of insurance in her favor prompted the offer to turn over to her, and for her benefit, what he believed to be a valuable property; and that all of his thoughts and actions were with reference to what he might be able to do that would contribute to the happiness of her and himself. If they were not affianced in name, the letter spoken of and his actions furnish the strongest possible evidence that they were drawn together by ties equally as strong, and that the relationship existed in fact, if not in name. With a record of this character, and with evidence pointing so strongly to intentional self-destruction, and with circumstances and environments conducing to such act, judging human nature as experience and observation has shown it to be, can it be said that the finding of the jury, which is tantamount to a declaration that death was the result of an accident, is supported by sufficient, or by any competent evidence? Can a verdict, which can be accounted for, only, on the theory that it is reached by a line of reasoning extending into the domain of conjecture and speculation, be upheld in the face of a record pointing so unmistakably to but one inference as to the cause of death? Is there, and can

there be, any rational hypothesis, deducible from the record, justifying the inference that the death of the insured was the result of an accident? The problem thus presented, as is often the case, is a delicate and difficult one for the reviewing court to solve. A jury, doubtless, of sensible and honest men has, by its findings, said that the insured did not intentionally take his own life or, correlatively speaking, that his death was the result of an accident. We are thus called upon to examine the record and say whether there is evidence sufficient to support the finding of the jury; to say whether there is a genuine controverted question of fact to be determined by the jury, or whether the ultimate fact to be determined is so indisputably established as to resolve the controversy into questions of law only. If from the evidence as to the ultimate fact to be determined—that is, the cause of the death of the deceased—it may be said, when such evidence is weighed and considered according to the legal rules which must always be applied, that the inference that death was the result of an accident has competent substantial evidence for its support, or that the evidence does not establish to a reasonable certainty that the mortal wound was intentionally self-inflicted, then, the findings can not, as we interpret the law, be rightfully disturbed. If, on the other hand, but one rational inference can be drawn as to the ultimate fact or facts which are to be deduced from the undisputed evidence, and that is the inference of the intentional taking by the deceased of his own life, then, the verdict can not be upheld because not supported by any competent evidence. It is the settled rule, in this court, that the finding of a jury will be set aside when there is not sufficient evidence to support it, as where the clear weight of testimony is against the verdict, so that it is apparent that it is wrong. *Anheuser-Busch Brewing Ass'n v. Murray,* 47 Neb. 627; *Fisk v. State,* 9 Neb. 62; *Mathews v. State,* 19 Neb. 330; *Brown v. Smith,* 26 Neb. 376; *State Bank v. Smith,* 29 Neb. 434; *Conway v. St. Joseph Iron Co.,* 33 Neb. 454; *Woodriver Bank v. Dodge,* 36 Neb. 708.

There is no substantial conflict in the evidence in the case at bar. All of the evidential facts are practically undisputed. How the insured came to his death is the ultimate fact which is to be determined from the undisputed facts thus appearing in the record. It is often the case that the necessary inference from an undisputed state of facts is so certain that it may well be, and is, ruled upon as a question of law. The authorities are all agreed on this proposition. The difficulty lies in the application of the rule. If under the evidence the death of the insured may be attributed to either an accident or to suicide, the law would presume that it was the former, and not the latter. *Burnham v. Interstate Casualty Co.*, 117 Mich. 142. The principle underlying the rule results from the experience of humanity, which teaches us that the love of life is usually strong in the minds of all and is, ordinarily, sufficient to deter a person from self-destruction. Whether, however, the cause of death is the result of an accident, or of intentional acts, is an inference which must be reasonably deducible from the evidence, and can not rest upon mere conjecture or speculation. A verdict of a jury whose finding is based upon conjecture, and not on the evidence, can not be permitted to stand. *Leisenberg v. State*, 60 Neb. 628. It is argued in brief of defendant in error and suggested as a theory, that the death of the insured may properly be inferred, from the evidence, to be the result of an accident, as found by the jury. It is said that he carried a revolver in his hip pocket; that he was tired from traveling and, in lying down to rest, found it inconvenient to have it remain in his pocket, and that in removing it, by some inexplicable means, he accidently discharged it, with fatal results. There is an utter lack of evidence that the deceased had lain down. The evidence is conclusive that the only imprint on the bed in the room where the body of the deceased girl lay, was that of a person sitting on it, otherwise it was, as expressed by the witnesses, "made up." The mother testifies that Hruby sat on the bed during the

afternoon, while talking with her. The bed was about three feet from the improvised bier where the remains of the girl lay. Hruby was standing between the two, and near to the body of the girl, when he was discovered by the mother after the shot was fired, in a standing position and reeling as he fell to the floor. When he fell, he lay alongside of the bier, on his back, with his head toward the feet of the dead body. That is, he must have been standing near the head of the bier, and fell toward the foot of it. There is a total lack of evidence indicating a removal of the weapon from his pocket for any ordinary purpose, or tending to warrant the inference that he was handling it for other reasons than to use it as an instrument of self-destruction. No circumstance can be pointed out, consistent with a use of the weapon for some explainable purpose, from which accidental shooting probably resulted. To indulge in such an inference is to engage in fanciful conjecture and spectral speculation. The basis of such a conclusion is not to be found in the evidence but altogether outside of it. It is to guess, to surmise, to conjure and to conjecture. While the burden of proof is on the defendant to establish its defense of alleged suicide by a preponderance of the evidence, as is required in all civil actions, it is not required to, by its evidence, demonstrate to a mathematical certainty that the deceased intentionally took his own life. This is asking more than the law demands. It is quite true as is argued by counsel, that the deceased was in good health, in the prime of life, dutiful to his parents, with pleasant surroundings and bright prospects for the future. We think it clear, however, from an examination of the record, that, notwithstanding all these, there is but one rational explanation for the act, and that the evidence pointing to suicide overcomes all that may properly be inferred from these conceded facts. It is within the range of human possibilities that his death was accidental, but it is not at all probable, nor is there, in our judgment, evidence in the record from which it may properly be inferred. Hruby

was at the time manifestly greatly grieved; he was suffering keenly because of the tragic death of one to whom he was most warmly attached and who occupied a place in his affections second to none other. His future and hers he regarded as being linked together by indissoluble ties. He was advised, immediately, of her death, and went at once to where her remains lay. He was under the impression that she had died from natural causes until sometime during the afternoon, when he was informed by the girl's mother as to the cause of her death, and shown the self-inflicted wound producing it. This could not have been other than a great shock to his already perturbed state of mind. He was alone only for a few moments, while the mother of the girl went into an adjoining room to prepare the evening meal. He carried a revolver in his hip pocket. He was in the room wherein lay the body of the deceased, Mary Vlach. A pistol shot was heard, and the mother of the girl rushed to the room. She found Hruby, while yet in a standing position, by the side of the dead body, reeling as if about to fall, with a smoking pistol in his right hand, and a mortal wound in his right temple. He fell to the floor, and was asked why he did the deed, but, without replying or uttering a word, soon expired. As to the cause of his death, under such circumstances, there can, in our view of the record, be but one rational answer given:

"The jury could not have said, as men, that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore it was not permissible for them to say it, as jurors, and have that stand as a verity in the case. The court should have granted the motion to direct the verdict, and, failing in that, should have set the verdict aside and granted a new trial." *Agen v. Metropolitan Life Ins. Co.*, 105 Wis. 217.

"There was no evidence whatever to indicate * * * that his death was accidental. The only rational or, indeed, conceivable explanation is that the deceased had committed suicide; any other conclusion would outrage

all reason. Had the jury found otherwise, its findings would have been set aside as being against evidence." *Sovereign Camp of the Woodmen of the World v. Thiebaud,* 69 Pac. (Kan.) 348.

Our attention is also called to another alleged error relating to an instruction given by the court to the jury, which in view of the conclusion already reached will not now be considered. For the errors complained of and discussed herein, the judgment of the trial court is reversed and the cause remanded.

REVERSED.

WARDER, BUSHNELL & GLESSNER COMPANY V. ISAAC MYERS ET AL.

FILED OCTOBER 7, 1903. No. 13,121.

1. **Answer:** SUFFICIENCY. Answer examined, and *held* to state a defense to the cause of action set forth in the petition.

2. **Action for Money Had and Received.** Where money is paid on a contract the consideration of which has wholly failed, a recovery may be had as for money had and received.

3. **Principal and Agent:** CONTRACT: RATIFICATION. One is not permitted to ratify an unauthorized act in so far as it operates to his advantage and repudiate it in so far as it imposes burdens. If one avail himself of the fruits of an act, he thereby charges himself with the burden of all the instrumentalities employed by the agent to effect his purpose. *Osborn Co. v. Jordan,* 52 Neb. 465.

4. **Instructions.** Instructions examined, and the giving of the same *held* without prejudicial error.

5. **Findings:** EVIDENCE. Where disputed questions of fact are determined by a jury on fairly conflicting evidence, its findings thereon become conclusive.

6. **Rulings.** Rulings of the trial court on the admission and rejection of evidence *held* to be without prejudicial error.

ERROR to the district court for Webster county: ED L. ADAMS, JUDGE. *Affirmed.*

George R. Chaney, for plaintiff in error.

E. U. Overman, contra.

HOLCOMB, J.

The plaintiff in error, also plaintiff below, began an ordinary action against the defendants for the recovery of the amount due upon a promissory note alleged to have been executed and delivered by them. As a defense, it was pleaded in the answer that the note was given in part payment for a harvesting machine purchased prior thereto from the plaintiff upon a contract of warranty which had wholly failed; that the note was given upon the express contract of the plaintiff that the machine, which, it is alleged, was wholly disabled for harvesting purposes, would be by it repaired and put into condition to do the ordinary work of a harvesting machine of like kind, without expense to the defendant, and in case the machine did not do such work, plaintiff would take it back and surrender to the defendant the note so executed and delivered as aforesaid; that the plaintiff had wholly failed to perform its part of the contract and put the machine in working order, and that, because thereof, the defendant has been wholly unable to use the machine for cutting and binding grain, and that the consideration for which the note was given had wholly failed. The reply denied the allegations of affirmative matter alleged as a defense to the plaintiff's cause of action. This is the second appearance of the case in this court. The unreported opinion, dealing with the case on first appeal, is found under the same title as here given. 2 Neb. (Unof.) 507. The judgment of the lower court was there reversed and the cause remanded, for errors in the admission of evidence in support of allegations of damages which, it was held, were too remote, and could not properly be recovered for a breach of the contract pleaded in the answer. The cause was remanded for the purpose of trying

the issue raised by the interposition of the defense of which we have made mention. The law of the case is, in many respects, settled by the former opinion, and requires no further or extended consideration at this time. The issues tendered by the pleadings were largely those of fact to be submitted and determined by the jury as such. Although the pleadings were construed in the former opinion and held to be sufficient to support a judgment in favor of either party, it is yet urged by counsel for plaintiff in error that the answer does not state a good defense. This is upon the ground that, according to the allegations in the answer, if the machine was not made to do good work, it should be taken back by plaintiff and defendant's note surrendered; yet it is nowhere alleged that any notice was given to the plaintiff, or demand made for a return of the note, nor was there an offer to return the machine and rescind the contract. The allegation as to the notice and rescission of the contract is not, we think, essential in order to tender a valid defense, assuming the agreement to be as pleaded in the answer. The plaintiff undertook affirmatively, under the agreement, to repair the machine and put it in good working order, or to take it back and return the defendant's note. This it failed to do and, until it had complied with the terms of the agreement, it had no cause of action on the note, the consideration of which, because of its neglect and refusal to put the machine in good working order, had, by reason thereof, failed. It was not a question of rescission of contract, but of compliance with its terms on the part of the plaintiff, in order to entitle it to a recovery on the note sued on. The machine, which before had been purchased by the defendant, had, it was claimed by him, wholly failed to comply with the warranty, and was wholly disabled. To adjust the matter and bring about a settlement of the original contract of purchase, the old contract was superseded by the new, and by the terms of the latter agreement, as the principal consideration for the note, the machine was to be repaired so as to do the ord-

inary work of its kind. It was, in the language of the answer, wholly disabled for harvesting purposes, and the note was given on the express consideration that the plaintiff would repair it and put it in condition to do ordinary work of a grain harvesting machine of like kind, without expense to the defendant, and that, in case it did not do such work, plaintiff would take it back and surrender the defendant's note, which it had wholly failed and neglected to do. If the allegations be accepted as true, then the plaintiff, by its default, forfeited its right to recover the amount due on the note because of a failure of consideration. Under the pleadings, it was not incumbent on the defendant to return the machine or to give notice of the rescission of the contract. It was the duty of the plaintiff, before a recovery could be had on the note, to repair the machine so that it would do the work ordinarily done by machines of its kind.

It is also alleged in the answer that, at the time of giving the note sued on, and for the same consideration, and none other, another note was given for $30, due and payable before it appeared that the consideration for the contract had failed, which note was paid at its maturity, with interest, and a judgment was prayed against the plaintiff for the amount which had thus been paid under, and in pursuance of, the contract, and before it was known that its consideration had failed. Judgment went against the plaintiff for the sum thus prayed for. It is contended that the allegations in the answer are insufficient to support such a judgment. All the facts essential to show a right of recovery for money paid when the consideration therefor had failed are, we think, disclosed by the answer, and that it is, as was indirectly held in the first opinion, sufficient to support a money judgment for the amount so paid, should the jury find the issues in defendant's favor. The note was alleged to have been given for no other consideration than plaintiff's promise and agreement to repair the machine, and was paid before it was known that the consideration for the contract had failed, or would fail. It

can not be doubted the law is that a party who agrees to perform an act, and fails to keep his agreement, must pay compensation for all injuries that naturally and proximately result from the breach. So far as the present case is concerned, under the pleadings and the evidence as found by the jury, it is established as a verity that there is no other consideration for the $30 note given by the defendant than the agreement of the plaintiff to repair the machine, which it had wholly failed and neglected to do. The failure to perform that agreement operated as a failure of consideration for the money so paid. In such a case where one party has received money from another on a consideration which has failed, or where money has been paid which in equity and good conscience ought to be refunded, the party entitled thereto ordinarily is entitled to recover the money so paid, and interest from the time of payment, as and for money had and received. The pleadings complained of, and the evidence in support thereof, we regard as sufficient to support a recovery in favor of the defendant for the money paid on the note before the failure of consideration for such payment became apparent.

Much of the controversy is with respect to the authority of the agent of the plaintiff to make the agreement relied on as a defense. It is contended by the plaintiff that the agent was wholly without authority to bind it by such a contract, and that his authority was limited to that of collecting the notes given in the first instance for the machine, which, it is alleged, under the contract last entered into was to be repaired and put in working condition. Complaint is made of the court's instructions touching the question; its rulings on the admission of evidence relating to the same; and its refusal, at the close of the trial, to permit the plaintiff to amend its reply by alleging specifically want of authority on the part of the agent to make such an agreement. This question may, we think, be properly disposed of by calling attention to the fact that the plaintiff by taking and accepting the notes procured by its agent, and attempting to enforce their collection, would

not be permitted, on the one hand, to enforce that part of the agreement which was beneficial to it, and, at the same time, repudiate the authority of the agent as to that part which carried with it a duty and a burden. The acts of its agent must be accepted and ratified as a whole or repudiated in the same way. *Osborn Co. v. Jordan,* 52 Neb. 465. One will not be permitted to adopt that part of a contract, made by his agent, without antecedent authority, which is beneficial, and repudiate the remainder. He must either adopt the whole or none. *Martin v. Humphrey,* 58 Neb. 414. Not only is there evidence that the plaintiff at the time was advised of the nature of the agreement made by its agent, but since that time the evidence is conclusive on the point that it had accepted and ratified the acts of its agent, and based its right to recover from the defendant on the contract entered into by him. On the principle of the authorities cited, when attempting to enforce in one particular the contract made by its agent, it is clearly estopped from, at the same time, asserting want of authority on the part of such agent to enter into that part of the agreement which it regards as to its interest to disavow.

Some of the instructions given the jury are excepted to. An examination of these several instructions leads to the conclusion that they are as favorable to the plaintiff or more so, than it was entitled to ask.

The prime question at issue was one of fact as to whether the agreement was made between defendant and plaintiff's agent at the time of giving the notes sued on, and in the manner as alleged in the answer, and whether the plaintiff had neglected and refused to comply with those provisions which it was obligatory upon it to perform. This question was fairly submitted to the jury upon evidence more or less conflicting, and its findings thereon adverse to the plaintiff, under the well established rule in this jurisdiction, have become conclusive.

The plaintiff offered in evidence the original printed warranty given at the time the machine was first sold to the defendant. On objection, the evidence was excluded,

and error is sought to be predicated on the court's ruling thereon. The old contract having been superseded by the new one, the evidence was not pertinent to the issues presented by the pleadings. This was made manifest in the former opinion. It is agreed by all that the machine was warranted, when first sold, and the defense to the note sued on was predicated on the proposition that, because of the failure of the harvester to comply with the warranty and of its being at that time wholly disabled to perform the work for which it was constructed, the parties, in order to effect a settlement of the matter, executed the two notes mentioned in the pleadings, and delivered them to the plaintiff, for the consideration and upon the express agreement that the machine should be repaired by the plaintiff, without expense to defendant, and put in ordinary workable condition, and, if not, the machine was to be taken back and the notes surrendered. Its neglect and refusal to perform this part of the agreement, thus entered into, when established by the evidence, would, it would seem, result in a failure of consideration for the giving of the notes, and the defense would be complete, irrespective of the question of the terms of the original contract of sale and the accompanying printed warranty offered in evidance. We find no prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

S. KNUDSON, SHERIFF, V. JULIA M. PARKER ET AL.

FILED OCTOBER 7, 1903. No. 12,115.

Review: ESTOPPEL. A party who objects to evidence and causes it to be excluded can not obtain a reversal of the judgment as unsupported for want of the evidence so excluded.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Former judgment of reversal vacated and judgment of district court affirmed.*

SEDGWICK, J.

At the former hearing the judgment of the lower court was reversed for the reason, as stated in the opinion (3 Neb. (Unof.) 481), that "the record fails to disclose any evidence showing the *bona fides* of Parker's claim." Upon this rehearing, it was pointed out that the plaintiff upon the trial below offered to prove that the notes and mortgage under which he claimed were given for money loaned by the plaintiff to Snow Brothers, who executed the mortgage, and upon the objection of the defendant this evidence was excluded by the court. It appears from the record that the plaintiff in his direct evidence proved the execution and delivery of the notes and mortgage, and that immediately upon their execution he took possession of the property mortgaged. The defendant then proved the attachments of the Symms Grocery Company and the United States National Bank against Snow Brothers, and the delivery of the writs to the defendant, as sheriff, for execution, and his levy upon the property in question. It was also shown that there was due to the bank on its claim against Snow Brothers the sum of $2,407.55 and interest, and to Symms Grocery Company $1,318.48 and interest. In rebuttal the plaintiff produced a witness and propounded questions in regard to the consideration for the notes and mortgage, which was objected to on the ground that it was not proper rebutting testimony, and the objection sustained, to which plaintiff excepted. The plaintiff then offered to prove by the witness that Snow Brothers in making the mortgage to the plaintiff "had no intention of cheating or defrauding their creditors" and "that the notes secured by the chattel mortgage given by Snow Brothers to Mr. Parker (the plaintiff) were given for money borrowed by them from the said Parker." This evidence was objected to on the ground that it was not proper rebutting testimony; the objection was sustained, and the evidence excluded. The defendant, who is now the plaintiff in error, in his brief says, "we, therefore, must admit

that plaintiffs made a *prima facie* case by their evidence in chief." It would seem that there is just ground for this admission, and it follows that the objection to evidence offered as not proper in rebuttal was not well taken, so that the plaintiff in error is in the position of asking for a reversal of the judgment of the trial court for the want of evidence which he himself caused to be excluded. He complains that the most important question in the case has not been tried, and that in the interests of justice the judgment ought to be reversed, so that the question of the good faith of the mortgage can be investigated. It is, of course, conceded that the proper time for this investigation was upon the trial already had. The plaintiff below sought to have this investigation in that trial, and the defendant below, who is now complaining of this judgment, prevented that investigation. By his conduct upon the trial he has committed himself to the position that a just determination of the case did not require the investigation of the consideration for these notes, and he clearly can not now change that position and insist that the parties be put to the expense and annoyance of another trial to investigate that question. Bigelow, Estoppel (3d ed.), 601.

It is insisted that the offer of proof was not broad enough and that if the matters offered had been proved the evidence would still be insufficient to support the verdict. But no proof of good faith of the parties in executing and receiving the notes and mortgage in question could be satisfactory or sufficient without showing the consideration, and this evidence, having been properly offered and refused, such ruling in effect excluded all evidence of good faith in the transaction. This is particularly so when evidence that the mortgagors had no intention of cheating or defrauding their creditors was also offered and excluded. This would seem to exclude all investigation of the question of fraud in the execution of the securities.

It is insisted that there are other errors in the record which require a reversal of the judgment. There is in the

original brief a considerable discussion of the force of the evidence in showing fraud in the transaction as bearing upon the contention of the plaintiff in error that the verdict is not supported by the evidence, but in answer to this argument it is sufficient to say that if it had been shown that the notes and mortgage were executed to the plaintiff for full consideration paid therefor, and without any intention on the part of Snow Brothers to defraud their creditors, the whole evidence in the record would not have been insufficient to support the verdict.

Eight of the instructions to the jury are, in a general way, challenged as erroneous, and error is assigned upon the refusal of several requested instructions, but we do not find any error of the court in these rulings.

Other points discussed in the brief are not raised by the petition in error. Rulings of the court which are mentioned in the brief as erroneous are not shown to be so; no reasons are given for some of the objections urged, and we do not find any error requiring a reversal of the case.

The judgment entered upon the former hearing is vacated and the judgment of the district court is

AFFIRMED.

WOODMEN ACCIDENT ASSOCIATION V. HELEN HAMILTON.*

FILED OCTOBER 7, 1903. No. 12,149.

1. **Accident Insurance:** PLEADING: DEMURRER. An allegation of settlement of all claims which a certificate holder in an accident association "had or might have" against the association, which makes no express reference to the beneficiary, nor to future accruing claims, will be held, on demurrer by the beneficiary who is suing for indemnity for the subsequent death from the same accident of the certificate holder, to refer only to the then accrued claims for disability, and not to the subsequent death of the insured, and to state no defense to the death claim beyond the amount of the payment alleged.

* Rehearing denied. See opinion, p. 30, *post*.

2. **Evidence.** Evidence *held* to suport verdict that death resulted from accident as claimed.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Adolphus R. Talbot and *Thomas S. Allen,* for plaintiff in error.

Abraham Lincoln Beardsley and *Addison Miller Gooding, contra.*

HASTINGS, C.

In this action on a certificate of accident insurance issued by the Woodmen Accident Association to the late Dr. Hamilton, of Coleridge, Nebraska, two grounds for the reversal of a judgment in favor of the plaintiff below are alleged in this court. One, that the court below erred in sustaining a demurrer to paragraphs five and six of the association's amended answer, and the other, that the evidence is not sufficient to support the verdict.

Paragraphs five and six, to which demurrer was sustained, are as follows:

"Fifth. Further answering, this defendant alleges that said Augustus Hamilton, while said certificate of insurance was in full force and effect, and on the 26th day of March, 1900, received an accidental injury within the provisions and terms of said certificate sued on; that in the due course of time and in accordance with the provisions and terms of said certificate, said Augustus Hamilton presented to this defendant his proofs of injury in support of his claim for damages, covering the injury which occurred to him on said date; that in said claim and proof for said injury, said Augustus Hamilton claimed a greater sum than $37.50, and the defendant denied such liability but claimed that he, the said Augustus Hamilton, was entitled to a less sum on account of said injury, but as a full and complete settlement and satisfaction of any and all claims or demands which he, the said Augustus Hamil-

ton, had, or might have, against the defendant on account of said injury received by him on the 26th day of March, 1900, the said defendant paid said Augustus Hamilton on the 22d day of May, 1900, the sum of $37.50, which said sum said Augustus Hamilton received in full satisfaction and accord, and in full settlement of all claims he had, or might have, against said defendant on account of said injury; that any and all claims that could lawfully be urged against this defendant association by Augustus Hamilton, deceased, or any other person, was then and there by said payment of said money and the giving of the receipt therefor fully liquidated, settled and paid, and that any and all liability of this defendant association on account of said injury received by said Augustus Hamilton on the 26th day of March, 1900, or the resulting consequences thereof, was fully settled, adjusted and paid by the payment to said Augustus Hamilton of said $37.50 as aforesaid.

"Sixth. Further answering, this defendant says that said Augustus Hamilton received no injury from accidental means within the terms of said policy of insurance from and after the date of March 26, 1900, to the time and date of his death, and that the plaintiff herein, being the beneficiary named in the said certificate sued on, ought not to recover herein because the injury complained of, which occurred to Augustus Hamilton, deceased, on the 26th day of March, 1900, was fully settled for, and all damage thereunder paid by this defendant to said Augustus Hamilton in his lifetime, which said settlement was made with the full and complete understanding and knowledge between the parties thereto that said settlement and payment, as aforesaid, included and covered every and all claims that were, or might be urged, against the defendant society, on account of the accidental injury received by said Augustus Hamilton on said 26th day of March, 1900. Defendant further alleges that the settlement and payment to said Augustus Hamilton by the defendant, as aforesaid, for the injury received by him on March 26, 1900, has never been changed or modified in any respect."

At the trial, the jury were instructed to disregard these paragraphs, and the sustaining of the demurrer and the refusal to submit the issues sought to be set up in them, are urged as grounds for reversing the judgment.

It will be remembered that the claim of plaintiff is by reason of the death of the insured. The allegations of paragraph five are that the insured presented to defendant proof of injury in support of a claim for damages, claiming a greater sum than $37.50; that defendant denied liability to that amount but paid him, "as a full and complete settlement and satisfaction of any and all claims" on account of the injury, on May 22, 1900, the $37.50: that the insured received it "in full settlement of all claims *he* had, or might have, against defendant on account of the said injury."

It is alleged, evidently as a mere legal conclusion from this, that all claims which could be urged against defendant by any other person, on account of this injury, were by the payment of this money, and the giving of a receipt for it, fully settled, and the liability of the defendant association, on account of the accident, adjusted and paid.

The sixth paragraph says that the doctor received no accidental injury after the settlement, and that plaintiff should not recover, because the injury of March 26 was fully settled for, and that this settlement "included and covered every and all claims that were, or might be, urged against the defendant society on account of the accidental injury received by said Augustus Hamilton on said 26th day of March." It is also alleged that the settlement had never been modified.

It will be observed that these allegations, in terms, refer only and solely to injuries received by and damages accruing to Dr. Hamilton. It will be observed, too, that the language does not in express terms refer to any future damage or injury that might result from the accident. It is true that it mentions, as above shown, "every and all claims that might be urged" against the defendant on account of the accident, but the allegation does not relate to

the terms of the settlement but is merely as to its effect, and does not necessarily refer to anything but claims that might have been urged at that time. It does not indicate that there was any agreement or intention on the part of either the insured or the defendant to surrender the contract, or to give up future accruing rights under it. If the language of these allegations is construed, as it should be, most strongly against the pleader, all of these allegations must be held to have relation to damages at the time of the settlement already effected, and which the contract provides should be paid and should be deducted from the $2,000 payable in case of death, if death should afterwards, within the stipulated time, result from the accident. A receipt drawn in the terms of these allegations and containing no more specific reference than they do to the contingency of the doctor's death would not, of itself and in the absence of attending circumstances, be held to cover damages in the future from his resulting death.

It is probably true that plaintiff and her counsel were at the time claiming, as they do now, that a vested right accrued to her, at once, at the time of the accident, which could not be settled for between the defendant and her husband without her assent, and it seems that the action of the trial court was based upon such supposition; but it does not matter upon what basis the trial court acted, if its action was right. In our opinion, if the defendant in this case really had the defense, which was held good in *Wood v. Massachusetts Mutual Accident Ass'n*, 174 Mass. 217, 54 N. E. 541, it should have set out that defense in plain terms; that is, defendant should have alleged distinctly that the $37.50 paid to Dr. Hamilton, on account of this injury, was paid not merely on account of the loss and suffering then already accrued to him, but was paid, also, on account of the relinquinshment and the surrender of all right and claim for any damage or injury which might thereafter accrue to him, or to the beneficiary, by reason of the accident. It would be by a very liberal construction of these allegations, that their language could be

held to cover and include in the settlement indemnity to the beneficiary for the doctor's death. The trial court was not bound to extend any such liberal construction. The allegations might be entirely true, and leave the whole matter of the liability to the beneficiary entirely untouched.

There is very little doubt that the facts are set out as fully and as favorably for the defense as the truth would admit, but we are of the opinion that the trial court was right in holding that they did not disclose a defense. Whether such holding was based on the insufficiency of the allegations themselves, or on the supposition that after the accident the beneficiary had a vested interest in the policy, does not seem material. Nor does it seem to be necessary to decide the latter question in the absence of a distinct allegation that the matter of the future liability to the beneficiary was distinctly included and covered by the terms of the settlement agreement. There seems no doubt that the fair interpretation of the language of these allegations is that the settlement of claims "which were, or might be, urged against the defendant," had reference solely to claims then existing, or which might have been urged on account of facts which had already transpired. A settlement, to do away with defendant's liability after an accident had already occurred, should be much more explicit.

The other question, as to the sufficiency of the evidence to sustain the verdict, is given very little attention by plaintiff in error and seems hardly to have merited more. It is true that the death of the insured on June 10 was the result of a complication of diseases, but the evidence tends very strongly to indicate that they resulted from a violent injury to his liver, which came from the runaway accident of March 26. We do not feel disposed to disturb the finding of the jury in reference to this matter.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK, C., concurs.

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

AFFIRMED.

The following opinion, overruling a motion for rehearing, was filed January 6, 1904:

1. **Review.** Unless there is material error in the record brought to this court for review, the judgment of the trial court will be affirmed regardless of the theory upon which it was defended.

2. **Mutual Benefit Association:** CHANGE OF BENEFICIARY. In this state, by express statute, members of mutual benefit associations have the right, at any time, with the consent of the association, to substitute one beneficiary for another.

3. ———: INTEREST OF BENEFICIARY. A certificate issued by such an association providing for the payment of indemnity in case of accidental death, gives to the beneficiary named therein a vested interest, not when tne accident happens, but when death occurs in consequence of the accident.

SULLIVAN, C. J.

This is a motion for a rehearing.

The contention that the decision in favor of defendant in error ought not to stand because her counsel failed to point out the true reason for affirming the judgment, is entirely without merit and must be rejected. Unless there is material error in the record of the trial court, its judgment, upon whatever theory it may have been defended, will be affirmed.

The second ground of the motion is that the decision is wrong because it is grounded upon the assumption that Mrs. Hamilton, the beneficiary named in the certificate, had a vested interest therein from the time of the accident which resulted in her husband's death. Evidently, counsel have not carefully read the opinion of Commissioner HASTINGS. In this state, by express statute, members of mutual benefit associations have the right at any time, with the consent of the association, to substitute one beneficiary for another. Until the death of the certificate-holder, the bene-

ficiary has no vested interest—nothing but a mere expectancy. This view of the matter is sustained by the case of *Fisher v. Donovan,* 57 Neb. 361, which is, we believe, in accord with the whole current of authority. *Burkheiser v. Mutual Accident Ass'n,* 61 Fed. 816, is cited by counsel for defendant in error in support of the contention that the interest of the beneficiary becomes vested when the accident occurs, which results in the death of the certificate-holder, but, as we understand that case, it goes only to the extent of holding that, under the terms of the contract there considered, the liability of the company had relation to the time of the accident, and that subsequent loss of membership was therefore no defense. The court did not say, or even intimate, that the occurrence of the accident operated to deprive the certificate-holder of the right to designate another beneficiary. And the logic of the opinion leads to no such conclusion.

We adhere to the judgment of affirmance, not because Mrs. Hamilton had a vested interest from the time of the accident, but because her contingent interest was not intended to be, and was not, in fact, covered by the contract pleaded as a defense.

MOTION OVERRULED.

SAMUEL A. TANNYHILL, APPELLEE, V. LOUIS PEPPERL, APPELLANT.

FILED OCTOBER 7, 1903. No. 12,977.

1. **Deed as Mortgage.** Where a deed, absolute in form, is given to secure payments of an indebtedness existing between the grantor and grantee therein, and the relation of debtor and creditor continues after the execution of the conveyance, the deed should be treated as a mortgage.

2. **Evidence.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Pawnee county: CHARLES B. LETTON, JUDGE. *Affirmed.*

Harry C. Lindsay and *John B. Raper,* for appellant.

Story & Story, Henry Matters and *Joseph Wurzburg,* *contra.*

OLDHAM, C.

The plaintiff in this cause of action, Samuel A. Tannyhill, held possession of a valuable tract of land in Pawnee county, Nebraska, under a contract of purchase. The contract provided for payments in instalments, and that, when all instalments were paid, a warranty deed should be executed to the holder or his assignees by the owner of the land. It appears that in making different payments on this contract, plaintiff had become indebted to numerous creditors who had either loaned him money or signed his notes, as sureties, and that, to secure one of these creditors, he had assigned his contract for the purchase of the land; that he applied to the agent of a loan company for a loan of money on the lands, sufficient to pay the remainder due on the contract and a portion of his general indebtedness; that he was informed that such loan could be procured as soon as title to the land was perfected; that the defendant in this cause of action, Louis Pepperl, was one of the creditors to whom he was indebted, in the sum of about $1,100, for money loaned and notes secured; that the plaintiff thereupon proposed to defendant that, if the defendant would advance sufficient money to pay the other indebtedness of plaintiff, he would redeem his contract and assign the same to defendant, and that they would procure a loan on the lands sufficient to pay the remainder due on the contract and the indebtedness of plaintiff to the other creditors, and that the deed should be made to defendant, who could immediately take possession of the lands, collect the rents thereon, and control the same, until the full amount of plaintiff's indebtedness was discharged; that, in furtherance of this understanding and agreement, the defendant advanced sufficient money to pay plaintiff's outstanding indebtedness, and plaintiff assigned the contract to defend-

ant, who paid the remainder due thereon, and received a deed to the premises; that a loan in defendant's name was negotiated on the premises for the sum of $2,400, and from the proceeds of this loan the defendant paid the remainder of the purchase price of the premises and the outstanding indebtedness of plaintiff to other creditors than himself, and took the deed to the premises in his own name, entered into possession of them, and continued in the possession for two years, making improvements on the premises, paying the interest and a portion of the principal upon the loan, as the same matured.

Plaintiff subsequently instituted this cause of action for the purpose of having an accounting with the defendant for the amount due him, and to have defendant's deed declared a mortgage, and the title quieted in plaintiff on payment of the remainder due defendant. Defendant contended that the assignment of the land contract by plaintiff to him was an absolute sale, in consideration of defendant's assuming and paying plaintiff's indebtedness. On issues thus joined, the trial court found for plaintiff, treated the assignment of the contract and the deed received thereunder as a mortgage to secure plaintiff's indebtedness to defendant, credited defendant with all money advanced under his agreement with plaintiff and with the value of all improvements made on the premises during his occupancy, charged him with the reasonable value of the rents and profits of the premises, and found that there were due him from the plaintiff $3,739.67, and decreed that, unless the plaintiff should pay said sum within ninety days, the premises might be sold, as on execution, to satisfy the judgment, and that, if the amount should be paid within the time fixed, the defendant should convey the premises to plaintiff, subject to the mortgage thereon.

It will be observed, from the above statement, that the question at issue in this case depends largely on a finding of fact as to the agreement and understanding existing between plaintiff and defendant at the time plaintiff assigned the land contract to defendant, on which the deed

to the premises was procured. There were two witnesses to the conversation that took place between plaintiff and defendant which led up to the assignment of the contract. Each of these witnesses was interested in having the title perfected, that they might procure a loan upon the land. Each of them stated that the agreement was as contended for by plaintiff; that plaintiff suggested that defendant might have the deed made in his own name, and that he might take possession of the land and hold it until the entire indebtedness was paid. While we understand that, in order to show that a deed absolute in form was intended as a mortgage, the proof must be clear, convincing and consistent with the known facts; yet, we think, in the case at bar, the finding of the trial judge on this question is fully warranted by the testimony required by this rule. Where the consideration for a deed absolute in form is shown to have been the security of an indebtedness existing between the grantor and grantee, and where, after the execution of the instrument, the relation of debtor and creditor still exists, such conveyances are universally held mortgages rather than deeds absolute. In the instant case, the proof shows that, after the assignment of the contract and the delivery of the deed, the defendant retained the notes which he had paid for plaintiff and did not return them canceled and satisfied. While he says that he did this merely through inadvertence, yet we think this fact, in connection with the overwhelming weight of the evidence as to the understanding between the parties at the time the assignment was made, is fully sufficient to sustain the judgment of the trial court.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

E. M. BRASS V. SUSAN O. VANDECAR.

FILED OCTOBER 7, 1903. No. 13,153.

1. **County Court:** JURISDICTION: ACTION FOR BREACH OF COVENANT. A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Hesser v. Johnson*, 57 Neb. 155, approved and followed.

2. **Incumbrance.** An unexpired term or lease, which prevents the grantee in a deed from recovering possession of the land described therein, is an incumbrance.

3. **Covenant.** In such a case the covenant does not run with the land, but is broken as soon as made.

4. **Measure of Damages.** When the breach of covenant consists of the existence of an unexpired term or lease, the measure of damages, at least in absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use.

5. **Damages:** EXPENSES OF ACTION. Where the grantor requests the grantee to take proceedings for the purpose of recovering possession, which fail, and agrees to pay the expenses thereof, such expenses, being actually incurred, may be recovered, in addition to the value of the use of the premises.

ERROR to the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

O. A. Abbott, for plaintiff in error.

T. T. Bell and *H. B. Vandecar, contra.*

BARNES, C.

This action was commenced in the county court of Howard county by Susan O. Vandecar against E. M. Brass and Anna Brass, to recover damages alleged to have been sustained by her on account of a breach of warranty against incumbrances, peaceable possession and quiet enjoyment, contained in a certain warranty deed executed and delivered by them to her. It appears that E. M. Brass sold certain land in Washington county in this state to

Susan O. Vandecar, and gave her a deed therefor, which contained full covenants of warranty, only reserving the possession of the premises until March 1, 1900; that, at the time the deed was given, Brass represented to Mrs. Vandecar that the lands were occupied by a tenant, whose lease would expire March 1, 1900; that the lease was at the First National Bank of Arlington, Nebraska; that on or about March 1, 1900, the agent of Mrs. Vandecar went to Arlington to take possession of the land, and then and there ascertained that the tenant was not holding under a lease which expired March 1, but claimed to be holding under an old lease and an arrangement which constituted him a tenant from year to year, and further claimed the right to remain on the land for another year, to wit, until March 1, 1901; Vandecar did not give the six months' notice required to terminate a tenancy from year to year, because Brass represented, at the time of the sale, that the tenant was holding under a lease which expired March 1, 1900; Brass never gave any notice to terminate the lease, and so it could not be terminated until the next year, and it was impossible for Vandecar to obtain posesssion until March 1, 1901. Attempting to obtain possession, Vandecar gave the three days' notice provided for by statute; the tenant refusing to vacate, nothing more was done because it appears that Brass requested Vandecar to go no farther, and agreed to go to Arlington and get the tenant off of the land at his own expense. Whether or not such an agreement was made, was a disputed question of fact, and upon which the testimony was conflicting, but the jury evidently found for the plaintiff, in the court below, on that issue. Brass failing to put Vandecar in possession, this action was brought to recover damages for the breach of the covenants contained in the deed above mentioned. The damages claimed were the value of the use of the land for the year 1900, and the expenses paid in getting possession. The petition was in the usual form; in the county court, the defendants demurred to the petition; the demurrer was sustained as to Anna Brass, but overruled as to E. M.

Brass. He thereupon answered, setting up several defenses, among which was an objection to the jurisdiction of the county court; the objection was overruled, and the trial resulted in a judgment for the plaintiff; Brass appealed to the district court, where the same petition was filed by the plaintiff, and the same defenses were raised by the answer of the defendant. The objection to the jurisdiction of the court was overruled; a trial was had, which resulted in a verdict and judgment for the plaintiff; the defendant prosecuted error to this court, and will hereafter be called the plaintiff.

It is contended by the plaintiff that the court erred in overruling the objection to the jurisdiction, because the county court had no jurisdiction of the subject matter, it being an action in which the title to real estate was in question. We are unable to agree with the plaintiff so far as this matter is concerned, for the reason that the identical question has been twice before us, and has been settled adversely to his contention. It was held in *Campbell v. McClure,* 45 Neb. 608, that a justice of the peace had jurisdiction in an action for damages based on the breach of a covenant in a deed against incumbrances, where there were unpaid taxes which were a lien on the land at the date of the execution of the deed, and which the grantee was obliged to pay. This case was approved and followed in *Hesser v. Johnson,* 57 Neb. 155, in which it was said:

"A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances."

It is stated in 2 Devlin, Deeds (2d ed.), secs. 906, 907, that a lease is an incumbrance. It was so held in *Fritz v. Pusey,* 31 Minn. 368, where the court said:

"An 'incumbrance,' within the meaning of the covenant against incumbrances, includes any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance. Hence, an outstanding lease is an incumbrance."

It was further held in that case:

"The inability of the grantee in a deed to *obtain* possession, by reason of an outstanding paramount right or title, is a breach of the covenant for quiet enjoyment. It is not necessary that there be an eviction by *process of law,* or even an actual *expulsion.* When the breach of either of the above covenants consists of the existence of an unexpired term or lease, the measure of damages, at least in the absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use."

In the body of the opinion we find the following language:

"It is immaterial whether or not this contract between defendant and Colwell created the conventional relation of landlord and tenant. Under it Colwell was entitled to the use and exclusive possession of the premises to the exclusion of plaintiff. This outstanding lease or contract in favor of Colwell constituted a breach of both covenants. An 'incumbrance,' within the meaning of the covenant against incumbrances, includes any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance. Rawle, Covenants (2d ed.), 94, 95; 2 Greenleaf, Evidence (16th ed.), sec. 242; Bouvier, Law Dictionary, Title, Incumbrance; *Prescott v. Trueman,* 4 Mass. 627. Hence, an outstanding lease is an incumbrance. *Grice v. Scarborough,* 2 Spear (S. Car.), 545; *Batchelder v. Sturgis,* 3 Cush. (Mass.) 201; *Porter v. Bradley,* 7 R. I. 538."

It is generally stated that an eviction is necessary to a breach of the covenants for a quiet enjoyment or of warranty. And no doubt the original and technical meaning attached to the word eviction was an expulsion by the assertion of a paramount title and by process of law. But the idea that the ouster must be by process of law has long since been abandoned. Constructive eviction is caused by the inability of the purchaser to

obtain possession by reason of the paramount title. When at the time of the conveyance he finds the premises in possession of one claiming under paramount title, the covenants for quiet possession or of warranty will be held broken, without any other act on the part of either the grantee or the claimant, for the latter can do no more toward the assertion of his title; and, as to the former, the law will compel no one to commit a trespass in order to establish a lawful right in another action. Where the incumbrance is an unexpired term or lease, the general rule, at least in the absence of any special circumstances, is that the measure of damages will be "the fair rental value of the land to the expiration of the term." A covenant against incumbrances is personal, and does not run with the land. Such a covenant is broken as soon as made. *Merrill v. Suing,* 66 Neb. 404. It follows that the question of title was not involved in this action, and the county court had jurisdiction to try it.

This also disposes of the second and third assignments of error, and it is unecessary to further notice them.

It is next contended that there could be no recovery, because plaintiff's oral promise to put defendant in possession, after the delivery of the deed, was without any new consideration, and was therefore void. It is sufficient to say that, as we understand the case, the original contract price paid for the real estate in question was a sufficient consideration for the promise or covenant in the deed, and that the defendant herein recovered upon that covenant and not upon any oral agreement made subsequently to the execution of the deed.

It is further contended that the defendant herein could have dispossessed the tenant and obtained possession herself, because the tenant did not pay rent for the year 1900 to any one, and, not paying rent, could not hold possession. An examination of the record shows us that at the time the deed was executed the tenant was, and had been, in possession for a considerable portion of the new term; and, if there was no payment of rent, it was the fault of the plain-

tiff. Having entered upon the term, and it being impossible to terminate it without six months' notice, the question of the payment or nonpayment of rent was immaterial, so far as the defendant's right to obtain possession of the premises was concerned. The tenancy being from year to year, and the tenant having entered upon the new term, he could not be dispossessed without six months' notice, given prior to the expiration of the new term.

It is also contended that it was the duty of the defendant herein to serve the notice; that she must ascertain at her peril the nature and extent of the tenant's rights. No authority in point is cited to support this contention, and the jury having found, upon conflicting evidence, that the plaintiff had led the defendant to believe that the tenant was holding under a written lease, by which his term would expire on the 1st day of March, 1900, she had the right to suppose that it was unnecessary for any notice to be served, at all. Plaintiff will not now be heard to say that the defendant can not recover because no notice was served, when, by his own statement, he had led the defendant to believe that no notice was required.

The evidence showed that the tenant was holding under a lease, or an arrangement which made him a tenant from year to year, and therefore he could not be dispossessed without six months' notice.

As to the expenses which the jury were allowed to consider: There is no reason why they could not be recovered. The plaintiff, as shown by the evidence, agreed to pay them, before they were incurred, and they were made at his request.

A careful examination of the record fails to disclose any reversible error, and we therefore recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.

GERMAN-AMERICAN BANK OF ST. LOUIS, MISSOURI, v. EDWARD G. CRAIG ET AL.

FILED OCTOBER 7, 1903. No. 13,135.

Sale: WARRANTY. C. S. & Co., in pursuance of a contract of sale with C. & A., consigned certain goods to the latter, drew a draft for the amount due, and negotiated it, with the bill of lading attached, to a bank, which delivered the goods and bill of lading, and collected the draft from C. & A. *Held*, The transaction did not, of itself, operate to substitute the bank for C. S. & Co., as a party to the contract of sale, in such a way as to render it liable for breach of warranty as to the quality of the goods.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Reversed.*

James I. Rhea, for plaintiff in error.

S. A. Dravo, John M. Stewart and *Thomas C. Munger, contra.*

ALBERT, C.

Conrad Shopp & Co., of St. Louis, Missouri, entered into a contract with Craig & Alder, whom we shall hereafter call the plaintiffs, for the sale and delivery to the latter at Holdrege, in this state, of certain produce warranted to be fresh and merchantable. The goods were consigned to the plaintiffs, the vendors retaining the bill of lading, which they attached to a draft drawn on the plaintiffs for the agreed price of the goods, payable to the order of the German-American Bank of St. Louis, which discounted the draft, taking the bill of lading as security for its payment. The draft with the bill of lading attached was forwarded to a bank at Holdrege, where it was presented to the plaintiffs and by them paid; the bill of lading and the goods were delivered to the plaintiffs. The goods did not conform to the warranty and were practically worthless, and the plaintiffs brought this action against the St. Louis bank and the vendors for breach of warranty. The suit

was aided by attachment, and a certain creditor of the bank garnished. No property of the other defendant was attached and, as it made no appearance in the case, the court acquired no jurisdiction either over its person or property, and the case therefore proceeded against the bank alone; and we shall hereafter refer to it as the defendant. Judgment was given for the plaintiffs, and the defendant brings error.

The decisive question in this case is: Whether by the transfer of the bill of lading the defendant succeeded to the liability of the vendors for a breach of warranty as to the quality of the goods. The plaintiffs' theory is that, by the transfer of the bill of lading, the defendant became the owner of the goods and, from that time, stood in the same relation to the plaintiffs that the vendors themselves would have held, had the bill of lading not been transferred. After considerable research, we have been able to find but two cases involving the same question, namely, *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246; *Finch v. Gregg*, 126 N. Car. 176. Both of these cases fully sustain the plaintiffs' theory. The first head-note to the Texas case fairly shows the point decided, and is as follows:

"A consignor of wheat delivered to a bank a bill of lading, with draft drawn upon his consignee attached. The bank cashed the draft and paid the consignor. The consignor had contracted to furnish sound wheat, but the wheat furnished was of inferior quality. *Held*, That the bank, purchasing the bill of lading, became the owner of the wheat, and was responsible to the consignee for the failure to furnish sound wheat."

The foregoing language amounts to this: That, by the transfer of a bill of lading and the subsequent delivery of the goods by the transferee to the vendee, the former becomes substituted for the vendor as a party to the contract of sale. We are unable to assent to that doctrine, because it seems to us to contravene some of the elementary principles of the law of contracts, to say nothing of the mercantile usages and customs upon which the law touch-

ing bills of lading rests. It is self-evident that the substitution of one party to a contract for another involves a new contract, a contract of substitution. That being true, the consent of all the parties to be bound by the contract of substitution is an essential element, for without it there could be no meeting of minds, no agreement and, consequently, there could be no contract. That substitution could only be effected by the consent of all parties is especially true where, as in the present instance, the parties to the original contract have a right to rely on the personal responsibility of each other for its performance. Were it otherwise, a responsible vendor might escape liability for a breach of warranty by the substitution of an irresponsible party in his stead. Hence, if the defendant were substituted for the vendors, in this instance, in such a way as to succeed to the rights and liabilities of the latter, it must have been with the consent, express or implied, of the plaintiffs. There is no hint that the plaintiffs expressly consented to the substitution, neither is such consent to be implied from the mere transfer of the bill of lading. It may be claimed, however, that the consent of the plaintiffs to the substitution is to be implied from the acceptance by them of the goods and bill of lading from the defendant, and the payment of the draft. We do not think their consent is to be implied from any or all of those circumstances. Such implication might arise, had the plaintiffs had the right to reject the goods on the ground that they were not tendered by the vendors, but they had no such right. It is a common practice for a vendor of goods to attach the bill of lading to a draft and transfer it to a third party who constructively, at least, delivers the goods. There can be no question that, under such circumstances, a tender of the goods by the transferee of the bill of lading is a sufficient tender by the vendor, and that the vendee would be liable for a breach of contract, should he refuse them on the sole ground that they were not tendered by the vendor himself. Such a tender would be held to be, in effect, a tender by the vendor and a sufficient compliance with the

contract. As the plaintiffs could not have rightfully refused to accept the goods because they were tendered by the defendant instead of by the vendors themselves, it is not to be implied from their acceptance of the goods and the payment of the price that they consented to the substitution of the defendant as a party to the contract, because consent involves the element of choice, and where there is no choice, there can be no consent.

Moreover, bills of lading have been in common use from time immemorial. They have their origin in mercantile usages and customs. The law in respect to them should be interpreted in the light of those usages and customs, as commonly understood by those conducting business in accordance with them, and in such a way as not to hamper trade and commerce unnecessarily. The transfer of bills of lading with drafts attached is a common and convenient commercial device. Its benefits do not extend to one party to the transaction, exclusively, but to all parties. Such transactions would be seriously embarrassed and the usefulness of such device seriously impaired, were it to become the rule that a party, by discounting a draft with a bill of lading attached, becomes substituted as the vendor of the property covered by the bill of lading, and is required to see, at his peril, that the goods fulfill the requirements of the contract of sale. Such rule is not generally recognized in the commercial world, and it appears to us to be not only unsound as a rule of law, but an unnecessary and vexatious restraint on trade. Bills of lading, when properly transferred, operate as a delivery of the property itself, investing the transferee with the constructive custody of the property, which serves all the purposes of an actual possession. *Union P. R. Co. v. Johnson,* 45 Neb. 57. We think the transaction shown in this case is the same, in effect, as though the bank had discounted the draft and, to secure its payment, had taken the goods for delivery to the plaintiffs. The property in the goods did not pass to the defendant, absolutely, but the goods were delivered to it, constructively, for a specific purpose, namely, to be

delivered to the plaintiffs. That being true, so far as the plaintiffs are concerned, the defendant was no more than a mere agency or means employed for the delivery of the goods, assuming no liability under the contract beyond such delivery; it was not substituted for the vendors as a party to the contract of sale, and is not, therefore, liable for the breach of warranty under such contract.

In our opinion, the judgment of the district court is erroneous, and we recommend that it be reversed and the cause remanded for further proceedings according to law.

GLANVILLE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED.

FRANK KORBEL V. FRANK SKOCPOL.

FILED OCTOBER 7, 1903. No. 13,155.

1. **Sale:** EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict.
2. ———: RESCISSION. To warrant the rescission of a sale on the ground of false representation, it must appear, not only that the representations were false, but that the injured party believed them and acted upon them to his injury.
3. **Error:** INSTRUCTION. Where the question covered by an instruction tendered by a party, is resolved by the court in his favor as a matter of law, he cannot complain of a refusal to give such instruction.
4. **Instructions.** Instructions examined, and *held* sanctioned by the former rulings of this court.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

F. W. Bartos and *J. A. Wild,* for plaintiff in error.

J. H. Grimm & Son, contra.

ALBERT, C.

The plaintiff alleges, in substance, that at a public auction held by the defendant the latter offered for sale a certain mare which he represented to be sound and but eight years old; that the plaintiff, relying upon said representations and believing them to be true, bought the mare at said sale and paid the defendant therefor the sum of $56.90; that the said representations were false; that the mare at the time of the sale was at least seventeen years old, as the defendant, at the time, well knew; that immediately upon learning of the falsity of the said representations, the plaintiff offered to return the mare to the defendant, and demanded of him a return of the price paid; that the defendant refused to accept a return of the mare or to return the price paid for her. The prayer is for judgment against the defendant for the amount of the purchase price with interest.

The answer admits the sale, but denies all the other allegations. A trial resulted in a verdict and judgment for the defendant; the plaintiff brings error.

The principal contention of the plaintiff is that the verdict is not sustained by sufficient evidence. In an action of this character the plaintiff must allege and prove, among other things, that he believed the representations to be true and acted upon them to his damage. 1 Beach, Contracts, sec. 804; *Stetson v. Riggs,* 37 Neb. 797. While there is evidence in the record that might warrant a finding of the foregoing facts, it can not be said that they are conclusively established. One of the witnesses testified that just before the mare was offered for sale he had a conversation with the plaintiff, in which he told him that the mare was about fifteen years old, and in which the plaintiff told the witness that he did not care about that because he did not want to pay a high price for a horse. In the same conversation, the plaintiff expressed the opinion that the mare was about ten years old. This, if true, and for the purposes of the contention under consideration it must be

taken as true, is amply sufficient to warrant a finding that the plaintiff did not rely on the representations of the defendant, because it shows that he did not buy the mare in the belief that she was about eight years of age, but in the belief, based on his own judgment, that she was at least ten years old. It is obvious that he can not be said to have relied on the representation that the mare was only eight years old, when he bought her in the belief that she was at least ten years old. Having failed to establish conclusively one of the facts essential to a recovery, it follows that the contention that the verdict is not sustained by sufficient evidence must fail.

The plaintiff tendered the following instructions:

"Misrepresentation may be either by word or acts, or the suppression of material facts with the intent to deceive. The important inquiry is, whether the plaintiff was wilfully deceived or misled by the defendant to his injury.

"A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth."

They were refused and their refusal is now assigned as error. Whatever may be said of the instructions as abstract propositions of law, their refusal would not justify a reversal of this case, in view of the evidence and the instructions given by the court on its own motion. The only representations relied upon were those made by the plaintiff and the auctioneer, which were not in the nature of a suppression of the truth but were active and specific. In one of the instructions given the jury were directed to find for the plaintiff, if they found that the representations in question were made; that they were false; that they were relied upon by the plaintiff and that the plaintiff, as soon as he learned that such representations were false, offered to return the mare. By this instruction the court held, as a matter of law, that if the representations were made as claimed, the plaintiff would be justified in relying upon them. His right to rely upon them is not

called in question in any part of the entire charge. That being true, the plaintiff could not be prejudiced by the refusal of the instructions tendered.

Complaint is made of the following instruction given by the court:

"If you shall find from the evidence that the defendant did not make the representation charged by the plaintiff, but that defendant's auctioneer, immediately before the sale of the mare in question, represented her to be eight or nine years old and sound, you will disregard the statements made by the auctioneer, unless you find that such representations were made with the knowledge or by the direction of the defendant."

An instruction to the same effect, and almost in the same words, is approved in *Boice v. Palmer,* 55 Neb. 389.

The foregoing disposes of all the assignments argued, and as they seem to be without merit, we recommend that the judgment of the district court be affirmed.

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, EX REL. SAMUEL I. GORDON, V. FRANK E. MOORES, MAYOR OF THE CITY OF OMAHA, ET AL.*

FILED OCTOBER 7, 1903. No. 13,094.

1. **Election:** JUDGMENT: RES JUDICATA. A judgment establishing the invalidity of an election attempted to be made at the general election in 1899, does not render *res judicata* between the same parties the power to make such an election at the general election in 1901, even if there be no change in the law affecting the validity of such election.

2. ———. An election provided for and required to take place by the constitution, may be held at the required time without special legislation providing therefor.

* Rehearing allowed. See opinion, p. 56, *post.*

3. ———: POLICE JUDGE. *Held*, That a successor to relator for the office of police judge has been elected and qualified; that relator was not the incumbent of such office during the time for which he is seeking herein to enforce payment of salary, and that the writ prayed for was properly denied.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

J. W. Eller, for plaintiff in error.

W. J. Connell, C. C. Wright and *W. H. Herdman, contra.*

GLANVILLE, C.

This action is before us on petition in error from the district court for Douglas county, seeking to reverse the judgment of that court denying a peremptory writ of mandamus to the relator, to compel payment of salary to him as police judge; and constitutes one more chapter in the long standing contention and litigation whereby the relator has sought to continue to hold the office of police judge of the city of Omaha at a salary of $2,500 a year. In the view we take of the case in its present condition, and of the questions involved, it will be necessary to take up the previous adjudications and discuss them with a view of distinguishing those points that have become *res judicata* from those that are open to determination in this action.

Contention is made by the respondents herein that the relator was not elected and qualified as police judge at the beginning of his term of services in January, 1896. We think the bill of exceptions clearly establishes such election, if it were an open question, but we think it also establishes that he was not qualified as a *de jure* officer at that time, except by the evidence therein contained showing that this question has been heretofore adjudicated in his favor. We say this because it is clearly shown that the oath of office subscribed by him after his first election was not the oath required by the constitution, and that he did not properly qualify. See *Duffy v. State*, 60 Neb. 812.

Because of a provision in the Omaha charter of 1897, attempting to provide for the election of a police magistrate for the term of three years in April, 1897, and every three years thereafter, an election for such office was attempted in April, 1897, and no election for such office was held in any manner at the general election in November of that year. At such attempted election in April, the relator received the majority of the votes, was declared elected and attempted to qualify, and thereafter respondents contended that he was entitled to a salary of but $1,200 per annum, being the salary fixed in the 1897 charter.

After it was announced in *State v. Stuht,* 52 Neb. 209, that the term of office of police judge could not be changed from two years to three years, because of the provisions of our constitution, the respondents paid the relator the salary fixed by the old charter to the expiration of his first two years' term.

Relator continued to perform the duties of the office of such police magistrate during the years 1898 and 1899, the respondents regularly making for his use a warrant of $100 for each month, which, however, he did not accept, and he finally brought mandamus proceedings in the district court for Douglas county to compel payment for the two years at the rate of $2,500 per annum. The case was brought to this court and decided in favor of relator. *State v. Moores,* 61 Neb. 9. The complete record in that case forms a part of the bill of exceptions in this, and from its examination we think it has become *res judicata* that the relator was elected and qualified for his first term, and has also been established as the law that during the continuance of that term the relator is entitled to a salary at $2,500 a year. For the regular election held in the city of Omaha in the year 1899, nominations were made for the office of police judge and relator was a nominee. An election was held, resulting in the relator's receiving a majority of the votes cast. He so far acquiesced in this as to give bond and take the oath of office, and in this instance did take the oath prescribed by the constitution for judi-

cial officers. An attempt was made to remove him from office but the proceedings were held under a void provision of law, and nothing affecting the rights of either party could be determined therein. See *Gordon v. Moores,* 61 Neb. 345.

Another action was commenced by relator to compel payment of his salary for the year 1900; and was brought to this court and decided in his favor. *Moores v. State,* 63 Neb. 345. In the opinion by OLDHAM, C., it is said:

"In the court below, respondents, by their answer and return, tendered the issue that the relator was the acting police judge of the city of Omaha for the year 1900, and that he was entitled to a salary at the rate of $1,200 per annum; but in this court counsel for the respondents abandoned that issue."

The record in that case is also a part of the bill of exceptions, and therein plea is distinctly made by the return to the writ that the relator was elected in 1899 and qualified, and that he was not holding over at that time but was in for a new term under a new election, and that the salary fixed by the charter of 1897 is the salary he was entitled to. In reply to the return, the relator pleaded *res judicata* by the judgment in *State v. Moores,* 61 Neb. 9. It will be seen, then, that it has thereby become *res judicata,* either that the charter of 1897 was ineffectual to change the rate of pay of the police judge, or that the relator during the year 1900 was still holding over by virtue of his first election and qualification and his subsequently qualifying as a hold-over officer.

The bill of exceptions in the last named case is made a part of the bill of exceptions in this case, and the evidence therein contained shows that the relator was regularly nominated by the people's independent and democratic parties as a candidate for police judge of Omaha, to be voted for at the November election, 1899, and that, if such election could then be held, he was elected, and in due time entered into a bond reciting such election and took the oath of office on the 28th day of December, 1899. While the

issues of fact in that case were authoritatively settled by the judgment therein, and it was thus established that during the year 1900 the relator was "holding over," we do not think that it could be thus authoritatively determined that no election for a police judge of the city of Omaha could take place at the proper one of the general elections provided for in the constitution, in the absence of any special legislation providing for the holding of such election.

Thereafter, a similar action for the salary for 1901 was commenced, carried to this court and decided in favor of the relator in the case of *Moores v. State,* 67 Neb. 535. The record in this action is also a part of the evidence contained in the bill of exceptions, and shows that the relator pleaded previous adjudication by the decision in the case in 61 Neb. 9, and it was correctly decided in favor of the relator because of the previous adjudication pleaded, as no new fact or issue entered into the case except such previous adjudication.

The present action is another one of the same nature brought for the purpose of enforcing payment of a salary to relator at the rate of $2,500 a year since the expiration of the term which would have commenced in January, 1900, had the election in November, 1899, been lawful, and the relator's incumbency during 1900 and 1901 been under such election. Another election was attempted at the general election in November, 1901, which, if such election was authorized, resulted in the election of Louis Berka to the office in question over the relator, who was also a candidate. Mr. Berka qualified according to law, and has been recognized by the authorities and people of Omaha as the incumbent of the office since January 7, 1902, and if such election was valid he is *de jure,* as well as *de facto,* police judge of Omaha, and the judgment of the district court is right; if such election was invalid, then the relator, having been found by previous adjudication to have been elected and qualified and the *de jure* incumbent of the office during 1900 and 1901, is still the *de jure* incumbent of the

office under the same hold-over term, and is entitled to the same salary heretofore required to be paid to him.

The only matter, therefore, that requires examination and discussion herein is the validity or invalidity of the election in November, 1901. As we have said, so far as establishing the right of the relator to the old salary during the years 1900 and 1901, the decisions in 63 Neb. 345, followed by the one in 67 Neb. 535, are conclusive, and render *res judicata* the invalidity of the election in 1899; but the law of the state, and especially that contained in the constitution, can not be foreclosed in such a proceeding to such an extent as to preclude our holding any other election valid which we may find on the law and evidence to be so, and we hold that the validity of the election in 1901 should be herein determined as an original question, arising for the first time in this action, and that the relator's plea of *res judicata* made in this action is not good as to this issue.

By section 18, article VI of the constitution, it is provided that "justices of the peace and police magistrates shall be elected in and for such districts * * * as may be provided by law." In *State v. Stuht,* 52 Neb. 209, and *State v. Moores,* 61 Neb. 9, above referred to, it is held that the police judge of Omaha is such a police magistrate. It follows, then, that the city of Omaha is a district provided by law wherein such magistrate should be elected. If by the changes in the charter the district does not continue to exist, then the office claimed to be held by the relator has been abolished and there is no such police magistrate. Section 20 of the same article of the constitution reads as follows:

"All officers provided for in this article shall hold their offices until their successors shall be qualified and they shall respectively reside in the district, county or precinct for which they shall be elected or appointed. The terms of office of all such officers, when not otherwise prescribed in this article, shall be two years. All officers, when not otherwise provided for in this article, shall perform such

duties and receive such compensation as may be provided by law."

This section of the constitution is the one under the provisions of which the relator insists that he is still holding over as one of the officers therein referred to, and was under consideration in the two cases last above mentioned, and it was held, although in the case of *State v. Stuht, supra,* the question was not directly in issue, that the length of the term of police judge of Omaha could not be changed from the regular two years' term by the legislature.

Section 13, article XVI, reads as follows:

"The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election which shall be on the second Tuesday in October, 1875. All state, district, county, precinct and township officers, by the constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. Judges of the supreme, district, and county courts, all elective county and precinct officers, and all other elective officers, the time for the election of whom is not herein otherwise provided for, and which are not included in the above exception, shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office; Provided, That the office of no county commissioner shall be vacated hereby."

Section 14 of the same article reads:

"The terms of office of all state and county officers, of judges of the supreme, district and county courts, and regents of the University shall begin on the first Thursday after the first Tuesday in January next succeeding their election, the present state and county officers, members of the legislature, and regents of the University, shall continue in office until their successors shall be elected and qualified."

It will be noticed that police magistrates are to be elected in such *districts* as are provided by law; that district officers are to be elected at general elections, unless they are within the exceptions mentioned in the above section of the constitution; and that unless the police judge of Omaha is a municipal officer of the city, his election is required to take place at the general election provided for. It was held in *State v. Shropshire,* 4 Neb. 411, that a justice of the peace elected in a ward of Omaha was required by law to hold his office within the ward which constituted a precinct, and it was held, in effect, that such ward had been created a district within which a justice of the peace should be elected. While the term "precinct" is used in section 20, article VI, only "districts" are mentioned in section 18. It would seem that the word "district," as used in the constitution in reference to general elections, must refer as well to districts created by the legislature as those provided for in the constitution, because it excepts specially "school district officers," thus mentioning a district that must be created by the legislature, but which would be included in the requirement unless so specially excepted.

We are of the opinion that a police magistrate is a district officer, and not a municipal officer of a city within the meaning of the constitution; that the relator having been elected for a term of two years to commence in January, 1896, at the regular election held in 1895, regular elections for police magistrate in the district comprising the city of Omaha should be held every two years thereafter; that the office and the district still existed in 1901; that the above quoted provisions of the constitution are so far self-enforcing that an election held to fill such office, participated in generally by the people of Omaha, at the general election in 1901, was a valid election for that purpose, in the absence of any provision made by the legislature for holding elections for such office in that district; that Louis Berka was elected at such election and qualified as required by law, and became, and is, the successor in

office to the relator, and was the incumbent of such office during the time for which the relator is herein seeking to compel payment of salary; that relator's term ended upon the qualification of Louis Berka; and that the judgment of the district court in denying an imperative writ of mandamus to the relator is right and should be affirmed.

To hold that the legislature can provide a district in which a police magistrate can be and is lawfully elected for a term of two years, and that it can then repeal the law providing for the election of a successor and, by so doing, prevent any further elections and still continue the district and office in existence, and thereby indirectly make the incumbent's term perpetual, when we have held that it can not be directly extended to three years, would be intolerable and destroy the safeguards of the constitution, and we can not so hold.

Our constitution provides by section 22 of the bill of rights:

"All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

The electors of the city of Omaha were not disfranchised or deprived of their right to elect a police magistrate in their district at the election provided in the constitution for that purpose, by a failure of the legislature to make any special provision for such an election. *Hall v. Commonwealth*, 94 Ky. 322.

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

BARNES and ALBERT, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed April 21, 1904. *Judgment of affirmance adhered to:*

1. **Municipality:** OFFICE OF POLICE JUDGE. The office of police judge or police magistrate of an incorporated city is called into existence by the constitution. *State v. Moores*, 61 Neb. 9, followed and approved.

2. **Action:** TITLE TO OFFICE. The right to an office occupied by one claiming title thereto under a certificate of election, can not be determined in a suit instituted by an adverse claimant for the salary of the position.

OLDHAM, C.

The original opinion in this case by GLANVILLE, C., is reported *ante*, p. 48, and contains a full and careful statement of the various issues that have been joined and determined in this court in the long continued contest between the relator and the mayor and council of the city of Omaha, over the emoluments of the office of police judge or police magistrate of the city of Omaha. A rehearing was granted for the purpose of considering relator's claim to the salary of this office for a portion of the year 1902, on the theory that he is not a police magistrate authorized by section 18, article VI of the constitution, but that he is, in fact, a police judge, a municipal and not a constitutional officer, authorized by the laws of Nebraska, 1869, p. 29, entitled "An act to incorporate cities of the first class," and that he was elected as such officer at a regular general and city election, held in November, 1895, and has ever since held over and still continues to hold over as his own successor under such election, and that all other subsequent elections at which he has ever been elected or defeated for said office, have been unauthorized, and his claim to the salary of this office is entirely unaffected by his participation as a voter or a candidate in such subsequent elections.

It is conceded by counsel that we are bound by all our former adjudications as to relator's right to the salary of this office up to the 7th day of January, 1902, and that all questions formerly adjudicated in this controversy are now a part of the law in this case; so we will cursorily review our former adjudications for the purpose of deter-

mining whether or not relator is a police magistrate authorized by the constitution, or a municipal officer authorized by the laws of 1869, *supra.* The first contest over the salary of this office between the relator and the mayor and council of Omaha grew out of the fact that in 1897 the legislature passed an act creating a new charter for the city of Omaha, wherein the term of the office of police judge was changed to three years, and the compensation of the office was reduced to $1,200, and we held in a carefully considered opinion by NORVAL, J., that the office of police judge or police magistrate of the city of Omaha is called into existence by the constitution, and the enactment attempting to change the term and the salary of the office was held to be unconstitutional and void. See *State v. Moores,* 61 Neb. 9. The next controversy affecting the relator's right to the emoluments of the office was before this court in the case of *Gordon v. Moores,* 61 Neb. 345, and rose from the fact that an attempt had been made to remove the relator from the office of police judge by the district court for Douglas county, for malfeasance in office. In this action it was determined that the statutes conferring such jurisdiction on district judges in metropolitan cities (laws, 1897, ch. 10) was void for attempting to confer a special jurisdiction on district judges in cities of the metropolitan class. In the opinion it was said by SULLIVAN, J.:

"But a police judge, like a justice of the peace, is a constitutional officer, and the power to remove him is precisely the same power whether he holds his commission from a city of the highest or the lowest rank."

The controversy was next before this court in the case of *Moores v. State,* 63 Neb. 345, and was a contest for the salary for the year 1900. In this case the respondent sought to defend by assailing the constitutionality of the statutes conferring jurisdiction on police judges in cities of the metropolitan class. In disposing of this controversy, we held that the office of police magistrate or police judge was called into existence by the constitution. The next

controversy before this court was over the salary for the year 1901. See *Moores v. State,* 67 Neb. 535. Here the chief question involved was the right of the city council to deduct from the salary of relator, the amount paid to an intruder, who wrongfully attempted to exercise the duties of the office, while the relator was prohibited from doing so by a void judgment of the district court for Douglas county. In this controversy we held that the relator was both a *de facto* and a *de jure* officer during all this time and was entitled to the compensation, notwithstanding the fact that it may have been paid to a usurper. Now it will be seen from this brief review of our former decisions, that relator has heretofore successfully maintained his claim to the honors and emoluments of this office, solely on the ground that the office of police judge or police magistrate which he claimed to hold was an office called into being by section 18, article VI of the constitution; consequently we think that relator is not now in a position to deny that he is a police magistrate authorized by the constitution. The next contention of the relator is that no district is provided in the constitution for police magistrate or for justice of the peace, but that the formation of districts for these officers is relegated to the legislative power of the state, and that no district has ever been formed in Omaha for a police magistrate by any valid legislative enactment. The answer to this may be that the act of 1869 did constitute the city of Omaha into a district for a police judge and that the constitution subsequently enacted reserved the existence of all laws not in conflict with its provisions. Consequently this act may be construed into constituting the city of Omaha into a district for a police magistrate. And it was evidently in view of this construction of the law, that the relator was elected police judge in the city of Omaha at the regular general city and state election held in 1895, and presumably for the term of two years or until his successor should be elected and qualified. While it is true that relator received a majority of the votes cast in the spring election

held in the city of Omaha in 1897 under a void enactment, yet he subsequently repudiated his claim to the office growing out of such election, and asserted his right to become a candidate at the regular general election in 1899, and was elected and qualified under such election. And again in 1901 he procured the nomination as a candidate for the office and contested the election with the present incumbent, Louis Berka, and was defeated, the certificate of election being awarded to the said Louis Berka, who qualified and has entered upon the active discharge of the duties of the office under claim of right based upon his certificate of election and his official oath and bond filed in conformity therewith, and is recognized as the police judge by the city officers of Omaha.

It is a well established rule that the right to an office occupied by one claiming title thereto, under a certificate of election, can not be determined in a suit instituted by another claimant for the salary of the position. But under such circumstances the adverse claimant must first establish his right to the office by proceedings in the nature of *quo warranto* against the occupant. *Selby v. City of Portland,* 14 Ore. 243; *Lee v. Wilmington,* 1 Marvell (Del.), 65; *Hagan v. City of Brooklyn,* 126 N. Y. 643; Dillon, Municipal Corporations (4th ed.), sec. 844.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former judgment of this court be adhered to.

AFFIRMED.

LIBERTY B. CROUCH ET AL. V. W. MARION PYLE ET AL.

FILED OCTOBER 7, 1903. No. 12,780.

1. **County Commissioners:** ALLOWANCE OF CLAIMS. The board of county commissioners in allowing claims made for salaries of county officers and other claims against the county, where the

amounts to be allowed therefor are fixed by law and where no judicial inquiry is required to determine the amount, act in a mere ministerial capacity and have no power or jurisdiction to allow an amount in excess of the fixed statutory compensation.

2. ———: ———: JUDICIAL DISCRETION. Where judicial discretion is called for in the allowance of a claim presented, the board then acts as any other judicial body, and its findings can be questioned and set aside only by an appeal taken from the decision as provided by statute. Neither can the members of the board be made liable for a mere mistake made in passing judgment on the claim, the commissioners, in such case, being entitled to the same immunity as other judicial officers.

ERROR to the district court for Pawnee county: JOHN S. STULL, JUDGE. *Affirmed.*

Ernest O. Kretsinger, for plaintiffs in error.

Albert S. Story and *Ralph W. Story, contra.*

DUFFIE, C.

In December, 1895, A. E. and J. N. Hassler, proprietors of the Pawnee Republican, entered into a contract with the board of county commissioners of Pawnee county by which they were to publish the delinquent tax list of 1895 in the Pawnee Republican, and also caused it to be published in the Pawnee Press, for the sum of twenty cents for each description of land, other than town lots, and for each town lot included in the deliquent tax list the sum of ten cents. The proceedings of the board of county commissioners and all printing required by law to be published by the county during the year 1896, were to be published without cost, in consideration of the award to them of the publication of the delinquent tax list. October 1, 1896, the county treasurer furnished these publishers a delinquent tax list for publication. Prior to this date, the treasurer had been advertising delinquent lands by giving the amount of the tax due for the preceding year only, but an examination of the delinquent tax lists published in other counties led him to believe that this was not correct, and after consultation with one or more attorneys, among

others the county attorney, he prepared the delinquent list for 1895 by describing the lands and town lots as many times as there were years delinquent taxes due against the same. By this method, many of the descriptions of land, and of town lots, were repeated twenty or more times according to the number of years' taxes standing against the same, and the bill for publishing this delinquent list, at the rate of twenty cents for each parcel of land and ten cents for each town lot, amounted to $1,113.80; whereas if each tract of land and each town lot had been set forth but once in said publication with the full amount of taxes due against the same, the amount would have been but $313.90. A bill was presented to the board of county commissioners for the amount first above named which was audited and allowed by the board and warrants drawn and issued in payment of said bill. It is agreed that no appeal was ever taken from the order of the commissioners allowing said claim and no action was taken thereon, until a short time prior to the commencement of this suit, when the plaintiffs in error petitioned the board of county commisisoners to take action to recover the amount claimed to have been illegally paid for the publication of said delinquent list. No attention having been given to said petition, plaintiffs in error commenced this action making the commissioners who allowed said bill, and their bondsmen and the county of Pawnee, parties defendant, and asking that the amount so alleged to have been illegally allowed and paid might be recovered from said commissioners and their bondsmen for the use and benefit of the county. The district court dismissed the plaintiff's petition, overruled a motion for a new trial, and entered judgment against the plaintiffs in error for costs, and the case is now here on petition in error.

Several preliminary matters such as a defect of parties plaintiff, a defect of parties defendant, and a misjoinder of causes of action are urged by the defendants in error; but these matters we do not care to discuss as we have concluded that the case presented by the testimony, while one

of great difficulty and open to grave discussion, was correctly determined by the district court. It is alleged in the petition that the county commissioners, when they audited and allowed the account for publishing the delinquent list, well knew that said claim was illegal, extortionate and unjust, and that they had no legal authority whatever to pay for printing the same in excess of the sum of $313.90, and that the commissioners confederated and conspired with the publishers of the newspaper with the unlawful and corrupt purpose of cheating and defrauding the county of Pawnee and its taxpayers out of the sum of $799.90.

If there was evidence in the record to support these allegations of fraud and conspiracy on the part of the defendants in error, they would, no doubt, be liable to the county for any amount allowed in excess of the legal fees, but a critical examination of the record fails to show any dishonest motive on the part of any of the defendants or to disclose that they were not acting honestly in the allowance of this claim. The proprietors of the Pawnee Republican were obligated by contract to publish the tax list in question: This list of necessity came from the county treasurer and the publishers had nothing to do with making it out or in directing its form. The treasurer was the agent of the county to furnish the copy and it was not for the publishers to question the correctness of the form. They were to publish it as furnished, and might rely with confidence upon the officer, charged with the duty of preparing it, doing so in the proper manner and form. When published they presented their bill to the board of county commissioners. This was undoubtedly a claim which had to be audited and allowed under the provisions of section 37, article 1, chapter 18, Compiled Statutes, 1901 (Annotated Statutes, 4455). That the claim should be audited and allowed by the county board is conceded by the plaintiff in error, but it is insisted that as the amount to be allowed was fixed by law at twenty cents for each description of land, and ten cents for each town lot, that the board acted

ministerially and are liable to the county for any amount allowed in excess of the legal rate.

In *Kemerer v. State,* 7 Neb. 130, it is said:

"Where the compensation for services rendered for the county is definitely fixed by law, the audit of the same and drawing a warrant therefor, by the board, are merely ministerial duties unattended with the exercise of any official discretion, and therefore, in such case, the board can not make such compensation any greater nor any less than that fixed by law."

This case has received the approval of this court, in subsequent cases. *State v. Roderick,* 25 Neb. 629; *County of Logan v. Doan,* 34 Neb. 104; *Hazelet v. Holt County,* 51 Neb. 716, 723; *Perkins County v. Keith County,* 58 Neb. 323.

These cases, however, all refer to claims made against the county by officers for salaries or for fees, the amount of which was definitely fixed by statute, excepting *Perkins County v. Keith County, supra,* in which the claim had been once audited and allowed by the board and in which it was held that a second presentation of the claim was unnecessary. It is true that *Heald v. Polk County,* 46 Neb. 28, while recognizing and affirming the rule announced in *Kemerer v. State, supra,* apparently establishes a different doctrine, in so far as it recognizes the allowance by the board of a claim made by the clerk for $200 for making out a tax list; and while it is attempted to distinguish the case from *Kemerer v. State, supra,* we concede that the distinction made is not entirely clear to our minds. The true rule, we believe, is to inquire whether the board in passing upon a claim acts in a ministerial or judicial capacity. Where the compenstaion is fixed by law and no judicial inquiry is necessary to determine the amount—cases such as the allowance of the quarter salaries due the officers of the county—there can be no question that the board is acting in a ministerial capacity, having no discretion to use, no judicial powers to exercise. Where, however, a claim is presented for services performed under a contract fixing

the remuneration, or at the request of the county through its properly authorized agent where compensation has not been agreed upon or where damages are claimed against the county for some act committed, then the account must be audited and the discretion of the board exercised to determine whether the work done is in accordance with the contract, what the value of the services may be if no value has been agreed upon, what the damages sustained amount to where damages are claimed, and in all such cases the board is acting judicially and, like other judicial bodies, can be called to account only upon a showing that their acts were wilfully illegal and corrupt. In the case at bar, the commissioners had to examine and pass upon this claim the same as on any other claim for legal printing done the county. In other cases, unless the statute prescribes the form of the notice or other legal matter required to be published, the officer from whose office it emanates, prepares the form for the publisher who prints it as furnished. We do not think that it can reasonably be claimed that after the allowance and payment of a bill for such printing a taxpayer who failed to make any objection to the allowance of the bill on the ground that the notice was more lengthy than required, could maintain an action on behalf of the county to recover either from the publisher, or the commissioners who allowed the bill, the amount which he claims was excessively paid on account of the notice being of greater length than was necessary. Certainly, in such case no action could be maintained in the absence of a showing that the parties acted corruptly and extended the length of the published matter for the purpose of defrauding the county. Such a case does not differ greatly from the one we are considering. The form of notice of the sale of lands for delinquent taxes is not given by statute, the legislature contenting itself with naming the several matters that the notice must contain, leaving to the treasurer the duty of formulating the notice in his own way. In such cases common fair dealing requires that the publisher who, in good faith, publishes the notice for the requisite time

should be paid for his work, and the commissioners who audit and allow the bill, and against whom no evidence of bad faith exists, ought not to be held liable for so doing. The principle involved is not greatly different from that applied in *Brown v. County Commissioners of Merrick County,* 18 Neb. 355, 360.

We are satisfied that the judgment appealed from was the only judgment that could be entered in the case, and therefore recommend its affirmance.

POUND and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE E. GIFFEN, A MINOR, BY ALBERT W. GIFFEN, HIS NEXT FRIEND.

FILED OCTOBER 7, 1903. No. 12,808.

1. **Railroad:** USE OF RIGHT OF WAY BY LICENSEE. The proprietor of an elevator, built upon the right of way of a railroad company by permission of the company, is a licensee upon the premises and must operate his elevator loading cars therefrom, subject to the right of the company to handle its trains and use the track for switching purposes in the ordinary and usual way of doing such work.

2. **Negligence:** QUESTION FOR JURY. The plaintiff, an employee of an elevator, was filling a car with grain when interrupted by the switching operations of a freight train that arrived at the station during his work. The partly filled car was moved easterly along the track, and finally returned to the elevator and left standing, with two other cars attached and to the west of the partly filled car. The brakeman in charge asked the plaintiff if the car was placed in the right position to be filled, and plaintiff replied that it was not but was as nearly right as they could place it, and that he would "pinch" it into position with a crowbar. The plaintiff then uncoupled the partly filled car from the one standing west of it, climbed to the top of the car and loosened the brake. While on the car, he looked for the engine and saw it, with some cars

attached, going west on the switch track, the engine then being about to enter upon the main track. Supposing that the crew had finished the work of switching, plaintiff descended from the car, took a crowbar and went between the partly filled car and the car standing to the west of it, and commenced the work of "pinching" said car into position to be filled from the elevator spout. While so engaged, another car was shunted or "kicked" upon the side-track with such force as to drive the two cars standing on the track, west of the car at which plaintiff was working, up against the plaintiff, and driving the crowbar which he was using through his thigh. *Held*, That the question of negligence on the part of the company was a question for the jury.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

J. W. Deweese and *Frank Elmer Bishop*, for plaintiff in error.

F. B. Donisthorpe, contra.

DUFFIE, C.

Giffen, the plaintiff below, was employed in an elevator in the town of Grafton, Nebraska. There are two elevators on the railroad right of way, Giffen being employed in the west elevator. The facts upon which he claims to recover, omitting the formal allegations, are as follows:

"That on or about the 27th day of July, 1901, and for a long time prior thereto, plaintiff had been working in said west elevator at a salary of $35 a month, and on said day there were standing on said sidetrack at said elevator three cars, one of which plaintiff was loading with grain, the other two standing west of said loaded car and being empty; that while said plaintiff was loading said car one of defendant's engines, pulling several freight cars, proceeded west of said depot on defendant's main line and backed on to said switch going to the east elevator for some purpose unknown to plaintiff; that in so going the said three cars as above mentioned were pushed toward said east elevator; that after the purpose had been accomplished for which defendant's engine and cars had been

pushed to said east elevator the said engine proceeded west, pulling the two empty cars and the car almost loaded as aforesaid back to the west elevator trying to leave the loaded car in the position it occupied before being moved east; that after said three cars were so brought to said west elevator one of defendant's brakemen uncoupled the said three cars form the balance of the freight train when said freight train proceeded west; that plaintiff discovering that said loaded car as aforesaid was not occupying a position where the loading of the same could be finished, went to the top of the loaded car, the brake having been put on by one of the defendant's brakemen, and threw off the brake, expecting that by so doing the car would move a little to the east, the grade inclining toward the east; that while plaintiff was still on top of said car he saw that said engine and the cars attached thereto were proceeding west to the main track and plaintiff, being satisfied that the switching by said engine for said time was through, descended to the ground and finding that said loaded car did not move far enough east, took a crowbar and commenced to apply the same to one of the wheels of said loaded car, thereby trying to move the same; that while plaintiff was so engaged defendant's brakeman, whose name is unknown to plaintiff, in connection with said freight train, discovering that a loaded car in connection therewith should also have been cut off and left on said sidetrack, accordingly notified the engineer of said train of said fact and while plaintiff was engaged in trying to move said loaded car with said crowbar and without any notice whatever of said change of plans being conveyed to him, without any of defendant's brakemen or agents in any way giving notice to said plaintiff, the said engineer with gross negligence and extreme carelessness and without giving any signal either by whistle, bell or in any other way, caused said engine to 'kick' said loaded car back on to said switch without said car having any person or persons controlling its movements, and it was sent with such force that as it struck said two empty cars they struck plaintiff on his back

whereby said crowbar he was using in front of him was driven completely through the following muscles of plaintiff's left thigh, to wit: Gracilis, adductor magnus, semimembranosus, semitendinosus, biceps and the glutæus maximus."

Damage was claimed in the sum of $3,000. Judgment went in favor of the plaintiff for $1,000, and the defendant has taken error to this court. From the foregoing extract from the petition, it will be seen that the action is based wholly upon the fact that the plaintiff believed that the train crew in charge of defendant's train had finished the work of switching and were about to proceed upon their way west. Acting upon this belief, he entered between two of the cars left upon the side-track and was injured in the manner stated in the petition by another car of the train being switched upon the side-track and "kicked" against the cars behind him.

The right of the plaintiff to recover and to avoid the charge of contributory negligence, does not depend solely upon his own belief that it was safe to enter between the cars for the purpose of "pinching" one of them into the position desired, but the question is, was this belief derived from acts and declarations of the servants of the plaintiff in error upon which he might rely and which, in the judgment of the jury, would justify a reasonably prudent man to act as he did? As stated in *Muldowney v. Illinois C. R. Co.*, 36 Ia. 462:

"The reasonable belief of a party that he will not sustain an injury in doing acts which, but for such belief, would be negligent, does not exonerate him from the charge of negligence."

The evidence discloses a state of facts which we think made it a question for the jury to say whether or not Giffen was negligent in going between the cars. Prior to doing so the switching crew had "spotted" the car which Giffen had been filling from the elevator. This, as we understand it, means that the car was placed as nearly in position to be filled from the elevator as could conveniently

be done by the use of the engine. At this time the following conversation took place between Giffen and the brakeman in charge:

Q. Tell us what he (the brakeman) said.

A. He asked me if the car was at the place I wanted it, and if the car was right. I told him "No" and said that "it is about as near right as you can get it." He says, "Shall I back up?" I said, "No, I will pinch it with a crowbar." He says, "All right," and went to the other end of the train and I noticed the train push on out west.

Q. Where did you notice it from?

A. When I got up on the car I see the train going out just heading on to the main track.

We think that the act of spotting the car and the inquiry by the brakeman, if it was properly placed, indicated that the train crew was through with its work of switching, so far at least as not to further interfere with the car which Giffen was filling, and that Giffen, by telling the brakeman that he would "pinch" it into the exact position wanted with a crowbar, gave notice to the crew that he understood that they would not further interfere with the car, and that he himself would enter between the cars and pinch it into position, thus giving them warning that he was about to occupy the dangerous position that he did under the belief that he was not to be further interfered with in his work and calling upon them to give him notice if in the further work of switching it was necessary to move the car or to back other cars against it in such manner as to endanger him. It is true, as argued by the company, that the owner of the elevator and his employees had a right upon the railroad ground at the elevator as licensees only, and that being mere licensees they undertook to do their work of loading cars at the elevator subject to the right of the company to handle its trains, and use the track for switching purposes; that the company had the first and primary right as against them to do all the work necessary in setting in or backing up cars on this side-track, whether the cars were moved by the direct movement of the engine

or whether they adopted the mode of "kicking" such cars onto the side-track. This right the company had exercised by moving the car which Giffen was filling from the elevator back and forth upon the side-track as the work of switching required, and then, as is usual in such cases, it had attempted to replace the car at the elevator from which it was being filled. In the language of the switching crew they had "spotted it" and we think that this act, together with what passed between Giffen and the brakeman in charge, was sufficient to support a finding that the company's employes had said to him in effect:

"Our work does not further require us to interfere with this car, and you may safely proceed to 'pinch' it into position and resume your work of filling it."

The employees of the company knew as well as Giffen that the work of pinching the car into position required Giffen to enter between the cars where he could neither see nor be seen, and under such circumstances it was undoubtedly a question for the jury to say whether the company was negligent in not ascertaining that he had entered into his dangerous position, and giving him notice of its intention to further interfere with the car at which he was at work, so that he might protect himself against danger. We conclude therefore that there was no error in submitting the question of negligence to the jury and that the findings of the jury are conclusive.

We recommend the affirmance of the judgment.

ALBERT, C., concurs.

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

AFFIRMED.

JOHN J. DONAHUE, CHIEF OF POLICE OF THE CITY OF OMAHA, V. STATE OF NEBRASKA, EX REL. NEILS SEIEROE.

FILED OCTOBER 7, 1903. No. 13,070.

Mandamus: DISCRETIONARY WRIT. Mandamus is a discretionary writ and will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual, nor where the relator has instigated, authorized or approved the acts complained of.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed.*

W. J. Connell and *Parke Godwin*, for plaintiff in error.

Byron G. Burbank, contra.

DUFFIE, C.

This is a mandamus proceeding brought by the defendant in error against the chief of police of the city of Omaha, the purpose being to compel the chief of police to close certain houses of prostitution in said city. The district court awarded the writ, from which judgment the chief has taken a writ of error. By section 170, chapter 12*a*, Compiled Statutes, 1901 (Annotated Statutes, 7639), the chief of police of the city of Omaha is subject to the orders of the mayor and board of fire and police. Being subject to the orders of these officers by whom his appointment is made, there is no reason to suppose that he is not entirely ready to comply with the directions of the board, the mayor assenting thereto. Such being the case, it is certainly a serious objection to the petition that it seeks to deal alone with a subordinate officer and that those who govern and control his actions are not made parties to the suit. *Alger v. Seaver,* 138 Mass. 331.

There is another matter which in our opinion calls for a reversal of the case. The record discloses that the houses complained of and against which it is sought to direct the

action of the chief of police, were built by Seieroe for one Slobodisky. These houses are located in what is known as the "burnt district" of Omaha and were, according to the evidence of the petitioner, kept as houses of prostitution for from five to seven years prior to the commencement of this action. A contract existed between relator and Slobodisky, the exact terms of which do not appear, but one of its conditions was to the effect that Slobodisky was to pay the relator $250 a month until the contract price for the erection of the buildings was fully paid. Some misunderstanding or disagreement arose between the parties and one Harris was appointed to collect the rents from the buildings and divide the same between them. We copy from the relator's cross-examination:

Q. What was done with that money after Harris collected it?

A. He was to keep the money until he has a certain amount collected, then he pays it over to Slobodisky.

Q. To whom?

A. To him just the same—he pay to me.

Q. You knew where it came from?

A. Yes, from Harris.

Q. You knew where it came from?

A. I knew he got it from those houses.

Q. And those women?

A. I suppose so.

Q. You knew what the women were doing—how they earned it—you knew that?

A. Yes, sir.

While the record is not entirely clear upon the question, we are satisfied from what does appear that Slobodisky, before paying in full for the erection of these buildings, refused further payments and that, in an action brought by relator to enforce payment, judgment went for the defendant and relator was denied the assistance of the court in attempting to collect his claim. Sometime thereafter he sent a written notification to the chief of police as follows:

"I, Neils Seieroe, a resident, citizen and taxpayer of the

city of Omaha in the state of Nebraska, hereby demand that you report to the police judge of the city of Omaha, Nebraska, in writing forthwith the names of all occupants or inmates of houses of ill fame and the names of persons of either sex who derive their support from the wages of prostitution, and demand is, hereby, made upon you that you forthwith make complaint against and cause the arrest of all such without delay, said houses being situated upon lots 7 and 8 in block 70 in the city of Omaha, Nebraska, except No. 902 Capitol Avenue, and said houses are also known and designated as follows." (Here follows a description of the houses by their street number.)

In *Hale v. Risley,* 69 Mich. 596, it is said:

"Mandamus is a discretionary writ, and will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual nor where the relator has instigated, authorized or approved of the act complained of."

The above we think announces a salutary rule and should be followed in this case. We are satisfied from the record before us that the relator built these houses with full knowledge of their intended use. Not only so, but his contract called for the payment of $250 a month and for a considerable time this amount was paid him with full knowledge that it was derived from prostitutes renting these houses. So long as this money was being paid him he was content to rest quietly and allow the violation of law, of which he now complains, to proceed. He made no complaint until deprived of his portion of the rents. Under these circumstances, it is clear that he occupies no position to ask the court to extend to him this high prerogative writ. We think that the court erred in awarding the writ and recommend a reversal of its judgment.

POUND and KIRKPATRICK, CC., concur.

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

REVERSED.

MAGGIE FRONK, A MINOR, BY MICHAEL FRONK, HER NEXT FRIEND, V. J. H. EVANS CITY STEAM LAUNDRY COMPANY.

FILED OCTOBER 7, 1903. No. 13,100.

1. **Dismissal:** DEMURRER TO EVIDENCE. Where a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. *Bee Building Co. v. Dalton*, 68 Neb. 38.

2. **Master and Servant:** NEGLIGENCE. Before recovery can be had against an employer based on the ground of negligence in not informing the employee of the danger attending the operation of a machine and instructing her how to avoid injury thereby, it must appear that the injury complained of occurred because of the want of such instruction. If it fairly appears that the injury complained of did not occur from want of knowledge of how the machine should be operated, but was incurred from causes which could not be foreseen or anticipated, it can not be imputed to the neglect of the master to give proper instructions.

3. **Question for Jury.** Whether a guard rail attached to a mangle for the purpose of protecting the hand of the operator from being caught and drawn into the machine was properly attached and placed in position, is a question for the jury under the evidence.

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

Constantine J. Smyth and *Ed P. Smith*, for plaintiff in error.

Charles J. Greene, Ralph W. Breckenridge and J. C. Kinsler, contra.

DUFFIE, C.

The plaintiff in error is a minor of the age of fifteen years, and brought this action by her father as her next friend. On May 5, 1902, she was employed by the defendant in error and placed in charge of the forewoman with instructions to put her to work. The first work assigned her was that of laying out wet clothes. She continued in this employment on Monday and Tuesday, and on Wednesday the forewoman put her to work feeding a

machine called a mangle, which is used for ironing clothes. This mangle is operated by steam and consists, as we understand, of four large rollers which revolve over a heated steam-chest. It is about eight feet wide. It has a table in front which is covered with a brass sheet. Above this table, running the entire length of the machine, is a guard. Between the guard and the table is the aperture through which the clothes are fed to the machine. The rollers revolving toward the operator, take hold of the clothes and pull them through to the other end, thus drying and smoothing them. The purpose of the guard is to prevent the hand of the operator from being dragged between the roller and the heated steam-chest. It is adjustable and can be raised or lowered by the engineer but, as we gather from the record, the operator has nothing to do with its adjustment. On Thursday afternoon, a day and a half after plaintiff commenced work on the machine, her right hand was caught in a double roller towel which she was passing through the machine, and dragged under the guard and between the steam-chest and the roller, and there crushed and burned so as to render amputation above the wrist joint necessary. At the time of the accident, she was standing at the right or east end of the machine. At that time, the guard at the left or west end of the machine was about one-half inch above the table, and at the east end, where plaintiff was working, the evidence tends to show that the guard was from an inch to an inch and a half above the table. The evidence also tends to show that no article was fed to the machine thicker than a double towel, and that it was not necessary that the guard should be placed more than from one-eighth to a half inch above the table. The petition alleges negligence on the part of the defendant in error in two particulars: (1) In not instructing plaintiff how to perform the duties of the employment in which she was engaged at the time of the injury; (2) in the adjustment of the guard on the machine in which plaintiff was injured. At the close of the plaintiff's testimony the court, on motion of defendant, instructed the jury to return

a verdict for the defendant. The motion to direct a verdict was apparently argued at length and, upon the court announcing its intention to direct a verdict for the defendant, the plaintiff moved to dismiss without prejudice. This was denied and is now alleged as error. Plaintiff, in her brief, cities authorities to the effect that there can be no final submission of the case to the jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case actually delivered to the jury, and until they are authorized, without further interposition or control of the court, to proceed to a judicial examination of the issues submitted to them. In view of the holding of this court in *Bee Building Co. v. Dalton,* 68 Neb. 38, it is not necessary to spend time on that branch of the case. It is there said:

"When a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost." Also: "To permit a party to dismiss under such circumstances is, in substance, to grant him a new trial after he has been fairly defeated and to deprive his adversary of the fruits of a fairly won victory. It is contrary to good sense and sound policy to allow a party to take his case from one court to another until fortune favors him with a judge who is willing to accept his view of the law or his construction of the evidence."

Neither do we think that the plaintiff's contention that the defendant's failure to instruct her how to perform the duties of her employment, and to give her warning of danger to be apprehended from the operation of the machine, can be used to work a reversal of this case. Plaintiff's own testimony is to the effect that she watched the other girls at work upon the machine and that she fed it just as they did, and, in answer to a question as to how her hand got caught, she said:

"All I know I was feeding that towel; I was trying to pull the wrinkles out of it, and the thumb got wound some way in the towel, and pulled it right in with the towel; that is all of it."

The following is a part of her examination:

Q. Your hand got wrapped up in some way or other in the towel and you could not get it out?

A. Yes, sir.

Q. And this time you did not have hold of the towel as you usually did?

A. No, sir.

Q. Nor the way Miss Black usually did?

A. No, sir.

Q. You did not have hold of it the way she usually fed it, that time?

A. No, sir.

Q. If your hand had not got tangled in the towel you could have taken it away couldn't you?

A. Yes, sir.

Q. And you would not have been hurt would you?

A. No, sir.

Q. So that it was not any lack of knowledge on your part that kept you from taking your hand away, was it?

A. Why, I don't know.

Q. Was it because you did not know, or was it because the towel held you, that you did not take your hand away?

A. It was because the towel held my hand in it.

Q. So if the towel had not held you, what you knew about the machine would have permitted you to take your hand away, wouldn't it?

A. Yes, sir.

It is evident from this examination of the plaintiff that it was not lack of knowledge on her part as to how the machine should be fed that caused the injury, and any information or instruction which might have been given her of the manner of feeding the machine could not in the least tend to obviate the injury which she received. The law does not cast upon the employer the burden of anticipating an accident of a particular kind, nor, as in the case at bar, of foreseeing how it might happen that the thumb of one of his employees might become entangled in a torn towel and drawn into the mangle. The plaintiff herself has

stated repeatedly that she did not know how her thumb became entangled, and, if she does not know, the law is not so unreasonable as to cast upon the employer the duty of telling her in advance how to avoid an occurrence which she can not explain after it has taken place. We are clear that plaintiff has not established any fact which tends to show that the injury occurred through the neglect of the defendant to instruct her in the operation of the machine.

Passing now to the complaint made that the guard was improperly adjusted, we are of the opinion that this was a question which should have been submitted to the jury. It appears without contradiction that the guard was placed on the machine for the sole purpose of protecting the operator and of keeping her hand from coming in contact with the rollers. As before stated, the evidence tends to show that a space of one-quarter to one-half inch was sufficient through which to feed any of the clothes that were passed through this mangle. If there had been no guard, the danger of feeding the mangle would have been apparent to the operator, and she would have taken the risk of such open and apparent danger if she continued in the employment. As said by the supreme court of Oregon in *Stager v. Troy Laundry Co.,* 38 Ore. 480, 53 L. R. A. 459, a case very similar to the one under consideration:

"The authorities appear to be uniform and conclusive that, where a machine similar to the Wendell Annihilator in principle is operated without a guard plate, the operator assumes the risk; for in such case the method of operation is known, and the peril patent. In the case at bar there was a guard plate, which was evidently designed to lessen, if not to obviate, the danger incident to feeding fabrics within the aperture between the rollers, and, if properly adjusted, would, no doubt, have afforded some protection, and it was the duty of the master to see that it was properly adjusted."

In *Swift & Co. v. Holoubek,* 60 Neb. 784, the contention of the plaintiff was that a certain shield was improperly and negligently constructed, and was attached to the ma-

chine in such a manner as to make the space between the knives and the revolving drum an inch or more and sufficient to permit the hand to pass into the rapidly revolving knives; when the proper construction would have allowed but an eighth to a quarter of an inch space, and thus prevented the possibility of the happening of the injury. In the opinion it is said:

"The shield was evidently for the purpose of protecting the operators of the machine from contact with the revolving knives, and, under plaintiff's theory, should be placed so near the drum as not to permit the hand to slip thereunder and against the knives or scrapers. * * * The issue we regard as purely one of fact, and upon which there is a conflict of the evidence, rendering the question one properly in the province of the jury for its determination."

The same views were expressed by the court on a reexamination of the case, the opinion being found in 62 Neb. 31; and these cases, we think, are an authoritative declaration that where the master has placed a guard to protect his employee and to prevent his hand from being drawn into the machine, and where the guard when properly placed will have this effect or will tend to prevent accidents, it is his duty to see that the guard is properly adjusted and whether it be so or not is a question for the consideration of the jury.

We think, therefore, that the court erred in not submitting the question of the proper adjustment of the guard to the jury, and for this error we recommend a reversal of the judgment and that the cause be remanded for a new trial.

POUND, C., concurs.

KIRKPATRICK, C. I concur in the result, but not in the rule announced in paragraph 2 of the syllabus.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

F. E. WATKINS, APPELLANT, v. CHARLES A. YOULL ET AL., APPELLEES.

FILED OCTOBER 7, 1903. No. 12,598.

1. **Specific Performance.** In a written agreement for the sale of real estate consisting of three quarter sections, it was stipulated on behalf of the vendee that he might elect not to take any of the quarter sections, if he could not also obtain the conveyance of a fourth quarter section. The vendee failed to obtain a conveyance of the fourth quarter section, and elected to take the three quarter sections. *Held*, That he was entitled to specific performance of the agreement to convey.

2. **Executory Contract:** OFFER TO CONVEY. A vendor under an executory contract to convey real estate, on the day of performance, presented himself at the bank where his deed had been deposited as an escrow, offered to convey and demanded the purchase money; the demand was refused, and it was several days before the vendee concluded to take the land. *Held*, That the vendor was relieved from the obligation to perform.

3. **Homestead:** CONTRACT TO CONVEY: SPECIFIC PERFORMANCE. A contract to convey a homestead was signed only by the husband, but both husband and wife signed and acknowledged a deed for such homestead, placing the deed in escrow to await the payment of the purchase price. The acknowledgment was taken before a notary who was disqualified by reason of his direct pecuniary interest in the conveyance. *Held*, That the vendee was not entitled to a specific performance of his contract as to such homestead.

4. **Tender.** A vendor under an agreement to convey real estate, on the day of performance of the contract, appeared at a bank where he had placed a deed for the land in escrow and demanded the purchase money. He was tendered a check signed by the vendee, but refused it. The cashier then offered to cash the check and give him the money. *Held*, That the vendee was entitled to a conveyance.

5. **Contract:** CONSTRUCTION. Contract for the conveyance of real estate between a vendee and three vendors, each owners of separate tracts of land, construed, and held to be severable and independent as to each vendor.

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

McNutt & White, A. H. Tingle, James M. Woolworth and *William D. McHugh,* for appellant.

W. T. Wills and *Michael F. Harrington, contra.*

KIRKPATRICK, C.

This is a suit brought to enforce the specific performance of a contract entered into between the parties to this case for the sale of certain lands located in Boyd county. Judgment was entered by the trial court, refusing specific performance and dismissing the petition of plaintiff for want of equity. The cause is brought to this court by appeal by plaintiff. The only question involved is whether the judgment of the trial court is right under the pleadings and evidence. The contract upon which the suit is founded is in the language following:

"BUTTE, NEBRASKA, MAY 24, 1901.

"It is hereby agreed by and between the parties hereto that the warranty deeds, to wit: for the norteast quarter of section 17, township 34, range 12, and the northwest quarter of section 17, and the southwest quarter of section 17; together with the checks hereto attached, each, be deposited in the bank of Butte, at Butte, Nebraska. F. E. Watkins or his agent agrees to pay the sum of $1,975 for the northeast quarter of section 17, and $2,550 for the northwest quarter of said section 17, and $600 for the southwest quarter of said section 17, on or before June 15, 1901. The several grantors mentioned in said deeds agree to furnish abstracts of title, showing clear title to said land, to be delivered on payment of said sums of money mentioned; and three checks of F. E. Watkins, for the sum of $125 each, shall be considered part of the purchase price herein mentioned for said described lands; and, in case said F. E. Watkins shall fail to pay the balance of said purchase price in case mentioned, said checks shall be delivered to the grantors named in said deeds, together with said deeds, and this contract shall, in such case,

be determined. Provided further, that, in case Ezra S. Bell and wife shall fail to convey to F. E. Watkins the southeast quarter of said section 17, township 34, range 12, in accordance with the contract of date May 24, 1901, then and in that case, the deeds herein mentioned shall be delivered to the grantors named therein, at the option of F. E. Watkins, and the checks shall be returned to F. E. Watkins.

C. A. YOULL.
"H. C. BELL.
"H. A. BELL.
"F. E. WATKINS,
"By J. E. DE FORREST, *Agent.*"

Separate answers were filed by the owners of the several tracts of land. These answers need not be set out in detail; it will suffice to say that the answers present the defenses following:

First: Want of mutuality in the contract; that it was a mere option, so far as the purchaser was concerned, and that being unenforceable as to the purchaser, it would not be specifically enforced as against the grantors named therein.

Second: That Hiram A. Bell tendered performance of the contract on the 15th day of June, the day performance was due; and that the agent of the purchaser, acting for him, declined to carry out the contract, and to pay the purchase price, because the contract made by Ezra S. Bell for the southeast quarter of the section, and of date of May 24, had not been consummated by Ezra S. Bell's procuring his wife's signature to the deed; and that, on the failure of the purchaser to carry out the contract, on the day named, Hiram A. Bell declined to be further bound by the contract, and demanded the surrender of his deed.

Third: That the land owned by Charles A. Youll and wife was a homestead, and that the deed had never been acknowledged before an officer competent to take an acknowledgment, and, therefore, the conveyance could not be enforced as against them.

Fourth: That the contract was an entirety and not severable, and being unenforceable as to the Youlls and Hiram A. Bell, it could not be enforced as to the remaining defendants, H. C. Bell and wife.

Regarding the first contention, it may be said that we are of opinion that the want of mutuality in a contract is no defense. Defendants saw fit to enter into the contract, worded as it is, leaving with the plaintiff, under its terms, the option not to complete the contract if Ezra S. Bell and wife failed to convey. It is contended by counsel that under the rule in this state, a unilateral contract will not be enforced. We do not so recognize the rule. The opposite doctrine seems to have been firmly established in this state by the decisions of this court in *Bigler v. Baker,* 40 Neb. 325, and other cases therein cited. We are therefore of the opinion that the answers, so far as the plea of want of mutuality is concerned, fail to state a defense.

It is disclosed by the evidence that the trial court was justified in finding that H. A. Bell appeared at the bank in Butte where the papers had been deposited in escrow, and notified the holder of the papers that he was ready to complete the transfer, and that he desired the money for his land. It is further disclosed by the evidence that De Forrest, who was acting as the agent for the purchaser, had gone to the bank in the morning of the same day and deposited three checks with the cashier, covering the purchase price of the three tracts of land, and had taken up and destroyed the three forfeit checks of $125 each, which had been deposited with the deeds. It is further disclosed that Ezra S. Bell and wife had failed to execute a deed for the southeast quarter of the section. Accordingly, De Forrest, when he left the three checks with the cashier, told him to close up the sale with Youll and H. C. Bell, providing the abstracts were all right, and to give them the checks, and take their deeds. But he directed the cashier not to deliver the purchase price for the land of H. A. Bell, but to hold that matter for a few days, to see if they could not get the deed for the fourth quarter from Ezra S. Bell and

wife. The lands owned by the father, H. C. Bell, a son, H. A. Bell, a son-in-law, C. A. Youll, and another son, Ezra S. Bell, composed an entire section of land. Watkins, in his contract, reserved the option not to take any of the lands if he failed to get that of Ezra S. Bell, the deal between Watkins and Ezra S. Bell being included in another and separate contract. A forfeit of $25 was put up by each of the parties to that contract. Ezra S. Bell signed the deed and was to procure the signature of his wife, and, on failure so to do, he was to forfeit the $25 which he had deposited. It is probable that the purpose of De Forrest, in declining to close up the deal with H. A. Bell, was to see, if holding it open, Ezra S. Bell could not still be induced to convey. However, whatever the purpose, we are of opinion that H. A. Bell, having appeared on the day performance of the contract was due, and tendering performance, which was declined, was no longer bound to carry out the contract, and that a court of equity ought not to specifically enforce the contract as against him, as it appears that it was several days later before the purchaser concluded to take the quarter owned by him. We are therefore of opinion that the judgment of the trial court in so far as the quarter of H. A. Bell is concerned, is right and should be affirmed.

As a third defense in favor of Charles A. Youll and wife, it is contended, and abundantly supported by the proof, that the quarter section which the Youlls were proposing to sell was their homestead. The deed of conveyance was executed before E. G. Barnum, who was acting as an agent for the purchaser, F. E. Watkins, his contract being that he would assist De Forrest in making purchases of land around Butte, and for each quarter section deeded to Watkins, he should have a commission of $50. So in the matter of the conveyance of the homestead of the Youlls, the notary public, Barnum, who took the acknowledgment, had a direct pecuniary interest in procuring the conveyance to be made. We are of opinion that he was disqualified, by reason of this pecuniary interest, to take the acknowledg-

ment. It is clearly against public policy that a notary public, before whom the acknowledgment to a conveyance is taken, should have an interest such as Barnum is shown to have had in the conveyance in question. *Chadron Building & Loan Ass'n v. O'Linn,* 1 Neb. (Unof.) 1. It follows that as to the northwest quarter, the judgment of the trial court is right and should be affirmed.

It is finally contended that the contract was joint and entire, and that, being unenforceable as to some of the defendants, it can not be enforced as to Hiram A. Bell. We are unable to find merit in this contention. The contract of each of the defendants is plainly independent and severable. The undisputed testimony shows that the money necessary to pay the purchase price due Hiram C. Bell was in the bank at Butte on the 15th day of June, when performance was due. A check covering the purchase price had been deposited with the cashier of the bank. H. C. Bell objected to this check, claiming that he did not sell his land for a check but for money. This objection does not merit consideration. The cashier informed him that he could obtain the money on the check. We are unable to see wherein H. C. Bell has presented any defense to plaintiff's cause of action. We are therefore of opinion that the judgment of the trial court as to the defendant H. C. Bell is wrong, and should be reversed. It is therefore recommended that, so far as the judgment of the trial court relates to the quarter section owned by Hiram C. Bell, the judgment be reversed and the cause remanded with directions to the trial court to enter a decree in accordance with the prayer of the petition; and that in all other respects the judgment be affirmed.

DUFFIE and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the trial court, so far as it relates to the quarter section owned by Hiram C. Bell, is reversed, with directions to the trial court to enter a decree in ac-

cordance with the prayer of the petition; in all other respects the judgment is affirmed.

AFFIRMED IN PART.

ELLA C. SPENCER ET AL., APPELLANTS, V. CHARLES FORD SCOVIL ET AL., APPELLEES.*

FILED OCTOBER 7, 1903. No. 12,996.

1. Will: DEVISE: CONSTRUCTION. A testator devised certain lands located in Nebraska, Missouri, Iowa and Dakota, to his daughter, M., her heirs and assigns forever, upon the condition that she should not alienate the lands in Nebraska until she attained the age of thirty-three; but that she might alienate the other lands with the consent of the testator's executors; and for the purposes of such alienation, appointed the mother of M. her guardian until M. reached the age of majority, clothing the guardian with full power to transfer on behalf of M. such title as testator possessed at the time of his decease. He then declared that, in the event of M.'s death without living issue, so much of all the lands described as she had not alienated and conveyed should go to certain other persons named. M. died after attaining the age of thirty-three but without issue, devising the lands in Nebraska to her husband. *Held*, That the testator intended to give to M. a fee simple estate in the Nebraska lands, with power of alienation after attaining the age of thirty-three.

2. ———: ———: LIMITATION OVER VOID. Where a testator devises land to his daughter in fee simple, a subsequent clause in his will, by which he attempts to devise over to others so much of the land as his daughter has not alienated during her lifetime, if she dies without living issue, is void.

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

L. F. Jackson, Andrew J. Sawyer, N. Z. Snell, James M. Woolworth and *B. M. Thompson,* for appellants.

Harry O'Neill and *George I. Gilbert, contra.*

KIRKPATRICK, C.

This is an appeal from a judgment of the district court for Otoe county, and involves the construction of the last

* Rehearing denied. See opinion, p. 99, *post.*

will and testament of one Robert Hawke, and, primarily, the sixth item thereof, which, omitting formal descriptions of the premises devised, reads as follows:

"I give and devise to my daughter, Minnie Hawke (certain property in Nebraska, Missouri, Iowa and Dakota), together with, all and singular, the tenements, hereditaments and appurtenances unto all and each of the above mentioned and described premises, in 'Item Sixth' of this instrument referred to, belonging or in any wise appertaining; upon the express condition, however, that the said Minnie Hawke shall not grant, bargain, sell, convey, mortgage or otherwise incumber, or permit to be incumbered or sold, any of the premises described in said 'Item Sixth,' until she shall have attained the age of thirty-three years, except the timber land situated in * * * Missouri, and her undivided land situated in * * * Iowa, and the mineral lands * * * in Dakota, may be by her granted, bargained, sold, released, quitclaimed or demised with the assent and approval of my executors of this my last will and testament, hereinafter named, the survivors or survivor of them, expressed in the deed, lease or other instrument alienating the same, without the aid of a court of equity, and, to that end, I do hereby appoint Elizabeth A. Hawke, her mother, guardian of my said daughter, Minnie Hawke, until she shall have arrived at the age of majority, for the purposes of her person and the conveyancing by her, leasing and selling of said last mentioned property, and with full power and authority to execute and deliver, in the name of my said daughter Minnie Hawke, until she shall attain the age of majority, as such guardian, all necessary deeds, conveyances, leases and other muniments of title, to assure to the purchasers such title therein as I possessed at the time of my decease, and until the said Minnie Hawke shall arrive at the age of thirty-three years, it is my will and I do hereby direct and request my said executors, the survivors or survivor of them, to enter into and upon the above described premises, situated in the state of Nebraska, referred to in said 'Sixth Item' of this

instrument, and to lease and farm-let the same, for the use, benefit and behoof of my said daughter, Minnie Hawke, and (after deducting certain charges) pay to my daughter's guardian for her use, the balance of such rents, issues and profits from time to time, until she shall arrive at her majority, and afterwards to her as the same shall come to the hands of my executors, they charging to the rest, residue and remainder of my estate such reasonable sum annually for their services in that behalf as will be a just compensation therefor.

"To have and to hold all and singular, the premises in 'Item Sixth' of this my last will and testament, unto my said daughter Minnie Hawke, subject only to the limitations herein above made, and her heirs and assigns forever.

"In the event my said daughter, Minnie Hawke, shall depart this life, either before or after my decease, having no issue of her body born, her surviving, it is my will, and I do hereby order, direct and require, that all the above mentioned premises described in said 'Item Sixth,' not by her alienated and conveyed previous to her death, shall descend to and be divided between my beloved wife, Elizabeth A. Hawke, and my daughters, Ella Spencer and Lulu Hawke Rector, and their heirs by representation, share and share alike, provided that no part, parcel or portion of said property shall descend to and be vested in any child or children of my son, William Hawke, begotten upon the body of the herein above mentioned Sadie Gladstone."

The appellants, Ella C. Spencer and William Hawke, are the claimants under the above quoted item; the appellees being Charles Ford Scovil, the husband of Minnie Hawke, who is the devisee of the Nebraska lands described in the will, under the last will of Minnie Hawke, deceased, his wife, and certain other heirs of Robert Hawke who were made defendants because of alleged interest claimed by them in the premises. Minnie Hawke died after attaining the age of thirty-three years and after her marriage to Scovil, leaving no issue surviving her; and appellants

brought this suit for partition of the Nebraska lands, seeking to bar Scovil of his claim under the will of his deceased wife. The appellants' petition in the lower court was demurred to; the facts above mentioned being admitted to be true, and the will of Robert Hawke being made a part of the petition and subject to the same demurrer, which was by the trial court sustained, and the cause is presented in this court for determination.

The only property in controversy in this proceeding is that located in Nebraska. The question presented is whether the attempted devise over is valid; or, stated differently, did Minnie Hawke under the terms of "item sixth" take such a title in the Nebraska lands as empowered her to devise the lands to her husband, and thus defeat the executory devise? A right decision of this question depends upon a correct answer to two inquiries: What was the intent of the testator? And, is there any obstacle to the enforcement of that intent? A question of fact and a question of law.

A rule always jealously enforced by the court is that the intent of the testator must be carefully ascertained. No court will add to or substract one word, or twist or strain an existing word, in order to condemn or save from condemnation a bequest clearly contained in the will. In this important inquiry the language of the will is the only evidence of the intent. Counsel in their able and somewhat voluminous briefs have stated their various contentions in many forms, but we think the principal contentions may be stated briefly as follows: On behalf of appellants it is contended that, by the will, Robert Hawke intended to give to his daughter Minnie a life estate in the lands in controversy, or perhaps an estate upon a conditional limitation, determinable upon her death without issue, with an executory devise or remainder over to appellants.

On behalf of appellees it is contended that Minnie under the will took an estate in fee simple in the Nebraska lands, and that therefore the devise over must fall for repugnancy,

in harmony with the rule that there can be no limitation over after an estate in fee simple. We do not understand that there is any substantial conflict between the parties to this controversy as to the rule that, where a testator has once clearly vested in a legatee a fee simple, absolute, subsequent clauses will not operate to cut down such an estate to a less estate, such clauses being held void for repugnancy. It seems to us that as to this proposition there is no discord between the cases cited by both appellants and appellees. The parting of the ways is arrived at in the application of rules of construction, not of positive rules of substantive law. This may, perhaps, be indicated by a brief excerpt from *Sheets' Estate,* 52 Pa. St. 257, cited by appellants in their reply brief:

"Subsequent provisions will not avail to take from an estate, previously given, qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might be a fee, was intended to be a lesser right."

Similar language, also quoted in appellants' brief, occurs in *Eaton v. Straw,* 18 N. H. 320:

"There can be no limitation over, after an absolute devise in fee simple; but an attempt to constitute a limitation over, after language which might otherwise be construed to convey an absolute fee, may serve to give a construction to that phraseology, and show that such an estate was not intended."

We think that these excerpts recognize the essential repugnancy between an estate in fee in the first taker, and an attempted devise over. While some question is made of the reasonableness of this rule, although sustained by many authorities, and some citations are made which plainly question its soundness, we will for the present assume it to be the rule applicable in this case, inasmuch as appellants seemingly base their case upon the assumption that Minnie Hawke took a base or determinable fee in the Nebraska lands, in consequence of which, under the rule stated, the

devise over would be good. It seems equally apparent to us that appellees have based their entire argument upon the proposition, that the devise over to appellants is valid if Minnie Hawke took less than a fee simple absolute in the lands in controversy, and have labored to show that the estate in her vested is one in fee simple, with unlimited power of disposition. We are brought therefore to the question of fact already suggested, namely: What estate was intended to be given to Minnie Hawke in the Nebraska lands? Our understanding of the language of Robert Hawke's will may be shown by rearranging the directions in the item quoted, reading the item as if it said:

"I give to Minnie the lands described in Nebraska, Missouri, Iowa and Dakota, to have and to hold all and singular unto the said Minnie, her heirs and assigns forever, subject only to the following conditions: The lands in Missouri, Iowa and Dakota, may be by her alienated with the assent of my executors, and, until she arrives at her majority, any such alienation shall be through her mother, hereby appointed her guardian, who shall have full power and authority, before Minnie's majority, to transfer, on behalf of her, such title as I possess therein at the time of my death. But the said Minnie shall not alienate or incumber any of the lands in Nebraska until she shall have attained the age of thirty-three years; and, until then, I direct that my executors shall take possession and manage the same, paying the profits to her."

As Minnie Hawke attained the age of thirty-three years, we may disregard the restriction upon her power of alienation until attaining that age, except so far as it may be necessary to consider it to ascertain the intent of the testator. As the lands outside of Nebraska are not in controversy, the directions concerning them are likewise interesting only in so far as they may enlighten the mind on the question of intent.

Appellants contend that Minnie Hawke was given a base or determinable fee in the Nebraska lands, which would ripen into a fee upon the birth of issue surviving

her, and, dying without living issue, would vest absolutely in the devisees over. To sustain this contention, they read the devising over clause as if it said: In the event of her death without issue, then all the lands in Nebraska, that is, the lands regarding which no power of alienation was given, shall go to, etc., restricting the words, "not by her alienated and conveyed," to the other lands devised. The argument assumes that she was not, by the will, empowered to alienate the Nebraska lands in fee simple, and if we have not misapprehended counsel, the warrant for this assertion is to be found in the fact that the testator did in express terms provide for the alienation by her of all the lands outside of Nebraska. There is no necessity, it is urged, to infer a power to sell in fee the lands in controversy, because the devisee has been expressly given the power to sell certain other lands in fee which are specifically described. We have read the language of this item many times, and can not bring ourselves to the belief that such a construction thereof is warranted. Let us read the item as if it contained no other devise than that of the lands in Nebraska. It would then give to Minnie Hawke, her heirs and assigns forever, all the lands in Nebraska, mentioned therein, subject only to the condition that she should not alienate the same until she arrived at the age of thirty-three years. Assuming that the item contained nothing more, would the testator not be understood by "a man of plain understanding" to mean that after the age of thirty-three had been attained, the power to alienate would vest? If one should say to his servant, "I give you this horse, upon the condition, however, that you shall not ride it until the first day of next month," the servant would be justified in assuming the right to ride it after the limitation had elapsed. Robert Hawke gave the Nebraska lands to Minnie Hawke, her heirs and assigns forever, upon the condition that she should not, until attaining a certain age, do with it what she would, except for the condition imposed, have had a right to do before then, a right incident to the estate

granted to her, her heirs and assigns forever. After attaining the age of thirty-three, therefore, in the absence of any words clearly indicating a contrary intent, it must be held that Minnie took an estate in fee simple in the Nebraska lands.

If such is the intent to be inferred from so much of the language of the item as relates solely to the Nebraska lands, what, if anything, is subtracted from the estate therein granted by reason of the fact that, in the same devise, the testator also devises other lands, and makes certain specific directions with reference to them? In substance, the testator has said, I give certain lands located in four states to my daughter, upon the condition that she shall not alienate the lands in one state until she is thirty-three years old; but the other lands she may alienate immediately, and, to that end, I make her mother her guardian, until she arrives at her majority, for the purpose of conveying this property for her, and give to her mother full authority to execute for her any instrument to transfer to the purchaser such title as I possessed therein at the time of my death. Does the fact that he expressly empowers her to alienate the lands outside of Nebraska, before she is thirty-three, imply that she is to have an estate less than a fee simple in the Nebraska lands? We are unable to answer in the affirmative. On the contrary, it seems to us, that, having attempted to restrict the power of alienation as to the Nebraska lands, he sought to avoid the possibility of a misconstruction of the exception, and to prevent its application to all the lands, by expressly stating that she might alienate the lands outside of Nebraska. Then, mindful of the fact that she was at the time of making the will under the age of majority, he sought to provide means for the alienation of those lands, before her majority, by the appointment of her mother as guardian; and, as we take it, the specific language in which he clothes such guardian with full power and authority to pass "such title as he possessed therein, at the time of his decease," is but the manifestation of a some-

what natural anxiety as to the obstacles that might present themselves to the alienation of the lands through a guardian before the devisee had attained her majority. As we read it, there is nothing in the language quoted, expressed or implied, regarding the lands outside of Nebraska, the appointment of a guardian for the minor devisee for certain purposes, the clothing of such guardian with certain powers, that argues against the supposition that the testator understood he had given Minnie Hawke a fee simple in the lands in controversy. The devising over clause, then, must be read as the testator wrote it, that is, the words, "not by her alienated and conveyed," must be taken to apply to all the premises described in the sixth item.

Coming now to a construction of the devising over clause, for the purpose of ascertaining whether the words "are operative to define the estate given," and to see whether "what without them might be a fee, was intended to be a lesser right," as expressed in *Sheets' Estate, supra,* it is plain that the testator's desire was that all the lands, including those in Nebraska, which Minnie had not alienated and conveyed, should, upon the happening of a certain contingency, go over, the contingency being Minnie's death without surviving issue. Minnie did die without issue. The question presented is, whether this is a case in which subsequent provisions are inserted to take from an estate, previously given, qualities that the law regards as inseparable from it, namely, alienability; or whether such provisions do, in fact, import that the testator has intended by the preceding language to give a less estate than that language, standing alone, would give. We have already concluded that the primary devising clause, standing alone, gives to Minnie a fee simple in the Nebraska lands. As we read it, the devising over clause rather reenforces than contradicts this construction, as it assumes in her the power of alienating those lands, and only attempts to give to the devisees over what she has not disposed of. It ought not to be contended that language

in a subsequent provision, which assumes that the first taker has the power of alienating the lands previously given to such devisee, her heirs and assigns forever, without other qualification, can be effective to cut down the estate of the first taker to a less estate. We think that before this can be done the language must be so clear as to leave no room for doubt.

We have then a case in which a testator has given to his daughter certain lands in fee simple, with a devise over to others of so much of the lands as his daughter has not disposed of. The rule is supported by a great weight of authority, both ancient and modern, that the devise over must fall for repugnancy.

In *Attorney General v. Hall,* Fitzg. (Eng. 1731) 314, the bequest was:

"Item. I give and bequeath all my real and personal estate unto my son Francis Hall, and to the heirs of his body, to his and their use, to be paid unto him in three years after my death, and during that time I make Sir Isaac Newton, executor of this my will, and after the said three years expired, I do appoint that my said son Francis shall be executor; and if my said son Francis Hall shall die, leaving no heirs of his body living, then I give and bequeath so much of my said real and personal estate, as my said son shall be possessed of at his death, to the Goldsmiths Company of London, in trust for several charitable uses mentioned in his will: But my will is, that the company shall not give my said son any disturbance during his life."

The testator died, and after three years Francis Hall took upon himself the execution of the will, and sometime after suffered a common recovery of the real estate, after which he made his will, appointing his wife executrix thereof, and died without issue. The Goldsmiths Company thereupon brought an action to have an accounting of so much of the estate as Francis Hall died possessed of. Quoting from the reporter's notes of that case:

"The court was unanimous, that the limitation over

was void, as the absolute ownership had been given to F. H., for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent; and therefore he had the power to dispose of the whole; which power was not expressly given to him, but it resulted from his interest: The words that give an estate-tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over."

In *Jackson v. Bull,* 10 Johns. (N. Y.) 19, the testator devised certain lands to his son Moses, his heirs and assigns forever, and then declared:

"In case my son Moses should die without lawful issue, the said property he died possessed of, I will to my son Young," etc.

It was held that the testator intended to give Moses an absolute control over the property, and the words, "the property he died possessed of," were, as in the Hall case, held to imply a power of disposition in Moses, repugnant to and destructive of the limitation over.

In *Ide v. Ide,* 5 Mass. 499, the testator gave to his son, Peleg, his heirs and assigns forever, certain lands, adding:

"That if my son Peleg shall die, and leave no lawful heirs, what estate he shall leave, to be equally divided between my son John Ide, and my grandson Nathaniel Ide."

The court there say:

"Whenever, therefore, it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. * * * In the case at bar, there is, first, an express fee simple devised to Peleg; in consequence of which, if not afterwards qualified, he might dispose of the lands at his pleasure. But the limitation over is only of what estate he should leave at his death; which is descriptive only of the estate of which he should then be in possession. The implication is therefore neces-

sary, that the testator intended that Peleg might dispose of any or all of the estate devised, and leave nothing at his death. The absolute unqualified interest in the estate devised, was therefore given to Peleg, which is inconsistent with the limitation over to John and Nathaniel, and consequently this limitation, under which demandant claims, is void."

The last two cases cited follow *Attorney General v. Hall, supra,* and it is urged by appellants that they misapprehend the holding in the *Hall* case, but we think the three cases are in a direct line. The devises in the three cases are strikingly similar. In each the primary devise is in language, standing alone, which imports a fee simple, and the devise over is of what the first taker has not disposed of, implying that the first taker had the power of disposition. Other cases which announce the same rule are numerous and need not be tabulated herein.

Finally, it is asked why, if the intent of Robert Hawke may be certainly ascertained, that the property devised to his daughter Minnie, not by her alienated and conveyed, should go upon her death without issue to certain persons named, such intent should not be enforced, no principle of public policy contravening? The common law rule, condemning for repugnancy the devise over, is characterized as harsh and arbitrary, and we are asked not to commit the jurisprudence of this state to it. The answer is, we think, that where a testator has once clearly expressed his intent to give to a devisee a fee simple, that devisee, his heirs apparent and assigns, are entitled so to regard it, and deal with the subject of the devise as a fee simple. The holder of an estate in fee simple may sell it and convert it into money, or by will devise it, or, taking thought, may say, "I will not make a will, as I desire my property to go to my heirs in the manner provided by law." There is no sound reason why, in the last named event, the estate should not pass as he impliedly directs, or why, in the second event, it should not go as he expressly directs, but pass again under the dominion of the

very instrument vesting in him the estate that empowers him to sell it and convert it into money, as in the first named event, giving the money to his heirs. A testator is not, under the well established rule, and, as we think, should not be, permitted to control the future devolution of property vested by his will in fee simple in his devisee.

In the view we have taken, both of the question of fact, and the law applicable, it becomes unnecessary to discuss certain other questions suggested, and from what has been said, it follows that the judgment of the lower court sustaining the demurrer is right, and should be affirmed.

DUFFIE and POUND, CC., concur.

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

AFFIRMED.

The following opinion on motion for rehearing was filed March 2, 1904. *Motion overruled:*

SEDGWICK, J.

It is contended, in the brief upon the motion for rehearing, that the words, "not by her alienated," etc., do not refer to the Nebraska lands. We can not so regard it. The will devises to Minnie Hawke certain lands in Nebraska and in other states. By the terms of the will she is given the power to alienate the lands after she reaches the age of thirty-three years. This applies to all the land. The lands outside of Nebraska could be alienated before that time in accordance with certain provisions in the will applying to other, but not to Nebraska land.

It is also provided in the will that, if the devisee dies without issue, the lands shall "descend to and be divided between" the wife and other daughters of the testator. This provision, by its express language, is made to apply to "all of the above mentioned premises described in said item sixth." As the Nebraska land is described in item

"sixth," it is of course included. But this devise over to the wife and other daughters is expressly made to embrace only land "not by her (Minnie Hawke) alienated and conveyed previous to her death." As the lands in question were by her alienated and conveyed previous to her death, they are not included in the devise over.

The terms of the will seem plain. We do not see the necessity of applying abstruse rules of construction. The conclusion of the commissioner is correct, and the motion for rehearing is overruled.

MOTION OVERRULED.

CHARLOTTE A. COCHRAN ET AL. V. PHILADELPHIA MORTGAGE & TRUST COMPANY.

FILED OCTOBER 7, 1903. No. 13,036.

1. **New Trial:** NOTICE: COURT RULES. A failure to give one day's notice in writing of the hearing on a motion for a new trial, as provided for in the rules governing the district court for Douglas county, will not *ipso facto* render the ruling of the trial court on such motion erroneous, requiring the reversal of the judgment; but in this court the inquiry will be, whether the trial court should have allowed or denied the motion.

2. **Lease:** DEFAULT: ACTION: NOTICE. Under a lease containing the provision that if the rent, or any part thereof, shall be in arrears and unpaid at any time, it shall be lawful for the landlord to retake possession without any formal notice, a right to maintain an action of detention accrues after default and statutory notice to the tenant.

3. **Forfeiture:** WAIVER. A tenant who held possession of premises under a lease providing for the payment of $15 rental, payable on the 12th day of each month in advance, was thirteen months in default. He sent a check for $15 by mail to the agent of the landlord, unaccompanied by letter of explanation or instruction and in abbreviated terms on the face of the check wrote, "1 mo rent, 1021 S. 36 St., to Apl. 25, '02." The check was cashed and the money applied on the past due rent. In an action to dispossess the tenant, commenced before the expiration of the period indicated on the face of the check, *held*, that the acceptance and retention by the landlord of the check, did not

waive the forfeiture, in the absence of a showing that the landlord or his agent received the check with actual knowledge of the proposed limitation in its application.

4. **Evidence.** Evidence examined, and *held* that a peremptory instruction for plaintiff was properly given.

ERROR to the district court for Douglas county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

J. L. Kaley and *H. E. Cochran,* for plaintiff in error.

Wharton & Baird & Sons, contra.

KIRKPATRICK, C.

On May 5, 1902, the Philadelphia Mortgage & Trust Company, defendant in error, filed in the county court of Douglas county its complaint in an action of detention brought to recover possession of certain premises owned by it in the city of Omaha, plaintiffs in error, who were tenants thereon, being made defendants. The complaint was in the ordinary form, alleging ownership, the possession of the defendants at an agreed rental of $15 a month, payable on the 12th of each month, their default from March 12, 1901, to April 12, 1902, service of notice to quit and demand for possession, with prayer for judgment. There was judgment for defendant in error, and the cause was removed to the district court, where there was a trial to the court and a jury. After hearing the evidence, the court, on motion of defendant in error, instructed the jury to return a verdict for it, and a motion for a new trial being overruled, the cause is presented to this court for review.

It is shown by the record that plaintiffs in error originally went into possession of the premises under a lease dated October 20, 1899, which provided for a rental of $15, payable monthly in advance on the 12th day of each month. The lease contained a provision that in default of payment of rent in accordance with the terms of the lease, it should be lawful for the lessor or his agent, without

formal notice or demand, to re-enter and take possession. It appears that the tenants were in default for many months, and various attempts were made to collect the rent due, and finally this action was instituted. Defendant in error dealt with plaintiffs in error through its agent, Brennan Love Company. Other facts will appear in the consideration of the several reasons urged why the judgment should be reversed.

It is made to appear that, at the time the motion for a new trial was ruled on by the trial court, plaintiffs in error were not present in court either in person or by attorney, and that no notice was served on them as to the time when the motion would come on for hearing, in seeming contravention of sections 2 and 3 of the rules of the district court for Douglas county, which are made a part of this bill of exceptions, providing for one day's notice in writing of the hearing of a motion. Counsel for plaintiffs in error contend that in this action of the trial court there is such error as requires the reversal of the judgment without further inquiry into the merits of the case made. On the contrary, we think the judgment can not be reversed for this reason alone. The enactment and enforcement of rules for the conduct of business is an inherent power of the courts of general jurisdiction (*Andres v. Kridler*, 49 Neb. 535), and while doubtless the rules referred to are of great importance and convenience to litigants and counsel, we do not think that their strict observance in acting upon a motion for a new trial is an essential to the court's jurisdiction. The purpose of a motion for a new trial, is to give the trial court an opportunity to review its own proceedings and to correct its own errors. If the trial court, which has heard the evidence, chooses to rule on the motion without the presence of the applicant, or the assistance that may be rendered in argument of the motion, it would seem that complete justice could be done by presenting the cause on error to this court, where error in the ruling on the motion may be corrected. It would seem to be a vain thing to reverse a judgment, because of

a ruling, otherwise right, merely on the ground that the trial court failed to give an opportunity for argument. We decline, therefore, to sustain the first contention of plaintiffs in error, and will take up for consideration their second contention.

Complaint is made of the insufficiency of the notice to vacate the premises served on plaintiffs in error prior to the commencement of this action. This notice was served on April 16, 1902, and this action was commenced May 5, 1902. The contention made is that section 1021 of the code, defining a tenant holding over his term as one who "has failed, neglected or refused to pay the rent, or any part thereof, when the same was due," is unconstitutional, being in contravention of section 11, article III of the constitution, the subject of the act being broader than its title, and the amendment of 1875 not being germane to the original section. Proceeding upon the theory that this section is unconstitutional, plaintiffs in error contend that mere failure to pay the rent does not make the holding unlawful or a holding over the term, and that the right to terminate the tenancy must be determined by the language of the lease. The lease contained a provision as follows:

"That if such rent or any part thereof shall at any time be in arrears or unpaid, * * * then, * * * it shall be lawful for the party of the first part, * * * without any formal notice or demand, to enter into and upon said premises peaceably to hold and enjoy," etc.

Thus it appears that under the lease, without reference to the provisions of section 1021 of the code, the defendant in error had a right to re-enter in the event of default in payment of rent. The notice given was reasonable, and it would seem that the right to maintain this action can not be doubted.

Whether there was a default at the time of the notice and the commencement of this action, is the next question for consideration, and is involved in the question whether there was error in directing a verdict for defendant in

error. It is contended that there was at least one material question in dispute under the evidence, requiring submission to the jury. It appears that before the notice to quit was served the plaintiffs in error had sent to the agent of defendant in error a check for $15, which appears in the record as follows:

"Omaha, March 25, 1902. Commercial National Bank, of Omaha. Pay to the order of Brennan Love Co. Fifteen & No-100 Dollars. 1 Mo. rent 1021 S. 36 St. to Apl. 25, '02. H. E. Cochran."

There was an effort made by defendant in error at the trial to show that this notation on the check was not there at the time of its receipt, but was put on afterwards. Inasmuch as the case was taken from the jury, this disputed question must be resolved in favor of plaintiffs in error, and the inquiry accordingly is whether the receipt and retention of this check constituted a new contract covering the period designated on the face of the check, so that during that period plaintiffs in error were not in default. Such is the contention now made.

H. E. Cochran testified that he wrote the check; that at the time he was in default for twelve months' rent; that he was well aware of this long default; that his purpose in putting the notation on the check was that if it were accepted, there would be no default during that period. His evidence also shows that many efforts were made by defendant in error through its agent to collect the delinquent rent, and that he had from time to time paid sums ranging from $164 to $5, and that in sending this check he did so by mail, inclosing it in an envelope, without any letter of explanation or instruction. The testimony of defendant in error shows that the check was received in the ordinary course of business, was handled alone by a young woman in charge of that department, was cashed and the amount thereof applied on the account against plaintiffs in error. It is now contended that the acceptance and retention of this check, with its notation, has the effect, not only to waive any prior for-

feiture, but to create a new tenancy commencing and ending on a different day of the month, plaintiffs in error invoking the rule that by the acceptance of rent, the landlord waives a prior forfeiture, and that the debtor has the right to dictate the application to be made of a payment. Both rules are well settled, but we do not think plaintiffs in error are in a position to be benefited by their application. Cochran does not claim that he directed the amount to be applied in payment of rent for the current month, but the notation itself shows an effort or intention to carve out a new month commencing on the 25th, a date entirely unknown to the existing and recognized tenancy. Whatever the holding might be if the tenant, in express terms brought to the attention of the landlord, directs that the amount of one month's rent tendered be applied on the last or current month under the lease, and upon no other, and the amount is accepted, it would be clearly unreasonable to hold that such a notation upon a check could abrogate the contractual relations of the parties as existing and create a new tenancy upon different terms.

But it is manifest to us that the placing of this notation upon the check was an attempt to set a trap in which it was sought to catch the agent of defendant in error. Under Cochran's own testimony, it amounted to his saying, "I am in default for twelve months' rent, but by means of this check, without letter of explanation or any act to challenge attention to what I am doing, I will limit the application of the amount to the present month."

There is nothing in the evidence to indicate that this payment would have been received upon the express condition, brought to the notice of defendant in error, that it was to apply otherwise than on the large indebtedness already past due. While, doubtless, a notation on a check stating the purpose for which it is sent may be notice to the payee, checks are not intended to be used as a means of creating contracts, and should it be held that the drawer of a check may, by abbreviated notations thereon entirely foreign to the legitimate functions of such an in-

strument, change or abrogate existing contracts, checks would become dangerous to the commercial world, whereby the payee might be drawn into a pitfall and lose valuable rights. The one case cited and relied on by plaintiffs in error is we think sufficient to indicate what the holding herein ought to be. *Prindle v. Andersen,* 19 Wend. (N. Y.) 391. Our understanding of that decision is that it is only when the landlord knowingly receives the payment, being aware of the conditions under which the tenant tenders it, that he will be held to have waived the forfeiture. In the case at bar, it is apparent that no contract for a new tenancy covering the month indicated in the check was ever in fact made, and we are of opinion that, in the absence of a showing that the notation on the check in question was brought to the actual knowledge of the landlord or his agent, its application upon the past due rent, and not for the period indicated, was within the right of defendant in error, and that there was no waiver, plaintiffs in error being in default at the time of the commencement of this action. The verdict for defendant in error was properly directed. It is therefore recommended that the judgment be affirmed.

DUFFIE and POUND, CC., concur.

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

AFFIRMED.

MATT MCHALE, JR., ET AL., APPELLEES, V. CHARLES H. METZ ET AL., APPELLANTS.

FILED OCTOBER 7, 1903. No. 13,112.

1. **Judgment:** EQUITABLE RELIEF. A court of equity will not grant relief against a judgment taken by default, where the applicant, shown to have been duly served with summons, failed to avail himself of an opportunity to defend, such failure not being the

result of fraud, accident or mistake, unmixed with laches on his part.

2. **Petition:** SUFFICIENCY. Petition examined, and *held* insufficient to state a cause of action.

APPEAL from the district court for Holt county: JAMES F. BOYD, JUDGE. *Reversed.*

John D. Pope and *E. H. Benedict,* for appellants.

R. R. Dickson, contra.

KIRKPATRICK, C.

This was a suit brought to enjoin a sale of land on execution issued out of the district court for Holt county on a judgment duly transcribed from Saline county. The petition was filed in the district court for Holt county, praying an injunction against the sheriff and the judgment creditors. To this petition a demurrer was interposed by appellants, which was by the court overruled. Appellants declining to plead further, judgment was entered in accordance with the prayer of the petition. To reverse this judgment, the cause is brought to this court upon appeal, and the only question presented is as to the sufficiency of the petition. The petition alleged, in substance, that in July, 1898, Matt McHale and Matt McHale, Jr., who at the time were residing in Seward county, purchased of the J. I. Case Threshing Machine Company of Lincoln a steam-engine and boiler to be used in the operation of a threshing machine, at an agreed price of $900, due in three payments of $300 each, evidenced by promissory notes in that amount. The appellant, Charles H. Metz, resided in Saline county, and was the agent of the threshing machine company, who made the sale of the machines to the McHales. It was alleged that the notes for the purchase price of the machines were made payable to the J. I. Case Threshing Machine Company, and were secured by a mortgage on the machines; that the notes, after being executed, were guaranteed by appellant,

Charles H. Metz; that, to induce appellees to purchase the machine, it was warranted to be a first-class engine and boiler, that it would do good work, and was fit for the purpose intended; that the machine was, in fact, wholly worthless and of no value whatever, and would not do the work as represented; all of which, it was alleged, was well known to the threshing company and to Metz; that appellants were notified of the worthless character of the machine, and were notified to come and take it away; that Metz did come and get the machine, and sold it; that thereafter the threshing machine company instituted an action in the county court of Saline county against Charles H. Metz, who resided in that county, and against the McHales, who resided in Seward county; that Metz entered his voluntary appearance in the action, and a summons was issued for the McHales, directed to the sheriff of Seward county, which was served personally; that the McHales made no appearance in the action and judgment was entered against them by default; that subsequently the threshing machine company assigned its judgment to Charles H. Metz. A transcript of the judgment was thereupon filed in Holt county, an execution issued and levy made, to enjoin which is the purpose of this action. It is alleged that the judgment was obtained upon the perjured testimony of Metz, and other matters are alleged which need not be noted.

It is disclosed by the petition that personal service of summons was had upon both the McHales; that they made no appearance in the cause, and no excuse or explanation is made of their neglect to appear and make a defense. The petition sets up matters sufficient to constitute a defense to the action at law, if such matters had been properly presented to the court. The McHales wholly failed and neglected to appear or make any defense whatever, and, in our opinion, this failure on their part is fatal to their right of recovery herein.

In *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb. 13, this court said:

"It is an inflexible rule that a party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action and also show that such judgment is the result of fraud, accident or mistake, unmixed with fault or negligence on his part. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend. This salutary rule rests in principle and authority, and its rigid enforcement is necessary for the repose of society, by preventing litigation from becoming interminable. *Losey v. Neidig,* 52 Neb. 167."

It clearly appears that the petition fails to state facts entitling the petitioners to any relief, and the demurrer should have been sustained. It is therefore recommended that the judgment be reversed, and the cause remanded for further proceedings.

DUFFIE and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLEE, v. CHARLES G. CREWS ET AL., APPELLANTS.*

FILED OCTOBER 7, 1903. No. 12,076.

1. **Riparian Owner:** USE OF WATER. A riparian owner has a right to make a reasonable use of a stream flowing over or along his lands for the purposes of irrigation.

2. ———: ———. This right is to be measured primarily by the amount of water in the stream available for such purposes, the number of persons who may so use it, the size, situation and character of the stream, and the nature of the region.

3. ———: INJURY TO RIGHTS. In case a reasonable use of the water,

* Rehearing allowed. See opinion, p. 115, *post.*

consistent with a like use by other riparian owners, can not be made, the injury to a riparian owner by reason of appropriation of the water by an irrigation enterprise is nominal only.

4. ———: ———: REMEDY. A lower riparian owner can not enjoin an irrigation enterprise by an upper appropriator under the statutes, merely because his damages for injury to his riparian rights have not been paid; his remedy is to sue at law for such damages.

5. **Equitable Relief:** DAMAGES. But in case a lower appropriator under the statute is materially affected by diversions of water by upper riparian owners, he may bring a suit in equity to determine the rights of all claimants to use of the water and to quiet his title thereto, in which the damages to riparian rights may be ascertained and due compensation awarded.

6. ———: PLAINTIFF MUST DO EQUITY. The lower appropriator may not maintain such a suit against upper riparian owners, without offering to do equity by paying whatever damages accrue to such owners by reason of the appropriation.

7. **Damages:** PRESUMPTION. It will not be presumed that the damages in such case are nominal only.

8. **Remand:** AMENDMENT: NEW PARTIES. In furtherance of justice, where a decree is reversed, this court may remand the cause with leave to amend the petition and bring in new parties, instead of requiring the expense of a new suit.

APPEAL from the district court for Hitchcock county: GEORGE W. NORRIS, JUDGE. *Reversed.*

Webster S. Morlan, for appellants.

Fayette I. Foss and *L. H. Blackledge, contra.*

POUND, C.

The plaintiff is operating an irrigation ditch, taking water from the Republican river as appropriator. The defendants are riparian owners upon the Frenchman, a principal tributary of the Republican river immediately above the plaintiff's canal, and claim a right to irrigate their lands with the water of said stream, both by virtue of their riparian rights and under subsequent appropriations. With the latter we have no concern. This suit is brought to enjoin the defendants from diverting water

necessary to the conduct and operation of the plaintiff's ditch, and claimed by the plaintiff by virtue of its priority. The trial court granted an injunction, and the defendants appeal.

The principles by which this cause must be governed have been settled substantially in the two prior cases of *Crawford Co. v. Hathaway,* 67 Neb. 325, and *Meng v. Coffee,* 67 Neb. 500, in which the several questions involved are discussed exhaustively. The defendants as riparian owners have a right to make a reasonable use of the stream for the purpose of irrigation. *Meng v. Coffee, supra.* And this right is property, entitled to protection, as such, the same as property rights generally, and is within the purview of the provisions of the constitution prohibiting taking of or damage to private property for public use without due compensation. *Crawford Co. v. Hathaway, supra.* The injury to the rights of a riparian owner in such cases may be nominal only, or may be substantial, depending, in each case, upon a number of circumstances. In general, the right is to be measured primarily by the amount of water in the stream available for irrigation or other proper uses, the number of persons who may so use it, the size, situation and character of the stream, and the nature of the region. The purpose of the common law doctrine on this subject is to secure equality of use by riparian owners, as near as may be, to each, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or other purposes. *Meng v. Coffee, supra.* The right of the riparian owner, therefore, is neither a right to have every drop of the water flow past his land, on the one hand, nor, on the other, to abstract such quantities as he may deem necessary and proper for use upon his own land, to the injury of others who may desire to use the water, also. It is simply a right to be permitted to enjoy, and to make a reasonable use of, the water, consistent with like use by all other riparian owners. In *Crawford Co. v. Hathaway,*

HOLCOMB, J., suggested, and we entirely concur, that the extent of land with reference to which riparian rights may be claimed can not exceed the area acquired by a single entry or purchase from the government, and he was inclined to hold that such area should be restricted to forty acres or, in case of irregular tracts, a designated numbered lot in the government survey. This is not to be taken, however, as meaning that every riparian owner may claim the benefit of the stream for the purposes of a tract of that size in every case. It is to be taken as a limitation of the reasonable use permitted by law rather than as defining it. In case the size of the stream, the amount of water therein, and the number of riparian owners who may make use thereof are such that the irrigation of five acres, for example, would be an unreasonable use, the riparian owner would not be permitted to use the water to that extent in derogation of the rights of other riparian owners, and, in consequence, could not claim damages as against an appropriator upon that basis. Two elements are to be considered; the amount of water in the stream and the extent of the riparian land. Unless and until there is sufficient water to permit use with reference to an entire tract acquired by the single entry or purchase from the government, the latter does not become material. In consequence, if a reasonable use of the water consistent with a like use by other riparian owners can not be made in a particular case, the injury to the riparian owner by reason of appropriation of the water by an irrigation enterprise is nominal only.

An important distinction must be made between an injunction suit brought by a lower riparian owner against an upper appropriator and a suit against upper riparian owners by a lower appropriator. In *Crawford Co. v. Hathaway, supra,* it was held that a riparian proprietor might recover damages for injury to his riparian rights by appropriation under the statute, in the same way and subject to the same rules as a person whose property is affected injuriously by the construction of a railroad. In

that case a comparison was made between injury to riparian rights by appropriations and injury to abutting property resulting from obstruction of streets and highways by the construction and operation of railways. It is well settled that the remedy of the abutting owner, in such cases, is to sue at law for his damages. The same conclusion was reached, with respect to injuries to abutting property resulting from the obstruction of streets and highways by poles and wires, in *Bronson v. Albion Telephone Co.*, 67 Neb. 111. In that case it was laid down as a general rule that "in case property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law, and is not entitled to an injunction unless upon proof of insolvency or some other special circumstance." This principle is clearly applicable to the instance under consideration. It follows that the lower riparian owner can not enjoin an irrigation enterprise by an upper appropriator under the statutes, merely because his damages for injury to his riparian rights have not been paid. His remedy is to sue at law for such damages. A different principle, however, comes into play with respect to suits by lower appropriators against upper riparian owners. Undoubtedly the upper owner, who will be deprived of the right to use water upon his riparian lands by reason of an appropriation requiring that all the water pass into the ditch or canal of the appropriator, may maintain an action at law to recover his damages. But in case he does not see fit to do so and diverts water for use upon his riparian lands so as to affect materially the lower appropriator, the latter may bring a suit in equity to determine the rights of all claimants to use of the water and to quiet his title thereto, in which the damages to riparian rights may be ascertained and due compensation awarded. *Crawford Co. v. Hathaway, supra,* was such a case.

Where it becomes necessary for the lower appropriator to go into equity to protect his appropriation as against riparian owners whose damages have not been paid, it is obvious that he ought not to be permitted to maintain his suit without offering to do equity by paying whatever damages have accrued to riparian rights by reason of the appropriation. Coming into equity, he must do equity, and can not put the riparian owners to the trouble and expense of actions at law for their damages. Nor can it be presumed that the damages in such case are nominal only. The right is a well recognized and substantial one, which may be, in particular cases, very valuable. A plaintiff who interferes with or takes away this right ought to be willing, when he comes into equity, to submit the nature and amount of the injury to adjudication and to pay such damages as may be awarded.

In view of these principles, we think the decree must be reversed. It does not provide in any way for proper compensation to the defendants for damages to their riparian rights, if any they have suffered, nor is there any provision for ascertainment thereof. But, as there must clearly be further litigation between the parties in order to settle the present controversy, we do not think it advisable to dismiss the cause. In furtherance of justice, where a decree is reversed, this court may remand the cause with leave to amend the petition and bring in new parties, instead of requiring the expense of a new suit. *Hoagland v. Van Etten,* 23 Neb. 462, 31 Neb. 292. We think the cause should be remanded with leave to the plaintiff to amend its petition and bring in new parties, if so advised, to the end that its title may be quieted, the damages, if any, to upper riparian owners by reason of its appropriation determined and awarded, and all matters in dispute completely adjudicated in the one proceeding. And we so recommend.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings, with leave to the plaintiff to amend its petition and to make new parties defendant, if so advised.

REVERSED.

The following opinion on rehearing was filed January 18, 1905. *Judgment of reversal vacated. Judgment of district court affirmed:*

1. **Appeal:** ISSUES. Ordinarily, a case on appeal will be tried and determined in the appellate court upon the same issues raised by the pleadings and the evidence as were presented in the trial of the case in the court in which it originated.

2. **Irrigation:** USE OF WATERS. It is the policy of the law to regulate the diversion and use of the waters flowing in the streams of the state for the irrigation of lands by a uniform system applying alike to all waters thus diverted; and the law of appropriation, as defined by the statute and administered by the state board of irrigation, is deemed an effective means to accomplish the desired results.

3. **Damages.** Where an appropriator of water for purposes of irrigation has acquired a vested right under the law to the use thereof for such purposes, a riparian owner on the same stream can not enhance the damages he has sustained, if any, to his riparian estate by, subsequently to the appropriation thus acquired, constructing irrigating ditches to irrigate his riparian lands under his common law right to a reasonable use of the water of such stream for such purpose.

4. **Injunction.** Where an appropriator has acquired a valid right to the use of water under the laws governing the taking and use of water for purposes of irrigation, the right is in its nature property and entitled to be protected as such, and for any invasion of, or injury to, the same the law will afford a remedy. And in such a case, equity will restrain an upper riparian owner from subsequently diverting water, the right to use which had been thus acquired, without requiring the appropriator to institute proceedings to condemn the rights under the common law of all riparian owners to the reasonable use of water flowing in the stream for irrigating riparian lands.

5. **Statutory Rights:** ACTION. Where an appropriator has acquired a valid right to the use of water under the irrigation laws of the state, and is in the actual use of such water for purposes of irrigation, the right thus acquired is superior to that of a riparian

owner to a reasonable use of the water of the stream under the common law, to irrigate riparian lands, and, for the taking or impairment of the latter's right, an action is maintainable if any damages have been suffered by the owners of the riparian estates.

6. **Rights Under Act of 1895:** REMEDY. The irrigation act of 1895 authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes which are declared to be a public use; and, in making appropriations of water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. *Crawford Co. v. Hathaway*, 67 Neb. 325.

7. **Right of Eminent Domain.** Under the constitution and statutes of this state, condemnation is authorized of the right of the private riparian proprietor to the use and enjoyment of a natural stream flowing past his lands, or its impairment by an appropriation of such water for irrigation purposes, and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad. *Crawford Co. v. Hathaway*, 67 Neb. 325.

8. **Statute Constitutional.** The statute governing the subject of the appropriation of water flowing in the streams, for the purposes of irrigation, is constitutional.

9. **Estoppel.** *Held*, That the plaintiff is not estopped from asserting its superior right to the use of the water in controversy for purposes of irrigation.

HOLCOMB, C. J.

In this case, a controversy has arisen between an appropriator of water for irrigation purposes, who has acquired a vested right to the use of the water appropriated, and upper riparian owners on the same stream who, subsequent to the appropriation, have sought and now seek to divert and use the water of such stream for the purposes of irrigating their riparian lands. The appropriator, appellee here, brought an injunction suit for the purpose of restraining the appellants, defendants in the action, from diverting the water of the stream to their riparian lands for irrigation purposes, when such diversion deprived the appropriator of the amount of water it was entitled to

under its appropriation right, which had been regularly adjudicated, established, and confirmed by the state board of irrigation. In the opinion heretofore handed down, *ante*, p. 109, it is held that the plaintiff appropriator could properly bring a suit in equity to determine the rights of all claimants to the use of the water of the stream, and to quiet its title thereto, and in which damages to riparian rights might be ascertained and due compensation awarded. Such an appropriator, however, could not, it is held, maintain such a suit against upper riparian owners, without offering to do equity by paying whatever damages accrued to such owners by reason of its appropriation. It is insisted on this rehearing that the real question presented by the record has been overlooked, and that the principal proposition of law to be determined is, whether riparian owners, after water has been appropriated and applied to the irrigation of non-riparian lands under the irrigation laws of the state, can go into the irrigation business, construct ditches for the purpose of distributing water over the land of riparian owners and, thereby, wholly deprive the prior appropriator of the water to which he is entitled under his appropriation. The case was tried in the court below upon the pleadings and a stipulation of facts. It is by the record, as thus made up, clearly disclosed that the right of the appropriator, the plaintiff in the action, and appellee here, is prior in time to the defendants, appellants, in so far as the question is affected by the actual appropriation by them of the water in the stream, by its diversion into ditches for the purpose of irrigating their riparian lands. It is stipulated that "subsequent to and not before the completion of plaintiff's said ditch, they (defendants) have claimed that they desired to divert the waters of said stream for the purpose of irrigating riparian lands, owned by them, * * * and have, by reason of the dam and ditches hereinbefore mentioned, diverted and are about to divert a large portion of the waters which would naturally flow down to and into the plaintiff's said ditch, and be applied to the irrigation of agricultural lands there-

under; but the defendants are diverting and appropriating such waters to the irrigation of riparian lands owned by them and others as follows." Then follow the names of the owners and the number of acres of riparian lands of each sought to be irrigated and continues: "Thereby depriving the plaintiff of water to irrigate crops planted and growing on lands under plaintiff's ditch; if defendants are allowed to divert the water as they have been and are threatening to do, the crops planted and growing on lands served by the plaintiff's ditch will be greatly injured on account of extremely dry weather which prevails during the summer of each year in the vicinity of the location of said ditch. The defendants threaten to and are about to divert all the waters flowing down said Republican river that would reach and come to the head-gates of plaintiff's ditch during the dry season of the year."

As to the right of a riparian owner to a reasonable use of the water of a stream running over or by his riparian land, the question has been so thoroughly and exhaustively considered in the former opinion filed in this case and in the case of *Meng v. Coffee,* 67 Neb. 500, that nothing can be added thereto. This right has been, in these opinions, stated with clearness and succinctness, and with the doctrine, as thus announced, we are quite well satisfied. The question in this case, however, which it is proposed to further consider, relates more to the remedial rights of the parties to the controversy than to a determination of the substantive rights or interests in property of which they may be possessed. The former opinion recognizes the property rights of the riparian owners and the right of the appropriator to the use of the water called for by his appropriation, and that the latter's right is superior, in the sense that the former is subject to be taken and condemned for the purpose of appropriating the water for the irrigation of lands, whether riparian or non-riparian, which by law is declared to be a public use.

1. The only issues presented, tried and determined in the trial court, were with respect to the relative rights of

the plaintiff and of the defendants to divert and have the use of, as against the other, the water claimed by the plaintiff under its appropriation. The question for adjudication in the last analysis and that which was decided, touches the superiority of right as between the litigants to the use of the water in controversy. No question of damage to the defendants' riparian estates was raised or considered, except that it was stipulated, that no compensation had been made by the appropriator to the owners of riparian lands who were made defendants in the action. The question of compensation for damages, if any, to upper riparian owners by the defendants' appropriation, therefore, is to be considered only as going to the statement of a cause of action by the plaintiff and of its right, in equity, to the relief prayed for, that is, to restrain the defendants from diverting the water to which plaintiff was entitled under its prior appropriation. The rule is, we think, as it should be, that ordinarily a case on appeal will be tried and determined in the appellate court upon the same issues, pleadings and evidence as were presented in the trial of the case in the court in which it originated. *Cobbey v. Buchanan,* 48 Neb. 391; *Hyde v. Hyde,* 60 Neb. 502. We are, therefore, in this case, to determine whether equity will protect the plaintiff, as an appropriator, in his acquired right to the use of the water for irrigation as against the upper riparian owners who, subsequent to the appropriation, seek to divert it, to irrigate riparian lands. It is unnecessary to determine, whether the action might not have been brought for the purpose of condemning the riparian estates, above or below the point of diversion, necessarily taken or injured in the prosecution of the irrigation enterprise, or, whether the defendants in the action might not have presented an issue concerning the damage sustained by the appropriation of the plaintiff, and had the same adjudicated in the action and compensation awarded, as a measure of relief they were entitled to on the final disposition of the cause. The plaintiff's right to the appropriation having been duly established and adjudicated

by the state board of irrigation, this right, it would seem, would be protected by the courts in any litigation where the question arose, and an action in the nature of one to quiet title would be unnecessary.

2. It is obviously the policy of the law governing the subject of irrigation, to regulate the diversion and use of the waters, flowing in the streams of the state, for the irrigation of lands, by a uniform system, applying alike to all waters thus diverted, and the law of appropriation, as defined by the statutes and administered by the state board of irrigation, is deemed an efficient means to accomplish the desired results. This is made manifest by a very cursory examination of the irrigation act and by the provisions found therein for the taking and condemnation of the private rights belonging to riparian owners. The water of every natural stream, not heretofore appropriated, declares the law, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriations as hereinbefore provided. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied, and priority of appropriation shall give the better right as between those using waters for the same purpose. Canals constructed for irrigation are declared to be works of internal improvement, and that the laws relating to works of internal improvement shall be applicable to canals constructed for irrigation. It is also declared that nothing in the irrigation act shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of the act. It is reasonably clear that the law of irrigation is not specially concerned regarding a plan and method for the taking and distribution of water for irrigation among riparian owners. This right is defined, limited and controlled by the common law. Of course, the right is recognized and the law will guard and protect such rights, as all other property rights are guarded and protected. The irrigation act contemplates a code or system which will, in a legal and orderly manner, provide for the ap-

propriation, distribution and application of the waters of streams diverted for purposes of irrigation to the end that all entitled to such rights may enjoy its benefits, and, for an infringement of which, redress will be granted. This does not mean that a riparian owner's right to the use of water for irrigation purposes is to be destroyed, but only that it is the intent of the law that the private right shall be subordinated and, when required for public use, taken under the law of eminent domain, and, for which, the owner of the riparian estate whose property is taken or injured is entitled to due compensation to be awarded in any suitable action.

3. In the case at bar, under the facts as disclosed by the record, it is to be observed that the plaintiff has a vested right to the use of the water for irrigation, which it is claimed is being wrongfully diverted by the defendants. The defendants had made no diversion of the water for the irrigation of their riparian lands, and no attempted diversion, until long after the plaintiff's rights as an appropriator had attached and become fixed under the irrigation act. As the record is made up, the defendants are claiming the right to divert all of the water of the stream adjacent to their riparian lands, to irrigate such lands, whenever the volume of the water flowing therein is below the amount thus required. The right thus claimed to the use of such water is manifestly in excess of their rights as riparian owners, as defined in the former opinion and in the other case cited. Although the defendants now claim solely as riparian owners, there is much in the record warranting the inference that the improvement was begun with the view of appropriating the water for irrigation under the law as then existing, rather than the use of it under rights as riparian owners. There is nothing in the record from which it may be determined what is a reasonable use of the water for irrigation, which belongs to the defendants as riparian owners, the extent of such right being always a question of fact to be determined from the evidence in a given case. As riparian owners, they, of

course, can not be permitted to divert all the waters of the stream as it is stipulated they were doing and threatening to do, nor can they be permitted to use for irrigation purposes on their riparian lands more than a reasonable amount of the water flowing in the stream at the time, due regard being had for a like reasonable use of such water by all riparian owners along such stream. The injunction is sought only to restrain the defendants from diverting water appropriated by the plaintiff, which diversion was attempted long subsequently to the time the plaintiff had made a legal appropriation of the water it now claims the right to the use of. The injunction does not seek to deprive defendants of any rights belonging to them as riparian owners, as existing at the time of plaintiff's appropriation. They are in nowise sought to be restrained of their usufructuary estate as riparian owners, of which they were possessed and were using when plaintiff's rights accrued. While they, at that time, were possessed of the naked legal right to a reasonable use of the water as riparian owners, yet such right was not coupled with an actual diversion or application of such water to irrigate riparian lands. The volume of water flowing past their lands was to remain undisturbed by the injunction, and their use of it as such owners, as then enjoyed, was not to be interfered with. The riparian owner, as it appears to us, could not, by the application of any sound principle of law, be permitted to enhance his damages and be entitled to greater compensation, by reason of his added expenditures in the construction of ditches for irrigation of riparian lands subsequently to the time of the appropriation by either a lower or upper appropriator on the same stream of water. The defendants, in the case at bar, constructed their ditches with full knowledge of the plaintiff's superior rights as an appropriator, and in equity and good conscience ought not to be permitted to add this increased expense to the compensation to which they might be found entitled as riparian owners for damages to their riparian estate. If

this were a case where the riparian owner had actually diverted water to irrigate riparian lands before the rights of an appropriator attached, the case presented would be entirely different, and it could hardly be doubted that the appropriator would, in equity, be compelled to make due compensation before a court would restrain the further diversion to and use of such waters by such riparian owner.

4. As the case stands, the plaintiff as an appropriator has acquired a vested right in and to the use of the water appropriated by it under the laws of the state governing the taking and use of water for purposes of irrigation. This right is in its nature property and entitled to be protected as such. The defendants are interfering with the right thus acquired to the use of the water, by diverting it to irrigate their riparian lands. The claim that their rights as riparian owners, to the use of such water for irrigation, are superior to those of the plaintiff is not well taken. The plaintiff's right under its appropriation has ripened into a legal estate; and, for any invasion of or injury to the same, the law will afford a remedy. Whether the defendants have suffered any substantial damages to their riparian estates by reason of their being denied the reasonable use of the water of the stream, when such use interferes with plaintiff's appropriation, is problematical and must depend upon the state of proof, when that question is under investigation and consideration. This right may prove to be so infinitesimal that the law would not take note of it. The damages may be nominal only. Whether the right to damages in such a case, if it exists, is to be claimed and enforced, must, we think, in a large measure, rest with the riparian owner where lands have thus been injuriously affected. Under such circumstances, it does not seem inequitable to remand the riparian owner to his remedy by an action at law for the recovery of whatever damages he has sustained by reason of such appropriation. Nor does it seem that the principle, that he who seeks equity must do equity, would

apply in a case of this kind, and compel an appropriator to institute proceedings to condemn all upper riparian owners' rights to the reasonable use of water flowing in the stream for irrigation under the common law, before his right of appropriation is protected from invasion by such upper riparian owners. The case at bar is to be distinguished from one where the action is brought for the purpose of adjudicating and establishing conflicting water rights and determining the priorities thereof. The plaintiff's right is already adjudicated and established; and it is sought by this action only to restrain an alleged wrongful interference therewith.

5. The plaintiff as an appropriator had, before the diversion of water by the defendants which is complained of, perfected its right to the use of the water it claims under the irrigation laws of the state. Its property rights by virtue thereof had been taken possession of and were being used in the prosecution of its business as an irrigation company. The water by means of its irrigating ditches was, under its appropriation, being taken from the stream and was being applied to the irrigation of the soil for the benefit of those engaged in agricultural pursuits. It was, at the time the defendants were doing and threatening to do the acts complained of, in the peaceful possession and quiet enjoyment of its property and conducting the business of irrigation for which it was organized. In its appropriation of the water of the stream for the purpose of irrigation and the acquirement of the right to the use thereof, it had, in legal contemplation, effected a taking of the upper and lower riparian owners' rights to a reasonable use of the water of such stream to irrigate riparian lands. No compensation, it is true, had been awarded for possible damages. An upper riparian owner, as well as the lower, could, doubtless, maintain an action for the injury, if any, of a substantial character, suffered to his riparian estate by reason of the appropriation. The appropriator having acquired a vested right to the use of so much water flowing in the stream, this right to use to that

extent would be an impairment of the upper riparian owner's right to divert the same water, and have a reasonable use thereof to irrigate his riparian lands, to which he is entitled under the doctrine of the common law.

6. In the case of *Crawford Co. v. Hathaway,* 67 Neb. 325, 60 L. R. A. 889, where the subject of the law of irrigation as it exists in this state is considered at some length, it is held:

"The irrigation act of 1895 authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes which are declared to be a public use; and in making appropriations of water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose."

In the same case, this further rule relating to the question was stated substantially as follows: That under the constitution and statutes relating to the subject of eminent domain, condemnation is authorized, of the right of the private riparian proprietor to the use and enjoyment of a natural stream flowing past his lands or its impairment by an appropriation of such water for irrigation purposes, and that such riparian proprietor may recover damages in the same way, and subject to the same rules, as a person whose property is affected injuriously by the construction and operation of a railroad. In the body of the opinion, it is said:

"In this state, the court has repeatedly held that section 21, article 1, of the state constitution, is of itself a sufficient basis to justify an action for the recovery of all damages arising from an exercise of the right of eminent domain which causes a diminution in the value of the private property of another. *Chicago, K. & N. R. Co. v. Hazels,* 26 Neb. 364; *Burlington & M. R. R. Co. v. Reinhackle,* 15 Neb. 279, 48 Am. Rep. 342. In the cases cited the question of damages arose, not for the taking of property, but for damage to abutting property by railroad companies, re-

sulting from obstructions of streets and highways, and other incidents of their construction and operation of railways, causing a depreciation in the value of abutting property. The right of the property owner to the benefit and advantage of a street and highway adjacent to his land, and the right of the riparian owner to the reasonable use and enjoyment of the water in the flowing stream over or adjoining his land, are not without features rendering them in a measure analogous."

In the opinion first filed in this case in the development of this same doctrine there is cited the case of *Bronson v. Albion Telephone Co.*, 67 Neb. 111, 60 L. R. A. 426. In the latter case, the rule is thus stated:

"In case property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law and is not entitled to an injunction, unless upon proof of insolvency or some other special circumstance."

The doctrine deducible from these several authorities were, in the former opinion, held applicable to lower riparian owners as against an appropriator, but not to upper riparian owners. Viewing the subject in its practical workings, and bearing in mind that we are dealing with a state of facts disclosing that the upper riparian owners were not, in fact, applying and using water to irrigate riparian lands at the time a legal appropriation was made of such water under the law regulating that subject, we are constrained to the view that the principle should be extended to the rights of upper riparian owners thus situated; and that an appropriator, who has acquired a valid right to the use of water for irrigation, may prevent by injunction a subsequent diversion of the water, even as against a riparian owner, without being required to commence an action to condemn and make compensation to all upper riparian owners who may, possibly, have suffered

damage to their riparian estates, because of their being deprived of the right to divert and have a reasonable use of such water to irrigate riparian lands by reason of the prior appropriation. Under the facts in this case, as disclosed by the record, the order of injunction entered by the trial court is, we are of the opinion, right and should be affirmed. This, of course, without prejudice to the rights of the defendant to recover damages if any have been sustained.

7. The constitutionality of the irrigation act is challenged, but as its validity has been upheld and recognized repeatedly in the prior decisions of the court, the question does not, it would seem, require further consideration at this time.

8. It is also argued that the plaintiff is estopped to deny that the defendants have a better right to the use of the water in controversy, because of it having, without objection, permitted the defendant to go to the expense of constructing the irrigating ditches necessary to irrigate their riparian lands. As heretofore indicated, the inference is warranted that the defendants were seeking to obtain a right to the use of the water as appropriators under the law as then existing, subject, of course, to the plaintiff's prior right. This of itself, we think, disposes of the question of estoppel. Aside from the consideration mentioned, there are essential elements of estoppel, the proof of which is wholly wanting, and this defense must, for these reasons also, fail. The judgment of reversal heretofore entered is vacated and the order of the district court granting a perpetual injunction is

AFFIRMED.

HENRY R. PENNEY ET AL. V. THOMAS BRYANT ET AL.

FILED OCTOBER 7, 1903. No. 12,950.

1. **Corporation:** LIABILITY OF AGENT. An officer or agent of a corporation is not liable personally to third persons for mere failure to perform some duty which the corporation may have owed them.

2. **Action:** JOINT AND SEVERAL LIABILITY. Where a joint liability is asserted against several defendants, in order to maintain an action against one or more of them in a county other than that wherein they reside or are found, the latter are not to be held upon a different and several liability, even though it is disclosed by the pleadings and proofs.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Affirmed.*

Carroll S. Montgomery and *Mathew A. Hall,* for plaintiffs in error.

Edmund M. Bartlett, Charles L. Dundy and *Edwin M. Martin, contra.*

POUND, C.

As stated by counsel, this action "was brought by the plaintiffs for the recovery of damages in the alleged sum of $1,000 of and from the defendants upon the ground that the defendants had wrongfully and unlawfully caused the First National Bank of Schuyler, Nebraska, to divert and misappropriate, and prevented it from paying to the plaintiffs the sum of $668.95, which the plaintiffs, in their firm name of H. R. Penney & Co., had on deposit in said bank, on and after July 21, 1900, subject to check or draft, and justly payable on demand and due from the said bank to the plaintiffs." It appears that, prior to the time the controversy arose, plaintiffs were conducting a so-called brokerage business in the city of Omaha and had as correspondent at Schuyler one Brown, doing business under the name of Black & Co. Brown testified, to use his own words, that he was "running a bucket-shop in Schuyler, transacting business with H. R. Penney & Co." When asked his meaning, he stated that he was "dealing in the grain market, or supposedly in the grain market," and that he did not know whether he was buying grain or not, and could not state just what the transactions in which he was engaged were. As money was paid to Black & Co.

from time to time in the course of the business, Brown deposited it in the defendant bank and at once advised plaintiffs of the deposit. One Louis T. Bryant, son of the defendant, Thomas Bryant, was dealing with Black & Co. During the two months prior to July 1, 1900, he paid to them on certain pretended purchases of grain sums of money aggregating $490, which were deposited in the defendant bank to the credit of the plaintiffs. On July 21, 1900, the plaintiffs drew upon the bank for the sum of $600. Payment of this draft was refused, and the cashier, one of the defendants herein, notified the plaintiffs that the sum of $522.50, out of the balance of $668.95 to the credit of the plaintiffs in the bank, was claimed by the said Louis T. Bryant. Thereupon, the plaintiffs wrote to the bank demanding payment of the money, and were informed by the cashier that the bank had been garnisheed. On behalf of the defendants, the evidence tends to show that, prior to the time when the draft was presented, the said Louis T. Bryant had notified the bank of his claim to the money, and that on July 25, and prior to the letter last referred to, said Louis T. Bryant had brought an action in the district court for Colfax county against plaintiffs, in their partnership name, and had garnisheed the bank. The present action was brought in Douglas county against the president and cashier and the bank, the bank apparently being served in Colfax county and brought in on the ground that a joint liability was asserted against all of the three defendants. The trial court found generally for the defendants, and dismissed the action.

It is beyond controversy that the money was received by Black & Co., as margins put up in a bucket-shop transaction, and that neither Black & Co. nor plaintiffs gave any other or further consideration therefor whatever. Hence, we think plaintiffs could be held by Louis T. Bryant, as constructive trustees, so long as the money or some part of it remained in their hands. The course of dealing between the parties was nothing more nor less than gambling upon the price of grain, and, in effect, the plaintiffs

had so much money of said Louis T. Bryant in their possession, which they held without consideration, and to which he was entitled. But, in case a person chargeable as constructive trustee deposits the money in a bank, the bank, on receiving notice of the claims of the owner, becomes a trustee also, and may be held as such. Hence, if the moneys in the bank on July 21, 1900, represented or contained, in whole or in part, the moneys paid to Black & Co. by said Louis T. Bryant, the latter, after notifying the bank of the facts, was entitled to insist that they be held and not paid out to the plaintiffs, and to charge the bank if it disbursed them notwithstanding. There is evidence that checks were drawn from time to time against the deposit, but it is not shown that it fell below the sum claimed, at any time from the date when Black & Co. received the money to the date of the draft. This evidence is not sufficient to prove that the balance remaining on July 21, 1900, did not contain or represent the trust fund. *City of Lincoln v. Morrison,* 64 Neb. 822. Consequently, we are inclined to the opinion that when the bank was notified that moneys on deposit were claimed by a third person as held in trust for him by the depositor, it might properly refuse for a reasonable time to pay out such moneys, until the ownership was settled by interpleader or other appropriate proceeding, or the facts were fully ascertained.

When, however, the said Louis T. Bryant brought an action against the plaintiffs for money had and received and garnisheed the defendant bank, he abandoned his claim upon the specific fund, and recognized plaintiffs as the owners thereof. Hence, if it were a mere question of whether the bank is or is not indebted to plaintiffs in the amount of the deposit, it would be necessary for us to inquire into the validity of the garnishment proceedings. But, in the present action, we do not think that matter involved in any way. An officer or agent of a corporation is not liable personally to third persons for mere failure to perform some duty which the corporation may have

owed them. The rule, in this respect, is well stated by a learned text-writer:

"Where the wrong done consists of mere *nonfeasance*—of the mere failure to perform some duty which the corporation, his principal, owes to the plaintiff—then, the corporation only is liable; but where it consists of misfeasance—an affirmative act wrongfully ordered or done against the plaintiff—then, he can not escape liability by setting up that it was the act of the corporation; for, although the corporation may be liable, he may be liable also; he as a personal trespasser; it, on the principal of *respondeat superior*. It is, in the eye of the law, like other cases of joint trespass." 4 Thompson, Corporations, sec. 4669.

The president and cashier of the bank, in this case, did nothing more than refuse to pay out the money upon plaintiffs' draft and the subsequent demand by letter. There was no conversion or misappropriation of the fund; it was simply held to await the result of the garnishment proceedings. All that can be charged is that, the bank being under a duty of paying the money to plaintiffs, its officers did not perform that duty. In other words, plaintiffs' case is one of nonfeasance, so far as the president and cashier of the bank are concerned, not of misfeasance or active trespass or wrongdoing. It follows that the defendants, Bryant and Rathsack, are not liable in this action; and, this being so, we do not think the bank may be held. Where a joint liability is asserted against several defendants, in order to maintain an action against one or more of them in a county other than that wherein they reside or are found, the latter are not to be held upon a different and several liabilty, even though it is disclosed by the pleadings and proofs. *Stewart v. Rosengren*, 66 Neb. 445. From the pleadings it is evident that the defendant, the First National Bank of Schuyler, was not and could not have been served with process in Douglas county. The district court had a right to, and doubtless did, take judicial notice of its own record in the case then before it,

and of the process and return by which it acquired jurisdiction. *Stewart v. Rosengren, supra.* Hence, although the pleadings and the evidence may have disclosed facts sufficient to entitle the plaintiffs to recover the amount of the deposit from the bank, in an action for that purpose, the trial court was not in error in rendering judgment for all the defendants.

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

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

AFFIRMED.

IN THE MATTER OF THE ESTATE OF ROBERT N. JAMES, DECEASED, ET AL., APPELLEES, V. LILLIE O'NEILL, APPELLANT.

FILED OCTOBER 7, 1903. No. 13,115.

1. **Probate Proceeding:** EQUITY. Every proceeding to set aside an order of a county court made in the course of probate or administration proceedings, on the ground that it was obtained by fraud, is not of necessity equitable in its nature.
2. **Equity:** FRAUD: FINAL JUDGMENT. It is only where a final judgment has been procured by fraud, or some order which by reason of the lapse of the term and its finality can not be set aside by the ordinary powers of the court, that its equity powers come into play.
3. **Allowance to Widow.** An order allowing an alleged widow a certain sum each month pending administration, for her maintenance, is subject to modification during administration as circumstances may require.
4. **Proceeding in Error.** Where no summons in error issues, the date of voluntary appearance is to be taken as the date of commencement of proceedings in error within the meaning of section 592 of the code.

APPEAL from the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Motion to dismiss sustained.*

Thomas H. Matters, for appellant.

Eugene J. Hainer and *Jerome H. Smith, contra.*

POUND, C.

Counsel seems to have assumed that he could take an appeal from the district court to the supreme court in a probate proceeding. At any rate, he filed no petition in error and caused no summons in error to issue. He now contends that an appeal is maintainable. I do not think this view can be sustained. It is not every proceeding to obtain the setting aside of an order by the court which rendered it, even though predicated upon fraud, that is equitable in its nature. Courts of law have always had the power to set aside their own orders, rendered in a proceeding pending before them, during the pendency of such proceeding, upon showing that such orders were obtained by fraud. It is only where a *final judgment* has been procured by fraud, or an order which, by reason of the lapse of the term and its finality, can not be set aside by the ordinary powers of the court, that its equitable powers come into play. In this case there appears no ground for thinking that any equitable powers of the county court needed to be exercised in order to give the petitioners all the relief which they sought. The case is not analogous to a final order admitting a will to probate, nor to an order of final statement of an estate. The order sought to be set aside was an interlocutory one allowing an alleged widow $15 a month for maintenance pending administration, and was subject to modification during the administration, as circumstances might require. *Baker v. Baker,* 51 Wis. 538; *In re Fisher,* 15 Wis. 567.

The appearance of the defendants on June 13, 1903, judgment having been rendered November 11, 1902, does not constitute a commencement of proceedings in error in the six months limited by the statute. They are not commenced until summons in error issues. *Bemis v. Rogers,*

8 Neb. 149. The date of voluntary appearance, no summons having been issued, is to be taken as the date of commencement. *Benson v. Michael*, 29 Neb. 131. Moreover no petition in error has been filed even yet. As the proceedings were not commenced within the meaning of that term as used in section 592 of the code, in the time limited, I think they should be dismissed.

The district court instead of trying the case *de novo*, as it evidently should have done, simply reversed the judgment of the county court, which had refused to proceed in the matter, and sent the cause back to that court for trial. The merits have never been passed upon, and I do not see that any one will suffer, in any case, by dismissal of the present proceedings.

I therefore recommend that the motion to dismiss be sustained, and that the motion for leave to file an additional transcript be overruled.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion to dismiss be sustained and that the motion for leave to file an additional transcript be overruled.

MOTIONS SUSTAINED.

KEELEY INSTITUTE OF KANSAS V. JAMES E. RIGGS ET AL.

FILED OCTOBER 7, 1903. No. 13,181.

1. **Transcript:** DIMINUTION OF THE RECORD. If a transcript filed in this court is incomplete or incorrect in some particular, the appropriate remedy is to procure an additional or corrected transcript, duly certified.

2. ———: WHEN STRICKEN. In case it appears from the transcript filed and a further transcript duly certified, that a party has wilfully filed an incomplete and incorrect transcript or has altered the transcript certified and furnished him, for the purpose of deceiving this court, the transcript will be stricken from the files. *Felber v. Boyd*, 44 Neb. 700.

3. ———: CORRECTNESS: AFFIDAVIT. But this court will not try the correctness or completeness of the transcript upon affidavits, nor require the clerk of the lower court to produce the original record.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. Motion to strike transcript from the files. *Motion denied.*

Robert S. Mockett and *Orpheus B. Polk,* for plaintiff in error.

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin, contra.*

POUND, C.

This is a motion to strike a transcript from the files on the ground that it is not a true copy of the record of the district court. It appears that the cause originated before a justice of the peace, and an affidavit is filed setting out that certain specified portions of the transcript of the justice's docket do not appear in the transcript certified to us by the clerk of the district court. On the other hand, an affidavit is filed in which it is stated that the lower court struck this matter from the record as improper and irrelevant. Counsel now ask that the clerk be required to bring the original record to this court for inspection. We find no warrant for any such practice. If a transcript filed in this court is incomplete or incorrect in some particular, the appropriate remedy is to procure an additional or corrected transcript, duly certified. *Haggerty v. Walker,* 21 Neb. 596; *Fulton v. Ryan,* 60 Neb. 9. There is nothing in *Felber v. Boyd,* 44 Neb. 700, relied upon by counsel, which would support a different conclusion. It may be conceded, as held in that case, that where it appears from the transcript filed and a further transcript, duly certified, that a party has wilfully filed an incomplete and incorrect transcript, or has altered the transcript certified and furnished him for the purpose of deceiving this court, the transcript

will be stricken from the files. But in *Felber v. Boyd,* the original transcript showed an omission on its face and the missing portions of the record were properly certified to this court. Such a case differs wholly from the one at bar. We will not try the correctness or completeness of the transcript upon affidavits, nor require the clerk of the lower court to produce the original record. *Fulton v. Ryan,* 60 Neb. 9; *Crancer & Curtice Co. v. McKinley Music Co.,* 69 Neb. 700. In the *Fulton* case it was said, neither extrinsic nor original evidence would be received to contradict the transcript. We have no concern with the original record. That belongs in the district court. A transcript, duly certified, is the sole means of showing its contents to this court.

We therefore recommend that the motion be denied.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion be denied.

MOTION DENIED.

WILLIAM H. PALMER V. STATE OF NEBRASKA.

FILED OCTOBER 21, 1903. No. 13,278.

1. **Larceny:** CONSENT: INFERENCE. In prosecutions for larceny, non-consent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances.

2. ———: POSSESSION OF STOLEN PROPERTY. 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.

3. ———: ———. The owner of a ranch is not in possession of an estray running with the cattle of his lessee upon the ranch, when such cattle are in the immediate charge of the lessee's servant.

4. **Instruction.** It is not error to instruct the jury that they must give the testimony of the defendant in a criminal case "only such weight" as they think it deserves.

5. ———. It is not error to refuse a requested instruction, when the substance of it has been already given.

6. **Constitutional Law.** Section 509*a* of the criminal code, which provides that this court may reduce an excessive sentence and pronounce such sentence as is, in the opinion of the court, warranted by the evidence in the record before it, is not violative of the provision of the constitution, which forbids the exercise by the judiciary of any power properly belonging to the executive branch of the government.

7. **Sentence.** Evidence examined, and sentence reduced from seven years to two years.

ERROR to the district court for Dundy county: ROBERT C. ORR, JUDGE. *Judgment reducing sentence.*

John M. Ragan and *J. W. James,* for plaintiff in error.

Frank N. Prout, Attorney General, David G. Hines, W. R. Starr and *Robert T. Potter,* for the state.

SULLIVAN, C. J.

William H. Palmer was found guilty of cattle stealing, and sentenced to imprisonment in the penitentiary.

The first assignment of error discussed by counsel is based upon the failure of the state to show by direct evidence that the stolen steer was taken by defendant without the owner's consent. The owner was not a witness and had, it would seem, no personal knowledge of the means by which he was deprived of his property. That he did not consent to the taking is a warrantable inference from the evidence. Indeed, no other inference is warrantable. Want of consent in prosecutions for larceny may be inferred from circumstances. Direct proof is not indispensable. *Wiegrefe v. State,* 66 Neb. 23.

It is claimed that the court erred in giving instruction numbered 4. This instruction is as follows:

"The jury are instructed that the possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found.

Whether such inference should be drawn is a fact exclusively for the jury."

This, in our opinion, is an entirely correct statement and, being applicable to the evidence, we approve it.

The third subdivision of defendant's brief is devoted to a discussion of the evidence. It is here contended that the state did not prove a felonious purpose on the part of the defendant at the time it is claimed he took possession of the steer. The animal was an estray, running with a bunch of cattle owned by Burr, and under the immediate control of Burr's servant. It was therefore in the possession of Burr and not in the possession of the defendant. The range, it is true, was owned by Palmer, but it had been leased to Burr. If Palmer took the steer for the purpose of butchering it, the taking and the intent to convert were coincident. It was not a case where the intent to convert was formed after possession had been lawfully acquired.

Exception was taken to an instruction in which the court told the jury that they must give the testimony of the defendant "only such weight as, in your judgment, it is entitled to." This was equivalent to saying that the testimony should not be given more weight than it deserved. The statement was not inaccurate or misleading, and the giving of it was not error.

It is claimed that the court erred in refusing instruction numbered 4, tendered by defendant. This instruction defined larceny, but the definition is no better than the one given by the court in the seventh paragraph of the general charge. Besides, the requested instruction was not based upon the testimony. It assumed that the steer was taken from the place where the owner kept it. This assumption was unwarranted.

The admission in evidence of various parts of the hide of the stolen steer is complained of, but, clearly, the complaint is not well founded. The identification was sufficient; and the fragments at least tended to prove that the animal was dead.

The sentence, "seven years for the larceny of a stray

steer, worth $20," is excessive and almost Draconian. It should be reduced and made to fit the crime. The trial court, in adjusting the penalty, acted within the limits prescribed by the statute; it was not bound to exercise clemency; it was under no obligation to extend to the rude frontiersman the tender consideration which it is customary to accord to those genteel persons whose criminal operations are conducted with more refinement and on a larger scale. It was, however, its duty to inflict punishment in some degree proportionate to the crime. This was not done. There is a lack of logical relation between the wrong and the punishment, and under section 509*a* of the criminal code it becomes the duty of this court to readjust the sentence. We know that the validity of this statute was denied in *Barney v. State,* 49 Neb. 515, and in *Fanton v. State,* 50 Neb. 351, but after much reflection we are fully convinced that these decisions are unsound. Legislation, giving a reviewing court authority to pronounce a just sentence upon the record before it, can not, we think, be overthrown, on the theory that it confers executive power on the judiciary. This conclusion is sustained by *Fager v. State,* 22 Neb. 332; *Anderson v. State,* 26 Neb. 387; *Charles v. State,* 27 Neb. 881, and *Nelson v. State,* 33 Neb. 528. The sentence will be reduced from seven years to two years.

JUDGMENT ACCORDINGLY.

ARTHUR B. WILCOX ET AL. V. COUNTY OF PERKINS.

FILED OCTOBER 21, 1903. No. 12,565.

1. **Official Bond:** DEFENSE. The fact that an official bond of a county officer, as executed, is joint, instead of joint and several as required by statute, is not an objection thereto of which the obligors upon the instrument can avail themselves as a defense. The bond is good to the extent it complies with the statute in that regard.

2. **Fraudulent Intent:** DIRECTING VERDICT. While by the provisions of

section 20, chapter 32, Compiled Statutes, entitled "Frauds," fraudulent intent is declared to be a question of fact and not of law, yet it does not follow that such question of fact must in every case be left to a jury for its determination. If from the uncontradicted evidence all reasonable men must reach but one conclusion, then it is proper for the court to direct a verdict.

3. **Officers:** SETTLEMENT. Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making the same. *County of Douglas v. Bennett*, 61 Neb. 660.

ERROR to the district court for Perkins county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan, for plaintiffs in error.

Benjamin F. Hastings, John M. Stewart and *Thomas C. Munger, contra.*

HOLCOMB, J.

County of Perkins, defendant in error, in its corporate capacity, prosecuted an action in the district court against defendant Wilcox, formerly county clerk, and the other defendants who were sureties on his official bond, because of Wilcox's alleged failure to fully and properly account for, and pay over to the county, certain fees claimed to have been collected in the discharge of his official duties, which fees were then due and owing to the county. The action was an ordinary one on the official bond of Wilcox for an alleged breach of its conditions respecting his duties to account for fees received while in office. The answer of the defendants denied the allegations of the petition, and pleaded affirmatively that, prior to the institution of the action, the principal, Wilcox, had made a full and complete settlement with the county board of plaintiff county, touching and covering the matters mentioned in the petition; that the same was fair in all respects, and that such settlement was conclusive on the county and, for that reason, it was estopped from questioning the same. To the answer a reply was filed, in which

it is alleged that the settlement pleaded as a defense is of no effect and not binding on the county, for the reason that the defendant, Wilcox, had fraudulently omitted from his report certain fees that had been by him collected, and falsely and fraudulently represented that the report he presented to the county board was a correct report of all the fees received by him while in office, when, in truth and in fact, certain fees were omitted, which omission was falsely and fraudulently made to deceive the county commissioners; that they were deceived and, because thereof, the alleged settlement was of no binding effect. A trial was had to the court and a jury wherein, after the admission of evidence, on a peremptory instruction, a verdict was rendered for a specified sum in favor of the plaintiff. The defendants prosecute error.

The bond sued on was a joint obligation, instead of joint and several as required by statute, and for this reason it is contended, exceptions having been properly preserved by demurrer to the petition and an objection to the introduction of any evidence, that the petition fails to state a cause of action and therefore no recovery can be had. The objection is believed to be untenable. This court has held in *Clark v. Douglas,* 58 Neb. 571, that an irregularity in this respect, in the form of an official bond prescribed by the statute, is not an objection thereto, of which the obligors upon the instrument can avail themselves as a defense thereto, and that the bond is good to the extent it complies with the statute in that regard. The case cited is decisive of the question in the present controversy and the objection is therefore without merit.

The principal point, however, relied upon as ground of error, as stated by counsel for plaintiffs in error, is in respect of the peremptory instruction of the court to the jury to return a verdict for the county. It is argued that on the face of the pleadings a settlement is admitted, to vitiate which the reply alleged that it was obtained by the fraud of the plaintiff, and that fraud, under our statute, is a question of fact which, under all circumstances, should

be submitted to a jury for its determination. Counsel contend that under no theory of the evidence did the court have the right to take the case from the jury and instruct them to bring in a verdict for the plaintiff, for any amount. No bill of exceptions containing the evidence is preserved; consequently, we may assume that if, under any possible state of the evidence, the instruction was proper, then, we must so hold in the present case. While by section 20, chapter 32 of the Compiled Statutes (Annotated Statutes, 5969), entitled "Frauds," it is provided that the fraudulent intent, in all cases arising under the provisions of this chapter, shall be deemed a question of fact and not of law, it may very well be doubted whether this section has any application to alleged fraudulent acts, such as are pleaded in the reply in the case at bar. The statute of frauds is in relation to fraudulent conveyances and contracts relating to real estate and to goods, chattels and things in action. The fraud here charged is a false and deceptive statement of fees received, for the purpose of obtaining an unfair advantage and withholding from the county moneys collected as fees rightfully belonging to it. If the fact of the false statement were established, then, the fraudulent intent, in the absence of explanation on the ground of mistake or misunderstanding, it would seem, would inevitably arise. Conceding, however, that the fraud alleged in the case at bar is a question of fact to be determined by a jury within the meaning of said section 20, it does not follow that the trial court's action, in peremptorily instructing the jury to return a verdict for plaintiff, is necessarily erroneous. It has heretofore been, by this court, judicially determined that fraudulent intent, even though a question of fact, may be, by the evidence, so indisputably established as to warrant it being ruled upon as a question of law. *Bender v. Kingman & Co.*, 62 Neb. 469, S. C. on rehearing, 64 Neb. 766. On the first hearing, in the case cited, it is held that, while by reason of section 20, referred to, the intent of the vendor in the alleged fraudulent conveyances is always a question of fact, it does not follow that such ques-

tion of fact must, in every case, be left to the jury; that if from the uncontradicted evidence all reasonable men must reach but one conclusion, then, it is proper for the court to direct a verdict. To the same effect is the announcement of the rule on a rehearing and reinvestigation of the question. *Bender v. Kingman & Co.,* 64 Neb. 766. See also *Hedman v. Anderson,* 6 Neb. 392; *Davis v. Scott,* 22 Neb. 154. Not having the evidence before us we may assume that it was of such a character as to leave no substantial controversy regarding any question of fact, that there was nothing for the jury's determination, and that the court was therefore justified in giving the peremptory instruction complained of. Portions of the briefs of counsel are devoted to a discussion of the nature and effect of the settlement had between the county, through its commissioners, and Wilcox, as county clerk. It is said, on the one hand, that such adjustment and settlement was purely a ministerial act, and would in no wise prevent a recovery for any sum found to be due the county and not accounted for. On the other hand, it is contended that such settlement has become final and conclusive on the county unless impeached for fraud or mutual mistake. *Heald v. Polk County,* 46 Neb. 28, and *Hazelet v. Holt County,* 51 Neb. 716, give support to the contention that a settlement made by a county officer with the board of county commissioners, relative to the accounts of the former with the county, has only the effect of furnishing *prima facie* evidence of a discharge of liability, which may be overcome by other competent evidence showing a failure to account fully and properly for all fees received, and that an action may be maintained to recover such unaccounted for fees, and without impeaching such settlement for fraud or mutual mistake. The decisions cited in respect of the matter now under consideration probably go further than by the application of sound legal principles is warranted. Such settlement should be regarded as something more valuable and effective than a merely formal act, neither signifying nor accomplishing anything. It would seem to be more

nearly related to the transactions of parties competent to act and who sustain relations contractual in their character. When once a settlement is entered into, it should be, it seems, regarded as final unless, for sufficient reasons, it may be avoided on legal or equitable grounds. As suggested by MAXWELL, Ch. J., in *Ragoss v. Cuming County,* 36 Neb., 375, 383:

"There should be an end to litigation, and an officer who has faithfully performed the duties of his office and made a full settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same."

And in *Bush v. Johnson County,* 48 Neb. 1, 15, it is observed in the course of the opinion of the court:

"Any settlement is all right and entitled to stand in favor of an officer who has faithfully performed the duties of his office, when in the settlement there is neither fraud, nor mistake, nor imposition."

In *County of Douglas v. Bennett,* 61 Neb. 660, it is held:

"Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is full and conclusive, unless there is fraud, mistake or imposition in making the same."

This case is controlling in the disposition of the question now being discussed and we adhere to the same. No error appearing in the record, the judgment of the district court is

AFFIRMED.

UNITED STATES FIDELITY AND GUARANTY COMPANY, OF BALTIMORE, MARYLAND, V. ELIAS S. ETTENHEIMER ET AL.*

FILED OCTOBER 21, 1903. No. 12,828.

Estoppel: APPEAL UNDERTAKING. Principles of estoppel are mutual and reciprocal. One who successfully attacks appellate proceedings,

* Rehearing allowed. See opinion, p. 147, *post.*

upon the ground that they are unauthorized by law and wholly void, is estopped afterwards to assert that they are in any respect valid. This rule applies to an appeal undertaking by which such proceedings were begun.

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

Robert S. Mockett and *Orpheus B. Polk,* for plaintiff in error.

Walter J. Lamb, contra.

AMES, C.

This case is an action upon an undertaking executed under a void statute, chapter 82, laws of 1883, for the purpose of effecting an appeal under that statute from the judgment of a justice of the peace in a suit for forcible detainer.

The supposed appeal was docketed and tried in the district court where the appellant was successful, but, upon proceedings in error in this court, the judgment of the district court was reversed and the appeal dismissed. *Ettenheimer v. Wallman,* 63 Neb. 647. This action resulted, in the district court, in a judgment in favor of the plaintiff and against the principal and sureties upon the undertaking. From the latter judgment this proceeding is prosecuted. The only question litigated is that of liability upon the undertaking. As a statutory obligation, it was confessedly void. Was there sufficient consideration to support it as a common law contract? It will be seen that the case differs from those of *Stevenson v. Morgan,* 67 Neb. 207, and *McVey v. Peddie,* 69 Neb. 525. In each of those cases, the proceeding upon the attempted appeal resulted, in the district court, in a trial and judgment adverse to the appellant, in which both parties acquiesced. In this case, a judgment of the district court in favor of the appellant, which nominally, at least, satisfied the condition of his undertaking, was attacked and set aside in this court as having been rendered without jurisdiction. In the cases

cited, the principal and sureties were held bound by the principles of equitable estoppel. The appellant, it was said, having by means of his undertaking acquired all that he stipulated for, namely, a trial and judgment in the district court and the possession and enjoyment of the premises in the mean time, was estopped to deny that the instrument was without consideration or was invalid for any other reason. But such was not the case here. The appellant did, it was true, retain the use of the demanded premises, and obtained a trial and judgment in the district court, but of the fruits of the latter, which were the principal consideration of the undertaking, he was deprived at the instance of his adversary. It is an elementary principle that mutuality is an essential element of an estoppel; that one party can not deny the existence of a fact or the validity of a transaction which he forbids another party thereto to dispute. We are not aware that there is any exception to this rule, and are of opinion that it governs the case at bar. The plaintiff participated, without objection, in the trial of the appeal in the district court and, by so doing, subjected the appellant to expense for attorney's fees and the procurement of witnesses and to a liability to a judgment for costs, the validity of which, according to the principles of the cases cited, the latter would not have been permitted to dispute because of lack of jurisdiction of the court rendering it. By so doing, we think that the plaintiff subjected himself to a like estoppel, from which he could escape only by relieving his adversary therefrom. When in this court he successfully assailed the proceedings upon appeal as being unauthorized by law and wholly void, he in turn subjected himself to an estoppel afterwards to assert that they were in any respect valid.

The conclusion thus reached in no way affects the question of the liability of the defendant in justice's court upon an implied contract for the value of the use and occupation of the premises during the time he unlawfully withheld them, but it does, we think, preclude a recovery upon the written instrument in suit.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

The following opinion on rehearing was filed May 5, 1904. *Judgment below affirmed:*

1. **Appeal Undertaking:** ESTOPPEL. One who executes a bond under circumstances that would estop him to assert its invalidity for want of consideration, can not, in an action upon the bond, avoid liablty on the ground that plaintiff is estopped to assert that there was any consideration for the bond. Estoppel against estoppel sets the matter at large.

2. ———: VALIDITY. A bond in pursuance of a statute afterwards held unconstitutional is not valid as a statutory bond, but may be valid as a common law contract, if supported by a consideration independent of the statute.

3. ———: ———. A bond, given in an attempted appeal in an action of forcible entry and detention, conditioned for the payment of rent, is valid as a contract, if the obligor has by reason of the bond retained possession of the premises, though the statute authorizing such appeal is afterwards held unconstitutional.

4. ———: EXECUTION. One of three persons who are appointed attorneys in fact by power of attorney may act for the principal, if the power of attorney contains no provision requiring more than one to join in the act.

SEDGWICK, J.

Ettenheimer recovered a judgment of restitution before a justice of the peace in a suit for forcible detainer. His opponent took an appeal to the district court, and gave the bond upon which this action is brought. The case was docketed in the district court as an appeal, and was treated by both parties as being properly before the court. It was again tried in the district court, and there was a verdict

and judgment in favor of defendant. The plaintiff then brought the action to this court. *Ettenheimer v. Wallman*, 63 Neb. 647. It was held that the district court had no jurisdiction of the appeal, and that the judgment of the justice of the peace was not affected thereby. The judgment of the district court was reversed, and the appeal from the judgment of the justice was dismissed. The plaintiff then brought this action upon the bond.

It was held upon the former hearing, *ante*, p. 144, that the plaintiff was estopped to prosecute the action, and the judgment of the district court in his favor was therefore reversed. The reason given for this holding was that one who successfully attacks appellate proceedings, upon the ground that they are not authorized by law and wholly void, is estopped afterwards to assert that they are in any respect valid.

If the proceedings in the district court were entirely void, because there was no law authorizing an appeal, as held in *Armstrong v. Mayer*, 60 Neb. 423, and *Ettenheimer v. Wallman, supra*, it is not apparent upon what theory it may be said that the plaintiff attacked the appellate proceedings. He might have treated the attempted appeal as absolutely nugatory. He might have compelled the issuing and execution of a writ of restitution on the judgment of the justice of the peace, notwithstanding the attempted appeal. This would have been a successful attack upon the appellate proceedings. But, instead of so doing, both parties appear to have treated the appeal as valid. It might with better reason be said that the plaintiff acknowledged the validity of the appeal.

It is insisted by plaintiff that the action of this court was upon its own motion, following the decision in *Armstrong v. Mayer, supra*, and that the plaintiff urged other grounds for the reversal of the judgment of the district court. But, whatever may be said of plaintiff's subsequent action in this court, it is certain that when the defendant asserted his right to appeal, and to give the bond now in suit and procure a stay of execution, and so retain posses-

sion of the premises, the plaintiff acquiesced in that action and treated the defendant's appeal as valid, at least, until the time of the trial in the district court. There can be no doubt that the defendants herein were at that time estopped to deny their liability upon the bond, under the holding of this court in *Stevenson v. Morgan,* 67 Neb. 207, and *McVey v. Peddie,* 69 Neb. 525.

In both of these cases, the actions were upon bonds identical with the one involved here. In the former, the court, after discussing the distinction between cases in which the contract involved must depend for its consideration solely upon the requirements of the statute and those cases in which the contract "rests upon a consideration of its own," said:

"The basis of distinction between these two lines of cases is the consideration. If it exists, the instrument may be enforced like any other contract and the annulment of, or departure from, a statute providing for it is not fatal. If, on the other hand, the consideration is absent, the instrument, like any other *nudum pactum,* affords no basis for recovery. In the case at bar the principal obligor on the bond was enabled by means of it to retain possession of the premises. At the time of the trial below, in February, 1901, he had occupied them for nearly three years following the execution of the bond. As one condition of the bond sought to be enforced was payment of rent, it will be seen that the obligor's promise was supported by a sufficient consideration, and this, without taking into account the fact that he also obtained *pro forma,* at least, a review of the justice's judgment in the district court. Indeed, it can not be doubted that if the instrument in controversy be denied the character of a bond at all and be treated simply as an agreement to pay rent in consideration of the occupancy of the premises, recovery must be allowed."

Many of the authorities are reviewed and applied, and we are entirely satisfied with the conclusion reached. It is approved and followed in *McVey v. Peddie, supra.* There

is no distinction between these two cases and the one at bar, except in the fact that in this case the proceedings afterwards taken in the district court were declared void. If the defendant obtained no other benefit of his attempted appeal, he, at least, was enabled to present the question to this court, and in the meantime retained the possession of the premises in dispute. The object of the undertaking was to protect the plaintiff against two sources of possible injury:

(1) He would be subjected to expenses in the district court, which would be unnecessary if the judgment already rendered should finally stand as the law of the case:

(2) He would, while the proceedings were pending, be deprived of the possession of the premises which had been awarded to him by the judgment of the justice. The condition of the undertaking was likewise twofold. To pay costs; and to pay rent. Each several liability was supported by a distinct consideration. He had the use of the premises for which, by his undertaking, he agreed to pay.

We do not see how the fact that neither party relied upon an estoppel, in the pleadings in this case, operates in favor of the defendant. The plaintiff, in his petition, sets out the facts in regard to the institution of the action of forcible detainer, the trial and judgment in his favor in justice court, the giving of the bond and attempted appeal to the district court, the plaintiff's acquiescence in the same and the hearing thereon in the district court in pursuance of the attempted appeal. He also alleged that, afterwards, the supreme court dismissed the proceedings.

The answer of the defendant denied these allegations and set forth other matters in defense, without alleging an estoppel against the plaintiff. The reply was a general denial. Under these issues, the defendant could not, upon the trial, insist upon an estoppel against the plaintiff, without confessing the estoppel which first arose against himself.

"Estoppel against estoppel commonly sets the matter at large." Bigelow, Estoppel (5th ed.), 360. Mr. Bigelow

cites, among other authorities, *Branson v. Wirth,* 17 Wall. (U. S.) 32, 21 L. ed. 566, in which the court say:

"Even if it were otherwise, and if the government *could,* in any aspect of the case, claim the benefit of the legal estoppel, it would be prevented from doing so by its own patent granted to Egerton. That would present the case of estoppel against estoppel, which, Lord Coke says, setteth the matter at large. No one can set up an estoppel against his own grant. Whoever else, therefore, might set up the estoppel against Egerton's title to the lot in question, the government could not do so."

The defendant had the use of the premises from the time he gave the appeal bond. This use of the premises belonged to the plaintiff. The defendant gave the bond, among other things, for the purpose of obtaining this advantage, which he did obtain thereunder. He can not say that he had no right to stay the execution. If the conduct of Ettenheimer was such as to have estopped him against other parties, it can not have that effect in favor of these defendants, who are estopped to deny their liability. Being estopped to deny their liability, they are also estopped to urge anything that would have that effect.

The fact that the statute under which it was attempted to take the appeal was unconstitutional and void, does not change the rule. "The principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached upon other grounds." *Tone v. Columbus,* 39 Ohio St. 281, 308. *Daniels v. Tearney,* 102 U. S., 415, 26 L. ed. 187.

2. It is objected that the bond was not executed so as to bind the company. The name of the company is signed, "per A. W. Miller, Agt." A power of attorney was in evidence which appoints "R. S. Mockett and A. W. Miller and E. P. Hovey," attorneys in fact for the company, to execute bonds. It also contains the clause:

"It being the intention of this power of attorney to fully authorize and empower the said R. S. Mockett and A. W.

Miller or E. P. Hovey to sign the name of said company."

It is insisted that this power should be construed to authorize R. S. Mockett to act in connection with A. W. Miller, or in connection with E. P. Hovey, and does not authorize Mr. Miller to act alone for the company. We can not so construe it. There is no provision that the three agents, or any two of them, must act together. The bond appears to be duly executed.

The former judgment of this court is vacated, and the judgment of the district court.

AFFIRMED.

STULL BROTHERS V. THOMAS POWELL ET AL.

FILED OCTOBER 21, 1903. No. 12,978.

1. **Parties:** JOINDER. To authorize a joinder of parties as defendants, they must be under a joint liability or must be claiming some right in the subject matter of the action.

2. **Summons to Another County.** To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants.

3. **Defenses:** JOINDER. A nonresident defendant may join a plea to the merits with a plea to the jurisdiction, where the facts as to the latter are not apparent on the face of the record.

4. ———: JURISDICTION: WAIVER. Where the question of jurisdiction is thus litigated, the nonresident defendant does not, by appealing from a county court's adverse decision, waive his plea to the jurisdiction.

5. ———: ———: RECORD. Where defendant's plea to the jurisdiction only inferentially alleges a service of summons in another county, the facts of service appearing in the record will be considered, when his pleading is attacked for the first time in this court.

ERROR to the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

Stull Brothers, Claude C. Flansburg and *Richard O. Williams,* for plaintiffs in error.

Hainer & Smith, contra.

HASTINGS, C.

The main question in this case is as to venue and jurisdiction. In November, 1900, Thomas Powell filed in the county court of Hamilton county a petition against Farley & Burt and Stull Brothers, alleging that the latter were an unincorporated company formed to carry on a loan brokerage business in Nebraska and having its place of business in Omaha, and the former a like company of Aurora, Hamilton county, Nebraska, and that they were "cooperating together" in making a $4,000 loan to Powell; that in November, 1899, the latter applied to Farley & Burt, at Aurora, for a loan of $4,000 on 320 acres of Hamilton county land, on which were already two mortgages, and one of which Stull Brothers had negotiated and had the management of; that Burt & Farley forwarded the application to Stull Brothers, who accepted it, and note, coupons and mortgage were made out by Powell and delivered to Farley & Burt, and by them forwarded to Omaha with abstract of title. Defendants were to make the loan for a commission of $100 and were to take up the existing mortgages; that these amounted to $1,524.25 and $1,610 respectively, leaving still due Powell $765.25, which amount the defendants have wholly failed and refused to pay. Judgment is asked for $765.25 and seven per cent. interest from January 1, 1900. Service of summons was waived by Farley & Burt, and service was had upon Stull Brothers at their usual place of business in Omaha. The two firms answered separately, Farley & Burt putting in a cross-petition for $40, their share of the commission. This last was dismissed by the county court, but a finding and judgment for plaintiff in the sum of $849.50 was entered against all defendants.

Farley & Burt seem to have filed an appeal bond. If Stull Brothers appealed, the record does not show it. Apparently they did, as they appeared in district court, where plaintiff Powell filed substantially the same petition, alleging that defendants "cooperated together" in making the loan, the payments that were to be made out of it, and that there were $765.25 and interest still due plaintiff.

Stull Brothers answered:

(1) That plaintiff was not the real party in interest, but Farley & Burt who were the instigators of the suit; (2) that there was no jurisdiction of them in Hamilton county because there was no joint liability with Farley & Burt, who were joined solely to get jurisdiction by means of having a resident defendant.

They deny that they are an association of persons formed for doing business in Nebraska, and deny "cooperating" with Farley & Burt in the loan negotiations with plaintiff. They admit making a loan to plaintiff of $4,000 and deny plaintiff's other allegations. They allege that Farley & Burt's action was as agents for plaintiff; that the papers were received from Farley & Burt, and the full proceeds of the loan, less commission and the two mortgages which were to be paid, were sent to Farley & Burt for plaintiff, and they have held and are holding such proceeds as plaintiff's agents.

Farley & Burt answered, admitting the loan and its terms; that the money was to be paid to plaintiff by Stull Brothers; that Stull Brothers sent a check for $711.25 to be delivered to plaintiff, which he refused, claiming a larger sum. They also set up their claim for $40 as agreed to be paid them by Stull Brothers.

A general denial was filed in reply to both answers.

The cause was tried to the court without a jury, and a finding and judgment entered for $893 for Powell against all defendants, and the cross-petition was dismissed at Farley & Burt's cost. Stull Brothers filed a motion for new trial, for error in the amount of recovery; that the judgment was contrary to law; the findings contrary to

the evidence and not sustained by it; error in the inclusion of interest on the money offered plaintiff; in finding defendants jointly liable; and error in finding jurisdiction in Hamilton county over Stull Brothers in this action.

The motion was overruled; and Stull Brothers bring error to this court, and urge that there was no joint liability shown; that, consequently, there was no jurisdiction as against them in Hamilton county; that there was error in allowing interest on the money paid to Farley & Burt and error in the inclusion of the amount of such payment in the judgment.

The first of these complaints is important, only, because of its bearing on the second. The last two turn upon the evidence, according as it is held to show or not show that Farley & Burt were agents of plaintiff and not of Stull Brothers in the transactions.

It is clear that plaintiff's rights are upon a contract by the defendants to loan him $4,000 or procure such a loan for him; and the action is for a failure to pay him the proceeds of the loan as agreed. There is no specific fund of money to which plaintiff's right is alleged to be denied. There is no plea of any conversion of the notes and mortgage and no statement of facts showing such conversion. The allegation is simply of a failure on defendants' part to pay to Powell an agreed sum of money. The allegations of the petition are somewhat vague but, on a liberal construction and after judgment, should be taken as stating a joint agreement of all defendants to procure the $4,000 loan. In that situation, suit, of course, might be instituted in any county where service of summons could be made on any party to the agreement. Code, section 60. The right to maintain it, however, would depend upon plaintiff's really having a right to recover from the resident defendants, jointly with the others, as liable upon the contract to furnish the loan.

In *Barry v. Wachosky,* 57 Neb. 534, three parties, residents of Dakota county, made a joint non-negotiable note to Clarke, a resident of Douglas county. Clarke sold the

note, indorsing on it a guaranty of payment. The makers were held to have rightfully objected to the jurisdiction in Douglas county, and the action was, by this court, dismissed as against them. They were liable, but not liable jointly with Clarke.

In the present case, we have looked in vain through the evidence for any joint ground of liability on the part of Stull Brothers and of Farley & Burt. Stull Brothers were to furnish the money and Stull Brothers were to pay off the existing liens. The trouble arose over their paying ten per cent. interest on $1,000 which was, by the terms of the note taken up, overdue and bearing that rate of interest. Mr. Powell claims to have had an extension agreement at six per cent. per annum and, consequently, that this was an overpayment. He wants his money. Stull Brothers, as a result of these negotiations, seem liable for the money, if they overpaid the interest on the former mortgage. The check to Mr. Powell's order, which they sent to Farley & Burt on January 12, 1900, was too small by about $40, if Mr. Powell is correct as to the terms of his extension agreement.

Farley & Burt may be also liable but, so far as this evidence shows, it must be on some other agreement. There is absolutely nothing to indicate that Stull Brothers or the plaintiff understood that Farley & Burt were joining in the agreement to furnish this money. It seems clear that there was no right to institute an action in Hamilton county against Stull Brothers on this agreement.

It is sought to justify the inclusion of Farley & Burt as defendants by the code provisions that all persons having an interest in the subject of the action and in the relief demanded (sec. 40), or "who is a necessary party to a complete determination or settlement of the questions involved therein" (sec. 41), may be made plaintiffs or, if they will not join, may be made defendants.

These provisions do not aid the plaintiff. Farley & Burt were not claiming any interest in his recovery from Stull Brothers. Their participation was in no way required to

determine whether or not Stull Brothers had carried out the agreement which the latter had confessedly made with plaintiff. To that agreement, as before stated, Farley & Burt nowhere appear as parties. They are therefore not necessary parties to a settlement of the questions involved in an action upon it. The fact that one of these firms might, if sued separately, endeavor to throw the blame on the other, does not warrant any joinder of them. Torts or contracts, to give rise to a joinder of defendants, must themselves be, at least, so far joint as to give to all the parties rights in the same subject matter. It does not appear that Farley & Burt had or claimed to have any rights in this money which plaintiff sued for. If they are liable for it, it is not by any joint agreement with Stull Brothers.

It is urged that the answer does not show that Stull Brothers were not properly served in Hamilton county, nor even that they were not residents there. But the plaintiff's petition supplies the fact of Stull Brothers' residence in Omaha, and the county judge's transcript shows service of summons on them in Douglas county. The answer alleges that there was no joint liability with Farley & Burt, and that for this reason there was no jurisdiction. We hardly think that, after trying this issue without objection, the plaintiff can say that the facts on which the attack on the jurisdiction is based are not disclosed by the answer, in connection with the record and his petition.

It is also urged that, in taking the appeal, objections to jurisdiction were waived. But assuming that a joint liability is alleged in the petition against resident and nonresident defendants, the lack of jurisdiction could only appear on a trial and a showing that the liability in fact was not joint. The question of jurisdiction must be put in issue and tried with the other issues, if at all. Doubtless, if the objection had been evident on the face of the record, defendants must raise it before pleading to the merits. But it is a settled doctrine of this court in such cases that, after raising it and having it settled against him, he may safely plead it with defenses to the merits.

Barry v. Wachosky, 57 Neb. 534. This is held to result from the provision of the code which permits a defendant to state in an answer all the defenses which he has (sec. 100). It would seem clear that defendants had the right to set up this matter and have it passed upon. They had the right to vacate the determination of it in the county court by an appeal, and bring it up again in the district court; and, when it is held against them there, they have the right to come here upon error without waiving the objection. *Hurlburt v. Palmer*, 39 Neb. 158. The case of *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211, is expressly overruled in *Barry v. Wachosky*, 57 Neb. 534.

The answer, with the petition, disclosed a lack of jurisdiction, which the proof sustained. It is true that there is no allegation, in terms, that service was made on Stull Brothers in Omaha, but it is implied in the answer, and the record so shows. It is merely alleged that there was no joint agreement. It also is alleged that for that reason there was no jurisdiction, and that Farley & Burt were made parties solely to obtain resident defendants, and so jurisdiction of the persons of Stull Brothers. The petition shows that the latter are residents of Omaha. The county judge's transcript showed service of summons on them there. Whatever may be held generally as to the necessity of pleading the facts as to service of process, in assailing the jurisdiction, it would seem that, where the pleading calls attention to and impliedly asserts a defect that the record shows, it should be upheld when attacked in another court. Who constituted the firm of Stull Brothers is nowhere alleged. Their place of business is alleged at Omaha. Service on them as a firm could only be made there. Code, section 25. The court will look to the process issued in construing pleading. *Supervisors of Kewaunee Co. v. Decker*, 30 Wis. 624. With some hesitation, we have concluded that this answer may be considered as raising the question of right to serve process in Douglas county, and that the facts of service appearing in the record may be considered in construing the pleadings.

The question of the measure of damages depends, as before stated, upon the evidence as to the real relationship of the three parties to each other. As we have concluded that there was no right to maintain the action in Hamilton county against Stull Brothers, there seems no reason to discuss that question now. In case of another action, properly brought, the evidence might be quite different.

It is recommended that the judgment of the district court be reversed, as to Stull Brothers, and the action as against them dismissed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action, as to Stull Brothers, dismissed.

REVERSED.

GERTRUDE T. EDNEY ET AL., EXECUTORS OF THE LAST WILL OF JAMES A. EDNEY, DECEASED, V. JAMES E. BAUM ET AL.

FILED OCTOBER 21, 1903. No. 13,164.

1. **Pleading and Practice:** DEMURRER. It is not error for the district court to permit answers to be withdrawn and a general demurrer to be filed, if the petition fails to state a cause of action, even if the case has been four times under consideration in this court, if no objection has been made to its sufficiency.

2. ———: WAIVER. By pleading to the merits, without raising them, a party waives all defects by way of misjoinder or defect of parties, but not the lack of jurisdiction in the court, nor that the petition does not state a cause of action. Code, section 96.

3. **Second Appeal.** Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing, will not be considered again in the same case.

4. **Jurisdiction.** The designation of cases in which the supreme court has original jurisdiction is a prohibition of it in other cases. *Bell v. Templin*, 26 Neb. 249.

5. ———: CONSENT. Consent of the parties can not confer jurisdiction of the subject matter. *Armstrong v. Mayer*, 60 Neb. 423.

6. **Executors:** TRANSFER OF ASSETS. The fact that a stock of hardware belonging to an estate is alleged to have been traded by the plaintiffs, as executors, for real estate, does not prevent the vendees getting title to the hardware stock delivered to them by the executors.

7. **Fraud of Vendee:** DAMAGES. The vendees of the hardware, having got title to the goods, are liable to an action for damages by reason of fraud used in getting the goods, if the executors elect to affirm the contract and sue for such damages.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

George A. Adams, Walter J. Lamb and *R. Cunningham,* for plaintiffs in error.

L. C. Burr and *Charles L. Burr, contra.*

HASTINGS, C.

This case, on its fifth appearance here, is brought to correct alleged errors in the sustaining of demurrers to plaintiffs' petition. Two verdicts have been rendered in the progress of the case; one for $500, which was set aside in this court at plaintiffs' instance for misconduct of the jury (44 Neb. 294); and one for $3,000, which was set aside in the district court, and the action dismissed for the reason that the plaintiffs had been discharged as executors, before the trial, and had no authority to prosecute the action. The district judge seems also to have been of the opinion that no cause of action in favor of the estate appears from the petition. Error proceedings from this dismissal were themselves dismissed in this court because no new executor or administrator had been appointed, and there was no one authorized to carry them on (53 Neb. 116). The plaintiffs, or at least Mrs. Edney, seem to have applied to the county court of Douglas county to set aside their dismissal as executors, and to have been refused. From this refusal an appeal to the Douglas county district court was taken, where their discharge was set aside, and they were reinstated as executors of the will of James Edney. From this

order the defendants, who had been permitted to intervene to resist such action, appealed to this court. Here, their appeal was dismissed because it was held that they had no interest which entitled them to say who should be executor of the will or whether there should be one (59 Neb. 147). A petition was then filed to reinstate this action in the Lancaster county district court, which was denied. Plaintiffs once more applied to this court, and procured a reversal of such action, and an order that the district court "proceed with the hearing as if no trial had ever been had" (2 Neb. (Unof.) 173).

In the district court defendants obtained leave to withdraw their answers and interposed separate demurrers. These last were all alike, and on the grounds: (1) That plaintiffs have no legal capacity to sue. (2) Defect of parties plaintiff. (3) Improper joinder of actions. (4) Not facts sufficient to constitute a cause of action. (5) No jurisdiction, because such jurisdiction was in the county court of Douglas county. The district court entered an order reciting, that the action is for damages to the estate of James Edney by misrepresentations of the value of real estate traded to Mrs. Edney, acting as executrix, for a stock of hardware belonging to the estate; that she had no authority to make such a trade, and the contract was void, and the executors could not enforce it; that their remedy was to rescind it; and, in order to do so, they must return the $14,000 in cash, which defendants paid, and deed back the lots, and this was not alleged to have been done. For these reasons, the demurrer was ordered sustained. Judgment of dismissal was subsequently entered; and, to reverse that judgment, plaintiffs come here the fifth time.

It is first urged that it was error on the part of the trial court to permit the withdrawal of the answers and the filing of the demurrers; that, the supreme court having passed upon the case as it stood, there could be no change of issues, especially as the mandate was to "proceed with its hearing" as if there had been no trial. It is also urged

that each ruling entered in the case has impliedly asserted that plaintiffs were alleging a cause of action.

This ground hardly seems well taken. It is true that, in each order heretofore made in the case, the sufficiency of the petition was assumed. It is also true that such sufficiency was not attacked. It is safe to say that it was not specifically considered. This court has repeatedly held that a petition may be assailed at any stage of the cause. *Renfrew v. Willis,* 33 Neb. 98; *Hudelson v. First Nat. Bank of Tobias,* 51 Neb. 557; *Kemper v. Renshaw & Co.,* 58 Neb. 513; *State v. Moores,* 58 Neb. 285.

Of course, if the question has once been adjudicated in terms, or by distinct implication, it is closed so far as that case is concerned. We do not think, however, that the assumption that an unassailed petition is good amounts to such an adjudication, and no case so holding is cited. Neither does it seem that the fact of the case being ordered to a "hearing as if no trial had been had" precluded any change of the issues.

The only question then before the court was, whether the case should have been reinstated on plaintiffs' petition. No question as to subsequent proceedings on such hearing was under consideration. If, as a matter of fact, there was no right of recovery alleged, the action of the trial court was eminently proper in saying so and ending, in that tribunal, this long litigation. The question was not, how the action should go on, but, whether it should go on and it be ascertained whether plaintiffs had a right of recovery or not. The lack of parties or misjoinder, if either exist, should be permitted to be corrected by amendment, and had been waived, so far as it could be done, by the answers. The trial court distinctly put its ruling on the ground of insufficiency of the facts pleaded to authorize a recovery.

The claim of no jurisdiction seems no longer to be urged. The claim of lack of capacity to sue is urged now, but seems distinctly to have been settled at the last hearing which was had in this court. It is based upon a claim that there was no jurisdiction in the Douglas county probate

court to set aside plaintiffs' discharge from their executorship, and so none in the district court to entertain any appeal from such action. It is therefore urged that the action of the Douglas county district court in setting aside such discharge is void for want of jurisdiction.

The time to urge this contention was at the last hearing, and it was evidently passed upon then. There was a distinct reversal of an upholding of this contention, and such action was final upon that point. The contention has by no means enough merit to warrant us in reversing the action then taken.

The defect of parties is on the ground of an alleged refusal and protest of Patrick Cavanaugh against being reinstated as executor. This too was evidently disposed of by the decision upon the petition to set aside the dismissal, at the last appearance of the case in this court. As is remarked in the opinion then rendered, there is no disclaimer by Patrick Cavanaugh in the record. There seems no question that this is one of the questions which, in disposing of defendants' attempt to appeal from the order reinstating the executors, Judge NORVAL said might be raised, whenever the executors should attempt to renew this action. It is clear that it was raised and decided at the last hearing, when plaintiffs' right to renew the action, and the sufficiency of their application to do so, was determined in this court, after having been refused in the district court.

There is then no ground on which the demurrers can be sustained, except the one on which the district court put its action, that the petition states no cause of action. If it does state one, then the plaintiffs, so far as the record now shows, are entitled to prosecute it. The reasons for sustaining the demurrer given by the district court are, as before stated, two: (1) That the contract was void because it provided for an exchange of goods for land by executors who had power only to sell for cash; (2) and, because the $14,000 cash paid by defendants was not returned.

Defendants are still urging both of these reasons, and add some others growing out of certain things which ap-

pear, as they say, in the "records of the cause." To bring these "records" into this present hearing, the parties have made the following stipulation:

"It is agreed and stipulated that all the records in the several transcripts and bills of exceptions filed in this action, and the facts therein stated, are to be taken and considered by this court."

It is sought, by this means, to have considered, in connection with the allegations of the petition, the probate records of Douglas county in regard to the James Edney estate. We have seen in what way it is sought to bring in questions as to the reinstatement of the executors. It further appears from these records that the stock of hardware was ordered by the county court to be sold for $14,000 cash, and was reported sold for such sum to defendants, and the sale confirmed on such report. We are asked, under the terms of this stipulation, whether there can be any recovery in this action, it being conceded that defendants paid the $14,000.

It would seem that, by their stipulation, the parties wish this court to pass upon the question of liability, under facts which are not within the record of the district court's action. That court, so far as the record shows, merely acted on the allegations of the petition. The demurrers which admit those allegations add nothing to them. Our state constitution fixes the jurisdiction of this court. It is original in cases relating to state revenue, civil cases where the state is a party, and cases of mandamus, habeas corpus, and quo warranto. In addition to this it has such appellate jurisdiction as the laws allow. Constitution, article VI, section 2. It has been frequently held that the jurisdiction of this court is limited to errors appearing in the record. *Morrill v. Taylor,* 6 Neb. 236, 252; *Frey v. Drahos,* 7 Neb. 194.

It seems clear that the only proper way to get this court to determine the effect of these additional facts upon the alleged liability of defendants, is to get them before the district court, and then here, by error proceedings from that court's decision.

We shall therefore consider simply the allegations of the petition, and if they show a liability on defendants' part in favor of plaintiffs, the trial court's action must be reversed.

The allegations are that those parties are and were, during all the time involved, the executors of James Edney, and duly qualified; that the estate had a stock of hardware in Omaha worth $31,749.90; that defendants offered to Mrs. Edney to purchase it and give in payment some lots in the city of Lincoln. That 130 lots in College Park subdivision, near Lincoln, which are described, were conveyed to her; that they were conveyed to her at $150 a lot, subject to $4,000 incumbrance; and the hardware was delivered and the lots accepted at such a value on the purchase price; that defendants took possession of the hardware jointly; that James E. Baum, acting for himself and for the other partners to cheat and defraud plaintiffs and the estate they represented, induced Mrs. Edney to come to Lincoln and, on pretense of getting her to examine a farm, took her over these lots, but distracted her attention from them, and she did not examine them with any view of trading for them; that he made various representations concerning the lots, twenty of which are set out; that these representations were false in each particular, which is set out; that Mrs. Edney, shortly after and as soon as she learned of the fraud, offered to reconvey the lots, and demanded a return of the hardware and a rescission of the trade, which was all refused; that defendants have disposed of most or all of the hardware; that the deed of the lots was made to Mrs. Edney, fraudulently, and after notice to make it to both executors. Damages are laid at $22,750 and judgment asked for that sum, interest and costs. A prayer for general relief is added.

A fair construction of this pleading is that given it by the trial judge, that it indicates the receipt by plaintiffs of about $14,000 on these goods. Does that fact, and that there is no allegation of any tender of its repayment, together with the fact that, as executors, they had no specific

authority to trade for lots, prevent any recovery, either for the goods, which are alleged to have been delivered, or for the misrepresentations which are alleged to have procured such delivery? It would seem not. The fraud of these plaintiffs, if there was a fraud, was their own. Their recovery, if they recover, is on behalf of the estate which they represent. No unauthorized individual transaction of the executors can estop their recovery in their official capacity. *Arlington State Bank v. Paulsen*, 59 Neb. 94.

That estate is entitled to its goods, if the contract was totally void, and to damages, if title to them was obtained by fraud. If the contract was void, "absolutely," as the trial court said, then the conveyance of the lots to Gertrude Edney would have nothing to do with the right to the goods. Defendants, in that case, should have returned them when they were demanded, and then proceeded to recover their money and property from whoever had it. If the contract was "absolutely void," it required no rescission, as it admitted of no ratification. If that is the situation, the plaintiffs would be entitled to recover for the estate's goods, and defendants could offset for the money paid, as far as it would go. The defendants surely can not, by their demurrers, admit that they got $3,000 of the estate's goods, admit that they turned over in payment for them 130 lots and $14,000 in money, admit that the lots were worthless, and the trade was induced by their fraudulent misrepresentations, but say to the executors, suing on behalf of the estate, your action in trading for the real estate was unauthorized on your part, the agreement was and is void, we will keep the goods, and you can get nothing for them but the money which has been paid you, and can have no damages for the fraud by which we got them.

The question which has caused us the most trouble, probably because it was the one to which counsel on either side hardly address themselves, is as to whether the contract is to be deemed void, and the conveyance of the real estate and the transfer of title to the goods as if they had

never been attempted, or whether it should be deemed merely an irregular transaction which passed title to the goods, and on which the executors could collect damages for fraud in it.

Evidently, if it was valid enough to need to be rescinded, it could be confirmed. Plainly, if a duty to rescind lay on the executors, as such, they could affirm it and collect damages, if there were any. Clearly, if the transaction was valid enough to warrant defendants in taking possession of the goods, selling a part of them and refusing on the executors' demand to return the rest, without incurring liability to the estate, it was valid enough to warrant a suit against them for fraud in bringing it about.

But what is the liability of defendants? Is it for the goods or for fraud in getting them? To be sure in either event the action of the trial court must be reversed. If defendants have no title to the hardware, there are facts enough alleged to make them liable for conversion of it. The right of possession in plaintiffs, and its denial and refusal, and conversion of the goods to their own use, sufficiently appear, if the attempted trade was of no effect. If it was effectual to pass the goods, fraud in bringing it about is also alleged. But it hardly becomes this court to say that some kind of a right is here, but what it is can not be determined. At common law the executor had the full title and *jus disponendi* of the personal estate. 1 Woerner, American Law of Administration (2d ed.), sec. 175; Schouler, Executors and Administrators (3d ed.), sec. 239; *Field v. Schieffelin,* 7 Johns. Ch. (N. Y.) 150; *Petersen v. Chemical Bank,* 32 N. Y. 21, 88 Am. Dec. 298. All of the above authorities hold that heirs, devisees or creditors have no right to pursue this property in the hands of one who has acted in good faith and in no way united with the trustee in a *devastavit.* Unless a different rule is established by statute, then, the right of disposing of these goods as if they were their own belonged to these executors. Evidently, it would not much help these defendants to try to set up a liability to the beneficiaries of this estate as a defense to the estate's direct claim.

We have in section 277, chapter 23, Compiled Statutes (Annotated Statutes, 5142), a provision for the probate judge's ordering a sale and directing the terms. This statute came from Massachusetts through Michigan, and in *Newell v. West,* 13 Blatchf. (U. S.) 114, it is held to be directory only and not to invalidate a sale made without such authority. In *Blake v. Chambers,* 4 Neb. 90, a trust estate in lands conveyed to an executor, in consideration of assets of a testator, was decreed to creditors. A similar holding in favor of heirs, in *Merket v. Smith,* 33 Kan. 66, 5 Pac. 394, construes a similar statute. The holdings of Chancellor Kent in *Sutherland v. Brush,* 7 Johns. Ch. (N. Y.) 17, and of Chief Justice Gibson in *Petrie v. Clark,* 11 S. & R. (Pa.) 377, both giving a full *jus disponendi* to executors, are said by Mr. Freeman, in his note to the former case, 11 Am. Dec. 383, to have settled the American law in this respect.

We conclude that as between these parties, on the facts alleged in the petition, and in the absence of any rescission, the defendants got title to the hardware and should respond in damages for any fraud committed by them in so doing.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

A. H. THOMPSON ET AL. v. M. J. EAGAN ET AL.

FILED OCTOBER 21, 1903. No. 13,026.

1. **Liquor License:** NOTICE. It is not necessary to republish the notice of application for license to sell intoxicating liquors after additional names are permitted to be added to the petition.

2. ———: PETITION: INFANTS. Infant children, although residents and heirs to estates of inheritance in real estate in the precinct, are not qualified signers of a petition for the sale of intoxicating liquors in such precinct.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Elberti Ready and *Cassius H. Whitney,* for plaintiffs in error.

R. J. Millard and *A. M. Gooding, contra.*

OLDHAM, C.

This is a contest over the granting of a license to sell intoxicating liquors by the board of county commissioners of Cedar county to one M. J. Eagan, in precinct No. 1 of said county. The original petition on which the license was granted purported to have been signed by forty-four freeholders of the precinct. The petition was filed June 24, 1902, and notice of the application was published as required by statute. On July 10, a remonstrance was filed against the petition. The time of hearing of the remonstrance was fixed by the board August 20, and the application was thereafter granted. The remonstrators appealed from the action of the board to the district court, and, on a hearing there, the remonstrance was dismissed and the findings of the county board were sustained. From this judgment the remonstrators bring error to this court.

The first question urged in the brief of remonstrators is that the county board had no jurisdiction to grant the license. This contention is based on the claim that the petition was not signed by a majority of the legal resident

freeholders of the precinct. As before stated, the petition purported to have been signed by forty-four freeholders of the precinct. The evidence introduced before the board showed that there were seventy-four resident freeholders in the precinct, and strongly tended to show that at least forty-two of the signers to the petition were resident freeholders of the precinct. It is urged, however, that certain of the signers of the petition subsequently signed the remonstrance to the petition, and, therefore, should have been counted as remonstrators and not as petitioners. This contention would be meritorious, if it were not for the fact that the record shows that, after signing the remonstrance, they filed a petition with the board, asking to withdraw from the remonstrance and to have their names continued upon the petition; and this leave was granted by the board before the final hearing on the remonstrance. Three other freeholders of the precinct petitioned the board, pending the hearing, to have their names added to the petition, which leave was granted by the board. It is contended that these additional names could not be added to the petition without the publication of a new notice. This identical question was before this court in *Livingston v. Corey,* 33 Neb. 366, where it was held that it is not necessary to republish a notice after the addition of names to the petition for a liquor license.

It is further contended, in the brief, that certain minor children who were heirs to estates in the precinct should have been counted among the legal resident freeholders of the precinct who had not signed the petition. We think that there is little merit in this contention. The statute never contemplated infant children, although residents and heirs to estate of inheritance in the precinct, as proper persons to sign a petition for a license to sell intoxicating liquors. This right was intended to be reserved for the full grown resident freeholders of the precinct.

Finding no error in the proceedings of the district court, we recommend that its judgment be affirmed.

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

L. W. POMERENE COMPANY v. MARY L. WHITE.*

FILED OCTOBER 21, 1903. No. 13,000.

1. **Master and Servant:** NEGLIGENCE: LIABILITY. The master is liable for the negligent act of a servant committed within the scope of, or as a necessary incident of, his employment.
2. **Liability of Master for Servant's Negligence.** Where, as an incident of employment, it is necessary for a servant to open a trap-door to perform his labor, and he carelessly and negligently leaves the trap-door open, after performing the work, and one to whom such duty is owed is injured by such negligence, the master is liable.
3. **Contributory Negligence:** BURDEN OF PROOF. Where plaintiff makes out his case without disclosing contributory negligence, the burden is on defendant to establish its existence, as an affirmative defense.
4. **Action for Injuries:** PROOF. In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries.
5. **Case Distinguished.** *Central City v. Engle*, 65 Neb. 885, examined and distinguished.
6. **Admission of Evidence:** REVIEW. Action of the trial court, in admission of evidence, examined and approved.
7. **Damages.** *Quantum* of damages examined, and *held* not excessive.

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

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

Albert G. Greenlee, contra.

OLDHAM, C.

This is an action for personal injuries occasioned by plaintiff's falling through a trap-door into the basement of

* Rehearing allowed. See opinion, p. 177, *post.*

her own dwelling house. The facts set forth in the petition and supported by plaintiff's testimony are: That plaintiff's husband had employed the defendant plumbing company to make repairs on his dwelling house, in the line of putting in plumbing fixtures and connecting the same with a bathroom; to do this work, it was necessary for defendant's servants to go under the floor of the residence; plaintiff's husband showed them a trap-door in the bathroom; raised it up for them that they might get to the place where part of their work had to be done; this bathroom was used as a closet by the family; plaintiff's testimony shows that the employees were cautioned to be careful about closing the trap-door, because of the fact that members of the family were frequently in the bathroom, which was entered from the kitchen; it appears from the testimony that the bathroom was small and very poorly lighted, so that when entering it from the well lighted kitchen, a person would not, at first, be likely to notice the open space occasioned by the raising of the trap-door; this trap-door was immediately in front of the sanitary bowl in the bathroom; after defendant's servants had entered on their work and had continued at it until the noon hour, they came up through the trap-door, left it open, and went to their dinners; before they returned to work again, plaintiff entered the bathroom, and, on approaching the sanitary bowl, fell through the trap-door, broke her right arm near the shoulder by the fall, and received other serious and permanent injuries. Under issues thus formed, the cause was tried to a jury, which returned a verdict for plaintiff for $1,000 damages; there was judgment on the verdict, and defendant brings error to this court.

The first question urged in the brief of plaintiff in error is that the court erred in not directing a verdict for defendant, at the close of the evidence. This contention is based on the theory that defendant owed no duty to the plaintiff in the matter of closing the open trap-door, and that as no duty was owed, no liability for non-performance of a duty could arise; and that, in no event, was defendant

liable for the act of the servant in failing to close the trap-door, because such a duty, even if it existed, did not arise within the scope of the servant's employment.

It is conceded that the defendant is engaged in the plumbing buisness; that it contracted with plaintiff's husband to do plumbing work on the premises; that to do the work it was necessary to go below the floor of plaintiff's dwelling, and that the trap-door in the bathroom was the only available opening through which defendant's servants could reach the place necessary to perform their service.

This court has defined negligence as "a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation." *Omaha Street R. Co. v. Craig,* 39 Neb. 601. This is perhaps as good a definition as can be ordinarily found, either in the text books or adjudicated cases. Under testimony from which reasonable minds might draw different conclusions on a question of negligence, it is always proper to submit such questions, under proper instructions, to the jury for determination; and this is just what the court did in the case at bar. We think that reasonable minds might have concluded from plaintiff's testimony that defendant's servants, in neglecting to close this trap-door, failed to do what prudent persons would ordinarily have done, under all the facts and circumstances surrounding the situation, and if we are right in this, then the question of negligence was properly submitted to the jury, if the negligent act of the servant was incident to and embraced within the scope of his employment. It is plain that when defendant's servants entered plaintiff's house they came there strictly within the scope of their employment, and to do the things which the master had directed; when they went through the trap-door into the space below the floor, to repair and connect up the different pipes, they were strictly within the line of their employment, and when they came up through the trap-door, on leaving the premises, they were doing what was a necessary incident to their employment, and any duty that these servants owed to plaintiff or her husband,

with reference to the opening or closing of this trap-door, was owed as representatives of their master. *Commonwealth v. Brocton Street R. Co.,* 143 Mass. 501. It has been held in numerous cases that, where one of the necessary incidents of an employment is the opening of a trap-door or the uncovering of a dangerous hole or excavation, the employer may be held for the negligence of the servant in not closing the door or covering the hole after the work has been completed. *Waters v. Pioneer Fuel Co.,* 52 Minn. 474; *Todd v. Havlin,* 72 Mo. App. 565; *Hughes v. Orange County Milk Ass'n,* 10 N. Y. Supp. 252.

It is further contended by plaintiff in error that a verdict should have been directed, because of the contributory negligence of plaintiff in walking into the opening caused by the raising of the trap-door. After an examination of the evidence, we can not agree to this contention. It is a well established rule in this state that, where plaintiff makes out a case without disclosing contributory negligence, the burden is on defendant to show this as an affirmative defense. In the case at bar, there is no evidence to show that plaintiff had knowledge that there was any probability of defendant's leaving their work with the trap-door open, and, in any event, the question was submitted to the jury, under a proper instruction. The jury were permitted to view the premises and heard all the testimony in the case, and we can not say that their finding on this question is wholly unsupported.

On the question of the measure of damages the court gave the following instruction:

"If from the evidence and the law given you in these instructions you find for the plaintiff, you may take into consideration the bodily pain and suffering caused by the injury, if any has been shown, and the pain and suffering which will result therefrom in the future, if you find from the evidence that such will probably be the result, also the probability of the injuries she has received being permanent and the extent, if any, to which the injury has incapacitated her for labor, also the reasonable expenses paid

or incurred for services of a surgeon or physician, made necessary by such injuries, and assess her damages in such sum as you believe from all the evidence will compensate her for the injury so sustained. You should allow no speculative damages, but such as are compensatory merely."

It is urged that so much of this instruction as permits the jury to take into consideration "the extent, if any, to which the injury has incapacitated her for labor" is clearly and prejudicially erroneous, as the husband alone would have been entitled to recover for such loss, and that this portion of the instruction is in conflict with the doctrine recently announced by this court in *Central City v. Engle*, 65 Neb. 885. The case just cited was an action by a married woman for personal injuries, in which the petition did not allege that she was engaged in any separate trade or business, but only in the performance of household duties. At the trial of the cause, plaintiff had been permitted to testify that, before the injury, her earning capacity was $7 a week, and that it was nothing at all at the time of the trial. This evidence was admitted over the objection of defendant, and the court in submitting the measure of damages told the jury, among other things, that in estimating plaintiff's damages, they should find how much money plaintiff would have been reasonably expected to earn if she had not been injured, as alleged, and how much she was, and is, and will be, able to earn with her reduced capacity resulting from the injury, and the difference between the two amounts would be the measure of this element of damage. The action of the trial court in admitting this testimony, under the pleadings, and giving the portion of the instruction before mentioned, was condemned by this court, because the pecuniary loss testified to, and submitted in the instruction, would have been recoverable in an action by the husband. The syllabus of the case, when read in connection with the point actually decided, goes no further than to hold that the pecuniary loss, for wages, sustained by a married woman, not engaged in any separate occupation or employment, can only be recoverd in an action by the husband and not in an action by the wife.

Damages recoverable in actions for personal injuries may be divided into two classes: pecuniary damages, or those which can be accurately estimated, as loss of wages, cost of medical attendance, etc.; and nonpecuniary damages, the amount of which can not be determined by any known rule, but depend upon the enlightened judgment of an impartial court or jury. In the latter class is included damages for pain, suffering, loss of reputation, impairment of faculties, etc.

In *Central City v. Engle, supra,* the pecuniary damages for loss of wages and the nonpecuniary damage for pain, suffering and permanent disability were both submitted to the jury as the measure of plaintiff's recovery, and for this action of the trial court the cause was reversed. In the case at bar, no pecuniary damages are asked because of the loss of plaintiff's wages, nor was any testimony offered tending to show the money value of such services, and the portion of the instruction excepted to appears to have been given only for consideration in determining the extent and nature of the injury. Considered from this viewpoint, the instruction is not in conflict with the decision in the *Engle* case. In states in which married women are permitted to contract for themselves and in which they are permitted to engage in business or employment in their own behalf, it has been frequently held that, in an action for personal injuries, it is proper to prove that a married woman is incapacitated from labor as the result of her injuries, for the purpose of showing the nature and extent of her disability. This rule seems founded on sound reason, because it is apparent that the mere fact that a married woman is not engaged in a separate business at the time she is injured should not deprive her of the right to recover for a disability that would ever afterwards bar her from engaging in an occupation on her own behalf. *Stutz v. Chicago & N. W. R. Co.,* 73 Wis. 147; *Powell v. Augusta & S. R. Co.,* 77 Ga. 192; *Jordan v. Middlesex R. Co.,* 138 Mass. 425; *Harmon v. Old Colony R. Co.,* 165 Mass. 100, 30 L. R. A. 658; *Metropolitan St. R. Co. v. Johnson,* 90 Ga. 500.

Objection is urged against the rulings of the trial court on the admission of evidence; these are disposed of in what has been said in support of the instructions given by the trial court, and need no further reference.

Slight complaint is made of the conduct of plaintiff's counsel in remarks made in the presence of the jury; there is nothing in the matter, however, that requires serious consideration, as the trial court checked plaintiff's counsel promptly when he attempted to go outside the record.

It is lastly contended that the damages awarded by the jury are excessive. The evidence is overwhelming that plaintiff received a most serious injury; that the fractured bone of her arm protruded through the muscles, and that the strong probabilities are that its use is permanently impaired. Under such conditions, we can not say that the damages awarded are of such a nature as to call for the interference of this court.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed March 17, 1904. *Remittitur ordered. Reaffirmed:*

Married Woman: ACTION: DAMAGES. In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might become liable therefor.

OLDHAM, C.

After a reexamination of the questions determined in the former opinion in this case, we are fully satisfied with the conclusions there reached. But our attention is specif-

ically called to the fact that, in the measure of damages submitted to the jury, plaintiff was permitted to recover for the value of medical services, and that the evidence contained in the bill of exceptions fails to show that she had expended any money for such services, or that she was the owner of any separate estate which might become liable for the reasonable value thereof. On a reexamination of the testimony, we find that this contention is well founded. We also find that the value of the medical services is shown without dispute to have been $100.

Under the rule laid down by this court in *Kocher v. Cornell*, 59 Neb. 315:

"The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract."

As the testimony in this case fails to show the existence of a separate estate owned by plaintiff, or that she has actually expended any money for medical services, under these circumstances, we are compelled to conclude that the right of action for medical services inures to plaintiff's husband and not to her, and that the instruction submitting this element of damages to the jury is unsupported by the testimony.

We therefore recommend that, unless plaintiff enter a remittitur of $100 from the judgment rendered within thirty days from the filing of this opinion, our former opinion be set aside, and the cause be reversed and remanded; but that, if such remittitur be entered, our former opinion be adhered to.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons given in the above opinion, it is ordered that, unless the remittitur of $100 be entered by plaintiff within thirty days, the former opinion of this court be set aside, and the cause be reversed and remanded; but that, if such remittitur be filed, the former opinion be adhered to.

AFFIRMED.

ABBIE E. MCKENZIE, APPELLEE, V. FRED E. BEAUMONT, APPELLANT, IMPLEADED WITH MRS. FRED E. BEAUMONT.

FILED OCTOBER 21, 1903. No. 13,055.

1. **Foreclosure:** EVIDENCE. A mortgage bearing a certificate of the proper officer showing that it was duly acknowledged before him by the mortgagor may be read in evidence without further proof.

2. ———: ———. To entitle the holder of a real estate mortgage to a decree of foreclosure, it is not necessary to show that the mortgage has been duly recorded.

3. **Tax Sale:** REDEMPTION. One who redeems from a tax sale of real estate, when he has no title to or interest in such real estate, is a mere volunteer, and such redemption gives him no claim against the owner of the land nor any lien against the land itself for the redemption money.

4. **Receiver:** DISCRETION. An application for a receiver is addressed to the sound discretion of the trial court, which discretion does not appear to have been abused in this case.

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

Hoagland & Hoagland and *James L. White,* for appellant.

Benjamin F. Hastings, contra.

ALBERT, C.

This action was brought by Abbie E. McKenzie against Fred E. Beaumont and wife to foreclose a real estate mortgage. It is alleged in the petition that one Muender executed and delivered a certain note to one Shriver, and, to secure the payment thereof, executed to the payee the mortgage in suit; that it was provided in the mortgage that, in the event of the failure of the mortgagor to pay the taxes levied against the mortgaged premises, the mortgagee might pay the same, and that the amount thus paid should be added to and become a part of the mortgage debt; that the mortgagee subsequently paid a portion

of such taxes, and thereafter indorsed and transferred the note, and assigned the mortgage and his claim for the taxes paid, to the plaintiff; that the defendant, Fred E. Beaumont, claims to be the owner of the land or to have some interest therein, but whatever rights he may have in the premises are subject to the lien of the plaintiff's mortgage. The petition contains all the allegations necessary to entitle the plaintiff to a decree of foreclosure. Mrs. Beaumont made default, and the action was subsequently dismissed as to her. The answer of the defendant, Fred E. Beaumont, is a general denial.

After the commencement of the action, the plaintiff made application for a receiver, on the ground of the inadequacy of the security. The application was resisted by the answering defendant, on the ground that the income derivable from the premises would be insufficient to defray the expenses incident to the receivership. The court granted the application, and, subsequently, upon a hearing of the cause on the merits, found for the plaintiff and entered a decree of foreclosure. The answering defendant appeals to this court from the order appointing a receiver and from the decree of foreclosure.

It is insisted that the evidence is not sufficient to sustain a decree of foreclosure because there is no proof of the execution and delivery, or the recording of the mortgage, which is the basis of the action. As far as the execution and delivery of the mortgage is concerned, the original mortgage was offered in evidence, and there is attached thereto a certificate of a notary public, showing that the same was duly acknowledged before him by the mortgagor. That entitled it to be read in evidence without further proof. Section 13, chapter 73, Compiled Statutes (Annotated Statutes, 10213). As to the failure to show that the mortgage had been recorded, we do not understand that proof of such fact is essential to a decree of foreclosure. A mortgage on real estate, other than a homestead, would be valid between the parties, though unacknowledged and therefore not entitled to record; if valid between the

parties, the court certainly would enforce it. If the courts would enforce a mortgage which is neither acknowledged nor recorded, there is no good reason why they should not enforce one which is acknowledged but not recorded. As a matter of fact, the original mortgage offered in evidence bears a certificate of the county clerk showing that it was duly recorded, but the certificate does not appear to have been offered in evidence.

It is next contended that the amount of the decree is excessive to the extent of $75.05, the amount allowed for taxes paid. The evidence upon this point is to the effect that the premises had been sold for taxes; that the mortgage was thereafter assigned to the plaintiff; that the day following such assignment, the plaintiff's assignor paid the above amount to redeem from tax sale, whereupon, a certificate of redemption was issued to him, which he assigned to the plaintiff. It thus appears that the plaintiff's assignor redeemed from tax sale after he had assigned the mortgage to the plaintiff, and it is not shown that he had any interest in the premises or that, for any reason, he was entitled to redeem. So far as appears from the record, he was a mere volunteer. That he acquired no claim against the mortgagor or the mortgaged premises by a payment of taxes or redemption from tax sale, under such circumstances, is elementary; the plaintiff, as the assignee, stands in no better position. The decree, therefore, is excessive to the extent of $75.05, the amount allowed for taxes paid.

It is also urged that the court erred in appointing a receiver. It is conclusively shown by the evidence that the value of the mortgaged premises is about $205.10, while the amount of the mortgage debt, exclusive of the amount allowed for taxes paid, is $458.71. The insufficiency of the security is therefore conclusively established. The only objection urged against the order is that the income derivable from the land does not justify it. An application for a receiver is addressed to the sound discretion of the trial court, and it does not appear that such discretion has been abused in this case.

The plaintiff appears to be willing to permit the amount allowed for taxes paid to be deducted from the amount of the decree, rather than submit to a new trial. It is therefore recommended, that the order of the district court appointing a receiver be affirmed; that the decree of foreclosure be modified by the deduction from the amount due thereon of the sum of $75.05 with interest accrued thereon at the rate fixed by the decree from the date thereof; and that the decree, as thus modified, be affirmed.

GLANVILLE and BARNES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court appointing a receiver is affirmed; the decree of foreclosure is modified by the deduction from the amount due thereon of the sum of $75.05 with interest accrued thereon at the rate fixed by the decree from the date thereof; and the decree, as thus modified, is

AFFIRMED.

CHARLES E. WILKINS V. OLIVE M. REDDING ET AL.

FILED OCTOBER 21, 1903. No. 12,210.

1. **Replevin:** PLEDGE: TENDER. Where personal property is pledged to secure the payment of a debt, the pledger can not recover the property in a replevin action without paying or tendering the whole amount of the debt and keeping good the tender.
2. **Tender.** Where the amount of a debt is not in dispute, a tender of the amount is not bad because coupled with a demand for the return of the property, but must be kept good, though it may still be on the same condition; but where the amount of the debt is in dispute, a tender of any sum less than that claimed by the pledgee, though equal to the amount actually due, is not good if coupled with such a condition.
3. **Lien:** FORFEITURE. A pledgee does not forfeit his lien by unsuccessfully contending that the equity of redemption has been extinguished by contract or by a sale under his right as pledgee.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, JUDGE. *Reversed.*

Brome & Burnett and *Charles F. Tuttle,* for plaintiff in error.

Frank T. Ransom, Carl C. Wright and *John F. Stout, contra.*

GLANVILLE, C.

The defendant in error, Olive M. Redding, brought an action of replevin in the district court for Douglas county to recover possession of a number of specified articles, claiming general ownership and right of possession thereof. Only one article was taken under the writ, but the action proceeded, without change of pleadings, as an action for damages under the statute as to property not taken by the officer, and as a simple action of replevin as to the property taken. The answer was a general denial. The parties will be called plaintiff and defendant, as they stood in the court below.

All the property in question had been placed in the possession of the defendant by the plaintiff, as security for money advanced. Counsel for the defendant, in his opening statement to the jury, recited the facts of the pledge, and also stated that he thought the evidence would show that the plaintiff had, by agreement, surrendered her title to the property in consideration of the discharge of the debt secured by the pledge; and, while claiming title to the property for the defendant, also claimed that, upon failure to establish such title by the agreement above mentioned, then the defendant would be entitled to hold the property because of his lien thereon.

A motion was made to require him to elect which defense he would stand upon, and the court indicated that he should so elect at that time. This he declined to do, whereupon the court said: "If you say you do not want to elect, you may go ahead with the case and I will see what we will do when you offer the defense."

The trial proceeded, and evidence *pro* and *con* was freely taken, which unquestionably showed the pledge of all the

property involved in the action, and tended to show an agreement to pass the title of the property to the defendant in satisfaction of the debt secured by his lien thereon. Without further requiring an election on the part of the plaintiff in error, so far as the record shows, the court instructed the jury upon the theory that the only defense available to the defendant was that of general ownership in the property involved under the contract sought to be proved by him, and refused to instruct the jury, as requested by the defendant, upon the other theory of the case, that is, if he failed to prove title, he still had his lien.

The theory of the trial court seems to have been, and that of the plaintiff is, that the claim of defendant that he first held the diamonds as a pledge, and afterwards took the title in satisfaction of the debt, is an abandonment of his lien; that his defenses are inconsistent; that his claim of title, thus derived, extinguished his lien, though in fact the title had not passed in consideration of the release of the debt.

It is contended that the plaintiff may say, "The property is all mine, with right of possession," though she has not paid the pledge, and yet forfeit no right to redeem because she fails in her proof that all interest is hers; but that the defendant, if he says, "The property is all mine, with right of possession, because I had it first in pledge, and then by contract took it for the debt," forfeits his lien if he fails of his proof, or is mistaken as to his right as to the second contract.

If the owner of a chattel mortgage attempts to foreclose and extinguish the right of redemption, and claims to have done so, the claim is as inconsistent with that of an existing lien by virtue of his mortgage as that of defendant, that he has extinguished the right of redemption by contract is with the continued existence of his right as pledgee. Yet no case can be found where our court has made such a claim on the part of a mortgagee, who has failed in his attempt to extinguish the right of redemption, a forfeiture of his mortgage lien. *Coad v. Home Cattle Co.*, 32 Neb.

761; *Rockford Watch Co. v. Manifold,* 36 Neb. 801; *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123; *Chaffee v. Atlas Lumber Co.,* 43 Neb. 224; *Callen v. Rose,* 47 Neb. 638.

Neither can any case be found where our court has held that one in possession of real property, making claim of title under void foreclosure proceedings, will be turned out of possession, until he has been paid the amount due on the lien sought to be foreclosed; nor a case where one claiming full title by deed absolute in form has been turned out without payment of the lien, when the deed is construed by the court to be only a mortgage.

Section 193 of the code provides:

"When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section one hundred and eighty-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper."

Under this, the plaintiff could proceed for damages only if she saw fit, but she is entitled only to such damages as are right and proper. Under this section, the action is not turned into one of trover; it is not permitted plaintiff to recover, unless the proof shows that defendant unlawfully detained the property at the commencement of the action.

In *Heidiman-Benoist Saddlery Co. v. Schott,* 59 Neb. 20, it is said in reference to the section last quoted:

"It does not justify a recovery without proof that the material averments of the petition are true. It does not change the rule that a litigant is entitled to affirmative relief only to the extent that the evidence sustains the facts alleged in his pleading."

The gist of the action remains the same, namely, the wrongful detention at the time of the commencement of the action.

By the testimony of the plaintiff herself, the money on the diamonds had been advanced from time to time, commencing early in 1898, in January or February. She never claimed to know the exact amount. She was quite positive

in her testimony that the amount for which one of the pieces of jewelry had been previously pledged was but $50. The evidence unquestionably shows that the defendant paid for her $157 to redeem it from the former pledge. By her own testimony she had never paid, or offered to pay, any money upon the claim except $12 at one time, which she asked him to apply as interest, and which she says he told her, afterwards, he took as interest.

Taking into consideration the entire evidence in the case, and the finding of the jury upon the evidence, we are not required to say that the defendant's claim of title was made in bad faith, nor that he, at any time, so insisted upon an absolute title that he was not willing to accept the entire amount due him upon his lien. The jury may have concluded that what he testified to as having taken place between him and the plaintiff, considering the apparent friendly relation between the parties at that time, and the plaintiff's willingness to redeem, while pleading inability to do so, and his unwillingness to accept the property instead of his debt unless he must, and the character of the property involved, was altogether too indefinite an arrangement to absolutely, and at all events, end her right to redeem. If his failure to establish his general title was because of the legal interpretation of what took place, his claim of ownership, based upon a wrong interpretation of what took place, could not have the effect of destroying his lien.

In *Lewis v. Mott,* 36 N. Y. 395, one Brown left sundry certificates with How to secure the payment of two notes. How sold the securities to Varnum. Varnum had notice of the manner in which How held the securities; and, to extinguish Brown's interest, attempted to sell, and bid them in himself; but no demand of payment had been made on Brown, nor notice of sale given to him. Brown, in writing, offered to Varnum to pay the notes, and demanded the securities. Varnum refused, and Brown assigned his claim to the plaintiff, who brought action against Mott and Varnum. The trial court held that there had been an

illegal conversion of the scrip by the defendant Varnum, and that he was liable as in an action of tort for the value of the property converted. This was reversed by the general term, and the opinion of the court of appeals sustaining the general term is in part as follows:

"There is a conclusive objection to the plaintiff's assignee recovering in this action as for a tort or illegal conversion. How, clearly, had a lien upon these securities for the payment of the amount of the two notes and interest. It must be conceded that Varnum, by the purchase of these securities from How, acquired at least the interest and lien of How, whatever that may have been; and plaintiff's assignee, to have entitled himself to a redelivery of these securities, must have tendered the amount of the lien. There was simply an offer to pay to Varnum the amount due upon these notes. It was unaccompanied by any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the possession of the notes. He could not, clearly, maintain an action for conversion unless he was entitled to such possession. Until a wrongful detention after a demand and refusal were shown, there was no evidence of a conversion. The possession of Varnum in this aspect was lawful, and its character could not be changed until some act was done which made it unlawful longer for him to retain these securities. *Hall v. Robinson,* 2 N. Y. 293. A tender of the amount due on the two notes, assuming Varnum held them as the substitute of How, might have entitled Brown to the possession of the securities. But, clearly, on no theory was he entitled to them, except upon payment of the amount of the lien, or a tender and refusal. Such tender has not been made. The offer to pay is not the equivalent for an actual tender."

This case clearly holds that the attempted sale and purchase by Varnum, and his refusal to accept payment of the debt for which the securities had been originally pledged, evidently based upon his claim of title under the sale, did not destroy his lien. Another instructive case is that of *Talty v. Freedman's Savings & Trust Co.,* 93 U. S. 321.

That was an action of replevin brought for securities pledged to one Kendig. Kendig sold the securities outright to the defendant, before the maturity of the debt, for ninety-six per cent. of their face value. A few days before the maturity of his debt, Talty called on Kendig, and offered to pay the note, and demanded back his collateral. In stating the case, the court said:

"The facts lie within a narrow compass, and, except as to the one point, which, in our view, is of no consequence in this case, there is no disagreement between them."

The disagreement which the court held to be of no consequence in the case was that Kendig insisted that by agreement he was to have the right to sell or take the claim, if he chose to do so, at ninety per cent. and had a right to sell them absolutely as he did. Talty denied this and refused to settle upon such basis, and brought his action against the defendant for the securities pledged. The court instructed a verdict for the defendant. The supreme court, in affirming the judgment, said:

"Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a pawnee for the purposes of the pledge."

The court then cite Story, Bailment, secs. 324, 327, quoting therefrom in part as follows:

"But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner; it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee.

"Whatever doubt may be indulged as to the case of a mere factor, it has been decided, that, in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

The court then cite with approval the case of *Lewis v. Mott, supra,* and continuing say: "The English law is the same," and cite *Donald v. Suckling,* L. R., 1 Q. B. 585, a case well in point, and held that the direction for a verdict for the defendant was proper. In the *Donald* case it was held: "A pledgee, who holds the pledge as security, may sell his interest therein. In such case the pledger can not recover the pledge of the purchaser without tendering to him the amount for which it was so held."

Another distinction which may be found in the case as to the necessity of a tender and keeping the tender good on the part of the pledger is between actions of replevin and actions for conversion; and it seems that to extinguish the lien so as to entitle the pledger to possession, there must be a valid tender kept good, but where there has been a conversion of the property by the pledgee, the pledger may sue for its value without tendering payment of his debt; this latter rule being based upon the proposition that to require a tender of the principal debt before action on the tort would be useless, as the amount of the debt is usually deducted from the damages. So, it seems to be held that want of tender of the debt in a possessory action will defeat the pledger's action, while, in an action for the value of the converted securities, want of tender will not defeat the action, because the debt is applied in mitigation of damages. See Colebrooke, Collateral Securities (2d ed.), secs. 165-167.

In a possessory action between mortgagor and mortgagee, this court held in *Tompkins v. Batie,* 11 Neb. 147, that an unconditional tender, kept good, is necessary to defeat the mortgagee's action, and that the evidence, "I showed him $500, and told him he could have it for his claim," showed a conditional offer, unavailing as a tender.

If the property had been taken upon the writ in this action, the plaintiff, to recover, would have been required to prove a tender made and kept good; and as the pleadings and issues are the same when the action proceeds under section 193 of the code, only the recovery being dif-

ferent, she must maintain her action by the same proof and show that defendant wrongfully detained the property at the time the action was commenced, and, as the pledge was conceded, she must prove tender kept good. She has failed to do so, and the judgment must be reversed. In view of the above holding we have not thought it necessary to discuss the claim of error in the rulings upon the admissions of testimony, nor some other assignments of error of possible merit.

We recommend that the verdict be set aside, the judgment reversed, and the cause remanded for further proceedings in accordance herewith.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the verdict be set aside, the judgment of the district court reversed, and the cause remanded for further proceedings in accordance herewith.

REVERSED.

M. L. MOYER V. RICHARDSON DRUG COMPANY ET AL.

FILED OCTOBER 21, 1903. No. 13,048.

Sale: RESCISSION: REPLEVIN. The vendor of personal property can not rescind the contract of sale and recover possession from the vendee on the ground of fraud and deceit, in the absence of fraudulent representations made by the vendee respecting some matter material to the contract, and upon which the vendor relied in making the sale and extending credit for the purchase price.

ERROR to the district court for Dawes county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

I. E. Porter and *Allen G. Fisher,* for plaintiff in error.

Albert W. Crites, W. H. Fanning, Edmond M. Bartlett, Charles L. Dundy and *Edward M. Martin, contra.*

DUFFIE, C.

January 1, 1900, M. L. Moyer, plaintiff in error, was the owner of a stock of drugs in the city of Crawford, Nebraska. On that day she sold said stock to Riley D. Richards, defendant in error, for the agreed price of $3,300, $100 in cash, the rest of the consideration being evidenced by notes of $80 each, payable monthly thereafter, the notes being secured by chattel mortgage upon the stock sold. January 1, 1901, this mortgage was surrendered and a new one executed, securing the notes then remaining unpaid. This mortgage contains the following conditions, to wit:

"Said Richards may sell and dispose of said stock and merchandise in the usual and ordinary course of legitimate retail trade, but shall keep said stock at all times renewed and filled in, so that the invoice value thereof with said furniture shall at no time be under $3,200. All stock, goods, and merchandise, and furniture, which may be added to or filled in, in said stock, is hereby declared to be as fully covered by this mortgage as though the same, and every part thereof, was in said stock, in my possession, at the date hereof."

Mrs. Moyer did not file either of said chattel mortgages; and on the trial Richards testified that it was agreed between them in effect, that they were not to be filed unless some change or difficulty should accrue in the business affairs of the mortgagor, which would make it necessary to protect the interest of the mortgagee. March 1, 1901, the note then falling due was not paid, and Mrs. Moyer, being apprehensive, as it is claimed, that goods were being surreptitiously removed from the stock, attempted to take possession on the evening of March —, 1901. It is claimed by plaintiff in error, and the evidence tends to prove, that Richards retook possession by force; and, thereupon, Mrs. Moyer commenced this action in replevin, and took possession of the mortgaged property. Prior to the trial the Richardson Drug Company and several other creditors of Richards intervened in the action, alleging that they had

sold goods to Richards, which had not been paid for; that large quantities of these goods remained in stock at the time they were replevied and put in the possession of Mrs. Moyer; that when they sold to Richards they had no knowledge, whatever, of the chattel mortgage held by Mrs. Moyer, and that credit was extended to Richards upon the faith of his full ownership of the goods; that, upon learning of the existence of the mortgage, they had elected to rescind such sales and to reclaim their property. They also alleged that in March, 1901, bankruptcy proceedings were commenced in the federal court, in Omaha, for the purpose of having Richards declared a bankrupt; that said proceedings were still pending, and no final order made thereon; that said proceedings were commenced within three months from the date that said chattel mortgage was executed and delivered to the plaintiff, and that under the federal law said mortgage was void as against the claims of the interveners. We gather from the record that petitions in intervention were filed by these creditors of Richards at some term of the court prior to the trial, and that, upon objections made by the plaintiff, the interveners withdrew their objections, with leave to file amended petitions; and objection is now made that these amended petitions were not filed within the time limited by the court. This objection was overruled, and error is assigned thereon. Relating to this, it is sufficient to say that, if the court made an order limiting the time within which the interveners might file their petitions, such order does not appear in the record. We must presume, therefore, that the action of the trial court was right, and that the petitions were filed in due time. The trial resulted in a verdict finding the plaintiff entitled to the possession of the goods in controversy as against the defendant, but the jury further found that each of the interveners were entitled to the possession of the goods and chattels mentioned in their petitions of intervention, the value of said goods being fixed by the verdict. Judgment was entered upon the verdict, and the plaintiff below brings error to this court, complaining of the judgment in favor of the interveners.

We think that these assignments are well taken. The petitions in intervention are wholly barren of any statement to the effect that any representations whatever were made by Richards to obtain credit, and there is no testimony to show that any false or fraudulent representations were made by Richards to any of the interveners or their agents upon the sale of the goods. So far as the record discloses, the interveners, in extending credit to Richards, did so in the belief that he was the owner of the stock of which he was in possession, and that no incumbrance existed against the same. This belief was not engendered by any statement made by Richards himself, or by any one for him. So far as the record discloses, Richards himself was never called upon for a statement of his financial condition. We understand the rule to be well established that, to entitle a vendor to rescind a contract of sale and to reclaim personal property after a delivery to the vendee, fraud or deceit practiced upon the vendor must be shown. Mere failure of a party to a contract to disclose material facts —that is, mere silence, without more—does not amount to fraud, if no inquiry is made by the other party. Something must be said or done to conceal the truth, or there must be a partial or fragmentary statement, or else the relation of the parties, or the nature of the subject matter of the contract, must be such as to impose a legal or equitable duty to disclose all the facts. 14 Am. & Eng. Ency. Law (2d ed.), 66; *Hamilton Brown Shoe Co. v. Milliken,* 62 Neb. 116.

We recommend that the judgment of the district court be reversed, and the cause remanded.

POUND and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

WILLIAM H. WOOLSEY ET AL. V. CHAMBERLAIN BANKING HOUSE.

FILED OCTOBER 21, 1903. No. 13,049.

Chattel Mortgage: TAXES: PRIORITIES. While the lien of a tax upon personal property is inferior to a chattel mortgage given after the taxes were levied, but before the tax books came into the hands of the collector, such mortgage is inferior to the lien of taxes levied and assessed against the mortgagor, for subsequent years, upon the property mortgaged remaining in his possession.

ERROR to the district court for Johnson county: CHARLES B. LETTON, JUDGE. *Reversed.*

Hugh La Master, for plaintiffs in error.

Lewis C. Chapman and *M. B. C. True, contra.*

KIRKPATRICK, C.

This is an action brought in the district court for Johnson county by the Chamberlain Banking House against William H. Woolsey and his bondsmen for the conversion of certain property in the possession of the banking house, the latter holding that property as mortgagee. The sheriff, Woolsey, attempted to justify under certain distress warrants for taxes due from the mortgagor. Under direction of the trial court, the jury returned a verdict for the banking house, and judgment was accordingly entered, to reverse which the sheriff and his bondsmen bring the cause to this court. This case was before this court at a former term (60 Neb. 516), where the judgment was reversed because of erroneous instructions given by the trial court. The controversy arose upon the following facts: Prior to September 1, 1892, George C. Zutavern owned certain livery stock, consisting of horses and buggies in Johnson county, and was engaged in the livery business in the city of Tecumseh. On the date named, he sold the stock to Rowcliffe & Paine, who conducted the business until November 1, 1892, at which time a sale of the stock and busi-

ness was made to the firm of Rowcliffe & Cummins, who conducted the business until July 24, 1894, at which time Rowcliffe bought out Cummins and continued the business alone until July, 1895, when defendant in error took possession of the property under its mortgages. The mortgage lien of the banking house arose in the manner following: At the time Rowcliffe & Paine purchased the business from Zutavern, September 1, 1892, they executed to him notes for the purchase price, secured by a mortgage on the property purchased. Zutavern, almost immediately, sold the notes and mortgage to defendant in error. On November 1, 1892, when the second sale was made, and the firm became Rowcliffe & Cummins, the new firm gave its notes and a mortgage, and the old notes by Rowcliffe & Paine were surrendered and, presumably, paid, although the mortgage seems never to have been released. When the firm again changed, July 24, 1894, Rowcliffe became the sole owner of the property, and he gave his individual notes to defendant in error, secured by chattel mortgage, but defendant in error still retained the notes and mortgage given by Rowcliffe & Cummins; and it is upon these two mortgages, one given by Rowcliffe & Cummins November 1, 1892, and one given by Rowcliffe, individually, July 24, 1894, upon which defendant in error must recover, if at all. On July 8, 1895, the county treasurer of Johnson county issued and placed in the hands of the sheriff two distress warrants, one against Willis Rowcliffe, for $192.68, covering personal taxes assessed against him for the years 1891, 1892, 1893 and 1894, and one against Rowcliffe & Cummins, for $29.74, assessed against the copartnership for the year 1893, and it is under these distress warrants that the sheriff seeks to justify his seizure of the property which defendant in error held as mortgagee.

The tax lists for Johnson county seem to have been placed in the hands of the county treasurer upon the dates following: For the year 1891, on September 27 of that year; for the year 1892, on September 14 of that year; for the year 1893, on October 5 of that year; for the year 1894,

on October 11 of that year. The property did not become the individual property of Rowcliffe until July 24, 1894, so that it is quite clear that the personal taxes of Rowcliffe for the years described in the distress warrant did not become a lien upon the individual property of Rowcliffe until after he purchased it in 1894; and it would appear that there could be no question but that the mortgage liens are superior to the lien of the individual taxes of Rowcliffe. It would seem, therefore, that, so far as the distress warrant in the hands of the sheriff, first hereinbefore described, is concerned, it would furnish no justification to the sheriff for taking the property out of the possession of the mortgagee.

It remains to be considered whether the distress warrant against Rowcliffe & Cummins for the year 1893 is a lien superior to that of defendant in error. The question is not free from doubt, and our attention has not been called to any decision of this court upon it, or the decision of any other court of last resort, which may be said to be an authority. The tax for 1893, mentioned, became a lien upon all the property of Rowcliffe & Cummins, including that in controversy, October 5, 1893, the date when the tax collector received the books, and defendant in error claims a lien by virtue of a chattel mortgage executed by Rowcliffe & Cummins on November 1, 1892, and also a mortgage executed by Rowcliffe after he became the sole owner of the property on July 24, 1894. The question we are, therefore, called upon to determine is, whether a chattel mortgage on property remaining in the hands of the mortgagor is a superior lien to taxes assessed against such property for succeeding years.

Section 4, chapter 77, of the revenue law provides, "that personal property shall be valued by the assessor at its fair cash value." This would seem to contemplate an assessment upon the property itself, rather than upon the interest which the person in possession might have in the property assessed. Section 139 of the same chapter provides, "that taxes assessed upon personal property shall be

a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector," which would appear to fix the lien upon all the personal property owned by the tax debtor at the time the tax books pass into the hands of the collector; not only the property upon which the tax was levied, but all other personal property owned by the tax debtor at the time. This statute does not seem to limit the lien to the title or interest which the tax debtor may have in the property, but attaches the lien to the property itself.

It is contended, on behalf of defendant in error, that, the bank having received its chattel mortgage in 1892, and long prior to the levy of the taxes for 1893, upon which the distress warrant is issued, the lien of defendant in error is a continuously superior lien to any tax that may thereafter be levied upon or against the specific property covered by the mortgage. For example, suppose A owns personal property consisting of live stock of the value of $500: He executes a mortgage upon the property to B, to secure the sum of $500, to mature at the end of five years, and retains possession of the property; that the property be regularly assessed for taxation in the hands of the owner of the property for each year, for the five years during which the mortgage ran before maturity, and even for a number of years thereafter, and that, at any time before the lien of the mortgage was barred by the statute of limitations, if the county sought to enforce its lien against the property for any of the years for which tax was due, the holder of the mortgage could claim the property, and thus defeat all tax liens that might exist: Each year the assessor might appear to tax the property, and A would say, B has a mortgage on this property for its full value, and while you may value and assess it for taxation if you desire, the county can never collect any tax until after the lien of B's mortgage is satisfied: And this might be repeated for each year, until B saw fit to take possession under his mortgage. We are unable to accept this construction of the law. We are of opinion that all property within the state is entitled

to the equal protection of the law, and is liable for its just proportion of the taxes necessary to support the government; that in the example given B must each year, as the taxes are assessed and become due upon the property mortgaged, suffer his security to be impaired to the extent of the taxes assessed, in order that the property may bear its just proportion of the expenses of government, and that the taxes assessed against the property, in whose possession soever it may be, is a lien upon the property, for the satisfaction of which the property is liable, unless the owner shall sell or mortgage it in the usual course of business, before the tax list for any particular year reaches the hands of the collector, in which event, the taxes for the year in which the sale was made might not be collected unless from other property of the tax debtor. We conceive that the doctrine is sound, that the owner of the property may sell or mortgage it at any time after the tax has been assessed and before the tax has become a lien upon the property under the law. No other construction could be entertained, without seriously interfering with the free exercise of the right to sell and dispose of property, and the purchaser or mortgagee, having no way to ascertain the amount of tax assessed against the property, would, except for such construction, be wholly without protection. But, after the tax list has been placed in the hands of the collector, the rule is otherwise, and the purchaser or mortgagee can, by an inspection of the records, ascertain the amount of taxes which are a lien upon the property he is about to purchase, and if the mortgagee retains the mortgage through succeeding years, leaving the mortgagor in possession, the tax for each succeeding year, as it matures, becomes a lien superior to that of the mortgage. We are unable to perceive any reason why the rule should be essentially different concerning taxes upon personal property than it is upon taxes affecting real estate. It is true, that, by the terms of the statute, taxes upon real estate are made a specific lien upon the property assessed, from and after April 1, of each year; but while there is a somewhat

different wording of the statutes affecting personal property, there is no language requiring a different construction. It has always been conceded, in this state, that taxes upon real estate, assessed for the year subsequent to the execution and delivery of the mortgage, become, for each succeeding year, a lien superior to the mortgage, and the holders of real estate mortgages have always understood that they must protect the mortgaged realty by the payment of taxes, or suffer the loss of their lien. So with the lien upon personal property. We are of opinion that the tax assessed against personal property, in each succeeding year, becomes a lien superior to the lien of a chattel mortgage, executed during a prior year.

It is contended, by counsel for defendant in error, that, at the former determination of this case, there was a ruling contrary to the conclusion we have reached. We do not so read that decision. The question now presented was not in the case when it was here before, and the doctrine announced in that decision can be considered authority only so far as it was necessary for and applicable to the questions presented. We are unable to find any decision of this court, or any statute of this state, in conflict with the conclusion we have announced, and it follows that the lien for the taxes against Rowcliffe & Cummins, for the year 1893, was a lien superior to that of defendant in error, and that the peremptory instruction of the court was, to that extent, wrong, requiring a reversal of this judgment. It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

JOSHUA PALMER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORNELIUS VAN AUKEN, APPELLEE, V. WILLIAM MIZNER, APPELLANT, ET AL.*

FILED NOVEMBER 5, 1903. No. 11,553.

1. **Bill of Exceptions:** AUTHENTICATION. This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions but in no way authenticated as such by the certificate of the clerk of the lower court.

2. **Practice:** FORMER DECISIONS. Being a question of practice, the many former decisions of this court adjudicating this question will be adhered to without critical investigation of the grounds on which they rest.

3. **Rehearing:** RECORD. A rehearing will not be allowed because of technical defects in the record, not urged by counsel upon the hearing, but when a rehearing has been allowed because of doubt of the correctness of the decision on the questions determined, the cause stands for hearing as though no former decision had been made, and the court will not consider papers appearing with the transcript but not authenticated as a part of the record.

4. **Review:** PLEADINGS. If, after the issues are made up in the lower court by petition, answer, and reply, an amended answer is filed containing allegations not denied by the reply, and the cause is tried in the lower court, and presented in this court, on the theory that the reply stands as a reply to the amended answer, it will be so considered by this court.

APPEAL from the district court for Saline county: WILLIAM G. HASTINGS, JUDGE. *Motion for rehearing denied.*

Archibald S. Sands and *E. M. Palmer*, for appellant.

Fayette I. Foss, Ben V. Kohout and *R. D. Brown, contra.*

SEDGWICK, J.

Upon this motion for rehearing, it is insisted that the opinion of the commissioner, to the effect that the document purporting to be a bill of exceptions can not be considered upon this appeal, because the same is not suffi-

* See former opinions, 2 Neb. (Unof.) pp. 899 and 903.

ciently identified by the certificate of the clerk of the district court, ought not to be adhered to.

It is suggested that in the case of *Wax v. State,* 43 Neb. 18, this court, after holding that such a certificate is indispensably necessary, still examined the bill of exceptions in that case, although not properly certified, because no objection had been made thereto by motion to quash or otherwise, and passed upon the sufficiency of the evidence to support the verdict. The same thing was done by this court in a similar case, *Childerson v. Childerson,* 47 Neb. 162.

These cases would seem to furnish some support to this argument of the appellant if the contrary doctrine was not so thoroughly established by other decisions. Our attention has been called to more than a score of decisions of this court which hold the contrary doctrine. The forty-seventh volume of the reports alone contains at least seven of these cases. In *Felber v. Gooding,* 47 Neb. 38; *Childerson v. Childerson,* 47 Neb. 162; *First Nat. Bank of Greenwood v. Cass County,* 47 Neb. 172; *Romberg v. Hediger,* 47 Neb. 201; *Wood Mowing & Reaping Machine Co. v. Gerhold,* 47 Neb. 397; *Andres v. Kridler,* 47 Neb. 585, and *Sieberling & Co. v. Fletcher,* 47 Neb. 847, it is held that an unauthenticated document purporting to be a bill of exceptions need not be examined by the court.

In *Chicago Lumber Co. v. Benjamin,* 50 Neb. 143, and *Gray v. Elbling,* 51 Neb. 727, it is held that a document not duly authenticated by the clerk as the bill of exceptions "is not before us for inspection."

In *Reuther v. Zimbleman,* 50 Neb. 165, such a document is said to be "not available." In *German Nat. Bank of Beatrice v. Terry,* 48 Neb. 863, it is held that an unauthenticated document "can not be considered" as a bill of exceptions; in *Union P. R. Co. v. Thorne,* 51 Neb. 472, that "it must be disregarded"; and in *Royse v. State Nat. Bank,* 50 Neb. 16, that "the court can not review the evidence."

The observance of the rule has, no doubt, in many cases deprived litigants of a hearing in this court, and it is al-

ways with reluctance that a reviewing court, through the observance of technical rules, declines to hear the merits of a controversy that is brought before it, but, in this case, we are constrained to adhere to the former judgment, not only by the many prior decisions of this court referred to, but also by the fact that the rule so established is not without reason for its foundation, as well as precedents from other jurisdictions.

Under the former practice, when cases were brought to this court by proceedings in error, the bill of exceptions, after having been allowed by the court, and duly filed, and so becoming a part of the record in the case, was copied in full by the clerk in making his transcript of the record which formed the basis of the proceedings in error in this court. By the statute of 1881, 587*a* of the code, it was provided that a party desiring to remove a cause to this court by proceedings in error might use the original bill of exceptions, the purpose apparently being to avoid the extra expense of procuring a copy thereof, and it was further provided that in such case the clerk in his certificate to his transcript should certify that the original bill of exceptions was attached, instead of certifying that the transcript included a copy of such bill.

Many of the cases above referred to were brought to this court under that statute; and the certificate of the clerk not showing, either that the bill of exceptions had been copied in the transcript according to the former practice, or that the original bill of exceptions had been attached to the transcript, as might be done under the present statute, and there being no authentication of the bill of exceptions as the original bill, it was considered that such purported bill of exceptions was "a mere fugitive" in the record, and the same rule would apply to it as would be applied to any other paper that might be found in the record, and was not, by any certificate of the clerk, identified as any part of the record. If the clerk certified upon the transcript that it contained a true copy of the original pleadings in a case, but made no mention of any motion

or demurrer, and a paper should be found in the record which purported upon its face to be a motion or demurrer, and was not authenticated or identified by the clerk as an original paper in the case, or a copy thereof, such supposed motion or demurrer could not be considered by the reviewing court. This is the uniform doctrine of reviewing courts, and the statute referred to applies this rule to bills of exceptions. The fact that the bill has been allowed and settled by the judge, and has his signature attached thereto showing such allowance, is not a compliance with the statute in question.

The statute applies with no less force to actions brought to this court by appeal. The statute providing for such appeals requires the appellant to file with this court a certified transcript containing the evidence, and the statute of 1881, in authorizing the use of the bill of exceptions in such cases, does not change the rule making the evidence an essential part of the record in cases brought to this court by appeal.

In *Schuyler v. Hanna,* 28 Neb. 601, it was held that an appeal to this court might be taken upon a transcript which contained the judgment appealed from, although it did not contain the evidence, modifying *Jefferson County v. Saxon,* 10 Neb. 14, and apparently some earlier decisions of this court, but this does not weaken the force or application of the statute which requires the clerk of the court to authenticate the original bill of exceptions when the same is not copied into or identified by his transcript. The case of *Yates v. Kinney,* 23 Neb. 648, is expressly overruled in *Romberg v. Folken,* 47 Neb. 198, and is necessarily overruled in the many other decisions above referred to, as, also, are some others of the earlier cases which apparently held a different doctrine.

2. The appellants urge that this court ought not to have vacated the first judgment because of the defective certification of the bill of exceptions, and that after having done so, the case having again been argued on its merits, the court ought not, on its own motion, to refuse to con-

sider the bill of exceptions. But the rehearing was not granted because of defective certification of the bill of exceptions, but because of grave doubts of the court as to the correctness of the first decision upon the questions therein determined, and after the rehearing had been allowed for that reason, the case stood for hearing before this court as though no former decision had been made therein.

3. It is also strenuously insisted by the appellants that another hearing should now be granted because, if the bill of exceptions be striken from the record, the judgment of the lower court is not supported by the pleadings. The record discloses that after the issues had been made up in the lower court by petition, answer, and reply, the defendants therein amended their answer, and added allegations which, if sustained, would entitle the defendants to a decree in their favor. No further reply was filed by the plaintiff, and it is insisted that these additional allegations of the answer were therefore confessed by the pleadings. This contention can not be sustained, because the issues were manifestly tried in the lower court upon the theory that the allegations and general denial of the plaintiff's reply applied to the amended answer, and that the allegations of the answer were, therefore, denied by the pleadings.

The parties having so tried the case in the lower court, and having submitted it to this court upon that theory, the rule is a familiar one, and has often been declared by this court, that the pleadings will be so considered here.

The motion for rehearing is overruled.

REHEARING DENIED.

JAMES K. LANE V. JAMES NEWTON SPENCE.

FILED NOVEMBER 5, 1903. No. 13,156.

Husband and Wife: ALIENATION OF AFFECTIONS: DAMAGES. In an action by a husband against his father-in-law for alienating the affections and enticing away the wife of the former, such damages

only are recoverable as are the natural and probable consequence of the act complained of, or are due to the negligence or wrongful conduct of the defendant connected therewith.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed.*

George H. Hastings, Fayette I. Foss and *Ben V. Kohout,* for plaintiff in error.

E. S. Abbott and Ray Abbott, contra.

AMES, C.

This action was brought by the defendant in error, hereafter called plaintiff, against the plaintiff in error, James K. Lane, and Anna L. Cave and William Britton, to recover damages for having, as is alleged, alienated the affections of and enticed away the plaintiff's wife. Lane was the father of the wife, Mrs. Cave was her sister and Britton was her brother-in-law; and the wrong complained of was alleged to have been committed by "the defendants and each of them," but they are not explicitly accused of having acted in conspiracy, and counsel for the plaintiff disclaims an intent to charge conspiracy and says that the petition, properly interpreted, does not contain that charge or, in other words, allege that the parties acted in concert, although the conduct of each, of which complaint is made, was contemporaneous with that of the others. It is further alleged, and seems to have been proved on the trial, without contradiction, that the wife did leave her husband's home on the 14th day of August, 1901, being at that time about four months advanced in pregnancy, and did not thereafter return. The petition contains the following further allegation:

"That after the aforesaid enticing by the said defendants, and while the said Ada Mabel Spence was apart from her husband, as aforesaid, and under the control and direction of these defendants and each of them, an abortion was performed upon the person of the said Ada Mabel

Spence, just how, when and by whom, this plaintiff is not advised, which abortion was performed in such a rude and unskilful manner as to cause her death, as aforesaid, in the city of Lincoln, Nebraska, on the 24th day of October, 1901."

The answers, so far as they are pertinent to the present inquiry, consisted of general denials. A trial resulted in a verdict and judgment in favor of the defendants Cave and Britton; and in favor of the plaintiff, and against the defendant Lane, for damages. Lane alone prosecutes this proceeding in error. There was evidence offered and admitted as tending to show that Lane had been guilty of the conduct of which he was accused, the sufficiency of which we are not, however, at present called upon to consider, and there is also evidence tending to show that on or about the 20th day of October, 1901, the wife submitted, at Lincoln, Nebraska, to a criminal abortion from the results of which she died on the 24th day of that month.

One of the errors complained of is the admission of this evidence over objection, and we think the assignment is well made. It is neither alleged nor proved that the defendant, Lane, consented to, or had any knowledge of, this criminal act, or even knew of his daughter's pregnancy, and it is not contended by counsel for plaintiff that it, of itself, afforded him a cause of action, but it is urged that evidence of it is admissible in aggravation of the husband's damages for the enticing away of his wife, of which the jury have found the defendant guilty. If it could be said that the abortion was the natural and probable consequence of the act complained of, or that it was due to any negligent or wrongful conduct by the father towards his daughter while she was in his custody and after her separation from her husband, there would be much to be said in support of this contention. But there is no evidence of the latter, and we think no presumption in support of the former of these suppositions.

After the separation, the wife remained but briefly at her father's house, going thence to Beatrice, and from there

to some point in Rosebud Indian agency in South Dakota, and from the latter place to Lincoln, Nebraska, where the operation was performed, if at all—for the evidence is in conflict—immediately upon her arrival. She is not shown to have returned to the home of her father after leaving it as above mentioned, and he does not appear to have afterwards seen her in life, or to have communicated with her, except briefly, by telephone, while she was on her way to Lincoln. But this circumstance is not commented on in brief of counsel and was admitted, on oral argument, to be of little or no significance. There is therefore an entire absence of evidence that the criminal act of the wife, if she committed one, was induced by the negligence or wrongful conduct of her father and, as we have said, we do not see that such an act was the natural or probable consequence of her separation from her husband.

There are other alleged errors assigned, but as the foregoing is sufficient, in our opinion, to require a reversal, we do not think it necessary to discuss them.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

ANTHONY MARTIN V. CATHERINE MARTIN ET AL.

FILED NOVEMBER 5, 1903. No. 13,103.

1. **Foreign Will:** PROBATE: PRESUMPTION. The proof and allowance of a will in another state, where the testator had his domicile at the time of his death, if duly authenticated, will be presumed to be in accordance with the laws of that state.

2. **Pleading and Proof.** It is not necessary to specially allege the

foreign statute, or to expressly prove that the proof and allowance of the will was in accordance with such statute.

ERROR to the district court for Thayer county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

T. C. Marshall and *M. H. Weiss,* for plaintiff in error.

O. H. Scott and *M. S. Gray, contra.*

HASTINGS, C.

The sole question in this case is as to the sufficiency of the showing of a probate of a will in Pennsylvania to warrant its admission to probate in this state under sections 144, 145 and 146, chapter 23, Compiled Statutes (Annotated Statutes, 5009, 5010, 5011). It is objected that the evidence failed to show that the will had ever been probated and allowed in Pennsylvania, at least, not by any officer or court known to our law, and there was no allegation or proof of any different law in Pennsylvania, and it is objected that such record as there is conclusively shows a noncompliance with the requirements of the Nebraska statutes. It appears that the testator died on March 11, 1886, and that letters testamentary were issued and order of probate made on the 16th of the same month. There is some complaint of the refusal on the part of the trial court to permit an amendment to the objections to the probate of the will; but these objections can not be considered here, as neither the proposed amendments nor the reasons for making them appear in the record and, practically, the sole question is, whether or not the probate in Pennsylvania and its authentication were sufficient to warrant the county court, and the district court on appeal, in admitting the will to probate.

The statutes under which the Nebraska courts were acting are sections 144, 145 and 146, chapter 23 of the Compiled Statutes (Annotated Statutes, 5009, 5010, 5011), as follows:

"Sec. 144. All wills which shall have been duly proved

and allowed in any of the United States, or in any foreign country or state, according to the laws of such state or country, may be allowed, filed and recorded in the probate court of any county in which the testator shall have real and personal estate on which such will may operate, in the manner mentioned in the following sections.

"Sec. 145. When a copy of such will, and the probate thereof, duly authenticated, shall be produced by the executor or other person interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in the case of an original will presented for probate.

"Sec. 146. If, on hearing the case, it shall appear to the court that the instrument ought to be allowed in this state as the last will and testament of the deceased, the copy shall be filed and recorded, and the will shall have the same force and effect as if it had originally been proved and allowed in the same court."

The whole matter seems to turn on the authentication of the Pennsylvania record. We have examined it with some care. It recites the appearance of the two subscribing witnesses to the will "before me, John S. Bare, register for the probate of wills and for the grant of letters of administration in and for Huntingdon county," and the taking of other evidence as to the authenticity of the will, and of the fact of the testator's death, and that "thereupon letters testamentary were granted" to the executor. The evidence given by the witnesses is recited. The register then appends his certificate as follows:

"COMMONWEALTH OF PENNSYLVANIA, } SS.
COUNTY OF HUNTINGDON.

"I, B. Frank Godard, register for the probate of wills and granting letters of administration * * * in and for said county, hereby certify that the within and foregoing is a correct copy of the last will and testament of Michael J. Martin, late of Tod township, deceased, with the probate attached and all matter touching the same, so full, true and

entire as the same remains on file and of record in the register's office of said county, in Will Book No. 11, page 16," etc.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said office at Huntingdon, Pennsylvania, this 11th day of March, A. D. 1902.

"(SEAL.) B. FRANK GODARD, *Register.*"

The record of probate is further authenticated as follows:

"I, John M. Bailey, presiding judge of the twentieth judicial district, composed of the counties of Huntingdon, Mifflin and Bedford, Pennsylvania, do hereby certify, that B. Frank Godard, register of wills, by whom the annexed record, certificate and attestation were made and given and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the register's office of said county, was at the time of so doing, and now is, register of wills in and for the said county of Huntingdon in the commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts, as such, full faith and credit are and ought to be given, as well in the courts of judicature, as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer. JOHN M. BAILEY, *Presiding Judge.*"

The authentication seems to us to be sufficient. Our statutes in reference to this matter were copied from the state of Michigan and we find in *Wilt v. Cutler,* 38 Mich. 189, record of probate almost identical with this, and without the authentication of the district court, is held sufficient to show jurisdiction of the officer, and it is held that it will be presumed that his action in taking the probate was regular. We think the fact of the jurisdiction of the register is sufficiently shown by these attestations, and, if the register had jurisdiction of the subject matter, his proceedings will be presumed regular and valid in the state of Pennsylvania, and consequently everywhere. 2 Free-

man, Judgments (4th ed.), sec. 411, citing 1 Wharton, Law of Evidence (3d ed.), sec. 99, declares that courts of probate are among those included in the terms of the act of congress providing for the authentication of judgments The Nebraska statute (ch. 23, secs. 143-145) in giving validity to a foreign will which shall have been "duly proved and allowed * * * according to the laws of such state or country," and for action upon such probate when "duly authenticated," can hardly have intended that any less presumption of compliance with law should attach to the "duly authenticated" probate record than does to any other judicial record. It does not seem that it was necessary to specially plead the Pennsylvania statute, or to prove it. The presumption of regularity follows its "due authentication." *Otto v. Doty,* 61 Ia. 23. As is held in *Wilt v. Cutler, supra,* the absence of a former allowance or probate is immaterial if the record as a whole shows that the will was "allowed and probated."

It is recommended that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

CHARLES WESTON, AUDITOR, V. ROBERT RYAN.

FILED NOVEMBER 5, 1903. No. 13,314.

1. **Constitutional Law.** "Changes or modifications of existing statutes, as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by section 11, article III of the constitution." *De France v. Harmer,* 66 Neb. 14.
2. **General and Special Laws.** It is for the legislature to determine as to the applicability of a general law to a given emergency, and as to the consequent propriety or otherwise of a special law.
3. **Act Constitutional.** This court will not undertake to say as to the

act of February 23, 1887, under which the ballots as to the adoption of the amendment to section 4, article III of the state constitution, were counted, and the result declared, that a general law would have been applicable, and that the act in question was therefore unconstitutional.

4. **Legislative Acts.** Something more than mere irregularities and improprieties in declaring the result of an election should appear, to warrant this court in attempting to set aside the solemn acts of the legislative bodies and the executive of the state as to the fundamental law of the state, especially after such legislative and executive action has been acquiesced in for sixteen years.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Frank N. Prout and *Norris Brown,* for plaintiff in error.

Robert Ryan, Charles O. Whedon and *Hector M. Sinclair, contra.*

HASTINGS, C.

In this case, the plaintiff below filed in the district court for Lancaster county a petition for an injunction, alleging that the defendant is auditor of public accounts; that he is about to prepare and issue warrants to the members of the state legislature of 1903, for their pay during the last twenty days of the session, at $5 a day; that warrants had already been drawn for the rest of the session at that rate; that the constitutional amendment of 1886 was never adopted by a majority of the votes at the election of that year; and that the legislature of 1887, in a joint convention, canvassed the votes on that proposed amendment, and declared that it had been defeated; that such result was correct, and was final, and is still in full force. He also alleged that he was a resident and taxpayer of Lancaster county, Nebraska, and would be compelled to contribute toward the payment of these warrants, and had no legal remedy.

The defendant, Weston, answered: (1) That the petition showed no cause of action. (2) Admitting the plaintiff was a resident and taxpayer of Lancaster county,

Nebraska, and defendant the auditor of public accounts. (3) Admitting the issuance by defendant of warrants for forty days' pay to the legislature, at $5 a day, and that he had drawn, and was about to issue, vouchers for the other twenty days of the session of the legislature, at $5 a day. (4) Alleging that the constitution of the state of Nebraska provides for a sixty days' session of the legislature, and compensation of the members at the rate of $5 a day. (5) Denying each and every of the other allegations of fact.

The sole question of fact in these pleadings is, whether or not the constitution of the state of Nebraska provides for compensation of $5 a day to members of the legislature, that is, has the amendment of 1886 become an integral part of the constitution? For the purpose of trial, the parties agreed that, under the constitution of 1875, members of the legislature were to have $3 a day for a session of forty days; that, at the general election of November 2, 1886, there was duly submitted to the voters of the state an amendment, whereby each member of the legislature, thereafter, should have $5 a day, for a session of sixty days; that copies of abstracts of the votes from the several county clerks, filed in the office of the secretary of state, showed 65,712 votes for the amendment, and 22,236 against it, and a total vote of 138,511 in the state, at that election; it is further agreed that the legislature on January 15, 1887, in joint convention, canvassed these copies, and declared that the amendment had been lost, and adjourned; that on February 15, 1887, senate file 255, entitled, "An act to provide for a recount of the ballots cast for and against the legislative amendment on the 2d day of November, 1886, and to declare the result," was introduced in the senate; that it passed both houses of the legislature, was signed by the proper officers, and was approved by the governor; that two senators and three members of the house were appointed members of the board provided for by this act; that they reported to the governor that an inspection of the ballots and poll books, used at the election, showed 72,497 votes for the amendment, and 22,135 against

it, and of those not voting 27,778, and of those voting both ways 16,013; that the board also reported to each house of the legislature, recommending another joint convention for the purpose of opening and counting returns made to the secretary of state and the speaker; that a joint convention of the two houses was held, and, at this convention, the following resolution was adopted, namely:

"*Resolved,* That the action of the joint session of the legislature, whereby the proposed amendment was declared not carried, be rescinded, and that the record of the same be stricken from the journal."

That the speaker proceeded to canvass the vote, with the following result:

For the legislative amendment.....	72,497
Against the legislative amendment..	22,135
Those voting "no"	27,778
Those voting for and against.....	16,013
Total voting for and against.....	138,423

That, from the report to the governor submitted to the joint convention, Blaine, Sioux and Loup counties were omitted, no returns having come in from those counties under the act of February 23, 1887; that Sioux county held no election, there being no return of such election in the secretary of state's office; that on March 2, 1887, the governor issued his proclamation, reciting the submission of the proposed amendment, the report of the committee declaring the amendment adopted by a majority of all the votes cast at the election, and that said amendment was, thenceforth, a part of the constitution of the state of Nebraska.

The district court, on examination of the stipulation and of the pleadings, concluded that the sole question for determination was as to the constitutionality of the act of February 23, 1887 (p. 69, ch. 2, laws of 1887). It found this act unconstitutional, because it was special legislation, and a general law would have been applicable. Constitution, sec. 15, art. III, last clause. A decree, per-

petually enjoining the auditor from issuing any warrant for this portion of the legislators' salaries, was entered. To reverse this decree, the auditor brings error. Section 15 of article III of the state constitution absolutely forbids special legislation as to certain subjects. Its last clause is as follows:

"In all other cases where a general law can be made applicable, no special law shall be enacted."

It is conceded that the act in question is special legislation, as, indeed, it could hardly be denied. It is claimed that a general law would have been applicable, and the act of February 23, 1887, is therefore unconstitutional. It is also claimed that the act in question is obnoxious to section 11, article III of the constitution:

"No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed."

It is claimed that, since the effect of the act of February 23, 1887, was to suspend, until the completion of the legislature's recount, the provisions of sections 34-43, chapter 26 of the Compiled Statutes, providing for the preservation and custody of votes and poll books, and no reference is made to this provision, and they are not repealed nor included in the act, therefore the act is unconstitutional.

As to this last contention, it seems sufficient to say that the act of February 23, 1887, makes no attempt to amend the other act. It simply supersedes those sections of it for a limited time. The provision of section 11, article III of the constitution, as to amended laws, is not considered to have any application to an act complete in itself, even though the latter does conflict with prior statutes. *Bryan v. Dakota County,* 53 Neb. 755; *State v. Moore,* 48 Neb. 870; *De France v. Harmer,* 66 Neb. 14.

Was the act of February 23, 1887, unconstitutional and void, because of its being special legislation, where a general law would have been applicable?

As to this question, the position taken by the defendant at the present time is, that the legislature is the sole judge

as to whether or not a general law would be applicable under a given situation; that the final clause in section 15, article III, is merely advisory, and that the legislature must determine how it could meet the emergency. A large number of cases are cited in support of this contention. The latest one to which attention is called is *Sanitary District of Chicago v. Ray,* 199 Ill. 63. This case applies the identical constitutional provision which is appealed to in the present case, and holds that it is addressed to the legislative branch of the government, alone, and the court can not review the question whether the act is void, as violating this provision. The Illinois case is in accordance with the uniform holding of that state since 1859 in the construction of this constitutional provision. *Johnson v. Joliet & C. R. Co.,* 23 Ill. 202; *Wilson v. Board of Trustees of Sanitary District of Chicago,* 133 Ill. 443; *Murray v. Sanitary District,* 136 Ill. 489. The cases indicating a similar holding in Arkansas, Colorado, California, Florida, Indiana, Kansas, Missouri, New York and North Dakota are gathered in 10 Cent. Dig., col. 1425. Contrary holdings are cited in an early case in Iowa (1859) and in *State v. Newark,* 40 N. J. Law, 71. In many cases where the question of applicability of a general law is held to be addressed to the legislature alone, it is on the ground of the impossibility of judicially controlling the legislative discretion in a matter expressly left to the legislature's determination. There seems no reason to depart, in this case, from the almost uniform holding that the question, as to whether or not a general law is applicable in a given instance, is for the legislature and is not a judicial one.

It remains to be said that, if we felt at liberty to pass upon this question, and were compelled to hold that the act of February 23, 1887, is unconstitutional and void, it would not, in our opinion, by any means, follow that the amendment is not a part of our state constitution. In the recent case of *Taylor v. Commonwealth,* 101 Va. 829, 44 S. E. 754, the supreme court of Virginia holds that their state constitution of 1902, having been acknowledged and ac-

cepted by the officers administering the state government and by the people and being in force without opposition, must be regarded as an existing constitution, irrespective of the question as to whether or not the convention which promulgated it had authority so to do, without submitting it to a vote of the people.

In *Brittle v. People,* 2 Neb. 198, is a similar holding as to certain provisions of the Nebraska constitution of 1866, which were added by the legislature at the requirement of congress, though never submitted to the people for their approval.

In the present case, it appears from the stipulation that the legislature examined the ballots and, on a count, found and declared, through the second joint convention, that enough of them had been cast in favor of the amendment to adopt it. The executive department of the state acted upon this declaration, and proclaimed it to be a part of the state constitution. The only requirement named in the constitution itself is that the amendment shall have been submitted in the manner prescribed, and shall have received a majority of all the votes cast at that election. The stipulation of the parties, in this case, contains a clause that this amendment was duly submitted, and another that the legislature, on a recount, declared that it had received the required number of votes. The same stipulation, it is true, says that there were "copies of abstracts" on file in the secretary of state's office showing that it had received some 3,500 less than a majority of the total votes. It would seem that the admitted fact of the presence of these abstracts, which there was no law for applying to the constitutional amendment, comes very far short of a showing that the ballots, certified to have been found by the legislature and this board, did not exist. It is true that the county clerk had, so far as appears, no interest in falsifying these copies of abstracts. It is true that the members of the legislature were acting on the question of their own time of service and the amount of their own compensation; but it seems to

us clear that the question of the adoption, and the consequent validity of this amendment, depends upon the number of votes it received, and that after sixteen years it is too much to ask us to set it aside, not on the ground of any actual lack of votes, but on the ground of irregularity, informality and impropriety in the manner in which the vote was counted and the result declared. We are inclined to the opinion that, if the act of February 23, 1887, was entirely void, the amendment would still remain a *de facto* portion of the constitution until it should be affirmatively shown that the alleged recount was false, and that the ballots declared by it did not exist, and that the amendment did not in fact receive a majority of all the votes cast at that election. No such showing was attempted by the plaintiff in this action, and it seems to us, as above remarked, that informalities and irregularities in declaring the result of an election should not be held to avoid an important portion of the framework of our state government which has been acquiesced in for sixteen years.

It is recommended that the judgment of the district court be reversed and the action dismissed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed.

REVERSED.

The following syllabus and opinion were prepared by Commissioner AMES:

1. **Submission of Constitutional Amendment.** The submission by the legislature to the electors of a proposed constitutional amendment is not a legislative act. In making such a submission, the legislature act in a capacity strictly analogous to that of a constitutional convention and are subject to such constitutional restrictions and limitations, only, as have direct reference to the exercise of that power.

2. **Constitutional Law.** An act is not obnoxious to the constitutional inhibition against special legislation, if the subject with which it deals is special and particular in its nature.

3. **Amendment to Constitution:** POWER OF LEGISLATURE. When a pro-

posed constitutional amendment has been duly submitted to the people without prescribed regulations with reference to the manner of counting, canvassing or returning the ballots, or ascertaining or authenticating the result of the election, it is competent for the legislature to provide by special enactment for so doing.

AMES, C., concurring.

I desire to state, as briefly as possible, though unavoidably at considerable length, some of the reasons why, in my opinion, the injunction applied for in this action ought not to have been granted.

Counsel for the relator question the validity of the act of the legislature of February 23, 1887, entitled, "An act to recount the ballots cast for and against the legislative amendment on the 2d day of November, 1886, and to declare the result," for two reasons: First, that the act is special legislation, and in violation of section 15, article III, of the constitution; second, that it is amendatory of chapter 26, entitled "Elections," of the Compiled Statutes of 1885, and is in violation of section 11 of said article, because of failure to set forth and repeal the provisions amended.

Inasmuch as this chapter 26 confessedly does not treat, even inferentially, of the counting or canvassing of votes cast at elections on constitutional amendments, the latter objection does not seem to call for comment. If counsel are in earnest in urging the former objection, it is surprising that they did not direct their assault against a possible point of attack occurring earlier in the history of the transaction.

The measure adopted on the 5th day of March, 1885 (p. 435, ch. 124, laws of 1885), is without an enacting or a repealing clause, and bears the following title: "An act for a joint resolution to amend section 4, article III, of the constitution of the state of Nebraska." This title, so far from "clearly expressing" the subject treated of in the body of the document, makes no reference whatever to the submission of a proposed amendment to the electors, although by a proviso at the end thereof a form of ballot to

be used at such an election is prescribed. If the object of the constitutional requirement as to title is, as has been frequently held, to inform the public of the nature and subject matter of measures pending before the legislature, the title in question not only failed of that object but was positively misleading, because the citizens, being supposed to know the law, and to know that the legislature were without power to amend the constitution, as the title purported that they were about to attempt to do, may well have looked upon the whole procedure as a farce, and so have omitted, what they would otherwise have done, to oppose it before the legislative bodies and committees. Why then have not counsel assailed this measure, or at least that part of it prescribing the form of ballot, as being unconstitutional and void, and insisted not only that there was no lawful counting or canvassing of the ballots cast at the election of 1886, but that there were no lawful ballots on the subject, cast at such election, to be counted? Plainly and obviously because the act of submitting a proposed constitutional amendment to the electors, is not an act of legislation at all.

Section 1, article XV, of the constitution is as follows:

"Either branch of the legislature may propose amendments to this constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published at least once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election, adopt such amendments, the same shall become a part of this constitution. When more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately."

In my opinion, this provision is self-executory, and no

legislation or regulation is indispensably requisite to carrying it into effect. The legislature, in proposing an amendment to the constitution, acts in a capacity in strict analogy to that of a constitutional convention. When the proposed measure has received the concurrent consent of three fifths of the members elected to each branch of the legislature, it is, *ipso facto,* submitted to the people for their approval or rejection at the next general election. It can not be repealed or revoked at either the same or a subsequent session, and the electors can not be deprived of a right to vote upon it, either by a failure to prescribe a form of ballot or to regulate the counting, canvass or return of them, nor even by a neglect or refusal of the executive department to make the required publication of it. There are notable, in this connection, two maxims lying at the foundations of the American republics. One is, that they are governments simply and solely by law and not at all by men; and the other is, that the people are the sole source of legislative power and that, in those respects in which they have reserved the right of direct legislation, they supersede all other law-making authorities whatsoever, and are not subject to any limitations or restraints of any description not self-imposed. These maxims have been the subject of much variously illuminating comment of late years, but I am unaware that they have been authoritatively repealed or abrogated.

At the time this joint resolution was passed and at the time of the ensuing general election, there was no regulation providing a method of ascertaining the result of the vote. That it was equally competent for the legislature to embody such a regulation in the resolution, as it was to prescribe therein the form of the ballots, does not appear to me to be open to doubt, but their failure in this respect did not invalidate the election or deprive the will of the voters of its potency. When the legislature of 1887 met, there had been held a lawful election, but there was, and had been, no lawful method for ascertaining and authenticating its result. To supply this omission was the imperative

duty of the lawmakers; and that purpose was accomplished by the act assailed by the relator. Even if the adoption of this act is properly regarded as the exercise of legislative functions, still the measure is not open to the criticism of being a special act. It was as general as was the subject matter with which it dealt. Normal schools, hospitals, asylums and such like educational and eleemosynary institutions under state patronage and control, are not required to be authorized by legislation general in form, and it would be strange if a specific constitutional amendment could not be proposed or adopted except in obedience to prescribed regulations not found in the constitution itself and enacted by general law. It is urged as a *reductio ad absurdum* that if the act in question is valid, a board of canvassers might have been constituted of road supervisors. The illustration is equally apt and unconvincing. A board might lawfully have been composed of such persons, or of deputy oil inspectors or game wardens, but we are not bound to presume that such a commission would have been less capable or trustworthy than that which was in fact created. It is enough to say that the composition of the board was a matter within the exclusive discretion of the legislature.

For the foregoing reasons, it is recommended that the judgment of the district court be reversed and the action dismissed.

OLDHAM, C., concurring.

In my judgment the question as to whether general legislation is applicable to a particular condition rests in the sound, rather than the arbitrary, discretion of the legislature. It seems to me, that the duty of canvassing and declaring the result of the election on the proposed constitutional amendment presented a question of procedure not at that time covered by general legislation, and created an emergency sufficient to authorize special legislation, if such were necessary, for the purpose of determining the will of the people, as expressed by the votes cast

at the election on the amendment. I think, however, that entirely independent of the question of the regularity or irregularity of the manner in which the result of the election was ascertained, the constitution itself is self-executing, in declaring that the vote of a majority of those present and voting at the election should adopt a proposed amendment properly submitted by the legislature. It is conceded that the amendment was properly submitted; that an election was held, and that votes were cast both for and against the proposed amendment. The legislature, acting within the scope of its apparent authority, attempted to and did canvass the returns of this election and, presumably, after a recount of all the votes cast for and against the amendment, declared the amendment to have been adopted. Proclamation of this result was made by the executive branch of the government. The result was and has been acquiesced in by all departments of the state government for sixteen years before the institution of the instant case; consequently, I think, we would not be justified in overturning the annex to the framework of our state government attached by this constitutional amendment, short of clear and convincing proof that a majority of the voters voting at the election did not vote for the adoption of the amendment.

JOHN FLANAGAN, APPELLEE, V. JOHN MATHIESEN ET AL., IMPLEADED WITH JOHN C. JACOBS ET AL., APPELLANTS.

FILED NOVEMBER 5, 1903. No. 13,056.

1. **Presumption of Grant of Lands:** PRESCRIPTION. A grant of lands may be presumed from acts of exclusive use and continuous occupation for ten years or more, when such use and occupation is accompanied by a claim of ownership.

2. **Appeal:** ERROR. On an appeal in an equity proceeding, error can not be predicated on the action of the trial court in the admission of evidence.

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

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Hugh Myers, William B. Ten Eyck and *William A. Saunders,* for appellants.

Charles W. Haller and *Benjamin E. B. Kennedy, contra.*

OLDHAM, C.

This is a suit instituted by plaintiff, John Flanagan, against numerous defendants who are the holders of the record title to various lots and blocks in Boyd's addition to the city of Omaha. The material facts underlying the controversy are that, at and prior to the year 1866, Edward B. Taylor was the record owner and in possession of the northeast quarter of the southeast quarter of section 4, township 15, range 13 east, in Douglas county, Nebraska. Some time during the year 1866, John Flanagan, plaintiff in this cause of action, took possession of this tract of land by consent of the record owner. Proof as to what the agreement was under which he took possession is very meager on account of the fact that Taylor had departed this life before suit was entered to quiet this title, and, consequently, plaintiff was disqualified as a witness to the conversation which he had with Taylor at the time he went into possession of the land. The only evidence bearing on this question, contained in the record, is that of Edward A. Taylor, son of Edward B. Taylor, deceased, who testified that "He (meaning his father) told us that he put John (meaning plaintiff) in possession there; that he was going to garden there and in fact farm the land." The only other evidence which may or may not properly throw light on the understanding and agreement between the elder Taylor and plaintiff at the time possession was taken of the land was elicited from plaintiff's wife on cross-examination, who in answer to the question: "Now, did this all belong to the same party?" said: "Forty acres belonged to A. B. Taylor and he gave it all to John for John's hire."

Outside of this testimony, the evidence showed that the plaintiff, who is a colored man and illiterate, had been in the employ of the elder Taylor some time before possession of the land was turned over to him, and that after plaintiff had taken possession of the land, he remained there continuously and cultivated the entire tract of land each year until the year 1885, at which time he conveyed by warranty deed the west half of the tract to one Elmer G. Cochran, who took possession under this deed. It is also in evidence that the land appeared to be of small value at the time the plaintiff took possession of it, and that plaintiff has always resided on the east half of the forty-acre tract of the land.

In 1870, one of the defendants, James E. Boyd, purchased the record title to the east half of this tract of land on which plaintiff resided, and subsequently surveyed and platted this portion of the land as blocks 5, 6, 7, 8, 17, 18, 19 and 20, of Boyd's addition to the city of Omaha, and duly filed his plat for record; that he subsequently conveyed many of the lots now in controversy to various defendants or their grantors. There is some evidence in the record that stakes were driven over the land by the surveyor when the survey was made, and defendants' testimony tends to show that the intersecting streets were marked by furrows plowed through the land. The plowing of the land is disputed by plaintiff, and the testimony is not very certain on this question. There was also evidence that boards were placed on the streets in front of these lots advertising them for sale. Plaintiff, however, denies that he ever noticed any of these boards and says that he could not have read the notices even if they had been there. It clearly appears that, after the land was platted as an addition, plaintiff cultivated it continuously down to the time of the trial of the cause in the court below. The taxes on the land appear to have generally been paid by the record owners and not by plaintiff. Defendant, Hans P. Hansen, the record owner of lot 1, block 17 of the addition, appears from the evidence to have taken actual

possession under his deed and to have held the same by himself and his grantees for more than ten years, and the title to this lot was accordingly quieted in the defendant, and no complaint is made of this action of the trial court. Another defendant, Marcus A. Post, who is the record owner of lot 6, block 5, of the addition, likewise established his claim by his record title and the actual possession under it, and this lot was accordingly quieted in him, and of this action no complaint is made. Defendants Belinda M. Engles, Oliver Otis Howard, Minerva C. Tisdale, James E. Boyd, John G. Jacobs, Lillian M. Maul, George J. Weaver, Matthew J. Riley, Peter Swan, Charles P. Coy, and John B. Robinson filed answers in which they asserted ownership in lots 1, 2, 7 and 10, block 5, lots 6 and 7, block 6, block 7, lots 9 and 10, block 17, and lots 1, 2, 3, 8 and 9, block 20, of the addition; all the other defendants named in the petition defaulted, and the court below quieted the title in all the lots in controversy in plaintiff, with the exception of the two lots quieted in defendants Hansen and Post. From this decree all the answering defendants, except Hansen and Post, have appealed to this court.

The contention of appellants in this case is that the evidence, as a whole, shows that plaintiff was holding the land in dispute by permission and not adversely to the claim of the various record owners. We have examined patiently a voluminous record of testimony for the purpose of arriving at an independent conclusion as to what the evidence actually shows. With reference to the nature of plaintiff's holding, this examination reveals the fact that plaintiff has occupied the lands now in dispute since the year 1866; that each year he has cultivated the lands in farm products and vegetables; that if any streets were marked out by plowing furrows through this addition, the plaintiff either did not notice such markings or deliberately plowed over the intersecting streets and alleys and has actually cultivated the entire tract of land for more than thirty years before the bringing of this action. In addition to this the evidence shows that plaintiff has conveyed a number of

lots in the Boyd addition and that he claimed and received damages from the Belt Line Railway when that road was extended through a portion of the lots claimed by him. This claim was made in 1886. While he does not appear to have been a prompt and cheerful taxpayer on the various lots and blocks now in controversy, the evidence does show that he paid the taxes on the west half of the 40-acre tract when he conveyed that portion to Cochran, and also that he paid some taxes on certain of the lots within the Boyd addition. We think that this long continued possession coupled with such acts of ownership is sufficient within itself to raise the presumption of a grant from the record owner of the lands. *Burdick v. Heivly,* 23 Ia. 511; *Commonwealth v. Low,* 3 Pick. (Mass.) 408; *Casey's Lessee v. Inloes,* 1 Gill. (Md.) 430, 39 Am. Dec. 658; *Cannon v. Phillips,* 34 Tenn. 211; *Candler v. Lunsford,* 4 Dev. & Bat. (N. Car.) 18. We are inclined to this view, because from an early day the statute of limitations has been looked upon with favor by the courts of this state as a statute of repose against stale demands, and occupancy of lands, coupled with claim of title and acts of ownership, such as farming and cultivating the soil continuously for a period of ten years or more, has been held sufficient to quiet the title, whether the occupancy is under color of title or not, and whether the original possession was with or without the permission of the record owner. *Gatling v. Lane,* 17 Neb. 77.

Under this view, the next question to determine is whether or not the presumption of ownership arising from this long continued possession and use of the lands is overcome by evidence sufficient to show that the holding was permissive and servient to the title of the record owner. The only evidence in the record relied upon by appellants to sustain this claim is the testimony of E. A. Taylor that his father had said: "He (meaning his father) told us that he put John (meaning plaintiff) in possession there; that he was going to garden there and in fact farm the land." While this evidence tends to show that plaintiff

went into possession of the lands by consent of the record owner, there is nothing in it necessarily inconsistent with the idea that plaintiff was to use and occupy the lands as his own or that he was taking them under an agreement of purchase, since the witness also testified that he had known of plaintiff's occupying the lands ever since the year 1866. We therefore conclude that the legal presumption of ownership attached to plaintiff's long possession and use of the lands is not overcome by the testimony of this witness.

Being satisfied that the judgment of the district court is supported by the clear weight of the testimony, we do not deem it necessary to determine what, if any, weight should be given to the testimony of plaintiff's wife in answer to the question propounded to her on cross-examination. Her legal interest in the property in dispute clearly disqualified her from testifying against the administrator, executor or privies of the deceased with reference to the conversation with the deceased concerning this land, and whether this disqualification was fairly waived by the question propounded to her on cross-examination is very doubtful under the state of the record. Be this as it may, no error can be predicated on the admission of the testimony, as the cause was equitable in its nature and is brought here for review on appeal and not by petition in error. As we regard the evidence fully sufficient to establish the adverse nature of plaintiff's holding through all the term of his occupancy of the lands, without considering the answer to this question, we recommend that the judgment of the trial court be affirmed.

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

CITY OF OMAHA V. HELEN HODGSKINS.

FILED NOVEMBER 5, 1903. No. 13,069.

1. **Taxes:** SPECIAL ASSESSMENTS. The provisions of section 144, article 1, chapter 77, Compiled Statutes, 1901, apply to special assessments as well as to taxes levied for general purposes.

2. **Statute:** METROPOLITAN CITIES. *Held.* That the provisions of this section were made applicable to cities of the metropolitan class by the repeal of section 69 of the charter of metropolitan cities in 1891.

3. **Title of Act.** The title, "An act to provide a system of revenue," is broad enough to include provisions for special assessments.

4. **Illegal Taxes:** ACTION. A taxpayer who has complied with the provisions of section 144, article 1, chapter 77, Compiled Statutes, 1901, may bring an original action against a city or county to recover illegal taxes paid, without filing his claim before the city council or board of county commissioners.

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

Carl C. Wright and *William H. Herdman,* for plaintiff in error.

Henry W. Pennock, contra.

OLDHAM, C.

The material averments of the petition filed in this case are: That the city of Omaha is a city of the metropolitan class; that on November 10, 1899, December 20, 1899, April 9 and 12, 1900, respectively, plaintiff and her assignors paid to the city, under protest, certain illegal special taxes and assessments theretofore levied and assessed by the city against and upon the real estate owned by the plaintiff and her assignors; that, within thirty days after each of said payments, due demand was made in writing for the return of the same; that said payments have never been refunded or returned, and that each and all of said special taxes and assessments, so paid, were illegal and void. At the trial of the cause, the city ob-

jected to the introduction of any evidence, because plaintiff's petition failed to state a cause of action; the objection was overruled, and judgment was rendered for plaintiff for the amount of the special taxes and assessments paid, and the city brings error to this court.

It is conceded that the taxes paid are illegal and that they were paid under protest, and that demand was made in writing upon the treasurer for the return of the taxes before suit was instituted, so that the issues presented to this court are of law and not of fact.

The first contention is that section 144, article 1, chapter 77, Compiled Statutes, 1901, on which the action is founded, does not authorize the recovery by suit of special taxes and assessments paid under protest. This contention is based on the theory that the words "any tax" used in this section does not authorize a suit for special assessments. This position, however, we think flies in the face of the decision of this court in *Wilson v. City of Auburn,* 27 Neb. 435, in which it was held that the provisions of this section applied to special assessments as well as taxes levied for general purposes; again, in the act itself, a tax is defined as "any tax, special assessments, or costs, interest or penalty imposed upon property." Compiled Statutes, 1901, ch. 77, art. 1, sec. 182. Hence the plain language of the statute itself indicates the intent of the legislature to apply its provisions to special as well as general taxation.

It is further contended that, even if the provisions of section 144, *supra,* are applicable to special assessments by cities of the first and second classes, these provisions can not be made to apply to cities of the metropolitan class. The reason assigned is that the charter of metropolitan cities went into effect March 30, 1887, and section 144, *supra,* went into effect on the following day. The charter of 1887 provided a particular mode of paying special assessments under protest, and for an action to recover the same, and made that remedy exclusive, thereby taking it out of the general law. The city further argues that when

the metropolitan charter went into effect there was no statute providing for the payment, under protest, and recovery of illegal special assessments, and, as an exclusive remedy was provided in the charter, it could not have been the intention of the legislature, at the same session, to provide an independent remedy. The trouble with this contention is that section 144 was originally enacted as a part of the revenue act of 1879, and in its original form it contained all the provisions relied upon in this action, and, by the act of 1887, it was simply amended so as to cover a different class of cases; in other words, what is denominated in the section, the first mode of paying taxes under protest, was added to the original section, and the amendment did not change the second or old method of paying taxes under protest, as contained in the original section. So that, when the charter of metropolitan cities took effect, there was a general provision for payment under protest, and recovery of special assessments; consequently, when section 69 of the charter of metropolitan cities, which provided a special method of paying taxes under protest, was repealed in 1891, it left the general law applicable to cities of the metropolitan class, as well as cities of other classes.

It is next urged that the title of the act of 1879, which is, "An act to provide a system of revenue," is not broad enough to include special assessments, and, consequently, that the portion of the act referring to special assessments should be declared void, as not having been fairly expressed in the title of the bill. Cases are cited in which the word "revenue" has been confined in a restricted sense to taxes and assessments for purely governmental purposes, as distinguished from those levied where a direct return is made to the citizen. With the reasoning of these cases, under the facts litigated, we have no quarrel, but none of them go to the question of the sufficiency of the title of an act, providing for a system of revenue, to include a provision governing special assessments. This presents the question, whether, for the purposes of upholding or defeating the ends of legislation, the word "revenue" should be construed,

in its generic sense, to include all the money raised by any form of taxation or, in its restricted sense, to only apply to taxes levied for general purposes. This question was before the supreme court of Kansas in the case of *State v. Ewing,* 22 Kan. 708, to determine whether the title of "An act to provide revenue," etc., was broad enough to include a provision with respect to the annual income of the state, derived from interest and rent of the school fund. In disposing of the case, the court said:

"Preliminarily we remark, as conceded law: First, that courts will not, upon mere doubts of its constitutionality, declare a law invalid. The conflict with the constitution must be manifest. Second, mere awkwardness of expression does not overthrow a statute. The substance, and not the form, governs. Third, the intent determines the scope and effect of a statute. It may restrict or enlarge the ordinary meaning of language. Not that an unexpressed intent is law, but a manifest intent interprets the words used. Not infrequently the 'letter killeth, but the spirit giveth life.'

"The act of 1879 is entitled 'An act to provide revenue,' etc. Now, how broad is the term 'revenue,' and what may be included in such a title? Does it mean simply funds raised by taxation, and is the levying of taxes all that may be included? Such would seem to be the views of the counsel for the state, but we can not think them correct. One of the definitions given by Webster of the term is 'the annual yield of taxes, excise, customs, duties, rents, etc., which a nation, state or municipality collects and receives into the treasury for public use.' The word is broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner."

We think the rule of liberally construing the title of an act for the purpose of upholding its constitutionality is in harmony with a long line of decisions of this court. *Rosenbloom v. State,* 64 Neb. 342; *In re White,* 33 Neb. 812; *Affholder v. State,* 51 Neb. 91.

The only other question urged is that plaintiff should have filed her account with the city council and, if its payment were denied, she should have prosecuted an appeal to the district court, instead of bringing an original action. This question was decided against the contention of the city in the recent case of *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274. The action there was brought against Chase county originally, without filing the claim with the board of county commissioners, and it was held that the statute requiring the filing of claims with the county board did not apply to claims of this nature, and that an independent action might be prosecuted against the county after the steps required by section 144 had been taken by the taxpayer.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

JOHN A. JOHNSON, TRUSTEE OF THE ESTATE OF NELS L. ANDERSON, A BANKRUPT, V. LEWIS ANDERSON.

FILED NOVEMBER 5, 1903. No. 13,106.

1. **Bankruptcy:** RECOVERY OF ASSETS: PLEADINGS. In an action by a trustee in bankruptcy to recover the proceeds of the property of the bankrupt paid over to a creditor on a judgment in completed attachment proceedings in his favor, within four months of, and before the filing of the petition in bankruptcy, it must be alleged in the petition that the preference was received by the creditor having reasonable cause to believe that the bankrupt was insolvent, and, by suffering the attachment proceedings and judgment to be taken against him, thereby intended to make a preference.

2. **Evidence:** SUFFICIENCY. Evidence examined, and found insufficient to sustain a judgment in favor of the plaintiff under the provisions of subdivision *f* of section 67 of the national bankruptcy act of 1898.

3. **Preference.** The trustee in bankruptcy may recover money paid by the bankrupt as a preference, only, when the person receiving it had reasonable ground to believe that a preference was intended.

4. **Amendment.** *Held*, That the court, in the exercise of a reasonable discretion, properly refused to allow the plaintiff to amend his petition, where the amendment tendered failed to allege that the defendant, to whom a payment was made by the insolvent, within four months before the filing of the petition in bankruptcy, had reasonable ground to believe that by such payment the bankrupt intended a preference.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Affirmed.*

William P. Hall and *Hector M. Sinclair,* for plaintiff in error.

Samuel A. Dravo, John L. McPheeley, John M. Stewart and *Thomas C. Munger, contra.*

BARNES, C.

This action was commenced in the district court for Phelps county by John A. Johnson, trustee of the estate of Nels L. Anderson, a bankrupt, against Lewis Anderson, defendant in error, to recover the value of certain property of the bankrupt which the defendant caused to be attached and sold for the payment of a debt due to him from said bankrupt within four months of the filing of the petition in bankruptcy. The petition was framed to recover under section 67*f* of the national bankruptcy act of 1898 (U. S. Compiled Statutes, vol. 3, ch. 7), which provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the

estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided,* That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The length of the plaintiff's petition precludes us from copying it in full, and it is sufficient to say that it alleges in substance that for a number of years prior to November 8, 1900, the bankrupt resided in Phelps county, Nebraska; was principally engaged in buying, feeding and selling live stock; that while carrying on that business he became and was indebted in various amounts to divers persons, and while so indebted, his creditors, on November 8, 1900, filed their petition in the district court of the United States for the district of Nebraska, for the purpose of having him adjudged a bankrupt under and by virtue of the laws of the United States; that he was so adjudged a bankrupt on the 16th day of February, 1901; that on the 12th day of June, 1901, the plaintiff was appointed trustee of said bankrupt; that he duly accepted such appointment, qualified, and since said time has been acting as trustee of said bankrupt estate (then follows a list of the different creditors and the amounts due them from the bankrupt, aggregating about $35,000), and it is alleged that no part of these claims have been paid. It was further stated that the trustee had not sufficient funds in his hands to pay the claims, and that the amount of the assets and money in his hands for that purpose was less than $500. It was then alleged that the defendant, on the 23d day of July, 1900, and within four months of the filing of the petition in bankruptcy, filed his affidavit for an attachment,

and procured thereon a writ of attachment to be issued out of the district court for Phelps county, by which the defendant seized and attached the goods and chattels of the bankrupt (describing them), of the value of $4,000, and caused them to be sold under said attachment proceedings; applied the proceeds to his own use and fails, neglects and refuses to account for and turn over to the plaintiff the said property, or its value. It was further alleged that the defendant on the 26th day of July, 1900, and within four months of the filing of the petition in bankruptcy, filed his affidavit for an attachment and procured thereon a writ of attachment to be issued out of the district court for Dawson county, by which there was seized and attached a large number of cattle, the property of the bankrupt (describing them); that thereafter such proceedings were had that said property was pretended to be sold under said attachment proceedings on the 16th day of October, 1900, to the defendant; that the property so taken was of the value of $2,500; that defendant thereupon converted the said property to his own use, and fails, refuses and neglects to account to, turn over or pay to the plaintiff the value of the same, or any part thereof, though often requested so to do. It was further alleged that on or about the 31st day of July, 1900, and within four months of the filing of the petition in bankruptcy, the defendant filed his petition against the bankrupt in the district court for Arapahoe county, Colorado, and procured a writ of summons to be issued out of said court by which, and through collusion with one Willard Smith, defendant seized and obtained property of the value of $1,000 of the said bankrupt, and through said process issued out of the district court defendant obtained possession of the $1,000 of lawful money of the United States, and converted the same to his own use, and has refused to pay the plaintiff said money, or any part thereof. It was further alleged that at the time of the institution of the various attachment proceedings and garnishment proceedings the bankrupt was insolvent, and has remained insolvent ever since. The plain-

tiff prayed for a judgment against the defendant on his several causes of action for the sum of $7,500, together with interest and costs.

The answer was a general denial, and contained the further allegation that the attachment proceedings referred to in the petition were in all respects regular; that the property in question had been sold by order of the court, and the proceeds of such sale paid to defendant before the filing of the petition in bankruptcy; that the judgments and proceedings of the court in said case were in all respects regular, and remained unreversed, unappealed from and unmodified in any particular. The reply was a general denial. The case was tried to a jury upon the following stipulation of facts:

"It is hereby stipulated by and between the parties that on November 8, 1900, a petition was filed in the district court of the United States, in and for the district of Nebraska, for the purpose of having said Nels L. Anderson adjudged a bankrupt; that said proceedings were involuntary. That on the 16th day of February, 1901, said cause came on for hearing before said court, and upon the petition and the evidence the said court duly adjudged said Nels L. Anderson a bankrupt; said judgment is still in force and effect. That on the 12th day of June, 1901, the plaintiff was duly appointed trustee of said bankrupt's estate, accepted said office and qualified, and since said time, and now is acting as trustee of said estate. That at the times hereinafter mentioned, said Nels L. Anderson was insolvent, but it is not admitted by defendant that defendant knew, or had reason to believe, that said Nels L. Anderson was insolvent at the said time. That on July 26, 1900, the defendant filed his petition in the district court for Phelps county, the prayer of which was to recover the sum of $2,900 from Nels L. Anderson. That at the same time he filed his affidavit for an attachment, and procured a writ of attachment to issue thereon, which he caused to be levied upon certain personal property of Nels L. Anderson, to the amount and value of $2,125,59.

That on the 12th of October, 1900, said cause pending in the district court for Phelps county, was heard before the court, a jury being waived, and the defendant recovered judgment on his said petition, in said court, for $2,190.80, and that he had an order of sale of the attached property on the same date. That on the 24th of October, he caused to be sold the attached property, under said order of sale, and received therefor the above mentioned sum, $2,125.59. That the ground of the attachment was that said Nels L. Anderson had absconded with the intent to defraud his creditors. That the attachment proceedings in all things were regular upon their face, and the proceedings of the sale, less $68.50, $67.75 and $58.75, expenses and costs of the sale, were paid over to the defendant Lewis Anderson on said 24th day of October, 1900. That on the 26th day of July, 1900, said Lewis Anderson filed his petition in the district court for Dawson county, against Nels L. Anderson, the object and prayer of which was to recover judgment upon said petition for the sum of $1,000; that at the same time he filed his affidavit and procured a writ of attachment to issue thereon against the lands, tenements, goods and chattels of said Nels. L. Anderson, in said county, and under said writ attached the property of said Nels L. Anderson, valued at the sum of $712.25. That on the 17th day of September, 1900, the cause came on to be heard in the district court for Dawson county, a jury being waived, said Lewis Anderson recovered on his said petition a judment against Nels L. Anderson, for the sum of $812.58, and the attached property was ordered to be sold by the said court at said time, and the proceeds of such sale ordered applied to the payment of said judgment. On October 16, 1900, said property was sold for $712.25. The expenses charged for selling said property were $79.25, and the remainder, $633, was received by said Lewis Anderson at said time, the indebtedness sued upon in Dawson county being for certain indebtedness due and owing from said Nels L. Anderson to defendant Lewis Anderson, other than for the indebtedness sued upon, or for, in Phelps county, Nebraska, as hereinbefore stipulated.

It is further stipulated that said proceedings in attachment in Dawson county were in all things regular upon their face. That on the 31st day of July, 1900, said Lewis Anderson began an action in the district court for Arapahoe county, in the state of Colorado, against Nels L. Anderson, for the purpose of recovering $1,500 from said Nels L. Anderson; that at the same time he filed his affidavit for attachment, and procured a writ of attachment and garnishment, and garnisheed under said process one W. M. Smith, a resident of Denver, Colorado, and obtained upon said garnishment the sum of $840; that said money was procured on the 31st day of July, 1900, and on the first day of August, thereafter, said suit and attachment proceedings were dismissed without proceeding to judgment; that said money so obtained was the property of the said Nels L. Anderson; that all the property attached, as already stipulated, was the property of Nels L. Anderson, the bankrupt.

It is further stipulated that the said sum of money so received from said Smith, in said proceedings, instituted in Arapahoe county, Colorado, was upon indebtedness due and owing from the said Nels L. Anderson to defendant Lewis Anderson, being indebtedness other than the amount of indebtedness sued for in Dawson county and Phelps county as hereinbefore stipulated. About the 28th day of October, 1900, the fact of the receipt of the said $840 by Lewis Anderson, the defendant, and the indorsement of the same upon the note held by him against the said Nels L. Anderson, was brought to the attention of said Nels L. Anderson, and the same was consented to and approved by him.

It is further stipulated that, during all the attachment proceedings heretofore referred to, said Nels L. Anderson was absent from the state of Nebraska, and his whereabouts unknown, and that he had no knowledge whatever of such attachment proceedings.

It is further stipulated that at the present time there are, in round numbers, $35,000 in debts that have been

presented and allowed by the referee in bankruptcy against the said Nels L. Anderson, and that the assets of said estate, outside of these suits in action, amount to not to exceed the sum of $1,500; that the gross amount sued for in the rights of action is $12,000.

Said stipulation is modified as follows:

"That the property sold in Phelps county under the attachment proceedings was $1,054, sold at the sale held on October 24th; that there was a readvertisement and sale of the remainder of the property on November 8, at 10 o'clock A. M., to wit, $693.80; and that there were hogs sold previous to the sale, but not at public sale, to the amount of $377.79, but sold by the sheriff of Phelps county at private sale, and that the return of said sale was not filed in the office of the clerk of the court until November 12, 1900, and that the proceeds of said sales were paid to the defendant Lewis Anderson at the close of such sales, and that said sale was advertised to begin at 10 o'clock A. M. November 8."

After introducing the stipulation in evidence the plaintiff moved the court to instruct the jury to return a verdict in his favor, and the defendant filed a motion asking the court to direct the jury to return a verdict for him. Before the court ruled upon either of these motions the plaintiff asked leave to amend his petition by inserting therein the following: "That said attachment proceedings and steps taken thereunder were for the purpose of obtaining a preference by said defendant, Anderson, over the creditors of said Nels L. Anderson, bankrupt." This request was refused, and plaintiff excepted. Thereupon the court overruled the plaintiff's motion, sustained the motion of the defendant, and the jury, by the direction of the court, returned a verdict for him. Plaintiff thereupon prosecuted error, and now contends that the court erred in his rulings on both motions, and in directing a verdict for the defendant.

The first question which requires our consideration, is the sufficiency of the petition. It will be observed that it

contains no allegation that the petition in bankruptcy was filed before the proceeds of the attachment sales were paid over by the sheriff to the defendant. When a writ of attachment has been fully executed and the proceeds paid over to the creditor, the provision of said section 67, subdivision *f*, does not apply. That provision applies only when the rights of the creditor exist by way of *liens;* the section does not reach cases where property or its proceeds are no longer held under the writs. The language is, "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent * * * shall be deemed null and void." The United States district court *In re Blair,* 4 Am. B. Rep. 220, held: That where the allegation was that the money had been collected on execution and received by the creditor within four months prior to the filing of the petition in bankruptcy, the petition of the trustee did not state a cause of action, but that he was required to allege and prove that the preference was received by the creditor having a reasonable cause to believe that the bankrupt was insolvent, and, by suffering judgment to be taken against him, thereby intended to make a preference. In the case of *Levor, Trustee, v. Seiter,* 8 Am. B. Rep. 459, it was held:

"Where money collected upon an execution issued upon a judgment obtained against the bankrupt within the four months' period is paid over to the judgment creditor before the filing of the petition in bankruptcy, the case does not fall within the provisions of section 67*f* of the bankrupt act, which specifically provides for the nullification of existing liens and for the right of the trustee in bankruptcy to receive the property of the bankrupt discharged therefrom. Although payment to the judgment creditor of money collected upon an execution, issued upon a judgment obtained against the bankrupt within four months of bankruptcy, constitutes a preference under section 60*a*, yet where the money was received by the judgment creditor before the filing of the petition in bankruptcy, it is not recoverable back by the trustee under section 60*b*, in the

absence of proof that the creditor had reasonable cause to believe that the banrupt, by suffering judgment to be taken against him, intended to give a preference."

In *Peck, Trustee, v. Connell,* 8 Am. B. Rep. 500, the court said:

"The bankrupt act does not take from the creditor all incentive to vigilance; he may still collect his claim from an insolvent debtor by legal process. Such process does not fall within the ban of the bankrupt act, unless the creditor shall have had reasonable cause to believe that it was intended thereby to give a preference. The intention of the creditor to obtain the preference is not condemned. The averment that the creditor had reasonable cause to believe that the debtor intended to give a preference is certainly as material and necessary to the statement in an action of this character, as is the allegation that the prosecution was commenced and carried on without probable cause in an action for malicious prosecution. * * * He who would recover back money which has been collected by the final process of a court of competent jurisdiction should distinctly aver every material fact upon which his right to recover depends."

The petition in this case wholly fails to allege that the defendant, Anderson, had reasonable cause to believe that the bankrupt by suffering the attachment proceedings, and judgment complained of, intended thereby to give him a preference.

It is contended that the court erred in refusing the plaintiff leave to amend his petition, as above stated. The amendment offered would not have cured the defect in the petition, for the reason that it does not contain the allegation above indicated. It was not enough that the defendant, Anderson, should have instituted the attachment proceedings for the purpose of obtaining preference over the other creditors of the bankrupt, but he must have had reason to believe that the bankrupt, by suffering such attachment proceedings and judgment, intended thereby to give him a preference.

Again, the plaintiff was not entitled to recover under the facts set forth in the stipulation. In order to constitute a preference the debtor must do some act to facilitate the proceedings; submissive inactivity is not enough. In *Wilson v. City Bank,* 17 Wall. (U. S.) 473, 488, the court said:

"Something more than passive nonresistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary, to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act."

In *Brown v. Jefferson County Nat. Bank,* 9 Fed. 258, Blatchford, J., observed:

"The mere existence of a desire on the part of a debtor, however strong such desire, that a particular creditor may succeed by suit, judgment, execution, and levy in obtaining a preference over other creditors, so that such preference may be maintained, even as against proceedings in bankruptcy which may be subsequently commenced, is not sufficient to establish that the debtor procured or suffered his property to be taken on legal process, with intent to prefer such creditor, if the proceedings of the creditor were the usual proceedings in a suit, unaided by any act of the debtor, either by facilitating the proceedings as to time or method, or by obstructing other creditors who otherwise would obtain priority."

It is certainly competent for a creditor to institute an attachment suit against a bankrupt, obtain judgment by default, and sell the attached property; and unless the bankrupt does some act by which he has participated in some way in the act of the creditor the preference otherwise acquired is a valid preference as against other creditors.

There is nothing in the record to show, or which tends to show, that the defendant did anything other than to proceed in a diligent, orderly and legal way to obtain the payment of the debt due to him from the bankrupt by and through proper legal process. It appears that the proceedings were wholly terminated, and the property or its pro-

ceeds were turned over to the defendant under the executed process of the court, before the petition in bankruptcy was filed, and it is not made to appear that the defendant had reasonable grounds to believe, or did believe, that the bankrupt had performed any act by way of suffering the judgment to be taken against him in the attachment proceedings for the purpose of assisting the defendant in obtaining an unlawful preference over the other creditors. Whether a creditor has reasonable cause to believe that his debtor is insolvent, and has done some act by which he has participated in some way in the act of the creditor by which a preference against other creditors has been obtained within the purview of section 60 of the bankruptcy act, is a question of fact. And, in order to authorize a recovery in this case, it was necessary for the plaintiff to aver this fact and introduce, at least, some proof in support of his allegation. The mere fact that the debtor had absconded, and was absent from the state when the attachment proceedings were instituted and carried forward to completion, is not sufficient to establish the fact that the plaintiff believed, and had reasonable cause to believe, that the bankrupt thereby intended to give him a preference. The object of the amendment to the petition tendered by the plaintiff, it is stated, was to enable him to recover a part of the property or its proceeds, together with the money obtained on the garnishment proceedings in Colorado, under section 60 of the bankruptcy act. The transaction by which defendant obtained the money from Smith in Colorado, and applied it on the insolvent's debt, with his consent, as set forth in the stipulation, amounted to a payment, and, before it could be recovered back by the plaintiff, it was necessary to allege and prove that, when defendant received it, he had reasonable ground to believe that the bankrupt intended to create a preference in his favor thereby. As above stated, the amendment tendered was not sufficient to authorize a recovery even under that section, and the court in refusing to allow the amendment was not guilty of an abuse of discretion.

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

GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.

WILLIAM M. CAMPION v. NELLIE M. LATTIMER.

FILED NOVEMBER 5, 1903. No. 13,257.

1. **Bastardy:** COMPLAINT: SUFFICIENCY. In a bastardy proceeding, a complaint, in which it is stated that the complainant is an unmarried woman, residing in the county where the complaint was filed, and that, on a certain day immediately preceding its filing, she was delivered of a bastard child, and that the accused is its father, is sufficient to sustain a verdict of guilty and a judgment thereon, when assailed for the first time in the appellate court.
2. **Witness:** LEADING QUESTIONS: DISCRETION. The matter of allowing interrogatories of a leading character to be put to a witness, rests in the sound discretion of the trial court, and a clear abuse of such discretion must exist to work a reversal.
3. ———: IMMATERIAL EVIDENCE. The refusal to allow the introduction of evidence to dispute the testimony of a witness upon an immaterial matter is not reversible error.
4. **Evidence of Alibi:** REBUTTAL. Where evidence is introduced by an accused for the purpose of establishing an alibi, testimony which tends to dispute such evidence may be properly received in rebuttal.
5. **Judgment:** VERDICT: EVIDENCE. Where the record contains competent evidence from which the jury may have reasonably arrived at their verdict, the judgment of the trial court will not be reversed for want of evidence to sustain it.
6. **New Trial.** Where the alleged newly discovered evidence is merely cumulative, and it appears that the witnesses named in the affidavits were all upon the witness stand and testified during the trial, and no excuse is shown for their not disclosing all of the facts known to them at that time, a motion for a new trial, based on that ground, should be overruled.

ERROR to the district court for Seward county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Norval Bros. and *Landis & Schick,* for plaintiff in error.

J. J. Thomas, M. D. Carey and *C. E. Holland, contra.*

BARNES, C.

This was a bastardy proceeding commenced before a justice of the peace in Seward county, in which Nellie M. Lattimer charged William M. Campion with being the father of her bastard child. The accused was bound over to the district court for said county, where, on a trial, he was found guilty by a jury, and judgment was entered on the verdict, ordering him to pay the sum of $1,000 for the support of the child, in payments as follows: $200 on January 1, 1903, and $100 on the 1st day of January, each year following, until the judgment was fully paid. From said judgment the accused prosecuted error.

We will consider the alleged errors in the order in which they are presented by counsel. It is first contended, with considerable energy, that the complaint on which the accused was tried was insufficient, in form and substance, to sustain the verdict and judgment. It is as follows:

"STATE OF NEBRASKA, }
SEWARD COUNTY. }

"This 16th day of July, 1901, Nellie M. Lattimer personally appeared before me, J. W. McCaulley, a justice of the peace in M. Township in Seward county, and being by me first duly sworn, on oath, says that she is an unmarried woman, resident of Seward county in the state of Nebraska; that on the 29th day of June, 1901, she was delivered of a bastard child, and that William M. Campion is the father of said child.

"(Signed) NELLIE M. LATTIMER."

It will be observed that this complaint is substantially in the language of the statute (Compiled Statutes, ch. 37, sec. 1), which is as follows:

"That on complaint made to any justice of the peace in this state by any unmarried woman resident therein, who

shall, thereafter, be delivered of a bastard child * * * accusing on oath, or affirmation, any person of being the father of said child, the justice shall take such accusation in writing and thereupon issue his warrant," etc.

It is the settled law of this state that, even in criminal prosecutions, an information is sufficient if in the language of the statute. *Leisenberg v. State,* 60 Neb. 628. It follows that in a civil proceeding, such as this is, nothing more could be required. The language used in the complaint should be construed according to its ordinary meaning, and the words should be given their usual definition. All that the statute requires is, that the complainant be an unmarried woman; that she be delivered of a bastard child; and that she state who the father of the child is. These requirements are fully met by the above complaint.

It is urged that it does not state that the complainant was unmarried when the child was begotten and born, and therefore is insufficient; and this contention is based on the opinion in *Parker v. Nothomb,* 65 Neb. 315. An examination of that case discloses that the question involved therein was one which had never been adjudicated, to wit: Whether a woman who was married after the birth of a bastard child could maintain an action under our statutes. And it was held that the words "unmarried woman" related to the condition of the mother at the time of the conception and birth of the child; that the fact that, after its birth, she had married a person other than the putative father did not prevent a prosecution under the statute. In the case at bar, no such state of facts exists. The complaint shows that the prosecutrix, at the time it was filed, was unmarried, and the positive statement is that less than one month before that time she was delivered of a bastard child, and that the accused was its father. This was a sufficient allegation of the fact that, at the time of the conception and birth of the child, the prosecutrix was an unmarried woman. The word "bastard" in our language, both in its legal signification and in its literary use, has a well defined meaning. Webster defines it as follows: "A

natural child; a child begotten and born out of wedlock." Now, in order that the child be begotten and born out of wedlock, it follows that the mother is an unmarried woman. In law the word is defined as follows:

"A child whose parents were not married to each other at the time of its birth." So it would seem that the objection is without force. But this matter has been before the court of last resort in some of our sister states. In the case of *Thomas v. State,* 37 Fla. 378, the court had under consideration a complaint based on a statute very similar to ours. The allegations of the complaint were as follows:

The complainant "deposes and says that she is a single woman, and is now pregnant with child * * *, which said child when born will in law be deemed and held to be a bastard."

This complaint was assailed because it did not allege that the complainant was single at the time of conception, but the court held it good. In the opinion we find the following: The averment, "which said child when born will in law be deemed and held to be a bastard," taken in connection with the other averments, can not be considered as a mere conclusion of law. In *Robb v. Hewitt,* 39 Neb. 217, we find the following:

"The complaint in a bastard proceeding, where it charges the date of the birth of the child, need not set out the time or place when or where it was begotten."

Judge IRVINE, in his opinion in that case, says:

"The complaint is in a form which has in its support at least the sanction of custom, but its sufficiency has never been directly determined by this court. Were it not for the provisions of section 1, chapter 37, Compiled Statutes (Annotated Statutes, 6250) requiring in such cases an examination under oath of the prosecutrix, before the justice of the peace to whom the complaint is made, there would be some force in the argument that the defendant should be informed by the complaint of the time and place of the alleged intercourse. But the section cited provides for such an examination, permits the accused to cross-

examine, and requires that the examination shall be reduced to writing, and certified to the trial court, where it 'shall be given in evidence.' These provisions furnish the accused with all requisite information."

In the case at bar, the prosecutrix was examined before the magistrate, and her evidence was reduced to writing; the accused was present in person and was permitted to cross-examine her to any extent desired. If it were true, or if there were anything in the contention that she was not an unmarried woman at the time the child was begotten and born, it could have been brought out upon such examination; and the defendant, if that fact appeared, would have been immediately discharged from custody. In *Parker v. Nothomb,* 65 Neb. 315, the court said:

"In this connection, counsel for the defendant say that it has been the universal practice in this state to allege in the complaint that the prosecutrix is unmarried when she makes the same, and to insert no averment with reference to her status at the time of coition and the birth of the child; that this is a practical construction of the statute which should have its due weight in the determination of the question. A sufficient answer to this is, we think, that, without exception, until the present case arose, the mother was unmarried when the prosecution was begun, and the general allegation in a complaint that the complainant was an unmarried woman includes the essential averment as to her status at the time her illegitimate child was begotten and born."

We therefore hold that the complaint in this case was sufficient, especially so where it was not assailed during the trial, and its insufficiency, as in the case at bar, is urged for the first time in this court.

It is next contended that the court was guilty of an abuse of discretion in permitting leading questions to be propounded to the prosecutrix on direct examination. It appears from the record, quite clearly, that the prosecutrix was very dull of apprehension; that she did not understand the meaning of the words "sexual intercourse," or "cohabi-

tation," and that it took considerable effort to make her understand the meaning of the questions put to her. Therefore, much latitude was necessarily given counsel in framing his questions. The matter of allowing interrogatories of a leading character to be put to a witness rests in the sound discretion of the court, and a clear abuse of such discretion must exist to work a reversal. *Welsh v. State*, 60 Neb. 101. After carefully examining the record, we can not say that there was such an abuse of discretion by the trial court, in this case, as to call for a reversal of the judgment.

A complaint is made that the trial court refused to permit defendant to introduce testimony to show that the complainant was 27 years old instead of 25, as testified by her. This evidence was wholly immaterial, and its rejection could not possibly work any injury to the defendant.

It is further objected that the court erred in receiving the evidence of one John Lattimer, for the purpose of showing the whereabouts of the defendant on a certain night during the latter part of September, 1900, and at a time within the period of gestation. There was no error in receiving this testimony. The defendant had attempted, by his defense, to establish an alibi, and this testimony was very competent to meet his proof. Again, the evidence was merely cumulative, and its reception would not be reversible error.

It is next contended that the evidence does not support the verdict. After a careful reading of the testimony, we are not prepared to say that the verdict is wholly unsupported by the evidence. It is true the evidence is conflicting, but that is to be expected, especially in cases of this kind. There is, however, competent testimony contained in the record from which the jury could reasonably have arrived at their verdict, and that, too, without disregarding any of the instructions of the court. It was the special province of the jury to reconcile the conflicting parts of the evidence, and determine the question of fact from the evidence and all of the circumstances surrounding the case,

and we are unable to say that there is such a total lack of evidence to sustain the verdict as will warrant us in granting a new trial.

Lastly, it is contended that the court erred in overruling the supplemental motion for a new trial. This motion was supported by affidavits on the one hand, and opposed by affidavits on the other. An examination of the affidavits tendered by the accused, discloses that the alleged newly discovered evidence is merely cumulative; that the witnesses were on the stand and testified at the trial, and no reason is given why they did not disclose all of the facts within their knowledge at that time. It was attempted by these affidavits to discredit the testimony of the prosecutrix, and yet the statements contained in them could be substantially true, and her testimony would not be materially shaken thereby. The court determined the disputed facts, and we are not justified in disturbing his findings. It follows that the showing made was insufficient to require the trial court to grant a new trial.

A careful examination of the record discloses no reversible error, and we therefore recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. NYE & SCHNEIDER COMPANY.

FILED NOVEMBER 5, 1903. No. 12,790.

Telegraph Company: NEGLIGENCE: DAMAGES. Where the negligent delay of a telegraph company, in the delivery of a message delivered to it for transmission by the plaintiff, results in the loss to the plaintiff of a sale of a quantity of corn at a price above the market value of the corn at the time and place it would

have been delivered had such sale been made, the measure of damages is the difference in value between the price the plaintiff would have received for the corn, had the sale been made, and the market value of the corn at such time and place of delivery, unaffected by the price at which the plaintiff may have disposed of the corn after that time.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

W. W. Morsman and *Edgar M. Morsman, Jr.*, for plaintiff in error.

W. J. Courtright and *S. S. Sidner, contra.*

ALBERT, C.

This action was brought by Nye & Schneider Company against the Western Union Telegraph Company to recover damages sustained by the former, by reason of the negligent delay of the latter in transmitting a telegram.

It sufficiently appears, from the pleadings and the evidence, that the plaintiff, whose home office is at Fremont, had a branch office at Morehead, Iowa, where it was engaged in the grain business. On the 13th day of June, 1901, plaintiff's agent, in charge of the business at the latter place, had a cash offer of 35 cents a bushel for 5,000 bushels of corn, which the plaintiff had on hand at that point, which was to stand open for acceptance until 7:30 P. M. of that day. The agent communicated the offer to the plaintiff at its home office. On receipt of such communication, the plaintiff, on the same day, delivered a message to the defendant for transmission to the agent of the former at Morehead, Iowa, directing him to accept the offer. Had the defendant used due diligence in the transmission of the message, it would have reached the agent in time to enable him to take advantage of the offer and close the sale before the time for which the offer was to hold good expired. But, by reason of the negligent delay in the transmission, it did not reach him until after 7:30 of that day; in consequence whereof, the plaintiff failed to

make the sale. Had the offer been accepted within the time fixed, the party making the offer would have paid the price in cash, and the corn would have been delivered to him at Morehead. The market value of the corn on that day, and for some time thereafter, was 32 cents a bushel.

Afterwards, the price advanced, so that between the 24th day of June and the 5th day of November following, the plaintiff disposed of the corn, at retail, at a higher price than that specified in the offer hereinbefore mentioned.

A trial to the court, without a jury, resulted in a finding for the plaintiff, the court adopting as the measure of damages, the difference between the price offered for the corn on the 13th day of June, 1901, and its market value at Morehead on that day, and gave judgment accordingly. The defendant brings error.

The defendant contends that the measure of damages adopted by the trial court is erroneous as applied to the facts in this case, because the plaintiff, having eventually sold the corn at a higher price than that accepted by the message in question, suffered no loss, and therefore sustained no actual damages by reason of the delay in the delivery of the message. At first sight, this contention appears reasonable, but we do not believe it will bear analysis. The action is one for breach of contract, and the breach relied upon is the failure of the defendant to transmit and deliver the message within what, under all the circumstances, would have been a reasonable time. In such cases, the general rule is that, so far as it can be done by money, the injured party is to be placed in the same situation in which a performance of the contract would have placed him. But it would be impossible to follow the labyrinth of remote results and consequences of a breach of contract, and determine either the ultimate situation of the party as affected thereby or what such situation would have been had the contract been performed. The law therefore takes into account only proximate results, and disregards such as are remote or are the product of intervening or independent causes. Hence the situation of the

injured party, which forms the basis of the comparison, must be his situation when the breach of contract occurred, and before remote or independent causes had intervened to change it. His situation after that time can never be material as an ultimate fact in the case because, after the intervention of such causes, it can never be known with any reasonable degree of certainty to what extent it is due to causes only remotely connected with the breach of contract or wholly independent of it.

In the present case, although it is questioned by the defendant, we think the evidence is ample to sustain a finding that the delivery of the corn, and the payment of the price, would have followed immediately upon the delivery of the message, had it been delivered in due time. Hence, upon the failure to deliver the message, the plaintiff had 5,000 bushels of corn which, instead of being worth $1,750 as it would have been, had the message been duly delivered, was worth only $1,600. In other words, the plaintiff's situation, upon the defendant's failure to deliver the message and before any remote or independent causes had intervened to change it, was such that it would have required $150 to make it what it would have been, had the message been delivered. The subsequent rise in the market and sale of the corn on such market are no more proximate results of the breach of contract or the contractual relations of the parties, than a subsequent decline in the market and sale of the corn at a loss would have been. The same principle that would have relieved the defendant from increased liability, had the market declined, excludes it from participation in the profits resulting from its advance. In neither case would it be possible to determine to what extent the result was due to the intervention of remote or independent causes.

Besides, as a matter of pure justice between the parties, we are satisfied that the rule adopted by the trial court is right. Had the plaintiff, immediately upon the failure to deliver the message, sold the corn at the then market price, the measure of damages, in the absence of special circum-

stances, would have undoubtedly been the difference between such price and what the plaintiff would have received for it, had the message been delivered in due time. Every hour it held the corn, after its cause of action arose, was at its own risk, because it will not be claimed that the damages recoverable would have been increased by the loss or destruction of the corn or its decline in price, after that time. Those are risks incident to the business of the merchant, and which he takes into account in estimating his profits and deciding upon a cause of action. Holding the corn for a better market, also involved interest on the capital invested, storage, the negotiations of another sale and other outlays, to say nothing of the foresight and energy necessary to conduct the venture to a successful issue. Is there any good reason why the defendant, who risked nothing, invested nothing and did nothing in the venture, should be permitted to share in the profits? We think not. We are aware that a different conclusion was reached in *Houston, etc., Telegraph Co. v. Davidson, Hardeman & Co.*, 15 Tex. Civ. App. 334, cited by defendant, but it is not supported by any line of reasoning, nor is it entirely clear that the point was necessarily involved in the case. But however that may be, it does not commend itself to us as a sound rule of law, and we must therefore decline to follow it. The defendant also cites *Mickelwait & Young v. Western Union Telegraph Co.*, 13 Ia. 177. In that case, a buyer delivered a message to the defendant, a telegraph company, for transmission to the plaintiff, which contained an offer to pay 20½ cents a bushel for corn. Through a mistake of the defendant, the message, when delivered to the plaintiff, read 21½ cents a bushel. On receipt of the message, the plaintiff went into the market and filled the order, paying 21 cents a bushed for a part of the corn and 20 cents for the remainder. The purchaser refused to pay more than 20½ cents a bushel for the corn, and it was delivered to him at that price. In passing on the case, Waterman, J., said:

"Plaintiffs claim a loss of profits. If this were a case

where loss of profits might be considered, still we think they could not recover. The mistake in the message caused them no loss of profits; for, if it had been correctly transmitted, they would have been in the same situation they now are. They obtained from Russell the exact price fixed in his message and as it should have been sent. There is no showing that the work of procuring the corn was worth more than the margin of profit received."

We think that case is clearly distinguishable from the one at bar, and is not in point. In that case, there was nothing to show that the plaintiff would have been in any better position had the message been correctly transmitted; it does not appear that they paid any more for the corn to fill the order by reason of the mistake, nor that, by reason of the mistake, they did anything they would not have done had it not occurred.

Hibbard v. Western Union Telegraph Co., 33 Wis. 558, is another case cited by the defendant. The reasoning in that case seems to us to tell against the defendant and to support the conclusion heretofore reached by us in the present case. The same may be said of *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, and *Squire v. Western Union Telegraph Co.*, 98 Mass. 232.

But the defendant further contends that the plaintiff did not learn of the failure of the sale, by reason of the nondelivery of the message, until some three days or more thereafter, and that, under such circumstances, it was necessary for the plaintiff to show the value of the corn at the time it learned that the sale had thus failed. In support of this contention the Texas case above referred to is again cited. We do not deem it necessary, in this case, to determine whether the rule hereinbefore approved would be affected by such circumstances, because, were we to adopt the modification suggested, the result in this case would be precisely the same. The plaintiff is a corporation, and acts only through its agents. Its agent at Morehead, through whom the negotiations for the proposed sale were conducted, the moment the message was not delivered

within the required time, knew that the sale had failed. What he knew, the plaintiff knew. Hence, the failure of the sale and knowledge on the part of the plaintiff that it had failed were contemporaneous, and the market price of the corn when the sale failed and when the plaintiff learned that it had failed would be the same.

It is therefore recommended that the judgment of the district court be affirmed.

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

AFFIRMED.

DUFFIE, C., concurring.

I fully concur in the opinion of Judge ALBERT heretofore filed in this case. The facts are sufficiently set forth in his opinion. It is earnestly insisted by the plaintiff in error that because the Nye & Schneider Company finally succeeded in disposing of its corn at an advance over the offer made by the proposed purchaser it was not damaged by the failure of the defendant in error to transmit and deliver the message accepting the offer. On the contrary it is said that the Nye & Schneider Company profited by the neglect of the plaintiff in error and was benefited thereby. It has also been suggested that, before defendant in error could recover, it should have disposed of the corn on the market at the best price which could be obtained and that, until such sale was made, no cause of action accrued to it.

I am not disposed to accept these views. Had the message accepting the offer been promptly delivered, a sale of the corn at a price one and one-half cents above the market value would have been consummated on the evening of June 13, 1901. A failure to deliver the message prevented the sale, and the consequence was that the defendant in error had on hand 5,000 bushels of corn, which would otherwise have been disposed of at a profit of $75

above the market price at that date. It is clear, therefore, that on the evening of July 13 it had been damaged to the extent of $75. A right of action accrued to it immediately for this amount. We know of no principle which would deprive it of this right of action, or which would give the plaintiff in error the benefit of a rise in the corn market, or allow such advance to be shown in mitigation of damages. The rule is aptly stated in 1 Sutherland, Damages (3d ed.), sec. 158, where it is said:

"There can be no abatement of damages on the principle of partial compensation received for the injury where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta.*"

There appears to be a dearth of authorities on the exact question involved but, in my opinion, the same principle and the same measure of damage should be applied that obtains in the case of a purchaser of personal property who refuses to accept the goods purchased, at the time fixed for the delivery. In such case, the authorities all agree that a right of action for damages arises in favor of the vendor for the injury or loss he has sustained by reason of the breach of the contract, and this is ordinarily or generally the difference between the market value of the property at the time and place of delivery, and the price fixed by the contract. *Funke v. Allen,* 54 Neb. 407; *Lincoln Shoe Mfg. Co. v. Sheldon,* 44 Neb. 279.

It is true that the vendor, on refusal of the vendee to accept, has a right, if he so elects, to resell the goods, but this seems to be a method only of ascertaining their market value and the extent of the damages. Sutherland, in his work (sec. 647), has given the rule established by the decided cases, as follows:

"An executory agreement which requires a subsequent acceptance of the property by the buyer, to consummate the sale does not become a complete bargain and sale so as to vest the title in him, if he refuses to accept it. In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee

to fulfill his contract, which is ordinarily the difference between the contract price and the market value, at the time and place of the breach, with interest. * * * This may be ascertained and fixed by a resale within a reasonable time, and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible. * * * The resale is made on the theory (which is a mere legal fiction) that the property is that of the vendee retained by the vendor as a means of realizing the contract price; he acts as the agent of the vendee, and deducts from the proceeds all the expenses incurred. * * * After notice of the vendor's intention to resell, no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade. * * * If the net proceeds of the sale are less than the contract price, he may recover the deficiency in an action on the contract."

Benjamin, Sales (4th ed.), sec. 758, says:

"When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract * * * as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery—the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not, at his pleasure. But his only action against the buyer is for damages for non-acceptance; he can in general only recover the damage that he has sustained, not the full price of the goods. The law, with the reason for it, was thus stated by Tindal, C. J., in delivering the opinion of the exchequer chamber in *Barrow v. Arnaud,* 8 A. & E., n. s. (Eng.) *595: 'Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract

to accept and pay for goods is broken, the same rule may be properly applied; for the seller may take his goods into the market and obtain the current price for them.' "

It is conceded that, by keeping the corn, defendant in error kept it at its own risk. In other words, had the price of corn gone down in the market, the Nye & Schneider Company would have had to bear the loss, whatever it might be, and could recover from the plaintiff in error only the difference between the price offered and the fair market value of the corn, giving it a reasonable time within which to dispose of the same. The corn being kept at defendant's own risk entitles it, certainly, to any advance in the price while so held. The plaintiff in error can not claim the benefit arising solely from a risk assumed by defendant in error and for which plaintiff in error could in no wise, and under no circumstances, be made liable. This principle is fairly established in *Bridgford v. Crocker,* 60 N. Y. 627, where it is said:

"Upon the failure of a vendee to perform an executory contract for the purchase of chattels, the vendor may elect to tender the property and sue for the contract price, or to retain the property as his own, and recover, as his damages for the breach, the difference between the market value at the time the vendee was to receive delivery, and the contract price. If he elect the latter, and the property subsequently rises in value in the market, the vendee can not avail himself thereof, but the vendor is entitled to the benefit."

A sale of the corn at an advance over the market price was lost through the negligence of the plaintiff in error. Had the defendant in error, on learning of this neglect, offered the corn on the market and sold it for the market price, no one disputes the liability of plaintiff in error for the difference between the price so obtained and the offer made by the proposed purchaser; but, because the defendant in error exercised its right to hold the corn at its own risk, the telegraph company claims the benefit of the advance in value which finally obtained; in other

words, it seeks to take advantage of a venture in which it took no part and of which it assumed no risk; the benefit of a hazard from which it could not be injured. The risk was that of the defendant in error and the advantage arising therefrom belongs to it alone.

LAWRENCE LARSON, ADMINISTRATOR OF THE ESTATE OF CHRISTINE ANDERSON, DECEASED, V. UNION PACIFIC RAILROAD COMPANY.

FILED NOVEMBER 5, 1903. No. 13,077.

1. **Appointment of Administrator:** PETITION: JURISDICTION. In a petition to the county court for administration on the estate of a deceased person, the only averments essential to the jurisdiction of the court are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case he was at the time of his death a nonresident of the state, that he left an estate in such county to be administered.

2. ———: COLLATERAL ATTACK. Section 178, chapter 23, Compiled Statutes, provides the order in which persons shall be entitled to administer on the estate of an intestate. *Held*, That such provisions do not go to the jurisdiction of the county court in such matters but to the manner of its exercise, and that an appointment made contrary to such provisions is not open to collateral attack.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

T. L. Warrington, W. A. Stewart and *Hector M. Sinclair,* for plaintiff in error.

Edson Rich, E. A. Cook and *J. M. Ellingsworth, contra.*

ALBERT, C.

The plaintiff, as administrator of the estate of Christine Anderson, deceased, brought this action against the defendant to recover damages alleged to have been sus-

tained by the next of kin of the deceased, by reason of her death, which, it is claimed, was caused by the negligence of the defendant. On the trial, the plaintiff offered in evidence the record of the county court of Dawson county, showing his appointment as administrator. The evidence was objected to and excluded, on the ground that the petition for the appointment of an administrator fails to state facts sufficient to give the county court jurisdiction, and shows on its face that the petitioner was not a proper party to apply for administration. For want of evidence, showing the plaintiff's appointment as administrator of the estate of the deceased, the court directed a verdict for the defendant and the plaintiff brings error.

The petition for letters of administration was filed on the 27th day of April, 1899, and is as follows:

"Your petitioner, Mary Westlund, a sister of the said Christine Anderson, late of said county, deceased, respectfully states that the said Christine Anderson departed this life on the 18th day of April, A. D. 1899; that she was, immediately preceding her death (and at the time of), a resident and inhabitant of said county, and was possessed of personal property in said county of about the value of $600.

"Your petitioner further shows that no will and testament of the said deceased has been discovered, nor is your petitioner aware of the existence of any such instrument, and your petitioner believes that the said Christine Anderson died intestate.

"Your petitioner further shows that the deceased was a widow and that she left surviving her children as follows: Esther Anderson, aged thirteen years, Ezekiel Anderson, aged seven years, and Nathan Anderson, aged five years. That your petitioner is the next of kin and the only relative of the deceased within the state of Nebraska.

"Wherefore, petitioner prays that letters of administration may be granted to Lawrence Larson, of Gothenburg, in said county, upon the goods, chattels, rights and credits of the said Christine Anderson, deceased."

The contention of the defendant is that the petition shows on its face that the petitioner is not the next of kin, and as it was filed less than 30 days from the death of the intestate, the petitioner was not a proper party to apply for administration under the provisions of section 178, chapter 23, Compiled Statutes (Annotated Statutes, 5043), and, for that reason, the county court acquired no jurisdiction to make the appointment. The section referred to is as follows:

"Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order: First—The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable or competent to discharge the trust. Second—If the widow or next of kin, or the person selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty days after the death of the intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent or willing to take it. Third—If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper."

The petition for administration is somewhat contradictory. It alleges that the petition is a sister of the intestate and the next of kin; it also alleges that the intestate left three minor children. If she left three minor children, the petitioner is not the next of kin, and the allegation that she is the next of kin is an erroneous conclusion. The petition, therefore, must be held to show on its face that the application for administration was made by one who was not the next of kin. It is not alleged in the petition that the petitioner is a creditor of the estate, nor that the next of kin or the creditors have renounced their right to administer.

We have, then, a case where the record affirmatively shows that administration was granted on an application made within 30 days of the death of the intestate, by one not the next of kin, and which fails to show that the petitioner was a creditor of the estate, or that the next of kin or the creditors had renounced their right to administer. The question presented, then, and the only question in this case, is, whether the appointment of an administrator based upon an application of that character and made under such circumstances, should be held void when assailed in a collateral proceeding?

The question, we think, should be answered in the negative. Section 177, of the chapter referred to, provides, that when any person shall die intestate, being an inhabitant of this state, letters of administration shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If at the time of his death he was a nonresident of the state, then administration shall be granted by the probate court of any county in which he left an estate to be administered. Section 195 provides for the giving of notice of the application for letters of administration and for the hearing thereof; it also provides that when, upon such hearing, the grant of such administration shall be refused, for any cause, the court of probate may, if all the persons interested were duly notified of such hearing, proceed to take the allegations and proofs to determine the party entitled to such administration, and to grant administration without further notice. Section 178, hereinbefore set out, does not give the widow or next of kin the absolute right to administer on the estate. *Spencer v. Wolfe,* 49 Neb. 8. On the contrary, by the second subdivision, such right depends on their competency, and the right of creditors to administer on the estate, by the third subdivision, is made to depend upon the same fact. Taking those sections together, it seems clear to us, that when a petition is presented to the county court which shows, as in the present case, that the deceased died intestate, and at

the time of her death was a resident of the county in which the application for letters of administration is made, it becomes the duty of the county court to give notice of the application, and of the time set for the hearing thereof, and to determine, on the hearing, the party to whom administration should be granted. The jurisdictional facts are, the intestacy of the deceased, and her residence in the county where the application is made. The competency of the person making the application, or of the person nominated for administrator, goes, not to the authority of the court to make an appointment, but to the manner in which that authority shall be exercised. This is the view taken by the supreme court of Kansas in *Taylor v. Hosick,* 13 Kan. 518, and *Brubaker v. Jones,* 23 Kan. 411. To the same effect is *Schnell v. City of Chicago,* 38 Ill. 382. In the latter state, the statute required a delay of 60 days, after the refusal of the widow or next of kin to administer, before a creditor could apply for letters of administration; if no creditors applied within 15 days after the 60 days, then the judge of probate could appoint any person he might think best qualified to manage the estate. The application, in that case, was made by one who was not the widow or next of kin of the deceased, nor a creditor of the estate, and was made 6 days after the death of the intestate. The petition failed to show that there was no widow, next of kin or creditor entitled to administration, or that they had refused to administer. The court said:

"The question arises, must not this court, in this proceeding, presume the probate court was satisfied on those facts? May not the probate judge have received proof thereof before he acted? As there is no law requiring him to preserve such proof in the record, must we not presume such proof was received and on which the judge acted? He had cognizance of the subject, his jurisdiction over it was complete, and if he erred in carrying it out, such error can not be urged in this collateral proceeding to upset them all. There is not, probably, in the

records of all these probate justices, a case to be found wherein the record will show such proof was received before letters were granted to a person not entitled to them, except in certain contingencies. Those records will not show the happening of those contingencies, and the result would be, if this objection is sustained, that nearly all the sales by administrators so appointed throughout the state would be rendered void, to the great loss and injury of thousands who have paid in good faith full value for the property so sold and purchased. On an appeal or writ of error from such proceedings, this court would undoubtedly hold them irregular and set them aside."

In *Pick v. Strong,* 26 Minn. 303, the appointment of an administrator was collaterally assailed on the ground that they had issued on the application of one who had no authority to make such application. In passing on that question the court say:

"The letters of administration were introduced on the trial. They were, in this action, conclusive of the regularity of the proceedings resulting in their issuance. That they were issued to one not entitled to them, or upon the application of one who had no right to make such application, is an objection which could be made only on an appeal from the order granting them; or, if such application could be made, upon an application to the probate court to vacate them. They can not be attacked for such reasons in a collateral proceeding. *Moreland v. Lawrence,* 23 Minn. 84."

Lawrence v. Englesby, 24 Vt. 42, and *Mowry v. Latham,* 20 R. I. 786, are to the same effect. See also *Emery v. Hildreth,* 2 Gray (Mass.), 228; *Hobson v. Ewan,* 62 Ill. 146; *Ramp v. McDaniel,* 12 Ore. 108, 6 Pac. 456; *Garrison v. Cox,* 95 N. Car. 353; *Simmons v. Saul,* 138 U. S. 439; *McNitt v. Turner,* 83 U. S. 352; *Comstock v. Crawford,* 70 U. S. 396; *Jones v. Bittinger,* 110 Ind. 476; *State v. Anderson,* 84 Tenn. 321. The appointment of a stranger before the widow had renounced her right was held not void in *Lyle v. Siler,* 103 N. Car. 261; and the appoint-

ment of an alien was upheld in *Berney v. Drexel*, 12 Fed. 393.

It is insisted, however, that the defect in the present case appears on the face of the petition. It clearly appears on the face of the record in *State v. Anderson, supra.* But, as before intimated, in our opinion, when a petition is presented to the county court, showing the intestacy of the deceased and her residence in the county where the petition is presented, it shows all the jurisdictional facts, and the competency of the party making the application or proposed for administrator, for jurisdictional purposes, is immaterial. But even if the competency of the party making the application or proposed for administrator were to be held jurisdictional, we do not think it can be said that the incompetency appears on the face of the petition in this instance. The most that can be said of the petition in that respect is, that it does not affirmatively show that the next of kin and creditors had renounced their right, or that the petitioner was a creditor of the estate. As to those omissions, we think the language of the supreme court of Illinois, in *Schnell v. City of Chicago,* 38 Ill. 382, aptly suggests the doctrine that should apply in such cases, and the presumptions which should be indulged in favor of the regularity of the proceedings of courts of probate.

We are aware that the conclusion reached by us in this case is contrary to that reached in *Haug v. Primeau,* 98 Mich. 91, 57 N. W. 25, where precisely the same question was involved. In that case the court simply followed its own decisions, which seem to us to stand opposed to the weight of authority as well as sound principles. To follow them would unsettle land titles in every county of this state without serving, as we can see, the ends of substantial justice.

In our opinion, the judgment of the district court is wrong, and we recommend that it be reversed and the cause remanded for further proceedings according to law.

GLANVILLE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

CHARLES M. PARKER, ADMINISTRATOR OF THE ESTATE OF WILLIAM H. H. RADER, DECEASED, INTERVENER, ET AL. v. KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY OF CHICAGO, ILLINOIS.

FILED NOVEMBER 5, 1903. No. 13,114.

1. **Review:** THEORY OF CASE. It is a settled rule of this court that it will dispose of a case on the theory on which it was presented to the trial court.

2. **Insurance:** WAIVER. A permanent waiver of a condition in a policy of insurance, would not be inferred from occasional indulgences shown a policyholder.

3. ———: ———. No implication of a waiver of the terms of a contract can arise from acts which may be construed as a compliance with such terms.

4. **Agency.** Where the agent of an insurance company undertakes to act for and on behalf of the assured, as to such acts, he is to be regarded as the agent of the assured and not of the company.

5. ———: PREMIUM PAYMENTS. Where an insurance agent, in taking the application for insurance, agrees with the assured to make the payment falling due on the policy for the assured, for a specified time, such agreement is not binding on the company, and in making payments in pursuance thereof, the agent acts on behalf of the assured and not for the company.

6. **Insurance Policy:** WAIVER: DEFAULT. A life insurance policy, by the terms of which the assured was required to pay a specified amount on the first of each month, provided, that if any such payment was not received at the Chicago office of the insurer, before 12 o'clock, noon, of the day it was due, the risk should be suspended, and such suspension should continue until the receipt of the payment at the Chicago office within thirty days of the date it was due; if not received within that time, or if the insured should die during such suspension, the contract of insurance should *ipso facto* terminate, although the amount of the payment had been forwarded during the life of the assured. The

insurer arranged with a bank at L., the residence of the assured, to receive such payments until the date they became due, and notified the assured of the authority of the bank to thus receive such payment. *Held:*

(1) That such arrangement operated as a waiver of the place of payment, and, that payments made to the bank, on or before the date they became due, would prevent a suspension of the risk, regardless of the date upon which such payments were received at the home office.

(2) That payment to the bank, in order to prevent a suspension, was required to be made on or before the date it fell due, and if made after that date, the risk would stand suspended until payment was received at the home office within thirty days of the date it became due, and during the lifetime of the assured; if not thus received, the insurance *ipso facto* terminated.

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

Willard E. Stewart, Frank M. Tyrrell, George A. Adams and *Samuel B. Iams,* for plaintiff in error.

Walter J. Lamb, Joseph Wurzburg and *Thomas Jefferson Graydon, contra.*

ALBERT, C.

This is an action on a life insurance policy issued by the defendant, a mutual company, on the life of Wm. H. H. Rader, in which the plaintiff, who at the time of its issuance was the wife of the assured, is named as the beneficiary. By a subsequent marriage, she took the name under which she prosecutes this action. The policy was issued in March, 1901, and the assured died June 15 of the same year. A copy of the policy is attached to the petition and the money consideration for its issuance, appearing on the face thereof, is $4.12, payable in advance, and a like sum on the first day of each month thereafter during the life of the policy. On the back of the policy, and as a part of the contract of insurance, is the following condition:

"5. If any payment is not received at the Chicago office of the insurer before twelve o'clock noon, central time, the

day it is due, the risk, under this contract, shall be suspended from that time and such suspension of the risk shall continue until the receipt of the payment at the Chicago office of the insurer, during the business hours of any day within thirty (30) days after the day the said payment becomes due. If the payment in default is not received at the Chicago office of the insurer, during the business hour of any day within thirty (30) days after the day it becomes due, or if the insured dies at any time during such a suspension of the risk, this contract shall be *ipso facto* terminated, although the amount of the payment may have been forwarded to the insurer before the insured's death; and if such payment is received at said office after his death, it shall be returned to the person who paid it or the insured's legal representative. After the second payment, the insurer will mail notices of payments becoming due, to the post office address of the insured which has been furnished to the insurer by him. and it is agreed that such notice mailed at Chicago at least fifteen (15) days before the day any payment becomes due, shall be sufficient notice thereof, and the insured then accepts the risk of any miscarriage of the mails. Delivery and acceptance of this policy shall be sufficient notice of the first monthly payment after the delivery of the policy."

Referring to the foregoing condition, the plaintiff in her petition alleges as follows:

"Plaintiff alleges that the defendant, after the execution of said policy and during the lifetime of the insured therein, waived the above provision and the requirement that the money be paid at its office in Chicago by noon of the day it was due, in that it constituted and appointed the First National Bank of the city of Lincoln, Nebraska, its agent to collect the premiums on the several and many policies it issued and had outstanding to citizens of said city of Lincoln and vicinity, and duly authorized and empowered said bank to collect said premiums at times and places other than as provided in the said policies, and to

so enable said bank to make said collections, sent notices to the said policyholders, including said Rader, requesting them and each of them to pay their said premiums to said bank, and for said purpose forwarded blank receipts to said bank to be filled out and delivered to said policyholders, including said Rader, as they made payment of said premiums from said policyholders, including said Rader, at times and places different from those mentioned in the said policies, to wit: at its place of business in the city of Lincoln, Nebraska, and at dates later in the month than the first day thereof, and the defendant, with full knowledge that said bank was taking and receiving said premiums from said policyholders, including said Rader, at dates later than the first day of the month, took and received said money as paid out of time, and credited the same to the said policyholders, including said Rader, and the defendant also authorized and empowered one J. E. R. Miller to take and receive said premiums from said policyholders, including said Rader, at times and places other than in said policy mentioned, and said Miller did at different and many times in the city of Lincoln, Nebraska, take, collect and receive from said policyholders, including said Rader, the premiums due from them and each of them to the defendant on said policies, and remit the same to the defendant at Chicago, Illinois, and said defendant knew that said Miller was so collecting, taking and receiving the same from said policyholders, including said Rader, as above stated, and remitting the same to the defendant at Chicago, Illinois, and knowing said facts and taking and receiving said remittances and crediting the same to the several policyholders as their several interests appeared, the defendant fully and completely waived the provisions of said policy requiring payment in advance at its office in Chicago, Illinois, before noon of the day it was due, central time.

"Plaintiff further alleges that said bank and said Miller and each of them was empowered to take and was accustomed to and did take from many of said policyholders,

including said Rader, the dues severally due from them, after noon of the day it was due, and long after said time, but within the thirty days for which such policy was claimed to be suspended, and did remit the same to the defendant, and the defendant took and received said money from said bank and Miller and each of them, during said thirty days of suspension, and kept and held the same and made no objection thereto, thereby ratifying and confirming the acts and conduct of the bank and said Miller in so doing, and thereby gave out to said policyholders that such payments were valid and sufficient and acceptable to it; that said Rader paid and caused to be paid to said Miller and tendered and caused to be tendered to said bank, all dues from him on the policy in suit herein, prior to his death, and within said thirty days limit or claimed suspension. The said First National Bank being the place designated by the defendant for said policyholders, including said Rader, to make such payment."

Upon grounds not necessary to mention, the administrator of the assured intervened. The petition of intervention also refers to the condition on the back of the policy, and in respect thereto alleges:

"By one of the conditions of said policy, it was provided that an assessment of $4.12 should be paid monthly on the first day of each succeeding month at the home office of the defendant at Chicago, Illinois, but this intervener alleges that said condition of the policy, as to time and place of payment of assessments, was waived by the defendant, and that after the issuance of said policy, the defendant directed said insured to thereafter make payments of such assessments at Lincoln, Nebraska, to the First National Bank of said city and to which bank said insured did habitually make such payments with the knowledge and consent of said defendant and without objection thereto.

"Said defendant further waived said condition of said policy as to time and place of payment of the several

maturing assessments therein provided for, by ratifying and adopting the acts of their local agent, J. E. R. Miller, at Lincoln, Nebraska, who, acting on behalf of the defendant, collected the payment which matured on the 1st day of June, 1901, from the insured, and remitted it to the defendant, where same was received and credit duly given the insured therefor, by the defendant, upon its books, and same retained by the defendant and is still so retained."

Neither the petition of the plaintiff nor that of the intervener contains any allegations, other than those hereinbefore set out, in regard to the payment of the monthly premiums required by the terms of the policy or any general allegation of performance of his part of the contract by the assured.

The answers to the plaintiff's petition and to the petition of intervention, so far as concerns the present inquiry, are substantially the same. Both open with a denial of "each and every allegation not herein expressly admitted," and admit the issuance of the policy as alleged in such petition. In respect to the condition on the back of the policy and the payment of the monthly premiums, both answers contain the following allegations:

"This defendant further avers that on, to wit, the 14th day of May, A. D. 1901, at the hour of 5:30 P. M., the said defendant mailed in the general post office in the city of Chicago, and state of Illinois, a notice addressed to the said William H. H. Rader at the street and number theretofore furnished to said defendant by the said Rader in the city of Lincoln, and state of Nebraska, and thereby notified the said Rader that a payment of $4.12 on the said policy would become due and payable on said first day of June, A. D. 1901.

"The defendant further says that, notwithstanding said notification, said Rader did not on June 1, before 12 o'clock noon, central time, pay to this defendant the said sum of $4.12 which the said Rader became and was obliged to pay to the said defendant, as hereinbefore al-

leged, and thereby the risk under the said policy was suspended from the time last mentioned and so continued to be suspended up to and including the hour of said Rader's death; and defendant further says that no payment of the amount thus in default was ever received at the Chicago office of the said defendant during the business hours of any day during the lifetime of the said Rader, and that the said Rader died during the suspension of the risk, and that the said policy or contract, if any, between the said Rader and this defendant, was *ipso facto* terminated and was not in force or effect at the time of his death, if at any time theretofore it had been in force."

In reply to such answers, both the plaintiff and intervener allege a waiver of the condition on the back of the policy, as to the time and place of payment of the premium, in substantially the same language as that hereinbefore quoted as a part of their respective petitions, and that, in pursuance of such waiver, the premium due June 1, 1901, was paid after that date but within thirty days thereof.

It appears from the evidence that the application for the policy in question was taken by one Miller, an agent of the company. At the time he took the application, he entered into an arrangement with the assured, whereby he agreed to advance such payments as should fall due from time to time, until the assured received a pension which he was expecting. In pursuance of this arrangement, Miller collected the admission fee from the assured and forwarded it to the defendant. It appears to have been the practice of the defendant to forward receipts for the payments falling due each month from its members in the city of Lincoln to the First National Bank of that city, and in addition to the notice required by the conditions of the policy to be given to members of payments falling due, to include the following:

"For your convenience your receipt has been sent to the First National Bank of your place, where you can get

it until said date (the date the payment became due), on payment of the amount due. After that date, if unpaid, it will be returned to this office, and you will be carrying your own risk."

The bank's instructions were in writing and among them was the following:

"Each has been notified that you will have these receipts for collection until (the date the payment became due) and after which date, remit collections made and return all unpaid receipts."

In pursuance of his agreement with the assured, Miller made the payments falling due on the policy April 1 and May 1, 1901, on the third and fourth days of those months, respectively, to the bank, in accordance with the practice above mentioned. Afterwards, and during the same month, and while the assured was living, Miller purchased a draft for the amount and transmitted it to the defendant by mail. An attorney for the assured agreed to reimburse him for the amount thus transmitted. It is conceded that the remittance was received by the defendant during the month of June, and within 30 days of the date which, by the terms of the policy, it was required to be paid. But whether it was received during the lifetime of the assured was one of the issues in the case. The remittance was rejected by the defendant, on the ground that it was not received during the lifetime of the assured, and returned to Miller in the form of a check. He returned it to the company, and it appears to have been returned to him, who produced it on the trial, where the defendant offered to pay it, and deposited the amount thereof in court for the benefit of the person entitled thereto.

At the conclusion of the evidence the court directed a verdict for the defendant, and from a judgment rendered on such verdict, the plaintiff and intervener severally prosecute error to this court.

At this stage of the litigation, there is no contest between the plaintiff and the intervener; they make com-

mon cause against the defendants; for the sake of brevity, we shall treat the arguments of each as made by both, and refer to both by their title in this court—the plaintiffs.

From the foregoing statement it will be seen that the defendant resists payment on the ground that the payment which by the terms of the policy was required to be paid at Chicago before noon of June 1, 1901, was not paid until after that date, and until after the death of the assured, and for that reason no recovery can be had, in view of the condition on the back of the policy hereinbefore set out.

The plaintiffs, on the other hand, insist that the payment was in fact made before the death of the assured and before the policy had lapsed, and also insist that the defendant had waived the time and place of payment.

One contention of the plaintiffs is based on the following allegation in the defendant's answer:

"The defendant further says that, notwithstanding said notification, said Rader did not on June 1, before 12 o'clock noon, central time, pay to this defendant the said sum of $4.12."

Their contention on this point is best shown by the following taken from their brief:

"Defendant's general denial is waived, modified and controlled by the special plea which, being *in hæc verba,* tenders no issue. It is an admission of payment and only puts in issue the manner of it, a fact which is immaterial and about which there is no dispute. Defendant says payment was not made in Chicago on June 1, and we, in substance, make the same allegation."

This contention conflicts with the theory upon which the case was presented to the trial court. The plaintiffs made no claim that payment had been made within the time required by the terms of the contract. On the contrary, by their pleadings as well as by the evidence, it is impliedly admitted that the assured, for some time at least, stood suspended because of nonpayment, unless there had been a waiver of the time of payment by the

defendant. That condition, having been shown to exist, would be presumed to continue until the contrary was shown. To rebut that presumption, the plaintiffs pleaded a waiver of the time and place of payment, and attempted to show due payment before the death of the assured and in time to avoid the suspension. It is a settled rule of this court that it will dispose of a case on the theory upon which it was presented to the trial court. That rule of itself, without going into other questions, is sufficient to dispose of the plaintiff's contention.

The plaintiffs insist that there is evidence tending to show that payment of the amount due June 1, 1901, was actually received by the defendant, at its office in Chicago, before the death of the assured. We do not think so. Miller, by whom the plaintiffs sought to show that fact, testified, in effect, that he had no recollection as to the exact date of making the remittance, except that it appeared from a memorandum made by him to have been June 13, 1901. When he entered the memorandum, or whether it correctly showed the date of the transaction, was not shown. But the remittance was mailed at Lincoln, and the receiving stamp shows that it was received at the post office at that place, June 14, 1901, at 8:30 in the evening. It was received at the post office in Chicago between 9:30 and 10 o'clock in the evening of the following day. The next day was Sunday, and the evidence on the part of the defendant is clear and positive that it was not received at its office until June 17, 1901, two days after the death of the assured. The evidence on this point we think admits of no other inference than that the assured was dead when the remittance reached the Chicago office.

A considerable portion of the argument in this case is directed to the question of waiver, that is, whether the defendant had waived the condition as to the time and place of the payments or monthly dues. As to the time of payment, it will be seen from an examination of the condition of the policy set out that in case payment was not

made before 12 o'clock, noon, the day it became due, the policy became suspended, and such suspension should continue, until the receipt of the payment at the Chicago office during the business hours of some day, within thirty days after the date the payment became due. If the payment in default was not thus received, or if the assured died during such suspension of the risk, the contract, *ipso facto,* terminated, although the amount had been forwarded to the defendant before the assured's death. There is ample evidence in the record that the defendant received payments after the date upon which they fell due, and within thirty days after that date. But the evidence does not show a waiver of the conditions of the policy in regard to the time of payment. On the contrary, it is strictly in accordance with those conditions. By the terms of the condition the assured had the right to make such payments at any time within thirty days after they fell due, subject to the penalty of suspension while in default. The question then of a waiver of the time of payment is not in the case, because there is no evidence tending to establish it.

As to the place of payment, the first contention of the plaintiffs is that the agent, Miller, was at least impliedly authorized to collect the payment at Lincoln, and that the condition as to the place of payment was thereby waived. In support of this contention, we are referred to the agreement between Miller and the assured, whereby the former undertook to pay the monthly dues for the latter for some time, and the payments made by Miller in pursuance of that agreement. We are also referred to evidence showing that Miller had paid the dues of another policyholder to the First National Bank on one or two occasions, and at least once had remitted such dues directly to the defendant's office in Chicago.

So far as the agreement between the assured and Miller is concerned, it was theirs exclusively. In making payments in pursuance thereof, Miller acted for the assured and not as agent for the defendant, and there is nothing

either in the agreement or the payments made in pursuance of it to indicate even remotely that the defendant had authorized payment to be made to Miller in Lincoln instead of to itself at Chicago as required by the terms of the contract. The assured's monthly dues were never paid to Miller but always by Miller to the bank which had restricted authority to collect for the defendant.

So far as the transactions between Miller and the other policyholder in regard to the payment of dues are concerned, it is not clear whether he was acting for the defendant or for the policyholder; the fact that he paid a part of them to the bank authorized to receive them instead of remitting direct to the defendant, would tend to show the latter. But assuming that in those instances he was acting for the defendant, the evidence on that point shows only an occasional indulgence, as to the place of payment, to one policyholder. Had such indulgence been shown to the holder of the policy in suit, himself, it could not be construed as a permanent waiver as to the place of payment. *Thompson v. Knickerbocker Life Ins. Co.,* 104 U. S. 252; *Mandego v. Centennial Mutual Life Ass'n,* 64 Ia. 134; *Sweetser v. Odd Fellows Mutual Aid Ass'n,* 117 Ind. 97, 101; *Marston v. Massachusetts Life Ins. Co.,* 59 N. H. 92; *Smith v. New England Mutual Life Ins. Co.,* 63 Fed. 769; *Haydel v. Mutual Reserve Fund Life Ass'n,* 104 Fed. 718. *A fortiori,* such indulgence should not be construed as a permanent waiver when shown to another person.

Another contention of the plaintiffs is, that the defendant having authorized the bank to receive payments at Lincoln, the condition of the policy, as to the place of payment, was thereby waived, and, consequently, the court erred in rejecting the evidence offered by them to show a tender of the payment falling due June 1, 1901, made by Miller, on behalf of the assured to the bank, after that date and before the date of his death, was a good tender. That the defendant, by authorizing payments to be made to the bank, did thereby waive the place of payment is obvious. But an examination of the written authority of

the bank to receive such payments, and of the notice to the policyholders that payment might be made to it, shows the extent of such waiver. By the terms of the policy, to avoid suspension, payments were required to be made at the office of the company, in Chicago, before 12 o'clock, noon, of the day they fell due. The notice to the policyholders of the authority of the bank to receive payment, informed each of them, in effect, that his dues could be paid to the bank until the date of payment fixed by the terms of the contract, and that after such date, if unpaid, the receipt therefor, furnished by the defendant to be delivered to him upon making payment, should be returned to the defendant, and that thereafter he would be carrying his own risk. The authority of the bank, as to the time during which it might receive payments, was correspondingly limited. The effect, then, of the waiver was that the policyholders could avoid suspension by payment to the bank, within the time specified in the notice, regardless of the time the payments thus made were received at the home office of the defendant. In other words, the waiver, as to the place of payment, extended only to such payments as were made within the time specified in the notice.

But the plaintiffs argue, that the express waiver, shown by the authority given to the bank to collect the dues, and the notice to the policyholders that payment could be made to the bank, was impliedly extended by the course of dealing between the policyholders and the defendant. This argument is based on the fact that the previous payments of the assured, as well as those of some other policyholders, had been made to the bank after the date, specified in the notice, for making such payments. We do not think such implication arises from those circumstances. By the express terms of the policy, if the payments were not made at the time and place therein specified the risk was suspended. But such suspension might be interrupted by the payment of the amount delinquent, at the home office at any time during the life of the as-

sured and within 30 days of the date such amount became due by the terms of the policy. When such amount was received at the home office, within that time, whether through the bank or directly from the assured, it operated to interrupt the suspension of the risk, and the defendant had no right, under the terms of the contract, to reject it. No implication of a waiver of the terms of a contract can arise from acts which are in strict accordance with such terms. The acceptance, therefore, by the defendant, of dues collected by the bank, after the time it was authorized to collect them, was not a recognition of the right of the assured to make them at Lincoln instead of Chicago and thereby arrest the suspension of the risk regardless of the time such payments were received at the home office, but of the right of the assured to avoid the suspension of the risk in the manner provided by the terms of the contract. Upon the failure of the assured to make the payment falling due June 1, 1901, to the bank at Lincoln, or to the defendant at its home office, on or before that date, he stood suspended and, by the express terms of the policy, such suspension was to continue until the receipt of the payment at the home office within thirty days of the date it became due and during his lifetime. There being no waiver of this provision, payment to the bank within that time would not interrupt the suspension until such payment was actually received at the home office. The evidence was properly rejected.

Another claim put forward by the plaintiffs is that the defendant retained the payment remitted by Miller, on June 14, 1901, until the time of trial, and thereby ratified his acceptance of the payment at Lincoln. As we have seen, in making payment for the assured, Miller was simply carrying out a personal arrangement between himself and the former. In those matters, he was acting for the assured, and the payment remitted by him June 14, 1901, is to be viewed in precisely the same light as though it had been made by the assured himself. The evidence shows it was not received at the home office until June 17,

1901, and until after the assured had died; that as soon as the defendant learned of the death of the assured, it returned the remittance to Miller, in the form of a check; that he returned the check to the defendant, who immediately returned it to him. It does not appear that the check was ever presented for payment, and, upon its production at the trial, the defendant, as we have seen, tendered the amount of it and deposited such amount in court for the use of those entitled thereto. It will be seen, therefore, that instead of a ratification or an acceptance and retention of the payment after it had notice of the death of the assured, the defendant promptly returned the payment to the party who, acting on behalf of the assured, had remitted it. A different question might arise had Miller been acting for the company in making the remittance.

Complaint is made of the rejection of evidence showing that the bank received payments after the first of the months, and that it was its practice to retain the list, showing the payments due, for collection until the 12th day of the month, and then report to the defendant showing the collections made and the time they were received, and that it was also its practice to send out collectors to make such collections. From what has already been said in regard to the evidence offered to show a tender to the bank, this evidence is clearly immaterial and it was not error to reject it. Complaint is also made of the rulings of the court excluding the answers to questions propounded on cross-examination. The answers were properly excluded, because the questions were not directed to matters brought out on the direct examination. Besides, in the view we have taken of the case, had such answers been received, they could not have changed the result.

Other errors are assigned, but we think they are disposed of by what has already been said.

It is recommended that the judgment of the district court be affirmed.

GLANVILLE and BARNES, CC., concur.

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

AFFIRMED.

JOHN C. BYRNES, SHERIFF OF PLATTE COUNTY, NEBRASKA, v. JOSIAH ELEY.

FILED NOVEMBER 5, 1903. No. 13,095.

1. **Trial to Court:** REVIEW. When trial has been by the court without a jury, reversible error can not be predicated on the admission of evidence, in the absence of an adequate showing by bill of exceptions that improper evidence was actually considered by the court as the basis of its findings, nor upon an exercise of the court's discretion in allowing proper evidence in the case to be brought out on the redirect examination of a witness.

2. **Evidence.** Evidence examined, and *held* sufficient to sustain the findings of the trial court.

ERROR to the district court for Platte county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

James G. Reeder, Ralph W. Hobart and *Frank Dolezal,* for plaintiff in error.

Patrick E. McKillip and *William A. McAllister, contra.*

GLANVILLE, C.

This is a proceeding in error seeking to reverse a judgment of the district court for Platte county in an ordinary replevin action tried to the court without a jury. The plaintiff in error was sheriff of that county and was defendant in the replevin action, being in possession of the goods in question under an attachment levy in an action against J. C. Eley, wherein the Fremont Saddlery Company was plaintiff. J. C. Eley is a son of the defendant in error; and the saddlery company is supporting the contention of plaintiff in error.

Error of law occurring at the trial was assigned in the motion for a new trial; and, in the petition in error filed herein, specific complaint is made of the rulings of the court admitting certain evidence. We have carefully examined all of these assignments and are satisfied that no error is shown in this respect in the record, the trial being to the court. Some of the complaints are based upon objections to evidence as not being proper upon redirect examination of the witnesses. This matter was within the discretion of the court, and such discretion was not abused in the present instance; and, without recounting the specific assignments of error in this regard, we hold that no such error is shown in the record.

The other contentions, though assigned in different forms, merely constitute complaints that the evidence does not sustain the findings and judgment of the court. The findings of the court in such a case are entitled to the same consideration as the verdict of a jury and, unless clearly wrong, under the established rule of this court they will not be disturbed. The saddlery company was a creditor of J. C. Eley, above mentioned, and brought an action in attachment against him, alleging in the affidavit all of the statutory grounds for attachment except nonresidence, and, prior to the trial in this action, it recovered judgment in the attachment case. Very soon after the levy of the attachment, the defendant in error brought a replevin action for the property in question, claiming ownership.

It appears from the testimony of the defendant in error and his witnesses, that he had signed notes with his son to enable him to start in the harness business and had paid the notes; that his son, who was a single man, boarded with him; that after a fire causing loss to the son, insurance was collected and some of the insurance money was used by the father in rebuilding the shop, under an agreement that the sum so used should be applied upon the rent agreed upon at $10 a month; that at another time the son informed the father that he needed money to pay for a

shipment of goods, and the father signed a note with him to procure the money, and afterwards paid the note.

On the 27th day of August, 1901, in pursuance to some previous negotiations, the entire stock of the son's harness business was turned over to the father, who hired a new man to take charge of the shop, and continued the business until the attachment was levied. The son immediately left home, but promised to return in a few days, and in the meantime to make and record a proper bill of sale for the stock when he was in Columbus. The father understood the son was going on the road as a salesman. It would seem from the testimony of the defendant in error, emphatic and reiterated, that at the time of the transaction in question, he did not know his son was indebted to any party other than himself. The son had learned the trade during his minority and had started in business without capital, to speak of, but had continually assured his father that he was not running in debt for stock, though in the meantime he was not ready to pay his board, nor his rent except to the extent of the payment advanced out of his insurance money. We do not think the evidence in the record so discredits the testimony of the defendant in error as to require us to hold that it will not support the findings; and it would seem from the entire evidence that the son was actually indebted to the father, at the time he went away, in excess of the value of the stock, fixtures and book accounts turned over in payment.

The value placed upon the stock in the transaction between the father and son is very close to the value placed thereon by the appraisers in the attachment action which was offered in evidence by the plaintiff in error, and the experienced salesman of the saddlery company assisted the appraisers in arriving at the value of the property. There is sharp conflict in the evidence in regard to some conversations between defendant in error and certain representatives of the saddlery company, but we do not think such conflict of evidence has any material bearing

upon the question in issue. Where a son turns over to his father all of his visible property in payment or settlement of a claim of the father against the son, the transaction will be scrutinized closely, and in a contest between the father and the creditors of the son, the burden is upon the father to clearly show the good faith of the transaction; but such a transaction may be free from fraud; and a creditor who attacks the transaction as fraudulent is not entitled to have it declared fraudulent *per se,* but must by sufficient evidence, aided by the presumptions justly arising from the relationship of the parties and the circumstances of the transaction tending to establish fraud, rebut the evidence of good faith in order to prevail against the father's title. We think there is much in the evidence lending plausibility to the father's statement of the transaction which, if true, shows it to have been in good faith for the purpose of making payment of an actual indebtedness of the son to the father, without any fraudulent intent on the part of the father, or any knowledge on his part of facts giving him any notice of any wrongful intent on the part of the son; and upon a careful examination of the entire evidence we are satisfied it is sufficient to sustain a finding that the transaction was in good faith.

Under the law in this state, unaffected by proceedings in bankruptcy or under assignment laws, an insolvent debtor may prefer any creditor and any creditor may accept such preferment, and, so long as a transaction is merely a preference given to one creditor over another, it is not fraudulent, notwithstanding such preference may render it impossible for the debtor thereafter to pay other creditors.

The relationship of the parties does not preclude such preference but only affects the question of the good faith thereof as a matter of evidence, changing the burden of proof and raising certain presumptions; but taking all of these effects into proper account in this case, we think the evidence is sufficient to sustain the findings, and that the judgment of the district court must be affirmed.

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

BARNES, C., concurs.

ALBERT, C., concurs in the result.

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

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. DAVID C. TROYER.*

FILED NOVEMBER 5, 1903. No. 12,853.

1. **Common Carrier:** LIABILITY TO SHIPPERS OF LIVE STOCK. A shipper of live stock who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained by reason of the negligence of its employees is that of a common carrier for hire.

2. ———: NEGLIGENCE. The caboose of a stock train was left about thirty car-lengths from the station, and the defendant in error and other passengers were directed to leave the caboose and take another which would be attached to a train to be made up. To reach the station the passengers were required to walk the length of the train between the train and another track eight feet distant from the track on which their train stood. The distance between cars or engines, occupying these two adjacent tracks, was four feet. While walking along the track a switch engine passed defendant in error, going north, and about the time he reached the south end of the train the same engine, returning south, overtook and struck him. *Held*, That while the company might rightfully stop its caboose at the place it did, it was bound to furnish defendant in error a safe passage way to the station, and that no duty devolved on him to be watchful for any but apparent and known danger, and he would not be negligent in failing to do so, it being the duty of the company to refrain from any act which threatened him with a danger of which he was not given warning and time to guard against.

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* Rehearing allowed. See opinion, p. 293, *post*.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

J. W. Deweese and *Frank Elmer Bishop,* for plaintiff in error.

John A. Whitmore, Henry H. Wilson and *Elmer W. Brown, contra.*

DUFFIE, C.

Troyer, the defendant in error, was injured in the freight yards of the plaintiff in error, at Lincoln, between 11 and 12 o'clock on the night of July 14, 1898. He left Aurora with a car-load of hogs on stock train No. 48, and, on its arrival at Lincoln, the train with the engine stopped at or near the O street viaduct and the rear end of the train some thirty car-lengths to the north thereof. It was the custom of the railroad company to make up another train at Lincoln, taking such stock as was destined for South Omaha into the newly made-up train, and the stockmen were required to leave the caboose of the Aurora train and walk between the tracks in the yard, along that train, to enter another caboose which would be attached to the train destined for South Omaha. On the arrival of the train in Lincoln defendant in error and other stock shippers in the caboose were told to leave it and make their way to the depot, awaiting the making up of another train. He left the caboose on the right hand side of the train and, together with other shippers and passengers who had occupied the caboose with him, made his way along the west side of his train until he had reached the south end thereof, from which the engine had, at that time, been detached. The tracks in the yard lay parallel with each other. The distance from the middle of one track to the middle of the other is 13 feet 2 inches, and between the west rail of one and the east rail of the other, 8 feet. The cars and engines project over these rails 2 feet on each side, leaving a distance of 4 feet between cars stand-

ing on adjacent tracks. On his way from the caboose to the south end of the train, defendant in error met a switch engine going north on the track next west. This engine had a headlight at each end, and we may assume that at that time, and afterwards at the time of his injury, the bell of the engine was ringing. One Green accompanied the defendant in error and was just in front of him. About the time they reached the south end of the train they had some conversation about going to the lunch counter for a lunch, and as the defendant turned to the left to cross the track on which his train stood, the switch engine, which but a few moments before had passed north, returned, and Troyer was struck by the drawbar of the engine on his left side and shoulder and thrown south some 35 or 40 feet between the rails of the track which he was about to cross. Defendant in error and Green both testified that they did not hear the approach of the engine or the ringing of the bell. The only defense made was contributory negligence on the part of the defendant in error. Judgment went in favor of defendant in error; and the railroad company has brought the record here for review.

The defendant in error was traveling on a drover's contract and pass usually issued to shippers of stock. The law is well settled in this state, following, we think, the weight of authority elsewhere, that a shipper who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire; that he assumes such risks and inconveniences as necessarily attend upon caring for such stock; but that, so modified, the liability of the railroad company to such shipper, for personal injuries sustained by him from the negligence of the company or its employees, is that of a common carrier for hire. *Omaha & R. V. R. Co. v. Crow,* 47 Neb. 84, 54 Neb. 747; *Missouri P. R. Co. v. Tietken,* 49 Neb. 130.

In *Omaha & R. V. R. Co. v. Crow,* 54 Neb. 747, it is said:

"On the former hearing it was held that one who is being transported over a line of railroad on what has been called a 'shipper's ticket' is not a passenger in such sense as to render applicable to him all the rules governing the transportation of passengers on passenger trains. Such a person is charged with the care of his live stock while in transit. He must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary travel. To the extent that such requirements interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified, and no further. The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications, is still bound to the exercise of the highest degree of care of which human foresight is capable; and contributory negligence is a defense. The difference between such a case and the ordinary one of a passenger affects also the latter question. The duties imposed on the passenger, of riding on a freight train and caring for his stock, excuse conduct which would be grossly negligent on the part of a passenger on a passenger train."

This rule, which has become the settled law of this state, disposes of the contention made by the plaintiff in error that Troyer assumed any risks not usually incident to travelers on freight trains and such as the care of his stock in transit demanded of him. Conceding to the plaintiff the right to stop the caboose at a great distance from the station and to require the shippers to walk between its tracks for a distance of 30 car-lengths for the purpose of changing cars to pursue their journey, it was its duty to furnish a safe path along which the shippers might walk, and to see that the path was not made dangerous by the operation of its train or engines. The shippers, on alight-

ing from the caboose and pursuing the directions given them by the employees, had a right to rest in the belief that the company would do nothing to endanger their progress. No duty rested on them to anticipate that the company would do any act to expose them to danger, and they were required to guard only against known and apparent peril.

In *Jewett v. Klein,* 27 N. J. Eq. 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up and down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station and before his train had come to a full stop. Referring to this case the supreme court of Colorado, in *Atchison, T. & S. F. R. Co. v. Shean,* 18 Colo. 368, 33 Pac. 108, said:

"By the foregoing and other well considered cases it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise that degree of care in crossing the railroad track that is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation; and this distinction is to be taken into consideration in determining the propriety of his conduct."

In the case of *Pennsylvania R. Co. v. White,* 88 Pa. St. 327, it is said:

"It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so."

The fact that on turning to the left to cross the track where the train on which he arrived was standing, the

drawbar of the engine coming south on the track adjacent, and to the west, struck him on the left shoulder and the left side of his body, shows conclusively that he must, at the time, have been standing west of the center line between the two tracks and within 2 feet of the east rail of the track on which the engine was being operated. This can not of itself be taken as negligence, such as to present a recovery. With a clear space 4 feet only in which to walk, it is evident that the variation of more than 1 foot from the center of the path caused by a false step, or confusion caused by the operations going on in a yard where so much business is done, would throw him in position to be struck by a passing car or engine. Having placed him in the dangerous position, the company owed him a greater degree of vigilance than under ordinary circumstances. If Troyer had seen the approach of the engine and knew of his dangerous position, it would be his duty to use all reasonable care and diligence in avoiding the injury; but his testimony, and that of Green who accompanied him, is to the effect that they did not hear the approach of the engine, and, as before stated, they were under no obligations to be alert in watching for the approach of a train or engine which the company had no right to operate in such a manner as to endanger them, until they had reached the station and were out of the way of danger. To say that one is negligent in not looking for danger which he has no reason to suspect, and which he knows it is the duty of the company to prevent, is to cast upon him a burden which the law does not justify. In this case there could be no negligence on the part of the defendant in error unless he knew or was given notice of the approach of the engine. That he did not, has been established by the verdict of the jury upon evidence ample to sustain such finding. If he were an employee of the company, an entirely different rule would obtain, and the cases cited by the plaintiff in error would be applicable; but, being a passenger, he had every right to suppose that the company would use the utmost care in seeing that no danger overtook him on his way from the caboose to the station.

We discover no error in the record, and recommend the affirmance of the judgment.

POUND, C., concurs.

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

AFFIRMED.

The following opinion on rehearing was filed May 17, 1905. *Former judgment of affirmance adhered to:*

1. **Common Carrier:** SHIPPER OF LIVE STOCK. A person traveling on a freight train on a stock shipper's pass or contract, for the purpose of attending to and caring for the live stock being shipped on such train, sustains the relation to the carrier of passenger but in a restricted and modified sense.

a. ———: LIABILITY. Such a person, while so traveling, assumes such risks and inconveniences as necessarily attend upon caring for such stock and such as are incident to the means and methods employed by the company in the operation of its freight trains, and, as thus modified, the liability of the railway company to such shipper for personal injuries by him sustained, by reason of the negligence of its employees, is that of a carrier for hire.

b. **Risks Assumed by Shippers.** A shipper thus traveling on a freight train carrying live stock does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated.

c. **Duty of Carrier.** In such a case, the duty devolves upon the carrier to exercise the highest degree of care, skill and diligence for the safety of the passenger practically consistent with the efficient use and operation of the mode of transportation adopted.

2. **Negligence:** QUESTION FOR JURY: FINDING: EVIDENCE. In an action for damages for negligence against a railway company for personal injury to a shipper of stock, riding in a freight train, by coming in collision with a moving switch engine in the yards of the defendant company, it is made to appear that the train on which the plaintiff was being carried came into the defendant's freight yards about midnight, and that he was required to change way-cars before proceeding farther on his journey. The way-car on which he had been riding was left about 30 car-lengths from the place where he was required to take another one. To reach the other way-car the plaintiff and other passengers were required to walk the length of the train between the track on

which it stood and another track 8 feet distant. The distance between cars or engines on these two adjacent tracks was 4 feet. While walking along the train and toward its head, where the other way-car was supposed to be, a switch engine passed the plaintiff on the adjacent track, going in an opposite direction; and about the time he reached the head of the train on his way to the other way-car, the same switch engine returning and moving in the same direction overtook and struck him, inflicting an injury which is sought to be compensated in damages. *Held*, Under the evidence, that the question of the alleged negligence of the company was a matter for the jury to determine under proper instructions of the court, and that the evidence is sufficient to warrant a finding that the defendant company was guilty of actionable negligence which was the proximate cause of the injury complained of.

3. **Contributory Negligence:** QUESTION FOR JURY. *Held, also*, That the question of contributory negligence was for the jury, and that, under the facts and circumstances narrated in the opinion, it can not be said, as a matter of law, that the plaintiff was guilty of contributory negligence so as to preclude a recovery on the cause of action stated in his petition.

4. **Instruction:** ERROR. Error can not be successfully predicated on the giving of an instruction which is similar, in substance, to one requested by the party complaining and given by the court.

HOLCOMB, C. J.

Plaintiff below, defendant in error, recovered a judgment against the defendant railroad company, plaintiff in error, to secure a reversal of which the company prosecutes this proceeding in error. An opinion has heretofore been handed down, in which the conclusion was reached that the judgment rendered in the district court should be affirmed, and it was accordingly so ordered. *Ante*, p. 287. The statement of facts found in that opinion are challenged, and we find it advisable, in order to avoid any possible misconception of our position, to briefly restate what we conceive to be the salient features of the case material to an intelligent discussion of the questions proper to be considered in disposing of the alleged errors relied on to secure a reversal of the judgment below. The plaintiff was a passenger on one of defendant's freight trains carrying live stock, the destination of which was the South

Omaha market. At the time of the accident resulting in the injury which is made the basis of plaintiff's right to a recovery, he was traveling on a stock shipper's pass or contract, which permitted the carrying of a person on the same train, to accompany and attend the stock, if necessary, while in transit. In this instance, the plaintiff was shipping a car load of hogs from Aurora to South Omaha, and, under his contract was a passenger on the same train, it appearing, however, that little if any attention was required in looking after the stock that was being shipped by him. When the train on which plaintiff was riding reached Lincoln, which was near the hour of midnight, the business of the company required a rearrangement of the train from that point on to Omaha, and it became necessary for the plaintiff to leave the caboose or way-car in which he was then riding and take another one to be attached to the train, as made up in the Lincoln yards, for its onward trip to South Omaha. This transfer took place near the center of the freight yards of the defendant company and in the midst of a network of tracks composing the same. The way-car on which the plaintiff rode was at the north end of the train as it came into the Lincoln yards, and the one to which he was required to transfer was on the south end of the train as it was being rearranged; and it thus became necessary for him to travel the length of the train, or about thirty car-lengths, and in a direction parallel with the tracks, in order to pass from the one way-car to the other. While he and a companion were walking between the tracks and by the side of the train on which he had been riding, and just as he came to the southern end of it, and while in the act of turning across the track on which his train was standing, the locomotive having been detached, he was struck by a switch engine, on the adjoining track, moving in the same direction he was traveling, and which, while going north, had passed him on his way to the head of the train to find the other way-car. The collision inflicted serious physical injury for which he brings this action, alleging negligence

on the part of the company. It is alleged in the petition, in substance, that when said train stopped in said yards, the conductor in charge of the same ordered the plaintiff and other passengers to get out of the way-car in which they were riding, and negligently compelled the plaintiff and the other passengers to go into and upon the yards of the defendant company; that it was dark in the yards and there was great traffic, and bustle, and moving of trains and cars upon the tracks; that neither the conductor nor any of the train men assisted, or offered to assist, the plaintiff to find the car upon which he was to complete the trip or to reach any place of safety in or near said yards, but, on the contrary, negligently left and abandoned the plaintiff and the other passengers in said yards, well knowing that such negligent abandonment placed the plaintiff and the other passengers in great danger from trains and engines on said track; that while the plaintiff with the other passengers were seeking their way out of the yards, the servants of the defendant company in charge of and operating a certain locomotive about the business of the defendant, and who were running the said engine along a track nearest to the track on which stood the train in which the plaintiff was a passenger, negligently ran its engine at a high and unnecessary rate of speed, and negligently ran upon and against the plaintiff, and negligently struck the plaintiff with said engine or some projecting part or appliance of the same and greatly and permanently injured the plaintiff. It appears that the distance between the tracks was approximately 8 feet and, with the overhanging of the cars, there is 4 feet of space between the cars or engines as they stood or moved along on two parallel adjacent tracks. It thus appears that a position, if maintained in the space thus existing between the cars on adjoining tracks, would leave a person unexposed to contact by the moving objects on either track, but, it is obvious, a slight deviation from the center line of this space between the tracks would render a person, standing or walking thereon, liable to be struck by a moving car or

engine being moved up and down the tracks between which such person stood or was walking. With this brief statement of the situation, we will endeavor to note the vital objections urged against the judgment obtained by the plaintiff in the court below.

1. The defendant company contends that its relation to the plaintiff is not that of carrier and passenger, but that the relation existing at the time of the injury was more nearly analogous to that of employer and employee. On the other hand, it is insisted by counsel for plaintiff that he was a passenger in the fullest sense of the word, and that the carrier must respond in damages under our passenger statute, for all injuries sustained except such as are occasioned by the criminal negligence of the passenger, or from his violation of some express rule or regulation of the company actually brought home to his notice. Compiled Statutes, ch. 72, art. 1, sec. 3 (Annotated Statutes, 10039). We are not disposed to accept either of the views thus advanced, as being a correct statement of the relations of the parties to each other, in the action at bar. At least, we do not find it necessary in this action to base the plaintiff's right of recovery upon the broad ground that he was a passenger in the fullest sense of the word, and entitled to the full protection given by statute to passengers within the meaning of the word, as therein used, while being transported by common carriers. The decisions of this and other courts recognize, we think, a well defined distinction between passengers transported in the ordinary way and those persons traveling, as was the plaintiff, on a freight train for some special purpose connected with the passage thus provided for. In *Omaha & R. V. R. Co. v. Crow,* 47 Neb. 84, it is held, by this court, that a shipper of stock, who for the purpose of enabling him to care for the stock in transit receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and that his contract of passage is under the implied conditions that he will submit to whatever inconveniences are necessarily

incident to his undertaking. In other words, as we understand the decision, it is that such a passenger traveling upon a freight train is subject to the inconveniences, the methods and appliances that are used and resorted to in the operation and movements of freight trains used in the prosecution of the business of traffic in freight commodities, which is the primary object of the operation and running of such trains. Such a person, say the court, is for certain purposes a passenger, but he is not such in the usually unrestricted sense of that term. His contractual right is to proceed on the freight train, upon which his stock is shipped, from the place of shipment to its destination. His duty is to care for his stock in transit, and his rights and privileges as a passenger are limited by the necessity of traveling on such freight train and by the requirement that he should care for his stock. In *Missouri P. R. Co. v. Tietken,* 49 Neb. 130, it is held that such a person, so riding on a freight train carring his stock, "assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained, by reason of the negligence of its employees, is that of a common carrier for hire." The rule is restated in the case of *Omaha & R. V. R. Co. v. Crow,* upon its second appearance in this court, 54 Neb. 747. It is also decided, in the latter case, that such a shipper does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties, while the railroad is being carefully operated. Say the court:

"He (the passenger) must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary travel. To the extent that such requirements interfere with the operation of the ordinary rules of liability, the duty of the carrier is accordingly modified. * * * The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but

subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications, is still bound to the exercise of the highest degree of care of which human foresight is capable; and contributory negligence is a defense."

It must, we think, be accepted as the settled doctrine of this jurisdiction that a person with right of passage on a freight train, for the purpose of attending to his stock being shipped by the railroad company on such train, sustains to the company the relation of passenger to carrier, but in a restricted and modified sense. He is required to perform the duties for which his passage is provided and, for such purposes, assumes the risks incident to their performance. In fixing the liability of the carrier, then, regard must be had to the means and methods employed by the company in the operation of its freight trains, in the accomplishment of the business for which primarily employed, and the risks and hazards inherent in and necessarily attendant on the carriage of passengers by this method.

"From the composition of such a train and the appliances necessarily used in its efficient operation, there can not, in the nature of things, be the same immunity from peril in traveling by freight train, as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from the negligence or want of proper care of those in charge of it. Ordinarily, carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence, practically consistent with the efficient use and operation of the mode of transportation adopted." *Chi-*

cago & A. R. Co. v. Arnol, 144 Ill. 261, 271. See also *Olds v. New York, N. H. & H. R. Co.,* 172 Mass. 73.

Judged by these tests, and measuring the duties and responsibilities of the parties to the present controversy, it is for us, next, to consider and determine the question of negligence of the defendant company for the injury complained of which is relied on as a basis of recovery by the plaintiff.

2. It is contended that the negligence of the plaintiff alone contributed to his injury, and that the evidence fails to show any negligence on the part of the defendant. Whether or not the defendant company is to be held liable because of its alleged negligence in respect of the injury complained of, is to be determined by the facts and circumstances surrounding and leading up to the act, as a result of which the plaintiff came in collision with the engine of the defendant, as above stated. As the situation then existed, it became necessary for the plaintiff to find his way from the way-car in which he had been riding to the other end of the train, a distance of about 30 car-lengths. The fact that the passengers on this train, of whom there were several, were compelled to change from one car to another, and from one part of the yard to another was, we are warranted in assuming, known to the servants of the defendant company who were operating the engines, moving cars and making up the trains that were then being arranged in its freight yards. They knew, and must have known, that such a change would lead to more or less confusion and doubt as to the proper and exact place to go, and the particular place where the car would be found in which to continue their journey. It was known that this change must be made by walking some distance between the tracks. There was no well defined roadway by which passengers could go from the one place to the other. The travel necessarily was along and between parallel tracks laid close together, many of which were occupied with moving cars and engines being changed about in the yards. More or less noise and confusion of a bewildering character

surrounded those transferring themselves from one car to the other. It can hardly be doubted that the same duty devolved upon the company to guard against injury to its passengers, while changing from one way-car to the other, that rested upon it at all times during the journey of the passenger. The passenger, as it occurs to us, had a right to rely on the belief that the company would, with reasonable prudence and caution, operate its trains and engines in such a way as not to unnecessarily endanger those who were, of right and at the company's direction, in a position to be injured by such engines and appliances. The plaintiff in passing, as he did, toward where he must take the other car, proceeded along the only practicable route that he might travel. He walked down by the side of the train on which he had ridden, till he had reached the point where he might reasonably expect to find the way-car on which he was to finish his journey, and in the neighborhood of which it was to be attached to the train as it was to proceed to its destination. Before he had left the position between the two tracks where he had been traveling, and while seemingly just in the act of turning to cross the track on which his train was standing, in so doing, it is obvious he deviated in a slight degree from the exact center of the path along which he had been traveling, so as to bring his body within the path of the moving engine on the adjoining track, where he was struck by it and injured. It is in evidence that he was thrown a considerable distance. He testifies that he heard nothing of bell, or whistle, or other warning sound. The engineer on the moving engine saw him a considerable distance in advance, about 100 feet, but, from the position he was then in, the engineer thought he would clear his body by about a foot. Was the engineer justified in taking such chances? Would the company be free from negligence, when no effort was made to bring the engine under perfect control so as to pass with safety the plaintiff and his companion who, by reason of the train on the other side of them, were compelled to occupy a more or less perilous position between the two

tracks? The defendant company owed to the plaintiff the duty of exercising the highest degree of care and caution for his personal safety consistent with the convenient and efficient operation of its engines and cars in its freight yard, in the proper prosecution of its business. Whether it had discharged this duty, under the circumstances, was for the determination of the jury, under the pleadings and the evidence in support thereof. All the attendant facts and circumstances, the time of night, whether the yards were dark or lighted, the distance necessarily traveled in going from one car to the other, the facilities and opportunities afforded for making the transfer, the location of the tracks with reference to each other, the movements of engines and cars thereon, and the precautions taken to avoid injury to those making such transfer, were all matters for the consideration of the jury, in determining the questions of negligence, under proper instructions of the court; and we are of the opinion that the evidence is sufficient to warrant a finding that the defendant company, through its servants, was, at the time under the circumstances shown in evidence, guilty of actionable negligence, and that such negligence was the proximate cause of the injury.

3. It is contended that the plaintiff was guilty of contributory negligence, which precludes any recovery on his part. This contention is based almost entirely on the proposition that he failed to use his senses of sight and hearing and thus allowed himself to be run down, as it were, by the moving engine on the adjoining track. It is contended that if further warning or knowledge was necessary, in order to induce him to be reasonably careful, that this was furnished when the engine which struck him passed him going to the north, as he was walking by the side of his train toward the south, and, to avoid which, he pressed closer to his standing train in order to be entirely out of danger from its passing. It is said that he, without looking backward, listening for or paying any attention to the running of this engine upon the adjoining

track, after he had observed it running to the north, proceeded on his way to the south, wholly heedless of its further movements on its return, when it ran onto him in the manner complained of. It is also argued that he was negligent, not only in failing to listen and look for the engine and to observe its movements, but that, in stepping to one side of the centre of the path between the tracks where he was walking so as to come in the path of the projecting portions of the engine, his act was equivalent to stepping between the rails of the track with knowledge, which he is shown to have possessed, that this track was being used by passing engines and cars, used in and about the business of the company in its freight yard, where the injury occurred. Whether or not the plaintiff is to be charged with contributory negligence precluding a recovery must, we think, be determined by the attending facts and surrounding circumstances, and the question of negligence on his part is peculiarly one of fact to be determined by the jury. Of course, the duty devolved on the plaintiff to proceed on his way from one car to the other with that degree of care and caution to avoid injury that would be exercised by a man of ordinary prudence and foresight under like circumstances. The caution and prudence that he was required to display must be commensurate with the known dangers surrounding him, and of those which he had reasonable cause to believe to be impending. He was reasonably familiar with the yards and had, prior to this occasion, changed way-cars in the same way he was then attempting to make the change. The plaintiff, at the time of the injury complained of, was going from one way-car to the other, where he had lawful right to be and where he found himself in a place of danger, not only on the invitation but at the direction of the defendant company. Whether the plaintiff, in fact, exercised that degree of care and caution required of him was a question for the jury, under the evidence bearing on the subject. It is apparent that he proceeded with all due caution between the tracks, and in a safe position, as he was traveling to the head of

the train on which he had been riding. His testimony warrants the inference that he was alert and observant of the movements around him, in order to avoid injury to himself. That he did not observe the return of the engine, as it was running to the south, and going as swiftly as the evidence warrants a jury in finding it was running, can not, we are satisfied, justify the conclusion that he was guilty of contributory negligence, as a matter of law. In respect of the question of his moving his body while standing or walking between the two tracks, so as to come within the path of the projecting parts of the engine, it is to be noted that but a slight deviation or swerving from a line marking the middle of the path between the tracks would bring the body of a person so as to come in contact with the overhanging portions of the cars or engines, as they were standing or moving on the adjoining tracks. A person in walking between the two tracks, or preparing to turn across one of them, would, at times, in all probability, and perhaps unconsciously, swerve his body from the true center line so as to come within the path of the overhanging parts of a car or engine moving on the adjacent track. Under such circumstances, we can not believe that negligence ought, as a matter of law, to be imputed to one who, while thus traveling, permitted himself to depart from the straight and narrow path in so slight a degree and, because of which, came in collision with a moving object on the track, the coming of which he was wholly unconscious of. It is to be borne in mind that the plaintiff, in finding his way from one way-car to the other, might reasonably assume that the defendant company would not expose him to any danger which, by the exercise of that degree of care and caution required of it to those in its charge as passengers, could be avoided. The plaintiff was required to exercise reasonable care but, at the same time, he could rely upon the faithful observance, by the employees of the defendant company, of such precautionary measures consistent with the proper prosecution of its business, as would secure to passengers a safe transfer from one car to

the other. The principle underlying cases of this kind and the reasons for the rule are well stated in the case of *Terry v. Jewett,* 78 N. Y. 338, 344. In discussing the doctrine of the relative duties, rights and responsibilities of carriers and passengers the court say:

"The rule is well settled that a traveler crossing a railroad track on a public highway is bound to use his eyes and ears to ascertain whether a train is approaching; but this rule has not been held in this state to apply to passengers who are crossing a track at a station to get on a train. There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

At the request of the defendant, the jury were instructed that, if it found from the evidence that the railroad company had been negligent in some or all of the particulars alleged against it, and it also found that the plaintiff himself had been guilty of negligence which caused or helped to produce the injury, then, the law is, if both parties are found to be guilty of negligence, neither one could recover from the other for the injury caused by such negligence and that, in this action, the plaintiff could not recover from the railroad company. The jury were also told that, in making the transfer from one car to the other, the plaintiff was bound to make careful use of his senses of sight and hearing, and to use all the care and caution of an ordinarily cautious and prudent person, under such circum-

stances, commensurate with the dangers of the situation, to protect and save himself from injury or accident, and especially to avoid collision with an engine or cars running on an adjacent track, and that, if the jury found that the plaintiff did not exercise such care and caution at or immediately before the time of the collision, then, he is not entitled to recover damages from the defendant company.

Negligence was properly defined, and these instructions, we think, fairly submitted to the jury the question of the alleged contributory negligence of the plaintiff, and the finding of the jury must, under well settled principles of remedial law, be regarded as conclusive.

4. Complaint is also made because of the submission to the jury, by an instruction, of an issue raised by the pleadings, of the alleged negligence of the defendant company in the manner of constructing its tracks in the freight yards where the accident happened. It is contended that the petition states no cause of action in this regard, and that the evidence did not justify the submission of such a question to the jury. In the absence of any attack on the pleading and in view of the theory upon which the parties tried the case, the pleadings must, we think, be held to have presented this issue. We are disposed to the view that, with no other issue of negligence, a verdict, under the record as presented, in favor of the plaintiff, could not be upheld. But the allegation respecting the construction of the tracks has only an incidental bearing upon the negligence charged. The defendant company tendered an issue on this question, and its evidence was elaborate on the proposition that the tracks in the yards were properly constructed. Competent evidence was introduced on both sides in order to maintain the issue. It was spoken of, in the instructions, in connection with the other alleged acts constituting the negligence charged. The defendant, we are satisfied, was in no wise prejudiced. In fact, instructions were given, at the request of the defendant, inviting a verdict from the jury upon all questions regarding the

negligence charged, and all allegations in respect thereof which were, in substance, the same as the one given by the court, of which complaint is made. The defendant can not, therefore, predicate error upon the giving of an instruction which is substantially the same as one given at its own request. The judgment rendered can not rightfully be disturbed, solely on the ground of the court's submitting to the jury in one of its instructions, in the way it was submitted, the question of the negligence of the defendant because of the manner of constructing its tracks in its freight yards, where the injury occurred.

Upon an examination of the whole record, we are of the opinion that no substantial error prejudicial to the rights of the defendant is found therein; that the evidence supports the finding of the jury; and that the judgment rendered thereon ought to be affirmed, which is accordingly ordered.

The judgment of affirmance is adhered to.

REAFFIRMED.

BARNES, J., dissenting.

It is correctly stated, in the prevailing opinion, that a shipper of live stock who receives, from the railroad company undertaking the transportation of such stock, a free pass to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon that manner of travel and the caring for such stock; and, modified accordingly, the liability of the railroad company to such shipper, for personal injuries by him sustained by reason of the negligence of its employees, is that of a common carrier for hire. It follows, that the plaintiff's right to recover for the injuries complained of in this case, depend upon some actionable negligence on the part of the defendant company. As I read the record, no such negligence is shown. The space between the railroad tracks, where the plaintiff was walking, in order to reach the caboose, as explained in the majority opinion, was wide

enough for his safe passage, if he had exercised ordinary care to avoid being struck by the defendant's passing engine. This fact was clearly established when it was shown that the defendant's yard, including the tracks and space in question, were constructed more than 25 years ago, and from that time to this has been used by the public for passage, the same as it was being used by the plaintiff at the time of the accident, and by the employees of the railway company to do their work in and about the yard, without other accident or injury than the one now complained of. The plaintiff, it appears, was entirely familiar with the situation, and such familiarity may have made him careless and inattentive to his surroundings, when he inadvertently stepped to one side, and thus suddenly put himself in front of the approaching switch engine. It seems to me that the negligence which caused the injury complained of, if any, was the plaintiff's negligence, and therefore I am of opinion that our former judgment should be vacated, and the judgment of the district court reversed.

BEATRICE CREAMERY COMPANY V. MARY FITZGERALD.

FILED NOVEMBER 5, 1903. No. 13,154.

Bond of Administratrix: PUBLIC POLICY. A bond executed by the administratrix of an estate, conditioned that she will reimburse a proposed purchaser of certain lots belonging to the estate, upon which a mortgage was being foreclosed, any amount in excess of twelve thousand dollars which he might be compelled to bid at the foreclosure sale, is void as against public policy.

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

Adolphus R. Talbot and *Thomas S. Allen,* for plaintiff in error.

Thomas J. Doyle, George W. Berge and *James Manahan, contra.*

DUFFIE, C.

Mary Fitzgerald is administratrix of the estate of John Fitzgerald, deceased. November 4, 1898, she entered into the following agreement:

"It is agreed by and between Mary Fitzgerald, administratrix of the estate of John Fitzgerald, deceased, as party of the first part, and the Beatrice Creamery Company, of Lincoln, Nebraska, as party of the second part, as follows: The party of the second part agrees to purchase lots five (5), six (6), seven (7), eight (8), nine (9) and ten (10) in block forty-five (45) in the city of Lincoln, and to bid and pay therefor the full sum of twelve thousand ($12,000) dollars. The party of the first part agrees to sell and convey said lots to the party of the second part for said sum of $12,000, and to convey the same under the direction and order of the United States court for the district of Nebraska, free and clear of any liens of any kind, as soon as decree is entered and sale confirmed by said United States district court. The party of the second part is to enter upon the possession of said premises under a lease executed and delivered this day, and as a part of this agreement the party of the second part is to pay said sum of $12,000 upon the delivery to it of said master in chancery's deed. Said sum to be paid first in satisfaction of any claims upon said property by the Provident Life and Trust Company of Philadelphia, and the balance to the order of the party of the first part. Upon the delivery of the said deed as aforesaid, and the payment of the said $12,000 according to this agreement, the said party of the second part will surrender to the party of the first part the lease executed this day. MARY FITZGERALD.

"4th November, 1898. BEATRICE CREAMERY CO.,
"By G. E. HASKELL, *Prest.*
"MORRIS FRIEND, *Sec'y.*"

At the same time she executed a bond of which the following is a copy:

"Know all men by these presents, that I, Mary Fitzgerald, administratrix of the estate of John Fitzgerald, deceased, of the city of Lincoln, Lancaster County, Nebraska, and Mary Fitzgerald, each are held and firmly bound unto the Beatrice Creamery Company, of Lincoln, Nebraska, in the sum of twenty thousand ($20,000) dollars good and lawful money of the United States, to be paid to the said Beatrice Creamery Company, its successors or assigns, for which payment well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents.

"Dated this 4th day of November, 1898.

"The condition of this obligation is such, that whereas, the said Beatrice Creamery Company has purchased from the estate of John Fitzgerald, deceased, lots 5, 6, 7, 8, 9 and 10 in block 45, in the city of Lincoln, Lancaster county, Nebraska, upon which it proposes to at once erect a suitable building and place therein proper machinery for conducting its business, and whereas said estate of John Fitzgerald, deceased, can not at once convey a perfect title to said property to said Beatrice Creamery Company, but said estate is anxious and willing that said Beatrice Creamery Company shall proceed forthwith to the erection of said building, and said Mary Fitzgerald, administratrix of said estate, shall furnish and deed said property to said Beatrice Creamery Company within four months from the date hereof, by deed, free and clear of all incumbrances, and if necessary, have said property sold through the court by administrator's sale to perfect said title; now therefore, if the said Mary Fitzgerald, administratrix of said estate, shall fully comply with her contract to convey or cause to be conveyed to said Beatrice Creamery Company said real estate above described free and clear of all incumbrances, and will furnish a complete abstract of title showing perfect title in the Beatrice Creamery Company by said conveyance within the time herein prescribed; and if at any public sale through an order of court or otherwise, the said Beatrice Creamery Company shall be

required, in order to protect its interests and rights, to bid and pay a greater price for said property described than that which is agreed upon as the purchase price of the same between said Beatrice Creamery Company and the administratrix of the estate of John Fitzgerald, deceased, then said Mary Fitzgerald, administratrix of John Fitzgerald, deceased, will reimburse and indemnify said Beatrice Creamery Company any and all losses or damages which it may sustain by reason of said public sale or otherwise, or because of the inability of the estate of John Fitzgerald to convey good and perfect title to said Beatrice Creamery Company upon this date, then this obligation to be void, otherwise to remain in full force and effect. MARY FITZGERALD.

"In presence of

"T. S. ALLEN."

At the time of making this agreement and bond, the property in controversy was being foreclosed in the federal court, and at the foreclosure sale plaintiff in error bid at the sale $12,000, being $2,000 more than the amount of the decree, and this excess was paid to Mrs. Fitzgerald as administratrix. At that time, certain taxes against the property amounting to nearly $1,800 were due and unpaid, and the company, in its petition, alleges that, in order to obtain a perfect title, it was compelled to pay said taxes. The petition further states that defendant in error failed to furnish an abstract of title, for which it was compelled to pay $33.85, and these matters are alleged as a breach of the bond, and judgment is asked against her for the amount. A demurrer to the petition was sustained by the district court, and, a motion for a new trial being overruled, the company has brought the case to this court by petition in error.

The only manner in which an administratrix can dispose of the real estate of the decedent is by a public sale made on the order of the district court. In the present instance the property in controversy was incumbered by a

mortgage which was being foreclosed, and, while a sale under the decree of foreclosure would convey to the purchaser a perfect title and would obviate the necessity of Mrs. Fitzgerald applying to the district court for an order to sell the equity of the estate, still it is clear that the interests of the estate which would receive the benefit of any surplus above the mortgage debt, required the sale in the foreclosure proceedings to be as open to competition and conducted under such circumstances as to encourage bidding, as though made on an application of the administratrix herself under our statute; and any contract, the natural result of which would be to induce the administratrix to discourage bidding at the sale or prevent free competition, would be against public policy and void. One of the conditions of the bond sued on is as follows:

"And if at any public sale through an order of court or otherwise, the said Beatrice Creamery Company shall be required, in order to protect its interests and rights, to bid and pay a greater price for said property than that which is agreed on as the purchase price of the same between said Beatrice Creamery Company and the administratrix of the estate of John Fitzgerald, deceased, then said Mary Fitzgerald, administratrix of John Fitzgerald, deceased, will reimburse and indemnify said Beatrice Creamery Company any and all losses or damages which it may sustain by reason of said public sale or otherwise."

It is clear from this condition of the bond that, to save herself from personal liability thereon, Mrs. Fitzgerald was interested in seeing that the property did not bring more than $12,000 at the foreclosure sale. In other words, she entered into a contract in which her personal interests ran wholly counter to the trust which she was administering, the natural result of which would be to induce her to discourage purchasers from attending the sale and to prevent, as far as she might, free competition thereat. That such a contract is against public policy requires no argument to show.

In *Herrick v. Grow & Brown,* 5 Wend. (N. Y.) 579, the

administrators entered into an agreement binding themselves to execute to the plaintiff a proper conveyance of a certain piece of land owned by the intestate, as soon as they could obtain a sale of same under the order of the surrogate, the price agreed upon being $555, and binding themselves to the performance of this agreement in the sum of $100. The plaintiff, in a suit for the penalty, alleged that, before the commencement of the suit, the defendants did obtain a sale of the premises under an order of the surrogate but they neglected and refused to execute a conveyance. The court said:

"By the statute, administrators must sell at auction, and they can sell in no other manner. * * * Suppose a bidder at the auction were to offer $600 for this property which the administrators have agreed to sell for $555, they must forfeit and pay $100 out of their own pockets according to this contract. They have every inducement therefore to discourage bidding, whereas their duty requires them to sell at the highest price. Such a contract is highly improper, and a violation of the duty of the administrators. It is of course contrary to the policy of the statute and void."

We have no doubt that the demurrer was properly sustained, and recommend an affirmance of the judgment.

KIRKPATRICK, C., concurs.

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

AFFIRMED.

COUNTY OF VALLEY, APPELLANT, V. MAGGIE B. MILFORD ET AL., APPELLEES.

FILED NOVEMBER 5, 1903. No. 12,602.

1. **Tax Lien:** FORECLOSURE BY COUNTY. A county can not foreclose its lien for taxes, without a sale first having been made by the county treasurer and a certificate of tax sale issued thereon.

2. **Limitation.** A foreclosure proceeding by a county, upon a tax sale certificate, must be brought within the time limited by section 1, article 4, and section 2, article 5, chapter 77, Compiled Statutes.

3. ———. The five-year limit, within which foreclosure proceedings upon a tax sale certificate must be brought, does not commence to run until the expiration of the two years within which the tax debtor may redeem from the sale.

4. **Loss of Lien.** The county's lien for taxes is not devested by the failure of the county to foreclose its tax lien within the time limited by statute, but the county may again purchase at tax sale for the years covered by its prior purchase.

APPEAL from the district court for Valley county: JOHN R. THOMPSON, JUDGE. *Reversed and dismissed.*

George W. Hall and *Victor O. Johnson,* for appellant.

Edwin M. Coffin, Elliott J. Clements and *Herman Westover, contra.*

KIRKPATRICK, C.

This is a foreclosure proceeding brought by the county of Valley against Maggie B. Milford and her husband, to foreclose a lien for taxes upon certain property owned by the Milfords in Ord, in that county. The petition pleads five causes of action, each for taxes against the same property for separate years. The first four causes of action are upon sale certificates issued by the county treasurer, upon sales made to the county, in accordance with law, after the property had been offered at public tax sale and remained unsold for want of bidders. The fifth cause of action was an attempt on the part of the county to foreclose its general lien for taxes, without a sale having first been made and a certificate issued. The regularity of the assessment and levy of the taxes was conceded, and the petition of the county was sufficient to recover upon all the causes of action except the fifth, unless the several causes of action are barred by the statute of limitations. The Milfords interposed general demurrers to each cause of action. The demurrers were sustained as to the first

and second causes of action, upon the ground that the statute of limitations had run as to the tax sale certificates issued to the county upon the sales therein alleged. The county declined to plead further, and its first two causes of action were dismissed. The demurrer was overruled as to the third, fourth and fifth causes of action, and the Milfords elected to stand upon their demurrer as to the fifth cause of action, and answered as to the third and fourth, pleading the statute of limitations. The county filed a general demurrer to the answer filed by the Milfords, which was sustained by the court, and the Milfords electing to stand upon their answers, a decree was entered by the court upon the pleadings, dismissing the petition as to the first and second, and decreeing a foreclosure as to the third, fourth and fifth causes of action. Both parties appeal, and the questions here presented are: First, can the county foreclose a lien for taxes, without a sale in due form having first been made by the county treasurer, and a certificate issued thereon. Second, does the statute of limitations run against the county, in a proceeding to foreclose its lien, after purchase at tax sale and the issuance of a tax sale certificate in accordance with law.

As to the first contention, it may be regarded as finally settled against the rights of a county to foreclose in the absence of a sale, by the determination of this court in the case of *County of Logan v. Carnahan,* 66 Neb. 685. Of the soundness of the conclusion reached in that case we have no doubt. It follows that the action of the trial court, in decreeing a foreclosure as to the fifth cause of action, is wrong and must be reversed.

There can be no doubt of the right of the county to purchase at private tax sale under the provisions of both section 1, article 4, and section 1, article 5, chapter 77, Compiled Statutes, and this right has been expressly recognized by this court in *County of Lancaster v. Rush,* 35 Neb. 119, and *County of Lancaster v. Trimble,* 33 Neb. 121.

It follows, therefore, that the only remaining question requiring determination in this case is, whether the limita-

tions contained in section 1, article 4, and section 2, article 5, can be held to apply to counties. Section 1, article 4, chapter 77, provides in part as follows:

"They (the county commissioners) may, in the name of their respective counties, proceed by action at any time before the expiration of five years from the date of such sale, to foreclose such certificates or liens in the district court of such county."

In view of the constitutional provision which provides that the tax debtor may redeem from the tax sale at any time within two years, and in view of other provisions of the statute, this court has repeatedly held that the five years, within which foreclosure proceedings might be brought, did not commence to run until the expiration of the two years within which the tax debtor might redeem from the sale. This rule has been so repeatedly announced by this court that the question may be no longer regarded as an open question. It follows, therefore, that proceedings to foreclose under a tax sale certificate must be brought by the ordinary tax sale purchaser within seven years from the date of the sale upon which the certificate was issued.

There would seem to be no valid reason why the statute of limitations should not be held to apply to a foreclosure brought by a county, upon a tax sale certificate issued under the provisions of section 1, article 4, chapter 77, inasmuch as the section which authorizes the purchase, in express terms, limits the time within which the county can bring its foreclosure proceeding. Such being the evident purpose and intent of the legislature, we are constrained to hold that the county must exercise its right to foreclose upon a tax sale certificate issued to it, within seven years from the date of such certificate, or its action will be by the statute.

It is contended on behalf of the county that, if the section quoted from be held to be a limitation upon the right of the county to foreclose, such section is, to that extent, unconstitutional; that, under the provisions of section

138, article 1, chapter 77, of the revenue law, taxes are made a perpetual lien upon the land against which they are assessed; and that by the provisions of section 146, article 1, of that chapter, it is declared that no county shall have the power to remit or commute any portion of taxes against any property or of any person; and that, by the terms of the constitution, the legislature is prohibited from releasing or in any manner discharging taxes; and, if the mere failure of the county board to institute foreclosure proceedings for a period of seven years after the tax sale certificate was issued would bar the right of the county to foreclose, it would operate as a release or discharge of the lien for taxes. The steps necessary to be taken and the rights acquired by a county at tax sale differ very materially from the steps taken and the rights acquired by a private purchaser. The county is not a competitive bidder, and can only purchase when the property has remained unsold for want of bidders. Again, the county is not required to pay the purchase price, and neither is it entitled to a twenty per cent. interest on the purchase price, nor the allowance of attorneys' fees in case of foreclosure. All of these questions seem to be settled by the statute or the prior decisions of this court. The distinctions between a purchase by the county and by an individual, as such, are so apparent, it must be held that a different rule applies to a purchase made by a county and one made by an individual.

In the case of *Foree v. Stubbs,* 41 Neb. 271, this court said:

"The provision of the revenue law by which taxes are declared to be a perpetual lien is designed for the benefit of the state and the different municipalities which are authorized to provide revenue by taxation."

To the same effect is *Johnson v. Finley,* 54 Neb. 733. The county, therefore, does not in any way waive its lien by a purchase at tax sale; it simply takes advantages of one of the provisions of the statute, to enable it to procure a judicial sale of the property that will devest the title of

the delinquent owner, and thus obtain the amount of taxes due. The lien for taxes is perpetual, and can only be devested by payment. When an individual purchases, he is compelled to pay the taxes, and the state, county and other municipal subdivisions receive and thereafter retain the money, and the law maintains the lien in force, for a stipulated number of years, to enable the purchaser to get his money with interest. But it was probably never contemplated that the county should ultimately become the owner in fee of the land, by purchase at judicial sale.

We are, therefore, of the opinion that while the statute of limitations in this particular case applies to a foreclosure of a tax lien by a county, yet, upon a sale for taxes to the county, and the failure of the county to institute and prosecute to completion a foreclosure of its lien, the county's lien for taxes is not devested and the county must again purchase at tax sale for the years covered by its prior purchase, and must, within the period fixed by law, foreclose upon its second purchase; and that the lien of the county for taxes is not devested except upon the judicial sale resulting from foreclosure proceedings, or the payment of the taxes.

It appearing in this case that more than seven years had elapsed from the date of the sale, in each cause of action, before the commencement of the proceedings, the first, second, third and fourth causes of action were wholly barred by the statute of limitations. It follows that the judgment of the trial court as to the first and second causes of action was right, and as to the third, fourth and fifth causes of action, was wrong. It is therefore recommended that the judgment of the lower court be reversed and the proceedings dismissed.

HASTINGS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the proceedings dismissed.

REVERSED.

JOHN RICHARD NEARY ET AL., APPELLEES, V. JOHN NEARY ET AL., IMPLEADED WITH WILLIAM H. THORALD, APPELLANT.

FILED NOVEMBER 5, 1903. No. 12,736.

1. **Action to Quiet Title:** TRUSTEE: MORTGAGEE: CAVEAT EMPTOR. The rule of *caveat emptor* applies to purchasers or mortgagees of property from trustees, executors or other persons acting in fiduciary capacities.

2. **Trustee:** NOTICE. A testatrix, who willed her property to her children, appointed her husband her sole executor, with power, when in his judgment it would best subserve the interests of the estate, to sell or exchange the property devised, provided the proceeds of such sale or transfer were reinvested in real estate, the title to which should vest in her children. After testatrix's death, the husband remarried, and, as executor, conveyed property of the estate to his second wife without consideration, and soon thereafter he and his wife joined in a mortgage upon the property conveyed, the money being paid to him and by him diverted to his own use. The will was probated, and appeared of record and upon the abstract of title upon which the mortgagee relied in making the loan. *Held*, That the mortgagee and his assignee were charged with notice of the want of power in the executor to place the legal title in the wife, and to mortgage any of the property of the estate.

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

Beeler & Muldoon and *H. S. Ridgley*, for appellant.

Wilcox & Halligan, contra.

KIRKPATRICK, C.

This is an appeal from a judgment of the district court for Lincoln county, quieting the title to certain real estate in North Platte in appellees herein, legatees of Sarah J. Neary. The questions in controversy arise upon the following facts: In December, 1885, Sarah J. Neary died, a resident of Lincoln county, being the owner of the real estate in controversy. She left a last will and testament, under the terms of which she bequeathed to appellees, her children, the real estate in question. She appointed her

husband, John Neary, her sole executor, the appointment being made in the following provision of her will:

"Reposing confidence and trust in my beloved husband John Neary, I appoint him sole executor of this my last will and testament, and direct that he be not required to furnish any bond as such executor. I hereby empower my said executor, when in his judgment it shall be for the best interest of said estate herein bequeathed to my children, to sell or exchange any portion of said real estate, provided that the proceeds of any such sale or exchange shall be invested in real estate, the title to which shall vest in my children. Any real estate so purchased shall be treated in all respects as hereinbefore directed."

The will was duly admitted to probate, and John Neary accepted the trust, and entered upon the discharge of his duties as executor. Shortly after the death of testatrix, John Neary married Mary Jane Mackel, and soon thereafter, individually and as executor of the estate of Sarah J. Neary, deceased, he deeded to his new wife, Mary J. Neary, the property in controversy, the expressed consideration in the warranty deed which he executed being $5,000. It is not disclosed that his new wife possessed any separate property, and it is conceded that no consideration was paid for the conveyance. After receiving title, Mary J. Neary instituted a proceeding in court to cancel some apparent cloud upon the title, and, about eight months after she received title from her husband, she and her husband joined in a mortgage on the property to the Meed Loan & Trust Company for the sum of $1,800, which was paid to the husband and used by him, no part of it being reinvested for the benefit of the legatees of the will. The trust company soon after obtaining the note and mortgage, and before maturity, in the usual course of business, sold them to William H. Thorald, appellant. Default being made in the terms of the mortgage, Thorald instituted a foreclosure proceeding, which was prosecuted to decree and sale, appellant Thorald being the purchaser. None of the legatees in the will of Sarah J. Neary, appellees herein,

were made parties, nor were they parties to the proceeding to quiet title above mentioned. The will of Sarah J. Neary was duly recorded in the office of the recorder of deeds in Lincoln county, and appeared upon the abstract of title obtained by the trust company at the time it made the loan mentioned. Neither the trust company nor Thorald had any notice of the relation of the parties and the nature of the conveyance between them, other than such as they obtained from the abstract of title, the public records of Lincoln county, and from the identity of names of the parties to the conveyance. The will contained a provision that the property should be divided among the children when a son, named in the will, should reach his majority. This he did about a year before the commencement of this proceeding. The children were all minors at the time of the mother's death.

Judgment was entered by the trial court in favor of the legatees, canceling the mortgage of Thorald, and quieting the title to the premises in controversy in the children of Sarah J. Neary, deceased, share and share alike.

On the part of appellant it is contended that the trust company and its assignee, Thorald, are innocent purchasers of the premises to the extent of the mortgage mentioned; that evidence was inadmissible, as against the recitals of the deed, to show that Mary J. Neary never paid any consideration for the conveyance of the premises to her; that the executor had a right, under the terms of the will, to sell the premises; and that it was no part of the duty of the purchaser or mortgagee to see that the sale made should be *bona fide* and the proceeds reinvested for the benefit of the children; that, at most, the sale was merely voidable.

On the part of appellees it is contended that a purchaser or mortgagee was bound to take notice of the terms of the will and the power of the executor thereunder to convey; that, from the identity of names, the mortgagee was bound to take notice that Mary Jane Neary who signed the mortgage with John Neary, the husband, was the same Mary

J. Neary to whom John Neary had previously executed a conveyance of the property, and that the deed, being a conveyance by an executor of the property of the estate to his wife, was void under the law. Not all of the questions suggested require determination in this case.

It is not necessary to determine whether the conveyance from Neary to his wife constituted a void or voidable sale. It does not, in fact, appear to have been a sale at all, or to have been intended by the parties to be such. There was no consideration paid, no change of possession, and it seems only to have been intended by Neary and his wife as a plan to defraud the loan company. Under the terms of the will, the most that can be contended is that Neary might have made a *bona fide* sale of the property for a valid consideration, provided he reinvested the proceeds of the sale in other real estate, the title to which, by the terms of the will, would vest in the legatees of the deceased wife. We are not called upon to determine what the standing of the mortgagee would be, had a sale been made by Neary to his wife in good faith for a consideration of $5,000 actually paid, because that question is not presented in the case. Neither do we think that appellees are in any way bound by the consideration recited in the deed. While cases might arise in which parties to a deed would be estopped to dispute the consideration named, this is not such a case. The deed was an attempted fraud upon the children, in a transaction in which they were not parties, and they are at liberty to show the fact that no consideration was paid, and that, in fact, no sale of the property was ever made, but simply a fraudulent attempt to change the legal title from the children of the testatrix to the new wife. The actual ownership, the equitable title and, in fact, the legal title, remain exactly where it was placed by the will of the mother; the father never had title. He was simply empowered by the will to devest the title of the children in a certain way. This power he never exercised, and the fraudulent attempt he made was wholly inoperative.

The contention that the mortgagee was an innocent purchaser seems wholly without merit. We do not understand that any one can be an innocent purchaser of real estate, when there are open and obvious defects in the record title of such a nature as to disclose, upon examination, that the grantor has no title. In this case, the mortgagee and assignee claim to have acted upon an abstract of title, which we find in the record. This abstract shows the record title to the property in question to have been in Sarah Jane Neary. The abstract then shows the last will and testament of Sarah Jane Neary, deceased. This must be the foundation of the title upon which the mortgagee is to rely. A very slight examination would have disclosed that under the terms of the will, the title to the property vested in the children of the deceased testatrix. A mere glance at this will would have disclosed that the executor had no authority to mortgage the estate in any event, and could only make a sale or transfer of the property in a particular way. The mortgagee was bound to take notice of the limitations upon the power of the executor to convey. On the same page of the abstract is shown the conveyance of John Neary, as executor, to Mary J. Neary, then the mortgage under which appellant claims, executed within less than a year thereafter, and in the execution of which Mary J. Neary, the grantee in the deed, joins with John Neary, as wife.

The very slightest diligence in the way of investigation along the lines suggested by the abstract itself would have disclosed the nature of the entire transaction.

Something is claimed on behalf of appellant because of the certificate of a lawyer that the abstract showed good title in Mary Jane Neary. We think the average layman would have experienced no difficulty in ascertaining from the abstract and the records of Lincoln county, coupled with even slight diligence in the matter of making inquiries along the lines suggested by the records of the county and the occupation of the property itself, that the title to the property rested in appellees, and that

Mary J. Neary and her husband had no power to bind the property by the mortgage in controversy. The rule of *caveat emptor* applies with full force and vigor to purchasers of property from trustees, executors, and other persons acting in fiduciary capacities. The mortgagee in this case comes clearly within the rule. The cases of *Bachelor v. Korb*, 58 Neb. 122, and of *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, are instructive cases upon the doctrine followed in this state. The judgment of the trial court seems in all respects to be right, and it is recommended that the same be affirmed.

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

AFFIRMED.

JOHN BARTON ET AL. V. HENRY B. SHULL ET AL.

FILED NOVEMBER 5, 1903. No. 12,877.

1. **Replevin Undertaking:** EXCEPTIONS TO SURETIES. Under section 189 of the code, exceptions to the sufficiency of sureties upon a replevin undertaking must be taken within twenty-four hours from the time the undertaking is given; the defendant is not entitled to the whole of the day after that on which the undertaking is given in which to except thereto.

2. ———: ———. It seems that such period of twenty-four hours should be held to begin on the expiration of the twenty-four hours from the taking of the property, allowed the plaintiff for the purpose of furnishing the undertaking, although the undertaking may have been given before the expiration of that period.

3. **Waiver of Objections.** Where no exception is taken to the sufficiency of the sureties within the time fixed by section 189 of the code, all objections as to sufficiency are waived; and the question whether the officer acted in good faith in accepting the undertaking becomes immaterial.

4. **Witness:** IMPEACHMENT. In laying the foundation for impeachment of a witness by showing a contradictory statement out of court, the witness may be asked whether in making the statement he did not detail a conversation with a third person, by reason whereof he claimed to remember the fact stated, and, if

he denies the whole, proof may be made, not only of the statement itself, but of the reasons he gave for remembering the fact in controversy.

5. ———: ———. It is not error, in such a case, to exclude testimony of such third person as to the conversation, the conversation itself not being material, but only the fact, if such it was, that the witness in question referred to it as confirming his memory of the fact in dispute.

6. Trial: STATEMENT OF TESTIMONY: EXCEPTIONS. If the trial judge substantially misstates the testimony in giving his recollection thereof under section 287 of the code, it is error; but if he merely fails to make a complete statement, the party who desires that a further or fuller statement be made, being present at the time, should make a request to that effect, and, if he makes no request, a mere general exception to the statement of the trial judge will not suffice.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

George H. Hastings, Addison S. Tibbets, George W. Tibbets, Morey & Anderson, for plaintiffs in error.

Fayette I. Foss, Archibald S. Sands, John D. Pope, Ben V. Kohout and *R. D. Brown, contra.*

POUND, C.

This is a companion case to *Barton v. Shull,* 62 Neb. 570, which had been before the court previously as *Shull v. Barton,* 56 Neb. 716, and 58 Neb. 741. The facts involved are, in general, the same, but in this case the chief controversy is: Whether exceptions to the sufficiency of the sureties upon the replevin undertaking involved herein were taken within the time required by law. In this respect, the cause differs materially from the one which has been considered so fully on former occasions. Seven special findings were returned by the jury, with their general verdict, of which the more material are, that the replevin undertaking was filed before 1 o'clock P. M. of August 7, 1891, that notice of exceptions to the sufficiency of the sureties was given to the coroner at 1

o'clock P. M. of said day, and that said notice was "not served upon the coroner within twenty-four hours after the bond was given." Upon the general verdict, and these special findings, the court rendered judgment for the defendants, and the plaintiffs prosecute error.

The statute (code, sec. 189) provides, among other things, that the defendant in replevin "may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the sureties." It further provides that "if he fail to do so, he must be deemed to have waived all objections to them." The plaintiffs contend that twenty-four hours, in this connection, is to be construed as "one day," and hence, as the law ordinarily considers a day a *punctum temporis,* and will not regard fractions thereof, that they were entitled to the whole of the day after that on which the undertaking was given in which to except thereto. We do not think this point is well taken. Had the statute said "one day," there would be another question. While a day is made up of twenty-four hours, a period of twenty-four hours may include parts of two days. The very fact that the term one day would admit of the construction claimed by plaintiffs, evidently moved the legislature to fix the period clearly at twenty-four hours, so as to prevent a further extension of the time by judicial construction. If we were to adopt counsel's interpretation, then, as the period of twenty-four hours within which the undertaking is to be given must be governed by the same rule, the forty-eight hours prescribed by the statute might become four days, if the property happened to be seized early on the first day. It is argued also, on behalf of plaintiff, that the period of twenty-four hours within which exceptions are to be taken should be held to begin on the expiration of the twenty-four hours from the taking of the property, allowed the plaintiff for the purpose of furnishing the undertaking, although the undertaking may have been given before the expiration of that period. We

are inclined to agree to this interpretation. The period allowed for investigation of and exception to the sureties is very brief, and the defendant in replevin ought to be afforded a fair opportunity to protect himself. He ought not to be asked to live with the officer for twenty-four hours after the property is seized, so as to know the exact instant at which the undertaking is given. There is good warrant in the holdings of this court in analogous cases for beginning the period in which the exceptions are to be taken with the termination of the period allowed for giving the undertaking. *Bazzo v. Wallace,* 16 Neb. 293; *Sherwin & Co. v. O'Connor,* 23 Neb. 221; *State v. Gaslin,* 25 Neb. 71; *Beard v. Ringer,* 41 Neb. 831; *State v. Scott,* 53 Neb. 571. But we do not think the question material in the case at bar. The evidence is undisputed that the property was taken before noon on August 6; according to the coroner, as early as 9 or 10 o'clock. If we allow forty-eight hours from that time, exceptions to the sureties must have been taken at least by noon of August 8, and, as we have seen, the jury found that the notice was not served till 1 o'clock in the afternoon of that day.

One of the questions submitted to the jury was, whether the coroner acted in good faith in accepting the undertaking. Upon this point, the jury found specially in his favor. This finding is complained of as contrary to the evidence. But we see no reason to think that the error, if any, in this finding is prejudicial. No issue of good faith is involved in the case. Where no exception is taken to the sufficiency of the sureties within the time fixed by section 189 of the code, "all objections" as to sufficiency are waived by express provision of the statute. Being waived, all questions as to who they are, what they are worth, and how they came to be taken, are at an end, unless, at least, the defendant in the replevin action can show that he was induced by fraud or misrepresentation not to take exception to them as permitted by law. Hence, it becomes immaterial whether the officer acted in good faith in accepting the undertaking. The parties have

precluded themselves from attacking the sufficiency of the sureties. So long as that matter is foreclosed, by force of the statute, we do not think it can be revived merely by attacking the officer's motives. *People v. Core,* 85 Ill. 248, is not in point, since, in that case, there were no statutory provisions placing the burden of investigating the sureties upon the defendant. In this jurisdiction, the statutes expressly terminate the responsibility of the officer for sufficiency of the sureties, when all objections are waived by failure to except or when the sureties justify. Code, sec. 189.

One of the witnesses for plaintiffs testified that the replevin undertaking was filed in the office of the clerk of the district court, with the return of the writ, on the afternoon of August 7. On cross-examination, he was asked if he had not stated, at a time and place named, and in the presence of a number of persons named, that it was filed in the morning of that day, and that an attorney for the plaintiffs had inquired of him, the next day, when it had been filed, and, on being told, exhibited great impatience, for the reason that there was no time to serve exceptions. The witness answered: "I never said any such thing as to this bond to any one." Afterwards, the defendants were permitted to show by several witnesses that the witness made the statement substantially as set forth in the question. We do not think the matter very material, since the issue was as to when the undertaking was given, *i. e.,* delivered to the coroner, not when it was filed. Section 186 of the code provides that the undertaking shall be returned with the order. Hence, it may have been given some time before it was filed. But the question when this particular undertaking was filed was treated as material by all parties and not a little conflicting testimony was adduced upon the point. In view of this, we do not think the trial court erred in its rulings. The answer of the witness to the question which laid the foundation for impeachment is interpreted by counsel as merely denying that part of the statement referred to

which relates to the time when the bond was filed, leaving the remainder of the question unanswered. We do not so understand it. Another answer, further along in his testimony, indicates that he claimed whatever statement he made was in the course of a conversation with reference to another cause and to other papers. He plainly intended to deny the whole, so far as the case in hand and the instrument involved therein were concerned. We have no doubt that, in laying the foundation for impeachment of a witness by showing a contradictory statement out of court, the witness may be asked whether in making the statement he did not detail a conversation with a third person by reason whereof he claimed to remember the fact stated, and, if he denies the whole, proof may be made not only of the statement itself, but of the reasons he gave for remembering the fact stated. The purpose of the requirement that a foundation be laid in cross-examination is, to be fair to the witness, to allow him an opportunity for reflection and explanation. Consequently, it is said that the attention of the witness must be "particularly directed to the circumstances." *The Charles Morgan,* 115 U. S. 69. There is no better and fairer way of doing this than by putting to the witness the whole of what he is claimed to have said, including the reasons he is claimed to have given for making his alleged statement. The statement of the fact and of the reasons for remembering it are, in substance, one statement, and no good ground can be given for excluding an important portion, which, from its circumstantial character, must often be the most convincing. Complaint is made, further, that the court, after receiving the impeaching testimony, would not permit the attorney referred to to deny that the occurrence, said to have been narrated by the witness, took place. This was clearly right. The question was not what, if anything, took place between the witness and the attorney on August 8, but what the witness said with reference to it, afterwards, as confirming his memory with reference to the time when the instrument was filed. The conversation

itself between the attorney and the witness was immaterial.

Finally, error is assigned upon a statement of recollection of the testimony, made by the trial judge after the jury had been deliberating for some time, under the provisions of section 287 of the code. It is not claimed that the trial judge in giving his recollection misstated the evidence, or that he did not answer the question propounded to him by one of the jurors. But it is urged that he should have gone further, and that, in addition to stating the testimony showing that the undertaking was given prior to one o'clock of August 7, which the juror asked for, he should have stated the evidence tending to show that it was given after that hour, which was not asked for. The practice of stating portions of the evidence to the jury after they have been deliberating, while sanctioned by section 287 of the code, is fraught with some danger to a fair trial, and ought to be indulged in with caution. But the trial judge is in the best position to know when it is required and how his statutory power may best be exercised in particular cases. He should not be hampered unduly. Probably the wisest course is to leave the matter largely to his discretion, reviewing his action only for abuse thereof. *Bonawitz v. De Kalb,* 2 Neb. (Unof.) 534. If he misstates the testimony, substantially, in giving his recollection, there is clearly error. *Stephens & Roberts v. Patterson,* 29 Neb. 697. But if he merely fails to make a complete statement, we think the party who desires that a further or fuller statement be made, being present at the time, should make a request to that effect; and if he makes no request, a mere general exception to the statement of the trial judge will not suffice. *Miller v. Royal Flint Glass Works,* 172 Pa. St. 70, 33 Atl. 350. This is the rule which is applied to instructions, and it is founded in good sense and fairness to the court. The record discloses that the plaintiffs took an exception. Hence they are presumed to have been present. *Rose v. Burr,* 43 Neb. 358. They should have

asked the judge to state his recollection of any further testimony to which they thought it necessary to direct the attention of the jury.

We recommend that the judgment be affirmed.

DUFFIE, C., concurs.

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

AFFIRMED.

JAMES C. MCNERNEY, APPELLANT, V. HERBERT A. HUBBARD ET AL., APPELLEES.

FILED NOVEMBER 18, 1903. No. 11,510.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. Rehearing of case reported in 3 Neb. (Unof.) 104 and 108. *Reaffirmed.*

James C. McNerney and *Stephen B. Pound,* for appellant.

Halleck F. Rose, contra.

PER CURIAM.

The appeal in this case presents for consideration and determination no question save one purely of fact. The evidence preserved by bill of exceptions discloses no serious or substantial conflict, the point of difference being with respect to the proper inferences to be drawn therefrom. Two departments of the commissioners have had the appeal under consideration, considered the grounds of complaint, and both have reached the conclusion that the finding and judgment of the trial court ought to be sustained. *McNerney v. Hubbard,* 3 Neb. (Unof.) 104 and 108. The facts are fully stated in these opinions. The further consideration by the court of the evidence contained in the record leads us to a similar conclusion.

As was stated by Commissioner HASTINGS in the latter opinion, a correct disposition of the matter hinges on the question of whether the alleged fraudulent grantors, Hubbard Brothers, were in fact indebted to their father, Enoch Hubbard, in the sum of $5,000, as claimed. The evidence, we are of the opinion, warrants the inference that the indebtedness was an actual, existing and *bona fide* claim. The elder Hubbard died before the case at bar came to trial, which fact may, in a measure, explain the dearth of evidence on a crucial point. It is quite true other facts in evidence have a bearing upon the alleged fraudulent transfer, but they are, we think, subordinate to the main and principal question just mentioned. If it may be said that the grantors, Hubbard Brothers, were, in fact, indebted to their father in the sum stated, then the incorporation of the company and the transfer of the property of the Hubbard Brothers to it, and the satisfaction of the father's demand, by his taking stock in the corporation, are explainable on grounds consistent with honesty of action in making the transfer as a legitimate business transaction. Fraudulent intent ought not to be inferred where the transaction is reconcilable with honesty of purpose and fair dealings. The grantors, as owners of stock in the corporation, still retained as much of an interest in the property, the transfer of which it is sought to have canceled, as they had before the incorporation of the company and the transfer of the property to it. While it is argued that the interest of the debtors, represented by the stock of the corporation, can not be reached because of the manner in which it was incorporated and the way it has been conducting its business, we can not accept the argument as convincing, and doubt not the right of creditors to pursue their remedy, in this respect, the same as might be done if the property were held in another form. Applying the rule announced in *Faulkner v. Simms,* 68 Neb. 295, to the record as we find it in this case, we reach the conclusion that the findings of the trial court should remain undisturbed, and that the conclusion reached at the former

hearings results in a right disposition of the appeal. The judgment of affirmance is accordingly adhered to.

REAFFIRMED.

W. J. COURTRIGHT v. JOSEPHINE A. ENO.

FILED NOVEMBER 18, 1903. No. 13,023.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

W. J. Courtright and *S. S. Sidner,* for plaintiff in error.

Frank Dolezal, contra.

PER CURIAM.

In an accounting in an action to redeem real estate, the party redeeming was charged, among other things, with an item for insurance on the premises redeemed, the policy for which insurance had not, at the time, expired. The item was allowed by the court as a proper charge, paid into court by the party redeeming and included in the total sum found to be due in order to entitle such party to the right to redeem. The attorney of the party from whom the premises were redeemed received and accepted the money thus paid into court, and, at about the same time, still having the policy of insurance in his possession, had the same canceled by the local agent, receiving the unearned premium therefor, which was remitted to his client who was a nonresident. The court, upon due notice to the attorney, and after a special appearance and objections going to the merits of the proposed action, entered an order directing the payment into court, for the benefit of the party redeeming, the amount received, as aforesaid, as unearned premium on the canceled policy of insurance. From this order, error proceedings are prosecuted. We are all of the opinion that the court had jurisdiction, and was authorized to enter the order it did for the purpose

of making its decree effective and protecting the rights and interests of the parties, as adjudicated.

As it appears to us, the order was advisedly and properly made, and no sufficient reasons have been advanced for its reversal. Regardless of the form of the order, its effect was to prevent the reception by the attorney and his client of a greater sum than was adjudged to be due from the party redeeming, and, when the same had been wrongfully obtained, to compel restitution. No good purpose would be subserved by a discussion of the subject in detail. The order complained of is accordingly

AFFIRMED.

STATE OF NEBRASKA, EX REL. WILLIAM HAYDEN ET AL., V. RICHARD S. HORTON, TRUSTEE OF THE GREATER AMERICA EXPOSITION, ET AL.*

FILED NOVEMBER 18, 1903. No. 12,920.

1. **Reversal of Judgment:** RESTITUTION. It is a general rule that, "upon the reversal of a judgment which has been executed, it is the duty of the court to compel restitution," but restitution is not, in all cases, a matter of absolute right; it rests in the sound discretion of the court.

2. **Restitution.** Ordinarily an order of restitution will not be made against a solvent party where the result will be to deprive him of an opportunity to be heard in the courts of this state as to the merits of his claim.

3. **Corporation:** BANKRUPTCY: RESTITUTION. A corporation neglected to issue stock to a subscriber therefor and, by its proper officers, ordered the money which had been paid upon subscription returned to the subscriber. The subscriber procured a peremptory writ of mandamus, compelling subordinate officers of the corporation to execute papers deemed necessary to secure a return of the money. The order allowing the writ was afterwards reversed. The corporation having gone into bankruptcy, and the relator being solvent, it is *held* that the trustee in bankruptcy is not entitled to an order requiring the relator to return the money, so obtained, to the trustee in bankruptcy.

* Rehearing allowed. See opinion, p. 343, *post*.

ERROR to the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Reversed with instructions.*

Constantine J. Smyth and *Ed P. Smith,* for plaintiffs in error.

James W. Hamilton and *Henry Maxwell, contra.*

SEDGWICK, J.

On the 15th day of July, 1899, a writ of mandamus was issued by the district court for Douglas county against the Greater America Exposition and certain officers and agents of that corporation, on the application of Hayden Brothers, commanding the Greater America Exposition to "cause to be issued and delivered to William Hayden, Edward Hayden and Joseph Hayden, partners doing business in the name of Hayden Brothers, forthwith, an unconditional order upon the treasurer, Frank Murphy, for the payment to them of the sum of ten thousand dollars, and that you, W. S. Streetor, auditor, do forthwith issue to William Hayden, Edward Hayden and Joseph Hayden, the unconditional warrant and order of the Greater America Exposition upon its treasurer, Frank Murphy, for the payment to the said William Hayden, Edward Hayden and Joseph Hayden, of the sum of ten thousand dollars, and that you as auditor of the Greater America Exposition forthwith sign and approve the same, and forthwith deliver the said warrant so drawn in the said amount, to Dudley Smith, secretary, and to C. J. Smyth, chairman of the executive committee, for their signature, and that you, Dudley Smith, secretary, and you, C. J. Smyth, chairman of the executive committee of the Greater America Exposition sign the said warrant forthwith."

The warrant was executed and delivered, and the money paid thereon to Hayden Brothers accordingly. Afterwards the Greater America Exposition became bankrupt and the trustee in bankruptcy brought proceedings in error in this

court to review the judgment of the district court in allowing the writ of mandamus.

The judgment of the district court was reversed by this court (*Horton v. State,* 60 Neb. 701), and the case was remanded to the district court for further proceedings. A mandate was issued upon the judgment of this court, but before the mandate was filed in the district court, the relators asked the district court to dismiss the case, which request was granted. Afterwards the mandate was filed in the district court, and a motion made to set aside the order dismissing the case. The motion was sustained and the order made requiring the relators to show cause why they should not deliver to the defendant Horton, trustee in bankruptcy of the estate of the defendant the Greater America Exposition, the sum of $10,000. The relators appeared specially and objected to the jurisdiction of the court, alleging that the case had been dismissed by order of the court, and that the court had no jurisdiction to reinstate the case. This objection was sustained by the district court, which order was reversed by this court upon proceedings brought for that purpose (*Horton v. State,* 63 Neb. 34), and the cause was remanded "for further proceedings under the order to show cause why restitution should not be adjudged." Thereupon the relators brought an action in equity in the same court restraining the respondents from proceeding further upon the order to show cause until the equities of their defenses could be examined and determined by the court. Upon proceedings in mandamus brought in this court for that purpose, a writ was awarded directing the district court to vacate its injunction and proceed under the mandate of this court to the trial upon the order to show cause why the money should not be returned by Hayden Brothers. *State v. Dickinson,* 63 Neb. 869. Thereupon the relators filed in the district court their showing in response to the order for that purpose, and on the issues so formed trial was had which resulted in an order upon relators to return the money to the trustee in bankruptcy. The case is here now upon

petition in error to review this order of the district court.

In *Hier v. Anheuser-Busch Brewing Ass'n,* 60 Neb. 320, it was said that, "upon the reversal of a judgment which has been executed, it is the duty of the court to compel restitution." The general rule of law so announced is not questioned, but it is contended that the rule is not applicable in this case for several reasons.

1. It is contended that Hayden Brothers did not procure this money by their proceedings in mandamus which were afterwards found to be erroneous and were reversed. "The exposition was not coerced in any sense either directly or indirectly into issuing the warrant or order on the treasurer; the mandamus was in strict harmony with the will of the exposition, not against it."

This is the theory of Hayden Brothers upon this point as stated in their brief.

When the corporation known as the Greater America Exposition was organized, Hayden Brothers subscribed first for $5,000 of the capital stock, and afterwards, in July, 1899, they subscribed for $10,000 more of the capital stock and paid the cash therefor. Under the articles of incorporation of the company, its affairs were managed by a board of directors consisting of twenty-five members, and this board of directors in turn appointed an executive committee of five of its members who, under the direction of the board of directors, had immediate charge of the business affairs of the corporation. The articles of incorporation provided that this committee should consist of not less than three nor more than seven, and "shall have all the powers of the board of directors when said board is not in session." On the 8th of June the board of directors, by resolution, ordered that the stock subscription books should be closed and no further subscriptions received after July 1st. The subscription of Hayden Brothers for the $10,000 worth of stock was made on the 3d of July. Whether the order of the board closing the books was overlooked in making and receiv-

ing this subscription, or whether it was disregarded on account of its supposed invalidity as in conflict with the by-laws of the board of directors, is not clear. No stock was issued to Hayden Brothers upon the subscription, but the money, $10,000, was received by the officers of the corporation thereon.

William Hayden, a member of the firm of Hayden Brothers, was also one of the executive committee, and soon afterwards at a meeting of the committee held upon the exposition grounds he was present with Mr. Smyth and Mr. Kitchen, two others of the executive committee, thus constituting a quorum; the other two members, although notified of the meeting, not being present. At this meeting Mr. Hayden asked that the subscription of Hayden Brothers be canceled, and that the $10,000 paid thereon be returned. This the executive committee ordered done by resolution for that purpose duly entered. Afterwards, the board of directors met, and appear to have considered the action of the executive committee in ordering the money returned to Hayden Brothers, but took no action thereon. No voucher appears to have been drawn in favor of Hayden Brothers to return this money, and a few days after the claim was ordered paid by the executive committee, Hayden Brothers applied to the district court for the writ of mandamus to compel the auditor of the corporation to issue the voucher therefor. This application appears to have been based upon the theory that the exposition had allowed the claim and had directed the auditor to draw the voucher, and that it was his duty to do so. The application for the writ also requested that the writ run against the exposition and against the chairman of the executive committee and against the secretary of the corporation, but it does not appear to have contained any allegations showing any neglect of duty on their part, or that there was any necessity for the writ so far as they were concerned. On the other hand, it alleges that the exposition company, by its proper officers, had determined that the money

ought to be returned to Hayden Brothers, and had taken proper action in that regard and ordered the money returned, but one Streeter, the auditor of the company, refused to issue the necessary warrant or voucher therefor. The writ was issued without any notice and commanded the defendants named to deliver to Hayden Brothers an unconditional order upon the treasurer for the payment of $10,000, and immediately after the service of the writ the voucher was delivered to Hayden Brothers, upon which the money was obtained.

There seems to have been a controversy among the stockholders and others interested in the management of the exposition as to the control of the company. Hayden Brothers, and others, who had been prominently interested in the enterprise from its inception, were about this time displaced by other parties in the control of the executive committee, but there seems to be no doubt that the committee as constituted up to this time was fully qualified with authority to represent the corporation in the absence of the board of directors and to bind the corporation by its acts. When the executive committee ordered the money returned to Hayden Brothers, it also in the same order acted upon a claim of Mr. Kitchen, so that Mr. Kitchen and Mr. Hayden were both personally directly interested in the action of the committee. There was no more than a quorum of the committee present when the order was made, and these two interested members constituted a majority of that quorum. This fact would undoubtedly have justified the board of directors in refusing to be bound by such action. This the board did not do. It considered and disapproved some of the actions of the committee taken at the same time. It added two members to the executive committee, thus changing the control of the committee. It did not rescind its order forbidding the issue of stock, or make any provision for tendering the stock to Hayden Brothers for which the money had been advanced to the corporation. It did not then, or afterwards, express any disapproval of the action

of the committee in ordering the $10,000 returned. It would seem clear that such of the acts of the executive committee as were not afterwards revoked or criticised by the proper authorities of the exposition should be considered and treated as the acts of the exposition and binding upon the exposition as such.

When Hayden Brothers subscribed for the $10,000 worth of additional stock in the exposition, there was nothing to indicate any change in the management, or that the stock was not a desirable investment. It was claimed on the part of some that the subscription books for the stock had been closed, and that the subscription of Hayden Brothers for the $10,000 additional stock was invalid. It appears that Hayden Brothers accepted this view and consented that their subscription be canceled, and it followed as a matter of course that their money which they had paid for their stock should be returned to them. This the authorities of the exposition recognized and ordered the money returned. This action appears to be binding upon the exposition, and that no proceedings by mandamus, or otherwise, were necessary to compel the exposition company to recognize this right of Hayden Brothers. One or more subordinate officers or agents of the exposition, whose signatures were deemed necessary in order to complete the transaction in accordance with determination of the exposition authorities, refused to take the action deemed necessary to that end, and the application for the writ was virtually at the instance of the exposition authorities as well as Hayden Brothers.

In the opinion in *State v. Dickinson,* 63 Neb. 869, 878, it is said:

"An order has been issued in the main case to show cause why the plaintiffs in that action should not be adjudged to make restitution of the moneys received by them from the defendant under a judgment in their favor which was afterwards reversed. It has been decided that such restitution is a matter of right, and does not depend upon

the merits of the controversy between the parties. Whether this rule of law is unyielding and without exception, we need not here discuss or determine. Certain it is that equity follows the law, and can not be resorted to for the purpose of overturning one of its well-settled principles."

In *Gould v. McFall,* 118 Pa. St. 455, 12 Atl. 336, it was said:

"Restitution is not a mere right. It is *ex gracia,* resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip."

By the opinion of this court last referred to (*State v. Dickinson,* 63 Neb. 869), the question was left open, and it was, of course, the duty of the trial court to investigate the facts of the case and ascertain whether it was a case in which restitution was a matter of right, or whether the case presented an exception to the rule in which the court in the exercise of a sound discretion would not order restitution. That this was the theory which this court intended to announce is made manifest, we think, from the following language in the opinion:

"However this may be, the rights of all parties in interest, it appears to us, ought to and can be adjudicated in the one action which has proceeded to the point where interfered with by the order of injunction which is now the subject of consideration. Counsel are in error in their position that, to obtain whatever relief their clients may be entitled to, they must invoke the aid of a court of equity in an independent action. We are altogether satisfied that, under our code, the trial court is, in the trial of a cause or any branch thereof, empowered and authorized to administer to the respective parties the relief to which they may be entitled, either legal or equitable. Under the order to show cause why restitution should not be adjudged against the plaintiffs or relators in that action, they may, under our form of practice, present any defense, legal or equitable, which they may

be possessed of, and the court will award the proper relief, as justified by the pleadings and the evidence. The distinctions between actions at law and suits in equity and the forms of all such actions are abolished. * * * It is the duty of the respondent to vacate the restraining order, and thereby give to the parties an opportunity to proceed in the main case in accordance with the mandate filed therein."

The necessity and propriety of an equitable proceeding to determine whether a return of the money should be ordered was the subject of discussion, and the language quoted above must be taken as holding that any reason, legal or equitable, for refusing to compel a return of the money might be shown upon the order to show cause. If this money is returned to the trustee in bankruptcy, the corporation being shown to be hopelessly insolvent, Hayden Brothers, however just their claim may be, will be unable to obtain more than a fraction of the money so paid over, and to procure even that they will have no remedy in the courts of this state.

"The national courts have jurisdiction in equity in the absence of an adequate remedy at law in those courts. The test of their equitable jurisdiction is the absence of such a remedy in the federal courts. The presence or absence of a remedy at law in the state courts is not the test of the jurisdiction in equity of the federal courts." *National Surety Company v. State Bank of Humboldt*, 120 Fed. 593, 61 L. R. A. 394.

It is not claimed that Hayden Brothers are insolvent. Surely the courts of this state ought not, under the circumstances of this case, to place this money in the hands of the trustee in bankruptcy, and to remit Hayden Brothers to so manifestly inadequate a remedy in the federal courts.

Several other grounds for reversal are urged by Hayden Brothers, some of which appear to be meritorious, but in view of the conclusion already reached further discussion is unnecessary.

The order complained of is reversed and the cause remanded with instructions to dismiss the proceedings.

REVERSED.

The following opinion on motion for rehearing was filed April 21, 1904. *Rehearing denied:*

Mandamus: FINAL ORDER. In mandamus proceedings, the hearing upon an order to show cause why money obtained by the relator from the respondent under such proceedings should not be returned to the respondent, is summary in its nature, and an order therein is not a final adjudication of the rights of the parties to the money in controversy.

SEDGWICK, J.

In the brief in support of the motion for rehearing in this case, it is insisted that the opinion complained of disregards the former adjudication of this court; and quotations are made from the opinion upon the first hearing, as showing that the law of the case as established in that opinion, has been disregarded. In this regard, we think that the question actually adjudicated by the former opinion referred to, has been overlooked by the writer of the brief.

It was determined upon that hearing that a peremptory writ of mandamus can not be issued against the officers of a private corporation without notice, and an opportunity to be heard. This was the principal question adjudicated in the case, and the several other matters determined relate entirely to questions of practice, and are plainly stated, and are in no respect inconsistent with the principles of law as adjudicated in the opinion complained of. The legal principles set forth in the eight paragraphs of the syllabus of the first decision, are not questioned, and they clearly justify the decision then made.

Upon the last hearing in this court, the question was whether the order of the district court directing Hayden Brothers to pay the ten thousand dollars in controversy

to the trustee in bankruptcy, could be sustained. This was the first hearing in this court upon that question, and was the first opportunity to investigate the matters necessary to its solution, and if there is any language in any of the former opinions of this court in this litigation that appears to determine this question before it was presented to this court, the language was not so intended.

It is complained that by the opinion in this case, the rights of parties are left in doubt.

Upon an order to show cause in a mandamus proceeding why the money should not be returned, the proceedings are in their nature summary. In *State v. Dickinson,* 63 Neb. 869, the question was whether an independent action in equity enjoining further proceedings under the order to show cause, was the necessary and proper remedy to enable the court to determine whether it should order the money returned. The matter determined was that such action in equity was unnecessary and improper, and that upon the order to show cause in the mandamus proceedings, the court could make the necessary investigation of the facts upon which the propriety of such an order might depend. It was not intended to determine that the rights of the parties to the money in controversy could be finally adjudicated in this summary proceeding. In the last opinion (*ante,* p. 334), it was held that under the circumstances there set forth, the court would not, in this summary proceeding, order a return of the money in controversy. This was put upon the ground, among other things, that the money was left by Hayden Brothers with the exposition authorities, as a payment for stock of the company to be issued to Hayden Brothers, and the company had refused to issue the stock, and had refused to recognize the right of Hayden Brothers to pay for and receive the stock, and had by its executive committee ordered a return of the money to Hayden Brothers.

It was considered that the company having, perhaps, just ground to do so, had not rescinded this action of the executive committee, but had allowed it to remain as the

action of the company until many months thereafter, when, the company having gone into bankruptcy, the trustee in bankruptcy sought to procure a return of the money.

In determining that this was not a proper case in which to summarily order a return of the money before the rights of the parties had been adjudicated in an action at law, it was suggested, in addition to the foregoing considerations as to the character and condition of the proceedings, that to order the money returned to the trustee in bankruptcy would, in effect, place the claim of Hayden Brothers upon the same footing with ordinary claims against bankrupt estates. Whereas, Hayden Brothers being solvent, the remedy of the exposition company would be effective if it could establish the liability of Hayden Brothers in an independent action.

It was said in the opinion that:

"It was claimed on the part of some that the subscription books for the stock had been closed, and that the subscription of Hayden Brothers for $10,000 additional stock was invalid. It appears that Hayden Brothers accepted this view and consented that their subscription be canceled, and it followed, as a matter of course, that their money which they had paid for their stock should be returned to them."

It was not by this language intended to hold that in this action the rights of the parties were finally adjudicated. The thought was that, for the purposes of this summary proceeding, these facts had been made sufficiently to appear.

It was not supposed that the refusal of this order in these proceedings would constitute a bar to a prosecution of the claim of the trustee against Hayden Brothers in a suitable action brought for that purpose.

We are satisfied with the conclusion reached in the opinion upon the last hearing for the reasons there given. The motion for rehearing is overruled.

REHEARING DENIED.

HENRY S. MCDONALD, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 18, 1903. No. 12,844.

Courts: JURISDICTION: HOMESTEAD LAWS. The courts of this state are without jurisdiction to compel the conveyance of lands, subject to entry and settlement under the homestead laws of the United States, to a person who has been denied the privilege of making such entry and settlement by the officials of the United States land department.

APPEAL from the district court for Buffalo county: HOMER M. SULLIVAN, JUDGE. *Reversed and dismissed.*

William R. Kelly, John N. Baldwin and *Edson Rich,* for appellant.

Byron G. Burbank, contra.

AMES, C.

This action was begun in the district court for Buffalo county on the 10th day of November, 1899. The petition alleges that the defendant is the successor in interest and in title of the Union Pacific Railroad Company, created by act of congress of July 1, 1862 (U. S. Statutes at Large, vol. 12, p. 489, ch. 120), entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, miltary and other purposes." That this act contains the following grant expressed by section 3 thereof, to wit:

"*And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within

the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

That among the lands covered by said grant is the northwest quarter of section seventeen (17), in township nine (9), north of range seventeen (17), west of the 6th principal meridian, in said Buffalo county in this state, and that on the 3d day of March, 1899, more than three years had elapsed after the entire completion of said railroad, during which said quarter section had remained unsold and undisposed of by said railroad company, its successors or assigns; that on said last named day the plaintiff, being a citizen of the United States, had tendered to the register of the United States land office for the district in which said quarter section lies, an application to enter said lands and settle upon them as a homestead under the public land laws of the United States, and had accompanied said tender with a tender to said register, of $380 and the fees required by law, and by filing with him affidavits in compliance with sections 2289 and 2290, chapter 5, page 419 of the Revised Statutes of the United States as amended, but that said register rejected said tenders and refused to permit the plaintiff to make said entry and settlement, of all of which circumstances and proceedings the defendant had due and written notice before it became a purchaser of or interested in said lands, and that, on the said 3d day of March, the plaintiff also tendered to the

defendant the sum of $380 in money and demanded from it leave to enter said lands as a homestead, and demanded a conveyance of them to himself, both of which demands the defendant refused, but that said tender had ever since that time been maintained and kept good. The petition concludes with a prayer that the defendant be decreed to accept said tender, and to convey the title to said quarter section to the plaintiff, and to permit the plaintiff to enter into possession of the same, and for general relief.

A demurrer to the petition was overruled and, after issues had been joined by answer, a trial ensued, resulting in a judgment for the plaintiff, to reverse which this proceeding is prosecuted. The plaintiff can not claim, and does not claim, that the evidence affords him a better title to relief than does his pleading.

Does the petition state facts constituting a cause of action within the jurisdiction of the district court or of this court? An answer to this question excludes from consideration the contention of the defendant, based upon an interpretation of the legal effect of various transactions respecting the granted lands, as affected by the above mentioned act of congress incorporating the Union Pacific Railroad Company, according to which it is claimed that the quarter section in controversy had been lawfully disposed of prior to the 3d day of March, 1899, and within three years after the entire completion of the road. Section 4 of the act of congress of March 3d, 1891 (U. S. Statutes at Large, vol. 26, p. 1097, ch. 561), entitled "An act to repeal timber-culture laws and for other purposes," enacts as follows:

"That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, and twenty-two hundred and eighty-six of the Revised Statutes of the United States, and all other laws allowing preemption of the public lands of the United States, are hereby repealed."

We think it is quite clear that this is a repeal of section 2301, chapter 5, page 421 of the Revised Statutes, which was

intended to extend to persons having homestead entries the privileges of preemption, as respected lands upon which they had made settlements, which were extended to other persons by the preceding chapter. In other words, it is our opinion that, as respects public lands concerning which there has been no especial grant or legislation, there is, and has been, since the passage of the act of March 3, 1891, no privilege of preemption, and that, as to such lands, it is the intention of congress that they shall be acquired by individuals only by continuous occupation and cultivation pursuant to the statutes relative to homestead settlements. Now, the most that can be claimed as tending to support the plaintiff's contention is that the quarter section of land in question, not having been lawfully disposed of by the railroad company or its successors is, as to everybody except the latter, to be regarded as though it had at all times remained, and was now, a part of the public domain. That is to say, in such view of the matter, title to the land can be acquired only through the operation of the homestead laws of the United States, by continuous occupation and cultivation for a period of not less than five years, and without the privilege of "commutation" by the payment of money within that period. Whether, as a consequence of the withdrawal of this privilege, or of the abolition of the right of original preemption, the railroad company and its successors have been unjustly deprived of the purchase price of $1.25 an acre guaranteed by the act of 1862, or whether the federal government will be liable to it or them for this price of so much of said lands as shall be appropriated by homestead settlement, are questions with which, in the circumstances of this case, at least, the plaintiff has no concern. It is manifest that neither the present defendant, nor either of its predecessors in interest, has or has had any right, power or authority to administer the public land laws of the United States, and the most that can be said with respect to the proviso in section 3 of the act of 1862 (U. S. Statutes at Large, vol. 12, p. 492, ch. 120) is that, in the contingency alleged to have arisen,

it reserved the tract in controversy for acquisition under said laws. That, before the acquisition of a vested right in public lands under such laws, it is competent for congress to withdraw them from entry, is a proposition so nearly self-evident as scarcely to require authority for its support, although it has been repeatedly so decided by the supreme court of the United States. *Hot Springs Cases,* 92 U. S. 698; *Frisbie v. Whitney,* 9 Wall. (U. S.) 187; *Yosemite Valley Case,* 15 Wall. (U. S.) 77. Not until the legal title has passed from the United States will the courts inquire into the circumstances preceding or attending the transfer, for the purpose of deciding which of two or more conflicting claimants has the superior equity. *Shepley v. Cowan,* 91 U. S. 330; *Johnson v. Towsley,* 13 Wall. (U. S.) 72, 87; *Rector v. Gibbon,* 111 U. S. 276, 290.

It is our opinion that the above mentioned reservation in the proviso of section 3 of the act of 1862, had sole reference to the purchase of public lands by preemption and that it was therefore, as respects the privileges of the public and of citizens, wholly repealed by the act of March 3, 1891; but, for the purpose of restricting the discussion to as narrow limits as possible, we have preferred to treat it, as does the plaintiff, as including the privilege of settlement and acquisition under the homestead laws. As already said, it is quite clear that the defendant has no duty to perform and no authority to exercise under these latter laws, the administration of which is committed solely to a governmental department created by congress. Hence, when the plaintiff tendered his money to the defendant and demanded from it a conveyance of the land in controversy, he required of the latter an act which it was not only under no obligation to perform but the doing of which, if the lands are open to entry under the laws of congress, would have conferred no title or right of possession upon the plaintiff. By upholding the plaintiff's claim the courts would, in practical effect, assume the administration of the public land laws, or, at least, the supervision of the administration of those laws by the department of the interior of

the United States, a thing which even the federal courts are confessedly without jurisdiction to do.

The plaintiff seeks to evade the force of the decisions of the supreme court of the United States last above cited, by the contention that the title to the lands has passed from the United States to the defendant, but that the latter holds that title in trust, and that to deal with trusts, and enforce their execution, is among the well known heads of equity jurisprudence. We do not think that this proposition advantages the plaintiff. If it be conceded, but this is a matter we are not called upon to decide, that the defendant does hold the title in trust, the plaintiff as an individual is not, but the government and people of the United States in their collective and corporate capacity are, beneficially interested therein, and the nature of it is to permit the legal title to the lands to be acquired through the operation of the public land laws under the administration of the land department of the United States. In the execution of such a trust the defendant has no active duty to perform and no right or authority to intermeddle, and the consummation thereof it is powerless to defeat or obstruct. The plaintiff has acquired no possession or right of possession of the tract in question, nor, if the lands are open to public entry, can the defendant confer any upon him. A conveyance to him by the defendant, voluntarily or under the coercion of a decree of this court, would, if the plaintiff's major premise is true, leave the lands in dispute still subject to entry and settlement under the homestead law and would confer no prior or superior right to the exercise of the homestead privilege upon him. This is no more than applying to the contention of the plaintiff the identical argument which he urges against the defendant. He says, in effect, that the defendant, as a purchaser at a mortgage foreclosure sale, is a grantee of the Union Pacific Railroad Company, the donee of the lands, and acqured the latter with knowledge of, and subject to, the trust, and that, notwithstanding the conveyance, they are still subject to entry and settlement under the homestead

laws of the United States. If this contention is true, the proposition is self-evident that if the defendant should convey them, or if they should be conveyed by judicial decree, to the plaintiff, he having like knowledge, their legal *status* would remain unchanged beyond the unimportant fact of the substitution of one trustee for another. If the plaintiff has been wrongfully denied the right of entry and settlement by the register of the land office, the defendant and the courts of this state are powerless to aid him.

The foregoing views having obtruded themselves upon us in the course of the consideration of the record and authorities, without having been urged, or so much as suggested, by counsel, either by brief or oral argument, the court, upon being informed of that fact, ordered a rehearing at which they were fully and exhaustively discussed. The reargument served only to confirm all of us in our preconceived ideas. Whatever other opinions may be entertained concerning the construction and effect of the series of acts of congress affecting the lands in controversy, it is clear, beyond dispute, that if there remains any condition, restriction or limitation upon the title or right of disposition of the donee of the lands, or its successors in interest, it consists in an obligation to hold them subject to settlement and entry under all or some of the public land laws of the United States. It is clear also, as has been already said, that congress has seen fit to commit the administration of those laws solely and exclusively to the land department of the United States, and that with the exercise of the powers thus created and conferred, neither the district court nor this court has jurisdiction to intermeddle.

It is recommended that the judgment of the district court be reversed, and that the action be dismissed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and that the action be dismissed.

REVERSED.

F. S. PUSEY, TRUSTEE, v. PRESBYTERIAN HOSPITAL OF OMAHA.

FILED NOVEMBER 18, 1903. No. 13,178.

1. **Tenancy from Year to Year.** A tenancy from year to year will not be created against the contrary intention of both parties, landlord as well as tenant, and the payment of rent is merely an evidential fact bearing upon the question of the intent of the parties. *Johnson v. Foreman*, 40 Ill. App. 456.

2. **Receipt of Rent.** The receipt of rent by the landlord is not conclusive as to the continuance of the term, but it is an equivocal act to be determined by the *quo animo*. *Atlantic Nat. Bank v. Demmon*, 139 Mass. 420.

3. **Evidence.** Evidence examined, and *held* insufficient to prove an intent to renew or continue the term.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Reversed.*

L. F. Crofoot and *Edgar H. Scott*, for plaintiff in error.

Warren Switzler and *Clency St. Clair*, *contra.*

AMES, C.

This is an action for forcible detainer begun in justice's court and brought here by proceedings in error from a judgment in favor of the defendant rendered upon appeal in the district court.

The sole question of importance is, whether the findings and judgment appealed from are supported by the evidence. The facts are not appreciably in dispute. The defendant was lessee of the premises for the term of five years, beginning on the 17th day of December, 1896. The rent reserved was $30 a month, payable monthly, and an obligation of the lessee to make certain repairs. The repairs were made and the monthly instalments accruing during the term were paid as stipulated. On or about the 13th day of January following, the superintendent of the defendant sent to one N. P. Dodge, an agent charged with the collect-

ing of rents for the lessor, a check for $30, together with a receipt or "voucher" reciting the sum mentioned to be in payment of "rent for January." Dodge executed and returned this document, and retained and cashed the check without present objection. Subsequently, under a date not given, but apparently within a few days, Dodge wrote and transmitted to the defendant the following letter:

"*Board of Directors, Presbyterian Hospital, Omaha, Neb.*—GENTLEMEN: The lease of the hospital for the term of five years expired on January 1, last. As the rent under the terms of the old lease was merely nominal, in consideration of your making extensive improvements on the building, the trustee of the property will expect an increased rental in future. He realizes that you have performed your part of the covenants in the lease and he would undoubtedly be pleased to rent it to you for a further period, to be agreed upon between us. Hoping you will give this matter your earliest attention, I remain,

"Very truly yours, N. P. DODGE, JR."

Soon afterwards one McClelland, the president and principal owner of the defendant corporation, called upon Dodge and stated that "he was negotiating for a change of management or sale of the Presbyterian Hospital (the defendant), and these negotiations were not closed, and that until they were he would be unable to enter into any negotiation for a new lease." This discussion concerning a new lease and concerning the amount of rent to be reserved, if one should be entered into, was continued between Dodge and representatives of the defendant until March 20, and afterwards, and on that date the plaintiff served the following notice upon the defendant:

"*To the Presbyterian Hospital of Omaha:* You are hereby notified to quit and deliver up to me the premises now occupied by you, situate at 2564 Marcy street, and described as follows, to wit: lot 7, block 2, Marsh's addition to the city of Omaha, in Douglas county, Nebraska, and

building situate thereon, at the expiration of three days from the date of service hereof upon you, your rent being in arrears.

"Dated Omaha, March 20, 1902.

"F. S. PUSEY, *Trustee,*
"By N. P. DODGE, JR., *His Agent.*"

A previous written notice to vacate was served on the defendant on February 1. Except the check above mentioned, no payment as rent or on account of use and occupation was paid or tendered, and it does not appear what authority Dodge had from his principal in the transaction, except that it seems to be assented to by both parties that he was authorized to collect rents accruing for the plaintiff from this and other property. No arrangements having been made, the plaintiff on or about the first of April begun this action in a justice's court, where he procured a judgment of restitution, which was reversed on appeal by the district court.

The sole contention upon the merits, by the defendant in error in this court, is that payment and receipt of the $30 check above mentioned, had the effect, by operation of law, to renew the former lease, if not for its full term of five years, then, at least, for one year and from year to year.

We can not think so for two reasons: First, because leases for a term of more than one year can not be made except in writing, or by an agent authorized by writing, and it is not shown that Dodge was authorized to make leases, even by parol; second, the payment and acceptance of money as rent, after the expiration of a fixed term, does not, of itself, renew the term, but is merely evidence of an intent to renew, from which, in the absence of evidence to a contrary effect, a contract to renew may be inferred. *Montgomery v. Willis,* 45 Neb. 434; 18 Am. & Eng. Ency. Law (2d ed.), 193; *Wilcox v. Montour Iron & Steel Co.,* 147 Pa. St. 540; *Atlantic Nat. Bank v. Demmon,* 139 Mass. 420; *Johnson v. Foreman,* 40 Ill. App. 456.

Now it is clear as daylight, from this record, that neither

the representatives of the defendant nor Dodge, whatever were his powers as agent, supposed, at any time during the pendency of their negotiations for the execution of a new lease, that one had already been effected by the transaction of January 13, 1902, and if they did not so suppose, it is impossible to infer that they had that intent at that date and had forgotten it so soon. It is quite evident, to our minds, that the idea never entered the head of either party until after the beginning of this action.

Defendant further contends that the judgment of the district court should be affirmed, because the first clause of section 1021 of the code, as it was published when this action was begun, was unconstitutional and void, and that a landlord was therefore remitted to the common law demand and notice, for the purpose of forfeiting a term for nonpayment of rent, and that no such demand or notice is proved in this case. But we do not find it necessary to pass upon this question, because we think it is clear that no term was in existence when this proceeding was begun, and therefore no steps to effect or declare a forfeiture were requisite. At the date mentioned, the defendant was simply holding over after the expiration of its term, and for such cases section 1020 of the code provides the remedy which was availed of in this case.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

REVERSED.

MATTHEW O'REILLY V. ABRAHAM L. HOOVER ET AL.

FILED NOVEMBER 18, 1903. No. 12,995.

New Trial. In an action for personal injuries, a new trial will not be granted on account of smallness of damages. Code, sec. 315.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

John M. Stewart and *Thomas C. Munger,* for plaintiff in error.

Robert J. Greene, Lorenzo W. Billingsley and *Richard H. Hagelin, contra.*

HASTINGS, C.

The sole error urged in the argument of this case is that the damages assessed by the jury in the district court in favor of the plaintiff in the original action are entirely inadequate. In the brief on file are some other complaints as to error in giving instructions and in the admission of evidence. The instructions complained of do not, however, affect the question of the amount of damages, nor does the evidence, errors as to the admission of which are complained of; and the question of the plaintiff's right of recovery having been found in his favor by the jury, error in the submission of that question can hardly be complained of by him. This was conceded in the argument, and the sole question that we are asked to consider is, whether the verdict, which was for $199 in the plaintiff's favor, is too small in amount to be sustained by the evidence.

It is asserted by the plaintiff in error that the uncontradicted evidence shows that plaintiff was an electrical engineer, capable of earning, and prior to the injury receiving, from $100 to $125 a month; that by the injury he was confined to his bed 12 or 13 weeks; that he went on crutches 8 or 9 weeks afterwards, and that from the injury

to the time of the trial his earning power was reduced at least one-half. It is claimed that he expended for medical treatment on account of the injury $100; that the injury is a permanent one and has left him with one short, stiff leg; and that the uncontradicted evidence shows damages to the plaintiff, up to the time of trial, for loss of time and for medical treatment, to the amount of at least $1,200, that therefore the verdict for $199 can not be sustained, and the case should be reversed and sent back for a new trial.

It is contended on the part of the defendant in error, in the first place, that smallness of damages in an action for injuries to the person is not a ground for a new trial. Section 315 of the code reads as follows:

"A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained."

Plaintiff in error, however, cites *Ellsworth v. City of Fairbury,* 41 Neb. 881; *Spirk v. Chicago, B. & Q. R. Co.,* 57 Neb. 565; *Carpenter v. City of Red Cloud,* 64 Neb. 126, and claims that the rule is applicable only to damages arising from loss of reputation, injury to the feelings and physical pain, or other matter which can not be exactly ascertained or computed in terms of dollars and cents, but has no application to cases involving actual loss of time and other circumstances which can be ascertained by ordinary computation. It is claimed that *Bailey v. City of Cincinnati,* 1 Handy (Ohio), 438; *Taylor v. Howser,* 12 Bush. (Ky.) 465; *Jesse v. Shuck,* 12 S. W. (Ky. App.) 304, and *Ray v. Jeffries,* 86 Ky. 367, under the same code provision as our section 315, so applied the rule. *Emmons v. Sheldon,* 26 Wis. 648, is also cited for the doctrine that inadequacy of damages may furnish sufficient ground for the setting aside of the verdict, but the question of the application of the code provision to such case is not considered, and, indeed, in that case, the verdict was set aside as having been "perverse."

The defendant in error, on the other hand, says that the Nebraska cases can not be regarded as authority for any such interpretation of the code provision, which has been quoted, but that in *Shoff v. Wells,* 1 Neb. 168, the precise question was passed upon, and it was there held that, in an action for injuries to the person, smallness of damages is no ground for new trial, and the fact that actual pecuniary damages in excess of the amount awarded was suffered by the plaintiff was no ground for reversal. *Shoff v. Wells* so holds, in express terms. It was an action where the trial court granted a motion for a new trial in a case of assault and battery, for the reason that the evidence showed $15 expenditure for medical attendance and $10 loss of time, and the jury awarded to the plaintiff only $17.50; and the district court allowed a new trial, and a new verdict was rendered allowing plaintiff $37.10. Motion was made in arrest of judgment on the last verdict, which the district court overruled, and, on error, this court set aside the second verdict and the judgment on it, and directed the rendition of one upon the first verdict, on the ground that section 315 of the code prevented the granting of any new trial in the case. This case has never been, in terms, overruled. It cites nothing but section 315 of the code.

Ellsworth v. City of Fairbury, 41 Neb. 881, was an action for injuries received by falling through a sidewalk. It was reversed in the following terms:

"It is undisputed that the average weekly earnings of plaintiff, prior to the accident, were from $8 to $10 and that, since receiving the injuries up to the time of the trial or for thirty-eight weeks, she has been wholly unable to do any work. Therefore, under the uncontradicted testimony, the verdict should have been for at least $304."

No other ground is given for reversing the case. So far as appears from the reported decision, the question of the application of section 315 of the code was not raised by counsel nor considered by the court.

The case of *Spirk v. Chicago, B. & Q. R. Co.,* 57 Neb. 565,

was reversed because of smallness of damages. It was an action brought for expulsion from a train. At the original trial, counsel for the plaintiff expressly refused to indicate whether the action was for tort or for failure on the part of the railway company to perform its contract of carriage. The petition set up the contract to carry the plaintiffs to Benkelman, and that a request for plaintiffs to leave the train at McCook was followed by their refusal and their forcible removal. The action was by no means simply one for injuries to the person. The application of section 315 to it would have been so entirely uncertain that the counsel on either side never raised it in this court.

Stanwood v. City of Omaha, 38 Neb. 552, cited in *Spirk v. Chicago, B. & Q. R. Co.,* was not an action for personal injuries, at all, but for damages to real property by reason of the erection of a viaduct.

Carpenter v. City of Red Cloud, 64 Neb. 126, was a suit for injury occasioned by the negligence of the city in digging a ditch across one of its streets and leaving it unprotected. Injuries to the person were claimed, and the killing of one of the plaintiff's horses and the crippling, sufficiently to destroy its value, of the other, and the destruction of his buggy were alleged, also. The cases of *Ellsworth v. City of Fairbury* and *Shoff v. Wells* are compared somewhat to the disadvantage of the latter, and it is suggested that *Shoff v. Wells* should be overruled and *Ellsworth v. City of Fairbury* adhered to, but it is expressly indicated that it is not done, and was not required to be done, in the *Carpenter* case.

It would seem that the legislator, who framed sections 314 and 315 of the code, certainly expressed his intention very definitely that, in an action to recover for personal injuries, smallness of damages should not be a ground for a new trial. The fifth subdivision of section 314 gives a new trial for "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property."

Such is the positive statutory provision with reference to new trials for errors in the assessment of damages, namely, that a new trial may be granted for error in that respect, where the action is upon contract or for injury to or detention of property. Section 315 is the negative provision, that a new trial shall not be granted on the ground of smallness of damages, in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained.

The interpretation sought to be given to this section is that it merely means, that no new trial shall be granted where the damages equal the actual pecuniary injury. Such interpretation nullifies the attempt to distinguish between actions on contract or for injury to property, and actions for injuries to the person, which is made, not only in section 315 but in section 314, not only in the negative but in the positive provisions of the code. To say that, in all cases, the damages allowed must be equal to the pecuniary injuries sustained, is to abrogate the distinction as to action for injury to the person or reputation, sought to be established by the legislature. The attempt to establish such a distinction may have exposed the law makers to the reproach, which has been frequently made against them, that they always show a greater regard for property rights than for personal ones; but, unless it is held to be an unconstitutional provision, a violation of some restriction upon legislative power contained in the fundamental law, the courts would seem compelled to respect it when the legislature has established it. What the precise reason for making such a distinction was, we can only conjecture. Perhaps, it might have been the fact adverted to in the defendant's brief in this case and extensively discussed in the notes to *Benton v. Collins* (125 N. Car. 83), 47 L. R. A. 33. Uncertainty as to the cause of an injury, and as to the degree of responsibility for it which would be attached to each of the parties, often serves to reduce the amount of plaintiff's recovery, when the jury finally decide in his favor. It might have been the supposition of the lawmaker

that substantial justice would be better reached, by preventing any complaint of smallness of damages on the part of the successful party, than by following the different rule that the pecuniary injury must, at least, be compensated for, if any recovery is allowed. This view seems to be announced in *Benzon v. Burlington & M. R. R. Co.*, 18 Neb. 659, in which the court say:

"Where in an action to recover damages for injury to property, and the cause of the injury is a matter of conjecture, a verdict in favor of the plaintiff will not be set aside, at his instance, because the verdict is not as large as it probably would have been had the cause of the injury been fully proved." *Benzon v. Burlington & M. R. R. Co.* was an action for a trespass upon real estate, which is alledged to have caused a considerable loss by the melting of ice in the plaintiff's storage house. Plaintiff's claim was for 4,000 tons of ice and injury to his building. The whole damage he had placed at $15,000. The verdict was for $75. In that case, as in this one, it was claimed that the general verdict being in plaintiff's favor, it must be held to establish defendant's responsibility for the injury and make it liable for the pecuniary extent of such injury; but this court, finding the question of the cause of the injury involved in complete obscurity, declined to interfere with the verdict.

A similar claim is made in this case, that the evidence is entirely inconclusive as to whether the injury was caused by the defendant's negligence or was due to the plaintiff's, at least in part; that, in fact, the evidence of plaintiff does not indicate with certainty any greater damages than he recovered, and does not indicate any sufficient ground of recovery at all, and the verdict should be sustained for these reasons. We do not deem it worth while to discuss these questions, because the authority of section 315 and of *Shoff v. Wells, supra,* seem to us to conclusively prevent any interference with the verdict upon the sole ground which is alleged in this case, namely, smallness of damages, where the action is purely for personal injuries.

The case of *Ellsworth v. City of Fairbury, supra,* does not seem to commit this court to any contrary doctrine, inasmuch as neither party chose to cite section 315 of the code, and this court did not see fit, itself, to raise the question.

In *Sullivan v. Wilson,* 15 Ind. 246, it is held that a code provision, identical in terms with our section 315, had no application to cases in which damages did not equal the pecuniary loss sustained by the plaintiff, and was held not to prevent a new trial.

In *Sharpe v. O'Brien,* 39 Ind. 501, however, this conclusion was overruled, and it was held that the code provision prevented an allowance of any new trial on the ground that damages were too small in actions for injury to person or reputation. This conclusion has since been adhered to in Indiana. *Gann v. Worman,* 69 Ind. 458.

We see no sufficient reason for departing from the holding of *Shoff v. Wells* until the legislature sees fit to adopt the Iowa statute. This latter statute provides, in substance, that smallness of damages in actions for personal injuries or to reputation shall be no ground for a new trial, if they are equal to the actual pecuniary injury.

The foregoing argument as to the distinction between action for injury to person or reputation, and other torts, is substantially taken from the case of *Sharp v. O'Brien.* It seems to us more logical than the reasoning of the Cincinnati superior court in *Baily v. City of Cincinnati,* 1 Handy (Ohio), 438, or that of the Kentucky supreme court in the cases cited. The general holdings on this subject will be found in 37 Cent. Dig., col. 1014, and following.

It is recommended that the judgment of the district court be affirmed.

AMES, C., concurs.

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

AFFIRMED.

EZEKIEL JOHNSTON V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED NOVEMBER 18, 1903. No. 13,134.

1. **Common Carrier:** CHATTEL MORTGAGE: DIVERSION OF SHIPMENT. Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to take possession of the mortgaged property, wherever found, a common carrier is not liable to the mortgagor for a diversion of a shipment of such property and a delivery of the same to the mortgagee demanding possession thereof while it is still in the carrier's hands.
2. ———: DELAY IN SHIPMENT: EVIDENCE. In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.
3. **Action by Mortgagor:** RIGHTS OF PARTIES. Where a mortgagee consigned a shipment of cattle, described in his mortgage, to a commission firm in order to protect the payment of his mortgage debt, and as soon as payment thereof was made directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for nondelivery to the party designated by such mortgagor.
4. **Amendments:** DISCRETION OF COURT. It is not an abuse of discretion for the district court to refuse to permit the plaintiff to file an amended reply where it changes the issues made up in the county court, where the case was originally commenced and tried, and where the right to recover on the new matter contained in such amended reply is barred by the statute of limitations.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Affirmed.*

James I. Rhea, John M. Stewart and *Samuel A. Dravo,* for plaintiff in error.

Webster S. Morlan and *J. W. Deweese, contra.*

BARNES, C.

This case is before us a second time. On the former trial, in the district court, the plaintiff recovered a judg-

ment, which was reversed in this court in the case of *Chicago, B. & Q. R. Co. v. Johnston,* 1 Neb. (Unof.) 314. A second trial in the district court resulted in a verdict and judgment for the defendant, from which the plaintiff prosecuted error. The facts stated in our former opinion, and detailed therein, are presented in the present record without any essential variance. We therefore, in substance, adopt that statement of the case as follows:

Ezekiel Johnston brought this action against the Chicago, Burlington & Quincy Railroad Company to recover damages for an alleged breach of contract between said parties, whereby the latter undertook and agreed to ship certain cattle for the former, by rail, from Holdrege to Chicago. The breach assigned by the plaintiff in his petition is, that the cattle were diverted from the direct route between said points to South Omaha, where they were detained for some hours and then forwarded to Chicago and delivered to another and different party than the one specified in the contract of shipment. The damages claimed are for the diversion above stated, for delay in the shipment and for the delivery to a person other than the one provided for in the contract. The defendant, by its answer, admits that the cattle were taken to South Omaha and there detained for some time, but alleges that, prior to the shipment of the cattle, the plaintiff had executed and delivered certain mortgages thereon to one J. H. Pratt; that by the terms of the mortgages, in case the plaintiff should remove, or attempt to remove the cattle from his premises in Phelps county, Nebraska, or attempt to dispose of them, the mortgagee should have the right to take immediate possession of the cattle, by himself or agent, wherever found, and when the cattle should be removed or shipped for sale they should be consigned to the mortgagee at South Omaha, and that they should not be shipped or sold without his order or consent; that such consent was never given, and when the duly authorized agent of the mortgagee learned of said shipment, and while said mortgages were still in force and unsatisfied, he stopped the

shipment and took possession of the cattle at South Omaha, under and by virtue of said mortgages; that, afterwards, in pursuance of an arrangement between the agent of the mortgagee and the plaintiff, the cattle were reshipped from South Omaha to Chicago without unnecessary delay, consigned to an agent of the mortgagee and, upon satisfaction of the mortgages, were at once turned over to the person or firm designated by the plaintiff. The reply is a general denial.

The plaintiff now contends that the defendant was not justified in the diversion, the delay or the nondelivery at destination, and in consequence is liable to him for damages. It appears that in October, 1895, J. H. Pratt shipped the cattle in question from Cadiz, Wyoming, billed to himself at Chicago, with the privilege of stopping and feeding at some point on the way in order to fatten and prepare them for market. They were stopped at Holdrege, where the plaintiff purchased the cattle, and gave his two notes dated October 29, 1895, secured by mortgages on the cattle in payment. The notes were made payable at the Union Stock Yards National Bank of South Omaha, six months from date, and the mortgages were recorded in Phelps county. They contained the following provision:

"It is hereby agreed and understood by and between said parties that said cattle shall not be removed by the party of the first part or taken from the section and township (section 27, township 5, range 18, in Phelps county) on which the same are herein declared to be situated, without written consent of the party of the second part (Pratt), and when removed or shipped for sale they shall be consigned to James H. Pratt, mortgagee, at South Omaha, Nebraska, to be sold on commission; the said party of the first part hereby covenants and agrees that in case the said first party shall remove, or attempt to remove, or permit to be removed from said premises, or dispose of, or attempt to dispose of, said stock or any part thereof, or in case the party of the first part shall fail to keep any of the argreements herein contained, or if the party of the first part

shall fail in full, or in part, with reference to the payment of the sums of money mentioned, then in all or any of the cases aforesaid the said second party shall have the right and power to take immediate possession (personally or by agent authorized by the possession of this instrument) of all of said stock wherever found, without legal process, in order to satisfy his lien."

On the 16th day of December, 1895, Pratt, the mortgagee, gave one Alex. Laverty full power of attorney authorizing him to collect the notes, release the mortgages, and do everything about the contract as fully as Pratt himself could do. On Saturday, April 11, 1896, Johnston and the First National Bank of Holdrege shipped the cattle, consigned to J. H. Pratt, to Chicago, Illinois. A day or two before, Johnston had spoken to Mr. Engstrom, the agent of the railroad company at Holdrege, about the shipment, and had ordered cars for that purpose at that time. At the time of the shipment, on Saturday, the plaintiff had not paid the mortgages, which lacked some eighteen days of being due, and had not notified either Pratt or Laverty that he was intending to ship the cattle and did not have the consent, written or otherwise, of Pratt or his agent to make the shipment. It is claimed by plaintiff that he told Engstrom that he had Laverty's permission for the shipment to Chicago, and that he had arranged with the bank to pay the mortgages, which arrangement he said was satisfactory to Laverty; and, with full knowledge of such arrangement, the agent received the shipment on Saturday, and the company was therefore bound to transport the shipment to Chicago without delay. This claim is not borne out by the evidence, and the finding of the jury was against him thereon. The evidence given by the plaintiff is as follows: "I told Engstrom I was going to ship the cattle to Chicago, and he says, have you got permission from Laverty to ship them to Chicago. I said he told me I could. He said don't depend on what Laverty told you; you had better have a statement in writing from him before you ship, and I would advise you to get a per-

mit before you ship." Plaintiff testified that he afterwards wrote to Laverty, but does not state the substance of his letter, and he never received any word in answer from Laverty, or any one representing him; that a day or two before the shipment he again saw Engstrom, who asked if he had heard from Laverty, and he said he had not; that Engstrom urged him to make an arrangement to pay the mortgages off for fear Laverty would cause trouble, and advised him to get the money from the bank and pay the mortgages if he was going to Chicago with the cattle. It appears that Johnston made arrangements with the bank to make the payment to Pratt at South Omaha by means of money that he borrowed for that purpose, and the shipment was made in the name of the bank as security for the payment of the drafts, which the bank mailed to Omaha on Saturday evening after the shipment was made at noon. It further appears that, the next day being Sunday, this draft did not reach Laverty and the Omaha bank until Monday forenoon. Laverty first saw the draft, and knew it had been sent or issued, on Monday forenoon of April 13, and the only information he had about it, before, was Johnston's statement on Sunday in the Exchange building in South Omaha that the draft had been arranged for and would be sent by the Holdrege bank. But Johnston himself says that he simply made arrangements with the bank on Friday; did not ask the bank when they were going to send the draft, or anything about it, but supposed that they had fixed it up, and that at the time the shipment was made he did not know whether the mortgages were paid or not; took no trouble to find out, and had heard nothing from the bank at all as to whether the mortgages were paid when the shipment was made, or when it was stopped and diverted to South Omaha. When Laverty found out late Saturday afternoon that the shipment was made, by inquiry by wire, Engstrom did not know anything about any arrangement with the bank, and did not know what arrangements had been made.

The record shows now, as it did before, that Laverty told

Johnston that his commission firm would like very much to sell the cattle if everything was satisfactory, but if he desired to go to other commission firms it would be all right. This testimony does not go to the matter of shipping the stock in violation of the provisions of the mortgages before payment, and it can not be claimed that this casual talk about which commission firm might make the sale amounted to a consent to Johnston to ship, when and where he pleased, without having paid the debt, or having obtained the written consent of the mortgagee. Johnston admits in his testimony that his shipment was consigned to Pratt at Chicago, care of Rosenbaum Bros., in order to obtain the through rate; that J. H. Pratt was the consignee, and could have changed the shipment himself. The record therefore shows, as the jury found, that the shipment was made on Saturday in violation of the provisions of the mortgages against the removal of the stock; that the payment had not been made; that no arrangement for payment had been made with Laverty, and that the shipment was entirely without his knowledge or consent; that the shipment was made to Pratt as the original billing required, and that the agent of the railroad company did not know that Johnston had failed to observe his warning to obtain authority for the shipment, and did not know whether payment had been made or not. So far as he knew, Pratt was the actual consignee and entitled to the possession of the cattle, if he desired it, under his mortgages, if they had not in fact been satisfied. It further appears that during Saturday afternoon Laverty, at Omaha, learned of the shipment and made inquiry through the railroad agent there, and was informed when and by whom the shipment was made. At that time he had given no consent for the shipment, and knew nothing of Johnston's letter concerning it, or of any attempt at payment of the mortgage debt, and he, thereupon, presented his mortgages and power of attorney to the agent of the railroad company, and demanded that the shipment be brought to South Omaha for his benefit. Under this state of facts, the

defendant was justified in diverting the property to South Omaha and in delivering it to Laverty as the agent of Pratt. The defendant, as a common carrier, was bound to receive the goods for carriage. It could make no inquiry as to the ownership. It has not voluntarily raised the question; it was raised by demand of the real owner before the defendant had parted with the goods. The law would have protected defendant against the real owner, if it had delivered the goods in pursuance of defendant's employment, without notice of his claim; it will equally protect it against the *pseudo* owner, from whom it could not refuse to receive the cattle, in the present event of the real owner claiming them and their being given to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding. Hutchinson, Carriers (2d ed.), p. 404; *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487; *Wells v. American Express Co.*, 55 Wis. 23; *Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co.*, 13 Ind. App. 225; *Western Transportation Co. v. Barber*, 56 N. Y. 544; *Bliven & Mead v. Hudson River R. Co.*, 36 N. Y. 403.

"Ordinarily, the person who delivers the goods to a common carrier is to be treated by them as the owner, and, in general, his title may not be disputed by the company, or a *jus tertii* or adverse title be set up, but the goods must be delivered according to his directions without putting him upon proof of his title. That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion. But, should the goods be the property of a third person who is also entitled to the possession of them, and, while in the custody of the carrier, such owner should demand possession, it would be justified in delivering the goods to him." Hale, Bailment and Carriers, p. 497, and cases there cited.

We therefore hold that the verdict, so far as this question is concerned, is sustained by the evidence, and the instructions of the court were without error.

It is next contended by the plaintiff that he is entitled to recover damages by reason of unnecessary delay in the shipment. It appears from the evidence that after the cattle had been taken possession of by Laverty for and on behalf of the mortgagee, Pratt, and placed in the yards at South Omaha, an arrangement was made between the plaintiff and Laverty by which the cattle were again loaded into defendant's cars and forwarded by special train to Chicago. This contract of shipment appears to have been with Pratt, and to him, in the care of Greer, Mills & Co. Plaintiff offered no evidence to show the ordinary and usual length of time necessary to transport the cattle from South Omaha to Chicago, and there is no proof in the record that the time consumed by the defendant in getting the cattle from the point of shipment to the place of destination was greater than that ordinarily required for such purpose. So there is no evidence in the record on which to base a claim or judgment for damages for delay in transportation.

It is further contended by the plaintiff that he is entitled to damages on account of the delivery of the cattle to Greer, Mills & Co., at Chicago, instead of Rosenbaum Bros., to whom he had desired the delivery to be made. It appears when the contract of reshipment was made in South Omaha, and the cattle were forwarded to Chicago, Laverty had not yet received the draft mailed on Saturday afternoon to him by the bank at Holdrege; that, in order to secure the payment of the mortgage debt due his principal, Pratt, he had the cattle consigned to the care of Greer, Mills & Co.; that, as soon as he received the draft and the mortgages were in fact paid, he notified Greer, Mills & Co. to turn the property over to Rosenbaum Bros., which was done. It follows that the plaintiff was not entitled to recover any damages on that account. In fact, it is thoroughly established by the evidence that whatever delay, change of route, loss of market, or weight, was suffered in the shipment, resulted entirely from the failure of the plaintiff to observe his obligations under the mortgage

contracts, and on account of his attempting to make the shipment when he had no authority or right to do so, and against the express provisions of the mortgages. He may have been, and without doubt was, entirely honest in his attempt to arrange for their payment through the Holdrege bank, but the payment was not made, and no consent was given for the shipment, so that to the mortgagee and to the defendant, it had all the appearances of a fraudulent transaction, in which the defendant was bound to observe the demands of the mortagee in stopping the shipment and forwarding it only to his order. All of the conditions then existed, authorizing Laverty to take possession according to the terms of the mortgages. *Meyer v. Michaels*, 69 Neb. 138. The fact that the money was on the way, at the time the cattle were shipped, without the knowledge of Laverty or the defendant, does not affect the situation.

Plaintiff also contends that the court erred in refusing him the right to file his amended reply. It was largely in the discretion of the district judge whether he would permit the filing of the amended reply or not. And the exercise of that discretion can not be overruled without essential and fundamentally good reason. The issues in the case had been carefully made up in the county court, and also in the district court; the case had been twice tried on these issues, and the offer to file the amended reply was an attempt to introduce new issues and a new controversy into the action. The court properly exercised his discretion in refusing to permit it. Again, the right to recover on the basis of the allegations contained in the amended reply was barred by the statute of limitations; the shipment was made in April, 1896, the amended reply, presenting new rights of recovery, was offered for filing in May, 1902; these new grounds for recovery could become effective only from the date of the filing of the reply, which was more than four years from the carriage of the shipment and after any cause of action could accrue thereon. *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504; *Box v. Chicago, R. I. & P. R. Co.*, 107 Ia. 660.

We are of the opinion that the verdict of the jury was sustained by sufficient evidence, that the judgment was right, and finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.

EMIL DOLD V. WILLIAM KNUDSEN.

FILED NOVEMBER 18, 1903. No. 13,136.

1. **Trespass.** One in the actual peaceable possession of land may maintain trespass against a party forcibly invading such possession, even though the latter has the better title to the freehold.

2. ———: JUSTICE OF THE PEACE: JURISDICTION. The jurisdiction of a justice of the peace in an action of trespass to lands extends no further than to enable him to try the fact of possession. He has no jurisdiction to inquire into the title to lands or into the right of possession as between the parties to such action. If the plaintiff can maintain his right to sue in trespass, by proof of actual possession, the action is cognizable in a justice court, but if the possession is constructive merely and can only be shown by the production of title, the justice has no jurisdiction.

ERROR to the district court for Sherman county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

Aaron Wall and *H. M. Mathew,* for plaintiff in error.

Richard J. Nightengale, contra.

DUFFIE, C.

Knudsen, defendant in error, is the owner of about eleven acres of land in section 27, township 15, range 13, in Sherman county, Nebraska. A tract of land adjoining him on the east, is owned by the Catholic church, the legal

title of which is held by Bishop Scannell. Dold, plaintiff in error, occupies a tract adjoining Knudsen on the north. The land owned by Knudsen and the church is bounded on the south by a road which leads to the village of Ashton. There is no public highway from Dold's land leading to the Ashton road, and, for some years, Dold and other parties living in his vicinity used a strip of land on the west side of the church property to reach this highway. Prior to 1894, the east four acres of the Knudsen tract were owned by one Jeschke who, on the 16th day of April of that year, conveyed the same to Knudsen. After this conveyance, Knudsen caused a survey of the line between his property and that owned by the church and built a fence near the line as established by the survey. The evidence discloses that a prior survey of the line had been made in 1895, and that the first survey located the line two feet and four inches west of the lines established by the survey made by Knudsen. Some time in the summer of 1900, Dold made an agreement with Bishop Scannell by which he leased from him the west sixteen and one-half feet of the church property, for fifty years from March 19, 1900, for a private way, to enable him to reach the Ashton road. A written lease for this strip of ground was executed by Bishop Scannell, which is not dated, but which was acknowledged on the 29th day of June, 1900.

Knudsen sued Dold in the county court for trespass upon his land, claiming damage for less than two hundred dollars, and from a judgment in his favor Dold appealed to the district court. The petition in the district court charges the defendant with throwing down the plaintiff's fence, with digging up the ground, with removing fence posts, wire fencing, and a gate of plaintiff's, and with removing a monument or post established at the northeast corner of his premises. The defendant, in the first count of his answer, alleged that the title and boundaries of land were brought in question in the controversy between the parties, that on that account the county court had no jurisdiction to give judgment in the case and the district

court had no jurisdiction on appeal. The second count of the answer is a general denial, and the third count avers ownership of the premises by the church society and peaceable possession thereof by Dold. A demurrer to the first count of the answer was sustained by the court; a reply was filed denying the allegations of the third defense. On a trial to the court without a jury, judgment was given in favor of the plaintiff; and the defendant has taken error to this court.

The court made the following findings of fact: (1) That in June, 1900, a corner was established by the county surveyor at the northeast corner of plaintiff's land; (2) that in 1895 the same surveyor established a corner, intending it to be a corner of the same land, at a point two feet and four inches west of the corner established in 1900; (3) that the corner established in 1895 was two feet and four inches out of place; (4) that at the time said corner was established in 1895, and at all times thereafter until 1900, the parties interested on both sides recognized it to be the true corner and believed it to be the true corner; (5) that in the plowing and scraping done by defendants, they did not plow, or break, or scrape, any land west of the line established in 1895, but they did tear up, plow and remove the ground immediately adjoining it on the east of where the corner and line were established in 1900; (6) that in so doing defendants injured the grade which the plaintiff had prior thereto placed in an embankment, while grading and leveling his park; (7) that the plaintiff had constructed a fence running north and south and inside of the line fixed by the surveyor in 1895, and had set posts there; (8) that the defendant, Emil Dold, maliciously tore up and destroyed the fence, so established, and that the same was upon the land of plaintiff and within the line established in 1895. The court also found generally in favor of the plaintiff.

We gather from the evidence that a creek runs east and west along the south line of Dold's land, and that he graded down the south bank along said stream in order to make

his private way more accessible. The removal of the soil, for which plaintiff claimed damage, occurred during this grading; but the grade, as found by the court, did not extend west of the line established by the survey of 1895. It will also be observed from the findings that the district court found that plaintiff's fence was set within the line established by the survey of 1895, and that Dold maliciously tore up and destroyed a portion of said fence. It is insisted by the plaintiff in error that the boundary between the church property and the land of defendant in error was the principal question in dispute in this action, and that the county court, acting as a justice of the peace, had no jurisdiction to entertain and try the cause; that his judgment entered in the case was void; and that the district court therefore had no jurisdiction upon appeal. Section 18, article VI of the constitution, is as follows:

"Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law; *Provided,* That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed $200; nor in a criminal case, where the punishment may exceed three months' imprisonment, or a fine of over $100; nor in any matter wherein the title or boundaries of land may be in dispute."

Section 906 of our code is in the followings words:

"Justices of the peace shall have jurisdiction in actions for trespass on real estate, where the damages demanded for such trespass shall not exceed $200, and no claim of title to such real estate set up by the defendant shall take away or affect the jurisdiction hereby given."

On first impression, it might appear that section 906 of our code, giving a justice of the peace jurisdiction to try actions of trespass, where the amount in controversy does not exceed $200, notwithstanding that the defendant attempts to plead title in himself, is in conflict with section 18 of article VI of the constitution, which prohibits a justice from taking jurisdiction, where the title or boundaries

of land may be called in question. An examination of the rules governing actions of trespass will, we think, disclose that the provisions of the code do not infringe upon the constitution. An action for trespass upon real estate can only be maintained by the party in possession at the time the trespass was committed or by one who then holds the legal title to the premises. In *Yorgensen v. Yorgensen,* 6 Neb. 383, it is said:

"In order to maintain an action of trespass *quare clausum fregit* by one not holding the legal title to lands, he must show an actual possession in himself at the time the alleged trespass was committed."

And in *Nelson v. Jenkins,* 42 Neb. 133, this court held that in order to maintain trespass to land, the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed. While the question does not appear to have been directly before this court, the authorities are numerous that an action of trespass may be maintained by one without title, but holding the actual peaceable possession of real estate, even against the true owner. In *Larue v. Russell,* 26 Ind. 386, it is said:

"A party peaceably in possession of lands may maintain trespass for an injury to his possession, though the trespasser have a better title to the lands."

In *Newcombe v. Irwin,* 55 Mich. 620, the facts were, that the plaintiff occupied the west half of a certain quarter section of land, and the defendant occupied the east half of the same quarter. A line fence divided their respective possessions, and each had cultivated the land up to this fence. The plaintiff cut a crop of clover growing on the land occupied by her next to the division fence, and the defendant entered and drew it away, claiming that the clover was grown upon land belonging to her, although occupied and fenced in by the plaintiff. On the trial, defendant offered to prove title, and it was shown that, two years prior to the trespass, the county surveyor had surveyed this quarter section and, by his survey, the division fence was some ten rods on Irwin's land, and since

that time the parties, respectively, had claimed this strip between the old division fence and the dividing line indicated by the survey, and had been endeavoring to obtain and hold the possession as against each other. The circuit court, to which the case had been certified from justice court, held that the title of land did not come in question, and Judge Cooley, in delivering the opinion of the court, said:

"There was no error in holding that the title was not in question. It appears not to have been disputed that up to the time of the survey made by the county surveyor the plaintiff was in possession up to the old division fence. If the survey showed that she occupied any part of Irwin's land, taking possession forcibly and against her will was not a proper remedy. To disturb a peaceable possession by force is a trespass, irrespective of ownership; and if the plaintiff had possession in fact, the forcible disturbance of her possession was made out beyond question. The judge was therefore right in treating the issue as one of possession merely."

In *Smith v. Schlink,* 6 Colo. App. 228, it was held, that where one of two adjoining tenants, each, respectively, in possession of land and buildings thereon up to a dividing fence, removes the fence on to the land of the other, an action by the other for damages for the taking of the lands and buildings thereon is not an action in which title or boundaries of lands are in dispute, of which a justice could not have jurisdiction, there being no dispute as to where the fence was, and it makes no difference that plaintiff introduced evidence to show that the true line was where the fence had stood. In the body of the opinion it is said:

"The defendant, until he removed the fence, had never been in possession of any part of the ground within the plaintiff's inclosure, nor had the defendant's grantor ever been in such possession. The survey made, to show that the true line was where the fence had stood, was unnecessary, and the evidence concerning it was immaterial. The plaintiff's right of action grows out of the invasion of a

possession which he actually had, and whose boundary, as between himself and the defendant, was the fence. When the defendant removed the fence, he committed a trespass. If he thought he had a rightful claim to the ground which he took, the courts were open for the adjudication of his title; but no title, or claim of title, is a justification of his forcible assumption of possession."

To allow a party to eject another in the peaceable possession of land, even though he be the true owner, is to dispense with actions for trying the title or right to possession of land. It is, as Judge Cooley says, to make a man judge in his own case, with the right to confirm his judgment; to allow him to employ force against a peaceable party; to invite a breach of the peace and a public disturbance instead of a legal settlement of disputed titles. Cooley, Torts (2d ed.), *323.

Where, therefore, an action of trespass is brought by one in actual possession, the fact of ownership becomes immaterial, the only issue to be tried being, did the defendant trespass upon premises in the actual possession of plaintiff?

In *Yorgensen v. Yorgensen*, 6 Neb. 383, a general rule of law was announced, namely, that "when land is unimproved, and unoccupied, the person holding the legal title is deemed to be in possession thereof." In other words, that legal title to land carries with it constructive possession in the owner. But as there can be no constructive possession where actual possession is held by another, an action for trespass for a disturbance of the possession must be brought by the one in actual occupancy of the land, while, for an injury to the freehold, such as the cutting of timber or the removing of the soil, the real owner of the estate may recover his damages upon proof of title. These considerations make it plain that in order to maintain trespass by one not in possession of the premises, he must establish his title to the land. He could not, therefore, commence an action in justice court because, in order to establish his right to a recovery, he would have to rely upon

his paper title, and this being denied by the defendant would require the justice to pass on a question of title, which he is prohibited from doing by the constitution. The plaintiff, in such a case, would by his own evidence oust the justice of jurisdiction to try the case; and it would be unnecessary for the defendant to plead title in himself, or to enter any plea except a general denial, which puts in issue both the plaintiff's title and the trespass complained of.

The evidence makes clear the fact found by the court, that up to the time of the second survey, made in 1900, all parties in interest recognized the corner established by the survey of 1895 as the true corner. Dold and others in the neighborhood had used a strip off from the west side of the church property as a private way to reach the Ashton road. So far as any actual possession of the land was established, the possession was in Dold and the other parties who used this strip as a private way. Knudsen never was in the actual possession of any part of this strip, and could only establish his ownership by showing a paper title thereto. This could not be done in a court exercising the powers of a justice of the peace, and the judgment of the county court was, so far as the record discloses, void for want of jurisdiction. Had the defendant in error brought his action to recover for the trespass charged, in tearing down his fence erected on his land and built within (west of) the line of the survey of 1895, no question of title would arise, as the evidence is clear that he was in the actual possession of the land inclosed by such fence, and such possession was evidence of title, sufficient to enable him to maintain trespass for breaking his close; but when he claimed damages for a trespass on the strip of land, the title to which was in dispute, and to which he could show title only by introducing his deed from Jeschke, the court was without jurisdiction to pass upon his claim of ownership to this strip of land, or to award him damages therefor, as was apparently done by a general finding and judgment in his favor. *Sheldon v. Edwards,* 35 N. Y. 279; *Slater v. Skirving,* 51 Neb. 108.

We recommend that the judgment be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WESLEY A. SPENCE V. JAMES K. LANE.

FILED NOVEMBER 18, 1903. No. 13,192.

Review: BILL OF EXCEPTIONS. The certificate allowing a bill of exceptions should affirmatively show that the bill contains all the evidence given upon the trial; and, in the absence of such showing, this court can not review any finding of the trial court or jury where the sufficiency of the evidence to support such finding is questioned.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

E. S. Abbott and *Ray Abbott,* for plaintiff in error.

Fayette I. Foss and *George H. Hastings, contra.*

DUFFIE, C.

Spence sued Lane for malicious prosecution. The jury returned a verdict for the defendant, and, from a judgment entered on the verdict, plaintiff has taken error to this court. The parties agreed upon the bill of exceptions which was signed and allowed by the clerk. The clerk's certificate is as follows:

"State of Nebraska, county of Saline, SS. I, J. W. Shabata, clerk of the district court in and for Saline county, Nebraska, hereby certify the within and foregoing bill of exceptions to be the original bill of exceptions had

and taken on the trial of the cause therein entitled and, by reason of the stipulation of the parties to said action, which stipulation is hereto attached, I hereby settle, allow, sign, seal the same and make it a part of the record in said cause. Witness my hand and official seal this 15th day of January, 1903. J. W. Shabata, clerk of the district court, Saline county, Nebraska."

This certificate of the clerk fails to show that the evidence contained in the bill was all that was given upon the trial. Hence, it is impossible for us to review the findings of fact of which complaint is made. The bill of exceptions should state affirmatively that it contains all the evidence. *Omaha & N. W. R. Co. v. Menk,* 4 Neb. 21; *Aspinwall v. Sabin,* 22 Neb. 73; *McClain v. Morse,* 42 Neb. 52.

It is urged, in argument, that the evidence clearly establishes that the defendant was actuated by malice in commencing the criminal prosecution against the plaintiff, and this is the principal question upon which a reversal is asked, it being insisted that the verdict of the jury is not sustained by the evidence. Whether the prosecution complained of was malicious depends entirely upon the facts established by the evidence given upon the trial, and as the evidence has not been certified to us, it is evident that we can not determine that question. The presumption is in favor of the action of the district court, and we recommend an affirmance of the judgment.

KIRKPATRICK, C., concurs.

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

AFFIRMED.

NEBRASKA MUTUAL BOND ASSOCIATION V. FRED KLEE.

FILED NOVEMBER 18, 1903. No. 13,171.

1. **Pleading:** DURESS. The plea of duress as a defense to an action upon a contract is sufficient if it shows that, by reason of threats or other unlawful means, the defendant was deprived of his free will and understanding, and that the contract sued upon was not his free and voluntary act.
2. **Instructions.** Instructions examined, and *held* correctly given.
3. **Evidence.** Evidence examined, and *held* sufficient to sustain the verdict and judgment.

ERROR to the district court for Douglas county: PAUL JESSEN, JUDGE. *Affirmed.*

Alexander A. Altschuler and *John F. Moriarity,* for plaintiff in error.

Albert S. Ritchie, contra.

KIRKPATRICK, C.

This action was instituted in the district court for Douglas county by the Nebraska Mutual Bond Association, plaintiff, against Fred Klee, defendant, declaring upon three promissory notes aggregating $88. In his answer, the defendant pleaded that the notes were wholly void, and that their execution had been obtained by duress, in that the plaintiff, through its agents and others, threatened the defendant that, if he did not sign the notes and settle with the plaintiff, on an alleged charge that the defendant's son-in-law, one Charles W. Norton, had embezzled moneys from the Singer Sewing Machine Company, the plaintiff would prosecute and imprison Norton, and send him to the penitentiary; the answer alleging that said threats were made for the purpose of overcoming the will of the defendant, and that they did overcome his will, causing him to sign the notes; that he would not have signed them but for the threats mentioned. The answer alleged that Klee was a German by birth, and a working man, em-

ployed in the Union Pacific shops; that he was not well versed in the English language, and that, at the time of the signing of the notes sued upon, he was wholly unaccustomed to the transaction of such business; and that his mind was so weak as to be easily overcome by threats, such as those alleged, which were well calculated to overcome the will of a man of ordinary strength and experience. A second paragraph in the answer alleged substantially the same facts; that Norton, defendant's son-in-law, was charged with the embezzlement of a sum of money from the Singer Sewing Machine Company, and that plaintiff threatened to prosecute him unless defendant signed the notes and that defendant was induced by this threat to sign the notes.

In reply, plaintiff alleged that prior to the signing of said notes, Norton had applied to it for a fidelity bond, in favor of the Singer company, of $500; that, before giving this bond, plaintiff required an indemnity bond to secure it against loss by reason of signing the fidelity bond; that plaintiff then requested Klee, the defendant, to sign the indemnity bond, which he did, in the sum of $500, the bond being set out in the reply. The reply further alleged that Norton defaulted, and became indebted to the Singer company in about the sum of $115; that by agreement between Klee and the Singer company, this shortage was settled for the sum of $88, and that Klee instructed the plaintiff to pay this sum to the company, and gave the notes described in the petition in settlement of the amount so paid by plaintiff to the company.

There was a trial to the court and a jury, a verdict for defendant Klee, and judgment thereon. A motion for a new trial was overruled, and plaintiff presents the cause here by petition in error.

The record discloses that, some time prior to December 28, 1900, Charles W. Norton, who was a son-in-law of defendant Klee, sought employment with the Singer Sewing Machine Company at Omaha, but found that a condition of employment was a fidelity bond acceptable to the com-

pany. He made application to plaintiff company for a bond, but was told by it that it could not bond him unless he could indemnify them against loss. It appears that, as a reslult of his negotiations with plaintiff, the indemnity bond set out in plaintiff's reply was executed, signed by Norton and defendant Klee. In December, 1900, it appears that Norton was discovered to be short in his accounts with the Singer Sewing Machine Company in the sum of $88, and that company accordingly made a demand upon plaintiff, by virtue of its bond to the company. This sum was, thereupon, paid to the Singer Sewing Machine Company.

There seemed to have been some slight difference of opinion, between the agents and managers of plaintiff, as to whether plaintiff should rely upon the bond given by Klee for indemnity, or secure notes signed by Klee covering the amount of the loss sustained by plaintiff by reason of Norton's defalcation. It was, however, decided to arrange with Klee to give the notes. A meeting was accordingly arranged for at the office of plaintiff's president. As to what took place at this meeting, there is a conflict in the testimony. The testimony on behalf of plaintiff is that Klee was willing to sign the notes, being doubtful only as to his ability to pay unless given plenty of time. That testimony also represents him as indignant with Norton because of the latter's conduct, and as signifying his willingness to assist plaintiff's officers in apprehending Norton and prosecuting him.

Klee's version is substantially at variance with that of the plaintiff's. From the reporter's transcript of his testimony, it is almost painfully apparent that his knowledge of English was exceedingly limited, but it is sufficiently clear that he came to the office of the plaintiff in response to a request either by postal card or letter, and that he intended to bring with him a confidential friend, more familiar with the English language than he was, who it appears failed him in the last moment. He was unwilling to sign the notes. Something, it appears, was said about

sending his son-in-law to the penitentiary, and he was told that he had to sign the notes. It appears from his testimony that the threat of sending his son-in-law to the penitentiary operated on his mind and induced him to sign the notes, not so much because of a concern for his son-in-law, but rather as a result of contemplating the stigma that would attach to his daughter if her husband was imprisoned. Klee was cross-examined by plaintiff at some length; but a perusal of the questions and answers does not make it clear that anything was added to, or detracted from, the substance of his testimony in chief.

The trial court gave the two following instructions:

"4. Under the admissions and allegations made in these pleadings, the only issue which you are called upon to try is this: Were the notes set out in plaintiff's petition given by the defendant by reason of the threats of imprisonment of the said Charles W. Norton, made by the plaintiff or its agents to the defendant at the time said notes were given.

"5. The burden of proof in this case is upon the defendant and, after admitting the signing and execution of the notes, before he can avoid the payment thereof, he must prove by a preponderance of the evidence that said notes were not given voluntarily by him, but were obtained from him by such threats and duress as to overcome his will and understanding."

In addition to the above the trial court instructed the jury in the following language:

"You are instructed that duress, in order to avoid the payment of these notes, must be such an influence exerted by the plaintiff upon the defendant as to overcome his will and compel a formal assent to an undertaking when he really does not agree to it, and make that appear to be his free act, which is not his but is another's imposed upon him through fear, which deprives him of self control. And, in this case, if you find that the defendant has proved by a preponderance of the evidence that he signed these notes, wholly and entirely on account of the fear which the plaintiff had created in his mind that his son-in-law, Charles W.

Norton, would be sent to the penitentiary unless the same were signed, and that Norton would not be sent there if he did sign them, and the fear was such as to deprive the defendant of his understanding and deprive the transaction of its voluntary character, then you are instructed that such notes would be void, and your verdict should be for the defendant.

"If, however, you believe the defendant has failed to prove that his mind was so overcome by such threats that he was deprived of reason and understanding, then you will return a verdict in favor of the plaintiff for the full amount of said notes sued on."

The instruction defining duress is assailed by the plaintiff as insufficient under the law and authorities; and the cases cited in brief of plaintiff are to the effect that the duress necessary to relieve from a contract must consist of threats of immediate and unlawful imprisonment; that the person making the threat must seem to be in possession of the means to carry out the threat, immediately, and that the threats must be of a character sufficient to overcome the mind of a person of ordinary firmness and courage. This state has already taken its place in line with the more advanced position upon this subject, and that position is accurately set forth in the instructions given. To constitute duress sufficient to avoid a contract in this state, the means adopted need only be of a character necessary to overcome the will and desire of the injured party, whether that person be below or above the average person in firmness and courage, and whether the means employed come clearly within the common law definition of duress or otherwise. In other words, the law extends its protection to an individual without reference to whether he is strong or weak intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of ordinary intellect, firmness and courage. *First Nat. Bank of David City v. Sargeant,* 65 Neb. 594, and cases cited; *Galusha v. Sherman,* 105 Wis. 263. Under this view of the law, the jury is properly directed to inquir

into the mental capacity of the defendant, and whether the threats, whatever they were, probably deprive him of his free will, inducing him to make a contract that he would not otherwise have made, rather than to the particular threats made, to see whether they meet with an arbitrary standard which may, or may not, be applicable to the person injured. The trial court committed no error in giving the instructions relative to the plea of duress.

It is next contended by plaintiff that the evidence is insufficient to sustain the verdict, and that the jury should have been instructed to return a verdict for plaintiff.

The argument of plaintiff in support of this objection is based, for the most part, upon its misconception of the law of duress as heretofore pointed out. With this misapprehension cleared away, we would hesitate to disturb the verdict of the jury. The defendant was an illiterate working man, almost wholly unable to speak English. He had been employed for a period of thirty years in the machine shops of the Union Pacific Railroad Company at manual labor. The credence placed by the jury in his testimony makes it necessary, for the purpose of this argument, to assume that so much of it as is reasonable and consistent is true. He came to the meeting at plaintiff's office directly from his work in the shops. He had expected a friend to be present at the interview with plaintiff's agents, but, as stated, this friend, whose superior knowledge of the English language made his presence peculiarly valuable, failed him in the last moment, and he entered the office alone. He says that he felt bad, and that fear for his daughter, and the effect upon her, if her husband were prosecuted criminally, preyed upon his mind, and he was thereby induced to sign the notes. In our view, it is reasonably to be inferred from his testimony that the signing of the notes was not his voluntary act, and that the jury, in whose presence his testimony was given, were justified in concluding that his signature was secured by duress, within the meaning of that term properly defined in the

instructions. It follows that the judgment ought to be affirmed, and it is recommended that the same be done.

DUFFIE, C., concurs.

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

AFFIRMED.

THOMAS NORBURY, ADMINISTRATOR OF THE ESTATE OF BLOOMER HARPER, DECEASED, ET AL. V. MARY M. HARPER ET AL.

FILED NOVEMBER 18, 1903. No. 13,076.

1. **Review:** MOTION FOR NEW TRIAL. In order to obtain a review by petition in error to this court of errors occurring during the progress of a trial in the district court, a motion for a new trial must be filed and overruled.

2. **Mortgage:** HOMESTEAD. A mortgage executed on a homestead, by one acting under a power of attorney which has been signed only by the husband, is void, as being an attempt to incumber the homestead without the joint signature and acknowledgment of husband and wife to the instrument.

3. **Pleadings:** RULINGS: EXCEPTION. A party is not in a position to complain of a ruling of the trial court, requiring certain defendants to file answers, instanter, as of date when the judgment was rendered, when no exception is taken to such ruling and it is made in response to a motion, filed many months after the rendition of the judgment, asking that such parties be required to answer.

4. **New Trial:** NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence is properly overruled, where it appears that the facts offered in support of the motion are only cumulative or relate to matters already established.

5. **Evidence:** SUFFICIENCY. Evidence examined, and *held* sufficient to support the judgment.

ERROR to the district court for Custer county: HOMER M. SULLIVAN, JUDGE. *Affirmed.*

Robert A. Moore, R. E. Brega and *J. R. Dean,* for plaintiffs in error.

Charles Holcomb and *J. B. Smith, contra.*

KIRKPATRICK, C.

This is a proceeding in error prosecuted from a judgment of the district court for Custer county. It is disclosed by the record that, up to the 6th day of July, 1894, Bloomer Harper, with his wife and children, resided upon a government homestead in Custer county; that, some days prior to that time, he had made final proof, showing compliance with the homestead laws of the United States before the county judge of Custer county, which, in due time, was forwarded to the land office in North Platte. July 5 a final receipt was issued for the land, and on October 23 of the same year a patent was issued. On July 5, 1894, Bloomer Harper with his wife and children left their homestead, apparently with the intention of returning, and removed to Indiana, where they had formerly resided, and where Bloomer Harper, the husband, on February 17, 1896, died. It is further disclosed by the record that, at the time Bloomer Harper made final proof on his homestead, he was indebted to various persons in Custer county, in sums aggregating more than $400. For the purpose of securing these creditors, among whom was the Seven Valleys Bank, plaintiff in error, Harper went to the bank on July 1 and executed to Thomas Norbury, plaintiff in error, a power of attorney, empowering him to pay his debts and, if necessary, to mortgage or sell the farm from which he was about to remove. On July 3, and two days before Harper removed from the homestead, Norbury, assuming to act under the power of attorney mentioned, executed and delivered to the Seven Valleys Bank, of which he was the managing officer, a note in the sum of $323.62, and also a mortgage securing the same upon the land involved in this controversy, both of which he exe-

cuted in the name of Bloomer Harper, by himself as attorney in fact. It is disclosed that, at that time, Harper was indebted to the bank, and that the bank had advanced to others of his creditors something over $200, and this mortgage and note were executed to indemnify it for such advances.

This so-called power of attorney, delivered by Harper to Norbury, was signed by Harper on July 1, 1894. It was not acknowledged, but was sworn to before a notary public, the notary attaching to his certificate a jurat, showing that Harper was duly sworn to the instrument. Some time before November 28, 1894, Norbury became dissatisfied with the so-called power of attorney, and prepared and forwarded to Bloomer Harper, in the state of Indiana, a second power of attorney, which was signed by Bloomer Harper and Mary M. Harper, his wife, and was duly acknowledged before a notary public. This second power of attorney was, in terms, substantially like the first. The record shows that, afterwards, Mrs. Harper executed and caused to be recorded in Custer county a revocation of this power of attorney.

It seems that Norbury took immediate possession of the farm, rented it and collected the rents, and, so far as is disclosed by the record, is still in possession.

It is disclosed that on August 25, 1900, Thomas Norbury filed his petition in the county court of Custer county, asking to be appointed administrator of the estate of Bloomer Harper. Such proceedings were thereafter had that, on October 24, 1900, he was duly appointed administrator and qualified as such, proceeding to administer the estate. Certain claims, in due course, were filed against the estate and allowed by the county court. On February 9, 1900, Norbury, claiming to act under his power of attorney, executed a warranty deed for the premises to one William Tyson, who was also an officer of the Seven Valleys Bank, and on December 1, 1899, it appears that Mary M. Harper executed a quitclaim deed to William A. Mendenhall of all of her interest in the premises, and, thereafter, on De-

cember 19, 1900, Mendenhall reconveyed, by quitclaim deed, to Mary M. Harper. It is disclosed that all of the last three mentioned deeds were wholly without consideration.

On May 28, 1901, Norbury filed in the district court for Custer county, as administrator, a petition for license to sell real estate of Bloomer Harper for the payment of debts against the estate. Due notice of the application was given to Mary M. Harper and her children, by personal service in Indiana. At the time fixed by the court to show cause why the license should not issue, Mary M. Harper appeared, by attorney, and the children, by guardian *ad litem;* and answers were filed, consisting of general denials, and also pleading, that no valid claims had been allowed against the estate; that the land was a government homestead, and that the debts mentioned, if any existed, were contracted prior to the time of making proof, and that, for that reason, the land was not liable for the debts mentioned in the petition. To these answers, the administrator filed replies.

When the cause came on for trial, the Seven Valleys Bank applied for permission to be made a party defendant, and to be allowed to file a cross-petition, setting up its mortgage which Norbury had executed to it, as attorney in fact for Harper. This application was granted, and Tyson, to whom the warranty deed had been executed by Norbury, was also made a party defendant, on his own motion. The bank filed its answer and cross-petition, setting up its mortgage and praying a foreclosure. The widow and children were given permission to file answers, instanter; and the cause was tried to the court, resulting in a finding, generally, in favor of the widow and heirs; denying the petition of the administrator to sell; adjudging that the bank had no valid mortgage on the land in controversy; that the land was a government homestead, and that the debts were contracted before final proof was made; that the land was not liable for the payment of the debts; the deed to Tyson being, by the decree, canceled.

This judgment was entered by the district court for Custer county on June 7, 1902, and, on the 12th day of the same month, Norbury entered into an undertaking superseding this judgment, which was duly approved by the clerk. Subsequently, and on October 8, Norbury and the bank filed a motion, asking permission to open up the judgment and introduced further evidence. On October 11 the bank filed a motion to modify the judgment, and on the same day filed a motion for a new trial, upon many grounds alleged, among which was that of newly discovered evidence. This motion was supported by the affidavits of several persons, setting out the alleged newly discovered evidence, and purporting to show diligence and inability to procure the evidence at an earlier date. These various motions came on for hearing on October 11, and were, each, overruled. The cause is brought to this court by petition in error.

From an examination of the record, it is disclosed that Norbury never filed a motion for a new trial; and, from the evidence in the record, it is quite apparent that the trial court committed no error in refusing to issue a license to sell the real estate in question. It follows that this branch of the case requires no further consideration.

The principal error complained of is, that the trial court should have decreed a foreclosure of the mortgage held by the Seven Valleys Bank. We are unable to find merit in this contention. In the first place, it would seem to be clear that the bank was improperly allowed to intervene in the case upon its own application. Whether the court had jurisdiction to determine the rights of the mortgagee, in this case, may well be doubted; but, as that question is not raised, and all the parties seem to have pleaded to the merits and acquiesced in the trial of the matter, it will be considered upon its merits in this court. It is claimed by the bank that, at the time the trial was actually had in the district court, on June 7, 1902, no answers were on file by the wife or any of the children as against its cross-petition, and that it was, for that reason, entitled to a

default. This contention seems to be without merit. On October 11, following, the bank applied to the district court for an order, requiring the widow and minor children to file answers to its cross-petition. This motion was sustained, and the answers were ordered filed as of date June 7, 1902. No exception by the bank was taken to this action of the trial court, and it is a familiar rule that a party can not predicate error upon a ruling of the court which he was instrumental in procuring.

Again, it is contended that, in any event, the mortgage was a valid and subsisting lien, as shown by the pleadings and evidence, and that the trial court erred in finding that it was invalid and created no lien. This contention also seems to be without foundation. The agreed statement of facts filed in the case, as well as the other evidence, discloses that, at the time the first power of attorney was executed and sworn to, Bloomer Harper, his wife and children were living upon the land, not only as a government homestead, but as a homestead recognized by the laws of this state. It follows, therefore, that even if Bloomer Harper had properly acknowledged this so-called power of attorney, first executed, it would have been absolutely void, as an attempt on his part to convey or incumber the homestead without the signature and acknowledgment of his wife to the instrument. Assuming to act under this power of attorney, the mortgage in suit was executed by Norbury to the bank, of which he was a stockholder, as well as the principal owner and managing officer. The mortgage, so executed, was, beyond question, absolutely void, and the execution of another power of attorney, many months subsequent thereto, could not have the effect of validating the mortgage or make it a lien upon the land.

Again, it may be said that the motion for a new trial does not set up any matters, which may be properly regarded as newly discovered evidence. It contains nothing that was not, apparently, known at the time of the trial, and the evidence suggested seems to be either wholly immaterial or cumulative, or already covered in the stipu-

lation. No valid reason is suggested why this evidence was not offered at the time of the trial. The bank was allowed to intervene in the case, at the time when the case was actually being tried, and, in view of the fact that its rights would have been fully protected without intervention by it at the trial, it is scarcely in a position to complain, many months after the determination of the cause, and after an adverse ruling, that it was not then ready for trial. Upon a view of the entire record, we are satisfied that justice has been done, and that the judgment should be affirmed. It is recommended that the same be done.

DUFFIE, C., concurs.

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

AFFIRMED.

GEORGE W. BROTT V. STATE OF NEBRASKA.

FILED DECEMBER 2, 1903. No. 13,325.

Burglary: EVIDENCE. The conduct and behavier of bloodhounds, after being set upon the trail of a fugitive criminal, may not be given in evidence by the state, for the purpose of proving that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical.

ERROR to the district court for Nemaha county: JOHN S. STULL, JUDGE. *Reversed.*

H. A. Lambert and *J. S. McCarty,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

SULLIVAN, C. J.

George W. Brott was charged with burglary and convicted. The court received as evidence of guilt the fact that bloodhounds, after being taken to the place where the

crime was committed, appeared to trail the burglar to defendant's house. The competency of this evidence is the only question necessary to consider in disposing of the case. The conduct of the dogs was, perhaps, rightly received, in connection with an admission made by Brott, as evidence tending to prove that he committed the crime charged in the information; but it was also received as proof of independent crimes which the state brought to the attention of the jury, to which the admission did not relate. The only evidence of these independent crimes was the inference afforded by the conduct of the dogs. If such evidence is incompetent the conviction can not stand. The argument of the attorney general is that the bloodhound has an exceptionally fine perception of scent; that, in following a trail and discriminating between smells, he seldom or never errs; and that knowledge of his extraordinary aptitude is so nearly universal that courts will act upon it without proof. The bloodhound has, of course, a great reputation for sagacity, and there is a prevalent belief that, in the pursuit and discovery of fugitive criminals, he is practically infallible. It is a commonly accepted notion that he will start from the place where a crime has been committed, follow for miles the track upon which he has been set, find the culprit, confront him, and, *mirabile dictu,* by accusing bay and mien, declare, "Thou art the man." This strange misbelief is with some people apparently incorrigible. It is a delusion which abundant actual experience has failed to dissipate. It lives on from generation to generation. It has still the attractiveness of a fresh creation. "Time writes no wrinkle on its brow." But it is, nevertheless, a delusion, an evident and obvious delusion. The sleuthhound of fiction is a marvelous dog, but we find nothing quite like him in real life. We repudiate utterly the suggestion that there is any common knowledge of the bloodhound's capacity for trailing, which would justify us in accepting his conclusions as trustworthy under circumstances like those disclosed by the present record. The burglary was committed on the morning of

July 5, before daylight. The trailing did not commence until about five in the afternoon. In the meantime the trail, near the scene of the crime, had been walked over, closely paralleled, and crossed, directly and obliquely, perhaps, a hundred times. And the sun had been shining on it steadily for more than twelve hours. The situation the dogs had to deal with was an exceptionally difficult one, and it was, we think, reversible error to accept their conclusion as legal evidence of defendant's guilt. To get a nearer and clearer view of the nature of the evidence erroneously admitted, let us consider closely what trailing is. The path of every human being through the world, at every step, from the cradle to the grave, is strewn with the putrescent excretions of his body. This waste matter is in process of decomposition; it is being resolved into its constituent elements and its power to make an impression on the olfactory nerves of a dog or other animal becomes fainter and fainter with lapse of time. Under favorable conditions, such as free exposure to air and sun, every compound particle is rapidly separated into its original parts and, when the dissolution is complete, its characteristic scent is gone. The bloodhound is endowed with a remarkably keen scent. He has great ability for differentiating smells. His method of trailing is simple and well understood. Particles of waste matter given off by a particular individual fall to the ground and, while undergoing chemical change, come in contact with the olfactory nerves of the dog, and produce an impression which he is able to recognize, as distinct and different from all other impressions. Hence, for a short time, a man may be easily trailed in the woods, or in the open country, by the effluvia in his wake. But in a city, and after the lapse of considerable time, the trailing is obviously more difficult and often, manifestly, impossible. But difficulties do not deter the bloodhound from pursuing his business. He trails as best he can. He always follows some scent, and he goes somewhere. Undoubtedly, nice and delicate questions are time and again presented to him for decision. But the con-

siderations that induce him, in a particular case, to adopt one conclusion rather than another can not go to the jury. The jury can not know whether the reasons on which he acted were good or bad, whether they were all on one side or evenly balanced, or whether his faith in the identity of the scent which he followed was strong or weak. In attempting to separate one smell from ten, twenty, fifty or a hundred similar smells with which it is intermixed and commingled, it is highly probable, if not quite certain, that the bloodhound undertakes a task altogether beyond his capacity. Like other dogs, he has his limitations and they must be recognized in courts of justice, if not elsewhere. That the conclusions of the bloodhound are, generally, too unreliable to be accepted as evidence in either civil or criminal cases, is, we believe, the teaching of that common knowledge and ordinary experience which we may rightfully bring to the examination of this subject. If such evidence were held to be legal evidence, it would, standing alone, sustain a conviction, and courts in this golden age of enlightenment, would now and again be under the humiliating necessity of adjudging that some citizen be deprived of his property, his liberty, or his life, because, forsooth, within twenty-four or forty hours after the commission of a crime, a certain dog indicated by his conduct that he believed the scent of some microscopic particles, supposed to have been dropped by the perpetrator of the crime, was identical, or closely resembled, the scent of the person who had been accused and put upon trial. There are, we know, some cases in this country which hold that this kind of evidence is competent, but, it seems, the judicial history of the civilized world is against them. The bloodhound is, we admit, frequently right in his conclusions, but that he is as frequently wrong, is a fact well attested by experience. What he does in trailing, may be regarded as the declaration of a disinterested party, but, so regarded, the authorities are opposed to its admission. It is unsafe evidence, and both reason and instinct condemn it.

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

REVERSED.

COUNTY OF LOGAN, APPELLEE, V. MCKINLEY-LANNING LOAN & TRUST COMPANY ET AL., APPELLANTS.*

FILED DECEMBER 2, 1903. No. 12,708.

1. **Foreclosure of Tax Lien by County.** In an action brought in the district court by a county to foreclose a tax lien on real estate for delinquent taxes, the determination of the question whether or not the county could, under the statute, maintain such action, without an antecedent administrative sale by the county treasurer and the issuance to the county of a tax sale certificate as a basis for such proceedings, goes to the existence of a cause of action and not to the jurisdiction of the court.

2. ———: DECREE. A decree rendered in a foreclosure proceeding for the sale of real estate to satisfy a tax lien, barring the equity of redemption of the owner of such property, is an adjudication of that question which can not be inquired into on objections to confirmation of sale, on the ground that the owner had not been given the time to redeem allowed by law.

3. ———: ———. Where the district court has jurisdiction of the subject of the action and of the parties in a foreclosure proceeding, questions which affect the regularity of the decree are concluded thereby. Such a decree can not be assailed for any mere irregularity upon a motion to set aside a sale made in pursuance of such decree.

4. **Decree:** IRREGULARITY: REMEDY. Where a decree in foreclosure proceedings, by its terms, erroneously denies to the owner of the equity of redemption the time to redeem from sale which is allowed by law, his remedy is by a direct proceeding to obtain a reversal or modification of the decree, and not by an indirect attack thereon, by objecting to the confirmation of sale made in pursuance of the decree because of such error.

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

Hoagland & Hoagland, for appellants.

M. F. Harrington, Beeler & Muldoon and *Wilcox & Halligan, contra.*

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* Rehearing allowed. See opinion, p. 406, *post.*

HOLCOMB, J.

This is an appeal from an order of confirmation of sale of real estate made in foreclosure proceedings. The objections interposed to the order of confirmation required to be noticed, are: First, that the decree of the court on which the sale is based is void, in that the court had no jurisdiction to enter such decree, because the action on the part of the plaintiff is unauthorized by law; second, because the action was to foreclose a pretended lien for taxes for the years 1893 to 1899, inclusive; the decree was rendered February 28, 1901; the sale was made October 2, 1901, and the two years' time for redemption from such sale, as provided in section 3, article IX, of the constitution, has not expired. As indicated by the motion, the action was instituted by the plaintiff county to enforce a tax lien for delinquent taxes on real estate, arising by virtue of the assessment and levy of taxes, for the several years mentioned, on the property sold for general revenue purposes.

The petition praying for a foreclosure of the tax lien, and on which the decree is based, was manifestly defective, in that it was not alleged that the land had been sold for delinquent taxes by the county treasurer and a tax sale certificate issued to the county, as is held must be done in the recent case of *County of Logan v. Carnahan*, 66 Neb. 685; s. c. on rehearing 66 Neb. 693. But, while the judgment or decree was erroneous in the sense that a reversal of it might have been obtained by prosecuting an appeal or a petition in error, yet, it was not, for that reason, void and subject to collateral attack. The counties of the state are empowered by the legislature to enforce the collection of delinquent taxes assessed on real estate, when the land has not been sold by the county treasurers to those willing to purchase by paying the taxes assessed against the property, and, for that purpose, to institute and maintain an equitable action in the nature of the foreclosure of a mortgage lien; the county acting, in such cases, as the trustee

of an express trust charged with the duty of enforcing the collection of such delinquent taxes by a foreclosure of the lien and a judicial sale of the property on which the taxes are assessed, and, when collected, to cause the taxes to be distributed to those for whose benefit they were levied. The district courts are the tribunals having general jurisdiction over actions of this character. In determining whether, in a given case, the county is authorized to maintain a suit to foreclose a tax lien, the court acts upon a matter confessedly within its jurisdiction, and its judgments and decrees become final unless appealed from or reversed, even though the rendition of the decree is erroneous because no tax sale certificate has been issued by the county treasurer to the county bringing the suit, as is required to be done in the regular exercise of the power thus conferred on such counties. *County of Logan v. Carnahan, supra.* Whether or not the county could, under the statute, maintain an action in a particular case, without, in form, an antecedent administrative sale by the county treasurer and the issuance to it of a tax sale certificate, was a question which went to the existence of a cause of action and not to the jurisdiction of the court. *Arnold v. Booth,* 14 Wis. 195. The objection to the confirmation on the ground that the decree is void is untenable.

In the petition filed in the action it was prayed that an accounting be had, and a finding of the amount due plaintiff county, which should be decreed to be a first lien on the property, and that the defendants, and each and all of them, be foreclosed, barred, and enjoined from any and all right, title and interest or lien in, to and upon such premises; that the premises be sold under a decree of the court and that, upon a confirmation of the sale, the sheriff be ordered to make to the purchaser of said premises a good and sufficient deed of conveyance, and put him in possession of the premises purchased. In the decree rendered it was adjudged by the court that, in case the defendants failed for twenty days from the entry of the decree

to pay the plaintiff the sum found due, with interest, the defendants' equity of redemption be foreclosed and said premises should be sold, and an order of sale was directed to be issued to the sheriff, commanding him to sell the real estate as upon execution and bring the proceeds into court to be applied in satisfaction of the decree. No attempt has been made to modify the decree or obtain its reversal, and the same has now become final. By its terms, the equity of redemption of the appealing defendants was barred and foreclosed upon the sale of the premises. Without determining the question of whether the decree might properly have been framed so as to permit a redemption at any time within two years from the judicial sale, as is contended by the appellants should be done, or might have been modified, in a suitable application, so as to accomplish the same purpose, it is sufficient to say that the decree, as it stands, does not contain any such provision and that, by its terms, the time for redemption had expired when the sale was confirmed and a deed executed by the sheriff to the purchaser thereat. The sale was made in pursuance of the decree and according to its terms, and if the decree is effective for any purpose, as it certainly is when unappealed from and unreversed, the appellants' equity of redemption was barred thereby and they, having slept on their rights, can not now be heard to complain. Their objections to the order of confirmation are in their nature a collateral attack on the decree, which, of course, it is not subject to, unless absolutely void.

Having suffered an erroneous decree to become final, the appellants are not in a position, now, to obtain a reversal or modification, by a direct proceeding brought for that purpose, and, by the application of well recognized principles, it is invulnerable to an attack, indirectly. The court having jurisdiction over the parties and the subject matter of the action, whatever was involved, adjudicated and determined regarding the merits of the decree which it entered was set at rest when the decree became final, and can not be inquired into upon objections to confirmation

of the sale made in pursuance thereof and in strict conformity with its terms. This rule has the sanction of several different holdings of this court on the subject. In *State Nat. Bank of Lincoln v. Scofield,* 9 Neb. 499, it is stated in the syllabus:

"On an appeal from an order of the district court confirming a sale of mortgaged premises, *held,* that this court would not consider a question involving the merits of the original case." POST, J., speaking for the court in *Stratton v. Reisdorph,* 35 Neb. 314, said:

"The district court had jurisdiction of the subject of the action and of the parties, hence, questions which affect the regularity of the decree are concluded thereby. The decree can not be assailed for any mere irregularity, upon a motion to set aside a sale. *Parrat v. Neligh,* 7 Neb. 456."

To the same effect are *Nebraska Loan & Trust Co. v. Hamer,* 40 Neb. 281; *Beatrice Paper Co. v. Beloit Iron Works,* 46 Neb. 900. In *Hoover v. Hale,* 56 Neb. 67, it is held:

"A judgment is an adjudication of the rights of the litigant to the subject matter of the suit, and in a proceeding to confirm a sale made to satisfy such judgment, the district court has no authority to inquire into its merits."

From the foregoing, it would seem quite clear that the second objection to the order of confirmation comes too late and can not now avail the appellants anything, even though they have been deprived of the two years' time for redemption from tax sale contemplated by the provision of the constitution referred to in the motion. This question should have been raised before the rendition of the decree and a determination had of the time which under the law they were entitled to in which to redeem from such sale or, in any event, by an application for a modification of the decree, preserving to them such rights as they were justly entitled to, before their title and estate in the land sold should be finally and absolutely extinguished. This position is fortified by reference to authorities in other jurisdictions. In *Brine v. Insurance Co.,* 96 U. S. 627, the

subject of the statutory right of redemption after sale was exhaustively considered, as affecting the procedure in the federal chancery courts in the foreclosure of real estate mortgages. The decree directing a sale of property to satisfy a mortgage foreclosing the equity of redemption was reversed, because not recognizing the right of redemption on the part of the mortgagor or the owner of the equity for the time allowed by the statute of the state, in which the land was situated, after a sale to be made in pursuance of the decree. It was decided that the erroneous decree should have contained provisions preserving to the owners of the equity the right to redeem, at any time within one year after the sale, which was given by the statute of the state, in which the land was situated. In *Maloney v. Dewey,* 127 Ill. 395, it is stated in the syllabus:

"Errors in a decree of foreclosure, such as directing a sale without redemption, do not divest the court of its jurisdiction so as to render the decree liable to collateral attack."

In the opinion it is said:

"The objection is urged, that the decree rendered is erroneous, because it directs a sale without redemption. But that error does not divest the United States circuit court of jurisdiction of the case. The remedy is, to apply to that court. What effect that error might have were this a suit at law, and the claim were made that the deed from the master was void because of such error, we will not undertake to decide. But this is a proceeding in equity to redeem from a deed of trust that a federal court has foreclosed. Whether the decree is erroneous in respect of the order of sale, or not, can not affect the jurisdiction of that court to render final decree. If this decree should be reversed on review or error, that court would still have the exclusive jurisdiction to render final decree in the case, and necessarily, therefore, some other court could not have jurisdiction to render a decree that redemption under the deed of trust be allowed. The right of redemp-

tion is involved in the question of foreclosure. No decree can be rendered in such a case without passing upon it, and the court first obtaining jurisdiction to pass upon it must retain that jurisdiction to the end. *Ex parte Jenkins,* 2 Wall. Jr. (U. S. C. C.) 521; *Wallace v. McConnell,* 13 Pet. 136, 151."

Moore v. Jeffers, 53 Ia. 202, is a case more nearly in point. It appears that, in a prior action, a sale of real estate had been made in foreclosure proceedings, in pursuance of a decree rendered therein which, by its terms, disregarded and cut off the time for redemption allowed by statute after sale. It is held, in the case cited, that the court in the prior action, having jurisdiction of the parties and the subject matter of the action, although its decree was undoubtedly erroneous, it was not void and could not be impeached in a collateral proceeding. In the opinion it is said:

"Under the doctrine of that case it is clear that the decree of foreclosure in this case was erroneous. It was, however, erroneous, simply, and not void. It can not be collaterally impeached, but must be regarded as valid and binding until reviewed by the appellate court. Where a court has jurisdiction the record must be received as conclusive of the rights adjudicated, and no fact established by the judgment of the court can be controverted. *Shriver's Lessee v. Lynn,* 2 How. 43. When it is once made to appear that a court has jurisdiction, both of the subject matter and the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto, and their privies, notwithstanding the court may have proceeded irregularly or erred in its application of the law to the case before it. Cooley, Constitutional Limitations, 408."

In *Mills v. Ralston,* 10 Kan. 206, it is said that the terms of a decree show not merely the property but also the amount of the defendant's interest therein which is ordered to be sold, that the sale follows the decree and the sheriff offers whatever the decree orders, and when the sale is

confirmed, it passes to the purchaser the interest the defendant possessed which the decree ordered sold. In a later case, *Ogden v. Walters,* 12 Kan. 282, it is held that a decree in a foreclosure suit, barring all right to redemption, is binding upon all parties and privies even if erroneous, and can not be attacked collaterally. From what has been said and the authorities cited, it seems clear that on principle and authority the decree in the case at bar has become final and conclusive on the parties to the action, and the sale having been made in pursuance of, and in conformity with, the terms of the decree, the order of confirmation was rightly entered, and whatever irregularity or erroneous action of the trial court which may exist, of which complaint is made, goes to the merits of the decree on which the sale was based, which can be corrected only by a direct proceeding for a reversal or modification thereof, and can not be raised by objections interposed to the confirmation of sale which appears to have been made in accordance with the decree and in conformity with the statute.

The order appealed from is therefore

AFFIRMED.

The following opinion on rehearing was filed December 7, 1904. *Former judgment vacated. Judgment of the district court reversed:*

1. **Foreclosure of Tax Lien:** DECREE: RIGHT OF REDEMPTION. In a suit to foreclose a tax lien on real estate and to sell the land for the satisfaction of the taxes found to be due, a decree barring the equity of redemption, only, does not, necessarily, adjudicate the right of redemption from tax sale given by the statute or the constitution.

a. **Right of Redemption.** The statutory right of redemption from tax sale differs essentially from the equity of redemption proper.

2. ———. A statutory right of redemption from sale as distinguished from the equity of redemption is usually self-executing, and to enjoy the benefit thereof, no proceedings, ordinarily, are required to be had in the courts to make such right effective.

3. ———: CONSTITUTION. Section 3, article IX, of the constitution declares that "the right of redemption from all sales of real estate,

for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less that two years," and, in the absence of statutory provisions more definitely pointing out the mode by which redemption may be made, these provisions are self-executing and secure to all whose property, as therein mentioned, may be sold for nonpayment of taxes or special assessments the right of redemption from tax sale as therein provided.

4. ———: ———. The sale of lands for taxes contemplated by the constitutional provisions above mentioned refers to and embraces both administrative and judicial sales.

5. ———: SALE: CONFIRMATION. The equity of redemption, only, being barred by the decree in the case at bar, the right to redeem from tax sale may appropriately be raised by an objection to a motion to confirm a sale made in pursuance of the decree.

a. ———: ———: ———. An absolute order of confirmation of a sale, made in pursuance of a decree for the sale of land for the satisfaction of taxes over objections which deprives the decree debtor of the right of redemption from tax sale given by the statute or the constitution, is erroneous.

HOLCOMB, C. J.

In the former opinion handed down in this case, *ante,* p. 399, it is held and decided, in substance, that appellant's right of redemption from tax sale was involved and had been adjudicated in the decree rendered by the court below, and that, upon objections to confirmation of a sale made in pursuance of the decree, he could not be heard to object to a confirmation on the ground that he had not been allowed the time provided by law to redeem the land ordered to be sold, in the exercise of his right of redemption from the sale, and that such objection was an indirect and collateral attack on the decree and therefore could not be sustained. A rehearing has been allowed, the questions again argued, and we have been favored also with some helpful briefs by counsel appearing *amici curae.* While the propositions announced in the former opinion are yet believed to be correct in the abstract, further consideration has led us to the conclusion that a misapplication of the propositions considered has been made in the case at bar

and a misconception had of the legal scope and effect of the decree entered in the trial court, which was the basis for the sale to which the objections were made and which resulted in the ruling appealed from. In the opinion, it is said:

"The court having jurisdiction over the parties and the subject matter of the action, whatever was involved, adjudicated and determined regarding the merits of the decree which it entered was set at rest when the decree became final, and can not be inquired into upon objections to confirmation of the sale made in pursuance thereof and in strict conformity with its terms."

The important question to be determined therefore is whether, as a matter of law, the decree does, in fact and in legal contemplation, operate to cut off and bar the appellant from his right to redeem his real estate from tax sale, as is provided by law he may do. The decree found a certain sum due the plaintiff county for taxes legally assessed and levied against the land and that such taxes were a lien thereon, were due and unpaid, and that, in case the defendant failed for twenty days from the entry of the decree to pay the sum found due, with interest and costs, the defendant's equity of redemption be foreclosed and said premises should be sold, and an order of sale was directed to be issued to the sheriff, commanding him to sell the real estate as upon execution and bring the proceeds into court to be applied in satisfaction of the decree. In pursuance of the decree, the premises were sold by the sheriff and a report made thereof, and, upon an application to confirm the sale, among other things, an objection was interposed on the ground that such confirmation should not be had, "because this is an action on the part of the plaintiff to foreclose a pretended lien for the taxes of plaintiff for the years 1893 to 1899, inclusive, and said decree was rendered February 28, 1901, and said sale for said lien was made October 2, 1901, and the two years' time for redemption of said sale, as provided in section 3 of article IX of the constitution, has not expired, and the

plaintiff is not entitled to confirmation of sale, nor the purchaser entitled to a deed thereunder before said time for redemption has expired."

1. Does the decree which bars only the equity of redemption of the tax debtor cut off his right to redeem from a tax sale, which is a different right and one arising wholly from the constitution and statutory provisions enacted in conformity therewith?

The equity of redemption, as usually recognized and applied, has its origin in the early chancery practice, where a strict foreclosure was decreed in cases where an equity, only, in real estate remained in the debtor or mortgagor and which, by a formal decree, was cut off and barred if the property was not redeemed at a time as therein stated. Under our practice, we now speak of it as belonging to the owners of the legal title to real estate mortgaged or otherwise encumbered, where, in the enforcement of the lien, the jurisdiction of a court of equity is invoked for the purpose of decreeing a sale of the property for the satisfaction of the debt. Strictly speaking, it is a right to redeem from the lien and may be taken advantage of at any time before the decree or, thereafter, before a sale and confirmation in pursuance of the decree, by means of which the equity of redemption becomes extinguished. This right to redeem is involved in all foreclosure cases, whether the mortgage creates a legal estate, subject to be defeated by conditions, or whether the incumbrance is merely a lien on the land; the court, in either case, determining, when rendering the decree, whether the conditions are violated and the estate, legal or equitable, subject to forfeiture or sale in satisfaction of the debt. In one instance, it is barred by the decree, and, in the other, by the decree and a sale of the land made in pursuance thereof.

"The statutory right to redeem differs essentially from the equity of redemption proper. It is not an estate in the mortgaged property, but is a mere personal privilege of redeeming the property within a certain time after the

mortgage has been foreclosed." 11 Am. & Eng. Ency. Law (2d ed.), 213.

In *Mayer v. Farmers Bank,* 44 Ia. 212, it is said:

"The equity of redemption must not be confounded with a right of redemption. A mortgagor has an equity of redemption until the sale, and not afterward, and this is true whether the sale is made upon foreclosure or under revised section 3664. After sale, he has a right of redemption if the statute gives it, and so has the lien holder."

2. The right to redemption from a sale in the enforcement of a lien on real estate, whether for taxes or otherwise, which has for its authority a statute or constitutional provision, is a right distinguishable from the equity of redemption, in that the latter is barred and foreclosed by invoking the jurisdiction of the courts for that purpose and by an adjudication and determination of the extent of such right, while the right to redeem from sale which is given by the law is usually self-executing and, to enjoy the benefit of which, no proceedings, ordinarily, are required to be had in the courts to make such right effective. A statutory right to redeem fixes the terms upon which such redemption may be had, and the right thus given may be availed of without the formality of a decree, consequent upon an adjudication in court proceedings, and without other or different steps for the establishment of such right than those provided for by the statute itself. It is a right of redemption as distinguished from an equity of redemption, and a bill in equity is not generally needed to enforce such right. It is statutory, to be enforced as the statutes provide and not otherwise. 2 Jones, Mortgages, sec. 1051; *McHugh v. Wells,* 39 Mich. 175. An ordinary decree of foreclosure of a mortgage lien, barring the equity of redemption, would, usually, be very similar in its terms to the language used in the case at bar; that is, the equity of redemption would be foreclosed and barred, if the amount found to be due and adjudged to be a lien on the property in litigation was not paid in a short time, and the property ordered sold; and, upon confirmation, the equity of re-

demption would be forever cut off. Yet, such a decree would be subject to the provisions of our statute authorizing a stay of the order of sale for nine months, and, in the face of a request for such a stay, a premature sale and confirmation thereof, of the property involved, in pursuance of the terms of the decree, would manifestly be erroneous. So, in the case at bar, the formal decree entered therein, barring and foreclosing the appellant's equity of redemption, must be held to leave unaffected and unimpaired the appellant's right to redeem, given him by positive law.

3. The law at the time these proceedings were had, provided that the owner or occupant of any land sold for taxes, or any person having a lien or interest thereon, might redeem the same at any time within two years after the day of such sale, upon terms as therein provided. The constitution expressly declares:

"The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof." Sec. 3, art. IX of the constitution.

In *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, it is held (p. 112):

"Under the constitutional provisions, the right of redemption is made secure to all those whose property as therein mentioned may be sold for nonpayment of taxes or special assessments, and the right is secured in the absence of statutory provisions more definitely pointing out the mode by which the redemption may be made. The constitutional provisions are held to be self-executing."

In the opinion, it is said (p. 142):

"No difficulty would be experienced in redeeming from sale of real estate in foreclosure proceedings of a lien for taxes, after sale and before confirmation, by paying the judgment, interest, costs and accruing costs; and we see no reason why a further extension of time after sale in which

redemption might be had would in any way prevent consummation of the object contemplated by the section, and at any time within the period therein mentioned; nor do the constitutional provisions appear inadequate to fully conserve the rights of parties in regard thereto. The proceedings are in a court of equity, and it has control over all the steps therein taken until the rights of all parties have been fully adjudicated and finally determined under the provisions of both the constitution and the statute."

4. In *County of Logan v. Carnahan,* 66 Neb. 685, the constitutional provision relative to redemption from tax sales was further considered, and it is there held that the section referred to authorizes, within the time mentioned, redemption from judicial as well as administrative sales. It is said in the opinion:

"The sales here referred to include, in our judgment, both administrative and judicial sales. The right secured to the landowner is the right to redeem from any sale which, if valid, would divest his title."

It is obvious, from what has been said, that, in this state, there is a right under the law to redeem from a sale of lands for delinquent taxes in favor of the owner for a period of two years from the time of such sale, and it is equally clear that whether we view the sale, in the case at bar, as having been made in an administrative capacity, by the proper authority, before the institution of the proceedings to foreclose in which the decree, in the case at bar, was rendered, or as having been made at the judicial sale made in pursuance of such decree, the landowner has been, by the order of confirmation, deprived of the benefit of the time allowed him by law in which to redeem, and that, unless his right to such legal redemption is foreclosed and cut off by the decree, which we are constrained to say has not been, the order of confirmation complained of ought not to have been entered, which, in effect, makes the sale absolute upon the execution and delivery of the sheriff's deed, and transfers to the purchaser the full and absolute title to the premises decreed to be sold.

5. Aside from the general averments in the petition and such as are usually found in pleadings of this character, where the object is to enforce a lien upon real property and cut off the equity of redemption, there is nothing in the record to indicate that the question of the legal right to redeem from a tax sale was either raised or expressly determined, except the inference proper to be drawn from the decree in the general terms in which it is framed, as heretofore noted. If this question is neither fairly raised nor necessarily determined by the decree entered directing a sale of the property for the satisfaction of the lien found to exist in the plaintiff's favor, and barring the equity of redemption, then there can be, we think, no valid objection to the question being raised, as it was raised, upon the application for a confirmation of the order of sale and the objections interposed by the appellant against the order of confirmation being, at that time, made absolute. The propriety of raising the question in this manner is recognized in *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, cited in the former opinion, where the court in the determination of the questions therein presented said:

"If the point had been raised or insisted on by the appellee, it would admit of doubt whether the question is fairly raised by the decree; for while it orders the sale of the lot, and a report to the court, it says nothing about barring the equity of redemption, nor of the making of a deed; and, but for a single phrase in the decree, it would seem that the appropriate time to raise this question would be on the confirmation of the report of sale and the order for a deed to the purchaser, which has not yet been done."

It is doubtless true that, if the issue were directly raised in the foreclosure action and an adjudication had respecting the constitutional and statutory right to redemption, and such question was necessarily and in fact determined by the decree entered, in that event, the question has become *judicata*, and could not be raised collaterally, by an objection to the confirmation of sale, because such right had been denied in the decree. But, if the decree purports

only to foreclose such right in general terms, when the question was not raised nor necessary to a proper determination of the controversy, then, we are not without authority for treating such part of the decree as being mere surplusage and as ineffective for the purpose of cutting out such right of redemption.

"The right of redemption," say the supreme court of Illinois, "given by the statute to a decree or judgment debtor is not affected by a failure of the court to provide in its decree for the sale of real estate, with the privilege of redemption. It is the statute that gives the right of redemption, and not the decree of the court. In a case where the statute authorizes a redemption from a sale, a clause in the decree ordering the sale that declares the sale shall be absolute, will not bar that right. That portion of the decree will be regarded as inoperative, and a redemption will be allowed as in other cases." *Fitch v. Wetherbee,* 110 Ill. 475, 492.

And to the same effect is *Hyman v. Bogue,* 135 Ill. 9. In support of the doctrine, the court in the latter case cites *Brine v. Hartford Fire Ins. Co., supra; Orvis v. Powell,* 98 U. S. 176; *Swift v. Smith,* 102 U. S. 442; *Burley v. Flint,* 105 U. S. 247; *Mason v. Northwestern Ins. Co.,* 106 U. S. 163. The conclusion we have reached insures to the tax debtor the right of redemption from tax sale contemplated by the constitution and the statutes, and which, of course, he is entitled to as a matter of right and justice, unless it is obvious that such right has been waived or lost by a failure to assert it seasonably, and in a proper manner; and, in this case, that question not having necessarily been determined by the decree directing a sale of the real estate for the satisfaction of the taxes due, there can, we think, be no valid reason for denying to the owner of the real estate the right to be heard on an objection to a confirmation of the sale made in pursuance of the decree which, if consummated, would devest him of all title, and deprive him of the right of redemption guaranteed him by the laws of the state. The order confirming the sale, and directing

the execution of a deed to the purchaser, should have been such as to preserve to the tax debtor his legal right of redemption from the tax sale within the time allowed him by law, and, because of its failure to so provide, the judgment of affirmance heretofore entered is vacated; the order of confirmation is reversed and the cause remanded, with directions to the trial court to enter an order confirming the sale, subject to the appellant's right of redemption within the time allowed by law, and to direct the execution and issuance of a deed by the sheriff conveying to the purchaser the premises sold, in the event such redemption is not had within the time provided.

REVERSED.

N. WESTOVER & COMPANY V. VAN DORN IRON WORKS COMPANY.

FILED DECEMBER 2, 1903. No. 12,949.

1. **Attachment:** AFFIDAVIT: AMENDMENT. The provisions of the code relating to amendments should be liberally construed, but one can not amend an affidavit in attachment so as to state a cause of action different from that stated in the original affidavit on which the writ was issued.
2. **Justice of the Peace:** JURISDICTION. The statute provides that in an action tried by a justice of the peace, where the defendant has been arrested or his property attached, the justice shall render judgment immediately on the conclusion of the trial. By taking such a case under advisement by consent of parties to a future day, in order to examine the evidence and briefs filed therein, the justice does not lose jurisdiction to render judgment.
3. ———: ERROR: PROCEDURE. Where, on a petition in error, the district court reverses a judgment of a justice of the peace, it should not dismiss the case, but must set it down for trial, as provided in section 601 of the code.

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

Jesse B. Strode and *Edmund C. Strode,* for plaintiff in error.

Robert S. Mockett and *Orpheus B. Polk, contra.*

BARNES, C.

The plaintiff in error commenced this action in the justice's court of Lancaster county before one Fritz Westermann, a justice of the peace, by filing an affidavit for an attachment and garnishment. An order of attachment was issued, together with a summons, and both were returned not served, because the defendant in the action was not found in Lancaster county. Thereupon service was made by publication, and a notice of garnishment was served on C. D. Campbell & Brother, the garnishees described in the affidavit. Later on, the garnishees answered that they were indebted to the defendant in the sum of $401.17. An order was made requiring the payment of the sum of $144.54 into court, that being the amount of the plaintiff's claim, together with $50, the probable costs of the action. The order was complied with, and, after the completion of service of summons by publication, the defendant appeared, and the cause was continued, on its application, for thirty days. Thereafter, several continuances were had by agreement, and on the 20th day of March, 1902, the cause came on for trial. The plaintiff thereupon asked leave to file an amended bill of particulars and affidavit in attachment, which was objected to on the part of the defendant, for the reason that the affidavit set up a different and new cause of action from that originally sued on, and upon which the writ of attachment had been issued; the objections were overruled; an exception was allowed, and the amended affidavit was filed. Defendant kept its objection good at all stages of the proceedings; the cause was tried, and, after the introduction of the evidence, was continued for argument to March 28, at 2 o'clock P. M. At that time the parties appeared in court, by counsel, and the cause was argued; plaintiff and defendant each filed their briefs and citations of authorities, and, by consent of the parties in open court, the cause was taken under advisement by the justice to April 9, 1902. On that day judgment was rendered in favor of the

plaintiff and against the defendant for the sum of $96.09 and costs; the court further ordered that the attachment be sustained. The defendant prosecuted error to the district court, where the judgment of the lower court was reversed, the cause was dismissed, the attachment dissolved and the garnishee discharged. From that judgment the plaintiff brings the case here by petition in error.

The questions presented by the record which require our consideration, are: First, did the justice err in permitting the plaintiff to file its amended affidavit for attachment? Second, did the justice of the peace lose jurisdiction of the case, and was he without power to render a judgment therein at the time to which he took the case under advisement? We will dispose of these questions in the order stated.

1. The ground for attachment, as stated in the original affidavit, was that the defendant was a foreign corporation and a nonresident of the state of Nebraska; and the cause of action was stated therein as follows:

"Affiant further says that the said firm of N. Westover & Company has commenced an action before Fritz Westermann, a justice of the peace in and for Lancaster county, Nebraska, against the Van Dorn Iron Works Company of Cleveland, Ohio, a corporation duly organized under the laws of Ohio, to recover the sum of $57.38, with interest thereon at the rate of seven per cent. from the 12th day of August, 1892, which said sum is now due and payable to the plaintiff on an account for goods sold and delivered by plaintiff to defendant at defendant's request, and for services rendered to, and expenses paid for, and on behalf of, defendant at defendant's request." (Then followed the items of account.)

In the amended affidavit for attachment the cause of action was set forth as follows:

"The firm of N. Westover & Company has commenced an action before Fritz Westermann, a justice of the peace in and for Lancaster county, Nebraska, against the Van Dorn Iron Works Company of Cleveland, Ohio, to recover

the sum of $57.38, with interest thereon at the rate of seven per cent. per annum from the 12th day of August, 1892, which said sum is now due and payable to plaintiff on account for goods sold and delivered to defendant at defendant's request and for services rendered to, and expenses paid for, and on behalf of, defendant at defendant's request in the months of July and August, 1892, by the firm of Fisher & Westover of Lincoln, Nebraska, a corporation consisting of John Fisher and Jennie Westover, which said account was, for a valuable consideration, sold and transferred on or about the 1st day of June, 1896, by Fisher & Westover to the firm of N. Westover & Company, a corporation consisting of N. Westover and Ann Westover; and on or about the 1st day of July, 1900, was, for a valuable consideration, sold and transferred by the said firm of N. Westover & Company to plaintiffs, a copartnership consisting of N. Westover and John Westover, plaintiffs in this case; that plaintiffs are the *bona fide* owners and holders of the same, and that the following is an itemized statement of said account."

It will thus be seen that the cause of action set forth in the original affidavit for attachment and in the amended affidavit are not the same. One was alleged to be for goods sold and delivered by the plaintiff to the defendant, and for services performed for the defendant at its instance and request; while the other was for goods sold and delivered to defendant by a firm consisting of John Fisher and Jennie Westover, known as Fisher & Westover, and by that firm assigned to a copartnership consisting of N. Westover and Ann Westover, and later on sold and assigned by said last named firm to the plaintiff.

This court has always construed the right of amendment provided for by the code liberally, but we are not aware of a case where it has been held that, by amendment, one can go to the extent of completely changing his cause of action. In the case of *Western Cornice & Mfg. Works v. Meyer,* 55 Neb. 440, it was held that a pleading could not be amended during the trial to show that the plaintiff

claims by assignment or transfer of the account, when the action had been brought by him as the original payee and owner thereof. In *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314, Judge GANTT, who delivered the opinion of the court, made use of the following language:

"It is true a party may amend his pleading while he preserves the identity of his cause of action. It is, however, said that an amendment is the correction of a mistake or error in the pleading before the court, and that courts never claimed the power to allow, as an amendment, the insertion of a new cause of action; therefore the insertion of facts constituting a new and different cause of action, would be a substitution of a different pleading, and not an amendment of an existing one."

The same rule was announced in *Dietz v. City Nat. Bank of Hastings,* 42 Neb. 584, and in *Harrington v. Wilson,* 10 S. Dak. 810, 74 N. W. 1055.

While it is permissible to allow an attachment affidavit to be amended as to a mistake in the venue, or where a ground of attachment is imperfectly stated, or in any clerical or unimportant matter, still, it is not permissible to allow an amendment which states an entirely different cause of action from the one on which the writ was issued.

It follows that the district court was right in holding that the justice erred in allowing the plaintiff to file his amended affidavit, during the trial, over defendant's objections.

2. The district court, so far as we can gather from the transcript, held that the justice, by taking the case under advisement with the consent of the parties, from the 28th day of March to the 9th day of April following, lost jurisdiction of the case, and was without power to render a judgment therein, and, for that reason, after having reversed the judgment of the justice court, dismissed the case. This ruling is assigned as error.

This question has been before us, in a somewhat modified form, several times. In the case of *Huff v. Babbott,* 14 Neb. 150, where the trial was had on the 28th day of Sep-

tember and the justice rendered a judgment the following morning, Judge MAXWELL, speaking for the court, said: "The justice did not lose jurisdiction." It was stated in the opinion, however, that it was evident that the justice required time to reach a proper conclusion, and that the legislature in the use of the word "immediately," as found in the statutes, evidently intended that the justice should render his judgment before transacting any other business. This case was cited with approval in *Austin v. Brock,* 16 Neb. 642. In *Worley v. Shong,* 35 Neb. 311, a case tried before a justice of the peace to a jury, a verdict was returned and filed at twenty-five minutes after 8 o'clock P. M. Judgment was not entered thereon until the next day, and it was held that the judgment was not entered immediately within the meaning of section 1002 of the code, and that the justice had lost jurisdiction at the time the entry of the judgment was made. In *Thompson v. Church,* 13 Neb. 287, an action tried to a jury in a justice court, with a verdict returned into court at 7:30 A. M. on Sunday, it was held that it was the duty of the justice to render judgment immediately upon the receipt of the verdict, although it was Sunday. The matter was again before the court in *Reed v. Mott,* 2 Neb. (Unof.) 450, where the trial was before a justice of the peace, and by the consent of both parties, in open court, the case was taken under advisement, judgment to be rendered within four days, as specified in section 1002 of the code; judgment was so rendered and an appeal was taken therefrom to the district court where, upon the trial of the case, the court held that the jurisdiction had not been lost, and such holding was affirmed by this court. It will be observed, however, that the defendant in that case, instead of prosecuting error, appealed from the judgment of the justice and brought up the whole case for trial *de novo.* After the commencement of the trial, he was hardly in a position to contend that the court had no jurisdiction to render the judgment from which he had appealed.

It thus appears that we have, in effect, passed on the

question presented by this record. In many of the states where the statutes are practically the same as ours, it has been held that, by not entering judgment immediately, the justice loses jurisdiction of the case and no judgment can thereafter be rendered by him; but in none of the cases, so far as we have examined them, was there any agreement of the parties consenting to such a course as the one pursued herein. Ordinarily, parties should be bound by their agreements entered into in open court; and where it appears, as in this case, that the parties filed briefs and the court required time to consider them, and such time was agreed upon, the case may be said to have not been submitted until the time arrived to which it had been taken under advisement. We hold that the justice was not without jurisdiction to render the judgment complained of, and that the district court erred in dismissing the case after having reversed the judgment of the justice. The case should have been set down for trial, as provided for in section 601 of the code.

We therefore recommend that so much of the judgment of the district court as reverses the judgment of the justice of the peace be affirmed, and that that part of said judgment dismissing the action altogether be reversed, and the cause remanded for further proceedings.

GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court reversing the judgment of the justice of the peace is hereby affirmed, and the judgment of said court dismissing the action is reversed, and the cause is remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

The code provides that an affidavit for attachment in justice court must show "the nature of the plaintiff's claim." The object of this provision seems to be to require

a showing under oath that the action is of such nature as to support an attachment.

"It is not necessary in the affidavit for attachment to set forth at length the cause of action. It is sufficient to state the nature of the plaintiff's claim. This must appear to arise *ex contractu,* but where the statement is not as full as may be desired reference may be had to the petition." *Hart v. Barnes,* 24 Neb. 782, 787.

The opinion appears to discuss the matter as though it were a question of change of cause of action by amendment of a petition. Even upon this theory, I think the conclusion is wrong, but this is not the question here. The proposition appears to be too plain to admit of argument or discussion.

The nature of the plaintiff's claim shown in the amended affidavit is not different from the nature of the claim shown in the original affidavit, and the justice, it seems to me, was clearly right in allowing the amendment.

LINCOLN TRACTION COMPANY V. JESSE D. MOORE.

FILED DECEMBER 2, 1903. No. 13,066.

1. **Action for Personal Injury:** REVIEW. **Questions not presented to the trial court by the motion for a new trial, and which are not mentioned in the petition in error, can not be considered by this court.**

2. ———: NEGLIGENCE: EVIDENCE. **In an action for personal injuries due to the frightening of plaintiff's team by the alleged negligent operation of a street car in running the same carelessly and negligently at a high rate of speed, and where it appeared from the testimony of all of the witnesses that the car was going slowly, that the motorman slowed it down and stopped it as soon as he saw that the team was becoming frightened, no inference of negligence arises, and a judgment for plaintiff will be reversed for want of evidence to sustain it.**

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Paul Clark and *Charles S. Allen,* for plaintiff in error.

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin, contra.*

BARNES, C.

The Lincoln Traction Company, the plaintiff herein, owned and operated a street railway on the highway running east and west on the north side of Lincoln Park, adjacent to the city of Lincoln, on the 29th day of April, 1899. On the afternoon of that day Jesse D. Moore, the defendant herein, was driving a double team hitched to a light road wagon going east over that road; the traction company's street car rounded the curve on its way west, when the team was about four hundred feet away. From the evidence it appears that the car was going slowly, and when the motorman saw the team was becoming frightened he turned the electric current off and slowed up still more. Some of the witnesses say he stopped the car, and some of them testified that the car was either stopped or was creeping along very slowly toward the team. The horses were traveling in a walk, and when they got nearly to the car they suddenly jumped to one side into the ditch. In attempting to hold them and control their movements, Moore place his foot against the dashboard of the wagon to brace himself; the pressure broke it off, causing him to slide partly out of the wagon; his foot struck the ground, his leg was broken, the team escaped from his control and ran away. The testimony further shows that the injuries which he thus sustained were quite severe and perhaps permanent. Upon his recovery, he commenced this action in the district court for Lancaster county to recover for the damages caused by his injuries; the trial resulted in a verdict and judgment in his favor for $3,000, and the traction company prosecute error therefrom. The petition on which the cause was tried contained the following allegations of negligence:

"The plaintiff alleges that, on the said date aforesaid,

while he was driving on said highway, one of the said electrical cars negligently driven by defendant, as aforesaid, came at a high rate of speed toward plaintiff, who was driving his team of horses attached to a buggy on said highway, and his team of horses aforesaid became frightened at said electrical car so operated and ran away, throwing plaintiff from the buggy on to the ground, dragging him a great distance and inflicting great injuries to the person of this plaintiff." Plaintiff says: "That on the said 29th day of April, 1899, he was traveling eastward in a buggy drawn by two horses upon said public highway leading from the hospital for the insane toward the city of Lincoln; while traveling along said public highway about three hundred feet west of First street, and on what would be a westerly continuation of Van Dorn street, his team became frightened at defendant's electric car, run by defendant in a careless, reckless and negligent manner, at a high rate of speed, and plaintiff was, by the negligence of the defendant, thrown from his buggy, the team running away," etc.

The answer of the traction company was: First, a general denial; second, a plea of contributory negligence on the part of the plaintiff.

The traction company contends: First, that the petition does not state facts sufficient to constitute a cause of action and sustain the verdict. This question is not raised properly, either by the motion for a new trial in the district court, or the petition in error herein, therefore, we pass it without further consideration.

It is next urged that the court erred in admitting certain testimony found on pages 88 and 89 of the bill of exceptions. An examination of this evidence discloses that witness Martin, whose testimony was objected to, testified that the street car was going slowly, and it is stated that this evidence ought not to have been received because it did not sustain the allegations of negligence set forth in the petition, to wit, that the car was running at a high rate of speed. The witness Martin was called for the plaintiff

Moore, and it is difficult to see how the evidence thus given by him could in any manner prejudice the rights of the traction company. Therefore, the court did not err in admitting it. It is further contended that the verdict and judgment are not sustained by sufficient evidence. This presents the main question in controversy in this case. It will be observed that the allegation of negligence is that the car was negligently operated and driven at a high rate of speed. In other words, that the defendant's car was run in a careless, reckless and negligent manner, at a high rate of speed, toward the plaintiff's team, and thereby frightened the same, and caused them to run away and throw the plaintiff from his buggy, and thus injure him in the manner complained of. The record shows that the only persons who saw the accident were the plaintiff, Charles Martin, and the witnesses Bacon, Pacal, Mrs. Langdon and the motorman, Heitzman. We state briefly the substance of the evidence on that point. Moore testified as follows: "I was driving and the street car was coming right toward me when they came round the curve; they were coming round there at a pretty good jog. I can't say how fast they were running, but it was a pretty good jog, and they were coming right toward me. The team was walking along, and when they came a little farther along I began to look after the horses; the car was coming right toward them. Martin hallooed to them, 'Why don't you stop that car?' They still kept coming, and when they got right against me the horses jumped sidewise," etc.

Q. Now, a little bit more about one thing: You testified that Mr. Martin called out to the man running the car, to stop. What did he do then, did he stop the car?

A. I could not tell you; the car still came on, and the horses took my attention.

Q. Did he stop the car?

A. I could not tell you, they were coming right toward me, and I was watching the team. I could not tell whether they stopped the car or not. I could not say whether he stopped the car or not.

The witness Martin who was riding with Moore testified in substance as follows: We drove round by the asylum, and came onto the bridge by the park; when we got just over the bridge we didn't see anything ahead; we were going along and talking, and when we got about 275 yards from the bridge the street car made the turn coming west; we saw the car make the turn and it was coming round there pretty lively, and the team pricked up their ears and kind of pranced a little, the car kept coming on and we went about sixty yards, when the horses commenced to act up a little harder; we didn't go quite sixty yards, when they commenced to side off and get away from the car; the car was probably fifty or sixty yards away, then. The team was trying to go toward the ditch, and I seen there was going to be trouble. I says, we are going to have trouble here, this is a narrow road. He says, oh, I don't think we will, and I hallooed to the street car man to hold up. I says, stop the car a minute, and he did slack up the car, and the team began to quiet down a little, and then he commenced to kind of creep on, he was watching the team, and kept the car going on a kind of creep; we were about fifty or sixty yards from the car, when I hallooed to stop the car; and the motorman slowed up and stopped, and then started the car again kind of easy, and kind of creeping and watching the team at the same time. I didn't have time to halloo any more; just as the car got within two lengths of us the team dove right into the ditch; the car was going very slow. I yelled to the motorman as soon as I thought there was any danger; we didn't turn round, because we didn't think the team would be frightened; we didn't want to turn round, we didn't know whether the team would be frightened or not.

Heintzman, the motorman, testified in substance as follows: I had probably gone about forty or fifty feet around the curve, when I noticed the team shying and getting scared. I commenced stopping my car as quick as possible. I was going around the curve, probably at the rate of four or five miles an hour. It is not possible to go fast

around the curve, not at full speed. I slowed up the car and cut off the current. I stopped the car and cut off the current as soon as I could after I noticed the team became frightened. The team finally got away from him; they left the road, I should judge, ten or fifteen feet ahead of the car, and ran over to the ditch, and about that time was when the dashboard gave way and threw Moore forward right onto the horses, and that started them to kicking and running faster, and then they went by the car and turned back into the road. All this time the car was standing still. I stopped the car as soon as I could.

The witness Bacon, who was riding in a buggy with Mrs. Langdon, a few feet behind Moore's team, testified in regard to the operation of the car, as follows: "I first noticed the street car about fifty or seventy-five feet before they made the turn. I saw them when they rounded the curve, and I could not tell how fast they were coming, but about the usual speed. When the car came round the curve, I guess I was about a block away; Mr. Moore was about three rods ahead of us. I noticed his team beginning to get frightened at the car as soon as it made the turn, and was coming directly toward us. Mr. Moore's team, at that time, was about 125 feet away from the car; the man in charge of the car shut down and stopped as soon as he could."

Mrs. Langdon's testimony was, in substance, that, after the car came around the curve, Mr. Moore's team was frightened and became fractious and was plunging; the car stopped, or came very slowly on round the curve. It slowed up; it appeared that the motorman had noticed the horses and he slowed up. I could not tell how much, but much slower than the car ordinarily runs. The car finally stopped; the team had almost reached the car when the car stopped.

Pacal, who was on the car, testified that it was stopped as soon as the horses showed fright.

This is all of the testimony bearing on the question of negligence, and it fails to support the allegations of the

plaintiff's petition, and does not show any negligence in the operation of the car. On the contrary, it conclusively shows that the car was going slowly, and as soon as the team showed fright the motorman slowed down, and finally stopped it. The petition contained no general allegation of negligence, neither was there any testimony offered to show negligence on the part of the company, other than in the operation of the street car. In the case of *Eastwood v. La Crosse City R. Co.,* 94 Wis. 163, it appeared that the plaintiff's horses became frightened at the noise made by the car while it was yet some distance away. As the car approached, the motorman saw that the horses were frightened, and turned off the current and applied the brake. The horses backed toward the sidewalk, throwing the rear end of the sleigh upon the track, where it was struck by the car, which could not be brought to a stop quick enough to avoid it. The car, when first seen, was about 175 feet away, and when the brakes were applied it was about 80 feet away. And the court held that these facts did not justify an inference that the motorman was negligent. This rule also is firmly supported by Nellis, Street Surface Railroads, 329; Booth, Street Railways, 401, and *Cornell v. Detroit Electric R. Co.,* 82 Mich. 495; *Terre Haute Electric R. Co. v. Yant,* 21 Ind. App. 487; *Flaherty v. Harrison,* 98 Wis. 559.

We are therefore constrained to hold that the evidence adduced on the trial was not sufficient to support the verdict and the judgment of the district court, and, for that reason, the judgment must be reversed and a new trial ordered.

Many other errors are assigned for the reversal of the judgment, but it is unnecessary to consider them. Upon another trial, all such errors, if any, will, without doubt, be corrected. For the foregoing reasons, we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

BALTHAS JETTER ET AL. V. WALDO H. LYON ET AL.

FILED DECEMBER 2, 1903. No. 13,211.

1. **Heirship:** PROOF. Proof of heirship is not confined to the records of the probate court alone, but may be established by the testimony of any one who knows the facts constituting such relation.

2. **Deed:** CONDITION RUNNING WITH LAND. A condition in a deed conveying real estate, by which it is provided, "That no malt, spirituous or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render the conveyance void, and cause the premises to revert to the grantor, his heirs and assigns," is a valid condition subsequent which, until broken, runs with the land.

3. ———: BREACH OF CONDITION: EJECTMENT. On a breach of such condition the grantor, if living, or, if dead, his heirs may claim a reversion of the estate and can maintain an action in ejectment to recover it.

4. **No Waiver.** Record examined, and *held* that such right had not been waived by either the grantor or the plaintiffs.

ERROR to the district court for Burt county: IRVING F. BAXTER, JUDGE. *Affirmed.*

A. S. Ritchie, H. Wade Gillis, Harrison H. Bowes and *Timothy J. Mahoney,* for plaintiffs in error.

Albert W. Jefferis and *Frank S. Howell, contra.*

BARNES, C.

This was an action in ejectment commenced in the district court for Burt county by Waldo H. Lyon, John Lyon and Mary E. Smith, sole heirs at law of Waldo Lyon, deceased, against Balthas Jetter and John Carlow, to recover

the east half of lot 11, in block 8, in the incorporated village of Lyons, in said county. The trial in the district court resulted in a judgment for the plaintiffs, and defendants prosecute error.

It appears that Waldo Lyon (now deceased) owned the land on which the village of Lyons is situated; that he laid it out into a townsite for said village, and duly dedicated it for that purpose; that on the 8th day of November, 1880, he sold the premises in question to one James H. Ramey, and conveyed the same to him by a deed, which contained the following condition:

"I, Waldo Lyon, in consideration of $50 in hand paid (and the further consideration that no malt, spirituous or vinous liquors shall be kept or disposed of on the premises herein conveyed; any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render this conveyance void and cause the said premises to revert to Waldo Lyon, his heirs and assigns) do hereby grant, bargain, sell and convey and confirm unto James H. Ramey," etc.

That, thereafter, Jetter obtained title to the premises through several mesne conveyances, all of which contained the condition above set forth; that he leased the property to John Carlow, and that they were jointly in possession of it at the time the action was commenced; that said lease to Carlow was for the purpose of enabling him to conduct a saloon on the premises; that he had a license for that purpose and was engaged in the sale of malt, spirituous and vinous liquors thereon at that time; that Waldo Lyon died before the premises were conveyed to Jetter, and that plaintiffs claimed the right to recover as heirs at law of the said Waldo Lyon under the condition contained in the original deed from their father to Ramey and by reason of the violation thereof. The plaintiffs in error contend that the judgment is not sustained by sufficient evidence: First, because there was no competent proof of heirship on the part of the plaintiffs below; second, because there has been a waiver of the conditions contained in the deed by

both the deceased and his heirs; third, because the restriction limits the violation of the condition in the deed to the grantee and any person claiming rights under him, and not to persons claiming title through him. We will dispose of these questions in the order in which they are presented.

It is contended that the only competent proof of heirship is a finding and judgment of that fact by the probate court of Burt county; which, it is claimed, had original and exclusive jurisdiction over that matter. This contention can not be sustained. Heirship may be proved in many ways. In *Cuddy v. Brown,* 78 Ill. 415, there were several persons joined as plaintiffs who claimed as heirs of a deceased person. They proved by parol evidence that the deceased originally came from a certain place in Ireland, and that he often, among his friends, had spoken by name of his father, brothers, half-brothers and a sister residing in that place, and they then proved that their father lived in the same locality; that it was a common repute in their family that they had an uncle in America of the same name as the deceased; that their father had brothers, a half-brother and a sister, and that their names correspond with the names mentioned by the deceased, and that the name of their parental grandfather corresponded with that of the father of the deceased as given by him, and that the claimants were the sole surviving descendants of their father, and that all his brothers, sisters and half-brothers were dead, and had no descendants surviving. It was held that these facts constituted a sufficient proof to the heirship of the claimants. See also 2 Greenleaf, Evidence (16th ed.), secs. 353-355. Again, one may establish ownership to real estate as the heir of a deceased person, even where no probate proceedings whatever have been had relating to the estate of the deceased. In this state our district courts have jurisdiction in ejectment suits, and the heirs of a deceased person, even before the estate is probated, may maintain ejectment as to all persons, except the executor or administrator. *Lewon v. Heath,* 53

Neb. 707. The record in this case shows that Waldo H. Lyon testified that he and his coplaintiffs were the only surviving children and heirs at law of Waldo Lyon, the grantor in the deed in question. Such evidence was clearly competent. It may be further stated that so much of the record of the probate court of Burt county as shows a settlement of the estate of Waldo Lyon, deceased, and a distribution of the property left by him to his heirs, the identical plaintiffs in this suit, was put in evidence by the plaintiffs below; so that this objection is without merit, and we hold that there was sufficent evidence of heirship to sustain the judgment.

It is claimed that there has been a waiver of the conditions contained in the deed from Waldo Lyon to James H. Ramey, both by the deceased and by his heirs who bring this suit. To support this contention certain deeds, executed by the deceased, conveying other lots to other persons, were introduced in evidence. An examination of these deeds shows that the only difference between them and the one in question is, that the reversion contained in them is restricted to Waldo Lyon alone. The record also contains certain quitclaim deeds from the plaintiffs below to each other, which, it appears, were made for the purpose of settling their father's estate and conveying to each one his or her respective share. Of course they contain no conditions whatever. These facts do not amount to a waiver of the condition contained in the deed in question. It will be observed that nothing is said in that deed about a waiver of its conditions, and an examination of the record shows that the half-lot conveyed by that deed was in the business part of the village. It may well be presumed that it was the intention of the grantor to forever prevent the sale of intoxicating liquors in the village which he was founding. Without doubt, he considered that the absence of the traffic would conduce to the good morals of the community, and render the remainder of his lots more valuable than they would be in case the liquor traffic was carried on therein. The deed in question in no manner

restricted his right to convey any other lot, or lots, belonging to him, without the condition. Again, an examination of the deeds, with the modified condition, conveying other lots, shows that the lots so conveyed are situated in the residence portion of the village, where there would be no likelihood that any one would ever engage in the liquor traffic. When Jetter accepted the deed under which he claims, he took it with full notice of the condition imposed in the deed under and through which his chain of title came. Again, every deed in that chain, from the first to the one accepted by him and under which he claims title, contained the same condition. He accepted the title burdened with the condition, with full knowledge thereof, and has no right to complain because other lots have been conveyed to other persons without the condition he now seeks to avoid. We therefore hold that there has been no waiver in this case by the deceased, or the plaintiffs below, such as would amount to a defense to this action.

Lastly, it is contended that there was no forfeiture under the terms of the deed, and many reasons are urged in support of this claim, but none of them seem conclusive to us. The provisions of the deeds in question constituted a condition subsequent. The title to the property vested in the several grantees and, finally, in Jetter, conditionally, to be devested on his failure to comply with the conditions by which it was provided he should hold it. *Smith v. Smith,* 64 Neb. 563. The condition was a valid one, and in all of the adjudicated cases has been held to be a condition subsequent which runs with the land, until broken. *Sioux City & St. P. R. Co. v. Singer,* 49 Minn. 301, 51 N. W. 905; *Cowell v. Colorado Springs,* 100 U. S. 55; *O'Brien v. Wetherell,* 14 Kan. 616; *Plumb v. Tubbs,* 41 N. Y. 442.

The provisions of the deed seem plain to us, beyond all question. There can be no doubt as to what was intended by the parties thereto. And, while its language clearly shows it was intended that Ramey should be bound by a personal covenant never to sell, or permit to be sold, intoxicating liquors on the premises, yet, it still more clearly

shows it was further intended that the estate in the premises should be conveyed merely upon the condition that neither Ramey, nor any one holding under him, should ever do any act prohibited by the covenant. The deed expressly says that the conveyance is upon that condition. The condition is expressly made to reach not only Ramey, but all persons claiming under him. The deed expressly says that if this condition shall ever be broken by the grantee, or those claiming under him, the premises shall be forfeited to the grantor, his heirs or assigns. Of this condition Jetter and Carlow had ample notice, as the recital in Jetter's deed clearly shows. The estate conveyed was clearly an estate upon condition subsequent, and the condition, until broken, runs with the land, beyond all doubt. We hold that, by the language contained in the deed from Lyon to Ramey, a valid condition subsequent was created, upon the continued observance of which, by the grantee and those claiming under him, the estate conveyed to them depended; and that, whenever either of them committed a breach of the conditions, the grantor, if living, or, if dead, his heirs were at liberty to claim the estate and could maintain a suit in ejectment to recover it.

The record contains sufficient evidence to sustain the findings of the district court, and the judgment accords with the great weight of authority. We therefore recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.