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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1905.

VOLUME LXXIII.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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HENRY P. STODDART,
DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

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SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.
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JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	John B. Raper..... William H. Kelligar.	Pawnee City. Auburn.
Second.....	Cass and Otoe.	Paul Jessen.....	Nebraska City.
Third.....	Lancaster.....	Albert J. Cornish .... Lincoln Frost ..... Edward P. Holmes...	Lincoln. Lincoln. Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day..... Lee S. Estelle..... Howard Kennedy, Jr. William A. Redick... Willis G. Sears ..... Abraham L. Sutton.. Alexander C. Troup..	Omaha. Omaha. Omaha. Omaha. Tekamah. South Omaha. Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Arthur J. Evans. ... Benjamin F. Good...	David City. Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck.. James G. Reeder.....	Fremont. Columbus.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Neligh.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Ed L. Adams.....	Minden.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	John R. Hanna..... James N. Paul.....	Greeley. St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel Keith, Kimball, Lincoln, Logan, McPherson, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan and Sioux.	James J. Harrington. William H. Westover.	O'Neill. Rushville.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1905.

JACOB CROCKFORD v. STATE OF NEBRASKA.

FILED JANUARY 5, 1905. No. 13,792.

1. **Statute: LOCAL CUSTOM.** A local custom cannot operate to suspend a criminal statute, nor to overthrow the rules of evidence by which the commission of an offense is proved.
2. **Cattle Stealing.** Where one not the owner takes into his possession a calf found running at large as an estray, and at the time takes it with the intent to convert it to his own use, and to permanently deprive the owner of his property without his consent, such a taking would constitute the crime of cattle stealing as defined in the criminal code.

2*a*. **Instructions** defining the crime of cattle stealing as copied in the opinion, where the taking is of an animal running at large, *held* properly given.

3. **Evidence** examined, and *held* sufficient to sustain a verdict of guilty.

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

Beeler & Muldoon, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

HOLCOMB, C. J.

The defendant was found guilty of the larceny of a calf alleged to be of the value of $10 but which the jury found to be worth only $5. Upon the rendition of the verdict of

guilty, the court sentenced the accused to imprisonment in the penitentiary for the period of one year. The alleged larceny was committed in McPherson county, where grazing and stock raising is the principal industry. The accused, while admitting that he obtained possession of the calf, testified that it came an orphan and in a half-starved condition to the premises where he was employed, and that as an act of kindness he placed it in an inclosure and cared for it as an estray, without any intent to steal.

1. It is urged upon us that the trial court committed prejudicial error in not permitting the defendant to prove a custom, claimed to exist in the locality where the offense was charged to have been committed, to the effect: "That any one finding a calf either upon the prairie, or upon his range, or upon his premises, that is lost from its mother, and in a starving or half-starved condition, to take up the calf and feed it and save its life if possible. That, unless the owner or any person claiming to be the owner comes and brings a cow to the place where the calf is, and that, unless the cow owns the calf and the calf the cow, it becomes the property of the taker up." We are not without scriptural authority for saying that the ox knoweth his owner and the ass his master's crib, and it would not seem unreasonable to conclude that the recognition by a cow of her offspring, especially before weaning time, ought to be of some probative value in determining the ownership of the calf. The real point of difference, however, in the case at bar, seems to hinge on the question of whether the cow should be taken to the calf, or the calf to the cow, for it is in evidence that when they were brought together the action of the older animal evidenced her maternal affection for her lost offspring, or, if not, that it is manifest that she was quite willing to become the foster mother of the orphan calf. Whatever may be the force of the alleged custom, if proved, as to the respective rights of those taking up and holding estrays and those claiming to be the owners, we do not find warrant in law or precedent for holding that such a custom, if existing, could operate to

suspend a criminal statute, or to overthrow the rules of evidence by which the commission of an offense is proved. The point at issue is whether the accused took the calf in controversy with the intent to steal the same, and thus to convert it to his own use against the owner's consent and thereby permanently deprive him of his property; and not whether he refused to surrender the possession of an estray to one claiming to be the owner thereof. Whether the calf was or was not an estray at the time of the commission of the alleged offense is not of itself of vital importance. In either event it was property subject to be taken with intent to steal.

2. The following instructions are complained of:

"9th. The jury are further instructed that if you believe from the evidence beyond a reasonable doubt that the defendant took the calf mentioned in the information into his possession, or found it running with his stock, or with stock that was in his care or under his charge, and that at the time he so took it or found it he knew it was not his own, and that he then and there intended to steal and convert the calf to his own use, and to deprive the owner of the calf, whoever he might be, and at the time took possession of the calf in question and held such possession with such intention, this would amount to the crime of larceny, provided you further find all the other material allegations of the information are proved by the evidence beyond a reasonable doubt.

"10th. You are instructed that if you find from the evidence in this case that the calf described in the information was an estray, and that the defendant took it into his possession, or found it running with stock that was in his care, and took care of it and fed it with his stock or with other stock that was in his care, and that when he first took possession of the calf or discovered it with his stock that was in his care he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of larceny or receiving stolen property, although you find from the evidence beyond a reasonable doubt that he after-

wards converted it to his own use with intent to deprive the owner of it."

These instructions are approved in *Lamb v. State,* 40 Neb. 312, and were pertinent to the issues raised in the present case and to the evidence introduced in support of the charge made against the accused. There was really but one question for the jury to determine and that was whether, when the accused took the calf, alleged to have been stolen, into his possession, he did so with the felonious intent to steal it; and these two instructions fairly submitted that issue to the jury as a question of fact which it was its province to pass upon.

3. It is argued that, aside from the confessions of the accused, there is no evidence to prove the *corpus delicti,* that is, that a larceny had been committed. There are other facts and circumstances in the record justifying the conclusion that the animal was stolen as alleged in the complaint, which, with the confession of the defendant offered in evidence, renders the evidence sufficient to support the verdict of guilty. We find no sufficient cause for reversing the judgment of the trial court, and the same is accordingly

AFFIRMED.

FRANK H. PARKER V. LEWIS C. PARKER ET AL.

FILED JANUARY 5, 1905. No. 13,514.

1. **Equity**: NEW TRIAL: PETITION. In an action in equity to set aside a judgment at law and for a new trial on the ground that the party complaining has been deprived of his right to be heard in this court, the petition should allege that a motion for a new trial was duly filed and overruled by the district court, when the assignments relied upon are of errors of law occurring at the trial.

2. **Petition**: SUFFICIENCY. If the evidence shows that such motion was in fact filed, and such evidence was received without objection, and the case tried in all respects as though the petition contained

such allegation, the petition will be treated as sufficient in that respect.

3. **Summons in Error: SERVICE: NEGLIGENCE.** When summons in error from this court is duly issued and placed in the hands of the proper officer for service, who informs the plaintiff's attorney upon inquiry that he has served the same, and the clerk of this court also informs plaintiff's attorney that the summons has been served and returned, the plaintiff's attorney may rely upon the presumption that the officer has done his duty. He is not guilty of negligence in failing to further investigate the manner of the service, there being no circumstances tending to suggest a doubt as to its validity.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed with directions.*

G. M. Johnston and *J. E. Cobbey,* for plaintiff in error.

E. O. Kretsinger and *T. J. Doyle, contra.*

SEDGWICK, J.

The plaintiff in error began this action in equity in the district court for Gage county to obtain a new trial in a former action at law tried in that court. The district court refused the relief asked, and from the decree of that court dismissing his petition in equity he prosecutes proceedings in error in this court. The ground upon which he sought to obtain a new trial was that he had been deprived of his constitutional right to a review of the former action at law in this court. After the determination of the law action in the district court, a bill of exceptions was duly settled, and a transcript of the proceedings with a petition in error was duly filed in this court, and a summons was issued thereon and delivered to the sheriff for service. The sheriff delivered a copy of the summons to the stenographer of the attorney for the defendant at the attorney's office, and returned the summons to the clerk of this court with a certificate of service as follows: "I hereby certify that on the 28th day of August, 1902, I served the within writ of summons on the within named Lewis C.

Parker's attorney, E. O. Kretsinger." After the time for issuing summons in error in this court had expired, the service was, upon motion of defendant in error, found to be insufficient and the action was dismissed. There is no substantial conflict in the evidence.

1. This petition does not allege that any motion for a new trial was filed in the law action. Of course, errors occurring at the trial could not be reviewed in this court, unless the attention of the trial court had first been called to such errors by a motion for a new trial. The party complaining would not be prejudiced by being deprived of a hearing in this court, if it was absolutely certain in advance that the matters of which he complained would not be considered here. No new trial could therefore be decreed because the party complaining had been deprived of his right to be heard in this court upon such assignments of errors, unless it appeared that a motion for a new trial had been duly filed. It appears, however, from the evidence in this case that such a motion was in fact duly filed. The motion was received in evidence in the court below without objection on the part of the defendant. The case was tried in all respects as though the petition alleged the proper filing of this motion. The point is not discussed in the brief. It seems to have been first raised upon the oral argument in this court. The objection therefore is not now available.

2. The controlling question here, and the one principally discussed in the briefs and oral argument, is as to the diligence of the plaintiff in his attempt to get his action into this court. It appears that he did not know what the sheriff had actually done in the matter of serving the summons in error until after the time had elapsed for instituting proceedings in error in this court, when motion was made to quash the summons in error. The evidence shows that soon after the summons in error had been delivered to the sheriff for service, the plaintiff's attorney inquired of the sheriff if the summons had been served, and was informed that it had been. Upon being asked to be allowed to see the return, the sheriff told him that the return had not

yet been written, but that this would soon be done. Afterwards plaintiff's attorney inquired of the sheriff if he had made the return, and was informed that he had returned the summons to the clerk of this court. The attorney soon afterwards inquired of the clerk whether the summons had been served and returned, and was informed that it had been and was upon file. The attorney did not ask to see the return, and did not inquire of the sheriff as to his actions in making the service. It is insisted that the plaintiff was negligent in not examining the return. We do not so regard it. It may be that vigilant attorneys often do take such precaution. It is possible that they save themselves and their clients trouble by so doing, but we think that the principle that a public officer is presumed to do his duty is applicable here, and that when the summons is placed in the hands of the sheriff, the parties interested have a right to rely upon the sheriff's duly serving the summons, unless there is some circumstance brought to their attention suggesting a doubt in regard to the matter. Before the time for taking out a summons had expired, the attorney for the defendant in error made no sign that he was aware of any irregularity in the service, but immediately after the time had expired, he procured and filed in this court proof of the manner in which the sheriff had attempted to serve the writ. It may be that before it was too late to correct the error there was a doubt in his mind as to the validity of the service, but there is no circumstance in the record which tends to indicate that any such doubt was brought to the mind of the plaintiff or of his attorney. If the form of the sheriff's return had been brought to the plaintiff's attention, it is not clear that he would have been guilty of negligence in not inquiring further in regard to the manner of the service. This, perhaps, might depend upon whether or not the service as shown by the return was *prima facie* sufficient. Upon this question there is a great variety of opinions to be found in the authorities. The statute (code, sec. 584) provides that service may be made upon the attorney of the defendant in

error, and that service may be made by delivering to him personally a true copy of the writ. A return by the sheriff that he served "a copy of the summons upon the defendant" (naming him) has generally been held to be *prima facie* sufficient where the summons might be served by delivering a copy to the defendant personally. And where the law requires that a copy be delivered to the defendant personally, it does not seem clear that a return that the officer served the summons upon the defendant ought not to be taken as *prima facie* proof of due service. However this may be, since it is clearly shown that the plaintiff had no notice of the form of the sheriff's return, we think that in failing to make further inquiry he was not guilty of such negligence as would deprive him of relief in this case. The other questions discussed in the briefs are disposed of in *Zweibel v. Caldwell*, 72 Neb. 47, decided with this case. The plaintiff has shown himself entitled to the relief asked, and the judgment of the district court is therefore reversed and the cause remanded, with instructions to enter a decree granting a new trial as prayed in the petition.

REVERSED.

ROBERT E. ROBERTS, APPELLANT, V. SIOUX CITY & PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED JANUARY 5, 1905. No. 13,037.

1. **Eminent Domain**: RECORD: PRESUMPTION. When, after the lapse of 30 years or more, the record of proceedings in the exercise of the power of eminent domain is shown to be such that they would have been valid under any circumstances, and where both parties have treated them as valid, such circumstances will, if necessary, and in the absence of evidence to the contrary, be presumed to have existed.

2. **Railroads**: EASEMENT: ADVERSE POSSESSION. The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right

of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement.

3. **Adverse Possession:** NOTICE. Occupancy, by an individual, of parts of the right of way of a railroad company obtained by condemnation proceedings, with elevators, granaries, coal sheds and similar structures, used in carrying on his business, and by the company, as a common carrier, for convenience in handling his shipments, will not be treated as adverse or under claim of title, unless actual notice of such claim is brought home to the company, or his conduct is such as will as a matter of law constitute such notice.

4. ———: ———. In the absence of such notice or conduct, the erection and maintenance of such buildings without express agreement therefor will be regarded as being with the permission, consent or license of the company, and subject to its right to resume possession of the ground whenever necessity requires its use for railroad purposes.

5. ———. The question whether in any case a railroad company can be deprived of its right of way by adverse possession is not involved in this case, and for that reason is not decided.

APPEAL from the district court for Washington county: WILLIAM W. KEYSOR, JUDGE. *Reversed: Decree entered.*

James W. Carr, for appellant.

B. T. White and *James B. Sheean, contra.*

BARNES, J.

The appellant, as plaintiff, commenced this action in the district court for Washington county to obtain a decree quieting the title in himself to a strip of land 50 feet in width lying along and adjacent to another strip 100 feet in width, occupied by one of the defendants, appellee herein, for the operation of its railroad. The trial resulted in a decree quieting the title in the plaintiff to a small part of the land in controversy, on which he had erected an elevator, and a judgment in favor of the defendant as to the rest of the premises. The case comes here by appeal; and the railroad company claims both strips of land are in-

cluded in its right of way acquired by the exercise of the power of eminent domain in the year 1868; while appellant denies such acquisition because of certain alleged defects in the condemnation proceedings, and contends that by reason of such defects the court acquired no jurisdiction, and that such proceedings were void. The trial court sustained the contention of the railroad company so far as the condemnation proceedings are concerned, and as his opinion on that question fully accords with our views, and has our approval, we adopt that part of it as our own:

"Defendants claim a right of way through plaintiff's land 100 feet wide on each side of the center line of their track, and are threatening to take possession thereof to its full width. Plaintiff admits that they have a right of way 50 feet wide on each side of the center line of their track, and brings this action for the purpose of enjoining them from excluding him from either of the strips of land which lie between the 50 feet and the 100-feet limits." * * * It appears that "prior to and at the time of the building of the Sioux City & Pacific Railroad through Washington county, plaintiff was in possession of three contiguous quarter sections of land adjacent to the village of Arlington, and extending east therefrom. The first, being the northwest quarter of section 18, township 17, range 10, he occupied as the tenant of one Thomas Beatty; the second, being the northeast quarter of said section, he owned and resided upon, which for the sake of convenience will be hereinafter referred to as the homestead; and the third, being the northwest quarter of section 17, in said township and range, he held possession of under a privilege of cutting hay thereon.

"July 19, 1868, the aforesaid railroad company filed an application in the county court of said county for the appointment of commissioners for the condemnation of a right of way across said quarter sections of land 100 feet on each side of the center line of its tracks. Commissioners were accordingly appointed, and they reported to

said court that the plaintiff was damaged in the sum of $150 for the right of way, as prayed for, through his homestead quarter. From this award he appealed to the district court; but he subsequently settled with the company for $500, dismissed his appeal, and delivered to the company a deed which conveyed to it an easement of 200 feet wide across said homestead. Plaintiff now alleges that defendants obtained no right of way by virtue of said proceedings because they were in many respects irregular and void. But, if said condemnation proceedings were irregular or even void, plaintiff estopped himself from making such a plea when he dismissed his appeal and accepted the $500 from the railroad company. *Kile v. Town of Yellowhead,* 80 Ill. 208; *Hartshorn v. Potroff,* 89 Ill. 509; *Burns v. Milwaukee & M. R. Co.,* 9 Wis. 420; *Hitchcock v. Danbury & N. R. Co.,* 25 Conn. 515; *Trester v. Missouri P. R. Co.,* 33 Neb. 171. At all events, plaintiff's right of way deed closes his mouth as to the existence of a 200-feet right of way across his homestead. It is true, however, that he alleges that said deed was altered subsequently to delivery thereof by a change of the word 50 to 100, thereby making the right of way 200 feet instead of 100 feet wide. But we are compelled, by a preponderance of the evidence, to find that he was mistaken. The recital in the deed that said alteration was made before the execution of the deed; the appearance of the ink, the similarity of the penmanship of said alleged alterations with the handwriting of the body of the instrument, and J. A. Unthank's testimony, all convince the court that plaintiff has forgotten the circumstances attending the execution of the deed and about the alteration, and that he must have known at the time that he was making a conveyance of 200-feet easement to the company. Moreover, the condemnation proceedings, of which he certainly had knowledge, related to a 200-feet right of way, and so did the release which he gave to the company for damages. The conclusion is irresistible that the plaintiff knew that the railroad company was attempting to procure a 200-feet right of way, not only

through his homestead, but also through the other two quarter sections of land; indeed, he so testified; and, that as to said homestead he is now estopped by his deed to claim otherwise.

"That the company obtained a 200-feet right of way through the other two quarter sections of land is not so clear. In *Trester v. Missouri P. R. Co.*, 33 Neb. 171, it was held that a petition for the appointment of freeholders to assess damages should state, among other things, the names of the landowners, if known, a description of the land over which the railroad is located, the width required for right of way purposes, and that the landowner refuses to grant a right of way through his premises. The petition filed in the condemnation proceedings in question did not state the names of the owners of the lands over which the railroad had been located, or recite that the owners were unknown, or allege that they had refused to grant a right of way over their premises. Plaintiff contends that these omissions render the petition jurisdictionally defective, and that therefore all of the proceedings based thereon are void. While the petition does not allege that the owners of said two quarter sections of land were unknown, the proceeding was evidently begun by the company and heard by the court on that assumption. The published notice described them as unknown owners, and that is sufficient proof of the fact, which has passed unchallenged for 34 years. If the names of the owners were unknown, it is manifest that they could not have been inserted in the petition, and that the rule laid down by the case of *Trester v. Missouri P. R. Co., supra,* was not intended to be applicable to such a case as this. An allegation that the names of the owners of the lands were unknown was a proper one, and it ought to have been put into the petition, but its omission was not fatal to the jurisdiction of the county court. So, too, the omission of an allegation that the owners had refused to grant a right of way over their premises is immaterial; for, after a studious consideration of the statutes, and for what

seems to be the better reasoning, and in the absence, too, of authorities to the contrary, we are of the opinion that in cases of nonresidents it is not essential to the jurisdiction of the county court that a railroad company should allege in its application for the appointment of commissioners that it had first tried to obtain a right of way by agreement with the owners of the lands over which its railroad was located. Under this view of the law the application aforesaid was sufficient to give the county court jurisdiction as to the other two quarter sections of land, whose owners the evidence shows were then nonresidents.

"The notice served on nonresidents by publication was published in a newspaper in Douglas county, and it was a legal notice, if there were no newspaper then being published in Washington county. Plaintiff claims that the burden of showing that there was no newspaper published in Washington county at that time rests upon the defendants, because they must prove a valid condemnation proceeding. The fact that the notice was published in another county, that the county court acted on said notice, and that said notice has passed unchallenged for nearly 35 years makes a *prima facie* case in defendant's favor as to this issue, and in the absence of testimony to the contrary warrants the court in holding that said notice was properly published, and is valid.

"Plaintiff also alleges that said condemnation proceedings were invalid because of want of proof of payment of the damages awarded. He admits that he received $500 for a right of way through his homestead. J. A. Unthank testifies that he received from the county court, for his nephew, the damages which were awarded for a right of way over the northwest quarter of section 18; and even if there be no evidence of his authority to receive said damages, his testimony nevertheless proves that they were paid into the county court. The county court record has the word 'paid' written on the margin of the page opposite the descriptions, northwest quarter of section 17, and northwest quarter of section 18. This word standing be-

fore the description, northwest quarter of section 17, is verified by Mr. Unthank's testimony; and if it is properly before the northwest quarter of section 17, on which the damages were paid, then it is reasonable to believe that it would not have been written opposite the northwest quarter of section 18 unless the damages had been paid on that quarter also. There is no apparent reason why the railroad company should have paid in the damages on one quarter section and not on the other, nor why the county court should have written the word 'paid' rightly before one description and wrongly before the other."

In *Livingston v. Arnoux,* 56 N. Y. 507, it was held that an official memorandum made by an officer against his interest is evidence as well of the fact against his interest, as of the other matters contained in it. "The evidence shows that the damages were paid into the county court, and it is reasonable to infer that the owners of the lands received the money. It is at all events very unlikely that plaintiff, who was then occupying the land as an agent and who had full knowledge of the condemnation proceedings, did not inform his principals of the seizure of a right of way over their land, and that they did not thereafer demand and receive the damages due them."

We are therefore of the opinion, and so find, that the Sioux City & Pacific Railroad Company did, by valid condemnation proceedings, obtain a right of way 200 feet wide over the aforesaid three quarter sections of land. The right thus obtained was only an easement under which the railroad company was entitled to use the land thus condemned as a highway for the purpose of operating its road, but the fee remained in the holders of the legal title, who were the owners of the servient estate.

The appellant further contends that he has obtained title to the strip of land in controversy, or at least a part of it, by reason of his alleged open, notorious, exclusive, continuous and uninterrupted adverse possession thereof under a claim of title for more than the statutory period of limitation. This requires an examination of the evi-

dence, and a finding on that question. It appears from the record that, except as to that part of the north 50-feet strip which lies west of the defendant's section house, the plaintiff's use of the disputed part of defendant's right of way was for agricultural purposes. The evidence contained in the bill of exceptions shows that the plaintiff cultivated a part of the right of way situated outside of the railroad fences, cut grass thereon, in fact, farmed the same up to said fences. Such use was permissive only, and not at all inconsistent with the defendant's use of its easement. Plaintiff being the holder of the legal title had a right to cut the grass and timber, and to cultivate the right of way outside of the railroad company's fences so long as the company did not need the grass and timber for the maintenance of its track, and such cultivation did not interfere with the proper and safe running of its trains. We fail to see anything in either the plaintiff's claim to the grass and timber, or his cultivation of the right of way which was outside of the defendant's fences, which would indicate that such use was other than permissive. It is true that appellant Roberts erected fences for calf pastures and hog lots, but the use of the right of way for such purposes was not less permissive and consistent with the company's rights than was his cropping of the ground within the 200-feet strip. It appears that payment was made to the plaintiff of $100 by Mr. Hall, the defendant's agent, for permission to remove earth from said disputed land, and for a waiver of damages therefor; and it is claimed that such payment was a recognition of the plaintiff's claim of title; but it is doubtful whether that act of the company, which appears to have been done in ignorance of its rights or in forgetfulness of the true width of its easement, should be held sufficient to take from it a large tract of land which the state has permitted it to acquire and hold for the purpose of a public highway. If, as was held by the supreme court of Maryland, a railroad company cannot grant an easement across its right of way, it certainly cannot lose its

right of way by unnecessarily paying out money for some of the earth thereof. *Sapp v. Northern C. R. Co.*, 51 Md. 115. Again, the plaintiff's possession of a large part of the 50-feet strip in question, north of the defendant's track, was not exclusive, for the public used said strip at least to the width of an ordinary wagon track as a public road, and the same may be said of that ground which was used by the company for the storing of ties. In order to obtain title by adverse possession, the plaintiff's use of the portion of the railroad company's right of way in question must not have been permissive, but must have been of such a character as to thereby apprise the railroad company that the possession was intended to be adverse and hostile to its easement. The great weight of authority is that fencing and cultivating a right of way, cutting the grass and timber thereon and using the land for pasturage are not evidence of an adverse holding, because the owner of the fee has the right to do these things so long as they do not interfere with the operation of trains. They are in themselves no notice to the company that its right to use its right of way to its full width, when needed, will be contested or denied. The supreme court of Iowa, in *Slocumb v. Chicago, B. & Q. R. Co.*, 57 Ia. 675 (a case very much like the one at bar), said: "Plaintiff's possession was not adverse to, nor inconsistent with, the right of defendant to occupy the whole right of way, whenever it became necessary or desirable for it to do so." The use of the plaintiff of the condemned lands along side of the railroad for agricultural purposes, so long as the same was not required for the purpose of convenience or necessity by the railroad company, was a use entirely consistent with his right as the owner of the fee, and was not incompatible with the easement granted to the railroad company. *East T. V. & G. R. Co. v. Telford's Executors*, 89 Tenn. 293; *Mobile & O. R. Co. v. Donovan*, 104 Tenn. 465, 58 S. W. 309. In *Northern Counties Investment Trust Co. v. Enyard*, 24 Wash. 366, 64 Pac. 516, the court held that fencing and cultivating land for over ten years, which is sub-

ject to a right of way, is not adverse but permissive, since it is not inconsistent with such right of way.

We are therefore of the opinion that the law is, and as a matter of right and logical reason ought to be, that no part of a railroad company's right of way which has been validly procured and paid for, and over which it is running its trains daily, can be lost to it by the use thereof of the owner of the adjoining land, which is permissive or consistent with the company's use of its tracks, such as cultivating, pasturing, mowing, or cutting the timber thereof. In this state, where thousands of fertile acres of railroad rights of way can be profitably cultivated by adjoining landowners without detriment to the railroads, the court ought not to deprive the state and the landowners of such sources of profit by adopting a rule which will compel the railroad companies to fence their rights of way to their full width in order to save their easements.

Plaintiff has called the court's attention to that section of the statute which relates to fencing railroads, and has argued inferentially, at least, that a railroad company loses its right of way by failing to fence it. This statute requires the fencing of a right of way for the protection of live stock, and it does not provide that a failure to fence shall in any respect affect its right to its easement or determine the width thereof. The use of its track by a railroad company is an assertion of its right to the full width of its right of way; and it is immaterial where it places its fences for the exclusion of stock from its track. The location of such fences is not in itself conclusive evidence of abandonment of any part of the right of way which may be outside thereof. The statute is a police regulation, and the only penalty for its violation is an action for negligence.

It is said that there is no evidence that the 50-feet strips of right of way in dispute are necessary for the operation of defendant's railroad, and therefore the plaintiff claims that he ought at all events to be awarded the injunction prayed for. The statute provides that a railroad company

may acquire for right of way purposes so much land as may be necessary therefor, not exceeding 200 feet in width. Whether the amount asked for in a condemnation proceeding is necessary or not must be determined in such proceeding; and the condemnation of a certain width for a right of way is an adjudication that said width is necessary.

The case of *Northern P. R. Co. v. Smith,* 171 U. S. 260, was an ejectment suit against the company to recover a portion of its right of way. The trial court found that the company claimed a 400-feet right of way under a grant by congress; that the company had actually used only 25 feet thereof; that the remaining part was not necessary for the operation of the road, and that the plaintiff should recover. The supreme court of the United States reversed the case, holding that a grant of a 400-feet right of way was conclusive that such an amount was necessary, and that a showing of the amount actually used was immaterial. The case is also an authority that ejectment will not lie against a right of way obtained with the knowledge of the owner of the fee. Under this decision the plaintiff herein could not recover the land in question by ejectment, and it is therefore doubtful about his right to an injunction to prevent the company taking its own.

The most logical rule is that announced in *Hurd v. Rutland & B. R. Co.,* 25 Vt. 116, in which the supreme court of that state held that those from whom land has been taken for a right of way retain no unquestionable right to its use for pasturage or otherwise, and that the right of the railroad company to the use and possession of its right of way is absolute during the existence of the easement.

Dietrichs v. Lincoln & N. R. Co., 13 Neb. 361, is a decision to the effect that the judgment of a railroad manager that a certain tract of land ought to be condemned for railroad purposes is *prima facie* evidence that said land is necessary for the operation of the road. If this be so, then the judgment of the defendant, as indicated by the

threat alleged that it ought to take possession of its right of way to its full width, ought to be at least *prima facie* evidence of the necessity of such taking, and casts upon the plaintiff the burden of proving that the company does not need the land in controversy; and the cases of *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465, and *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740, decide nothing contrary to this rule. It cannot be the law that even a railroad company must prove that it needs its property in order to recover possession of it. If plaintiff believed that defendant did not need a 200-feet right of way through his homestead, he should have raised that issue in the condemnation proceeding. He did not do so, and we do not perceive how he can do so now, either justly or lawfully, without at least tendering back to the company a proper part of the $500 which he received as compensation for the 200-feet easement.

We come now to consider the rights of the parties as to that part of the 50-feet strip in question occupied by the plaintiff's elevator, comprising 1,960 square feet. The testimony establishes that from the west line of section 18, running north and south, which is the east line of the village of Arlington, and extending east along the railroad of the defendant's 335 feet to the fence inclosing the section house referred to in the record, is a strip of ground 50 feet wide. Upon a part of, and near the west end of, this strip the plaintiff, in the year 1880, erected a granary extending east 100 feet and adjacent to the right of way of the defendant, measuring 50 feet from the center of its track, north. He maintained said granary at that point until the year 1882, in connection with an elevator which he had erected upon the ground which he leased of the defendant on its 50-feet right of way, at which time he removed the granary referred to across the road to the north, and erected upon the former site of said granary a grist-mill, at which time the defendant, the Sioux City & Pacific Railroad Company, at the request of the plaintiff, constructed a spur track from its main line to the plain-

tiff's mill for his accommodation in the shipment of the products of the mill. The spur track was constructed from near the section house over the 50-feet right of way on the north of the main tracks of the railroad toward the west, parallel with the side track to a point a short distance west and south of the mill. Sometime during the spring of the year 1885, the elevator which plaintiff was maintaining upon the ground which he leased of the defendant southwest of the mill, together with the mill, was burned to the ground, and the plaintiff discontinued the use of the leased ground. Plaintiff immediately began the construction of an elevator upon the site of the mill which was burned and which had been formerly occupied by the granaries referred to, also some coal houses which extended for some distance to the east thereof, being something near 100 feet in length, east of the elevator. From that point to the west line of the fence inclosing the section house, plaintiff occupied the ground with his lumber yard and for a stone yard until the year 1898, when he tore down a portion of the coal house and erected, or permitted to be erected, another elevator which is occupied by his lessee, who is a son of the plaintiff, and which they continued to occupy and use until the commencement of this suit. At the place where this elevator is standing the tracks of the company have never been fenced by it, but appellant Roberts has maintained a fence inclosing his own land upon a line running 100 feet north of the track, that is, along the northern boundary of the right of way as claimed by the company. The controverted strip lying between this boundary and a line running parallel with and 50 feet from the track has, with the exception of that part of it actually occupied by the above mentioned structures of appellant, continuously, since the building of the road, been in use by the company for a section house yard, for a spur track, and as dumping and storage ground for ties, rails and like material; and by the permissive use of a part of it by the public for a road. During the same time the company have burned fire guards and cut the

grass growing upon the ground in like manner as with other parts of its right of way. The now existing elevator was built in 1900, in the face of protest and disputed right, so that there are no equitable considerations of estoppel or other kind to obscure legal principles or restrain their application.

It seems, then, that the strip lying 50 feet north of the unfenced portion of the company's track, if regarded as a whole, was used in common by the appellant and the company and by the public for highway purposes. We think this fact has an important bearing upon the question whether appellant had open, notorious and exclusive possession under claim of title to the grounds occupied by his buildings. That the company was ever actually notified that he made such a claim, or regarded his possession as so characterized, until about the time of the building of the new elevator is not asserted, and the first building he erected on the right of way, on a site adjoining the land in dispute, was built under a lease from the company. Elevators, granaries, cribs, coal sheds and similar structures are in the nature of warehouses, and serve as adjuncts and accessories to the carrying on of the trade and transportation which are the principal objects for which railroad companies are created. As in the case of passenger stations and depot buildings, it is within the charter powers of the companies to erect and maintain them themselves, or they may permit them to be built by other corporations or by individuals upon their rights of way, and in either case they serve the same purpose. But in the nature of things, at least in the absence of agreement or evidence to the contrary, such occupancy must be regarded as permissive and subject to be terminated at any time when the company shall require the grounds for the erection of such structures by itself, or for occupancy by side tracks and sidings; otherwise the utmost vigilance might be required of railroad corporations to preserve the beneficial and necessary use of their rights of way for their own purposes from being destroyed or taken away from them by "squat-

ters" and adverse claimants. Manifestly, as it seems to us, such a situation would be contrary to public policy.

Again, as we have stated above, a railroad company acquiring its right of way by condemnation proceedings under the constitution and laws of this state does not obtain a fee title thereto. It secures merely an easement in the right of way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remains in the original owner, and may be sold and conveyed by him to another. In the very nature of things the railroad company cannot dispose of, alienate or even lease its easement for any purpose except for the operation of a railroad; and whenever the right of way is abandoned for that purpose, it reverts at once to the owner of the servient estate. Such was the right obtained by the railroad company to the land in controversy in this case. Therefore it is not manifest to us how title or right to this easement of the company can be obtained by a third person by adverse possession. It follows, as a logical consequence, that persons erecting structures, such as the ones above described, upon railway rights of way, do so with the knowledge of existing conditions, and their occupancy will be presumed to be permissive only and by the express or tacit license of the company at least, until the latter shall be distinctly notified that the occupiers are claiming a superior right. This conclusion renders it unnecessary to decide whether in any case a railroad company can be deprived of its right of way by adverse possession. The railroad company filed a cross-bill in the district court praying for a dismissal of the plaintiff's petition, and for a decree quieting title to its right of way over all the lands in controversy. The trial court granted the prayer except as to the elevator and site, and the right of ingress and egress thereto, adjudging the latter to be in the plaintiff. We are of the opinion that the district court was wrong in granting the plaintiff such relief, and for that reason the decree of that court must be reversed.

We find that the plaintiff has failed to show any ground

for relief; that his petition should be dismissed, and that the prayer of the defendant's cross-bill should be granted to the extent that its easement be quieted in and to the whole of its right of way in question. It is therefore ordered that the decree of the district court be reversed, and a judgment entered in this court in accordance with this opinion.

JUDGMENT ACCORDINGLY.

HOLCOMB, C. J., dissenting.

I am unable to concur in that part of the majority opinion reflected in the third and fourth paragraphs of the syllabus. As I view the law and the evidence as disclosed by the record, the judgment of the trial court should be affirmed in its entirety. The majority opinion, as it seems to me, leads logically to the conclusion that no title can be acquired by adverse possession of any part of a railroad company's right of way except upon actual notice of the adverse claim of title which is in fact brought home to the company holding such right of way. This engrafts on the law of adverse possession an exception to the general rule for which I can perceive no sound reason nor authority in precedent. The learned trial court hearing the case filed therein a written opinion in which the authorities are reviewed, and the reasons for the conclusions reached are ably and clearly stated. In order to make myself the better understood, I desire to quote from portions of this opinion, even though in so doing I may, in a measure, repeat what is said in the majority opinion. It is to be borne in mind that the plaintiff claims by adverse possession a portion of the defendant's right of way because of his having occupied and used it for agricultural purposes, and to another portion because of his having erected and occupied a mill, elevators and coal houses for purposes for which such structures are generally used. The defendant railroad company claims a right of way of 200 feet in width, that is, 100 feet each way from the center of its main tracks. The inner 50-feet strip is in nowise in

controversy. It is the outer strip of 50 feet to which the plaintiff lays claim by virtue of his alleged adverse possession.

1. The interest of the railroad company in and to its right of way arising by virtue of condemnation proceedings and a right of way deed executed for value seems to be in the nature of an easement rather than a qualified or absolute fee title, and, because of the character of its ownership of its right of way, it is sought in the argument to draw a distinction as to the acquisition of title by adverse possession of an easement, such as exists in the case, and of real estate used for right of way purposes when the title is held unqualifiedly. I am of the opinion that there are no substantial grounds for a distinction. It may be the fact of the nature of the interest of the company enjoying the benefit of the right of way may have a legitimate bearing in determining the question of whether the possession of the adverse claimant was hostile and inconsistent with the possession for right of way purposes, or permissive only; otherwise, I think the same rules should apply to all. In this connection, the trial court in its opinion says:

"The railroad company obtained an easement in said 200-feet strip of land, but the fee thereof remained in the holders of the legal title. While counsel spoke of the plaintiff's obtaining title by adverse possession, they doubtless meant merely that he had by such possession cut off defendant's right to the enjoyment of that part of the easement in controversy. * * * This proposition of law seems unimportant, however, for, if it be conceded that a portion of a right of way which a railroad company holds in fee can be lost by adverse possession, then, a right of way easement may be lost in the same way. * * * Indeed, there seems to be no sound reason for the rule that a right of way held as an easement cannot be lost by adverse possession, and that one held in fee can be. The arguments pro and con for one of these propositions are quite as pertinent to the other."

The courts generally, where it is held an adverse title may be acquired, regard the right, whether it be merely an easement or an absolute fee title, as being subject to loss of such right or title by adverse possession under rules equally applicable to both estates. This court has said that an easement in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years, *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847; and that it may likewise be lost is hardly open to doubt. In Washburn, Easements and Servitudes (4th ed.), 717, it is said: "In the first place, if the easement has been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time long enough to create a prescriptive right, will destroy the right granted." Speaking of the right of way of a railroad company, the supreme court of Massachusetts say: "The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature, and practically exclusive." *Hazen v. Boston & M. R. Co.*, 2 Gray (Mass.), 574. Or as is said by the Vermont supreme court: "If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land." *Hurd v. Railroad Company*, 25 Vt. 116. See, also, *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550; *Illinois C. R. Co. v. Wakefield*, 173 Ill. 564; *Donahue v. Illinois C. R. Co.*, 165 Ill. 640.

In those states where the right of way of a railroad company may be lost by adverse possession, the general rule is that it makes no difference whether the railroad company has merely an easement, or has a qualified fee, or an absolute fee simple title. *Nashville, C. & St. L. R. Co. v.*

Hammond, 104 Ala. 191, 15 So. 935; *Matthews v. Lake S. & M. S. R. Co.,* 110 Mich. 170; *Pittsburg, C., C. & St. L. R. Co. v. Stickley,* 155 Ind. 312; *Donahue v. Illinois C. R. Co., supra; Turner v. Fitchburg R. Co.,* 145 Mass. 433; *Northern P. R. Co. v. Ely,* 25 Wash. 384, 54 L. R. A. 526.

2. In respect of the claims of the plaintiff that he had acquired by adverse possession the railroad company's interest in the outer 50-feet strip of its right of way because of his possession and use of the land for agricultural purposes, the trial court in its opinion observes:

"That is to say, the possession of a portion of a railroad right of way must not be permissive, but must be of such a character as to thereby apprise the railroad company that the possession is intended to be and is adverse and hostile to its easement. While a few of the authorities, notably those from Illinois, hold that fencing in and cultivating a right of way or a portion thereof constitutes adverse possession, the great weight of authority is that fencing and cultivating a right of way, cutting grass and timber thereon, and using the land for pasturage, are not evidence of an adverse holding, because the owner of the fee has the right to do these things so long as they do not interfere with the operation of trains. They are in themselves no notice to the company that its right to use its right of way to its full width, when needed, will be contested or denied. The erection, however, on the right of way of a mill or an elevator or any other kind of improvements which become a part of the land, and which are inconsistent with the right of the company to take possession of the right of way to its full width at any time, has been held to be sufficient evidence of adverse possession to destroy the company's easement in the land so occupied."

It seems to me that this statement of the law is fully as favorable to the defendant railroad company as is justified by the authorities and sound reasoning, and I am unwilling to go further or to the extent to which the rule is carried in the majority opinion. To support the

conclusion of the trial court as to the extinguishment of the right of way easement, or the acquisition of title by adverse possession to the outer 50-feet strip occupied by the plaintiff and used for purposes of agriculture, the trial court, among many cases, cites *Slocumb v. Chicago, B. & Q. R. Co.*, 57 Ia. 675, wherein it is said: "In *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Ia. 276, a right of way was conveyed by deed to the Missouri & M. R. Co., in 1853, which the Chicago, R. I. & P. R. Co. acquired in 1866, and then constructed its road. It was held upon demurrer to the answer that the right of way was not affected by non-user, and that the statute of limitation did not bar the defendant's right, notwithstanding the fact that the answer alleged that the lands over which the right of way was claimed, during this whole period of thirteen years, had been fenced and used for agricultural purposes. This case, it seems to us, is decisive, that the defendant's right to the twenty-one feet in question is not barred by the possession of the plaintiff. The plaintiff's possession was not adverse to, nor inconsistent with, the right of defendant to occupy the whole right of way, whenever it became necessary or desirable for it to do so."

Also the *Northern Counties Investment Trust Co. v. Enyard*, 24 Wash. 366, 64 Pac. 516, wherein the court say:

"The uses for the right of way in connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation, and fencing of a portion of the right of way not in use at the time would not seem to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the

strip of land in controversy. Such occupancy and use by appellant may be regarded as permissive."

I think these authorities, among the many conflicting cases, announced the sounder and better rule, and, so believing, my views accord with those expressed by the learned trial judge in the opinion from which I have liberally quoted.

After discussing the authorities and the issues of law involved in the action, the questions of fact arising from the evidence in the case were disposed of by the trial court in the following manner:

"Except as to that part of the north 50-feet strip which lies west of the section house, the evidence clearly proves that plaintiff's use of said disputed part of defendant's right of way was permissive only, and not at all inconsistent with defendant's use of its easement. Plaintiff being the holder of the legal title had a right to cut the grass and timber and to cultivate the right of way outside of the company's fence, so long as the company did not need the grass and timber for the maintenance of its track and said cultivation did not interfere with the proper and safe running of its trains; and the court fails to see anything in either plaintiff's claim to said grass and timber, or his cultivation of said right of way, that was, under the greater weight of the authorities, any notice to the defendant that he would ever dispute its title to its easement, or any part thereof. It is true that he erected fences for calf pastures and hog lots; but the use of the right of way for such purposes was no less permissive and consistent with the company's rights than was his cropping of the ground within the 200-feet strip."

3. With reference to that portion of the right of way in controversy occupied by the elevator and other structures adjacent thereto, the trial court found that the adverse possession of the defendant had ripened into a perfect title. It is said:

"The testimony establishes that the elevator occupies 1,960 square feet. As to this land and enough more if

necessary to provide proper and needed approaches to the elevator the prayer of the petition must be granted. It seems to me that the Kansas and California cases lay down the more logical and the sounder rule; but the weight of authority sustains the plaintiff as to the ground on which the elevator stands. In order to obtain a hostile possession of any part of said right of way it was necessary to give the company notice of an intent to do so. There is no evidence that plaintiff ever gave the defendant any actual notice that he was holding any part of the right of way adversely. * * * But the erection of an elevator was such an appropriation of the land and was an improvement of such a permanent nature that the railroad company was thereby charged with notice that said possession was hostile. While it may be true that railroad companies foster business and encourage trade by permitting the erection of mills and elevators on their rights of way, a donation of lands for that purpose ought to be presumed where no objection is made to the erection of such structures and they have been allowed to stand ten years or more."

It seems to me there can be no question but that the erection by the plaintiff of the buildings of which mention has been made was a positive and unqualified assertion of claim of title adverse to the railroad company, and that the possession was so open, notorious, continuous, exclusive and hostile in character as to charge the plaintiff as a matter of law with notice of the adverse claim. It is, in my judgment, erroneous to say that these buildings were adjuncts of the railroad property, or that the plaintiff's business as conducted was carried on in conjunction with that of the railroad company. The plaintiff's business was purely private and conducted for his own benefit and profit. It is true that his business was facilitated by having his structures on or adjacent to the railroad right of way and close by the spur track constructed by the company along the outer edge of the inner 50-feet strip of land. These facts, however, do not render the structures

erected by the plaintiff adjuncts to the railroad, or the business conducted as being carried on in conjunction with that of the railroad company. It is to be noted that the plaintiff first had an elevator on the inner 50-feet strip and upon land he leased of the railroad company; later on, however, he erected his mill just outside of the inner 50-feet strip, took possession of and used it as his own, and in the conduct of a business exclusively pertaining to his private affairs. The mill was obviously of such a character as to become a part of the realty. It was a permanent structure. It was not erected to be removed at pleasure. Its erection and operation by the plaintiff was notice to all the world, and to the defendant company especially, that the plaintiff claimed the property as his own, and was using and exercising dominion over it as such owner. The same may be said of the elevator erected on the mill site after its destruction by fire, and of the other elevator later on erected to the east of the first one, and of the coal sheds constructed between the two. These structures were all on the outer 50-feet strip and immediately adjacent to the outer line marking the boundary of the inner 50-feet strip. I can scarcely conceive of an adverse holding of real estate that would be more open, notorious and hostile to the holder of the paper title than was the possession of the plaintiff in the case at bar in so far as it relates to that portion of the right of way on which he had constructed his mill, elevators, coal houses, etc. Nor can I appreciate the necessity of actual notice of an intention to claim adversely in a case like the one under consideration, unless it be said that there can be no acquisition of title by adverse possession except upon actual notice to the holder of the paper title. The elements of adverse possession, it is said, and the rule is, I think, of universal application, are that such possession must be actual, visible, exclusive, hostile, and continued during the time necessary to create a bar under the statute of limitations. 1 Cyc. 981. These elements all concur in point of fact and in time in the case at bar as respects the right of way

occupied by the structures mentioned and claimed by the plaintiff by virtue of his adverse possession. The trial court, as well as this court in its majority opinion, relies upon *Northern Counties Investment Trust Co. v. Enyard,* 24 Wash. 366, 64 Pac. 516, *supra,* as authority for its decision to the effect that occupancy of a right of way for farming purposes is not necessarily adverse in character, but is to be regarded as permissive only. The same court in a later case, *Northern P. R. Co. v. Ely,* 25 Wash. 384, 65 Pac. 555, hold that adverse possession of a portion of a railroad right of way, inconsistent with its use as such, maintained for the statutory period of limitation confers title on the occupant, and bars the right of the railroad company to recover possession. It is also held, if a railroad company permits portions of its right of way to be occupied by settlers under preemption and homestead laws without objection for more than 10 years, and such occupants plat the land into city lots, make valuable improvements thereon, and expend vast sums of money for taxes and assessments, the company is estopped from asserting title to such portions of its right of way. In the body of the opinion it is said, by Dunbar, J., writing the opinion of the court:

"The case of *Northern Counties Investment Trust Co v. Enyard,* 24 Wash. 366, 64 Pac. 516, cited in appellant's reply brief in support of the position that possession for more than the statutory time on a railroad right of way was not adverse, but permissive, shows, on examination, that the circumstances surrounding it were altogether different from the circumstances surrounding the case at bar. Under the circumstances of that case it was held that the occupancy of a portion of the right of way of the railroad company by the owner of a servient estate was not inconsistent with the easement, the occupation there being for the purposes of farming the land embraced in the right of way. We do not desire to extend the rule ennunciated in that case. But, whether or not the facts in that case warranted the conclusion reached by the court, certainly

the circumstances shown by the record in this case will not justify the conclusion reached in that, that the occupancy of the defendants, taken in connection with the improvements and the use to which the improvements were put, was not inconsistent with the appellant's right to use the same for railroad purposes."

So in the case at bar I feel quite confident that the rule as respects the use of the right of way for agricultural purposes should not be extended, as is held in the majority opinion, so that the occupancy and use of a mill or elevator and similar structures which are really a part of the real estate, and which cannot be removed without great damage and detriment to the owners, is to be regarded as a permissive holding and one not inconsistent with the company's possession of its right of way upon which to operate its trains and conduct its business as a common carrier. It is for these reasons that I dissent and favor an affirmance of the judgment entered in the court below. I have not thought it necessary nor prudent to discuss the question of whether in any case a railroad company can be deprived of its right of way by adverse possession. For the purposes of this case, I have assumed that it could be done; and as the judgment herein must at all events, according to the majority opinion, go in favor of the railroad company, a discussion of that question by me would not change the result.

SEDGWICK, J., concurring.

The position of the court upon this important question should not be misunderstood. It is not intended to hold that "no title can be acquired by adverse possession of any part of a railroad company's right of way except upon actual notice of the adverse claim of title which is in fact brought home to the company holding such right of way." The conduct of the parties with reference to the possession may be such as to constitute notice. This is expressly stated in the third paragraph of the syllabus. In the opinion of the court in *Northern P. R. Co. v. Ely,* 25 Wash.

384, 54 L. R. A. 526, referring to a former opinion of that court, it is said: "Under the circumstances of that case it was held that the occupancy of a portion of the right of way of the railroad company by the owner of a servient estate was not inconsistent with the easement." This is the ground of our decision in this case. It is thought that the circumstances of this case are such as to show that the occupancy of the right of way by the plaintiff was permissive on the part of the company.

It seems to be conceded that the trial court was right in its conclusion that the right of way held as an easement may be lost by adverse possession under the same conditions that a fee title right of way may be lost. Another proposition seems likewise to be conceded. The fencing and occupation of a part of the right of way does not necessarily constitute adverse possession; whether it would or would not do so depending upon the circumstances. Ordinarily, the taking possession of a piece of land and fencing it with a substantial fence is strong evidence of an adverse possession. Such a fence is permanent in its nature, and will become a part of the real estate under the same conditions and circumstances that an elevator building would become a part of the real estate. An absolute rule that the construction of an elevator upon the land would be sufficient evidence of an adverse holding, while inclosing the land by a permanent fence would not be so considered, is inconsistent. Such a rule cannot be derived from the authorities. A permanent fence around the land would exclude the railroad company from using it as a right of way until such fence was removed, and so perhaps the building of an elevator thereon would also, and in either case the question whether the holding was adverse or permissive must depend upon the relations of the parties and the conditions surrounding the transaction. It does not seem to be needed to restate the facts in this case, but, among other conditions existing, it will be borne in mind that, when the buildings were erected upon the land in question, there had been a long course of

dealing between these parties involving the use of a part of the right of way by the plaintiff. When he first began using the company's right of way, he did so under a lease from the company for a nominal rental, and, though the lease was temporary, he erected an elevator upon the ground so leased. When this lease expired it was not formally renewed, nor was any new lease executed. The plaintiff continued in the same line of business that he had prosecuted before, and in that business he needed the the privilege of erecting similar buildings upon the company's right of way. It is true that he placed buildings upon this land that are generally considered of a permanent character, but they were such buildings as are commonly placed upon the right of way with the permission of the company. The former action of this plaintiff indicates this. The holding of the court is that, in view of such conditions as these and many other circumstances disclosed in the record, a part of which are recited in the opinion, the action of the plaintiff in erecting these buildings was not so inconsistent with a recognition of the right of the railroad company as to notify the company that he held this land in hostility to its rights. This is not placed upon the ground that he failed to give actual notice to the company that he did not recognize any right of the company to the possession or use of this land, but rather upon the ground that the circumstances and conditions were such that the company might reasonably suppose that the plaintiff intended to recognize the rights of the company to use this land when necessary for right of way purposes.

With this understanding of the opinion, I concur in the conclusion that the defendant is entitled to the relief asked for in its cross-petition.

L. M. WEAVER V. SAMUEL SNIVELY.

FILED JANUARY 5, 1905. No. 13,449.

1. **Real Estate Agent**: AUTHORITY. A letter written to one who has solicited the agency for the sale of certain real estate, in which the owner states, in substance, "I still have the northwest quarter of section 20, township 22-5, and would sell for $3,000 cash net to me, or $3,200 on time, one-third down and the back payments secured by first mortgage. The man that sells it will have to get his commission out of the man that buys"—is sufficient to authorize such person to sell the land according to the terms therein stated.

2. **Specific Performance**: CROSS-PETITION: DEMURRER. An answer and cross-petition praying for the specific performance of a contract for the sale of the land in question entered into by such agent, which affirmatively shows that the owner had sold it to another *bona fide* purchaser for a valuable consideration, before the date of the contract made by said agent, and in which no claim is made for damages for a breach of such contract, does not state facts sufficient to entitle the defendant to any relief, and is therefore vulnerable to a general demurrer.

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

H. Halderson, for plaintiff in error.

H. C. Vail, contra.

BARNES, J.

On November 15, 1901, H. Halderson, who lived at Newman Grove, in this state, sent to the defendant in error, who lived at McComb, Ohio, the following letter:

"NEWMAN GROVE, NEB., Nov. 15th, 1901.

"*Sam Snively, McComb, Ohio.*—DEAR SIR: Do you still own the N. W. ¼ of Sec. 20, T. 22, 5 Boone county? A party was telling me that you wished to sell this land for $3,000. If this is the least you will take would you be willing to pay me commission out of that of $75 for selling in case I should find a buyer. A good quarter about

2 miles from there sold the other day for $2,400. I should be pleased to hear from you by return mail. I am,

"Yours respectfully, H. HALDERSON."

On the 19th of November defendant in error replied by letter as follows:

"MCCOMB, OHIO, NOV. 19, 1901.

"*Mr. H. Halderson, Newman Grove, Neb.*—DEAR SIR: Your favor of the 15th at hand making inquiry about my farm in Neb., the northwest quarter, sec. 20, township 22-5. I still have and would sell for $3,000 cash, net to me or $3,200 on time one-third down and the back payments secured by first mortgage, the man that sells it will have to get his commission out of the man that buys. The quarter that you spoke of surely wasn't improved, or the man that bought got a snap, and mine won't hold at that price long as I don't have any trouble to rent to make better than 6 per cent. on investments.

"Yours truly, SAM. SNIVELY."

On the 25th day of November, Halderson as agent, in the name of Snively as his principal, entered into a written contract to sell and convey the land practically for cash to the plaintiff in error, Weaver, for a consideration of $3,100. A few days thereafter Halderson received a postal card from Snively, as follows:

"MCCOMB, 11-12, 1901.

"*Mr. H. Halderson, Newman Grove, Neb.*—DEAR SIR: The land you wrote me about is sold, and I write to let you know so you won't be to any unnecessary trouble.

"Yours, etc., SAM'L SNIVELY."

In reply to a letter of later date Halderson received from Snively a letter, of which the following is a copy.

"MCCOMB, O., Nov. 29th, 1901.

"*Mr. Halderson, Newman Grove, Neb.*—DEAR SIR: Yours of Nov. 27th at hand today, will say I would like to sell to Mr. Weaver as it would be a few dollars to me to do so, but the sale to Mr. Graves was through a letter writ-

ten by me Sept. 2, 1901, to Mr. Mitchell, and I had given up hearing from it till I received the letter and contract dated Nov. 16, 1901, and I then wrote you immediately of the sale, and he has sent me draft with cont. money, so it is my duty to stand by it. Sorry there was so much business going on at once, but I can only sell the same land once.

"Yours respectfully, SAM'L SNIVELY."

This action was begun by the defendant in error to remove the Halderson contract as a cloud and incumbrance on the title. The plaintiff in error answered by cross petition setting forth the correspondence, including the postal card and letter last above quoted, and praying specific performance. The court sustained a general demurrer to the answer, and rendered a judgment as prayed in the petition. The defendant below having declined to further plead prosecutes the proceeding for review.

Two questions are presented by the record. One is, whether the letter of Snively above quoted constituted Halderson his agent with power to enter into the contract on his behalf; and the other is, whether the answer stated facts sufficient to require the court to decree a specific performance of said contract. As to the first question, we are of the opinion that Halderson had the authority to sell the land for his principal, Snively. It seems clear that by his first letter Snively intended to authorize Halderson to sell the land for him, provided he obtained a certain price and terms of payment therefor; but he was to make his commission out of the purchaser. This was sufficient to create an agency; but it is equally clear that Snively did not give Halderson the exclusive right to sell the land, and so could sell it himself, or through another agent at any time he chose to do so. Being thus constituted the agent for the sale of the land, Halderson had the power to enter into the contract pleaded by the defendant. But it appears from the defendant's answer that before his contract was made with the agent Halderson, Snively sold

the land to an innocent purchaser for value, under a contract dated November 16, 1901, which had theretofore been authorized by a letter written as early as the 2d day of September, 1901. This matter is set forth in the defendant's answer and cross-petition, without any denial of its truth or any claim that the sale to Graves was not *bona fide* and for a valuable consideration. It was thus made to appear by the defendant's answer that Snively was incapacitated from performing the Halderson contract; that it would be inequitable and unjust to decree specific performance, and that such decree if awarded would be nugatory. The general rule is that where a vendor has contracted to sell his land to one person, by selling it and conveying it to another *bona fide* purchaser for a valuable consideration, he puts it out of his power to fulfil his first contract. 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1405, note; Pomeroy, Specific Performance of Contracts, sec. 294, and cases cited. But this is a stronger case, for it appears that the sale of the land by Snively to Graves was made November 16, 1901, and the postal card notifying Halderson of that fact was written and mailed November 22, 1901, three days before the Halderson contract was entered into. So we hold that the answer itself presented sufficient facts to authorize the court to refuse to decree specific performance. The trial court, however, found that Halderson had no authority to enter into the contract with the plaintiff in error, and for that reason sustained the demurrer. In this we think the court erred. But an examination of the answer further discloses that no facts are pleaded therein which would sustain a judgment for damages for the breach of the Halderson contract, and no relief, except for specific performance, is prayed for therein. It therefore seems clear that the demurrer was properly sustained for the reason that the answer did not state facts sufficient to entitle the defendant to any relief. The judgment of the trial court was right, and is therefore

AFFIRMED.

ARLA CATTLE COMPANY V. AUGUST BURK.

FILED JANUARY 5, 1905. No. 13,559.

1. **Submission of Case:** RECITALS. When a cause is submitted without oral argument upon a brief by the plaintiff in error alone, recitals of fact in the brief not obviously erroneous, and, of course, not contradicted, will be taken as true.
2. **Evidence** in this case *held* insufficient to support the verdict.

ERROR to the district court for Cheyenne county: HANSON M. GRIMES, JUDGE. *Reversed.*

Miles & McIntosh, for plaintiff in error.

H. E. Gapen, contra.

AMES, C.

This case was submitted without oral argument, and upon a brief by the plaintiff in error alone. This court has several times decided that in such cases recitals of fact in the brief not obviously erroneous, and, of course, not disputed, will be taken as true.

The action is in replevin to recover possession of some cattle in the possession of the defendant at the beginning of the action, who had taken them under the estray law while they were trespassing upon his cultivated lands. As a defense to the action, he claimed in his answer a lien upon the animals for damages alleged to have been done by them at the time of the trespass, and recovered a verdict for $27 as the amount thereof. What purports to be substantially all the evidence bearing upon the question is set forth in the brief of plaintiff. The premises in question were an unfenced field of millet on the open prairie in a neighborhood in which there were several herds of cattle running at large. It was proved that all these herds had at divers times trespassed on the field, and had destroyed the greater portion of the crop prior to August 1, 1903,

when the cattle of the plaintiff trespassed and were taken into custody by the defendant, and when they are alleged in the answer to have done the damage complained of; but there is no evidence that they did any appreciable damage on that day, or any damage entitling the defendant to more than a nominal recovery, and it is the only fair inference from the evidence that they could not have done more because of the grain having been already destroyed. Neither is it shown what specific damage, if any, was done by the cattle of the plaintiff at any time. At the conclusion of the trial the court gave the following instruction:

"Unless it affirmatively appears that the cattle of the plaintiff did an actual damage to the defendant's millet at the particular time when they were taken up by the defendant, and that this damage was sufficient to amount to an actual and perceptible injury to be estimated in dollars and cents, you will not be justified in finding for the defendant."

It is evident that the verdict is in conflict with the instruction and with the law, and is unsupported by the evidence. The plaintiff prosecutes error.

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

LETTON 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.

NATIONAL LIFE INSURANCE COMPANY ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.*

FILED JANUARY 5, 1905. No. 13,677.

Cities: COUNCIL: SPECIAL MEETINGS. The Omaha city charter contains the following section: "The mayor or any three councilmen shall have power to call special meetings of the council, the object of which shall be submitted to the council in writing, and the call and object and the disposition thereof, shall be entered upon the journal by the clerk." A meeting was held pursuant to a call signed by all the members of the council as follows: "Special meeting. A special meeting of the city council of the city of Omaha is hereby called for Thursday, September 15, 1898, at 5:15 P. M., for the consideration of communications, petitions, committee reports, resolutions, and ordinances on first, second and third reading and passage." *Held*, That at that meeting the mayor and council were authorized to pass a city ordinance then pending before that body, and previously twice read and referred to a committee.

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed and dismissed.*

C. C. Wright, W. H. Herdman and *A. G. Ellick,* for appellants.

H. W. Pennock and *Frank H. Gaines, contra.*

AMES, C.

This is an action to perpetually enjoin the collection of a special assessment for street improvements in the city of Omaha on the ground that the procedure of the mayor and council was so wide a departure from the requirements of the statute as to render their action void. But one false step is alleged to have been taken. Section 39 of the city charter is as follows: "The mayor or any three councilmen shall have power to call special meetings of the council, the object of which shall be submitted to the

* Rehearing denied. See opinion, p. 44, *post.*

council in writing, and the call and object and the disposition thereof shall be entered upon the journal by the clerk." On the 15th day of September, 1898, the council being in vacation, the following was signed by all the members of that body: "Special meeting. A special meeting of the city council of the city of Omaha is hereby called for Thursday, September 15, 1898, at 5:15 P. M., for the consideration of communications, petitions, committee reports, resolutions, and ordinances on first, second and third reading and passage." At the time mentioned in the call six of the nine members of the council, together with the mayor, assembled in the council chamber, and the clerk entered that document upon his records of the meeting. An ordinance ordering the improvement in question was pending before the body, it having been previously introduced and read a second and third time, and referred to a committee. At this meeting the committee reported the measure to the council with a recommendation pursuant to which it was put upon its passage and passed.

The plaintiff contends that the ordinance is void because it is not specifically mentioned in the call above quoted, and a proposed vote upon its passage was not otherwise submitted to the council in writing. This is the sole question in the case, and there is no dispute about the facts. Requisite petitions, notices and publications had been made and had, the ordinance was duly pending, and the mayor and council had ample jurisdiction of the subject matter with which they dealt. Was their procedure so irregular that they lost jurisdiction, and their subsequent action rendered wholly void? We do not think so. Whether the call was as specific or definite a recital of the objects of the meeting as is contemplated by the statute is a subject of debate by able counsel, and one concerning which the authorities speak with no certain voice. The manner in which a special meeting shall be called or convened is not prescribed by the statute; but it is enacted that after the members have assembled some one, presumably the person or persons convoking them, shall submit to

them in writing the objects of the meeting, and that this submission shall be entered upon the journal by the clerk. What is the purpose of this submission is not difficult to be understood. Before it is made, or any object of the meeting is required to have been stated in any manner, the body has met in lawful assembly. If nothing further was mentioned by the statute they would doubtless have all the powers of a general session, and there are no prohibitory words and no express limitation in the statute. It seems to us fair to assume that, if it had been intended that the written submission should operate as a restraint upon their power, the charter would have so enacted. That document accomplishes an obvious and sufficient purpose by calling the attention of the members, specifically, to such matters as the authority convoking them may deem especially important, but it is not required for, and cannot serve the purpose of, informing either the public or the members, in advance of the assemblage, respecting either the object of the meeting, or the character of the business intended to be transacted thereat.

No precedent construction of a similar statute has been cited by either party. In *Commissioners of Kearney County v. Kent,* 5 Neb. 227, it appears that the statute required that special sessions of the county board should be convened by the county clerk by a written notice stating the objects of the meeting. Such a call was issued for a meeting for the "approving of official bonds and auditing accounts." The court held that the board were not restricted to the transaction of the business named, but that a sale by them of personal property belonging to the county was valid. The decision is valuable only as showing that a statutory requirement, even of previous notice, will not be strictly construed. In *City of Greeley v. Hamman,* 17 Colo. 30, it was held that, where a special meeting of the council was required to be notified by personal service upon every member, a meeting at which there was a full attendance was valid, although no record of such notice or service was made, and the document itself, if there

was one, could not be found. In *Fuller v. Inhabitants of Groton,* 77 Mass. 340, a notice calling or "warning" a town meeting "to hear the report of any committee heretofore chosen and to pass any vote in relation to the same" was held sufficiently definite, and to authorize a vote appropriating money pursuant to the report of a committee appointed at a former meeting. This case is not without analogy to the one at bar; but decisions with reference to popular assemblages in New England towns, where the notices or warnings are expressly required to notify the inhabitants of the business intended to be transacted, can throw but little if any light upon the present case. Since the written submission prescribed by the Omaha charter is not required to be made until after the meeting has convened, we do not understand what advantage would be gained or what evil would be prevented by exacting the definiteness of statement demanded by the plaintiff.

The district court granted a perpetual injunction as prayed and the city appealed. We recommend that the judgment be reversed and the action dismissed.

LETTON 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 the action dismissed.

REVERSED AND DISMISSED.

The following opinion on motion for rehearing was filed May 3, 1905. *Motion overruled. Judgment modified:*

PER CURIAM.

The judgment and order of this court heretofore entered in this action is modified to read as follows: For the reason stated in the foregoing opinion, it is ordered that the judgment of the district court, in so far as it affects the repaving assessment levied in improvement district

numbered 647, be reversed, and that the cause be remanded, with directions to the district court to dismiss the plaintiff's alleged cause of action, in so far as it affects the assessment levied in said improvement district numbered 647, and that otherwise the decree of the district court rendered in said action remain undisturbed. It is further ordered that the motion for rehearing be denied.

JUDGMENT MODIFIED: REHEARING DENIED.

MARY E. CURTIS ET AL. V. GEORGE C. ZUTAVERN ET AL.*

FILED JANUARY 5, 1905. No. 13,690.

Review: LAW OF CASE. It is the established and necessary practice of this court that issues of law definitely decided upon error or appeal cannot be relitigated in the district court in a subsequent trial of the same case.

ERROR to the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed with directions.*

M. B. C. True and *S. M. True,* for plaintiffs in error.

S. P. Davidson, contra.

AMES, C.

A former decision in this case is officially reported in 67 Neb. 183. It was there adjudged, after a full recital and consideration of the pleadings and evidence, that the defendant Zutavern was estopped by the decree in partition and by the recitals of the bond in suit from claiming more than three-ninths of the land in controversy, including, of course, the reversionary title to the fund set apart for the guaranteeing of the dower estate, and represented by the bond; and the cause was remanded for further pro-

* Rehearing allowed. See opinion, p. 47, *post.*

ceedings in accordance with the opinion. Evidently nothing consistent with this decision and having a tendency to enlarge the recovery of the defendant could have properly been shown in such further proceedings, except some transaction or transactions occurring subsequently to the date of the rendition of the decree of partition and of the giving of the bond, and tending to discharge the estoppel.

There was, however, a new trial in the district court upon the same pleadings as formerly, in the course of which evidence was produced, and inquiries were gone into, tending to impeach the decree in partition by showing that it was mistakenly or inadvertently procured, and that it is inequitable and unjust to the extent of two-ninths of the fund, one each of which was represented by Henry Cannon and Smith Cannon. This investigation, which was conducted in spite of the protest of the plaintiffs who insisted upon a judgment pursuant to the decision of this court, resulted in a judgment in their favor for three-ninths instead of five-ninths of the fund, one-ninth thereof, represented by Patience Curtis, having been voluntarily relinquished. How this result was reached is not to our minds entirely clear, but it is evident that it was by the consideration of matters of controversy merged in and foreclosed by the estoppels above mentioned, and which are, therefore, no longer proper subjects of judicial discussion. It is the established and necessary practice of this court that issues of law definitely decided upon error or appeal, cannot be relitigated in the district court in a subsequent trial of the same case. It is therefore recommended that the judgment of the district court be reversed, and that the cause be remanded, with instructions to ascertain five-ninths of the fund in controversy and render judgment therefor in conformity to the former opinion of this court.

LETTON 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 cause be remanded, with instructions to ascertain five-ninths of the fund in controversy and render judgment therefor in conformity to the former opinion of this court.

REVERSED.

The following opinion on rehearing was filed May 3, 1905. *Judgment of reversal adhered to:*

OLDHAM, C.

A rehearing was granted in this case for a further examination of the questions decided by this court at its first hearing in the opinion delivered by HASTINGS, C., and reported in 67 Neb. 183.

It is contended by counsel for defendants in error that the effect of this opinion was to reverse and remand the former judgment of the district court for a new trial of all the issues in that court; and it is contended on the other hand by counsel for plaintiffs in error that the effect of this decision was a final determination from the evidence that defendant Zutavern was the owner of three-ninths of the reversion of the dower interest in controversy, and no more, and that the court erred in permitting a trial of the issues that had been finally determined on the suit in partition on which the right to maintain this action was founded.

A careful review of the opinion delivered by HASTINGS, C., *supra,* shows that the questions therein finally determined are that defendant Zutavern and his sureties are estopped from denying the recitals in the bond sued upon; that at the time the bond was entered into Zutavern claimed no interest except the dower and three-ninths of the reversion in the dower right; and that the partition decree is conclusive on Zutavern as to his holding any other right or claim in the land at the time the decree was entered, and that the only right that Zutavern claims to have acquired since the decree in partition is an additional

one-ninth interest, which he obtained by quitclaim deed from Mrs. Patience Curtis. The opinion also held that it was plainly the intention of the court at the time the money was turned over to Zutavern and the bond taken for its repayment on the death of Mrs. Platt, that the money should be paid back after her death and be divided in accordance with the partition decree; and the opinion further held that it was proper to permit defendant Zutavern to show the acquisition from Mrs. Patience Curtis of her one-ninth interest in the reversion of the dower after the decree of partition. The opinion concludes as follows:

"It having been concluded that Zutavern is estopped by the decree and the bond given under it from claiming more than three-ninths of this land, it follows that the other parties to that action, who were makers of these deeds, are also estopped. It must be held, as to them, conclusive that at the time of the partition proceedings Zutavern held absolutely the dower interest and the three-ninths of the fee title. He therefore must be allowed to have that three-ninths of the reversion of this fund which is derived from the sale of his three-ninths of the land. It is believed, therefore, that the heirs of Bluford Cannon are entitled to recover six-ninths of this fund by their joint action, unless Patience Curtis is found to have assigned to Zutavern her original one-ninth of it; that the one-ninth of it belonging to Charles Henry Cannon in his lifetime, if he is dead without leaving a will, should go to the plaintiffs jointly; and that Benjamin Cannon, Katie Jones and Cora Jones should receive their portion of this one-ninth. As to Patience Curtis, the question of whether or not she has assigned her reversionary interest to Zutavern since the partition proceedings should be determined."

As we are compelled to view this opinion, it left but one question to be determined on a rehearing of the cause, and that was the question as to whether or not Patience Curtis had assigned her reversionary interest to Zutavern after the partition proceedings had been determined. This was the view of the case taken by Mr. Commissioner AMES

when the second opinion, reported, *ante,* p. 45, was delivered. At the last hearing in the district court it was determined that Patience Curtis had in fact assigned her reversionary interest to defendant Zutavern after the partition decree. This finding of the district court was not disturbed in the opinion, and the cause was remanded, with directions to the district court to ascertain the value of five-ninths of the fund in controversy and render judgment therefor. After a further examination of the questions involved, we think this opinion is right and recommend that it be adhered to.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

REVERSED.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. CARRIE M. BENDSEN, ADMINISTRATRIX.

FILED JANUARY 5, 1905. No. 12,341.

Decision followed. *New Omaha Thomson-Houston Electric Light Co. v. Anderson,* p. 84, *post,* followed.

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

W. W. Morsman, for plaintiff in error.

Charles M. Harl, contra.

OLDHAM, C.

The facts in this case are identical with those in the case of *New Omaha Thomson-Houston Electric Light Co. v. Fred Anderson, Administrator of the Estate of Charles Hopper, Deceased, post,* p. 84. The intestate in this case

met his death from the same cause and under the same conditions and surroundings as those occasioning the death of Charles Hopper, his fellow workman; consequently, this case should follow the decision recently announced in that case.

Hence, for the reasons set forth in the above cited case, we recommend that the judgment of the district court be reversed and the cause remanded.

BARNES 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.

EZEKIEL JOHNSTON V. PHELPS COUNTY FARMERS MUTUAL INSURANCE COMPANY.

FILED JANUARY 5, 1905. No. 13,652.

Review. Action of the trial court in the exclusion of evidence examined, and *held* not reversible error.

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

James I. Rhea, R. T. Potter and *J. L. McPheeley,* for plaintiff in error.

Shaffer & Clay and *John M. Stewart, contra.*

OLDHAM, C.

This is an action on a policy of insurance against fire issued by the Phelps County Farmers Mutual Insurance Company, on the property of plaintiff on December 31, 1892. The cause comes here a third time for review by this court. The first opinion was rendered on November 20, 1901, by POUND, C., and is reported in 63 Neb. 21.

All the issues arising on the pleadings and the evidence adduced at the first trial of the cause in the district court are carefully reviewed in this opinion, and, because the district court at the first hearing had directed a verdict for defendant insurance company, when the evidence tended to show that all the property covered by plaintiff's policy had been destroyed by the fire, we held that the acceptance of assessments from plaintiff after his loss were inconsistent with any other theory than that of a waiver of plaintiff's default in paying assessment numbered one, of which he had notice long prior to the loss.

At the second trial of the cause in the district court, the defendant insurance company adduced evidence showing conclusively that all the property covered by plaintiff's policy of insurance was not destroyed by the fire, and that he had paid his subsequent assessments and the one of which he was in arrears at the time of the fire, with full knowledge that the company insisted on the forfeiture of the policy for the time that he was in arrears; and this being a right reserved in the policy, we held on a second hearing in this court, in an opinion reported in 66 Neb. 590, that it was error under this proof to direct a verdict in favor of plaintiff, although there was no dispute as to the amount of the loss sustained. On a third trial of the cause, under evidence substantially the same as that contained in the record at the second hearing of the cause in this court, the trial judge directed a verdict for defendant, and plaintiff again brings error to this court.

Now, before considering plaintiff's numerous allegations of error, it is well to take a retrospective view of this cause in the light of our former decisions, and determine what, if any, questions now arising have already been determined in such a manner as to be controlled by the rule of "the law of the case." At the first hearing it was determined that, if all plaintiff's property covered by the policy was destroyed by the fire, the acceptance of subsequent assessments by the company amounted to a waiver of his default in the payment of his first assessment. At

the second review in this court it was held that the first assessment on which plaintiff was in default at the time of his fire had been legally and properly made, and that plaintiff had had sufficient notice of this assessment, and that under the by-laws and the conditions of his policy the company was not liable unless this default had been waived. We also held that under the evidence then adduced there was property remaining on plaintiff's farm after the fire, to which the policy attached, sufficient to constitute a consideration for his payments of subsequent assessments. Now, unless new evidence was introduced at the third trial sufficient to overcome defendant's proof that the property covered by its policy was not all destroyed by the fire, the trial court plainly followed the opinion last rendered in directing a verdict for defendant. As before set forth, the evidence admitted at the last trial was substantially the same as that contained in the bill of exceptions of the second trial, and, consequently, unless the court erred in excluding the additional testimony offered by plaintiff, his judgment is right and should be affirmed.

To reach a proper conclusion on the action of the trial court in excluding the new evidence offered by plaintiff at the last hearing, it is necessary to examine the description of the property insured under the policy and application. These conditions are as follows:

"The application provides: 'Horses, mules, colts, cattle, wagons, buggies and harness insured on the premises and also when temporarily removed from the premises.' The policy provides as follows: 'The above named company agrees to insure Ezekiel Johnston * * * against loss or damage by fire or lightning to the amount of $2,165 on the following described property for the term of five years from noon on Dec. 31, 1892. * * * On farm implements and machinery, $200; on wagons, buggies and harness, $100; on grain in granary, crib or dwelling, $1,000; on hay, $200; situated on sec. 27, twp. 5, range 18, Phelps county, Neb.'"

At the last as at the second hearing of this cause it was conclusively shown that after the fire plaintiff had left on the premises numerous farming implements and a quantity of grain in one of the granaries, which was not destroyed by the fire, and that he moved another barn on the premises in which he kept farming implements, grain, harness and other property of the kind and quality covered by his policy. For the purpose of rebutting this testimony, plaintiff offered to prove by his own evidence that, when he took out his policy of insurance with the defendant company, he had insurance in another company on the grain in the granary which was not burned; and that he only intended to insure the grain which was contained in the granary and barn that were destroyed by the fire. He also offered to prove that there was no danger of destruction by fire and lightning on the wagons and farm implements not contained in the barn or granary. He likewise offered to prove by the secretary of defendant company that, when the policy was taken, this witness was present and only inspected the grain and farm implements that were contained in the barn and granary that were destroyed by the fire. Now, by an examination of the conditions of the policy it is apparent that the insurance on farm implements and machinery, wagons, buggies, harness and hay, was not conditioned upon either being contained in any building, and that the insurance on grain attached to all that was contained in any granary, crib, or dwelling situated on the premises described in the policy. The policy was what is commonly called a blanket policy, not intended to apply specifically to any particular number of bushels of grain that might have been in any particular granary at the time the policy was written, but to continue on this class of property, even though replaced by other of a similar specie, during the entire term of the policy. In the case of *State Ins. Co. v. Schreck*, 27 Neb. 527, the court in construing a similar policy said: "Under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be

no doubt of plaintiff's liability in case of loss." In this view of the case, we do not think that the admission of the testimony excluded could have changed the result in any manner, as grain raised any year on the place and placed in any granary, crib or house on the premises would have been and was protected by this policy the same as that contained in one particular crib at the time the policy was written. There was no complaint in the petition that the policy did not conform to the contract between plaintiff and defendant. Consequently, the evidence could not have been admitted for the purpose of changing the unambiguous conditions of the policy sued upon. We are therefore of opinion that the learned trial court was justified in directing a verdict for defendant, and we recommend that the judgment of the trial court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

CITY OF WAHOO V. EZER NETHAWAY ET AL.

FILED JANUARY 5, 1905. No. 13,689.

1. **Title by Adverse Possession.** Prior to the passage of chapter 79, laws of 1899, title by adverse possession could be established in lands owned by a municipal corporation the same as in those owned by a private individual.

2. **Decision: OVERRULING.** In order to overrule a former decision deliberately made, the supreme court should be convinced not merely that the case was wrongly decided, but that less injury will result from overruling than from following it.

ERROR to the district court for Saunders county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

J. E. Wilson and *Charles H. Slama,* for plaintiff in error.

B. E. Hendricks, contra.

OLDHAM, C.

This was an action in ejectment instituted by the plaintiff, City of Wahoo, to recover a portion of two of its streets occupied by the defendants. At the trial of the cause in the court below, a jury was waived by consent of the parties and a trial had to the court, where a judgment was rendered in favor of defendants, and plaintiff brings error to this court.

The testimony clearly establishes that defendants, who are husband and wife, had been in possession of the property in dispute for more than 10 years prior to the passage of chapter 79, laws of 1899; that the premises had been inclosed with a fractional block on which defendants resided and occupied as their homestead, and that they had been cultivated in shrubbery, garden and ornamental trees within such inclosure from the year 1885, as before stated for more than 10 years before the passage of the act of 1899.

It is conceded in the brief of plaintiff in error that the judgment of the trial court is in harmony with the rule laid down by this court in *Schock v. Falls City,* 31 Neb. 599; *Lewis v. Baker,* 39 Neb. 636; *Meyer v. City of Lincoln,* 33 Neb. 566, and *Webster v. City of Lincoln,* 56 Neb. 502; but counsel say that, feeling "that the rule laid down in these cases is too harsh, they desire to urge its modification in the case at bar." While it is true that decisions of courts of last resort in other jurisdictions, and opinions of text writers of eminent ability, are cited in opposition to the doctrine announced in these cases, yet it is equally true that these decisions are consistent with themselves, are founded on reason, and are likewise supported by adjudications without the state from courts of learning and

ability. In this state prior to the passage of the act of 1899, we held that the statute of limitations runs against the lands of a municipal corporation the same as against the lands of a private individual; and, in determining the question of title by adverse possession between a citizen and a municipality, we should apply the same rules as in determining a like controversy between private individuals. The reasons for this rule were well set forth by SULLIVAN, J., in *Krueger v. Jenkins,* 59 Neb. 641, when he said:

"It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys and other public places within their corporate limits. See Compiled Statutes, 1899, ch. 14, art. I, secs. 104, 106. They may maintain ejectment to recover possession of them; they may, speaking generally, vacate them either in whole or in part, The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. See Compiled Statutes, 1899, ch. 14, art. I, sec. 77. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the same degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trusts, municipal corporations are on the same footing with private individuals and equally affected by the limitation laws. See *Powers v. City of Council Bluffs,* 45 Ia. 652; *Evans v. Erie County,* 66 Pa. 222; 2 Dillon, Municipal Corporations (3d ed.), 676."

Now, while we may concede, for the sake of argument, that the rule adopted in this state which subjects the streets and alleys of a municipal corporation to the ravages of the statute of limitations is a doubtful rule on the

soundness of which the authorities differ, yet, we think, we would scarcely be justified in changing one doubtful rule for the purpose of establishing another not of itself free from doubt. We think, as recently announced by the supreme court of Michigan in *McEvoy v. City of Sault Ste. Marie,* 136 Mich. 172, 98 N. W. 1006:

"Before overruling a former decision deliberately made, the court should be convinced not merely that the case was wrongly decided, but that less injury will result from overruling than from following it."

Now, if any injury has resulted to the municipalities of this state by reason of the rule so long followed in this court, the possibility of a recurrence of such injury has been entirely removed by the passage of the act of 1899, which protects the streets and alleys of cities and villages from the operation of the statute of limitations. Consequently, we think that nothing of good could be accomplished by now changing our former rule.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

OXNARD BEET SUGAR COMPANY V. STATE OF NEBRASKA.*

FILED JANUARY 5, 1905. No. 13,995.

1. Constitutional Law. *Held,* That chapter 1, laws of 1895, entitled "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor," is in contravention of section 11, article III of the constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

* Rehearing denied. See opinion, p. 66, *post.*

2. ———: OBLIGATION OF CONTRACT. A moral obligation can never be deemed to rest upon the people of the state to discharge a contract made by the legislature in direct violation of the constitution.

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

Charles F. Manderson, James E. Kelby, Frank H. Gaines and *Edward R. Duffie*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

OLDHAM, C.

The plaintiff below, who is also plaintiff in error in this court, is the manufacturer of sugar from beets grown within this state. Its claim against the state is based on the provisions of chapter I, laws of 1895, entitled "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor," passed March 29, 1895, by a constitutional majority, over the governor's veto. Having complied with all the provisions of this act, it presented its claims for bounty to the auditor of the state, which were audited and approved, and warrants drawn for the various amounts due plaintiff under this act. In the case of *State v. Moore*, 50 Neb. 88, it was held by this court that claims for bounty could not be paid without a specific appropriation for such purpose. In this opinion, however, the validity of the claims was not considered. Plaintiff in error presented its claims to the legislature at its session in 1903, asking that an appropriation be made for their payment. The house of representatives on April 2, 1903, passed a resolution reciting, among other things, the presentation of these claims for payment, and that "the validity of each of said claims, or the right to payment thereof, is questioned," and authorizing the plaintiff in error to prosecute an action against the state in the district court for Lan-

caster county for the purpose of ascertaining and determining said claims and the liability of the state for the payment thereof. After the passage of this resolution, plaintiff filed its petition in the district court for Lancaster county, setting forth in detail its compliance with all the provisions of chapter 1, laws of 1895, the filing of its claims with the auditor, the approval of the claims and the drawing of the warrants, countersigned by the treasurer, and also alleging, by way of inducement, that plaintiff had engaged in the manufacture of sugar, relying on the provisions of this act, and had paid the minimum of $5 a ton, required by the act, for beets raised in the state, from which sugar was manufactured, when it could have procured such beets for the sum of $4 a ton. To this petition the state interposed a demurrer, for the reason that chapter 1, laws of 1895, is unconstitutional and in contravention of section 11, article III, of the constitution of the state of Nebraska, in that it embraces two separate and distinct subjects in one act; and also because the object of such act was not a public object, nor such an object as the legislature of the state had power to aid by the appropriation of the public revenue, or the promise of such appropriation. This demurrer was sustained by the trial court, and plaintiff electing to stand on its petition, judgment was entered dismissing the petition; and from this judgment plaintiff has taken error to this court.

The only objection to the constitutionality of the act in controversy which it will be necessary to examine is that it is in contravention of so much of section 11, article III of the constitution, as provides that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." In considering this constitutional restriction upon legislative power, it is well to remember that this court has followed the trend of the best considered cases in other states, and held it mandatory and not directory in its nature. Referring to this provision of the constitution we said in the case of *Kansas City & O. R. Co. v. Frey,* 30 Neb. 790:

"The object of the framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it; in other words, members were prohibited from joining two or more bills together in order that the friends of the several bills may combine and pass them."

Again in the case of *Trumble v. Trumble*, 37 Neb. 340, IRVINE, C., in an able and exhaustive opinion in which the former decisions of this court were considered, said:

"Is this act within the inhibition of that clause of the constitution providing that no bill shall contain more than one subject? This question is in most cases surrounded with difficulty. As was said in *Kansas City & O. R. Co. v. Frey*, 30 Neb. 790, this clause of the constitution 'was never designed to place the legislature in a strait jacket and prevent it from passing laws having but one object under an appropriate title.' Provided the object of the law be single the whole law may be embraced in a single enactment, although it may require any number of details to accomplish the object. The purpose of the constitutional inhibition upon the other hand was to require each proposed measure to stand upon its own merits, and to apprise the members of the legislature of the purpose of the act when called upon to support or oppose it, and perhaps a still stronger purpose was to prohibit the joining of several measures in one act in order to combine the friends of each measure and pass the bill as a whole, where probably a majority could not be procured in favor of any one of its different objects."

On the other hand, in the case of *Hopkins v. Scott*, 38 Neb. 661, in discussing the validity of chapter 50, laws of 1891, relating to the keeping of state and county funds, we said:

"It is urged that the act of 1891 is unconstitutional, as

containing more than one subject. The act provided both for the depositing of state funds and for the depositing of county funds and it is contended that each of these forms a separate subject of legislation. The general object of the act is to provide for the safe custody of public funds, and it seems to us that this is a single subject of legislation, whether the funds are state or county. The object of the act is plainly expressed in its title, and the combination of provisions in regard to both state and county funds presents none of those objections which influenced the adoption of the constitutional inhibition against uniting two or more subjects in a single act."

In *Van Horn v. State,* 46 Neb. 62, in which the validity of chapter 32, laws of 1895, providing for township organization, had been assailed as containing more than one subject, it was said:

"It has always been said that the legislature might choose for itself its manner of legislation, and that an act, no matter how comprehensive, would be valid providing a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose. Thus, in *State v. Page,* 12 Neb. 386, the act of 1879, already referred to, entitled 'An act concerning counties and county officers,' was held to contain but one subject because it had 'but one general object' fairly expressed in the title, although this act contained a complete scheme of county government, and so operated as to materially change the law on other subjects related thereto."

Also in the recent case of *Wenham v. State,* 65 Neb. 394, we held that "An act to regulate and limit the hours of employment of females in manufacturing, mechanical and mercantile establishments, hotels and restaurants; to provide for its enforcement and a penalty for its violation," was not obnoxious to the objection that it contained more than one subject.

We do not think that there is any serious conflict in these decisions. The rule established is that, if the title

fairly expresses a general purpose, then all matters fairly and reasonably connected therewith, and all measures which facilitate its accomplishment, constitute but a single subject. *City of Grand Rapids v. Burlingame,* 93 Mich. 469, 53 N. W. 620. For instance, in *Hopkins v. Scott, supra,* the general purpose of the act, as set forth in the excerpt quoted from the opinion, is to provide for the safe keeping of public funds, and state and county funds being each a specie of this genus are included within the title. In *Van Horn v. State, supra,* the object of the act was to provide a system of local government by township organization; consequently, all the means by which this object was to be accomplished were properly connected with this title. In *Wenham v. State, supra,* the act construed was a police regulation for the protection of female employees and the different places of employment named in the title were closely and logically connected with the subject of the act, and the penalties prescribed were but the means by which the act was made effective.

Now the question is, does chapter 1, laws of 1895, present two separate and distinct subjects for the bounty of the state, or does it contain a comprehensive generic title to which both objects of the bounty are germane? It will be noticed that the title of the act is "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor." The first section provides: "That there shall be paid out of the state treasury to any person, firm or corporation engaged in the manufacture of sugar in this state from beets, sorghum or other sugar yielding canes or plants grown in Nebraska, the sum," etc. The second, third and fourth sections of the act are all germane to the title of the manufacture of sugar, and provide the means and conditions under which the bounty shall be paid. The fifth section of the act provides: "That there shall be paid out of the state treasury to any person, firm, or corporation engaged in the manufacture of chicory in the state from chicory beets or plants grown in Nebraska, the sum," etc.

The sixth and seventh sections are germane to the manufacture of chicory, and provide the means of carrying the act into effect. Sections eight and nine of the act apply to both sugar and chicory.

It is said in the brief of the able counsel for plaintiff in error that the subject matter before the legislature was "to encourage the production of sugar and chicory from certain agricultural products, and as a result to provide a remunerative and stable market for our farming population for such products." In our judgment, if this was the object of the legislation, such object is not fairly expressed by the title of the act. For the title refers to the encouragement of the manufacture of sugar and chicory, and the body of the act provides that they shall be manufactured from plants or beets grown in the state. While we regard the question of the policy of the act as one for legislative rather than judicial determination, yet we cannot but be impressed from both the language of the act and from the manner of its passage that it contains two separate and distinct subjects, and aims at two distinct objects. If the act had provided for encouraging the manufacture of beets grown in this state into sugar or chicory, we would be inclined to say that the act contained but a single subject, which was the manufacturing of beets into sugar and that both the chicory and sugar beet could be fairly embraced within the title. But this is neither the subject nor the condition of the act. It attempts to provide a bounty for sugar manufactured either from beets, sugar cane, or any other sugar producing plant raised in the state, and in the same act to provide a bounty for chicory either from chicory beets or from plants raised in the state. There is no such close relation between the manufacture of sugar and the manufacture of chicory as to say that provisions for the encouragement of the manufacture of the one are the means by which the encouragement of the other is logically accomplished. While there is always a remote connection between the manufacture of articles consumed as food stuffs and beverages, yet there

is not such an inseparable relation as to make the one dependent upon the other. The use of sugar as a food product is so universal in all conditions of life that it is regarded as a primary necessity. On the other hand, chicory is a plant cultivated in various parts of Europe and the United States, at first, for the medicinal properties contained in its roots, which contain many similar qualities to the roots of the dandelion. Later, its production has been encouraged for the purpose of its use as a beverage as a substitute for or in a mixture with coffee. The process of manufacturing chicory is by roasting its roots in iron cylinders, which are kept revolving as in the roasting of coffee. While it might be said that the manufacture of chicory and its use as a beverage tend to increase the demand for sugar, yet the same could be said of another beverage in common use, which can be manufactured by distillation from corn or rye raised within the state of Nebraska. But, as a matter of fact, the use of sugar with either of these beverages, while frequently indulged in, is not essential to their full enjoyment. Now, it seems to us that the purpose of the inhibition of section 11, article III of the constitution, being to require every enactment to stand or fall on its own merits or want of merit, and to prevent omnibus legislation, is aimed directly at just such measures as this. When the act in controversy was introduced in the house it only provided for encouraging the manufacture of sugar, and in this form it passed the house; when it went to the senate it was amended by adding sections 5, 6 and 7, which provided for the encouragement of the manufacture of chicory. While the senate amendment was subsequently passed by the house, and while the measure as amended passed both bodies later, over the veto of the governor, we cannot escape the conclusion that the friends of the manufacture of each of these different products were gathered together for a common fight for the bill in this omnibus form, when, perhaps, a provision for the encouragement of either standing on its own merits might have failed of

passage. *People v. Denahy,* 20 Mich. 349; *State v. Harrison,* 11 La. Ann. 722; *Skinner v. Wilhelm,* 63 Mich. 568, 30 N. W. 311; *In re House Bill* 168, 21 Colo. 46, 39 Pac. 1096.

But it is urged by counsel for plaintiff that, even if the statute under which its claims are made is unconstitutional for any reason, there is still a moral and equitable duty resting upon the legislature to pay the bounty, and this contention seems to receive some support in the language used by Peckham, J., in the case of *United States v. Realty Co.,* 163 U. S. 427. While recognizing the high standard of the tribunal from which the decision comes, as well as the great learning of the author of the opinion, we are still unable to give our assent to this doctrine. We are unable to understand any principle either of equity or good conscience that should estop the people of the state of Nebraska by an unauthorized act of the legislative department of their government, especially when such act is attempted to be enforced in the face of a direct prohibition in the constitution or basic law adopted by the people. An unconstitutional statute is a legal stillbirth, which neither moves, nor breathes, nor holds out any sign of life. It is a form without one vital spark; it is wholly dead from the moment of its conception, and no right either legal or equitable arises from such an inanimate thing. In discussing *United States v. Realty Co., supra,* and the principle it is cited to support, it was said by the supreme court of Minnesota in the case of *Minnesota Sugar Co. v. Iverson,* 91 Minn. 30, 97 N. W. 454: "The claim is made that the state is under a moral obligation to pay this bounty, and reliance is placed upon *United States v. Realty Co.,* 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120. There the court declined to pass upon the question whether the original legislation—the congressional bounty act—was constitutional, but assumed, for the purposes of the decision, that it was not. The case has been very severely criticised, and we are unable to find any other in which it has been held that the unconstitu-

tional act of a legislative body is any justification in law for any action or non-action."

We are therefore of opinion that the learned trial court was right in sustaining the demurrer to plaintiff's petition, and we recommend that the judgment be affirmed.

AMES and LETTON, 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 November 11, 1905. *Rehearing denied:*

1. **Legislative Powers.** The legislature cannot appropriate or pledge the public money for private purposes.
2. **Constitutional Law.** Chapter 1 of the laws of 1895, entitled "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor," is unconstitutional and void.
3. **Bounties: OBLIGATION OF STATE.** The statute offering a bounty for the manufacture of sugar and chicory being unconstitutional because of lack of power on the part of the legislature to appropriate money for such purpose, the fact that the manufacturers paid larger prices for their products to the producers of beets from which to manufacture these articles, relying upon this statute for remuneration, will not create in favor of such manufacturers any obligation against the state.

SEDGWICK, J.

Because of doubts as to the correctness of the opinion in this case *ante,* p. 57, oral argument was heard upon the motion for rehearing, and new and exhaustive briefs have been filed. Upon the constitutional point mainly discussed in the opinion we are inclined to think that we were wrong. It was said in that opinion:

"The rule established is that, if the title fairly expresses a general purpose then all matters fairly and reasonably connected therewith, and all measures which

facilitate its accomplishment constitute but a single subject."

The title of the act in question is "An act to provide for the encouragement of the manufacture of sugar and chicory and to provide a compensation therefor." It is not accurately quoted in the former opinion. This court has generally held to the rule that no act of the legislature will be held unconstitutional unless it is manifestly so. All doubts will be resolved in favor of the constitutionality of an act of the legislature. We think that, under the rule above quoted from the former opinion, it is not so clear that two subjects are involved in the statute within the meaning of the constitutional provision as to require us to hold the act unconstitutional for that reason. The manifest object of the legislature in encouraging the manufacture of sugar and chicory was, as stated in the brief of counsel, "to build up manufacturing industries in the state which would help to develop our natural resources," and so diversify "our pursuits, as well as our products." We think that the legislators must have understood from this title that this was the purpose of the legislation. The former holding upon this subject, then, was wrong.

2. Another question presented is as to the power of the legislature to appropriate the public money for such purposes. It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature; and to our minds this is the only reasonable conclusion. We have had much difficulty with the question presented here. We have, however, been aided by the discussion of the courts of some of our sister states upon this precise question. In Michigan, under a constitutional provision similar to ours, the legislature attempted to appropriate the public money to encourage the production

of sugar, and the supreme court of that state upon thorough investigation and careful reasoning determined that the purpose of the appropriation was not a public one, and held the legislation unconstitutional. *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625. Following this decision the supreme court of Minnesota, in *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454, held similar legislation unconstitutional for the same reason. The circuit court of appeals of the United States for the eighth circuit has announced the same conclusion. In *Dodge v. Mission Township*, 107 Fed. 827, Judge Sanborn, speaking for the court, gives strong reasons for concluding that the encouragement of the manufacture of sugar is not a public purpose for which the legislature may appropriate the public money, and concludes that such legislation is unconstitutional. The legislature cannot appropriate the public moneys of the state to encourage private enterprises. The manufacturing of sugar and chicory is a private enterprise, and the public money or credit cannot be given or loaned in aid of any individual, association or corporation carrying on such enterprises. Const., art. XII, sec. 3.

3. It is contended in the brief that, though the statute be held unconstitutional, still there is a moral obligation resting upon the state to pay the claim. The argument is that the purpose of the legislature was to pay to the farmers who raised the beets a bounty, and that the sugar company was only the intermediary for so doing, and relying upon this legislation, the sugar company paid thousands of dollars to the farmers, supposing that the state had requested them to do so upon the agreement of the state to repay the sugar company. This it is claimed raises a moral obligation on the part of the state to repay the company. This argument would be very forcible if the company had paid to the farmers money which the state could be either legally or morally obligated to pay them. But, since it was unlawful for the state to pay this money to the farmers, and the state was not and could not be

under any obligation, legally or morally, to do so, the sugar company could not place the state under obligation to it by making such payments to the farmers. It seems to us that the reasoning in *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. Rep. 1120, 41 L. ed. 215, which is a case much relied upon, is not satisfactory and conclusive upon this point. Other courts have refused to follow it, as appears from the cases above cited.

It follows that the conclusion formerly reached is right, and the motion for rehearing is

OVERRULED.

NORFOLK BEET SUGAR COMPANY V. STATE OF NEBRASKA.

FILED JANUARY 5, 1905. No. 13,996.

Decision Followed. *Oxnard Beet Sugar Co. v. State, ante,* p. 57, followed.

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

Charles F. Manderson, James E. Kelby, Frank H. Gaines and *Edward R. Duffie,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

OLDHAM, C.

This is a companion case with *Oxnard Beet Sugar Co. v. State, ante,* p. 57, alleging a claim for bounty under the same act. The petitions are similar, and a demurrer was sustained by the court below in each. In this court the cases were argued together; consequently, for the reasons stated in *Oxnard Beet Sugar Co. v. State, supra,* the judgment of the trial court should be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

GEORGE B. FRANCE V. WILLIAM HOHNBAUM ET AL.*

FILED JANUARY 5, 1905. No. 13,641.

1. **Homestead: LIENS: PRIORITIES.** Where a mortgage lien exists upon a tract of land claimed as a homestead, and the mortgage debt is paid with the proceeds arising from a loan secured by a new mortgage on the same land, the interest of the claimant in the land being less than $2,000 in value in excess of the original mortgage debt, a judgment of a county court, a transcript of which was filed in the office of the clerk of the district court while the old mortgage was in force, is not a lien on the premises superior to that created by the new mortgage.

2. ———: APPRAISEMENT. Where a creditor files a petition under the statute for the appointment of appraisers to set aside a homestead, it is not error to allow the homestead claimant to file an answer and to contest the question whether the value of the homestead exceeds the amount of the homestead exemption before appraisers are appointed. If the court in such case finds that the value does not exceed the exemption it is entirely proper to refuse to appoint appraisers.

ERROR to the district court for York county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

George B. France and *Meeker & Wray*, for plaintiff in error.

F. C. Power and *Gilbert Bros., contra.*

LETTON, C.

This is an error proceeding brought to review a judgment of the district court for York county refusing to appoint appraisers to set off the homestead of defendant in

* Rehearing denied. See opinion, p. 74, *post.*

error. The facts are as follows: On May 10, 1888, plaintiff in error recovered a judgment against defendant in error in the county court of York county, a transcript of which was filed in the office of the clerk of the district court for that county on the 12th of the same month. Executions were issued upon this judgment from time to time, but no levy made on account of no property being found, and the judgment was thus kept from becoming dormant. On August 6, 1903, an execution was issued on the judgment and was levied upon a 62-acre tract of land upon which the defendant in error resided as his homestead. Plaintiff in error then filed his petition in the district court under the provisions of section 6 of the homestead act (Ch. 36, Comp. St. 1903, Ann. St. 6205), praying for the appointment of appraisers to set aside the homestead interest of the execution debtor. Notice was duly given of the time and place of the hearing, and before the hearing defendant in error filed an answer to the petition. A motion was made to strike the answer from the files on the grounds that no answer is authorized in this proceeding, and that no trial should be had at this time, but the motion was overruled and exception taken.

It appears that before the judgment of plaintiff in error was obtained 22 acres of the 62-acre tract which was claimed as a homestead, had been mortgaged to one Holt, and that the remaining 40 acres had been mortgaged to one Marvel. For convenience we will consider the 22-acre tract and the 40-acre tract separately, though in fact they are contiguous and form one body of land on which defendant in error resides. On December 12, 1890, the Holt mortgage was foreclosed, plaintiff in error being a party to the proceedings; the court found due on the mortgage the sum of $925, with interest and costs; found the 22 acres to be of less value than $1,000; that it was a homestead, and that plaintiff in error's judgment was not a lien on the same. Soon after this decree was rendered this tract was conveyed to one Miltner by defendant in error. Miltner on the 19th day of September, 1891, ex-

ecuted a mortgage to one Bowen, who lived in Illinois, for the sum of $1,000, and then reconveyed the premises to defendant in error. The money thus borrowed from Bowen was used to pay off the Holt decree on September 28, 1891. On January 9, 1900, defendant in error together with his son, who owned a small tract of land adjoining this, borrowed $1,800 from one Hummell, who also resided in Illinois, giving a mortgage covering the 22 acres and the son's land also. This mortgage was recorded on January 11, 1900. A release of the mortgage given to Bowen was executed in Illinois on December 30, 1899, but the testimony shows it was not delivered until the debt was paid with part of the money derived from the Hummell loan of $1,800, defendant in error testifying that it took $1,100 of that money to pay off the Bowen mortgage. The $1,800 mortgage to Hummell, of which defendant in error owed $1,100, was found to be a lien on the land by the district court, and we do not see how any other conclusion was possible.

As to the 40-acre tract, in 1884, a mortgage loan was made to one Marvel by defendant in error on this part of the land. On June 4, 1896, this mortgage was foreclosed in an action to which plaintiff in error was a party, and the decree found due the plaintiff the sum of $800, with interest and costs; found premises to be a homestead of less value than $2,000, and found that plaintiff in error's judgment was not a lien on the same. On December 31, 1897, $550 was borrowed by defendant in error from Mr. Hummell, and this was used in paying off and satisfying the decree, which was satisfied of record January 8, 1898. A mortgage was given at the time of the loan to secure the payment of the debt, which was still unpaid at the time of the hearing.

From this statement it will be seen that at the time of the hearing there were valid liens existing against the land amounting to at least $1,660. A number of witnesses were examined as to the value of the premises. The trial court found the total value to be $3,100, and this finding

seems to be fair and just from the testimony. It is evident therefore that unless the making of a new mortgage to pay off a prior one divested the defendant in error of his homestead rights, no ground existed for the appointment of appraisers. It appears however that at no time were the premises free from a mortgage lien. A new one was created before the old was released. There was no time in which the lien of the judgment could interpose, if such a thing were possible at all, which we do not decide. The interest of the defendant in error has always been less than $2,000 in the premises, and there was nothing in existence upon which the plaintiff could levy his execution. The action of the court in refusing to appoint appraisers therefore was proper.

As to the assignment that the court erred in not striking the answer from the files and in trying the issue as to homestead before the appointment of appraisers, the statute requires the application to be made on a verified petition showing: (1) The fact that an execution has been levied on property which had been claimed as a homestead; (2) the name of the claimant; (3) that the value of the homestead exceeds the amount of the homestead exemption. A notice of the time and place of hearing is required to be served upon the claimant at least ten days before the hearing. At the hearing, upon proof of service and of the facts stated in the petition, the court shall appoint appraisers. It is necessary therefore for the creditor to prove at the hearing that the value of the homestead exceeds the amount of the homestead exemption. We see no reason why the claimant cannot contest the proof offered by the creditor, whether an answer is filed or not. While there is no provision made in the statute for the filing of an answer, the manner of procedure is within the discretion of the district court, and unless an abuse of this discretion is shown a reviewing court will not interfere. If appraisers had been appointed who had reported their finding to the court, there is no doubt that the homestead claimant might

have filed objections to their report and had a hearing upon the same before it was confirmed. But he was not obliged to wait until the report came in, unless he so desired, if the court was willing to grant him a hearing before the appraisers were sent out. The action of the court in this instance seems to have been fair and proper, and designed to save the unnecessary expense of making an appraisement.

We recommend 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.

The following opinion on motion for rehearing was filed September 20, 1905. *Rehearing denied:*

Homestead: LIENS: PRIORITIES. Where the extent of the homestead and the value of the claimant's interest therein are less than that allowed him by law, a mortgage placed thereon after the rendition of a judgment against such claimant, for the purpose of paying off a prior mortgage, will not be affected by such judgment.

BARNES, J.

The questions involved in this case were decided by an opinion written by Mr. Commissioner LETTON, *ante*, p. 70, where it was held that a certain judgment in favor of the plaintiff and against the defendants was not a lien on the defendants' homestead superior to a mortgage, the proceeds of which were used to pay off another mortgage which was executed and recorded prior to the time the judgment was obtained; and that the court could refuse to appoint appraisers to appraise the defendants' homestead, which was sought to be subjected to execution sale, where it clearly appeared that such homestead did

not exceed 160 acres in extent, and that the defendants' interest therein was less than $2,000. Plaintiff, having filed a motion for a rehearing, in his brief and on the oral argument contends that our decision conflicts with the rule announced in *Beach v. Reed,* 55 Neb. 605; *Horbach v. Smiley,* 54 Neb. 217, and *Brown v. Campbell,* 68 Neb. 103.

An examination shows that the question involved in *Beach v. Reed* was whether a decree of foreclosure should be reformed so as to include lands not embraced therein, and it was decided that a mortgagee who purchased real estate sold at judicial sale to satisfy the decree foreclosing his mortgage was not entitled to have the foreclosure decree and sheriff's deed reformed so as to include therein lands not adjudged by the foreclosure decree to be subject to the lien of the mortgage. Incidentally it was said in the opinion that a debtor's homestead exemption is limited in quantity to two contiguous lots in an incorporated city, town or village; if outside such corporation, 160 acres of land; and in either case in value to $2,000; and that a money judgment of the district court becomes a lien upon all of the lands of the debtor in the county, at least from the date of its rendition; and a mortgage executed upon such lands thereafter will not invest the mortgagee with a lien superior to the judgment for anything more than the debtor's homestead interest.

In *Horbach v. Smiley, supra,* it was held that under the homestead law of 1867 a judgment is a lien on the homestead, but that such lien cannot be enforced by execution so long as the premises are owned and occupied by a judgment debtor; but that the existing homestead act exempts from forced sale upon execution or attachment a homestead not exceeding in value $2,000; and a judgment, while the premises are impressed with the homestead character, is not a lien thereon, even after their sale and abandonment by the debtor; that under the present homestead law a judgment is a lien merely on

the debtor's *interest* in lands occupied as a homestead in excess of $2,000. While in *Brown v. Campbell, supra,* it was held that the head of a family has a homestead right of the value of $2,000 in 160 acres of land owned and occupied by him as a homestead, which is not the subject of fraudulent alienation; that a conveyance of such homestead right will not be set aside as having been made in fraud of creditors. It was further held that, if there was a surplus in excess of the sum of $2,000 within the homestead limits, a conveyance of such surplus can be set aside when made in fraud of creditors.

So it appears that the direct question involved in this controversy did not arise in any of the foregoing cases. On the other hand it is provided by section 1, chapter 36, Compiled Statutes, 1903 (Ann. St. 6200):

"A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, * * * shall be exempt from judgment liens and from execution or forced sale."

The effect of this section is to preserve to the head of a family a homestead, not exceeding 160 acres of land, or two contiguous lots in any incorporated city or village, not exceeding in value $2,000, clear and free of judgment liens, and all other liens and incumbrances, unless placed thereon by the joint act of the husband and wife. Construing this act it was held in *Hoy v. Anderson,* 39 Neb. 386, that the extent of a homestead is not to be determined from the fee simple value of the land, but from the value of the homestead claimant's interest therein. It appeared in that case that Anderson owned 160 acres of land in this state of the value of $2,800, upon which he resided with his family as a homestead; there was a valid

mortgage on the premises to secure the payment of 1,200; subsequently to the giving of the mortgage, but while the land was occupied as a homestead, two judgments were obtained against Anderson, transcripts of which were duly filed in the district court for the county in which the real estate was situated. On these facts, the court said:

"Applying the foregoing considerations to the case before us, it is clear that Anderson's interest in the land cannot be reached by an ordinary execution. The total value of the quarter section is but $2,800, and deducting therefrom $1,200, the amount of the mortgage, leaves Anderson's interest less than $2,000. It follows that the transcripted judgments are not liens upon the real estate. * * * To hold otherwise would be against the spirit, if not the very letter, of our homestead law."

It was further held in effect that, in case Anderson should convey the property to another, in that event the judgments could not be satisfied out of it because Anderson's grantee, taking the land in the then existing conditions, would hold it free and clear of judgment liens. In *Munson v. Carter,* 40 Neb. 417, it appeared that a homestead, which was exempt at and before the rendition of a judgment, was by mesne conveyances transferred from the judgment debtor to his wife. And it was held that the right of the wife to assert such homestead exemption was in no way affected by fraudulent intent with which either of the conveyances was given or received. In *Smith v. Neufeld,* 57 Neb. 660, this court held that one rightfully in the possession of a homestead can maintain an action for the removal of the apparent lien of a judgment therefrom, on the theory that such lien, though only apparent, is a cloud upon his title. In *Mundt v. Hagedorn,* 49 Neb. 409, it was decided that our homestead act exempts to those persons within its provisions a homestead not exceeding $2,000 in value over and above incumbrances, and that the exemption in such a case is determined, not from the value of the fee simple title, but from

the value of the claimant's interest in the premises. The foregoing decisions have been often approved and followed by us, and the principles announced therein have become a rule of property and the settled law of this state.

Applying the foregoing rules, if a debtor has a right, so long as his homestead interest is within the statutory limits, to transfer the homestead absolutely unincumbered by judgments that may be of record against him, he would have the right to execute mortgages on his homestead for the purpose of taking up and paying off prior existing mortgages which would be superior to any judgments against him, and the lien of such new mortgages would be in no way impaired thereby. The evidence in the case at bar clearly shows that the value of the defendants' homestead interests in the premises at no time since they purchased the property has approached the statutory limit; so, when the mortgages in question herein were executed thereon, they had a right to so incumber the homestead without regard to the plaintiff's judgment. Perhaps the reason of this rule, as heretofore stated, may not be entirely satisfactory to us, but the rule itself has been settled and established by such a long line of decisions that we do not feel at liberty at this time to change it. We conceive, however, that the principle on which these decisions rest is that the present homestead act expressly provides that a judgment shall not be a lien on the homestead of the judgment debtor; that is to say, it is not a lien on the land comprising such homestead so long as its extent is less than 160 acres of land, or two contiguous lots situated in an incorporated city or village, and his interest therein does not exceed the sum of $2,000. If a judgment is not a lien on the land embraced in the homestead of the judgment debtor, it, of course, is not a lien on his homestead interest therein.

From the statement of the facts in this case it appears that the mortgages which the plaintiff claims are now

subsequent and inferior to the lien of his judgment were executed and placed on record at a time when the defendants' interests in the homestead were less than $2,000, and at a time when no execution had been issued, and no attempt made to levy an execution upon the homestead. So there was no point of time when the plaintiff's judgment could or did become a lien on the land, and there never was any excess which could in any manner be impressed with such a lien. Such being the conditions when the execution in question herein was issued and levied, there was nothing upon which a lien could be impressed, and the trial court could in its discretion refuse to make the needless expense of appraising the interests of the defendants in the premises.

For the foregoing reasons, we are satisfied that our former opinion is right, and the plaintiff's motion for a rehearing is therefore

OVERRULED.

NATHAN B. METCALF, APPELLANT, V. NANCY J. METCALF, APPELLEE.

FILED JANUARY 5, 1905. No. 13,686.

1. Alimony. In awarding alimony the court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came and how far, if at all, the wife contributed thereto.
2. Evidence examined by this criterion, and *held* that the amount of alimony awarded is not excessive.

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

A. D. Ranney and *Tibbets Bros. & Morey,* for appellant.

John C. Stevens, contra.

LETTON, C.

This is an action for divorce brought by Nathan B. Metcalf against Nancy J. Metcalf in the district court for Webster county. A cross-petition was filed, praying for a divorce on the ground of cruelty. A divorce was granted the husband on account of desertion, but an allowance of $500 was made to the wife as alimony. Appellant contends that the alimony allowed was excessive. The parties were married in 1877, in Iowa, and resided there until the spring of 1893, when they moved to Nebraska. When they were married they had very little property. The amount contributed by each to the common fund is somewhat in dispute, but the evidence shows that the husband had saved from $400 to $750, and that the wife had two cows, two pigs, feather beds, poultry and household furniture. No children were born to them. The plaintiff at his marriage invested all his money in a farm in Iowa, and, as the result of their joint labor and of the fortunate results of his investments in Iowa land, at the time he left Iowa he sold his property there and realized somewhere from $7,500 to $10,000 in money, the testimony being conflicting as to the exact amount. He paid $6,500 for a farm in Webster county, Nebraska, to which the family moved, and he testifies he had about $500 left, while the wife testifies that they had figured it up before leaving Iowa, and had $10,000 to bring to Nebraska. When they moved to Nebraska the wife's mother and sister came to live with them, and during the summer of 1893 dissensions occurred by reason of their presence in the home. In November, 1893, the plaintiff accused his mother-in-law of taking $200 in money which he claims he had brought to the house from the bank the day before. This she denied. He claims she struck him during the controversy, while this is contradicted by his wife who was present at the time. At all events, the plaintiff became so dissatisfied with her presence in the home that he procured a notice to quit to be served upon

her. She then left, but her daughter, defendant herein, insisted upon leaving if she did, and left with her. From that time the parties have lived apart. At the time of this separation a written contract was entered into between them, whereby they agreed to make a division of property, "particularly the real estate," in which contract the plaintiff agreed to pay his wife $1,500, and she agreed to make him a deed conveying her interest in the land. Plaintiff failing to pay the amount agreed upon by the contract, an action was brought against him to recover the amount, whereupon he sought to reform the same so as to show that the sum of money specified should be in full of all claims or demands on his property and for full release of all defendant's dower rights. By the decree the court found the contract to be as alleged by the wife; that it ought not to be reformed, and that the contract had no reference to any other property but the real estate described; and required the wife to deposit a deed of her interest in the property with the clerk of the court for the plaintiff, and thereupon execution should issue for the amount due under the contract. This judgment was satisfied; but, if a deed was ever deposited, it was lost or mislaid so that the plaintiff's title to the real estate was apparently clouded or burdened by the dower right of the defendant. This action for divorce was begun in 1902. At the trial the court found for the plaintiff, but awarded the wife $500 alimony, in addition to the $1,500 which had been paid to her under the contract. Plaintiff's contention is that this $500 additional alimony is excessive and unjust, and he seeks to have that portion of the decree reversed or modified.

At the time of the trial it appeared that the farm in Webster county had depreciated in value from the time of its purchase; that a large barn upon the farm had been burned; that the house had been poorly taken care of and needed repair, and that the forest and fruit trees had been neglected and destroyed; that the farm would not sell for more than $5,000, and that there was a mort-

gage upon the same for $700. It was also shown that the plaintiff had virtually no other property. It further appeared that between the time that his wife left him and the time of the trial he had purchased a gambling room in Hastings and had lost $600 which he invested therein. The evidence further shows that, during the time that the parties lived in Iowa together, the wife had faithfully performed that portion of the work upon a farm which usually falls to the lot of the wife; that she worked hard herself so as to avoid the necessity of hiring help, and had aided in the accumulation of the property. There seems to have been no difference or dispute between them until they made the unfortunate move to Nebraska. It appears also that the defendant is weak and sickly, and is unable to earn her living as a result of her trouble and hard work.

As to awarding of alimony the rule is that the court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came and how far, if at all, the wife contributed thereto. Taking the testimony as to the value of the entire estate, it appears that at the time of the trial the value of the husband's net interest in the farm was $4,000 or $4,300; that $1,500 had been paid to the wife previously, making a total of at least $5,500 to $5,700 which the parties would have had at that time if no division had been previously made. Of this sum the district court awarded the wife $2,000, leaving the husband from $3,500 to $3,700 in value. This takes no account of the additional property which seems to have been squandered by the husband during the separation. If we consider the result of the partnership labors as of the time that the separation was had in 1893, according to the plaintiff's own testimony he was worth then over $7,000. Under the circumstances in this case, where the property was almost entirely the result of the joint labor, care and investments of both parties continued over a

period of 16 years before the separation, and considering the condition and situation of both parties, we do not think this allowance was inequitable or unjust. The district court had all the parties before it, and, while the testimony in the case is largely devoted to the issues as to the right to a divorce, still that court was better fitted to weigh the value of the evidence as to the property and situation of the parties than a reviewing court is. This is a trial *de novo,* but we cannot refrain in such a case as this in giving some regard to the conclusions of the district court.

It is contended that the contract by which the plaintiff paid the defendant $1,500 was to be a full and complete adjustment of their property interests, and that the court should not increase the amount that the parties agreed upon. That question was submitted to a court in an action where the plaintiff sought to have the contract reformed to that end, and the court specially found against him upon that issue. That decision is final between the parties. The position taken, therefore, cannot be maintained in this action, whatever might be the views of this court as to the true intention of the contract.

For these reasons, we recommend 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.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. FRED ANDERSON, ADMINISTRATOR.

FILED JANUARY 5, 1905. No. 12,180.

1. **Fireman:** LICENSEE. In the absence of any municipal ordinance or statute changing the rule, a fireman who entered upon property without any special authority or invitation of the owner is a bare licensee, made such by public necessity and takes the risk of the premises as he finds them.

2. ———: ELECTRIC WIRES: INJURY. A member of a truck company, who assists to hoist a ladder with metallic corners against an electric light wire, cannot, in the absence of invitation or permission of the owner, complain that the wires were not properly insulated and that he was injured because of such lack of insulation.

3. **Injury:** APPLIANCES. A claim for injury by an electric shock cannot be sustained by a mere hypothetical claim that such shock was only rendered possible by a ground current negligently permitted at some other point in the circuit by defendant, it not appearing that any usual precautions to prevent such "grounding" had been omitted or that defendant had or under the circumstances ought to have had knowledge of it.

4. **City Ordinance:** DUTY OF ELECTRIC COMPANY. Section 1 of ordinance numbered 4,363 of the city of Omaha, *held* to impose no duty on the defendant light company except to furnish a competent lineman to act under the city authorities' direction in disconnecting wires.

5. **Electric Companies:** NOT INSURERS. The furnishing of electric currents for power and lighting purposes is a recognized business which must be conducted with due regard to the safety of both employees and the public in view of the dangerous character of such currents, but their furnishers are not insurers against all dangers from them. Blameless casualties may arise from their operation.

6. ———: AGENT: ORDINANCE. A lineman of the electric light company, while acting at fires under the direction of the city authorities in pursuance of the ordinance before mentioned, cannot render the company liable by his words or acts in the absence of special authority.

7. **Pleading and Proof:** NEGLIGENCE. *Held*, That in the present case there is neither allegation nor proof that defendant, after knowledge of the dangerous position of deceased, negligently omitted to turn off its electric currents.

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

W. W. Morsman, for plaintiff in error.

James H. Van Dusen, contra.

HASTINGS, C.

In this case the intestate of the plaintiff died August 9, 1899, as a result of an electric shock received by him while serving as a fireman in lowering a truck ladder by means of cranks. The ladder was so constructed with straps along its side that it presented metal corners capable of cutting the insulation on defendant's wires, and it had a metal connection from the top to the bottom capable of carrying down electric currents. The wooden spokes of the wheels of the truck on the platform of which the ladder was resting constituted an insulator, and the firemen in wet clothing holding the cranks by which the ladder was being lowered, and standing with wet feet upon wet ground, served to complete the ground connection, and a current down the ladder, through the cranks, and through the workmen to the ground was the result. The fire had occurred on the south side of Howard street, between Eleventh and Twelfth streets, in a building running back to the alley; 40 feet above the alley the defendant company had secured the right to maintain its conducting wires and was maintaining them there to the number of 11. The wires were carried on what is known as an "arch," a piece of timber resting upon poles at each side of the alley. The "arch" crossed the alley practically on a line with the west wall of the burning building. Of the 11 wires, numbering them from the south, the first, second and third were not touched by the ladder; the fourth and fifth constituted what is called "Opera House Circuit," and when in use carried a current of 2,000 volts; the sixth was one side of a street arc-light circuit,

the other side passing back by another route; wires 7, 8 and 9 belonged to a secondary circuit used for supplying incandescent lights, and intended to carry a maximum current of 216 volts; the other two wires were used for supplying power, and when in operation carried a current of about 500 volts, according to the testimony. One witness says that the insulating material on the wires was apparently ragged, but no one claims that there was, before contact with the ladder, any uninsulated wire at the places of contact. The fire occurred about, or shortly after, five o'clock on August 9. A hose was laid from a hydrant near the intersection of the alley with the west side of Twelfth street, along the alley to the rear of the burning building. The truck, with this ladder, entered the alley at Eleventh street and came west until opposite the north end of the burning building. The truck stopped under the wires with the front toward the west and on the north side, so that by the slope of the alley toward its center line, the south side of it stood a little lower than the north. It carried an extension ladder which could be raised about 75 feet and which extended back from its base on the truck about 40 feet. It was raised by means of cranks and machinery attached to the front axletree of the truck. The machinery comprised a turntable, by which the ladder, when raised, might be turned through the use of the crank to face any desired direction. The ladder was of 700 or 800 pounds weight, and 32 inches wide. The "barrels" of the ladder were bound with iron straps, making sharp iron angles on the outside corners of the "barrels." It was old, and would sway from side to side, and spring up and down in the process of raising. Iron straps on its side were connected from the top to the bottom and with the machinery to which the cranks were attached. The truck also carried a portable ladder about 54 feet long, and others of various lengths from 18 to 35 feet, and a pair of insulated shears for cutting electric wires. The city electrician, Schurig, was present when the truck came into position.

When the ladder was just commencing to be raised, the electrician was standing about 10 or 15 feet in front of the truck. Lieutenant Sullivan, now captain, in control of the truck, asked if the wires ought to be cut. The electrician replied that they should and that he would cut them if the lieutenant would clear the alley. The deceased did not, apparently, hear this. The upper end of the ladder came up against two wires, and Mr. White, one of the truckmen, went up and lifted these two wires off and placed them—number 6 to the south and number 7 to the north of the ladder. He hesitated about doing this, and was told by Schurig that the wires on the north were low-pressure ones, and that on the south was the arc-light circuit, and, if so, the truckmen would be all right; that the north one was harmless, and the south one dead at that time of day. The ladder then rested between these wires numbered 6 and 7, where it remained until finally removed. It was raised to a perpendicular position, and in the process approached the arch which was on a line with the west wall of the building. When it reached this perpendicular position it was some six or seven feet east from the arch. On the arch the wires were fastened 14 inches apart. It then extended four or five feet above the wires and was turned about, facing toward the south, and was permitted to incline south toward the burning building. The upper end remained five or six feet away from the north wall of the building. The ladder was then extended 25 feet more above the wires, and remained so until the fire was extingushed and it was ordered taken down. It was then once more drawn to a perpendicular position, brought by the use of the turntable so that the rungs were once more at right angles with the alley and with the wires, and by means of the cranks the men were proceeding to let it down between the same wires. They had not made to exceed two turns of the cranks, which would let the ladder move toward the east along the wires about two feet, when it caught upon the arc-light circuit wire numbered 6, on the south side. This prevented its

coming further. Livingston, a fireman, started up the ladder to loosen it, declining to take officer Sullivan's gloves because they were wet. Defendant's lineman, Brinkman, who had come to the fire and was standing by, remarked, "That wire is dead" or "Those wires are dead." The ladder was then held fast on the south side by this wire numbered 6, and Livingston was unable to release it until it was raised nearly two feet. This was done, and he released the wire without shock. The ladder was not then in contact with wire numbered 5. Livingston went down, and with the other men proceeded to lower the ladder, making five or six revolutions of the cranks, when the shock was received by which four of the men were killed. The shock did not produce instant death or throw the men from the cranks, but rendered them incapable of letting go and held them until life was so nearly extinct that their bodies fell to the ground. The men were wet both by water and perspiration, and they were standing in pools of water and mud. Farmer and Livingston, who also had hold of the cranks, received only slight shocks. All the evidence goes to show that at the time of the electric discharge the ladder was in contact with wires 6 and 7 only; such is the testimony of the city electrician. It is hardly possible that there can be any error about this, for the ladder was left standing some time in the position in which it was when the shock came, and was not taken down until the defendant's lineman, Brinkman, had telephoned to the power station and had the currents through this alley all cut off.

The foregoing statement is drawn for the most part from the brief filed on behalf of the defendant company. Plaintiff's counsel, as to defendant's statement of facts in the brief filed, says: "I desire to state that it is in the main a fair statement, although I would not be willing to admit that all propositions therein stated were established by the undisputed testimony." The only important matter of fact as to which any dispute is found is concerning the insulation of the wires. The legal duty of

defendant, as fixing the question of its negligence, is the main subject of dispute, together with the inferences to be drawn from the facts, and especially the extent to which the fact of a terrible casualty should be considered as establishing negligence on the principle of *res ipsa loquitur*.

The defendant claims that it owed no duty whatever to the fireman Hopper in reference to its lines. It is conceded that these firemen in pushing their ladder against defendant's wires were not trespassers, because they were acting in public right and were entitled to invade the defendant's property for the purpose of securing public protection against fire; but it is claimed that they were bare licensees who pushed their ladder against defendant's wires, without permission, for their own purpose, and at their own risk.

It is also urged that no defect of insulation, which was in any degree the company's fault, is shown to have had anything to do with the accident. The defendant admits that one witness, Rudousky, testified that the insulation on these wires near this place was ragged and hung in strings; but he did not testify, nor did any one else, that it was so at any spot where the ladder came in contact before its metal corners scraped the wires. Plaintiff's counsel, evidently, does not rely upon defects of insulation as sustaining the claim of defendant's negligence.

The averments of negligence in the petition, denied by the answer, are stated in the brief of the defendant company as follows:

"1. That the defendant negligently and in disregard of its duty did not keep its wires at the scene of said fire securely insulated, so as to prevent electricity escaping therefrom to objects that should come in contact with them. 2. That the defendant negligently and carelessly allowed the wires aforesaid to become grounded, or so connected with the earth as to allow the current of electricity carried thereby to escape into the earth, and failed to so construct its system of wires as to prevent connec-

tion with the earth, which would carry the current of electricity to the earth. 3. That the defendant negligently and carelessly failed at said time to disconnect the wires in said alley, so as to prevent them becoming a menace to the lives of the firemen, and plaintiff's intestate. 4. That the defendant negligently and carelessly failed to notify plaintiff's intestate and the other firemen that the said wires, or any of them, were grounded or connected with the earth, so as to carry the current of electricity to the earth, and thereby render them dangerous to life. 5. That the defendant failed and neglected to notify the said Charles A. Hopper and others that the said wires were charged with electricity, which would be dangerous to the lives of persons coming in contact with them. 6. That the defendant negligently and carelessly failed to keep its wires so insulated and protected that the said Charles A. Hopper and others would not be injured as a result of coming in contact with them. 7. That the lineman in the employ of the defendant, when the ladder was about to be lowered to the truck, notified the firemen and Charles A. Hopper that the wires upon the poles in the alley were dead wires, and that it was not until after such notification that the firemen and said Hopper commenced to lower the ladder by means of the machinery upon said truck."

This summary is acknowledged by plaintiff's counsel to be correct except for one omission. Plaintiff says that the petition also charges that it was the defendant's duty under the city ordinance to have its lineman at the scene of the fire for the purpose of removing "deadly wires," so that plaintiff's intestate would not be injured by them, but that the defendant negligently failed to perform such duty to Hopper's injury. The summary therefore, with this addition, may be taken to fairly represent the case which the plaintiff seeks to make. It is that defendant's wires were not properly insulated; were negligently permitted to become "grounded"; were not disconnected at the fire, so as to prevent their being a menace to life;

that no notice was given as to the grounding; that no notice was given of danger from the wires; that deceased was told by defendant's lineman the wires were "dead," and after such notification the ladder was lowered upon them; and that defendant failed in its duty under the ordinance "to have its men on the ground for the purpose of removing deadly wires, so that plaintiff's intestate would not be injured thereby." Plaintiff's counsel is still, he says, insisting on each of these claims, but his brief lays no stress upon the matters of insulation and "grounding." The action of the defendant's lineman and the failure to discharge its duty under the ordinance constitute, apparently, the negligence relied upon. The matter of "grounding," that is, the claim that no dangerous current would have come down the ladder if there had not been permitted to exist some other connection with the ground to complete the circuit, and that the permitting of such other connection was negligence, is not argued, except by reference to another case. This other "grounding" is entirely hypothetical. If it existed it was without defendant's knowledge, then, or since, so far as the evidence shows, and has never been located. If any liability arose on its account it would be on the theory that an electric current is like a dangerous animal for whose restraint the keeper is absolutely liable. Some expressions drawing such an analogy are quoted by plaintiff from various decisions, but no holding of such a liability is cited.

As above suggested, the defendant declares that it owed no duty to these firemen whatever; that such right of entry as they had upon defendant's wires they had against the wires and not against the owner; and that, by way of preparation for such invasion, the owner was not bound to insulate, nor to do anything except refrain from resistance and from establishing anything in the nature of a trap, to the firemen's injury; that the latter were bare licensees, and that the duty of the company is fully discharged if it permits them without resistance to go upon

its premises. "The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration." 1 Cooley, Torts (2d ed.), *313.

Defendant cites *Omaha & R. V. R. Co. v. Martin,* 14 Neb. 295, a case in which one driving where the public had been accustomed to pass on the company's premises fell into a hole, and was held to have no right of recovery against the railroad company who dug it, because the company had not invited him to come on its premises and had assumed no responsibility for his safety there.

In *Rcdigan v. Boston & M. R. Co.,* 155 Mass. 44, it is held that a bare licensee has some rights; the landowner may not shoot him, and may not run him down without proper warning. The landowner may be responsible if he arranges a trap expecting the licensee to fall in, but as a general rule the latter comes at his own risk and must take the premises as he finds them.

In *Richards v. Connell,* 45 Neb. 467, the owner of a pond of a dangerous depth is held not required to fence it or to otherwise insure the safety of strangers, old or young, who may come to the premises, not by invitation, expressed or implied, but for purposes of amusement or from motives of curiosity. In that case this court say that liability of the owner for injury incurred on his premises results in three classes of cases: 1. Where the owner has made or permitted some construction dangerously near to a public highway, so as to injure one in the rightful use thereof. 2. Has left negligently exposed dangerous machinery likely to attract children and resulting in their injury, as in the turntable cases, which constitute a recognized exception to the rule. 3. Where the injured party was present by the invitation, expressed or implied, of the owner.

In *Hamilton v. Minneapolis Desk Mfg. Co.,* 78 Minn. 3, 80 N. W. 693, where a fireman fell through an uncovered elevator shaft, it was held that he could recover

no damage for his injury, and the rule is stated as follows:

"By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building."

In *Woodruff v. Bowen,* 136 Ind. 431, 34 N. E. 1113, in which the plaintiff's intestate and ten other firemen were killed by the falling of a roof on which they were standing in discharge of their duty, negligence in constructing the building and knowledge of its unsafe condition on the part of the owner were alleged. Recovery was refused. The court say:

"We think that the authorities fully establish the rule that the licenser owes to the mere licensee no duty except that of abstaining from any positive wrongful act which may result in his injury, and that the licensee takes all risk as to the safe condition of the premises upon which he enters. To the question now under discussion, decisions based upon expressed statutes or ordinances, as well as decisions based upon the fact that the injured party entered the premises under an invitation, express or implied, are not applicable. We are of the opinion that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers, who, in a contingency, may enter the same under a license conferred by law."

A similar holding is found in *Faris v. Hoberg,* 134 Ind. 269, 33 N. E. 1028, where the plaintiff entered a store from the alley at the back door and fell into an open elevator shaft; the visitor was held to be a mere licensee and unable to recover, because there was no duty on the

owner's part to keep the premises safe for such an intrusion.

In *Augusta R. Co. v. Andrews*, 89 Ga. 653, a lineman for a telephone company in doing his work placed a telephone wire above and across a fire-alarm wire, and for this purpose ascended the pole of the fire-alarm system, and while on the pole, in passing the telephone wire over the fire-alarm wire, he received an electric shock whch caused him to fall; he claimed that a street railway company had been negligent in constructing a feed wire so that it came in contact with the fire-alarm wire and charged it with a dangerous current, and that this negligence was the sole cause of his injury. It was held that the street railway company owed him no duty and was not liable for any injuries that happened to him while, without permission, he was a trespasser upon the pole of the fire-alarm system.

Hector v. Boston Electric Light Co., 161 Mass. 558, also on rehearing, 174 Mass. 212, is a case wherein the electric company and a telephone company were jointly using a standard on the roof of a building in Boston to support their wires; they also maintained their wires over the roof of another building, but not jointly, their wires there being in separate groups. Plaintiff, a lineman of the telephone company, went on the second building by permission of the owners. While on this roof he went to the electric company's wires to look down at the other building, and came in contact with one of that company's wires from which the insulation was gone, and he received an injury. It was held that the light company owed no duty to the plaintiff to have these wires insulated at that point; that he had no authority from the light company to approach its wires on the second building, and that if he did so and received an injury there could be no recovery.

In *McCaughna v. Owosso & Corunna Electric Co.*, 129 Mich. 406, 89 N. W. 73, one who was passing over private grounds where the public sometimes went, but in the face of a warning from the owners not to do so, was held to

acquire no right of action for a fatal shock from a guy wire charged with electricity from defendant's plant.

The controlling precedent is said to be *Hargreaves v. Deacon,* 25 Mich. 1, in which recovery was denied for the death of a child of tender years, who fell into an uncovered cistern, not adjoining a highway, and which had not been left uncovered with design or expectation to harm anyone.

The cases seem to establish that, in the absence of any statute or ordinance prescribing a duty toward firemen on the part of the owner of premises, the latter is not liable for anything short of a designed injury. The trial court, however, seems to have instructed the jury on the theory that there was a duty to insulate for the protection of firemen, merely as such, and that there was evidence of this duty having been unperformed. We are constrained to think that under the circumstances the firemen had no right to rely upon any insulation, and that there is no sufficient evidence that a failure to properly insulate defendant's wires had anything to do with causing this injury. The trial court instructed as to this matter as follows:

"I further instruct you that those who employ, in the prosecution of their business, a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others as the emergency would reasonably seem to require, and where wires of an electric company extend along, over and above the streets and alleys of a city, carrying a highly dangerous current of electricity, the law requires the exercise of care, skill and caution commensurate with danger to be apprehended, in the construction, inspection and repair of the wires, so as to keep them harmless at places where persons are liable to come in contact with them."

By the 9th instruction the jury were told that if they thought that a reasonable degree of care and skill required defendant to keep all its wires securely insulated and keep them from ground connections, then a failure to

exercise such caution would be negligence and render defendant liable, and that whether or not such care had been exercised by the defendant was a question of fact for the jury's decision.

The 10th instruction was in these words:

"The evidence shows that Hopper at the time he lost his life was engaged at work in this alley, where he had a right to be, in pursuance of duty under his employment by the city of Omaha as a public fireman. You are instructed that it was therefore the duty of the defendant company to use and exercise care, skill and caution commensurate with the danger to be apprehended, as explained in these instructions, in the insulation of its wires running over and along the said alley, and in the transmission of the currents of electricity on said wires, at such places as the deceased in the proper discharge of his said duties might come in contact therewith."

No attempt is made on the part of the plaintiff to sustain this portion of the case. No authority is given for throwing on the company an absolute duty to so insulate its wires as to resist attacks, such as are shown in this case, nor for a like duty as to preventing ground connections. It is not thought that while operating its lines the defendant company was an insurer to either firemen or others that the insulation of its wires could not be penetrated by the edges of this ladder. A jury ought not to be permitted to find such a duty, as a matter of fact, from the evidence in this case.

It is urged, however, that there was a duty resting upon the defendant at the time of this accident to "disconnect and remove any wires or cables which might become a menace to life and property." Sections 53 and 131 of the city charter, as then existing, are cited as giving the city council general authority to make police regulations for the welfare, health, safety and security of the city, and to pass proper ordinances therefor. Special authority was given to regulate and provide for street lighting, electric power or other apparatus, and to regu-

late electric wires, poles and the placing of wires thereon, or to require their removal from public grounds, streets or alleys. March 1, 1898, the following ordinance was adopted:

"Section 1. That all corporations, companies and individuals owning and operating overhead wires shall in time of fire send one or more linemen to the scene of fire, who shall report to the chief of the fire department or the city electrician, and they shall disconnect and remove any wires or cables which may become a menace to life and property."

It is claimed on behalf of the plaintiff that under this ordinance it was the defendant's duty to have a lineman at the fire and to decide at its peril what wires were a menace to life and property, and if any were found to be so to remove them. The defendant on the other hand says that the only duty imposed upon the company by this ordinance is to furnish a lineman, and at this fire one was present; the defendant asserts that the provision for the lineman to report for duty to the chief of the fire department or to the city electrician, and that "they shall disconnect" any unsafe wires, makes the lineman a mere subordinate whom the light company must furnish to act under the orders of the chief of the fire department or the city electrician. Defendant says that it is obvious that the general control at a fire must be in the hands of the city authorities; that it is plain that the ordinance intended to confer no authority upon the defendant as to what wires should be removed or disconnected, and that it therefore leaves the defendant no responsibility. It seems that prior to this ordinance the city had its own fire-alarm system and had linemen in its service, who were attached to the fire companies to attend fires and take care of wires; that the fire-alarm service was turned over to the telephone company, and by this ordinance the electric company was required to furnish the linemen. It is urged that the city retained the same control over them which it had previously held over those employed by itself.

Counsel for plaintiff says that this ordinance is a remedial one and is to be liberally construed so as to remedy the mischief which existed. This may be granted, but what is the michief to be remedied? The firemen have the right to go upon premises and take such measures as they find necessary for the purpose of preventing or extinguishing fires, and no citizen has any authority to resist any action which they may take. They are not, however, presumably skilled in the handling of electric wires. The defendant's lineman is presumably able to make connections and disconnections without risk to himself or others. It seems rational to conclude that he is required for that purpose, and that this police control of emergencies and power to direct action as to wires must remain with the city authorities, and that they are not under obligations to accept any advice, orders or instructions from these linemen who are required to report to the fire chief or city electrician.

Plaintiff claims that the pronoun "they" as used in this ordinance refers to the linemen. Doubtless it refers to the linemen together with the city electrician and chief of the fire department, as the case may be. The disconnection must be, as above stated, in the control of the city. It is apparently intended to be carried out by the linemen. It may be granted that, if the absolute duty to remove all wires dangerous to life and property rested upon the defendant, the evidence in this case shows conclusively such duty was not performed. The wires were not removed, and the death of four firemen from contact of their ladder with these wires resulted. With the contention of counsel, however, that the defendant was in such control of the management of the electric wires in connection with the raising of this ladder on the part of the firemen as to cast upon it any such absolute liability, it is not possible to agree. The ordinance cannot be construed to create such a liability. We do not think a violation of it by defendant was shown.

It is contended on plaintiff's behalf that there is a

cause of action against the defendant arising out of the statement of defendant's lineman made as Livingston was ascending the ladder to release it when caught against wire numbered 6, the arc-light wire, "That wire is dead," or "Those wires are dead." It is claimed that Brinkman was acting as a servant of the company; that his words were an invitation to continue lowering the ladder between the wires, and render defendant liable for the consequences. It is claimed on the other hand by the defendant, with extensive authority, that Brinkman in acting as a lineman at that fire was acting, not on behalf of defendant, but as a lineman for the city; that responsibility for the acts of a servant depends upon authority over him; that the defendant was compelled to furnish linemen, but had no authority or control over them and was no more responsible for what he said than for how he acted.

Western Union Telegraph Co. v. Mullins, 44 Neb. 732, is cited for the following passage:

"It is familiar law that a master is not liable for the acts of his servants unless those acts have been done in the line of the servant's duty and in furtherance of the master's business, or, as sometimes expressed, the acts must be within the servant's apparent scope of employment."

In that case misinformation as to the relative location of Glenwood Springs, Colorado, and Seattle, Washington, by the telegraph company's agent was held to give no right of recovery, although it was in connection with the delivery of a message and the misinformation caused the plaintiff considerable expense. The telegraph company's clerk was held to have no employment warranting him in giving to travelers such information on behalf of the company.

In *National Fire Ins. Co. v. Denver Consolidated Electric Co.,* 16 Colo. App. 86, 63 Pac. 949, where the owner of a building had been misled to his prejudice by misstatements that there was no danger to a building from the

wiring, he was held to have no right of action against the company, the servant having no authority to advise outside of the particular adjustment he was sent to make.

In *Coughlan v. City of Cambridge*, 166 Mass. 268, the city was held liable for an injury to an employee engaged in working on a gravel train which had been furnished under contract, with its equipment fully manned, to the city by a railway company; it was held that the negligence by which plaintiff was injured was negligence of the city. "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." To this last proposition four other Massachusetts and one English case are cited.

Miller v. Minnesota & N. W. R. Co., 76 Ia. 655, 39 N. W. 188, and *Hitte v. Republican V. R. Co.*, 19 Neb. 620, are cited to the same proposition. In the last named case suit was brought for the killing of plaintiff's intestate by a train on defendant's road, but it was shown that, at the time, the road was in process of construction, and the entire work, including the management of the train which did the injury, was under the control of the contractor, and the train and its crew were furnished to the contractor by the railroad company to advance the work. It was held that there could be no recovery. "In the case 'it appeared' that Fitzgerald was clearly an independent contractor. He had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him, and if the engineer and fireman of the train which did the damage were borne upon the pay rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, * * * doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train * * * was not being run by nor under the control or management of the defendant company, and that the defendant is not bound to respond to any damage, if any,

suffered through or by reason of negligence of the engineer, conductor or other persons in charge of the said train."

It appears in the present case that the city electrician was present and that he had, before any statement by Brinkman, told the lieutenant in charge of the truck company that one of the wires against which the ladder was being pressed was dead at that time of day, and that the other was a low-pressure one. Brinkman's assurance was simply added to his, and the action of Livingston in going up and loosening the ladder was already in progress when Brinkman made this remark, "That wire is dead," or "Those wires are dead." White had previously gone up and safely lifted both of these wires out from between the "barrels" at the head of the ladder. The work which was then under way was successfully accomplished on the part of the fireman who, with his bare hands, picked up this wire numbered 6. It is true that he was standing on a rung of the ladder and not upon wet and muddy earth. It must be conceded that if the defendant had an absolute duty to perform in the removal of these wires and the taking away of any which was a menace to life and property, the lineman sent to perform that duty on defendant's behalf would be acting for defendant, and his negligence would be the company's. But, as above stated, we do not think that any such absolute duty can be claimed to result either from the general doctrines of the law or from this ordinance of the city.

A large part of plaintiff's brief is devoted to the proposition that the defendant is chargeable with knowing of the deceased's dangerous position, and with almost, if not quite, criminal negligence in continuing to send its current through these wires notwithstanding such knowledge. We have been unable to find in the petition an allegation of negligence in this particular. It is true that the third allegation of negligence is that the defendant failed to disconnect the wires in said alley, so as to prevent them becoming a menace to lives and the firemen and plaintiff's

intestate, but this cannot be considered an allegation of failure to turn off the current after learning the position of the firemen. The plain intention of the pleader was to complain of the inaction of the linemen who were present at the fire. They, however, had no more knowledge than had the city electrician that there was any occasion for turning off the current. The evidence seems to show that, for some unexplained cause, a most surprisingly severe shock came from one of the low-pressure wires which the linemen, like the city electrician, supposed was harmless. There is no evidence for the support of this claim of neglect to exercise due care after the firemen were known to be in danger, except the fact that the firemen are dead and that it was undoubtdly an electric shock which killed them. *"Res ipsa loquitur,"* as counsel says. But it is only when defendant is under an absolute duty to prevent results that their appearance shows negligence. Black's Law Dictionary, *sub voce.*

It is not necessary in this instance to pass upon the defendant's contention that there must be some contractual relation, actual or implied, between the injured party and the person whose negligence is asserted in order to create a cause of action by a mere failure to perform. In other words, there must be a legal duty. If the injury to this fireman had arisen when he was engaged merely in working upon the surface of the street instead of raising a ladder in the air to touch these wires, another question would be presented. The defendant was only authorized to make such use of the alley as would not interfere with its use as a highway. It must put no dangerous constructions near enough to the highway to imperil those rightfully passing. Danger to firemen pushing a metallic bound ladder against the wires, it had no duty to provide against, except by furnishing a lineman to disconnect them if deemed necessary by those in charge of the fire extinguishing operations.

In the case of *Mitchell v. Raleigh Electric Co.*, 129 N. Car. 166, 85 Am. St. Rep. 735, it was held that, where a

telephone company and a lighting company jointly occupied the streets, such joint occupancy gave enough of relationship between the parties so that a telephone lineman who was injured because of defective insulation in the lighting company's wire had a right of action. But this case is clearly distinguishable from that of a fireman who invades the lighting company's wires with a ladder likely to cut the insulation on them, and who can claim no right at the wires except to go there without resistance from the defendant. The fireman's rights were wholly against the wires and not against the owner. The owner was without knowledge of his intention to use the ladder, and was under no obligation to render its use safe or to attempt to do so. If the city requires better provisions for the safety of its firemen from these dangerous wires, it is entirely competent for it to so provide by ordinance. In the present case it seems impossible to charge any failure of legal duty against the defendant upon the record made here. Of course, in such case there is no need to discuss any question of contributory negligence.

A careful consideration of the record and each of the briefs of parties, together with the brief for defendant in error in the case of Bendsen against the same lighting company, which is cited by plaintiff's counsel, compels the conclusion that no duty to insulate for the protection of these firemen rested upon defendant at common law or by the ordinance. In the *Bendsen* case counsel urge that the defendant company, with its wires, is itself only a licensee in the alley, and had not the rights of an ordinary property owner in these wires, which the city allows it to put up. Doubtless the city has the right to prescribe the terms on which they may be maintained. When those terms are complied with, however, the property of the lighting company has all the incidents of other property, except as those terms modify it. No modification except the compulsory attendance at fires of a lineman has been pointed out. It would seem that the defendant, as the

owner of the wires, maintaining them at the required distance above the alley, had the same rights in them as the owner of a building would have in it, and that firemen would take the risk in pushing their ladder against the wires, as they would in going against a building. The requirement to send a lineman to disconnect wires does not seem sufficient to change the rule. It seems to give no authority and, consequently, to impose no responsibility on the defendant. If the last proposition is true, then the lineman, Brinkman, did not make his remark as to the wire being dead in his employment for defendant, but while acting for the city.

It is recommended that the judgment of the district court be reversed and the cause remanded.

KIRKPATRICK and LOBINGIER, 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.

STATE OF NEBRASKA V. STEPHEN W. TANNER.

FILED JANUARY 18, 1905. No. 13,706.

1. **Indemnity School Lands:** CONGRESSIONAL GRANT. The act of congress approved March 3, 1893, 27 U. S. Statutes at Large, ch. 200, p. 555, grants to the state such portions of the lands embraced within the abandoned military reservation therein named, out of the odd-numbered sections, when surveyed, as indemnity school lands as shall be selected within one year after the survey and the filing of the plats thereof, and accepted in full satisfaction of the state's claim for a like number of acres lost in sections 16 and 36, which were set apart for the use and benefit of the common schools at the time of the admission of the state into the Union.

1a. ———: ———. The grant became absolute and the state became possessed of the fee simple title upon its acceptance of the terms

of the grant and its selection, within the time limited, of the lands granted for the purpose named, as therein provided.

1*b*. ———: SETTLERS. The proviso found in the act to the effect that no existing lawful rights arising under the public land laws shall be prejudiced by the act cannot inure to the benefit of one who settles on and improves the land at or about the time of the passage of the act, and before the survey of the land as therein contemplated, and before the expiration of the time in which the state might make its selection, as therein provided. A person settling upon such land under such circumstances is technically a trespasser, and can acquire no valid preference right thereby as against the state's right to select lands as indemnity school lands, as in said act provided.

1*c*. ———: ———. The act of congress of July 5, 1884, 23 U. S. Statutes at Large, ch. 214, p. 103, recognized only the right of an individual settler who was in actual occupation of a portion of a military reservation prior to the location of the reservation or prior to January 1, 1884, in good faith, for the purpose of securing a home.

1*d*. ———: ———. The rights acquired by settlement, and recognized by the act of July 5, 1884, as above mentioned, or those of like character are the "lawful rights" which it is declared shall not be prejudiced in the act of March 3, 1893, granting lands to the state as indemnity school lands in lieu of other lands theretofore lost.

1*e*. ———: ———. The act of congress of August 23, 1894, 28 U. S. Statutes at Large, ch. 314, p. 491, giving the perference right of entry to a *bona fide* settler on lands embraced within an abandoned military reservation, in no way impairs the right of the state to select indemnity school lands within the time and manner as contemplated by the grant for that purpose contained in the act of March 5, 1893.

2. Pleadings. An allegation in an answer which pleads only a conclusion and not an issuable fact states no defense and is vulnerable to a demurrer.

3. School Lands: SELECTION: CONSTITUTIONAL LAW. The constitutional provisions relating to the control and management of educational lands and funds, and the creation of commissioners for that purpose, are not applicable to the means employed whereby title to lands is acquired by the state for the benefit of the public schools, but only to the control and management thereof after the title has become vested in the state.

3*a*. ———: ———: ———. The state may by its legislature accept the terms of an act of congress granting to it lands as indemnity

school lands, and authorize the commissioner of public lands and buildings to select the lands thus granted, without violating any of the provisions of the fundamental law.

4. ———: TITLE. The legislature having accepted the terms of the grant of indemnity school lands, as provided by the act of congress of March 3, 1893, and authorized the selection of the lands granted by the commissioner of public lands and buildings, and the selections having been made within the time limited and approved by the interior department, and set apart and noted upon its records as indemnity school lands selected by the state of Nebraska, the state thereby became vested with a perfect and absolute title to all of such lands.

4a. ———: POWER OF LEGISLATURE. It is not competent for the legislature to provide for the disposition of school lands to which the state has acquired a perfect and absolute title, otherwise than as authorized and directed by the constitution.

4b. **Statute**: CONSTITUTIONAL LAW. The act of the legislature passed in 1901, ch. 115, laws, 1901, entitled "An act for the relief of" the parties therein named, contravenes the provisions of sections 1 and 8, article VIII of the constitution, and is therefore inoperative and wholly void.

ORIGINAL action in the nature of ejectment. *Judgment for the state.*

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

Sanford Parker, W. T. Wills and *M. F. Harrington, contra.*

HOLCOMB, C. J.

This is an action begun in this court in the exercise of its original jurisdiction. The petition is in the usual form in an action of ejectment. The answer consists, first, of a general denial; and second, of allegations of fact touching the source of title and ownership of the state and of the defendant respectively of and to the land in controversy, with a prayer that title thereto be quieted in the defendant and that the state be adjudged to have no right to maintain its action. A general demurrer is in-

terposed to the second defense, and the cause is thus submitted on the pleadings. The issues arising under the allegations of the answer and the demurrer thereto are not as clearly and well defined as it seems to us they might be made, and such as would conduce to a more intelligent disposition of the controversy; but, since the cause is thus submitted, we endeavor to determine the legal questions arising from the record as it is presented to us. It will not be necessary to set forth in detail the allegations contained in the answer. The facts pleaded therein will sufficiently appear in the discussion to follow. Suffice to say that the state claims the title and ownership of the land in controversy under an act of congress granting such land with other lands as indemnity lands for school lands lost to the state, and to which it is entitled under the provisions of the enabling act admitting the state into the Union. The defendant contends, and so alleged in his answer, that, by virtue of his settlement on the land and the improvement thereof, with a view of acquiring title thereto under the homestead laws, prior to the time the state had made its selection of such land as school indemnity land, he acquired a preference right to the land and is in fact the equitable owner, and that the title acquired by the state is subject to such preferential right and interest so secured by the prior settlement. The answer alleges in substance that the land in controversy is a part of an abandoned military reservation known as the Fort Randall Military Reservation; that he settled on the land March 20, 1893, and has ever since resided upon and made valuable improvements thereon, and that he settled thereon with the intention of making entry and acquiring title thereto from the United States under the homestead laws; that he has resided thereon and improved the same for more than five years, and is the equitable owner of said premises and possessed of all interest therein except the naked legal title. After referring to different acts of congress, and a concurrent resolution of the legislature of the state authorizing the

commissioner of public lands and buildings to select as agent of the state, pursuant to the provisions of an act of congress, indemnity lands for school lands lost to the state, it is in the answer further alleged in substance that, in pursuance of such legislative authority, the commissioner of public lands and buildings proceeded to said Fort Randall Military Reservation and selected certain lands as indemnity school lands, and that among the lands so selected was the tract in controversy, upon which the defendant was at the time a settler; and that the commissioner thereafter reported the said lands to the secretary of the interior—that he had selected the same in behalf of the state of Nebraska as indemnity school lands, and that it was recorded upon the books of the department of the interior as indemnity school lands selected by the state of Nebraska.

While some allegations are found in the answer to the effect that the commissioner in selecting the lands he did select made a mistake in that he did not intend to select lands upon which settlers were residing, these allegations, when analyzed, amount to nothing more than that the commissioner was ignorant that the land he selected was occupied by a settler, and would not have made the selection had he been so advised. There is no question of mistake in the description of the lands selected, or that the list as made out included other or different lands than were selected and intended to be selected as school indemnity lands granted by the act of congress, and in pursurance of the concurrent resolution of the legislature accepting the terms of such grant and authorizing the selection of such lands. These allegations found in the answer may therefore be passed without further notice. Other portions of the answer will receive attention as we progress.

1. In arriving at a correct conclusion as to the respective rights of the state and the defendant, we assume that the United States holds the proprietorship of the public lands in this state in the same manner as does an indi-

vidual owner, and that it may dispose of the same by gift or otherwise in such manner and upon such terms as congress may in its wisdom provide for. It is also taken for granted that whatever right the defendant may have acquired by virtue of his alleged settlement on and improvement of the land must have for its basis and upon which it is grounded some act of congress recognizing and protecting the right as in the nature of a validly acquired interest in property. In respect of the title and interest of the state, it may be observed that by section 7 of the enabling act sections 16 and 36 in every township, not otherwise disposed of, were granted to the state for the support of the common schools; and it is therein provided that other lands equivalent to the lands in such sections, otherwise sold or disposed of, shall be granted to the state for the same purpose. The state thus became entitled to all the lands contained in sections 16 and 36 of every township, or their equivalent, when disposed of otherwise, to an equal amount in regular subdivisions of not less than one-quarter section, to be secured from other portions of the public domain lying within the state. After the abandonment of the Fort Randall Military Reservation, and before it was thrown open to settlement, congress, March 3, 1893, passed an act entitled "An act to provide for the survey and transfer of the part of the Fort Randall Military Reservation in the state of Nebraska to said state for school and other purposes." 27 U. S. Statutes at Large, ch. 200, p. 555. The act provides in substance that the odd-numbered sections, after the same shall have been surveyed, may be by the state, at any time within one year after the filing of the official plats of the survey in the local land office, selected as a part of the lands granted to said state as indemnity lands for school lands lost in place, under the provisions of the act to provide for the admission of the state into the Union, provided, that said lands shall be accepted by the state in full satisfaction of lawful claims now existing, or that may hereafter arise, for school land indemnity for a corresponding number of

acres, upon assignment of the basis of the claims by description and selection according to regulations of the interior department. It is provided in the act that no existing lawful rights under any of the land laws of the United States providing for the disposition of the public lands shall be prejudiced by the act. Provisions are also made for the survey and appraisement of the lands included in the reservation, and for opening to settlement under the homestead laws the even-numbered sections and the portions of the odd-numbered sections not selected by the state, as above provided. The legislature of the state at its twenty-fifth session very promptly accepted the terms of the congressional act referred to above, and empowered and authorized the commissioner of public lands and buildings to make the selections as therein provided. Laws, 1897, ch. 122. The lands were thereupon, and in pursuance of the act of congress and the concurrent resolution of the legislature, by the commissioner of public lands and buildings selected within the time limited; the list thereof with the description and all needful information reported to the secretary of the interior, and the lands so selected set apart as belonging to the state for the use and benefit of the common schools.

The act of congress, as we read it, will admit of but one construction. The language is clear and unambiguous. It grants to the state out of the odd-numbered sections, when surveyed, as indemnity lands for school lands lost, such portions thereof as shall be selected within one year, and accepted in full satisfaction of its claim for a like number of acres lost in sections 16 and 36 which were set apart for the benefit of the common schools at the time of the admission of the state into the Union. The grant became absolute, and the state became possessed of the fee simple title, upon its acceptance of the terms of the grant and its selection within the time limited from the odd-numbered sections of the lands granted for the purposes named, when surveyed, as therein provided. The proviso found in the act to the effect that no existing law-

ful rights arising under the public land laws shall be prejudiced by the act cannot inure to the benefit of the defendant. He had acquired no lawful right. His going upon the land was unauthorized. He was technically a trespasser. The odd-numbered sections were in terms withheld from settlement until after the state had made its selections or until the time limited therefor had expired. They were, or such portions as should be selected and accepted by the state in lieu of other school lands lost to it, as contemplated in the original grant, specially reserved and withheld from settlement or entry under the homestead laws. The state's right to select these lands as indemnity school lands was paramount to any right that might be acquired by settlement within the time which, by the terms of the act, the state was given to make its selection. The question is set at rest by the department of the interior, in so far as its administration of the public land laws can affect the question, by a decision of the secretary of the interior. In the case of *Blair v. State*, 30 L. D. 286, it is held: "A settlement on an odd-numbered section within Fort Randall abandoned military reservation and an application to enter the tract settled upon filed prior to the expiration of the period accorded the state by the act of March 3, 1893, within which to exercise a preferred right of school indemnity selection, cannot defeat the assertion of such right on the part of the state, unless the settler was an actual occupant of said tract prior to the establishment of the reservation or had settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and entering the same under the general land laws." It is said in the body of the decision: "At the date of Blair's settlement, and at all times since then to the time of the state's selection, no lawful right could have been initiated upon said land under any public land law of the United States, and hence at the date of the act of March 3, 1893, Blair did not have an existing lawful right. His act of settlement was not authorized by any law, was

a mere trespass, and he took nothing thereby. The debates of congress upon the bill which afterwards became the law above quoted seem to indicate that the 'existing lawful rights' intended to be protected by said proviso were such as it was contemplated might exist by reason of the provisions of an act of July 5, 1884 (23 Statutes at Large, ch. 214, p. 103), entitled 'An act to provide for the disposal of abandoned and useless military reservations,' under which this land would have been disposed of, upon being turned over by the war department, but for the special legislation contained in the act of March 3, 1893." Manifestly the views thus expressed lead to the only rational construction that can be given to the several provisions contained in the act. Any other construction would obviously defeat the main object of the act, that is, the granting of indemnity lands for school lands which the state had lost. The construction contended for would subject the state's rights and interests to those of the individual, who is ever alert and active in an endeavor to acquire from the government title to portions of its public lands whenever or wherever the possibility of so doing arises. These lands are granted to the state for a sacred purpose. They are held in trust for the benefit of the common schools. This trust is by the constitution declared to be inviolable. Congress has by this act expressly made provisions for the state to secure more nearly its full quota of school lands, as originally contemplated. The grant has been accepted and the lands selected, and it would seem that the state cannot escape the responsibility thus thrown upon it, and cannot do otherwise than execute the trust with which it is charged in harmony with the provisions of the fundamental law.

The act of July 5, 1884, 23 Statutes at Large, ch. 214, p. 103, provided only for the transfer of the military reservation to the interior department, and for the survey, appraisement and sale. Nothing is found therein throwing the lands, after survey, open to entry and settlement under the homestead laws. It is provided in the act that any

settler who was in actual occupation of any portion of a military reservation prior to the location of the reservation or prior to January 1, 1884, in good faith, for the purpose of securing a home, and has continued in occupation and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied not exceeding 160 acres, provided, that such lands were subject to entry under the public land laws at the time of their withdrawal. The defendant of course can claim nothing under this proviso by virtue of his alleged settlement made in 1893. The rights preserved by the act of March 3, 1893, are lawfully acquired rights of the character above described, and not those supposed rights which would arise in favor of one going upon lands of an abandoned military reservation before being thrown open to settlement at the time and under the circumstances the defendant made the settlement, as alleged in his answer herein.

The defendant seems also to place some reliance upon a later act of congress which was passed August 23, 1894, 28 U. S. Statutes at Large, ch. 314, p. 491, as giving him preferential rights and an interest in the land in controversy as against the state under its selection made as aforesaid. The act cited provides in substance that all lands, not already disposed of, included within the limits of any abandoned military reservation placed under the control of the secretary of the interior under the act of July 5, 1884, the disposal of which has not been provided for by a subsequent act of congress, where the area exceeds 5,000 acres, are open to settlement under the public land laws, and a preference right of entry for a period of six months from the date of the act shall be given all *bona fide* settlers who are qualified to enter under the homestead law, have made homes and are residing upon any agricultural lands in said reservations, and, after the passage of the act, for a period of six months from the date of settlement, when that shall occur after the date of the act. This act cannot help the defendant as it is expressly declared that it refers to lands the disposal of

which has not been provided for by other acts of congress. This latter act must be construed in the light of the prior acts on the same subject, and, thus construing them, it seems reasonably clear that the latter act went no further than to give a preference right to settlers on lands subject to settlement and for the disposition of which no other provisions had been made, and that, when so construed, all of the different acts are harmonious and all are given effect, as should be the case in construing statutes *in pari materia*. We are confirmed in our views in this respect from the allegations of the answer to which the demurrer is interposed, which are to the effect that the defendant has a preference right to said lands, and a preference right to enter said lands for a period of six months after the same shall have been thrown open to entry, and that the defendant has made diligent effort to enter said land, but that the same has always been refused. That is, as we construe these allegations, the department of the federal government having the administration of affairs connected with the disposal of the public lands has denied to the plaintiff the right to enter the land in controversy as a homestead, because the same has been disposed of and belongs to the state under the act of congress granting lands to be selected by it in lieu of and as indemnity for school lands theretofore lost, and the acceptance by the state and its selection of such land with other lands under the provisions of the said grant. We cannot escape the conclusion that as between the state and the defendant the state has acquired the title in fee to the land in controversy, and that the contention of the defendant that he has become the equitable owner thereof by reason of his alleged settlement and residence upon the land and the improvement thereof is not well founded. His settlement upon the land and his residence thereon thereafter render him a trespasser and wrongdoer, that is, he had no lawful right to go upon the land either as between himself and the government, or as between himself and the state as the grantee of the government. He must have known, or

at least is presumed to know, that the disposition of the land embraced in the abandoned military reservation must be under and according to the terms provided by congress, and that no valuable right could be acquired by settlement or improvement unless authorized by congressional enactment. He was charged with knowledge of the act which provided for the disposition of these lands and in which the state was accorded the first right to select and secure title to the lands situated in the odd-numbered sections, when surveyed, as indemnity school lands. He must have known that in such act no provisions are found giving to one settling upon such lands a right to acquire title under and by a homestead entry as against the state's right of selection within the time limited therein.

2. Allegations are found in the answer of the defendant to the effect that, before the state made its selection of lands in lieu of and as indemnity for school lands lost and in which is included the land in controversy, it had selected other lands in lieu of some of the lands which were described as indemnity school lands lost by the state, and that, while some of the lands described in said list so selected as school lands lost by the state were in fact actually lost by it, yet some of them had been replaced by other lands selected in said list, and thereby, and by reason thereof, the said list was uncertain, indefinite, invalid and utterly void. If we understand the pleading correctly, the validity of the entire list of lands with the descriptions thereof as made by the commissioner of public lands and buildings under the act mentioned is void because, as is sought to be alleged, some of the bases assigned for one or more of the selections made had been exhausted by a prior selection on behalf of the state of other lands as school indemnity for school lands lost, and to which the state was entitled under the provisions of the enabling act. There is no statement of fact showing any valid prior selection which would have the effect of depriving the state of the right to select all lands included in the list, which embraces the land claimed by defendant. It is not

averred that the bases assigned in the selection of any of these lands were exhausted by a selection and conveyance of other lands to which the state had acquired a perfect title. No fact is alleged from which it can be inferred that any of the lands included in the list last selected were not lands which the state is entitled to receive under the provisions of the act of congress of March 3, 1893. In truth, in other portions of the answer it is alleged without qualification that the lands selected by the commissioner of public lands and buildings under the provisions of that act were in lieu of lands lost to the state under the grant contained in the enabling act, and as school indemnity for school lands lost as contemplated by the original act. This of itself is a solemn admission that the lands selected and claimed by the state were in lieu of other lands theretofore lost, and which it was entitled to receive for the use of the common schools. The selections of the lands made in the case at bar were made within the year limited by the act granting the same, and during which time no valid rights of third parties could intervene. The selections thus made being valid, the plea of a prior selection of other land without the allegation of other facts is manifestly not the pleading of an issuable fact, but of a conclusion only of the pleader, and states no ground of defense to the plaintiff's cause of action. Again, it is not believed that the defendant can be heard to raise this question as the adjustment of the amount of lands granted in lieu of others to which the state is entitled is a matter exclusively for the government and the state. It can hardly be doubted that the government might grant to the state any portion of the public domain that congress saw fit and wise to bestow upon it, where no private rights had attached.

3. The question is presented as to the authority of the state to select the land in controversy with the other lands selected by it by the adoption of the method resorted to for the accomplishment of the desired object. It is argued that this authority cannot be delegated by the legislature to the commissioner of public lands and buildings, but

that the selection must be made by the board of educational lands and funds, which by the constitution is charged with the duty of managing and controlling educational lands and funds held by the state in trust for the use and benefit of its common schools. The constitutional provisions appealed to are not applicable to the means employed by which title to lands are acquired for the benefit of the public schools, but only to the control and management thereof after the title has become vested in the state. The grant of the lands in controversy comes from congress. It is in the nature of a gift to the state to be held in trust for the benefit of the common schools. The terms of the grant or gift are a matter of regulation by congress, and its acceptance may be by the state through its legislature or by an authorized agent selected for that purpose, and this would in no wise infringe on any provisions of the fundamental law. It is not until the gift has become effective and the title vested in the state in trust that the board of educational lands and funds by virtue of constitutional provisions become clothed with the exclusive authority to control and manage such lands and the proceeds thereof for the benefit of the common schools. We find nothing in the concurrent resolution accepting the terms of the act of congress granting the lands to the state, nor of the action of the state's agent, the commissioner of public lands and buildings, in making the selection of the lands thus granted, that in any way contravenes any of the provisions of the organic law.

4. What has heretofore been said necessarily leads to a conclusion adverse to the contention of the defendant. There arises, however, another question to be considered and determined. This question involves the construction and validity of an act of the legislature passed in 1901, ch. 115, laws, 1901, entitled "An act for the relief of" the defendant, naming him, and three others, and to authorize the governor to execute a deed of relinquishment to the United States of the land in controversy and other lands to enable the said defendant and the other persons men-

tioned therein to each perfect his entry and title to said lands under the homestead laws of the United States. After several whereases reciting the facts relating to the land in controversy similar to those hereinbefore disclosed in the opinion, it is enacted that the governor is authorized and directed to execute a deed of relinquishment to the United States, conveying any and all interests of the state of Nebraska in and to the land in controversy and other lands as therein described to enable the said defendant and other persons therein named to perfect their entry of and title to said tracts of land under the homestead laws of the United States. The validity of the act is challenged by the state on different grounds, but principally for the reason that it violates the provisions of the constitution relating to the control, management and disposition of the educational lands belonging to the state and held by it in trust for the use and benefit of the common schools. Whether the act contravenes the fundamental law must, we think, be determined by the nature of the title and interest held by the state to the lands in controversy at the time of the passage and approval of the act under consideration. If the state's title had been perfected, if a title in fee simple had at the time vested in the state, and nothing further was to be done in order that its ownership of these lands should be that of the holder of an absolute and indefeasible title the same as that of other common school lands held by it under the original grant, then, in our judgment, the conclusion is irresistible that such lands can only be disposed of in the manner and under the terms and conditions pointed out by the constitution regulating the control and disposition of all educational lands owned by the state. If, on the other hand, the state's title was not perfected, and something further was required to be done in order to render its title absolute and unqualified, it would seem that the exercise of the same power which authorized the acceptance of the proffered grant might provide for its relinquishment, and no fundamental provisions of law are violated thereby.

Had the state's title become absolute? The answer must, we are of the opinion, be in the affirmative. The congressional act heretofore noticed made a present grant of all school indemnity land which the state might select in the odd-numbered sections in lieu of other lands lost, as contemplated by the original grant, if selected at any time within one year after a survey of the land and the filing of the plats thereof in the local land office. The legislature accepted the terms of the grant and authorized the selection of the lands granted by the commissioner of public lands and buildings. The selections were made in due form within the time limited and a list thereof filed with the secretary of the interior, approved by him, and the lands thus selected and designated were by the proper authority set apart and noted upon the records as school indemnity lands belonging to the state of Nebraska. This was the final act of transfer, the livery of seisin, and thereby was vested in the state full, complete and absolute title to the lands as thus granted, selected and accepted as indemnity lands for other lands lost in place. As was said by the California supreme court: "The state, by the act of congress, received a present grant of five hundred thousand acres of land, to be selected out of such lands as were open to selection, in such a manner as the state, by its legislature, should direct. 'When the selection and location are once made pursuant to the directions, of lands not reserved, but subject to location, the general gift of quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same.'" *Bludworth v. Lake,* 33 Cal. 255, and authorities therein cited.

Section 8, article VIII of the constitution, declares that common school lands which are now held or may hereafter be acquired by the state for educational purposes shall not be sold for less than seven dollars an acre, nor less than the appraised value. The act in question contravenes this provision of the constitution, for it in effect contemplates a gift of the state's interest in the land in

controversy to the defendant, assuming such lands to be common school lands, as we are constrained to hold they are. It is also declared by section 1, article VIII of the constitution, that the governor and the other state officers therein named shall, under the direction of the legislature, constitute a board of commissioners, for the sale, leasing and general management of all lands and funds set apart for educational purposes. The act under consideration conflicts with the above provisions and must give way to the paramount law. It is not within the power of the legislature to authorize the control, sale or leasing of school lands by an officer or individual other than those named in the organic law. *State v. Scott,* 18 Neb. 597. The act of the legislature purporting to authorize the governor to convey the state's interest and title as thus acquired to the United States for the benefit of the defendant, and in order to permit him to perfect his homestead entry, must be held inoperative and wholly void.

In considering this case, we have not been unmindful of the fact that the defendant, who is in a measure innocent, is the victim of circumstances which work a great hardship on him, but this hardship cannot rightfully be obviated by the violation of a sacred trust imposed upon the state and those chosen to administer its affairs relating to the lands and funds belonging to the common schools, which should ever be kept inviolate and used and disposed of only in the execution of the trust. While the legislature no doubt may grant to the defendant, if in its wisdom it sees fit so to do, some measure of relief, in so doing due regard must be had to the greater interests of the state, which, if observed, require a faithful administration of affairs pertaining to the management and disposition of the school lands and funds as contemplated by constitutional provisions, and thereby promote the efficiency of the common schools in which all are alike interested. The demurrer is sustained, and a judgment is ordered entered in favor of the state, as in its petition prayed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. JOHN T. BRIMMER.

FILED JANUARY 18, 1905. No. 13,707.

State v. Tanner, ante, p. 104, followed.

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

Sanford Parker, W. T. Wills and *M. F. Harrington, contra.*

HOLCOMB, C. J.

This case, in all its essential features, is the same as the case of *State v. Tanner, ante,* p. 104, in which an opinion has just been filed. The same questions of fact and legal conclusions deducible therefrom are presented in both cases. The decision in the one controls in the other and should be followed. On the authority, therefore, of the decision in the first case rendered, the demurrer in the case at bar is sustained, and it is ordered that judgment be rendered therein in favor of the state, as in its petition prayed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. FRANK J. BEDNAR.

FILED JANUARY 18, 1905. No. 13,708.

State v. Tanner, ante, p. 104, followed.

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

Sanford Parker, W. T. Wills and *M. F. Harrington, contra.*

HOLCOMB, C. J.

This case, in all its essential features, is the same as the case of *State v. Tanner, ante,* p. 104, in which an opinion has just been filed. The same questions of fact and legal conclusions deducible therefrom are presented in both cases. The decision in the one case controls in the other and should be followed. On the authority, therefore, of the decision in the case first rendered, the demurrer in the case at bar is sustained, and it is ordered that judgment be rendered therein in favor of the state, as in its petition prayed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. ARTHUR T. MCCRIGHT.

FILED JANUARY 18, 1905. No. 13,709.

State v. Tanner, ante, p. 104, followed.

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

Sanford Parker, W. T. Wills and *M. F. Harrington, contra.*

HOLCOMB, C. J.

This case, in all its essential features, is the same as the case of *State v. Tanner, ante,* p. 104, in which an opinion has just been filed. The same questions of fact and legal conclusions deducible therefrom are presented in both cases. The decision in the one controls in the other and should be followed. On the authority, therefore, of the decision in the first case rendered, the demurrer in the case at bar is sustained, and it is ordered that judgment be rendered therein in favor of the state, as in its petition prayed.

JUDGMENT ACCORDINGLY.

WILLIAM J. LANSING V. STATE OF NEBRASKA.

FILED JANUARY 18, 1905. No. 13,643.

1. **Misdemeanor:** PURE FOOD ACT. The sale of milk adulterated by adding thereto a substance containing poison is made a misdemeanor by the general provisions of chapter 99, laws of 1897, known as the "Pure Food Act."
2. **Information:** ADULTERATED MILK. The allegation in the information that the defendant "did then and there unlawfully and knowingly sell to one William F. Thompson a quantity of milk, to wit, one quart of milk, as and for pure milk, an article of food to which a quantity of a substance or ingredient was added which is poisonous," is sufficient. No special allegation of guilty knowledge is necessary.
3. ———: ———. The allegation that defendant sold milk "as and for pure milk, an article of food," is a sufficient allegation that it was sold as an article of food.
4. **Sale for Analysis.** It is not a violation of the act to sell a quantity of an article of adulterated food as a sample for the purpose of analysis upon demand made for that purpose under section four of the act. If the sale is freely made in the ordinary course of trade without a demand therefor for the purpose of analysis, provisions of section four have no application. The fact that the purchaser intended to analyze it, and that the seller was aware of that intention, will not bring the transaction within the provisions of section four.
5. **Sale:** GUILTY KNOWLEDGE. The statute provides that food shall be considered adulterated if it contains "any added substance or ingredient which is poisonous or injurious to health." A dealer in food, who puts a foreign substance containing poison into the food which he sells, cannot defend such action on the ground that he did not know that such substance contained poison.

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

W. M. Morning and *J. J. Ledwith*, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *J. L. Caldwell, contra.*

SEDGWICK, J.

The defendant, who is plaintiff in error in this court, was found guilty of a violation of chapter 99, laws of 1897, known as the "Pure Food Act."

1. It is contended "that the specific mention of milk in the 5th subdivision, with a definite statement there as to what shall be deemed adulteration of milk within the meaning of that section, excludes it from the general provisions of the section." It is therefore urged that there can be no conviction for the sale of adulterated milk under this act unless the "milk is the produce of a diseased animal, or diluted with an inferior liquid, or mixed with an inferior substance." The language of section three is: "An article of food shall be deemed to be adulterated within the meaning of this act in the following cases: First. If any substance or substances have been mixed with it, so as to lower or depreciate, or injuriously affect its quality, strength or purity. * * * Fifth. If it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not or, in the case of milk, if it is the produce of a diseased animal or diluted with any inferior liquid or mixed with any inferior substance. * * * Seventh. If it contains any added substance or ingredient which is poisonous or injurious to health, or any deleterious substance not a necessary ingredient in its manufacture." It is manifest that the words "or, in the case of milk, if it is the produce of a diseased animal or diluted with any inferior liquid or mixed with any inferior substance" cannot have the force and meaning claimed for them. This clause does not purport to be a complete statement of the adulterations of milk that are intended to be forbidden by the act. The necessary meaning of this section is that any adulteration that would be so considered in the case of any other article of food should be considered an adulteration in the case of milk, and that, in addition thereto, if milk is the

produce of a diseased animal or is diluted with any inferior liquid or mixed with any inferior substance, it shall likewise be considered adulterated within the meaning of the act.

2. It is next urged that the complaint is insufficient in not alleging that the defendant knew that the milk sold was adulterated. The allegation is, "did then and there unlawfully and knowingly sell to one William F. Thompson a quantity of milk, to wit, one quart of milk, as and for pure milk, an article of food, to which a quantity of a substance or ingredient was added which is poisonous." The argument of defendant upon this point is based upon the peculiar construction, above referred to, which he has given the statute. The statute being rightly construed there can be no necessity of a special allegation that the defendant knew that the milk was adulterated.

3. It is said in the brief that the charge that it was "sold as and for pure milk, an article of food," is insufficient. The idea seems to be that under this act it is insufficient to show that the thing sold was in fact an article of food, that it is necessary to allege that it was sold "as and for" an article of food. The complaint sufficiently shows that the substance was sold as milk and that milk is an article of food, and this is a sufficient compliance with the statute in that regard. Section one of the act is:

"That no person shall, within this state, manufacture for sale, offer for sale, or sell, any article of food which is adulterated, within the meaning of this act."

4. The fourth section of the act provides:

"Every person manufacturing, offering or exposing for sale or delivering to a purchaser, any article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender to him the value of the same, a sample sufficient for the analysis of any such article of food which is in his possession"; and the fifth section makes it a criminal offense to refuse to comply and furnish such sample. The bill of exceptions

shows that the deputy food commissioner purchased the milk for the purpose and with the intention, at the time, of making an analysis of the same to ascertain if the same were adulterated, and it is shown from the statement of facts that the defendant claimed that he knew the purpose for which the milk was purchased, and would so testify. There is no doubt that, if the sale was made in pursuance of section four of the act, the defendant could not be prosecuted for a sale which he was compelled by law to make, and it is insisted that the facts above indicated show that the sale was made in pursuance of that section. But we do not so view it. There is nothing to show that the food commissioner applied to the defendant for a sample of milk for the purpose of analysis. The admission is that the defendant sold to W. F. Thompson one quart of milk, at the time stated in the complaint, and there is nothing to show that he refused to sell it in the regular course of his trade, or that he was under any compulsion, or supposed himself to be under any compulsion, to sell the milk in pursuance of a demand for the purpose of analysis.

5. The judgment is supported by the evidence. In the stipulation of facts upon which the case was tried in the court below, it is admitted that the defendant "put milk-sweet into the milk and that milk-sweet does contain formaldehyde, a poison." Under the seventh subdivision of section three above quoted, food is to be considered adulterated if it contains "any added substance or ingredient which is poisonous or injurious to health," and in the first subdivision of that section it is considered adulterated if it contains any substance that injuriously affects its quality, strength or purity. A dealer in food cannot be heard to say that he has put a foreign substance containing poison into the food which he sells, but that he did not know, at the time, that the foreign substance was poisonous. The statute (sec. 3) provides "that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles of

food, if the same be distinctly labeled as mixtures or compounds, and are not injurious to health." This milk was not distinctly labeled as a mixture or compound, and the article added to it was injurious to health, so that the defendant cannot claim exemption under this provision of the statute.

We find no errors in the record. The judgment of the district court is therefore

AFFIRMED.

EVALD KOEFOED, APPELLEE, V. SOPHUS THOMPSON, APPELLANT.

FILED JANUARY 18, 1905. No. 13,264.

1. **Land: TRANSFER TO CO-OWNER: TRUST.** If an owner of an undivided one-half of a tract of land conveys the same by quitclaim deed to his co-owner, who thus obtains the legal title by virtue of confidential relations between them, and under such circumstances that he ought not according to the rules of equity and good conscience as administered in chancery to hold the benefits, out of such circumstances or relations a court of equity will raise a trust by construction, fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
2. **Equity.** In such a case, on the refusal of the grantee to reconvey according to the agreement of the parties, the court will set aside the quitclaim deed and restore the grantor to his rights in the property.
3. **Accounting.** If the grantee makes no claim for an accounting, and introduces no evidence to show that he has contributed more than his share to the payment of the purchase price, the interest thereon and the taxes assessed against the land, the court is not required to state an account between the parties before rendering the decree.

APPEAL from the district court for Wayne county: JOHN F. BOYD, JUDGE. *Affirmed.*

A. A. Welch and *Allen & Reed,* for appellant.

Wilbur & Berry, contra.

BARNES, J.

The appellee as plaintiff commenced this action in the district court for Wayne county against the appellant Thompson for an accounting, to set aside a quitclaim deed executed by him to the appellant for a certain tract of land situated in said county, and to recover an undivided one-half interest therein. Issues were framed, and as no objections were made to the form or sufficiency of any of the pleadings, it is unnecessary to copy them in this opinion. The trial resulted in a finding that the parties were not partners, but that the plaintiff was the owner of an undivided one-half of the land in question, and a decree was entered setting aside the quitclaim deed, and confirming his title thereto. The defendant Thompson appealed, and the case is, under the present rule, before us for a trial *de novo*. The evidence contained in the bill of exceptions clearly establishes the following facts:

For some time prior to the year 1891, the plaintiff and the defendant had been working together, farming and carrying on other business ventures in Wayne county under a kind of partnership arrangement. In the fore part of that year, they jointly purchased the land in question, each one contributing one-half of the first payment thereon. Thereafter they held the land under their contract of purchase until the year 1893, when they borrowed $1,800 of one Charles H. Burr, and paid the balance of the purchase price therewith, taking a joint deed for the premises. For this borrowed money they gave two notes, signed by them jointly and secured by a mortgage on the land in question. Thereupon the defendant went into sole possession of the premises, upon which there was a house, barn and other improvements; and the plaintiff left with him a considerable amount of personal property to be sold and applied to the payment of his half of the mortgage debt. Plaintiff then went on a visit to Denmark, returning in the year 1895. Meanwhile the smaller of the two notes given to Burr had become due, and a

foreclosure of the mortgage was had for $450, which was the amount due on said note. The plaintiff up to this time had paid his full share of the purchase money, and the interest. It then became necessary to renew the mortgage or secure another loan in order to save the premises from sale under the decree of foreclosure. The plaintiff, who at that time resided in Chicago, Illinois, for the sole purpose of enabling the defendant to renew the mortgage or secure a new loan, executed to him a quitclaim deed to the land, dated December 20, 1895, and left him in possession thereof under a verbal agreement that he would secure the money and redeem the land from the mortgage foreclosure for their joint benefit, and account for one-half of the rents and profits to the plaintiff, and in due time reconvey to the plaintiff his one-half interest therein. At the time of the commencement of this action, it appears that the defendant had paid off and satisfied the decree of foreclosure, but the balance of the $1,800 was still unpaid. It further appears that the defendant had been in possession of the whole of the premises, and had received the rents and profits therefrom, and had paid the taxes thereon, together with the interest on the mortgage. It also clearly appears that, in 1899, the plaintiff and defendant jointly, by an instrument in writing, made one F. M. Skeen their agent for the sale of the land; that Skeen found a purchaser, and thereupon the plaintiff was notified to come from Chicago to join in the sale and conveyance, and to settle up the whole matter. When he reached Wayne county, the defendant refused to sell the land, and for the first time declared his purpose to exclude the plaintiff from any interest therein. An arrangement was made, however, by which the defendant agreed to send the plaintiff $200 in cash within two weeks, together with four promissory notes of $200 each in payment for his interest in the property. Plaintiff thereupon returned to Chicago, but the agreement was never carried out, and the defendant boasted to several of his friends that he had been smart enough to induce the plaintiff to leave

under the promise of sending him the $200 and the notes within two weeks; that the plaintiff would not get the $200, and that he would never pay him anything for his interest in the land. It also appears that up to this time, in all of his transactions in relation to the property, and in all of his conversations with friends and neighbors about it, the defendant had at all times acknowledged that the plaintiff had a one-half interest therein, and that he would account to him for it whenever the land was sold. It further appears that the plaintiff had demanded a reconveyance from the defendant before the commencement of the action, which demand was refused.

On the foregoing facts it is the contention of the appellant that the agreement under which the quitclaim deed was made by the appellee to him is within the statute of frauds, and therefore the trial court erred in its findings and judgment, and we are asked to reverse the decree and dismiss the action. To support this contention the appellant relies on *Courvoisier v. Bouvier,* 3 Neb. 55; *Hansen v. Berthelsen,* 19 Neb. 433; *O'Brien v. Gaslin,* 20 Neb. 347, and *Dailey v. Kinsler,* 31 Neb. 340. These cases are not in point. In each of them it was held that an express trust cannot be created by a parol agreement, therefore it cannot be contended that they have any application to a case where the facts create a resulting or constructive trust. We have here the case of appellee, the owner of property both real and personal, delivering possession of the personal property and making a conveyance of the real estate by quitclaim deed to appellant, by which he, in effect, constituted appellant his agent under an oral contract, which charged him with the custody, control and disposition of the property, and required him to account to appellee for it or its proceeds. Thus given the undisputed ownership of the appellee, the fiduciary or confidential relation between the parties, the conveyance without consideration except a mere matter of convenience in handling the property for the joint benefit of both parties, the law raises a duty on the part of the

appellant to respond to the demand of the appellee for a return of such property or the proceeds, and a court of equity should find no difficulty in enforcing the contract as made. One of the provisions of our statute of frauds is that it shall not be construed so as to prevent any trust from arising by implication or operation of law. We think this case falls within the rule relating to such a trust, and is therefore not within the statute of frauds. In many things the case at bar closely resembles *Wood v. Rabe,* 96 N. Y. 414, which was an action brought to enforce an oral agreement between the plaintiff and his mother in respect to certain real estate in the city of New York. It appeared in that case that the property had been devised by will to the plaintiff, with a life estate in his mother, who was one of the defendants. Two judgments had been entered by confession against the plaintiff and in favor of one Stillwell, his brother-in-law, which became liens on the plaintiff's interest in the land. Execution was issued on one of the judgments, and the sheriff sold thereunder the right, title and interest of the plaintiff in and to the premises to said Stillwell, for the sum of $740. The mother thereupon bought the premises, under an arrangement with the plaintiff to protect him and save the property, which was worth much more than the judgments in question, the agreement being that, when the plaintiff should pay the money advanced by her, the property was then to be conveyed back to him. Afterwards she refused to convey the property upon the tender of the amount due. Action was brought by the plaintiff to recover his interest in the land, and in granting the relief prayed for the court said:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction, which taken together in our opinion entitled the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other that, when a person through the influence of a confidential relation acquires title to property, or obtains an

advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief."

The transaction in the case at bar was between parties who, as shown by the testimony, believed themselves to be partners and who we conclude were such, although no formal agreement of partnership existed between them. The relation of partnership is fiduciary in its strictest sense, and involves the greatest confidence between the parties thereto. The confidence which the appellee in this case reposed in the appellant had its origin in their previous dealings, and their previous partnership arrangements in farming and other matters. So that, when it became necessary to place the title of the premises in the appellant as a matter of convenience in securing a new loan and executing the proper papers in that behalf, in order to save the property from the foreclosure sale for their mutual benefit, there was no reason why the appellee should not repose the strictest confidence in the good faith of his former partner, and execute a conveyance in the nature of a quitclaim deed without other and further consideration, and for that sole purpose. The betrayal of this confidence by the appellant and his subsequent refusal to carry out his contract to account for the property or its proceeds to the appellee are sufficient to raise the presumption that he intended from the first to defraud his partner of his interest in the land and give rise to a constructive trust. *Wood v. Rabe, supra; Brison v. Brison,* 75 Cal. 525, 17 Pac. 689; *Kimball v. Tripp,* 136 Cal. 631, 69 Pac. 428.

It is a well-settled principle of law which has been recognized by this court that, where there was a confidential or fiduciary relation between the parties to an agreement, the existence of the evil intention at the time the promise was made may be inferred from the failure to comply with such promise, and the promisor will be presumed to have intended when he made the promise to do what he finally did do. In *Pollard v. McKenney,* 69 Neb. 742, commenting on *Brison v. Brison, supra,* we said:

"The court held, not only that a promise made with the intention of not performing it is fraudulent, but that the violation by the grantee of a promise to reconvey is constructively fraudulent, and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol agreement to reconvey to the grantor to whom he stands in the confidential relation, *even where there be no intention at the time not to perform the promise.* * * * A transaction of that character involves more than a mere breach of contract; there is also involved the element of confidence reposed by the grantor in one upon whom he had a right to rely, and a betrayal of such confidence."

In such a case the court may well deprive the defendant of the fruits of a fraudulent transaction, and still give force and effect to the statute of frauds. *Larmon v. Knight,* 140 Ill. 232, 29 N. E. 1116; *Newton v. Taylor,* 32 Ohio St. 399. In the last named case it was held without reservation, that a trust raised by implication of law may be proved by parol.

Kimball v. Tripp, supra, is a case where the plaintiff conveyed real estate by a deed absolute on its face to an agent, with oral instructions to dispose of the property as she directed. The principles involved in that controversy are much the same as the principles involved in this. The agent refused to carry out the directions imposed upon him by the oral agreement contemporaneous with the execution of the deed. Judgment was entered in the lower court against the defendant, and he appealed. The supreme court of California in deciding the controversy, when the protection of the statute of frauds was invoked, said:

"The position of the appellant on this point is that, as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But, assuming the absense of fraud (though, in view of the defendant's relation to the grantor as her agent, this can hardly be assumed), it does not follow that equity cannot afford

relief. The deeds, it was found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him."

It seems to be well settled that if a party obtain the legal title to property by virtue of a confidential relation, and under such circumstances that he ought not according to the rules of equity and good conscience as administered in chancery to hold the benefits; out of such circumstances or relations a court of equity will raise a trust by construction, fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. *Pollard v. McKenney, supra.*

It is claimed, however, that, before the decree complained of could be rendered, the court should have made an accounting between the parties, and required the plaintiff to pay the amount found due from him to the defendant as a condition precedent to setting aside the quitclaim deed. It is sufficient to say that the evidence tended to show that plaintiff had contributed his full share to the payment of the purchase price of the land, and the interest and taxes thereon. But, if it be true that the appellant has advanced more than the plaintiff for such purposes, the matter can be properly adjusted by a proceeding for that purpose, or the amount thereof can be collected in an action at law against the plaintiff, for it is nowhere suggested that he is insolvent, and such claim against him uncollectible. Again, defendant made no claim for an accounting, and the evidence was not sufficient to enable the court to state an account between the parties. It would seem that the facts in the case at bar bring it within the foregoing rules, and therefore the decree appealed from was right.

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

AFFIRMED.

LINCOLN TRACTION COMPANY V. WILHELMINA WEBB.

FILED JANUARY 18, 1905. No. 13,712.

1. **Street Railways**: LIABILITY. Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principles. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of their passengers, and they are liable for the slightest negligence.
2. **Action**: EVIDENCE: PRESUMPTION. In an action for damages for an injury received while being transported by such common carrier, proof of mere injury, without more, does not raise the presumption of negligence sufficient to impose on the company the burden to prove due care on its part.
3. **Burden of Proof**. In such case the burden is on the plaintiff to prove that he was a passenger, was injured, the extent of his injuries, the accident from which the injury resulted, and circumstances of such a character as to impute negligence.
4. ———. But where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, the carrier is then required to show that it was in nowise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of.
5. **Instruction**. In such a case it is error to instruct the jury, in substance, that it is only necessary for the plaintiff to prove that he was a passenger and was injured, and that the burden of proof is then upon the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of.
6. **Case Disapproved**. Paragraph four of the syllabus to *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, is disapproved, and the opinion is modified to conform to the rule above stated.

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

Clark & Allen, for plaintiff in error.

Billingsley & Greene and *R. H. Hagelin, contra.*

BARNES, J.

In this case the Lincoln Traction Company prosecutes error from a judgment of the district court for Lancaster

county in favor of one Wilhelmina Webb, who will hereafter be called the plaintiff; and the traction company will be called the defendant.

The principal assignment of error discussed by counsel is that the court erred in giving the sixth paragraph of his instruction to the jury. For a clear understanding of the question presented, it is necessary to state the issues as made by the pleadings. The charging part of the petition is as follows:

"That on or about the 1st day of August, 1903, the plaintiff, at the special instance and request of the defendant company, became and was a passenger on said street railway to be carried in its cars safely from the post office building in said city, to 19th and O streets on said railway, for the sum of five cents; that when the car on which plaintiff was a passenger was between 18th and 19th streets, on O street in said city, the plaintiff rang the bell to notify the defendant that she desired to leave said car at 19th and O streets; and when the car reached said 19th and O streets it stopped, and the plaintiff started to get off said car, and before plaintiff had time to leave said car, and while standing on the steps of said car, the defendant carelessly and negligently started said car without a bell ring from the car's conductor, and plaintiff, without negligence on her part, was by the negligence and carelessness of the defendant, as above alleged, thrown violently from said car to the hard pavement, and suffered great and permanent injuries."

The answer was a general denial and a plea of contributory negligence, which was denied by the reply. It is also proper to state that the evidence as to whether the car was stopped a sufficient length of time for the plaintiff to alight, or whether she got off from the car carelessly and negligently while the same was in motion, and was thus guilty of contributory negligence, was, to say the least, conflicting. On the issues presented by the pleadings and the evidence, as above stated, the court gave the instruction complained of, which reads as follows:

"6th. The burden of proof is on the plaintiff to prove by a preponderance of the evidence that she received the injuries complained of while being transported by the defendant company at about the time and place alleged, and that by reason thereof the plaintiff has sustained damages. On the other hand, when the plaintiff has shown that she met with an injury, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of in the plaintiff's petition, said act being the proximate cause of the plaintiff's injuries. The burden of proof is also upon the defendant to show that some negligence of the plaintiff contributed to her injuries as the proximate cause thereof, unless the plaintiff in making her own case has shown that some act of hers contributed to said injury."

It will be observed that this instruction placed the burden on the defendant company, after the injury was shown, to prove by a preponderance of the evidence that it was not guilty of the negligent act set forth in the plaintiff's petition. Its effect was to shift the burden of proof on the question of negligence from the plaintiff, who held the affirmative of that issue, to the defendant, as soon as it was shown that she had been injured. At this point it may be said that it is the settled law of this state that street railways are common carriers of passengers for hire, and are liable as other common carriers upon common law principles. They are bound to exercise extraordinary care and the utmost skill, diligence and human foresight for the protection of their passengers, and are liable for the slightest negligence, but they are not held to the strict liability of insurers. That is to say, they are not governed by the provisions of section 3, article I, chapter 72, Compiled Statutes, 1903 (Ann. St. 10039), which defines the liability of steam railways in this state for damages inflicted upon passengers. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; *Pray v. Omaha Street R. Co.*, 44 Neb. 167; *East Omaha*

Street R. Co. v. Godola, 50 Neb. 906; *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672; *Omaha Street R. Co. v. Boesen,* 68 Neb. 437. It follows that, before the plaintiff could recover in this case, it was necessary for her to allege and prove some negligent act of the defendant company which was the proximate cause of the injury complained of. The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof. *Rapp v. Sarpy County,* 71 Neb. 382; *Kay v. Metropolitan Street R. Co.,* 163 N. Y. 447, 57 N. E. 751. It was said by the supreme court of Massachusetts in *Central Bridge Corporation v. Butler,* 68 Mass. 130:

"The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." See also *Kahn v. Triest-Rosenberg Cap Co.,* 139 Cal. 340, 73 Pac. 164; *Scott v. Wood,* 81 Cal. 398, 22 Pac. 871.

It is true that in some cases loose expressions may be found that the burden of proof shifts when the fact that is the basis of a presumption of negligence is made to appear. But it is believed that no court has upheld such a ruling when its attention has been challenged thereto. The burden always rests on the party who has the affirmative, and actions for personal injuries against common carriers are no exception to this rule unless they are made so by statute. Again, by this instruction the jury were told, in substance, that when the plaintiff had shown that she was a passenger, and had met with an injury, the burden of proof was on the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of in her petition. This, in

effect, informed the jury that proof of the injury raised a presumption of negligence. The negligent act charged in the petition was the sudden starting of the car while the plaintiff was alighting therefrom, and the jury were told that the burden of proof was on the defendant to show that the car did not so start. This was clearly wrong. The court must have misapprehended the rule upon which the doctrine of the presumption of negligence rests. This presumption arises, if at all, from the proof made or conceded facts from which negligence on the part of the defendant may be inferred. We cannot infer that the car suddenly started and threw the plaintiff from the mere fact that she fell and struck on the back of her head. She might have fallen when attempting to alight if the car were standing still. And, again, she might have slipped or stumbled, and for that reason have fallen immediately after alighting from the car. The basis of the presumption in actions against carriers for personal injuries is not the mere fact of the injury, but is the act of the defendant which causes the injury. In *Spellman v. Lincoln Rapid Transit Co., supra,* it appeared that the car in which the plaintiff was riding was derailed. He alleged that he was injured thereby, and there was evidence to support the allegation. It was said: "He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him." This was enough. The burden was then on the carrier to rebut this proof of negligence by showing that it was produced by causes wholly beyond its control. In that case the fact of derailment was admitted, and was therefore the basis of the presumption of negligence. In the case of *Omaha Street R. Co. v. Boesen, supra,* it was alleged in the petition that the plaintiff was injured by the derailment of the defendant's car. The charge of derailment was denied by the answer, which also contained a plea of contributory negligence, in that defendant was injured by jumping from the rapidly moving train. There was a conflict of evi-

dence on those questions, and the court gave an instruction as follows:

"You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries and the damages occasioned thereby. * * * And the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received while a passenger, by being thrown from a car because of the derailment thereof, were without fault on defendant's part, and that they could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant, consistent with its business."

The judgment of the trial court was reversed, and in the opinion is found the following:

"It may be stated, as a general proposition, that a street railway company is a common carrier of passengers for hire; that ordinarily it will be sufficient for one to show that he was a passenger, that while such passenger he was injured, and the extent of such injuries. It will then devolve upon the company to show that the injury occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injury. It will be found, however, that this doctrine has been laid down in cases where there was a collision, or where the person injured had been struck or run over by a street car—in short, in cases where the undisputed cause of the injury fairly raised the presumption of negligence. * * * He (the plaintiff) alleged, as a substantive part of his case, that he was thrown from the car by a derailment of it, caused by the negligence of the company; and it would seem that before he could make his case it would be necessary to show, at least, that he was thrown from the car as alleged in his petition, before any presumption of negligence could arise."

This rule is sustained by the decisions of the federal

courts. See *Frizzell v. Omaha Street R. Co.*, 124 Fed. 176, and cases there cited.

It is true that the cases of *Stokes v. Saltonstall*, 38 U. S. *181; *Transportation Co. v. Downer*, 78 U. S. 129, and *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, are sometimes cited as announcing a contrary doctrine, but an examination of those cases shows that in each of them the accident itself, which was the proximate cause of the injury complained of, raised the presumption of negligence and thus supplied the plaintiff with the proof which otherwise he would have been required to make. The English case of *Christie v. Griggs*, 2 Camp. N. P. 79, is a leading case on this question. The opinion reads as follows:

"I think the plaintiff has made a *prima facie* case by proving * * * the damage he has suffered. It now lies on the other side to show, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied."

In *Rose v. Stephens & Condit Transportation Co.*, 20 Blatchf. (U. S.) 411, it was said of the presumption of negligence: "The presumption originates from the nature of the act, not from the nature of the relations between the parties."

In *McDonald v. Montgomery Street R. Co.*, 110 Ala. 161, it was said:

"Proof of mere injury, without more, does not raise a presumption of negligence, sufficient to impose on the company the burden to prove due care on its part. In order to recover, it is incumbent on the plaintiff to show an acci-

dent, from which injury resulted, or circumstances of such character as to impute negligence."

In *St. Louis & S. F. R. Co. v. Mitchell,* 57 Ark. 421, the court said:

"It is true that the burden was upon the appellee to show by proof that the railway company was guilty of negligence. The mere fact that the appellee was injured, without more, was not sufficient to raise a presumption of negligence on the part of the railway company. But the derailment of the car and its overturning, and the injury to the appellee thereby, being in the usual course, the logical inference of negligence might be drawn therefrom. * * * In such a case, *res ipsa loquitur.*"

But this rule applies only when the circumstances are such as to afford just ground for a reasonable inference that according to ordinary experience the accident would not have occurred except for want of due care. If causes other than negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. *Wadsworth v. Boston Elevated R. Co.,* 182 Mass. 572, 66 N. E. 421. The presumption of negligence has been more frequently applied in cases of passengers than in any other; but there is no foundation in reason or authority for such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties. The duty which the law enjoins in the two cases—carriers and non-contract cases—only differs in the degree of care to be exercised. The principle of law involved is the same, and the reason of the rule is not found in the relation between the parties. The presumption arises from the inherent nature and character of the act. No further authorities need be cited in support of this rule. It is contended, however, that this case should be governed by the rule announced in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672. In that case the judgment was reversed solely because the trial court instructed the jury that in order

to defeat a recovery the burden was on the defendant to prove gross contributory negligence on the part of the plaintiff, and the question in dispute herein was not involved in that case. It was said, however, by the learned judge who wrote the opinion:

"In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in nowise at fault."

It is quite probable that the trial court gave the instruction complained of because of the statement quoted above. We cannot wholly approve of that expression. It seems clear that it is too broad and is not a correct statement of the law. It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. A presumption arises from the cause of the injury, or from other circumstances attending it, but not from the injury itself. The better rule is found in *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb. 570, where it is said:

"The presumption of negligence, where entertained, must be from proved and conceded facts, and from such must be the logical, reasonable, and probable deduction."

From the foregoing it would seem clear that the opinion in *Lincoln Street R. Co. v. McClellan, supra*, should be modified to conform to the rule announced herein. That the instruction complained of was wrong because it assumed that the contract of carriage and the injury were the basis of a presumption of negligence. There was no basis for the presumption in the instant case until it was proved that the sudden starting of the car was the cause of the plaintiff's injury. That fact being disputed the burden of proof was on the plaintiff to establish it by a preponderance of the evidence.

We therefore hold that, in actions against common carriers on their common law liability for personal injuries, the burden is on the plaintiff to prove that he was a passenger, was injured by the negligence of the defendant,

and the extent of such injuries. That where the nature of the accident, when proved or conceded, is such as to fairly raise the presumption of negligence, proof of such accident, which is the proximate cause of the injury complained of, is sufficient. But where from the nature of the accident the presumption of negligence does not arise as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases his cause of action.

It is also contended that the evidence was not sufficient to sustain the verdict. But as the judgment must be reversed for another cause, and the case may be tried again, we decline, at this time, to express any opinion on that question.

For the foregoing reasons, the fourth paragraph of the syllabus to *Lincoln Street R. Co. v. McClellan, supra,* is disapproved, and the opinion therein modified to conform to the rule announced above. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HOLCOMB, C. J., concurring.

Although reluctant to consent to the overruling of the proposition announced in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, relative to the presumption of negligence when an injury has occurred to a passenger while being transported by a common carrier, which was agreed to by a unanimous court, I am convinced that the rule therein stated is not an accurate expression of the law on the subject, and is without substantial support in authority or principle. It should be said that a ruling on this particular question was not in that case essential to the decision rendered. An examination of the briefs of counsel discloses that the only questions which were presented and argued were with reference to whether simple contributory negligence on the part of the injured passenger would bar recovery, or whether the negligence

must be gross; also whether the statute making steam railroads liable for injuries to passengers, except in cases where the injury done arises from criminal (gross) negligence to the person injured, is applicable to street railways. The instruction considered in that case permitted a recovery unless the jury should find that the injured passenger was guilty of gross negligence which contributed to the injury received. It thus becomes obvious that the opinion, in so far as it discusses and lays down the rule relative to the presumption of negligence arising from the mere fact that an injury occurred to a passenger while being transported by the street railway company, is *obiter dictum.*

As has well been said, the mere fact of an injury to a passenger while being transported is, regarding the question of negligence, colorless and raises no legitimate inference as to the carrier's failure to perform some duty owing to the passenger. Passengers while being transported are frequently injured by their own acts, and by extraneous causes in no way connected with the means employed in transporting the passengers, as well as by the negligent acts of the carrier. It is difficult, therefore, to perceive why it should be said that proof alone that the passenger was injured while being transported raises the presumption that the negligence of the carrier was the proximate cause of the injury. It is said in *Swift & Co. v. Holoubek,* 60 Neb. 784, 795:

"Negligence will not be presumed in the absence of facts or circumstances from which its existence may reasonably be inferred. In the absence of evidence the presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by the evidence." In the case at bar the injury is alleged to have been caused by the street car being started while the passenger was alighting, and by reason thereof she was thrown to the pavement and sustained the injuries complained of. If this fact had been conceded or established by the evidence to the satis-

faction of the jury, then, doubtless, the presumption of negligence would arise, and it would devolve upon the carrier to show that it exercised that degree of skill, diligence and foresight for the safety of its passengers which the law charges it with. This alleged cause of the injury, however, was the pivotal point in the controversy and regarding which the evidence was conflicting. The burden of proof was upon the plaintiff to establish the fact upon which she relied as a basis for the presumption of the negligence charged. She was required to prove, it being disputed, that the injury complained of was chargeable to the acts of the defendant's servants or the means and appliances employed in her transportation. It was the defendant's contention that the plaintiff's injury was caused by her own carelessness and voluntary action in stepping from the car while in motion. The plaintiff was therefore required to go one step further than as stated in the instruction complained of, and establish by the evidence that the cause of the injury was the starting of the car while she was in the act of alighting therefrom. In a well-considered case, *Benedick v. Potts,* 88 Md. 52, 41 L. R. A. 478, it is said the doctrine of *res ipsa loquitur* does not go to the extent of implying that you may from the mere fact of an injury infer the physical act that produced the injury, but it means that when the physical act has been shown or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. Another court has said:

"When a passenger is injured in an accident to the machinery, appliances, or means provided for his transportation, it is unnecessary for him, in the first instance, to do more than prove the fact of the injury, and show that the accident in which it was received was due to the failure or insufficiency of some of the agencies provided for the carriage. When such proof is made, the burden is transferred to the carrier to show its own freedom from fault, and that the accident was one which the utmost skill,

care and prudence could not have prevented. * * * But the rule does not apply in the case of an accident unconnected with the means of transportation." *Denver & R. G. R. Co. v. Fotheringham,* 17 Col. App. 410, 68 Pac. 978.

If the injury is caused to the passenger by apparatus wholly under the control of the carrier, and furnished and applied by it, a presumption of negligence arises. It is only when the injury occurred from the abuse of agencies within the defendant's power that it can be presumed to act negligently. *Chicago City R. Co. v. Catlin,* 70 Ill. App. 97. The true rule seems to be that, where a passenger sustains an injury growing out of the acts of the carrier's servants or employees, or because of any defect in machinery, coaches or roadway, or any of the means, appliances or agencies connected with or employed in the transportation of the passenger, the presumption arises that the injury was caused by the negligence of the carrier, and it then devolves upon it to explain the act and relieve itself of the imputation of negligence thus cast upon it, the negligence complained of being the proximate cause of the injury inflicted. *Connell v. Chesapeake & O. R. Co.,* 93 Va. 44; *Spencer v. Chicago, M. & St. P. R. Co.,* 105 Wis. 311. In 6 Cyc. 629, the author of the text, in speaking of this particular subject, says:

"His (the passenger's) right of action for injuries is based on negligence, and the burden of proof of negligence is on plaintiff. Therefore the mere proof of an injury to the passenger in course of transportation, which, so far as it is shown, might have occurred by reason of other cause than the carrier's negligence, such as the act of the passenger himself, or without fault of any one, will not make a *prima facie* case."

The courts and text writers all appear to be of one mind and in substantial accord on the question, and, on principle, it would seem that the passenger must at least assume the burden of proving the proximate cause leading to the injury, if not conceded, and that such injury was

the result of some fault or imperfection in the means, appliances and agencies employed by the carrier in the transportation of the passenger.

GRAND VIEW BUILDING ASSOCIATION, APPELLEE, V. NORTHERN ASSURANCE COMPANY OF LONDON, APPELLANT.

FILED JANUARY 18, 1905. No. 13,617.

1. Contract: REFORMATION: LIMITATION OF ACTIONS. The statute of limitations relative to actions on written contracts applies to a suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed.
2. Res Judicata. A suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract.
3. Evidence examined, and found to uphold the findings and judgment of the district court.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Greene, Breckenridge & Kinsler, for appellant.

Halleck F. Rose and *Wilmer B. Comstock, contra.*

AMES, C.

The Grand View Building Association, a corporation, hereinafter called the association, obtained a policy of fire insurance upon chattel property belonging to it, from the Northern Assurance Company of London, England, hereinafter called the insurance company, or the company. The policy contained a clause declaring that it should be void if concurrent insurance should be obtained without the consent of the company in writing indorsed thereon.

Concurrent insurance was obtained without such written consent, and on June 1, 1898, the property was totally destroyed by fire. On the 30th of August following, an action was brought on the policy in the district court for Lancaster county. The petition in that action, for the purpose of avoiding the forfeiture, alleged in substance that the concurrent insurance was subsisting at the time the policy in suit was written, and was known to exist by the agent of the company who received and retained the premium, and wrote and delivered the policy, and who had authority to make the written indorsement mentioned, and that by such conduct he *waived,* for his principal, the making of the writing, and the latter was estopped to insist upon the forfeiture. The company by answer denied these allegations, and at its instance the action was removed to the circuit court of the United States for this district, where it was tried and the jury returned a verdict, finding specially the foregoing as well as other issues of fact in favor of the plaintiff. Thereupon the plaintiff recovered a judgment for the face of the policy, interest and costs. The judgment was affirmed upon proceedings in error in the circuit court of appeals for the 8th circuit, and the cause was removed thence, by *certiorari,* to the supreme court of the United States. It was decided by the last named court that the facts pleaded by the plaintiff and found by the jury were insufficient to relieve from the forfeiture for the reasons, first, because in the absence of fraud or mistake all contemporaneous or previous oral understanding or agreements are conclusively presumed to have been merged in the written contract, and, second, because the contract itself expressly denied to the agent any power to omit, change or waive any of its stipulations or conditions by parol, so that the knowledge or intent either of the agent or of the assured, or of both, could not operate as a waiver or as an estoppel, because, if the latter was misled thereby, it was due to his own folly. The very contract that he received notified him that he could safely rely upon nothing less or other than

an indorsement upon it. The judgments of both the lower courts were therefore reversed, and, in obedience to a mandate from the supreme court, the circuit court rendered a judgment for the defendant company upon the merits, and for costs. *Northern Assurance Co. v. Grand View Building Ass'n,* 183 U. S. 308.

On the 21st day of January, 1903, this action was begun in the district court for Lancaster county. The petition recites identically the circumstances set forth in the pleadings of the plaintiff in the former action, but supplements them by alleging that it was the intention of both the plaintiff and the defendant at the time the policy was written that it should, by its terms, permit the carrying of concurrent insurance, and that its failure so to do was unknown to the plaintiff at the time it was by it received and paid for, and until after the loss by fire, and was due either to the mistake or to the fraud of the agent of the defendant, and that the instrument as it was executed and now exists does not express the real and true contract of the parties thereto. The prayer of the petition is that the policy may be reformed so as to include the alleged omitted permission, and that when so reformed the plaintiff may recover thereon. Issues were joined, and, after a trial, findings were made and a judgment rendered according with the averments and prayer of the petition, and the defendant prosecutes this appeal.

No motive is shown for actual fraudulent intent on the part of the agent of the insurance company, and it is not attempted to be proved that he was guilty of any, or of any intentional deceit or concealment from which constructive fraud may be inferred. Mistake, to be actionable for the reformation of a contract in a court of equity, must be mutual and not due to the gross negligence of the complaining party. These propositions are elementary, and are so familiar to the profession that the citation of authority in their support is not deemed necessary. We have made a careful examination of the evidence, and the interpretation that we put upon it is the following: There

were but three participants in the transaction, Walsh, the president and agent of the association, Borgelt, an agent of the insurance company, and Richards, an agent of another insurance company, who acted to some extent as an intermediary between the other two. Richards testified that he was the first to tell Borgelt that Walsh desired the latter to write $2,500 insurance on the property in question, and that he at the same time told him that there was already $1,500 insurance upon it, with which it was desired that the new policy should be concurrent. Borgelt denied this latter statement and denied that he knew of the existing insurance. Walsh testified that he was present at an interview between the other two, in which the subject of concurrent insurance was mentioned and discussed, but he did not attempt to give the conversation, or the purport of it in detail. As to what occurred after the instrument had been written, and when it was delivered, he testified upon cross-examination as follows:

Q. In the taking of the policy (and) in payment of your premium, what or whom did you rely upon as to the form of the policy in which the risk was underwritten?

A. I relied—I never looked at the policy; I supposed it was like all my policies; I presumed the indorsement was on there, and I did not know for two or three weeks after the fire but that the policy was all right.

This is in substance the whole case. It is not pretended that there was any specific agreement that the now desired indorsement should be made upon the policy. The whole impression that this evidence makes upon our minds is this: That Walsh desired to obtain from the defendant insurance concurrent with that then existing. That Borgelt, the agent, knew of the existing insurance, and knew of the desire of Walsh, and intended to comply with it, but through inadvertence omitted so to do; that he knew of the condition for a forfeiture contained in the policy, and knew that it could be avoided only by an indorsement on the instrument. That the failure to make

the indorsement was due, not to fraud, but to the mistake or inadvertence of the agent, and that the acceptance of the contract by Walsh without the indorsement was due also to his mistake or inadvertence. The evidence falls short of showing that he knew that such an indorsement was necessary. He seems to have had a desire for concurrent insurance, and to have made it known to Borgelt, but what form of contract or policy was requisite for that purpose, he does not testify, nor is it otherwise shown that he knew. That matter he seems to have left to the skill and fidelity of the agent. That he was somewhat negligent in so doing, and in accepting and retaining the policy without reading it, is evident, but his negligence in that regard was not greater than that of the agent, with which it was concurrent, nor, we think, greater than that of ordinarily capable and prudent men in the transaction of such affairs. The case, we think, falls within the rule laid down in 2 Pomeroy, Equity Jurisprudence (2d ed.), sec. 845, and in the cases cited in his note. We quote the paragraph in full.

"The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, *by means of a mistake of law,* fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancelation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties

had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject matter, and as to the import of technical words and phrases; but the rule is not confined to these instances."

Within the rule thus established we think that the evidence supports the findings of fact of the trial judge, and that the mistakes of the agent and of Walsh were concurrent and mutual, and of a character against which equity will in ordinary cases relieve.

Is the judgment in the federal court *res adjudicata* and an estoppel to the prosecution of this suit? We think that so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative. When the plaintiff begun the former action, it supposed, as is shown by testimony of its counsel, preserved in the record, and, moreover, was bound to suppose, not only that an action at law on the contract, with pleading and proof of oral waiver of the stipulation for forfeiture, was a proper and adequate remedy for the recovery of its loss, but that, because it was so, a suit in equity to obtain a vain and unnecessary reformation of the contract would not lie. *Fireman's Fund Ins. Co. v. Norwood,* 16 C. C. A. 136; *Home Fire Ins. Co. v. Wood,* 50 Neb. 381.

The plaintiff begun its action and prosecuted it to final judgment in reliance upon, and in strict conformity with, these decisions, the former of which was justified, as the court pronouncing it thought, by the opinion of the supreme court of the United States in *Union Mutual Ins. Co. v. Wilkinson,* 13 Wall. (U. S.) 222. To say now that the plaintiff is estopped because it failed, in the first instance, to take its cause into a forum whose doors were to all appearances firmly and finally bolted and barred

against it, would not fall short of a mockery of justice. The language of this court in *State v. Bank of Commerce,* 61 Neb. 22, is strictly applicable to the present situation:

"One is not precluded from resorting to a remedy which the law gives him because he has attempted to avail himself of one to which he was not entitled."

More especially must this be true if the remedy to which he first makes unavailing resort is one which has been expressly and exclusively sanctioned by the very tribunals to which he makes application for it. The same doctrine was reannounced by this court in *Chicago, B. & Q. R. Co. v. Bigley,* 1 Neb. (Unof.) 225, approving and adopting the language of the supreme court of Indiana in *Bunch v. Grave,* 111 Ind. 351, 12 N. E. 514.

"A party who imagines he has two or more remedies, but who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one. * * * Justice * * * ought not be wholly denied because she mistook her remedy in the first instance."

Nor, it may well be added, because the first and only really prejudicial and misleading error, if it was an error, which we much doubt, was not made by the litigant, but by the ministers of justice themselves. To the same effect are *Pekin Plow Co. v. Wilson,* 66 Neb. 115; *Omaha v. Redick,* 61 Neb. 163; *Simons v. Fagan,* 62 Neb. 287; *Lansing v. Commercial Union Assurance Co.,* 4 Neb. (Unof.) 140.

The former suit was not inconsistent with this, but in that case the plaintiff sought to treat the contract as having been, in effect, reformed by the circumstances of its execution, which it was claimed waived or annulled one of its covenants. The supreme court held, and in practical effect it held nothing more, that the supposed reformation had not been accomplished. Thereupon the plaintiff resorted to this suit to secure its accomplishment, and for his right so to do he may quote no less authority than Mr. Chief Justice Marshall, who, in *Parker v. Judges,* 12 Wheat. (U. S.) 561, says that one who pro-

poses to "try a question entirely new, which has not been, and could not be, litigated at law," may do so "before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal."

From the final decision in the former action, four out of the nine judges of the United States supreme court dissented. The opinion of the majority, being an adherence to the letter of an antiquated and worn out technical formality, seems to us to be an ironical commentary upon the often repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to be and ought in good conscience to have been done has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue. It is admitted on all hands that the agent Borgelt had authority to bind his principal by executing the desired written stipulation for concurrent insurance. The greater includes the less. If he had power to enter into the covenant, he also had power to agree to enter into it. And if for value he made such an agreement, and through fraud or mistake failed to keep it, his failure is actionable both at law and in equity. It is upon such failure that this action is grounded. The parties did not *waive* written consent to concurrent insurance, or attempt so to do, but on the contrary agreed that it should be given. It is because of such agreement, and because such consent was mistakenly or accidentally omitted, that the plaintiff is entitled to have the contract reformed. Besides, the place where the contract was made, and where by its terms it was to be performed, and where the subject of it was situated, is in Nebraska. We are at a loss to understand why the laws of Nebraska, as expounded by the highest court of the state, are not conclusive of its obligatory force, and of its meaning and

effect, if not of the remedy appropriate to its enforcement. It is another familiar and often quoted maxim that the law enters into, and becomes an inseparable part of, every contract. We desire to be told what law, other than that of Nebraska, became thus incorporated into the contract in suit. The defendant contends that this action is barred by a limitation written in the policy and by the statute, and it is insisted that the decisions of this court in *Miller v. State Ins. Co.*, 54 Neb. 121, and *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623, ought to be overruled. We are entirely satisfied with both the reasoning and conclusions in those cases. A man may not by contract deprive himself of the right to apply to the courts for the protection of his person, property or liberty in the manner or within the time prescribed by public law. Otherwise he might be permitted to sell himself into servitude.

Section 10 of the code enacts a limitation of five years for the commencement of actions accruing upon written contracts, and section 12 provides that an action for relief on the ground of fraud shall be brought within four years after the discovery of the cause therefor. It is not disputed that an attempt to take unfair advantage of a mutual mistake is constructive fraud that falls within the latter provision. This action was brought less than five years after the destruction of the insured property by fire, but more than four years after the discovery of the mistake in the terms of the policy. The question which provision of the statute of limitations applies is not free from difficulty, but we have come with some hesitation to the conclusion that it is the former of them. If the sole object of the action was to obtain relief from the consequences of fraud, or to recover money or property obtained by its means, doubtless the four-year limitation would govern; but actions like the present are, we think, founded upon the written contract, and the aid of equity is requisite, in those jurisdictions in which it is required at all, merely as auxiliary thereto, for the purpose largely of interpretation, so as to enable the court to read and

understand the contract as it was understood by the parties at the time they entered into it. Without the written policy there would have been no contract between the parties at all, however much they might have conferred with reference to the terms of one if made; but the instrument, when written and accepted, was obligatory upon both, and the plaintiff can recover only for a breach of it. The aid of equity is required merely to enable him to show that he is not, in good conscience, to be held, as he is charged with being, guilty of committing the first breach of it, and to establish that a certain stipulation which ought to have been, and which the parties intended should be, included in it, was mistakenly omitted. When equity has made the desired correction, according to the pleading and proof, it proceeds to enforce, not only the newly incorporated covenant, but the formal written contract as amended. Indeed, it could not do otherwise, because the omitted stipulation, standing alone, would be meaningless. This view, we think, is in harmony with previous decisions both in this court and elsewhere. *Gwyer v. Spaulding,* 33 Neb. 573; *Baldwin v. Burt,* 43 Neb. 245; *Hyde v. Hartford Fire Ins. Co.,* 70 Neb. 503; *Winchell v. Coney,* 27 Fed. 482; *Dodge v. Essex Ins. Co.,* 78 Mass. 65; Wood, Limitation of Actions (3d ed.), sec. 58, p. 137.

For the foregoing reasons, we are of the opinion that the judgment of the district court is right, and we recommend that it be affirmed.

LETTON 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

AFFIRMED.

JOHN G. ASHLEY V. BURT COUNTY ET AL.

FILED JANUARY 18, 1905. No. 13,670.

1. **Highways:** DAMAGES: WAIVER, WITHDRAWAL OF. A landowner who has united in a petition for the establishment of a public road, expressly waiving compensation for damages arising therefrom, may withdraw such waiver by filing a claim for compensation before the establishment of the road.
2. **Purchaser:** ESTOPPEL. A purchaser of land, pending proceedings to appropriate the same for a public use, may prosecute a claim for damages for such appropriation in his own name, when such compensation has been wholly denied to his grantor.

ERROR to the district court for Burt county: GUY R. C. READ, JUDGE. *Reversed.*

Hopewell & Hopewell and *J. A. Singhaus,* for plaintiff in error.

P. E. Taylor, contra.

AMES, C.

W. R. Goodman was the owner of a tract of land in Burt county, and united with other competent freeholders in a petition to the county board praying for the location and establishment of a public road across it, and expressly waiving, in writing, compensation for damages resulting therefrom. These proceedings were had and the statutory notice to persons whose lands were sought to be appropriated was published on May 17, 1901. On June 14 Goodman reconsidered his waiver, and filed a claim for damages pursuant to the notice, and the appraisers assessed the same at the sum of $80. On November 5 the plaintiff, with knowledge of all the foregoing facts, purchased the land from Goodman and received a conveyance thereof by deed of general warranty. On November 12 the county board rejected Goodman's claim. Subsequently the plaintiff filed a claim, which was also rejected

by the board, and afterwards, on appeal, by the district court, and the plaintiff prosecutes error.

The waiver was not such an instrument as was effectual as a conveyance of an easement or interest in land under the statute of frauds, and it would have become operative as such only by estoppel. But before the road had been established or an estoppel had attached, Goodman withdrew the waiver and claimed damages, so that no one was misled by reason thereof.

The land had not been taken or the road established when Ashley, the plaintiff, purchased, and he succeeded therefore to his grantor's right of compensation, and apparently the only serious matter of contention now before the court is whether he did not also succeed to Goodman's claim of damages, so that he was bound by the final disposition thereof. It was held by this court in *Chicago, B. & Q. R. Co. v. Englehart,* 57 Neb. 444, that a purchaser of lands upon which an easement had been acquired for a public use did not succeed to his grantor's right to damages therefor in the absence of a special grant or assignment thereof, such right being regarded as a personal claim not attached to or passing with the land. But in this instance the appropriation was not complete when the plaintiff acquired title, so that, as it seems to us, he took the land unincumbered by the easement for which he was entitled to compensation when the appropriation was in fact made. That under such circumstances he was entitled to prosecute an appeal from the order rejecting the claim of his grantor is not disputed. But in view of the constitutional guaranty that his land should not be taken or damaged for a public use without just compensation, and in view of the fact that all compensation was refused by the county board, we are of opinion that he was not bound so to do, and that he had a right to prosecute a new claim in his own name.

It is recommended therefore that the judgment of the district court be reversed and the cause remanded.

LETTON 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 the cause remanded.

REVERSED.

NATHAN TIBBITS v. MAGGIE I. SWEET.

FILED JANUARY 18, 1905. No. 13,700.

Instruction. An instruction is erroneous which withdraws from the issues a material matter in dispute.

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

W. W. Wood, for plaintiff in error.

Allen G. Fisher, contra.

AMES, C.

This is an action for damages for an alleged breach of a contract for the care and keeping by the defendant in error of certain live stock belonging to the plaintiff in error. The petition purports to set forth a list of the animals which were the subject of the contract, including among them a three-year-old steer. The answer admits the making of the agreement, in substance the same as that pleaded in the petition, except that it sets forth a list of the animals, omitting the steer, and denying every other allegation of the petition. One of the principal controversies on the trial was whether a three-year-old steer was among the animals delivered and cared for under the agreement. This question the jury answered in the affirmative, but the court had instructed them that the answer "admits the making of the contract set out in the plaintiff's petition, and admits that he delivered the stock described therein to the plaintiff, and left them with her."

Presumably the instruction was inadvertently given, possibly because of the fact that the contract is in writing, and is in evidence, and includes a three-year-old steer, but that fact is not conclusive of the delivery of such an animal under the agreement, which was a vital matter in dispute, and which was withdrawn by the instruction from the issues. It is therefore recommended that the judgment of the district court be reversed and a new trial granted.

LETTON and OLDHAM, CC., concur.

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

REVERSED.

HENRY ROCK, APPELLEE, V. HENRY HUFF, APPELLANT, IMPLEADED WITH MARY S. HITCHCOCK ET AL., APPELLEES.

FILED JANUARY 18, 1905. No. 13,701.

Disclaimer: APPEAL. A defendant who has disclaimed in the district court, and against whom no judgment has been rendered except to bar him of the subject of the action, is not entitled to a review on error or appeal.

APPEAL from the district court for Wheeler county: JOHN R. THOMPSON, JUDGE. *Affirmed.*

Bishop & Anderson and *H. C. Vail,* for appellant.

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

AMES, C.

This is an appeal from a decree of mortgage foreclosure upon a tract of land in Wheeler county. It seems that some time after the mortgage was executed and made of record in 1888, the mortgagor abandoned the property,

and the defendant Henry Huff went into possession of it. The mortgage debt matured in September, 1893, but the time of payment was extended by agreement, also made of record, until September 1, 1898, so that an action for its foreclosure would not have been barred by the statute of limitations until 1908. This action was begun in 1902, both the mortgagor and Huff being made defendants thereto. The former made default, but Huff, who was charged by the petition with having or claiming to have some interest in the mortgaged premises, the exact nature and extent of which were unknown to the plaintiff, filed an answer consisting of general denial, and the following paragraph: "Defendant, further answering plaintiff's petition, alleges that this defendant has had and maintained exclusive, open and adverse possession of the land involved in this action for more than ten years before the commencement of this action, and the said mortgagee or his assigns have not made any requests or demand for any payment on the mortgage set out in plaintiff's petition or any part thereof." As a response to the petition the general denial is, in substance, a disclaimer, and the quoted paragraph, which is pleaded as a second defense, is immaterial.

There was a trial, and an ordinary decree of foreclosure and sale barring all the defendants, but there was otherwise no judgment against Huff or demand for any, but he has brought the case to this court by appeal. It not appearing by his answer that he has any interest in the subject matter of the suit, he has, of course, no right to have the proceedings reviewed, and it is recommended that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

JOHN T. RITCHEY ET AL., APPELLANTS, V. AFFA C. SEELEY, EXECUTRIX, APPELLEE.

FILED JANUARY 18, 1905. No. 13,938.

1. **Proceeding in Error**: EXECUTRIX. A proceeding in error may be prosecuted in this court against the personal representative of a deceased party, whether plaintiff or defendant to the judgment attacked.
2. **New Trial.** Sections 602 *et seq.* of the code are inapplicable to a proceeding to obtain a new trial in the court in which a judgment was rendered, on the ground that by unavoidable casualty and misfortune the complainant has been deprived of his constitutional right of review in this court.
3. **Showing.** In such an action as is above mentioned, it is not requisite to show conclusively that the complainant has a sufficient cause of action or defense, but it suffices to establish good faith and tender a seriously litigable issue.
4. **Limitation of Actions.** The time within which such an action as is above mentioned may be brought is prescribed by section 16 of the code, fixing a limitation for causes of action concerning which no specific provision has been made.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed with directions.*

Matthew Gering, for appellants.

Jesse L. Root, contra.

AMES, C.

On the 10th day of January, 1902, Seeley recovered a judgment against the Ritcheys in the district court for Cass county. Shortly afterwards a transcript of the record and judgment and a petition in error were filed in this court, and one of the attorneys of record of Seeley executed a written waiver of the issuance and service of a summons in error, but this latter was not lodged with the clerk until after the death of Seeley, and it was held that this court did not acquire jurisdiction of the pro-

ceedings in error, and they were dismissed on March 4, 1903, and the order of dismissal was reaffirmed on rehearing on December 16, 1903. Counsel for the Ritcheys was informed of the death of Seeley not until June 1, 1902.

It was held by this court in *Webster v. City of Hastings*, 56 Neb. 245, that a proceeding in error is a new action which may be prosecuted by the personal representative of a judgment defendant without revivor. It is a corollary of this rule that such a proceeding may be prosecuted in like manner against the personal representative of a deceased judgment creditor. *New Orleans & G. N. R. Co. v. Rollins*, 36 Miss. 384. A contrary practice would lack consistency. That counsel for the Ritcheys did not misconceive the law in this respect is evident from his written correspondence, contained in the record, with one of the attorneys of Seeley, in which he sought during the summer of 1902 to procure a revivor of the proceeding in error in the name of the personal representative by stipulation. But he failed of his purpose, and in the meantime the time for beginning a new proceeding in error in this court expired before that begun here was dismissed.

Letters testamentary upon the will of Seeley were issued to his widow on the 10th day of March, 1902, by the surrogate's court for Dutchess county, New York, where he resided at the time of his death, and where she continued to reside. Whether the Ritcheys knew of the place of her residence or of such proceedings does not appear, but it does appear that the attempted proceeding in error was pending in this court until the expiration of nearly two years after the time for beginning a new proceeding to obtain a review had elapsed, when the court dismissed it for want of jurisdiction, and afterwards affirmed the judgment of dismissal. On the 30th day of April, 1904, more than two years after the rendition of the first mentioned judgment, this action was begun in the court in which it was rendered to obtain a new trial on the ground that by unavoidable casualty and misfortune

the Ritcheys had been prevented from prosecuting their petition in error in this court.

It is first objected that the action is barred, either as having been brought under section 602 of the code after the lapse of more than two years from the date of the judgment complained of, or else because of there having been opportunity to bring it under that section, which, on account of the plaintiff having neglected to improve it, bars him of a remedy in equity by his own laches. But in our opinion sections 602 *et seq.* of the code have exclusive reference to happenings incident to procedure in the district court, and while that court has jurisdiction of the cause in which they occur. Such is the plain and ordinary signification of the language employed, and we do not think this court would be justified in putting a strained construction upon it which might have the effect, not only in this but in many cases, of depriving a party of an opportunity to prosecute a meritorious suit. The object of the statute is to enable the district court to "vacate or modify its own judgments or orders" because of some inherent infirmity or injustice in them, not due to the previous fault, but to the prior misfortune, of the party complaining. It plainly has no natural applicability to a casualty or misfortune happening after their rendition, and whose sole effect is to prevent a review on appeal or error. In our opinion, therefore, the equitable right is not barred by the two-year statute, but by section 16 of the code, prescribing a limitation for causes of action concerning which no specific provision has been made.

It is further contended that it is not made sufficiently to appear that the plaintiff has a valid defense to the original action or would be victorious on a new trial, but we think that enough is shown to establish good faith and to tender a seriously litigable issue. To require much more than this would be to put the cart before the horse and, in effect, to compel a new trial before granting one, and so to render the latter, if granted, a needless formality. Besides this the plaintiff has been deprived by the casualty

of which he complains of his constitutional right of review, which, as the records of this court conclusively show, would have afforded him in the ordinary way the relief which he now seeks.

The district court rendered a judgment for the defendant, from which the plaintiff appealed. We recommend that the judgment be reversed and the cause remanded, with instructions to enter a judgment as prayed in the petition.

LETTON 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 the cause remanded, with instructions to enter a judgment as prayed in the petition.

REVERSED.

NANCY SMITH V. MILO CURTICE.*

FILED JANUARY 18, 1905. No. 13,699.

Ejectment. In ejectment, plaintiff must recover, if at all, on the strength of his own title.

ERROR to the district court for Gosper county: GEORGE W. NORRIS, JUDGE. *Affirmed.*

Warrington & Stewart and *E. A. Cook,* for plaintiff in error.

J. O. Middleton, O. E. Bozarth, J. L. White, A. M. White and *Wilson & Brown, contra.*

OLDHAM, C.

This was a suit in ejectment. Plaintiff in the court below, who is also plaintiff in error in this court, alleged, in substance, that she was the owner of the north half of the

* Rehearing allowed. See opinion, p. 169, *post.*

northeast quarter of section 32, township 8 north, of range 21 west, Gosper county, Nebraska, and that the defendant was the owner of the southeast quarter of section 29 in the same township, range and county; that defendant is in possession of a strip of land owned by plaintiff, which is described by metes and bounds, and which is a part of plaintiff's half section. Defendant answered, admitting that he was the owner of the southeast quarter of section 29, as alleged in plaintiff's petition, and denying each and every other allegation of the petition. There was a trial to a jury in the court below, verdict for defendant, judgment on the verdict, and plaintiff brings error to this court.

This contest apparently arose over a dispute as to the location of the original government corner at the northeast corner of section 32 and was tried by plaintiff on the theory that this was the only issue tendered by the pleadings. But defendant by his general denial put in issue both plaintiff's' title and right to the immediate possession of the land in dispute; consequently, it devolved on plaintiff to recover on the strength of her title, and the only evidence contained in the bill of exceptions tending to support plaintiff's claim to the north half of the northeast quarter of section 32 is a sheriff's deed from F. F. Dunn, as sheriff of Gosper county, dated the 11th day of March, 1898, conveying to plaintiff all the right, title and interest of William Shryer and Mary E. Shryer in and to said premises, under an order of sale in a mortgage foreclosure proceeding. But there is no evidence introduced to establish any title in William Shryer and Mary E. Shryer to the land at the time of this judicial sale. Under this state of the record, plaintiff has not shown either title or right to the immediate possession of the premises in controversy. Consequently, the verdict rendered and the judgment entered by the trial court are the only ones that could be sustained under the evidence, and, this being the case, we are relieved from reviewing any of the alleged errors called to our attention in the brief of plaintiff in error

with reference to either the giving or the refusing of instructions, or the admission or exclusion of evidence.

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

AMES and LETTON, 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 January 3, 1906. *Judgment of affirmance adhered to:*

1. **Instructions:** REVIEW. Action of the trial court in giving and refusing instructions examined, and *held* not prejudicial.
2. **Evidence:** REVIEW. Action of the trial court in admitting evidence examined, and *held* not prejudicial.

OLDHAM, C.

In the brief filed in support of a motion for a rehearing in this case, our attention is called to the fact that, while it is true, as set forth in the original opinion, that plaintiff in this action failed to connect the title of William and Mary Shryer with a patent issued from the general government, yet the testimony of a witness produced by the defendant in the trial of the cause does tend to connect plaintiff's chain of title with a patent from the United States government. Plaintiff having thus shown herself to be the owner and entitled to the immediate possession of the north half of the north half of section 32, township 8, range 21, in Gosper county, Nebraska, we will proceed to examine the allegations of error contained in her brief.

As stated in plaintiff's brief, the sole question at issue is the location of the original section corner at the northeast corner of section 32, as above described. Plaintiff claims no ownership beyond the line separating section 32 from section 29 of the same township and range. Defendant

claims nothing beyond the southeast quarter of section 29. The corners east and west of the disputed corner are not in dispute. Plaintiff attempted to establish by parol proof the existence of the original government monuments at the corner for which she contended. Defendant relied on a corner fixed by subsequent surveys, and introduced evidence tending to discredit the proof of the original markings at the place contended for by the plaintiff. Neither of the corners correspond fully with the description of the government field notes, so the question involved was peculiarly one of fact for the determination of the jury.

The brief of the plaintiff in error is chiefly devoted to a criticism of the action of the trial court in giving and refusing instructions. The first paragraph of the instructions is criticised for being indefinite and not clearly stating the issues. While the instruction is not a model for brevity and precision, yet there is nothing in it in anywise prejudicial to the plaintiff, and it closes by directing the attention of the jury to the only question at issue in the following language:

"The main question in dispute and the one for you to determine is whether the tract of land in dispute, containing 12½ acres, belongs to the north half of the northeast quarter of section 32 or to the southeast quarter of section 29, in said township and range."

This instruction is followed by another properly placing the burden of proof upon the plaintiff to establish the land in dispute as a part of section 32, and in the following paragraph the court told the jury:

"If it has been shown to you by a preponderance of the evidence that the mounds and pits claimed by the plaintiff as a government corner, and known in this case as the Smith corner, was the place where the United States surveyors originally located the section corner, then you must recognize this corner as the true corner between said sections regardless as to whether it might agree or disagree with any subsequent surveys. In other words, if the government corners can be found, and you find from the evi-

dence that they were so found and established, they settle the question of the boundary line between these lands in dispute, no matter what effect it might have on the case, or on the land in dispute, and no matter whether this corner agrees with the government field notes or not."

These instructions, we think, fairly and fully cover every contention insisted upon by the plaintiff in the court below, and justified the trial court in refusing instructions embodying the same principles, which were requested by the plaintiff.

We have examined the allegations of error in the admission of testimony, and find nothing in that regard which could have been prejudicial to plaintiff.

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

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former judgment of this court is adhered to.

AFFIRMED.

ROBERT L. KIMBRO, APPELLANT, V. MELISSA A. KIMBRO, APPELLEE.

FILED JANUARY 18, 1905. No. 13,704.

Evidence examined, and *held* that the alimony awarded by the district court is clearly excessive.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Judgment modified.*

E. E. Spencer and *Tibbets & Anderson,* for appellant.

W. T. Stevens, S. B. Iiams and *H. C. Ward, contra.*

OLDHAM, C.

This was a suit for divorce between plaintiff and defendant, tried to the district court for Lancaster county,

Nebraska. A decree of divorce and alimony was granted on the cross-petition of defendant, Melissa A. Kimbro, on the ground of desertion and abandonment for more than two years before the filing of the petition. There is no complaint of so much of the decree as grants defendant a divorce on her cross-petition, but it is urged that the amount of alimony awarded is clearly excessive, in view of the financial condition of appellant, who was plaintiff in the court below.

It appears from the evidence in the bill of exceptions that plaintiff and defendant were married in the state of Illinois in the year 1866, and lived together as husband and wife from that time until the year 1900, when, on account of differences arising between them, the husband left defendant, and subsequently removed to Lancaster county, Nebraska, where he now resides, and where he had been residing for two or three years before the decree was entered. It appears from the testimony that there is nothing in the conduct of either that imputes moral obloquy to either, but that the differences, such as they were, all arose from a mere incompatibility of disposition. There are two children surviving of the marriage —one, a married daughter of the age of 28 years; the other, a son of the age of 17 years, who resides with his mother in Sterling, Illinois. At the time of the marriage the husband had a very small patrimony, and during the time of the marriage the wife received $500 from her father's estate. Outside of this all the property owned by them stands as the joint product of their industry and thrift. The evidence shows that this property consists of 80 acres of land in Lee county, Illinois, of the value of $60 an acre, the legal title of which is in the wife; also a certificate of deposit in the First National Bank at Sterling of $1,857.73, and a certificate of deposit in the Sterling National Bank of $218, both of these certificates being in the name of the wife, giving her a total of $6,469.73 in her own right, without any indebtedness outstanding against it. The evidence shows that plaintiff has in his

own name a business block in Sterling, Illinois, of the value of $15,000; a residence at Sterling, Illinois, of the value of $7,000; and a house and lot in Sterling, Illinois, of the value of $700; or a total of real estate of the value of $22,700, which stands in his own name. The evidence shows that there is household and kitchen furniture owned between the parties of the value of $200, and that plaintiff is indebted on mortgages, judgment liens and outstanding claims in the sum of $6,000. In this condition of the property the trial court awarded the wife, in addition to the land and certificates of deposit held by her, the household and kitchen furniture of the value of $200; alimony in gross in the sum of $5,500. If the decree as awarded is permitted to stand, it would leave the wife in possession of property practically of the value of $12,500, without any indebtedness to meet, except her attorneys' fees in this proceeding; and it would leave the husband real estate of the estimated value of $22,700, from which he would have to pay his outstanding indebtedness of about $6,000, the judgment for alimony of $5,500, and his attorneys' fees and costs of this litigation.

As has been said by this court in numerous cases, there is no hard and fast rule for awarding alimony in a divorce proceeding. The time the parties have lived together as husband and wife, the contributions that have been made by either or both to the property accumulated during the marriage relation, and the health and condition of the parties at the time of the decree are all elements that should be considered in making the award. Now in the case at bar there is every reason why substantial justice should be accorded to each of these parties. The husband was 61 years of age and the wife 58 years of age at the time of the decree; neither are in robust health, and all the property stands for their joint accumulation. While there is no doubt but that the wife should have a fair and reasonable share of the accumulated property, yet we cannot but be impressed with the idea that the things awarded her—being unincumbered real estate, interest bearing cer-

tificates in solvent banks, household and kitchen furniture, and a money judgment against the plaintiff of $5,500—are clearly more than an equitable division; especially when this property remaining as the husband's share is all real estate, some of it incumbered with mortgages, and other of it with judgment and attachment liens, which, while considerably less than its estimated value, might, if pressed for immediate collection, sacrifice the whole or nearly all of the property allotted to him. For this reason, we think the award excessive, and recommend that the judgment of the district court be modified by an award of $2,500 as alimony in gross instead of $5,500, as adjudged in the court below, and that, as so modified, the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified by an award of $2,500 as alimony in gross instead of $5,500, as adjudged in the court below, and, as so modified, the judgment of the district court is affirmed.

JUDGMENT MODIFIED.

JAMES P. BALL V. CHARLES H. BEAUMONT ET AL.

FILED JANUARY 18, 1905. No. 13,698.

1. **Assumpsit: QUESTION FOR JURY.** Where a material alteration has been made in a promissory note, whereby such note was avoided, and an action is brought against the makers for money paid to defendant's use by one who guaranteed the note, procured money from a bank thereby and sent it to one of the makers, the question whether or not the money was paid to one of the defendants for his sole benefit, or whether it was paid to a partnership composed of both defendants, or the transaction adopted and ratified by the partnership, is a question for the jury.

2. **Review.** Where, upon sufficient evidence, the jury has found that such money was paid to and for the sole benefit of one of the defendants, its verdict will not be disturbed.

ERROR to the district court for Perkins county: JOHN R. THOMPSON, JUDGE. *Affirmed.*

Beeler & Muldoon and *Charles McDonald,* for plaintiff in error.

B. F. Hastings and *T. C. Munger, contra.*

LETTON, C.

This case has been before this court three times prior to this. See *Ball v. Beaumont,* 59 Neb. 631, 63 Neb. 215, and 66 Neb. 56. The issues have been fully stated in the preceding opinions. At the last hearing the law of the case was clearly laid down by Mr. Commissioner DAY. It was said by him:

"Plainly, then, the only chance for plaintiff to recover is by the establishment of a partnership transaction, so that Penn's knowledge and ratification of plaintiff's acts would be a ratification by both defendants. The condition of affairs seems to be that plaintiff has no direct knowledge of the relative positions toward this transaction of the two defendants. Penn says it was a partnership transaction, and Beaumont that it was a personal one of Penn's and an endeavor on the latter's part to raise his share of the firm's capital, in which Beaumont signed the note as surety. If the note itself is avoided for alterations, and does not furnish a basis of recovery, the burden of proving a partnership transaction and a valid authorization or ratification by the partnership of the payment, is on plaintiff."

The case was reversed, and retried under the law as thus laid down. Under the pleadings, in this state of the case, the plaintiff would only be entitled to recover against Beaumont if he proved that the firm of Penn and

Beaumont received the money from him for the benefit of the firm, or ratified Penn's action. The action is not on the note, but for money paid to defendant's use, and the lengthy arguments in plaintiff in error's brief relating to the rights of the parties under the note are not applicable.

The evidence adduced on the part of the plaintiff was to the effect that the note was sent to him at his place of residence in Iowa by Penn, bearing the signature of George W. Penn and Charles H. Beaumont, and having certain blanks which he was authorized to fill; that it was sent to him on behalf of the partnership; that he filled the blanks, changed the place of payment, guaranteed the note, procured the money from the bank in Iowa thereby, and sent it to Penn, who immediately deposited it in the Madrid bank for the partnership in the partnership account. This evidence standing alone would uphold the plaintiff's claim and justify a verdict in his favor against both Penn and Beaumont. However, the defendant Beaumont introduced evidence to the effect that the note was executed by Penn as principal and by himself as surety; that the transaction was for Penn's personal benefit and not for the firm, and that the purpose of the execution of the note was to allow Penn to borrow money with which to pay his share of the money which was to be invested in the partnership business; that when the money was procured by the plaintiff he sent it in a personal letter to Penn, and that Penn paid his debt to the partnership with it and received credit on his debt to that extent. The case was submitted to the jury under this directly conflicting evidence, and the jury by its verdict found that the version of the transaction given by Beaumont and his witnesses was true. The plaintiff urges that even under this state of facts the partnership received the benefit of the money and hence should be held liable for it. If the money in the first place was sent to Penn by the plaintiff for Penn's individual benefit, it matters not what disposition of the money was made by him, so far as the relation of the plaintiff to the person receiving it is concerned. The fact

that Penn, if the money was his, paid it to the partnership would create no greater liability on the part of the partnership to the plaintiff than any other creditor of Penn's would have been subject to if he had paid the money to him. Upon the receipt of the money by Penn his liability was fixed, and nothing that he might do with the money afterwards would extend that liability to other persons.

The case of *Savage v. Savage,* 36 Ore. 268, 59 Pac. 461, quoted by plaintiff, is not in conflict with this holding. In the Oregon case the evidence disclosed that each of the signers of the void note applied to the plaintiff for a loan of $1,500, and that for such loan they tendered their joint and several promissory note for $3,000, and the loan was consummated on that basis. Since both parties received the money upon their joint promise to pay, the court held that the money was paid to the use of both defendants and that they were jointly liable for the debt. In that case the point in issue in this case was not touched upon or determined at all. The cases would be similar if in the instant case it was admitted that the money was received one-half of it for the benefit of Penn and the other half for the benefit of Beaumont, but this is the very matter in dispute.

As to the question whether or not one signing as surety a note which is subsequently avoided by a material alteration can be held upon the original consideration, this has already been decided in this case adversely to the contention of plaintiff. This is the law of the case and will not be re-examined.

Complaint has been made of a number of instructions given and refused. We have examined the same and find that the issues in the case are clearly stated in the instructions given, and that plaintiff was not prejudiced by the refusal to give those requested by him. The case seems to have been fairly tried, and though we might perhaps draw a different conclusion from the facts proved than the jury did, there is ample evidence to support the verdict. We recommend 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.

JOSHUA PALMER v. ALEXANDER MCFARLANE.

FILED JANUARY 18, 1905. No. 13,702.

1. Petition examined, and *held* to state a cause of action.
2. Parties. Persons severally liable upon the same promissory note may all or any of them be included in the same action, at the option of the plaintiff. Section 44 of the code.

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

F. I. Foss and *R. D. Brown,* for plaintiff in error.

J. D. Pope, contra.

LETTON, C.

This is a proceeding in error from a judgment of the district court for Saline county sustaining a demurrer to the petition and dismissing the case. The petition is as follows:

1. The plaintiff complains of the defendant, for that on the 5th day of April, 1902, said defendant made and delivered to C. W. Mitchell a promissory note, of which the following is a copy:

"$63. FRIEND, NEB., April 5, 1902.

"April 5th, 1903, after date, for value received, we or either of us promise to pay to the order of C. W. Mitchell sixty-three dollars, with interest at the rate of ten per cent. per annum from date until paid.

"Payable at the Merchants and Farmers Bank, Friend, Neb. J. F. ADAMS.

"ALEX MCFARLANE."

2. On the 5th day of April, 1902, for a valuable consideration, the plaintiff bought said note of said C. W. Mitchell, and has been the owner thereof ever since, and the same was indorsed by him in words as follows: "Pay to the order of Joshua Palmer. C. W. Mitchell."

3. No part thereof has been paid, and there is now due thereon from the defendant to the plaintiff the sum of $63, with interest at 10 per cent. from April 5, 1902, for which, with costs of suit, the plaintiff prays judgment against the defendant.

The action was brought against Alexander McFarlane alone. He demurred upon the ground of a defect of parties defendant and also generally. The makers are severally liable, and one may be sued without the other under section 44 of the code. We find no defect of parties and nothing lacking in the petition to constitute a good cause of action.

We recommend that the judgment of the district court be reversed and the cause remanded.

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.

REVERSED.

WALTER L. SELBY v. E. W. PUEPPKA ET AL.

FILED JANUARY 18, 1905. No. 13,157.

1. **Petition**: JURISDICTION: DECREE. A demurrable petition may confer jurisdiction on a district court, and a decree, valid unless appealed from, may sometimes be rendered upon it.
2. ———: FORECLOSURE OF TAX LIEN. That a petition for foreclosure of a tax lien discloses that no preliminary sale for taxes was had will not of itself render the foreclosure proceedings totally void, if had *coram judice*, and with jurisdiction of the parties.

3. **Tax Sales**: REDEMPTION. Section 3, article IX, of the state constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as to administrative sales.

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

Gaines, Kelby & Storey, for plaintiff in error.

J. A. Douglas, contra.

HASTINGS, C.

In this suit in equity, brought by a grantee of the original owner to redeem land sold for taxes at a judicial sale, a general demurrer was sustained by the court to plaintiff's petition. He elected not to plead further, and from a judgment of dismissal brings error.

The sale for taxes was made by the sheriff of Rock county upon a decree of foreclosure entered at suit of Rock county. There had been no administrative sale for taxes. The county sought to foreclose a tax lien without resorting to a sale. It procured the premises to be sold to defendant's grantor, and the sale to be confirmed, and a sheriff's deed to be issued upon it. Afterwards this title was conveyed to defendant. The owner at the time of the assessment of the taxes afterwards conveyed to the plaintiff, who brought this action to redeem from the taxes, alleging that the foreclosure proceedings were all void, for the reason that the petition of the county in that action showed there had been no prior sale of the premises for taxes. It is also urged that the constitution of the state allows a redemption within two years from any tax sale. It is urged on the other side that the fact that a petition is demurrable does not make the decree of a competent court subject to collateral attack, where the parties were before it and the subject matter one of which the court had cognizance. This is thought to be a sufficient answer to the claim that the foreclosure proceedings are void.

To the claim that the two years' time for redemption from sales for taxes has not run, it is replied that the decree of confirmation is as conclusive as to the sale as that of foreclosure is as to the lien and right to sell under it. It is urged that to permit a redemption now is to allow a collateral attack upon the decree of confirmation. So far as plaintiff's first contention is concerned, it would seem that defendant's claim is good. An insufficient complaint often confers jurisdiction. 1 Freeman, Judgments (4th ed.), sec. 118. As is said in *Logan County v. Carnahan*, 66 Neb. 693, there is no lack of power in the district court. In a proper case it can grant a foreclosure of a tax lien. Whether or not a proper case was presented to it on Rock county's allegations was for that court to determine as to this land. Plaintiff's grantor was before the court, and if aggrieved by its decision he should have appealed.

As to the second contention of plaintiff—that he has a right of redemption—defendant's answer is not so good. The terms of the constitution are very sweeping. Art. IX, sec. 3. A right of redemption is given from all sales of real estate for the nonpayment of taxes for two years after the sale. This provision has been held to be self-executing. *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 109. It has also been declared to apply to judicial sales as well as to administrative sales. *Logan County v. Carnahan*, 66 Neb. 685. We see no reason for suggesting any change in the ruling. The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court. The court's action must be held to have been taken with this right in view. Of course, in this view, that confirmation, like the other proceedings in this sale, was had provisionally and subject to the right of redemption—the costs of the sale, as well as the costs of foreclosure, being added to the taxes and interest in making the redemption.

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

REVERSED.

ELIZA R. SWAN, APPELLANT, V. WILLIAM S. CRAIG ET AL., APPELLEES.

FILED FEBRUARY 9, 1905. No. 13,200.

1. **Promissory Note: EXTENSION OF DEBT.** Where, at or about the maturity of a negotiable instrument, the time of payment of the indebtedness evidenced thereby is extended by a written agreement of the parties upon a valid consideration, the agreement being independent of and collateral to the original contract, such extension does not continue the commercial characteristics of the note as live unmatured negotiable paper.

2. **Payment.** The maker of a nonnegotiable instrument, who has no notice of a transfer thereof, may make payment to the original payee. *Consterdine v. Moore*, 65 Neb. 296.

2*a*. ———. One S. by purchase became the owner and holder of a note secured by a real estate mortgage long before its maturity. At or about the time of its maturity, she consented to an extension of the time of payment of the debt evidenced thereby. The original payee of the note, a loan company, made a written agreement in its own name with the payor, extending the time of payment for five years, and at the expiration of such extension again made a second agreement extending the time of payment another four years. These extension agreements after their execution were assigned by the original payee to the holder of the note, who ratified and approved the same and enjoyed the fruits arising therefrom. *Held*, That, by reason of the course of dealings between the parties, payment made to the original payee by the maker, he having no notice of the transfer of the note to S., was a good payment and operated as a discharge and cancelation of the indebtedness, even though the note was not

in the possession of the payee and was not at the time of payment delivered to the maker.

2*b*. **Equitable Estoppel.** Under the facts as disclosed by the record, *held*, that the principle of equitable estoppel precluded S., the note holder, as against the maker from denying the ownership and authority of the payee to receive payment and thereby discharge the indebtedness.

APPEAL from the district court for Burt county: IRVING F. BAXTER, JUDGE. *Affirmed.*

Montgomery & Hall, for appellant.

Hopewell & Singhaus, contra.

HOLCOMB, C. J.

This is an action brought for the purpose of foreclosing a real estate mortgage executed by the defendants to the Omaha Loan & Trust Company. The plaintiff, appellant here, claims as the indorsee of the note secured by the mortgage before the maturity of the debt, and in the ordinary course of business. The petition is in the usual form with some added allegations to the effect that prior to the maturity of the principal of the indebtedness the plaintiff consented to extend the time of payment for a period of five years, and that thereupon an extension agreement of a "farm mortgage bond" in writing was duly signed, executed and delivered by the defendants, a copy of which is set forth in the petition. That prior to the maturity of the debt as thus extended, the plaintiff, at the request of the defendants, consented to extend the payment of the said principal indebtedness for a further period of four years, and, thereupon, the defendants executed and delivered another extension agreement, a copy of which is set forth in the petition. That said extension agreements and coupons for interest to accrue during the periods of extension were immediately after their execution assigned and delivered to the plaintiff by the Omaha Loan & Trust Company with whom the agreements were entered into.

And that thereafter the plaintiff became, and has ever since been, the holder and owner of said extension agreements.

The answer does not admit the assignment of the note and mortgage before maturity, as alleged in the petition. It admits the execution and delivery of the extension agreement and that it was delivered to the Omaha Loan & Trust Company; and also the same admission is made as to the second extension, and that such extension agreements were assigned by the loan company and with the full understanding and belief on defendants' part that the loan company was the holder and owner of the paper evidencing the indebtedness thus agreed to be extended. It is denied that the plaintiff is the *bona fide* owner and holder of the note and mortgage. It is alleged that no assignment of the bond and mortgage or either extension agreement was ever recorded, and also that the defendants received no notice in any manner that plaintiff was or claimed to be the owner of any of the papers evidencing the indebtedness or the security therefor, or the agreements extending the time of payment of the indebtedness. It is also averred that all payments of interest were made by defendants to the loan company, the payee, and that on the 8th day of August, 1901, upon notice and request of the Omaha Loan & Trust Company, the defendants paid to such company the full amount of the principal and of the interest then due, and that such payments were made in good faith and upon the belief that the Omaha Loan & Trust Company was the owner and holder of the paper and entitled to receive payment. The reply consisted of a general denial.

It is disclosed by the record that soon after the execution of the note and mortgage, and before the maturity of the debt, the plaintiff, by purchase in the due course of business, became the owner and holder thereof by assignment. In the assignment, the mortgagee, the Omaha Loan & Trust Company, guaranteed the collection of the principal and the prompt payment of the coupons attached

for interest accruing according to the terms of the principal document. The place of payment was fixed at the Chemical National Bank of New York city. The interest coupons were paid by the makers in all instances to the Omaha Loan & Trust Company. It also appears that as these interest coupons matured, they were presented by and paid to the plaintiff at the Chemical National Bank, the designated place of payment, she never having any communication with the Omaha Loan & Trust Company, the payee. The coupons when surrendered at the place of payment and when paid to the holder were returned to the loan company, who in turn, after stamping most of them "Paid" with the loan company's stamp, sent them by mail to the makers. This appears to have been the course of dealings between all three parties during the entire time the loan was in existence and until the final payment of the principal by the debtor to the loan company. About the time of the maturity of the principal debt according to the terms of the original instruments, the defendant executed a written agreement entitled "extension of farm mortgage bond," which in terms provided that the Omaha Loan & Trust Company agreed to extend the time of payment of the principal debt for five years from maturity, and the defendant on his part agreed to pay the principal sum with interest according to the terms of ten interest notes, payable semiannually, and attached to the extension agreement. About five years afterwards, and just prior to the maturity of the principal debt as extended by the first agreement, the interest coupons in the meantime having been paid, another extension agreement was entered into between the defendant and the Omaha Loan & Trust Company whereby the time of payment of the original indebtedness was again extended for a term of four years, coupons for interest being attached as before to the extension agreement. These extension agreements, it appears, were both soon after their execution assigned to the plaintiff by a proper indorsement thereon by the Omaha Loan & Trust Company, one of the

parties to the agreement. The plaintiff accepted such assignment, thereby acquiescing in and consenting to the extension of the time of payment of the original indebtedness according to the terms and conditions of such agreements. The plaintiff testifies that she consented to the extensions as thus made, but fails to state with whom she dealt in transacting the business. Having testified that she had no communication with the loan company, it is fairly inferable from all the evidence that these agreements were received and accepted by her through the Chemical National Bank, the place of payment of the principal indebtedness and of the interest accruing thereon. At about the time of the maturity of the debt under the second extension agreement, the defendant paid the interest then accrued, together with the principal sum due to the loan company, and this amount was never received by the plaintiff, the loan company shortly thereafter passing into the hands of a receiver. The district court, after trial on the evidence adduced, an epitome of which has been given, found the issues generally in favor of the defendant, and adjudged that the note and mortgage should be canceled. The plaintiff appeals.

1. The vital question in the case is, whether the payment to the loan company, under the facts and circumstances as narrated, operates as a discharge and satisfaction of the debt, and whether the plaintiff is estopped by her conduct and actions in relation to the transaction, from denying the apparent ownership and authority of the loan company to receive payment and cancel the indebtedness. The defendant, as he testifies, and regarding which there is no controversy, declares that in all matters connected with the loan, the extensions of the time of payment, and the payment of interest coupons and the principal, he dealt with the loan company under the belief that it was the owner and holder of the paper, and the one to whom payment might rightfully be made. This belief on his part arose not only out of the original transaction, but also by reason of their subsequent dealings of the

kind and character heretofore referred to. Aside from the fact that the loan company was negotiating real estate loans and dealing in secured negotiable paper such as it might ordinarily be expected to negotiate and dispose of to third parties, there is nothing in the whole transaction which would advise the defendant that the paper in question had been actually indorsed and was held by some third party. Nor was there anything connected with the coupons for interest as they were paid and surrendered, nor the extension agreements entered into, nor the correspondence between the loan company and the defendants which would serve to apprise the latter that the instrument evidencing the original indebtedness and the security thereof had been assigned or indorsed to others, or that their possession and ownership had passed out of the hands of the payee. It is not to be doubted from the evidence that, as a matter of fact, the plaintiff purchased the original note and mortgage before maturity, paying full value therefor. We are satisfied that the note or bond was negotiable in form, and by such purchase the plaintiff became clothed with all the rights of a good faith purchaser of negotiable paper before maturity and entitled to protection as such. It seems reasonably clear that, had no extension been made, payment to the loan company, it not having possession of the note, and the plaintiff having done nothing to warrant the belief that she had constituted the company her agent, with authority to collect the same, would have been unavailing as a defense. It becomes material, therefore, to inquire as to what effect the execution of the extension agreements in the manner they were executed and the participation of the plaintiff in and in connection therewith, and the dealings of the parties with respect thereto has on the rights of the plaintiff and the defendants. It is contended by plaintiff's counsel that such extensions revive and continue the negotiability and commercial character of the note or bond, and that during all of the time covered by the several transactions and till the maturity of the debt according to

the second extension agreement, she continued to be the holder of negotiable commercial paper before maturity, and that defendant dealt at his peril with any one other than the actual owner and holder regarding such unmatured paper. We are unable to accept this contention as being sound. The contract of extension is a simple executory agreement. It is devoid of the characteristics of a negotiable instrument. The loan company, as the ostensible owner of the note and mortgage, agreed to extend the time of payment of the debt for a period of five years, in consideration of which the mortgagors agreed to pay the principal sum when due as thus extended, and interest thereon annually during the time of the extension at a given rate per cent. This contract was a subsequent, separate, and distinct agreement from the one originally entered into which was evidenced by the note and mortgage now in controversy. The new agreement was independent of and collateral to the old one. The note and mortgage after execution were the subject of contract like any other property or chose in action. An agreement to extend the time of payment, like any other agreement affecting the indebtedness or one which might work a rescission of the contract, could, upon a valid consideration, be entered into. The original contract could by a valid subsequent agreement be altered or altogether destroyed. 1 Daniel, Negotiable Instruments (5th ed.), sec. 157. The rule as to construing contemporaneous agreements does not apply in a case of this kind. Nor would the rule as to memoranda on negotiable paper which requires its purport to be collected from its "eight corners" govern. The rule extends no further than that memoranda appearing on the back of negotiable paper affecting its operation must be construed the same as if written on its face. It is true, an indorsement before the day of payment on negotiable paper postponing its maturity has been held to continue the negotiable character of the instrument until the postponed date of maturity. *Sagory v. Metropolitan Bank,* 42 La. Ann. 627, 7 So. 633.

But this is upon the express holding that the indorsement must be considered as incorporated in and made a part of the paper as though the postponed date of maturity had been originally written in the note. But this cannot be said of the subsequent independent agreement in the case at bar. On the other hand it is held, where the time of payment of a negotiable note is extended by an agreement indorsed upon the back, one who takes it after its original maturity will be subject to all equities between the parties. *Marcal v. Melliet,* 18 La. Ann. 223; *Dryer v. Mercantile Bank,* 4 Mo. App. 599. The contract for the extension for the time of payment of the original indebtedness in the case at bar neither adds to nor takes away from the negotiable characteristics of the note as originally executed. Such a contract might rest in parol, and if such were the case, it would hardly be contended, we apprehend, that the negotiability of the note evidencing the original indebtedness would be kept alive during the period covered by the agreement of extension. The same rule as to the effect of the contract upon the negotiability of the instrument would apply either to a written or an oral agreement to extend the time of payment of the indebtedness. When the note in controversy had matured according to its terms, it was not thereafter subject to transfer by assignment or indorsement as live negotiable paper whose holder would be protected against defenses and equities that might be urged by the payors if it were in the hands of the payee or of those purchasing with notice. It became after its maturity as any other dishonored negotiable instrument and was thereafter a mere chose in action subject to the laws applicable generally to contract rights and obligations stripped of the protection thrown round live commercial paper.

2. Assuming, then, as we do, that the note in controversy lost its characteristics as unmatured negotiable paper after the time it became due as originally executed, what is the legal status of the parties and how are the rights of the plaintiff to be determined in view of her ac-

tion and conduct in the premises? Each extension agreement was made between the makers and the loan company as payee and as the ostensible owner of the indebtedness. This was done with the consent and authority of the plaintiff, the then legal holder of the paper, that is, she by her acceptance and acquiescence in what had been done ratified the acts of the loan company, and thus expressly permitted them to deal with the paper as though it were their own. Had no extension been made, payment by the debtor to the loan company, it not having possession of the paper, and the plaintiff having done nothing to give it ostensible authority as agent or owner, would have been unavailing as a defense. It may be that, if but one extension agreement had been entered into, and it having been executed sometime before the maturity of the note, the defendants would, notwithstanding the agreement, be charged with notice that the loan company might have negotiated the paper before its maturity and for that reason payment could not be made to the company except at the maker's peril, unless it was shown that the company had possession of the note or authority to receive payment from the actual holder. No such contention, however, can be made as to the second extension, as the note at that time was confessedly near five years past due. The mortgage at that time stood as security for a nonnegotiable instrument, and the mortgagor was justified in assuming that it was yet owned by the mortgagee, and in the absence of notice that the paper had been assigned, could with safety pay the mortgagee. *Consterdine v. Moore,* 65 Neb. 296. At the time of the second extension of time of payment, and at all times thereafter, the principal note had long since matured. Any one to whom it was offered would discover from an inspection that it had been dishonored. Evidence of an extraneous character, to wit, the extension agreement, would have to be resorted to in order to show that a date beyond that fixed by the terms of the note had been subsequently agreed upon for its payment. In other words, it was a new, separate, and

distinct agreement, by which it could be shown that the parties had upon a good consideration agreed that the date of payment should be postponed. The loan company, it is true, had no original authority to extend the loan; but when the extension agreements were made in its name and assigned to the plaintiff, she ratified and approved its action in that regard, and in this way not only made the loan company her agent for that purpose, but in truth, by this course of dealing, permitted the company to hold itself out and to deal with the paper as though it was the legal owner and holder thereof. The contracts, and each of them, on their face purport to have been made between the maker and the payee as debtor and creditor respectively. The plaintiff's approval of these extension agreements and her acceptance of the fruits derived therefrom was a ratification of the company's acts in that regard and a ratification of the representations made by the company to the defendants which, impliedly at least, were to the effect that it was still the owner of the note and mortgage with power and authority to enter into the contract and extend the time of payment as therein agreed upon. By the plaintiff's acceptance of the fruits of these transactions, her failure to notify Craig of the true state of affairs and disabuse his mind of the belief that he was dealing with the owner, or to disclose to him the fact that she had purchased the same knowing, as she must have known from these extension agreements coming into her possession, that defendant was dealing with the company as the owner, she is now, it would seem, on well-defined equitable principles, estopped from questioning the legality of the payment made by the debtor to the ostensible owner of paper. The plaintiff as well as the defendant is charged with knowledge of the law. She is charged with knowledge that the time of payment which was extended under the agreements entered into between the loan company and the defendants does not extend the commercial character or negotiability of the note evidencing the indebtedness forming the basis of such agreements. She

must have known, therefore, that by allowing the loan company to make these extensions in its own name, and to deal with the paper as its own, this would lead the defendant to believe that the loan company still owned the paper, and, its negotiability having long since ceased, that he might safely pay the loan to the company in the absence of notice that it was not the real owner. She ought not now to be permitted to complain of the payment of this paper to the original payee, she herself by her action and conduct having led the maker to believe that the loan company was still owner. The case as presented seems to be one where one of two innocent persons must suffer by reason of the wrongful act of a third. It is a familiar principle that the loss in such a case must rest upon the one who placed it in the power of the third person to commit the wrong. Applying the principle to the case at bar, it seems reasonably clear that the defendant ought not again to be required to pay the obligation which he has once discharged by paying, in the honest belief which was induced by plaintiff's conduct, and upon reasonable grounds for the entertaining of such belief to one who was entitled to receive the payment and cancel the obligation. For cases analogous in principle to the one under consideration illustrating and applying the doctrine of equitable estoppel, see *Fowle v. Outcalt,* 64 Kan. 352, 67 Pac. 889; *Fields v. Carney,* 63 Tenn. 137; *Morgan v. Neal,* 7 Idaho, 629, 65 Pac. 66; *Marshall v. Ender,* 125 Ill. 370, 17 N. E. 464. The conclusion we reach is that the payment made to Omaha Loan & Trust Company by the defendant was effective as a discharge and cancelation of the mortgage indebtedness and that the decree of the district court should be affirmed, which is accordingly ordered.

AFFIRMED.

JOSEPH WILLIAMS ET AL., APPELLANTS, V. JOSEPH H. MILES ET AL., APPELLEES.*

FILED FEBRUARY 9, 1905. No. 13,599.

1. **Law of Case.** The decision of a law question by this court upon the first appeal of a cause will ordinarily be adhered to upon a second appeal as the law of the case. No exception to this rule will be made when the question so determined is one of practice, and the parties have been guided by such decision in the second trial of the case.
2. **New Trial.** When a proceeding is begun in the county court, and appealed to the district court and there tried, an application for a new trial on the ground of newly discovered evidence can be made only in the district court.
3. **Appeal.** Under the statute allowing appeals "in actions in equity," any order or proceeding in such action that may be brought to this court for review may be brought by appeal.
4. **New Trial.** In an action in equity to vacate a judgment at law, the district court may grant a new trial for the same reasons and upon the same condition that it may in other equity causes.
5. ———: LIMITATION. In an action tried in the district court upon appeal from the county court, the time in which an application for a new trial may be filed runs from the date of the judgment of the district court. This is so though the action or proceeding is one of which the county court has exclusive original jurisdiction.
6. ———: DILIGENCE. To obtain a new trial on the ground of newly discovered evidence, it must be made to appear that the party applying has used due diligence to obtain the evidence and present the same at the trial. The pleadings and evidence in this case show such diligence.
7. ———: SHOWING. In such application for a new trial, it must appear that the new evidence is of so controlling a nature as to probably change the result of the former trial. If the party applying for the new trial failed upon the former trial for want of sufficient proof of an essential fact which the new evidence strongly tends to prove, it sufficiently appears that such evidence would probably change the result.
8. **Lost Will:** PAROL EVIDENCE. When a subsequent will is lost or cannot be produced, it is competent to prove by parol that it contained a clause revoking the former will.

* **Rehearing denied.** See opinions, pp. 205, 206, *post.*

9. **Destroyed Will**: EVIDENCE. PRESUMPTION. If a prior will is proposed for probate by a beneficiary thereof, whose testimony is that he found the will among the effects of the deceased, but did not find a later one (which the evidence shows it would plainly be to his interest to destroy), it will not be presumed that the testator himself destroyed the later will, and that in so doing it was his purpose and intention to revive the former one. The existence of a fact cannot be presumed from another fact which itself rests wholly on presumption.

APPEAL from the district court for Richardson county: JOHN R. THOMPSON, JUDGE. *Reversed with directions.*

John L. Webster, Smith P. Galt, Rearis & Reavis, I. J. Ringolsky and *J. H. Atwood*, for appellants.

J. H. Broady, for appellant Samuel A. Miles.

Clarence Gillespie, E. Falloon, F. Martin, J. W. Deweese and *T. J. Mahoney, contra.*

SEDGWICK, J.

After the death of Steven B. Miles, an instrument purporting to be his last will and testament was duly presented to the county court of Richardson county, and, upon consideration of that court, was duly allowed as his last will. After the time for taking an appeal from this order of the probate court had elapsed, these appellants and others filed a petition in the county court to set aside the probate of the will, and asking for leave to present for probate an alleged later will of the decedent and for general equitable relief. Issue was joined upon this petition and upon trial in the county court the action was dismissed. An appeal was taken to the district court, and, upon trial, judgment was there also rendered in favor of the defendants, the appellees here, and from that judgment an appeal was taken to this court. A motion was made in this court to dismiss the appeal on the ground that the action was not appealable and that this court had no jurisdiction of the action by appeal. This motion was

overruled. *Williams v. Miles,* 63 Neb. 859. Afterwards, upon final hearing in this court upon the merits of the controversy, the judgment of the district court was affirmed (*Williams v. Miles,* 68 Neb. 463), and a motion for rehearing therein was overruled. *Williams v. Miles,* 68 Neb. 479. Before the action was disposed of in this court the appellants began this proceeding in the district court for Richardson county. It is a petition for a new trial on the ground of newly discovered evidence. Upon the trial of this action in the district court a judgment was rendered in favor of the appellees, and the appellants have again appealed to this court. A motion of the appellees to dismiss this appeal was overruled. No opinion was filed at the time and it seems proper to briefly state the reasons for that ruling:

1. An able and exhaustive argument is made in the briefs that the original action brought in the county court to vacate the order admitting the will to probate is not an action in equity. It is urged that the county court is not given any general equity jurisdiction and that while it may exercise equitable powers incidentally, actions in equity within the meaning of the statute providing for appeals in equity cannot be brought in that court. It is also urged that the proceeding in the county court to vacate the probate of the will was brought under subdivision 4 of section 602 of the code, proceedings under that section being expressly made available in the county court in probate matters by section 610. The writer does not desire to express an opinion upon the merits of this contention when viewed in the light of an original question. The answer of appellants to this argument is that when the decision upon this application for a new trial was against them in the district court, and they were compelled to determine whether their remedy was by appeal to this court or by petition in error, they had before them the opinion of this court upon the former appeal, 63 Neb. 859, and by that opinion it was decided that this is an action in equity and appealable to this court. They acted

upon that decision and again brought the case here by appeal.

We think this is a complete answer to the argument of appellees on this point. If a decision of this court should ever become the law of the case, it should be upon a question of practice, when the parties to the litigation have acted upon that decision and guided their practice by it. It is established then as the law of this case that the proceeding in the county court to vacate the probate of the will was an action in equity within the meaning of the statute allowing appeals to this court.

2. The next ground for the motion was that the proceeding was begun in the wrong court. The county court is by the constitution given original jurisdiction in all probate matters, and by statute it has exclusive original jurisdiction of the probate of wills. The statute, however, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court." Comp. St., ch. 20, sec. 42; Ann. St. 4823. Section 47 provides that when an appeal has been perfected in the district court "that court shall be possessed of the action, and shall proceed to hear, try, and determine the same, in like manner as upon appeals, brought upon the judgment of the same court in civil actions." This removes the issues to the district court for final determination. The district court must "hear, try, and determine the same." The evidence is taken and the cause tried without regard to the evidence in the lower court. The result, not the case itself, is certified back to the county court. After the district court becomes so possessed of the case, the county court will never have any further jurisdiction over the issues so removed. If there is another trial of the case it must be in the district court. There can be no doubt that the district court is the place to make application for such trial. It was determined by this court upon the first appeal that the action to set aside the probate of the will was a new action, equitable in its nature, and was prop-

erly begun in the county court and afterwards appealed to the district court. There having been a trial thereof in the district court, that court and no other might grant a new trial. This proceeding for a new trial then was rightly brought in the district court.

3. The third ground for the motion is stated in the brief as follows: "No appeal lies from the district court to this court for refusing an application made in the former court for a new trial to set aside a probated will on the ground of newly discovered evidence. The right to maintain this action, if at all, is given by section 318 of the code."

Risse v. Gasch, 43 Neb. 287, is relied upon. That was an ordinary contest of the probate of a will, appealed from the county court to the district court, and proceedings in error were prosecuted in this court to reverse the judgment of the district court. It was determined upon the former appeal, and has become the law of this case, as before pointed out, that this action, begun in the county court to set aside the probate of the will, was an action in equity and was properly tried as such in the district court upon appeal; so that the application for a new trial was an application in an action in equity. It is contended in the brief that an order denying an application for a new trial in an action in equity under section 602 of the code is not appealable but can only be reviewed in this court upon proceedings in error. *Browne v. Croft,* 3 Neb. (Unof.) 133, is cited for this doctrine, but upon rehearing of that case the doctrine was repudiated. 3 Neb. (Unof.) 134. It is there held that the appeal was properly dismissed because the order appealed from was not a final order; but *Iler v. Darnell,* 5 Neb. 192, and *Morse & Co. v. Engle,* 26 Neb. 247, are cited and approved, and in those cases it is made plainly to appear that the proper construction of the statute is that such orders are appealable. Under our statute appeals are allowed "in actions in equity" and in such action any order or proceeding that may be brought to this court for review may be brought by appeal.

4. It is urged that "there is no statutory authority for

granting another trial on a second petition to impeach a judgment." By this it must be meant that when an action in equity is brought for the purpose of setting aside a default judgment obtained by fraud and this action in equity has been tried, there can be no new trial of this equitable action on the ground of newly discovered evidence. To this proposition we cannot agree. If, as was held upon the former appeal, this action begun in the county court to set aside the probate of the will was an action in equity, after it had been tried in the county court and appealed to the district court, and there tried, there can be no reason for refusing the district court jurisdiction to entertain an application for a new trial that would not apply to any other trial and judgment in the district court.

5. It is contended that, "as more than one year had elapsed since the county court first probated the Rulo will, an application for a new trial could not be made in the district court because the county court has exclusive and original jurisdiction in all probate matters." This is but a repetition of the former grounds which have already been discussed. This application for a new trial was made within the statutory time after the judgment of the district court was rendered in the action which had been appealed to that court, and in which a new trial was sought in the district court.

For the foregoing reasons the motion to dismiss the appeal was overruled.

Second. We are required by this appeal to review the whole proceedings, and determine whether these appellants were entitled to a new trial in the district court. The evidence upon the former trial in the district court as preserved in the bill of exceptions was received in evidence upon the hearing in that court of this application for a new trial. Several witnesses were examined and their evidence is also preserved in the bill of exceptions. The evidence is embraced in seven large volumes of typewritten matter. The new evidence is, of course, to be con-

sidered with the issues, evidence and decree upon the former trial. Many of the questions disposed of upon the former appeal have been reargued at great length. Upon a reexamination of the former evidence we are satisfied with the conclusions of fact reached, and are content to regard the principles there announced as the law of the case. No further analysis of that evidence is demanded.

1. It is contended that the petition and evidence do not show due diligence on the part of the appellants to discover and avail themselves of the additional evidence which they now produce. It will be remembered that the will which has been admitted to probate by the decree already entered in this case was executed in 1888, and is known as the Rulo will. Upon the first hearing in the district court these appellants attempted to show that Mr. Miles had executed a will in 1897, which is called the St. Louis will, and was alleged to have been executed at the St. James Hotel in St. Louis. There was evidence upon that trial, as is stated in the opinion upon the former appeal (68 Neb. 463, 475), tending to show the execution of this St. Louis will, and it is said in that opinion:

"Without going over the details, we may say that the evidence produces a strong conviction that a will of some sort was made at St. Louis. There is not only the testimony of the two subscribing witnesses, but a very considerable mass of circumstantial evidence. Moreover, the declarations of the testator are well authenticated and circumstantial."

In the application for a new trial it was alleged that the plaintiffs had learned that one Paul T. Gadsen, at that time a lawyer practicing in St. Louis, had prepared the St. Louis will for Mr. Miles, and upon the hearing the evidence consisted mainly of the testimony of the said Gadsen and the testimony of other witnesses which was introduced for the purpose of corroborating him. It is insisted that it does not appear that the plaintiffs used due diligence in discovering the whereabouts of the witness Gadsen and in endeavoring to procure his testimony upon the

trial of the case. The witnesses who testified to the execution of the will were not able to give the name of the lawyer who prepared it. They testified that they were called to the room where Mr. Miles was with this lawyer, who was a stranger to them, and that they made no inquiry as to his name. The appellants caused notices to be published in the St. Louis papers and sent notices asking for information to the members of the St. Louis bar generally and obtained no response. Soon after the first trial in the district court Thomas L. Cannon, a citizen of St. Louis, having seen some of the articles in the press in regard to the trial informed Judge Galt, who was an acquaintance of his and who was also one of the attorneys for appellants, that in the year 1897 Paul T. Gadsen was practicing law in the city of St. Louis, and occupied a room in Mr. Cannon's house, and that during that year Gadsen had talked to him about writing a will for an old gentlemen from Nebraska, and also informed Judge Galt that Gadsen had afterwards left the city of St. Louis and had gone to Mexico, and referred Judge Galt to a former partner of Mr. Gadsen's for his address. Judge Galt appears to have promptly ascertained that Gadsen had gone to the city of Mexico, and obtained what purported to be his address in that city, and addressed a letter to him to obtain further information, but it appears that Gadsen had left the city of Mexico and did not answer Judge Galt's letter; and afterwards upon further inquiries, Judge Galt received what then seemed to be reliable information that Gadsen had been very sick, and that it was reported among his acquaintances in St. Louis that he was dead. Judge Galt testifies that he made, as far as he could, inquiries that would lead to finding Mr. Gadsen, and was led to and did believe that he was dead, and so made no further inquiries. A short time afterwards it was learned that Gadsen was living, and steps were immediately taken to ascertain his whereabouts, and he was soon thereafter procured to make an affidavit stating his knowledge in regard to the execution of the will, in which he testified that he

drew the will for Mr. Miles, and that he was present at its execution, and gives a synopsis of the contents of the will. There is other evidence bearing upon this question of the diligence of the appellants in procuring this evidence, and without going into further detail it is sufficient to say that it impresses us as amply sufficient upon that point.

2. In considering whether the evidence is sufficient to require the granting of a new trial, it must be borne in mind that the rule is established in this state that the "legitimate effect of the new evidence" must be such as to require a different decision from that which it is sought to set aside. The inquiry is not whether, taking the newly discovered evidence in connection with that produced on the trial, a different decision might be rendered, but whether the whole evidence, taken together, would require a different decision. *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753. It must be "of so controlling a nature as to probably change the verdict." *Lillie v. State,* 72 Neb. 228. It has already been pointed out that it was considered upon the first appeal that the evidence then before us produced "a strong conviction that a will of some sort was made at St. Louis." Upon the hearing of this application for a new trial the district court found that "there was a will made by Stephen B. Miles, deceased, in 1897, at St. Louis." The witness Paul T. Gadsen positively testifies to this fact. He also states quite definitely the contents of the will. The character of this witness and the reliance to be placed upon his testimony will be again referred to. It is sufficient now to say that we consider the whole evidence amply supports this finding of the trial court.

3. It was considered upon the former appeal that the evidence then presented was not sufficient to show that the St. Louis will contained a revocatory clause. The witness Gadsen upon this last hearing testified positively that such a clause was inserted in the will. He says that Mr. Miles asked him if it was necessary to have such a clause in order to revoke the former will, and that he him-

self was of the opinion that such clause was not necessary, and so informed Mr. Miles, but afterwards he (Gadsen) mentioned the matter to Judge Wind, whose office was with Mr. Gadsen, and Judge Wind advised him that such clause should be inserted in the will if it was desired to revoke the former will, and that after considering and studying the matter, Mr. Miles insisting that the clause should be inserted, he inserted the clause. He says that it was in substance, "I declare this will to be in revocation of all previous wills and testaments I have made." It was determined upon the former appeal that when a later will is lost or cannot be produced, it is competent to show by parol evidence that it contained a revocatory clause. It is insisted that the only evidence in this record upon this point is the evidence of the witness Paul T. Gadsen, and that his evidence is shown by the record to be so unreliable that it is not sufficient for the purpose of establishing this fact. Mr. Gadsen appears to come from a distinguished family of that name in South Carolina. He is the son of a clergyman. He was a graduate of a southern university and took a course of legal studies from which he graduated in 1893, and having pursued his studies for another year, he entered upon the practice of his profession in the city of St. Louis in the early part of the year 1895. He seems to have been in some way associated with Judge Wind, who was a lawyer with an established practice, but Mr. Gadsen does not appear to have been a man of fixed business habits, nor to have acquired a very extensive law practice. He left St. Louis in 1898. At this time he appears to have been assignee of an assigned estate, and he so managed the business that he was superseded by another assignee who subsequently recovered a judgment against Mr. Gadsen and his sureties as assignee. While in St. Louis he was employed by the city, and one witness testifies that he was worthless in the office, and was lazy and unreliable; that what he did "could not be relied upon, and had to be done over." On the other hand his personal honor and honesty are established by many witnesses

whose evidence cannot be doubted. The preparation of the will in question appears to have been the first important business of that character that was ever intrusted to his care. His conduct in regard to it may not have been characterized with the dignity and care which business of that character usually inspires in the practiced lawyer. His detailed statements of the contents of the will are not of sufficient character and consistency to justify a probate court in relying upon them to establish for probate the contents of a lost will. But we find nothing in the record to indicate that his evidence is corrupted with perjury, or that he, as a witness, was inspired with a desire to deceive the court. It is said that it is incredible that a man with the habits and business experience of Mr. Miles would go to an unknown young lawyer, an utter stranger to him, for the transaction of such important business, but business men do not always appreciate the importance of high professional skill and experience in the preparation of wills. The conduct of Mr. Miles in this instance was not more singular than in other instances disclosed in the evidence. If the evidence of the proponent of the Rulo will is to be believed, this testator, ten years after the execution of that will which disposed of more than a million dollars worth of property, was keeping it with worthless papers and soiled clothing in an old "satchel" which he was accustomed to carry with him. The testimony of Judge Wind corroborates Mr. Gadsen's testimony upon his statement that the will contained a revocatory clause. The evidence of this witness has every mark of reliability. He says that about the noon hour when he was alone in the office "the telephone rang, and I answered it. Some one asked for Mr. Gadsen; I answered that he was not in, and then asked if they desired to leave any word for him. I was then requested to leave word for Mr. Gadsen to come to the St. James Hotel as soon as he came back." Soon afterwards a gentleman called at the office. Judge Wind says: "The gentleman handed me a card or gave me the name of Miles and said please tell Gadsen to come to the

St. James Hotel as soon as he comes in." He says that about this time, and in connection with this transaction, Gadsen questioned him in regard to the necessity of a revocatory clause in a will and that he told Gadsen "by all means to put in a revocatory clause in every will, particularly if you have any knowledge of a will having been written before that time." And that his understanding from Gadsen at the time was that the revocatory clause was inserted in the will. The evidence of this witness and other corroborative evidence in the record tending to show that the will prepared by Mr. Gadsen contained the revocatory clause, is wholly uncontradicted. We think that it is shown by a strong preponderance of the whole evidence that the St. Louis will in express language revoked the former will.

4. The trial judge in his findings said: "But if we consider the St. Louis will revoked the Rulo will by implication or otherwise, then the question of the revivor of the 1888 will comes up for our consideration." On this point the decision of the trial court was made to turn. This appears to be a question of law and we think it has been incorrectly determined by the trial court. It will be remembered that the will which Joseph H. Miles presented to the county court for probate made him the principal beneficiary. He testifies that after having searched exhaustively he finally found the Rulo will in his father's satchel in the room at the hotel where he died, and that he found no other will there. It is insisted that this raises the presumption that the deceased destroyed the St. Louis will, and that from this presumption another presumption arises that in doing so he intended to revive the Rulo will. There is some conflict in the authorities in regard to the effect of the destruction of a later will. It has in some cases been held that upon proof that the testator destroyed the later will which contained a revocatory clause, the presumption will arise that he intended thereby to revive the former will. It is doubtful whether in these cases it is intended to declare the rule that by the mere fact of the

destruction of the later will by the testator, and without other evidence to be derived from surrounding circumstances and his proved declarations, the former will is revived. We have no hesitancy in saying that no such principle can be invoked in a case like this where the one principally benefited by the former will brings that will forward, claiming that he has found it under such extraordinary circumstances, and denying that he has found with it the later will which it would be so much in his interest to suppress. If the presumption could arise from such circumstances that the testator had destroyed the later will, it would not follow that from that presumption we must raise the further presumption that in so destroying it he intended to revive the former will. We think the true principle of law is announced upon the decision of the former appeal, and that the present is a very strong case for its application. This evidence showing that the Rulo will was revoked by the subsequent will, there being no evidence from which it can be found that the former will was revived, would require the rejection of the Rulo will.

The decree of the district court refusing a new trial is therefore reversed and the cause remanded, with instructions to grant a new trial as prayed.

REVERSED.

The following opinion on motion for rehearing was filed October 19, 1905. *Rehearing denied:*

PER CURIAM.

In this case the appellees have filed a motion for rehearing, principally upon the ground that the newly discovered evidence offered is not sufficient to justify this court in reversing the ruling of the lower court by which a new trial in that court was refused. This motion is supported by an exhaustive and able brief which reviews the main features of the whole case. We have studied this brief and the parts of the record to which it refers with great inter-

est. Manifestly the whole record, including the evidence offered upon the application for a new trial in this court, presents issues of fact which are peculiarly within the province of a jury to try, and upon this reexamination of the case we are entirely satisfied that the additional evidence offered in the district court upon this application for a new trial is of such a character that the interests of justice demand that the whole evidence together be submitted for a determination of the issues presented. Upon the evidence as it now is in this record, it would be the duty of the district court to set aside its former judgment upon the probate of the will, and the orders of the county court in that regard, and retry the whole case presented by the proponents and contestants of both of the alleged wills respectively. The language used in the former opinions of this court, commenting upon the evidence of the various witnesses, was used with reference to the questions presented in this court only, and was not a discussion of the weight that should be given to this evidence upon a new trial of this case. The court will apply the law of the case so far as it has been determined by this court, but the discussion of the evidence here will not restrict the trial court in its examination and submission of the questions of fact.

The motion for rehearing is

OVERRULED.

The following opinion on motion to modify opinion on rehearing was filed February 8, 1906. *Motion overruled:*

SEDGWICK, C. J.

The plaintiff has filed a motion to modify the language used in the memorandum upon the order overruling the motion for rehearing. In the brief and argument thereon it was contended that the language would admit of the construction that the district court could not take further evidence before setting aside the order of the county court appealed from and all proceedings in the district court

thereon. This was not the idea intended. What was meant was that, if the evidence introduced before the district court upon the new trial which has been ordered should be the same as it now is in this court, it would be sufficient to require the district court to reverse the order of the county court in refusing to set aside the probate of the Rulo will. When the county court refused to vacate the default judgment probating the Rulo will, and an appeal to the district court was taken from this order of the county court, what did that appeal remove to the district court? If the district court had decided it as the appellants wished, what would the district court have done next? Would it have certified back to the county court that the order of that court refusing to vacate the probate of the will was set aside and direct the county court to proceed to retry the question on the probate of the will, or would the district court have retained the whole matter, and proceeded to the trial of the will contest itself? If it did proceed to the trial of the will contest itself, of course it would have to investigate the question of the St. Louis will, because, if a subsequent will was made in St. Louis which operated to revoke the Rulo will, that would require the court to reject the Rulo will. Now, if the case had proceeded thus far, would the district court then proceed to consider whether the St. Louis will should be established and admitted to probate, or would it remit that question to the county court for trial—a question which it had itself already tried and determined?

The *per curiam* memorandum goes upon the theory that, when the first appeal was taken to the district court, it removed the whole controversy in regard to whether the estate was testate or intestate, so that the district court then had jurisdiction of the whole matter. Our view of the matter was that, as a new trial had been ordered, if upon that new trial the evidence should turn out to be the same as it is in this record, it would be the duty of the district court to decide that the county court was wrong in refusing to vacate the probating of the will, and, having

decided that, it would be the duty of the court, of course, to declare the probate of the will by the county court vacated, and that then the district court would not remit the case to the county court, but would itself try the question as to whether the Rulo will should be established as the will of the deceased, and in trying that question would necessarily try also the force and effect of the St. Louis will. This would require the court to determine which will, if either, should be admitted to probate, so that this trial before the district court would be a trial of all the issues presented, and the parties would be entitled to a jury.

In the argument upon the motion we were led to believe that there may be some doubt about the practice so indicated, but in view of the prior holdings in this case, and the condition of the record, we conclude that our former memorandum, as here explained, indicates the correct practice.

JOHN JUNOD ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1905. No. 13,039.

1. **Evidence** examined, and found to be sufficient to connect the accused persons with the commission of the crime charged against them, and sustain the verdict and judgment of the district court.
2. **Larceny.** Wire fastened to posts for the purpose of fencing a part of the public domain for temporary use as a summer pasture for live stock is personal property; and one who cuts or tears it from the posts and carries it away with larcenous intent, without the consent of the owner, may be convicted of larceny.
3. **Instruction:** REASONABLE DOUBT. Instruction defining a reasonable doubt identical in form and substance with the one criticised in *Mays v. State*, 72 Neb. 723, is not approved, but we cannot reverse the judgment solely because it was given.
4. ———: REVIEW. Error cannot be predicated on a single sentence or clause of the court's instructions. If, when read in full and considered together as a whole, they state the law applicable to the case correctly, and are not prejudicial to the rights of the accused, such assignments of error will be disregarded.

5. **Sentence.** A sentence of five years in the state penitentiary for stealing property of the value of $40, under the circumstances disclosed by the record in this case, is excessive, and for that reason is reduced to two years and six months, and the judgment of the district court, as thus modified, is affirmed.

ERROR to the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Judgment modified.*

E. D. Clark and *Hamer & Hamer,* for plaintiffs in error.

Norris Brown, Attorney General, and *W. T. Thompson, contra.*

BARNES, J.

An information was filed in the district court for Cherry county during the November, 1902, term thereof, against John Junod, Harry Junod and Thomas J. Nelson, charging them with the crime of grand larceny. After a plea of not guilty, Nelson demanded a separate trial, and the Junods making no such demand were tried together and found guilty, as charged in the information. The value of the property stolen was fixed by the verdict of the jury at $40. From a sentence of five years each in the penitentiary, they bring the case here by a petition in error. The property stolen was a quantity of wire owned by one David A. Hancock, and the evidence shows that it was taken from a fence which inclosed a pasture situated on the public domain which Hancock used as a summer pasture for his stock.

The plaintiffs herein contend, first, that the evidence is not sufficient to sustain the verdict, because it does not connect them with the commission of the crime. The record discloses that the stolen wire was found in their possession; that it was pointed out to the owner by Harry Junod, and the place where it was joined onto other wire, thus making a fence which inclosed his pasture, was designated by him. When asked how he came by the wire, he stated to Hancock and the officers and other persons pres-

ent that he bought it from a man, whose name and place of residence he refused to disclose. When John Junod was arrested he claimed to have purchased the wire from one Bowers, and said he gave it to his brother Harry. Bowers was produced as a witness for the state, and testified that he never saw the wire in question and never sold it to John Junod, or any other person. Other incriminating facts and circumstances were shown which seem to clearly establish the fact that the plaintiffs were the identical persons who stole the wire, and so we conclude that the verdict is amply sustained by the evidence.

Plaintiffs' second contention, and the one on which they lay the most stress, is that the property in question was a fixture to real estate, and for that reason was not the subject of larceny. It was described in the information as follows: "Ten thousand pounds of wire, of the value of $300, the personal property of David A. Hancock." The evidence in support of the charge discloses that one Anderson was the owner of a ranch in Cherry county, Nebraska, consisting of what was called the "Dewey Lake Ranch, and the Niobrara Pasture"; that on the 27th day of July, 1901, he sold the property to the prosecuting witness, David A. Hancock. The Niobrara pasture appears to have been a tract of government land inclosed by a temporary post and wire fence constructed by Anderson, and for which he gave Hancock a bill of sale when he conveyed the other ranch property to him. The evidence shows that the wire in question was torn or cut from the posts surrounding the pasture above described, was wound up on home-made spools, and then hauled away in wagons to the premises of Harry Junod, where it was afterwards found and identified.

It is true that the old common law rule with respect to the crime of larceny was, that where the article taken was in fact and in law a fixture to real estate, to constitute that crime the severance and asportation must be separate and distinct acts. Authorities can be found which hold that at least a day must elapse between the acts of sever-

ance and asportation. In other words, that during the day of severance the property stolen retains the character of real estate, but on the following day it becomes converted into personal property, and, if then carried away without the consent of the owner, such asportation is larceny. These fine technical distinctions and absurd sophistries are repugnant to our conceptions of justice, and the courts of most states have discarded them; while those which in a measure retain them have confined the rule within the most narrow limits. Undoubtedly the modern and true rule is that he who by his wrongful acts converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny. In *Jackson v. State,* 11 Ohio St. 104, it was said:

"The rule of the common law, that things savoring of the realty are not the subjects of larceny, only applies to things issuing out of or growing upon the lands, and such as *'adhere'* to the freehold, but not to personal chattels which are only constructively annexed thereto."

In the body of the opinion in that case we find the following language:

"The wrongful severance does not destroy the title nor the constructive possession of the owner; it is still his property *in its altered* condition, and its felonious asportation, though immediate, would seem to be as much a felonious taking of the personal property of another from his possession and without his consent, as if the wrongdoer had severed it on one day and removed it the next. In every case there is necessarily a point of time between its severance and its asportation, and, upon principle, we can see no difference between one instant of time and a period of twenty-four hours, for in that interval, brief as it may be, 'the property lodgeth in the right owner as a chattel,' and a felonious taking thereof should be larceny."

Again, it would seem from the evidence that the wire in question never became a fixture to or a part of the realty, but at all times retained its original nature as a

personal chattel. It was such in its originally manufactured condition, and it seems clear that it was never intended to affix it or make it a permanent part of the land inclosed as a temporary pasture. Anderson never intended to make this fence a permanent part of the public domain, or in other words, a permanent accession to the freehold. He intended to use the government's land as a pasture as long as he was unmolested and permitted to do so, and then remove the fence. This is clearly shown by his treatment of it as a chattel, and the conveyance of it to Hancock by an ordinary bill of sale. So the stolen wire never became a fixture to the real estate, but always remained personal property, and therefore was at all times the subject of larceny.

It is further contended that the court erred in giving certain of his instructions to the jury, and several assignments of error are presented in support of this contention. The last of these will be considered first, because it is the one most strenuously argued. It relates to that paragraph of the instructions by which the court attempted to define a reasonable doubt. We will not quote the instruction, for it is a copy of the one given in *Willis v. State,* 43 Neb. 102; *Barney v. State,* 49 Neb. 515, and *Mays v. State,* 72 Neb. 723. We have heretofore steadily refused to reverse a judgment of conviction solely because of this instruction, and we still refuse to do so. We decline to approve of it, however, because it is doubtful if any attempt by a trial court to give a technical or extended definition of a reasonable doubt can accomplish any good result. In the case of *United States v. Hopkins,* 26 Fed. 443, Dick, J., said:

"The inherent imperfection of language renders it impossible to define in exact express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by a jury, acting under the

obligations of their oaths and their sense of right and duty."

It is also claimed that the court erred in giving other instructions, but in order to sustain this contention counsel quote certain sentences or clauses contained in some of the paragraphs of the charge, and thus attempt to predicate error. The rule is, that each paragraph of the charge must be read in full, and the instructions thus read should be considered together. When so read and considered, if the charge, as a whole, is a correct statement of the law, criticisms of the kind above described will be disregarded.

A careful reading of all of the instructions given in this case discloses that, as a whole, they are correct. And the rights of the accused persons could not have been prejudiced thereby.

We have been impressed, however, from an examination of the record in this case, with the thought that the sentence imposed upon the plaintiffs in error herein was excessive. The value of the property stolen was found by the jury to be only $40. If it had been found to be less than $35, the plaintiffs could have only been fined in a sum not exceeding $100, or imprisoned in the county jail for a time not exceeding thirty days. But because the value of the property was $40 instead of less than $35, the plaintiffs were each sentenced to imprisonment in the penitentiary of this state for a period of five years. This sentence is so disproportionate to the nature of the crime of which the plaintiffs were convicted that it shocks one's sense of fairness and justice. We are convinced that we should exercise the power given us by section 509*a* of the criminal code, and reduce the sentence in this case to the period of two years and six months, which is accordingly done.

Finding no reversible error in the record, the judgment of the trial court, as modified above, is hereby affirmed.

JUDGMENT ACCORDINGLY.

LINCOLN SUPPLY COMPANY V. JOHNSON H. GRAVES.

FILED FEBRUARY 9, 1905. No. 13,394.

1. **Evidence of Value.** A husband and wife are competent to express an opinion as witnesses concerning the value of their own household furniture.
2. **Evidence: REVIEW.** An insufficient objection to the competency of a witness cannot be availed of as an objection to the competency or relevancy of his testimony.

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

Kirkpatrick & Hager, for plaintiff in error.

Talbot & Allen, contra.

AMES, C.

This is an action for damages against a storage company for alleged injuries to household goods averred to have been occasioned by the negligence of the defendant while the property was in its possession as bailee for hire. There was a verdict and judgment for the plaintiff and the defendant prosecutes error. The principal witnesses for the plaintiff, who was a married man and the owner of the goods, were himself and his wife, who both testified to having purchased the articles and used them as household furniture, and to their cost price, and that they knew their condition and value at the time of the bailment and when they regained possession of them, and stated what in their opinion such values were. To each witness it was objected as follows: "To any testimony of the witness touching value for the reason that the witness has not qualified himself (herself) to testify as to the value of second-hand goods." The objections were overruled and the rulings are severally assigned for error. We think there was no error. It would be strange indeed if a head of family and his wife should be held incompetent to ex-

press an opinion concerning the value of their own household furniture. The degree of their competency and the weight of their testimony being, of course, left to the determination of the jury as in other cases.

The evidence as to values was conflicting, but the jury adopted the estimate of the plaintiffs, as they had a right to do, and this fact disposes of the remaining assignments of error, that the verdict is not sustained by the evidence, and that it is excessive and seems to have been given under the influence of passion and prejudice. There was considerable argument, both orally and by brief, in support of the contention that the evidence as to the cause of the injury and the time of its occurrence and amount of the damage is incompetent or irrelevant; but there is no assignment in the petition in error with respect to the competency or relevancy of evidence as distinguished from the competency of witnesses, and we therefore are not charged with the duty of considering the matter.

No reversible error is assigned, and we recommend that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

JULIA S. BOWEN V. LLOYD LYNN ET AL.

FILED FEBRUARY 9, 1905. No. 13,696.

Criminal Statute: CONSTRUCTION. Section 214 of the criminal code, as amended in 1887, which provides for the recovery by civil action of money lost at gambling, applies to such kinds or descriptions of gambling only as are mentioned in that section.

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

John M. Ragan, for plaintiff in error.

Tibbets Bros. & Morey, contra.

AMES, C.

The plaintiff sued to recover $90 paid by her to the defendants pursuant to an agreement executed by them as follows:

"Series 6. No. 87.

"The Tontine Investment Co.
"Home Office, Hastings, Neb.
"Diamond Contract.

"Know all men by these presents, that if Julia S. Bowen, the holder hereof, shall first, well and truly, make each and all payments herein provided for to be made by her, at the time and in the manner herein specified, time, manner, and amount of payment, being of the essence hereof, The Tontine Investment Company, of Hastings, Nebraska, will sell and deliver to her, or her legal representatives, or assigns, a commercial, white, clear and perfect diamond of the weight of two carats, the same to be delivered, whenever, after full payment thereof, the contract shall be reached in the order of performance, herein provided.

"The holder hereof duly promises and agrees to pay to the company, at its home office, in the city of Hastings, Nebraska, or to its authorized collector, the full sum of $90 in the following manner, to wit: $5 on delivery hereof, the receipt of which is hereby acknowledged, and $1.25 on the last day of each calendar week, following the date hereof, for sixty-eight consecutive weeks.

"If she shall fail to pay any of said instalments within the week in which it is payable, the said delinquent instalments, together with the additional sum of 25 cents may be paid at any time before the end of the next succeeding calendar week. But if she shall fail or neglect to pay any

of said weekly instalments, at the time and in the manner herein provided, and shall continue in such default for more than one week, then, and in that event, this contract shall, because of such default, become and be wholly null and void, and all payments theretofore made hereon shall be forfeited.

"The company shall employ $1 out of each weekly instalment paid on this and similar contracts in the purchase and delivery of the diamonds required for the performance of such contracts, and may retain all other or further sums paid in hereon, for the purpose of defraying its expenses.

"As often as there is paid to the company enough of said weekly instalments, so that the portion thereof, herein provided for such purpose, is sufficient to provide for the delivery of the diamond required to fulfil the contract next outstanding, and in force, in the order of its issue, at the rate of $95 per carat, which price the company is authorized to pay to or retain for the diamond delivered in the fulfilment thereof, such amount shall be so applied; and the delivery of the diamond, as described in this contract, shall thereupon be made by the company.

"This contract is transferable, but no transfer will be recognized by the company unless first registered by its secretary, for which a registration fee of $1 will be charged.

"In witness whereof, The Tontine Investment Company has caused this contract to be signed by its president and secretary, and its corporate seal to be hereto attached this 2d day of December, A. D. 1899.

(Seal) "THE TONTINE INVESTMENT COMPANY,
"By JOHN W. SINK, *President.*
"LLOYD LYNN, *Secretary.*"

That the transaction was gambling, we think, is too plain to admit of dispute. Gambling, according to the common use and understanding of that word, is a generic term, and includes within its meaning every act, game and

contrivance by which one intentionally exposes money or other value to the risk or hazard of loss by chance.

A glance at the foregoing document discloses that by no possibility could more than half of the persons situated like the plaintiff receive anything in return for their payments, and the number less than half who should do so, and who of them should be fortunate or otherwise, was contingent upon events impossible to be foreseen. But notwithstanding the essential identity of the many forms of gambling, there is, both in common speech and by the statute, a rough classification of them which serves for certain practical purposes, and we think that in this view the device under consideration is properly described as a lottery, which has been defined to be a scheme for the distribution of valuable prizes by chance. One of the differences between lotteries and more common forms of gambling is that the betting and the happening of the contingencies according to which the prizes are distributed, both of which are common to all of them, are reduced to sort of a mechanical system and are divorced from every form of present amusement, so that the participants are not necessarily at any time assembled, and it is possible to simulate some of the forms and solemnities of legitimate business. This, we take it, is the kind of offense defined and for which punishment is provided by section 224 of the criminal code, of which the following is a copy:

"If any person shall open, set on foot, carry on, promote, make, or draw, publicly or privately, any lottery, or scheme of chance, of any kind or description, by whatever name, style, or title the same may be denominated or known; or if any person shall by such ways and means expose or set to sale any house or houses, lands or real estate, or any goods or chattels, cash, or written evidences of debt, or certificates of claims, or anything or things of value whatever; every person so offending shall be fined in any sum not exceeding five hundred dollars, at the discretion of the court."

But this section affords the losing party no civil remedy and this suit was accordingly brought, and is sought to be maintained, under the proviso of section 214, which section reads as follows:

"Every person who shall play at any game whatever for any sum of money or other property of value, or shall bet any money or property upon any gaming table, bank, or device, prohibited by law, or at or upon any other gambling device, or who shall bet upon any game played at or by means of any such gaming table, or gambling device, shall, upon conviction, be fined in any sum not less than one hundred dollars, and not exceeding three hundred dollars, or be imprisoned in the penitentiary not more than one year, and upon a second or any subsequent conviction shall be fined in any sum not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not more than two years; *Provided,* That if any person or persons who shall lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard of any kind, such person, the wife or guardian of such, his heirs, legal representatives, or creditors, shall have the right to recover the money or the amount thereof, or the property or the value thereof, in a civil action, and may sue each or all persons participating in the game, and may join the keeper of the gambling house or other place in the same action, who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind, and no title shall pass to said property or money, and in an action to recover the same no evidence shall be required as to the specific kind or denomination of money, but only as to the amount so lost."

The district court dismissed the action and the plaintiff prosecutes error.

We are of opinion that the judgment should be affirmed. The proviso was added to the section by amendment in 1887, and it may be inferred from that fact, as well as

from its own language, that the legislature intended to confine its operation to such forms of gambling as were previously particularly mentioned in the section. Indeed a separate classification of lotteries having previously been made, and continuing in existence, it may well be doubted if a further regulation of this latter offense would have been germane as an amendment of section 214. But at all events the proviso affords a civil remedy to such persons only as shall "lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard." Now it seems to us that this statute is aimed especially and almost exclusively at two things which are absent, or substantially so, from the record in the case at bar, namely, a gambling house or place and a game at cards or other device or some game of hazard. In other words, what the legislature had prominently and principally in mind, in drafting this section, was the unlawful game or amusement and the place where it should be carried on; while in section 224, that to which their attention was mainly directed, was the scheme of chance distribution without reference to amusement or local habitation, the former of which, in such enterprises, may be wholly absent and the latter difficult or impossible of discovery, or ambulatory or even non-existent.

Mrs. Bowen bought her number much as she might have bought any other lottery ticket. The fact that she paid for it in instalments is an insignificant detail. She knew at the time of her purchase, or ought to have known, that whether she would ever derive any benefit from it, or whether she would lose her money, depended upon future contingencies which no one could foresee. Chief among them were how many holders of prior numbers would forfeit their claims, and how much in the aggregate they would pay in before doing so, and how many persons could be induced subsequently to participate, and how much they would contribute to the fund, and finally with what fidelity the persons in charge of the scheme should execute

their unlawful trust. But there was no "gambling house or place," no cards, dice, roulette wheels or other devices for playing games, no assemblage of participants in the scheme, no games or pastimes, and no amusement except for the recipients of the money. It was just a plain lottery. For these reasons we recommend that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

W. A. GORDON V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1905. No. 13,821.

Contempt. A court of record may not punish, as for a criminal contempt, summarily, without formal accusation or complaint, and without affording the accused a reasonable time to prepare his defense, except in those cases in which the judge is, while in exercise of his office, an actual witness of the alleged contemptuous conduct, or, at least, of a substantial part thereof, so that he is not compelled to inform himself concerning it and of the circumstances of its commission by the testimony of witnesses.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Reversed and dismissed.*

C. E. Herring and *B. F. Thomas,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

AMES, C.

A suit in which the plaintiff in error was defendant was in progress of trial in the district court. The hearing of evidence had been concluded, the jury had retired to de-

liberate upon their verdict, and the judge had left the bench and gone into another room, when the defendant assaulted the plaintiff's attorney in the court room. There had been no formal intermission of the session, and the judge, hearing of the incident, returned to the bench, examined witnesses concerning the occurrence, and rendered a judgment punishing the defendant by fine and imprisonment. The defendant objected and excepted because no formal information or accusation was made and filed against him, and because he was given no opportunity to prepare a defense. Thus arises the sole question presented by this petition in error.

The code enacts that every court of record shall have power to punish, as for criminal contempt, various descriptions of conduct including that of which the defendant was found guilty; and section 670 is as follows: "Contempts committed in the presence of the court may be punished summarily; in other cases, the party, upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." We think the latter clause of this section has reference to all cases in which the judge is not, while in the exercise of his office, an actual witness of the alleged contemptuous conduct, or at least of a substantial part thereof, and in which he is, therefore, compelled to inform himself concerning it and of the circumstances of its commission by the testimony of witnesses. *Le Hane v. State,* 48 Neb. 105, and cases cited.

For this reason, we recommend that the judgment be reversed and this proceeding dismissed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be reversed and this proceeding dismissed.

REVERSED AND DISMISSED.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT, V. GOTHENBURG WATER POWER & IRRIGATION COMPANY, APPELLEE.

FILED FEBRUARY 9, 1905. No. 13,277.

1. **Irrigation:** EXTENSION OF DITCHES. Before the enactment of the general irrigation law of 1895, after an appropriation of water to a beneficial use had been made, the appropriator had the right under section 5, chapter 93*a*. Compiled Statutes, 1903, to extend the ditch to places beyond where the first use was made.
2. **Application, Requisites of.** Said section 5, however, must now be construed together with the provisions of the general irrigation law of 1895, and persons or corporations claiming the right to extend the ditch or change the place of use of water, in their application to the board of irrigation for an adjudication of priority, or for a permit to change the place of use, must specify the lands which the new use of the water is designed to irrigate.

APPEAL from the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed with directions.*

E. A. Cook, for appellant.

E. C. Calkins & H. V. Calkins, contra.

LETTON, C.

This is an appeal from the district court for Dawson county, Nebraska, from proceedings brought to determine the priority of appropriation of the Gothenburg Water Power & Irrigation Company to water from the Platte river. The Gothenburg Water Power & Irrigation Company applied to the board of irrigation for an adjudication of the priority of its claim to an appropriation of 200 cubic feet of water a second from the Platte river in Lincoln county, and the Farmers & Merchants Irrigation Company contested its right, taking the position that the Gothenburg Company has no right to use any of the water for irrigation east of the village of Gothenburg, nor any right to use water once applied for power purposes for irriga-

tion. A hearing was had before the secretary of the state board, and an appeal was taken to the board of irrigation, and from the decision of the board an appeal was taken to the district court for Dawson county.

It appears that in 1889 and 1890, under the former irrigation law, an irrigating canal was constructed from a point in Lincoln county to the vicinity of the village of Gothenburg, Dawson county, a distance of about ten miles, by the Gothenburg Canal Company, which was afterwards succeeded by the Gothenburg Water Power & Irrigation Company, hereinafter called the defendant. In the notice of appropriation it was set forth that the water was to be diverted for the purposes of irrigation and agriculture, for the manufacture of ice, and for the furnishing of power and also for other useful and beneficial purposes, including therein the right of storage thereof in basins, lakes or reservoirs; that the place or places of intended use thereof should be on and along the line of the canal hereinafter mentioned; that the means by which said water should be diverted shall be an open ditch or canal, commencing at the point aforesaid on the Platte river, and running and extending from there through Lincoln and Dawson counties in the state of Nebraska in a southeasterly direction for a distance of about ten miles to a point in or near the village of Gothenburg in said county of Dawson.

The canal company completed its ditch under this notice of appropriation and turned the water into a lake or reservoir near Gothenburg. The water was used for irrigation along the line of the canal, and for power purposes at Gothenburg, the waste water escaping from the flume flowing toward the south into the Patte river. On the 26th day of June, 1894, the Farmers & Merchants Irrigation Company, hereinafter named the plaintiff, made an appropriation of the waters of the Platte river, the point of diversion being south and east of the point where the waste water from the Gothenburg canal, after being used for power, escaped into the Platte river, and below that

point on the river. After this appropriation was made by the plaintiff, the defendant extended its ditch and laterals east from the lake with the capacity to irrigate 17,000 acres of land, and since said time has been using the water on this land in such a manner that none of it escapes into the Platte river above the point of diversion of the plaintiff's ditch, thereby depriving the plaintiff of the use of the waters which formerly flowed through the waste way into the river.

The contention of the plaintiff in substance is, that since the notice of appropriation made by the Gothenburg Canal Company specified that the place or places of intended use thereof should be on and along the line of the proposed canal, and since the length of the canal and the place of its termination are specifically mentioned, therefore, the defendant acquired no right to use the water beyond the specified terminus north of Gothenburg. That other persons examining the notice of appropriation had the right to govern themselves by the notice, and that no use of water outside or beyond the line of the canal therein specified is allowable to the defendant. On September 22, 1894, the Gothenburg Canal Company made an additional appropriation of 80,000 cubic inches of water, which appropriation was subsequent to that of the plaintiff. The plaintiff contends that the only right that the defendant now has to use water east of the Gothenburg lake is derived by virtue of this appropriation.

The defendant claims that under the law governing the use of water as applied in the states and territories wherein the law of appropriation prevails, it has the right to change the use of the water it had actually appropriated, from power purposes to irrigation purposes, if it so desire. That the use of the water for irrigation is as beneficial as the use of it for power. It further claims, that the question is settled in this state by reason of section 5, chapter 93*a*, Compiled Statutes, 1903 (Ann. St. 6751), which provides: "The person, company, or corporation entitled to the use may * * * extend the

ditch, flume, or aqueduct by which the diversion is made to places beyond that where the first use was made."

It will be observed that all the appropriations under which both parties claim were made before the irrigation law of 1895 took effect, and that their rights having become vested before the enactment of the same, its provisions are only applicable in so far as it determines priorities and in so far as it provides for the administration of water rights.

It appears from the evidence that previous to 1894 the Gothenburg Canal Company had actually constructed its canal and diverted from the river the full amount of 200 cubic feet of water per second; that this water was conveyed to a lake lying north of the town of Gothenburg; that the company constructed pen stocks at the lake and conveyed the water to water-wheels for the purpose of generating power for lighting and manufacturing purposes and that from thence the waste water escaped to the Platte river above the point of diversion from plaintiff's canal. In 1894 a great demand arising for water for irrigation, in May of that year, before plaintiff's appropriation was made, the defendant constructed small ditches lying eastward and southeastward from the lake, and after plaintiff's appropriation had been made, one of these ditches was enlarged and extended for nearly twenty miles. Although these ditches were extended so as to carry the water beyond the lake, still no greater amount of water was diverted from the Platte river than had originally been appropriated. This question has often arisen in other localities especially in relation to the use of water for mining purposes. It often occurs in placer mining that the deposits of gold at the point to which the water was first conveyed have become exhausted, and it becomes necessary for the owners of the ditches and flumes to change the place of use of the water to another point where the gravel has not been worked. It would indeed be a harsh rule to hold that after appropriating water and after conveying it, it may be for many

miles, and at a great expense, the appropriator should not be allowed to put it to a beneficial use at some other point than that to which it was first conveyed, if he can no longer make a useful application of it at the first location. It has been the uniform rule to allow appropriators of water after it has been actually taken and applied to some beneficial purpose to change the place or character of its use. *Macris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Davis v. Gale*, 32 Cal. 26; *Woolman v. Garringer*, 1 Mont. 535; *Wimer v. Simmons*, 27 Ore. 1, 39 Pac. 6, 50 Am. St. Rep. 685. The appropriation having actually been made by the defendant, it acquired the right to use the water thus actually appropriated, either for the purpose for which it was first taken or for any other useful or beneficial purposes within the objects claimed in its notice of appropriation. There is no evidence that by reason of the extension of the defendant's ditch any greater amount of water than 200 cubic feet per second is diverted, and as long as the defendant takes no more water by reason of the longer ditches than it had taken previously, and actually applies it all to a beneficial use, the plaintiff cannot complain.

Aside from these considerations the statute, we think, settles this question. In our opinion the section quoted is merely declaratory of the law as it existed before its enactment. Unless the statute applies to this case it is of no force, for a plainer case for its operation could hardly exist.

Under the law existing in 1894 the defendant had the right to extend its ditch and change the use of the water so as to use it all for irrigation purposes instead of for power if it so desired, and therefore the holding of the board of irrigation and the district court that it had a prior right to the use of the whole 200 inches of water is correct. But since the irrigation law of 1895 has been enacted, under its provisions by which the water must be attached to the land, it is incumbent upon the defendant clearly to specify in its application the identical lands

upon which the water has been applied. The section of the statute allowing an extension of the ditch or a change of the place of use must be construed together with the provisions of the 1895 law, and while a prior appropriator may change the place of use of water which had already been appropriated, it can only do so under the permission and subject to the administrative control of the board of irrigation.

Since the decree of the district court does not definitely point out the lands to which the beneficial use of the water applies, we recommend that its decision as to priorities be approved, but that the cause be reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.

By the Court: For the reasons stated in the foregoing opinion, the decision of the district court as to priorities is approved, and the cause reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.

JUDGMENT ACCORDINGLY.

WINFIELD S. MATTERN V. TIMOTHY F. MCCARTHY.

FILED FEBRUARY 9, 1905. No. 13,515.

1. **Bailment:** BAILEE'S LIABILITY. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence.
2. **Contract:** CONSTRUCTION. Contract examined, and *held* to require the defendant to use reasonable and ordinary care to care for, feed and protect the cattle specified therein, and to make him liable for negligence.

3. **Damages.** "Just remuneration," as used in the contract, means the remuneration which the plaintiff would be justly entitled to under the law for the loss of his cattle by the defendant's negligence, and this is the value of the cattle lost.

4. **Care Required.** When a contract requires an agister to care for cattle "in all respects as he would for similar property of his own," the legal presumption is that he would give his own cattle such care as an ordinarily prudent man would under like circumstances, and this is the measure of the diligence required of him under the contract.

5. **Instructions: REVIEW.** Objections to instructions *en masse* will not be considered where any of those so complained of are correct.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Stark & Grosvenor, for plaintiff in error.

Hainer & Smith, contra.

LETTON, C.

This action was commenced in the district court for Hamilton county by the defendant in error, Timothy F. McCarthy, as plaintiff, against the plaintiff in error, Winfield S. Mattern, as defendant. The parties will be named hereinafter as they appeared in the district court. The action is for damages for breach of contract. The contract is as follows:

"Agreement in Duplicate. This agreement made and entered into this 26th day of February, 1901, by and between W. S. Mattern, party of the first part, and T. F. McCarthy, party of the second part, both of Hamilton county, Nebraska, Witnesseth: That said party of the first part, in consideration of the covenants and agreements of the said party of the second part hereinafter set forth, does by these presents, agree with said party of the second part, that he will pasture, feed, and care for forty-one (41) head of cattle, consisting of forty (40) cows and one (1) bull, and the increase thereof, all belonging to said party of the second part, caring for them in all re-

spects as he would for similar property of his own, for a period of three (3) years beginning May 1, 1901, and that at the expiration of said three years he will deliver and return to the party of the second part all of said forty-one (41) head of cattle and one-half the increase thereof, and one-half the increase of such increase.

"In consideration of the performance of the above agreements upon the part of said party of the first part, the said party of the second part agrees to give to said party of the first part one-half the increase from said forty-one (41) head of cattle and one-half of the increase of such increase, said one-half of the increase to consist, in numbers, of one-half of the male and one-half of the female increase, a division of such increase and the giving thereof to the party of the first part of his share, to take place annually at the branding period, to wit, on or about the 1st of October.

"It is expressly understood and agreed by the parties hereto that in case of the death, or loss, of any of the said forty-one (41) head of cattle, or of any of the increase thereof, arising from the fault, neglect or improper care on the part of the party of the first part, then said party of the first part shall, on or before the termination of this contract, make just remuneration to said party of the second part, but it is also expressly agreed that in case of the death of any of said forty-one (41) head or any of the increase thereof, resulting from disease, old age, or other cause which said party of the first part, by reasonable and ordinary care could not have prevented, then in such case said party of the first part is not to be held liable for the return of said cattle or any equivalent thereof.

"It is further expressly understood and agreed that if either of the parties hereto should desire to terminate this contract before the expiration of the said three years, such party may do so at the expiration of any year from the date hereof of this contract by giving to the other party three (3) months' notice of his intention so to do,

and such division or divisions of the increase of said cattle as may have been made previous to such termination, and the return of the said forty-one (41) head of cattle or remainder of said cattle as above indicated, and of the one-half of the increase as above indicated, shall be regarded as a full settlement under this contract by the parties hereto.

"Made in duplicate the day first above written."

The plaintiff alleged performance on his part, delivery of the cattle to the defendant; that during the first year of possession of said cattle there was an increase of 31 head, which was divided according to contract, 16 head being allotted to plaintiff and all of said cattle and increase being retained by Mattern; that defendant neglected to properly feed, shelter, care for or breed said cows so that during the next year there was only an increase of two head; that if properly cared for and bred said cows would have had 30 calves; that on account of this negligence 21 head of the original stock and three head of increase died or were lost; that on July 16, 1902, under the terms of a written agreement the remaining cattle and the remaining increase were divided, and the matter of the loss either by death or otherwise was expressly left open for future determination; that under this agreement Mattern returned to McCarthy 20 head of the original stock and 13 head of the increase for the year 1901, and two head of increase for 1902, and no more, and further averred the performance of all conditions on his part. The defendant admitted the execution of the contract and the contract of dissolution; alleged that the cattle were at all times properly cared for as if they belonged to him; that the death of the cattle referred to in plaintiff's petition was without fault or negligence on his part, and denied all other allegations of the petition. Trial was had, and a verdict rendered for the plaintiff, from which the defendant prosecutes error to this court.

A large number of assignments of error have been made

as to the admission and exclusion of testimony and the giving and refusal of instructions. In the view we take of the law of the case, however, it will only be necessary to examine a few of the errors assigned.

In the first place it may be well to determine the legal effect of the contract, since the defendant contends that the measure of his duties and liabilities fixed by the contract is different from that of the general law governing cases of agistment of this nature. The contract was for the benefit of both parties. The bailor delivered the possession of his cattle to the bailee with the intention upon the part of both of the parties to the contract that the result of the agistment would be mutually advantageous. The contract provides that the bailee "will pasture, feed and care for" the cattle, "caring for them in all respects as he would for similar property of his own," and that in case of the death or loss of any of the cattle or of any of the increase "through the fault, neglect or improper care" on the bailee's part, he should "make just remuneration" to the bailor; that in case of the death of any of the cattle or increase resulting from disease, old age or other causes which the bailee by reasonable and ordinary care could not have prevented, then in such case the bailee is not to be held liable for the return of the cattle. The general rule of law is that, where a bailment is mutually advantageous to both parties, the bailee is required to exercise only ordinary and reasonable care and diligence. He must exercise such care as a man of ordinary prudence would use under the same circumstances toward his own property. *Calland v. Nichols,* 30 Neb. 532.

It will be observed that the requirements of the contract in regard to the quantum of care to be given to the cattle, and the liability of the defendant in case of neglect, are the same as they would have been had no specifications been made in the contract as to the diligence which he should exercise, or the damages which he should pay for lack of ordinary care. The contract, therefore, though in one sense special, merely speaks the language

of the law as to the duty and liability of the defendant and is so far general in its nature. When the defendant agreed to give the cattle the same care as his own, the intention evidently was that he should, and the legal presumption is that he would, give his own cattle the same care that an ordinarily prudent man would under like circumstances.

The 7th and 8th assignments of error in the motion for a new trial are as follows: "7th. The court erred in refusing to give the first and second instructions asked by the defendant. 8th. The court erred in giving the 4th, 5th, 6th and 9th paragraphs of instructions, all of which were duly excepted to by the defendant."

Under the familiar rule in this court, since these assignments of error have been made to the instructions *en masse,* if any one of the instructions refused by the court was properly refused, or any of those the giving of which is assigned as error was properly given, these assignments are not well taken.

The first instruction asked by the defendant and refused by the court is as follows: "The jury are instructed that as a matter of law a special contract of bailment prevails in determining the liabilities of the parties as against general principles of law applicable in the absence of express agreement." Since, as we have seen, the liabilities under this contract are the same as under the general principles of law, the defendant could be in no wise prejudiced by the refusal to give the instruction; and in fact it may well be questioned whether the court would not have erred in giving such an abstract proposition of law to the jury, which we think was without relevancy in this particular case. This instruction, therefore, being properly refused, under the rule we cannot examine further into this assignment.

The fifth instruction given by the court is as follows: "Under the terms of the contract herein sued upon the defendant is liable for the value of any cattle delivered to defendant or any of the increase thereof which were lost,

dead or not returned, if you believe from the evidence that such loss, death or failure to return such stock could have been prevented by the defendant in exercising reasonable and ordinary care in handling such stock. On the other hand, it is provided by said contract, and the law is that he would not be liable to plaintiff on account of the death of any of the 41 head of cattle or the increase thereof resulting from disease, old age or other causes which the defendant by reasonable and ordinary care could not have prevented."

It is objected to this instruction that it makes the defendant liable for the value of cattle lost, when the contract reads that in case of the death or loss, etc., the defendant should make "just remuneration," and it is argued that to determine what is just remuneration the facts specially applicable to this contract and the mutual loss of profits, if any, would have to be taken into consideration. But we think that the phrase "just remuneration" as used in the contract means the remuneration which the plaintiff would be justly entitled to under the law for the loss of his cattle by the defendant's negligence, and this would certainly be the value of the cattle lost. Loss of profits could be taken into consideration where the property was lost or destroyed without negligence upon the part of the defendant. In such case each party to the contract must bear his share of the loss since each is equally free from fault, but where the loss is occasioned solely by the wrongful neglect of the defendant he is liable both under the contract and the common law for the actual value of the property. Instruction No. 5, therefore, being correctly given, the whole assignment of error with reference to the 4th, 5th, 6th and 9th instructions must fall.

The defendant complains that the court erred in giving instruction No. 4 to the jury as to the burden of proof. The giving of this instruction is assigned as error together with the 5th instruction which we have seen was correctly given. We cannot, therefore, consider this point.

The other assignments of error are with respect to alleged errors in the overruling and sustaining of objections to specific questions and the refusal of the court to strike out certain testimony. We have examined these assignments carefully and find no error in the rulings of the court prejudicial to the defendant. The evidence objected to is mainly with regard to the condition of the cattle at the time they were delivered to the defendant; also opinion evidence as to the number of calves which probably would have been dropped by the cows if they had been properly bred and cared for and as to the value of calves in August, 1902. This evidence was given by men who were farmers, and who had had experience in growing and handling cattle. We are satisfied that they were competent and fully qualified to express an opinion on these matters. It is true the evidence was merely of opinions, but that is all that could be adduced under the circumstances. Though plaintiff's damages were somewhat difficult to ascertain, as is usually the case where gains prevented is an element of damage as well as losses sustained, it seems to us that they were not so remote and speculative but that the jury could arrive with reasonable certainty at the probable loss of profits which the plaintiff suffered, and that evidence of the character objected to was admissible.

However, the amount of the verdict is so small that the jury probably disregarded all this evidence as to loss of profits, and only allowed plaintiff to recover damages for a part of the cattle that apparently died of neglect. The value of all the cattle that died of other causes than disease or old age is shown to be more than the amount of the verdict. Hence the defendant was not prejudiced by the admission of the evidence complained of even if it had been erroneous.

The defendant further complains that he was not allowed to show how the wind-breaks and other provisions for the care of cattle upon the defendant's ranch compared with those upon other average cattle ranches in Garfield

county, nor to show what the custom was for caring for cattle in Hamilton county and to prove that there was a difference between the usual method of caring for cattle in Hamilton county and in Garfield county. We fail to see wherein the defendant was prejudiced by the refusal of the court to permit this evidence. The question before the jury was whether or not the defendant had used ordinary and reasonable care in the care of the plaintiff's cattle. The defendant was permitted to show by the witness Boag what the custom and usage as to caring for cattle was in Garfield county. If there was a difference in the manner of taking care of cattle in Garfield county from that in Hamilton county this would be immaterial and would not excuse the defendant from exercising the care that an ordinarily prudent person would under like circumstances. If the defendant had been able to show that it was the custom in Garfield county to provide absolutely no protection for live stock during the winter, which is as strong a proposition as he could possibly have established, it would not excuse him, because common experience is sufficient to teach any man, whether familiar with the care of cattle or not, that climatic conditions in this latitude demand some protection for animals from the winter storms. This fact has been recognized by the law making power, and failure to properly shelter cattle is a crime in this state. Under section 67*c* of the criminal code, it is a misdemeanor for any person having in charge any cattle to carelessly neglect to provide sufficient shelter therefor.

The defendant was permitted to show to the jury all the circumstances connected with his care of the cattle, and a number of his witnesses testified that the cattle received the usual and ordinary care, feed, shelter, breeding and treatment.

The evidence was conflicting as to this and as to the age and condition of the cattle, and in regard to the amount of care that was bestowed upon them by the defendant, but the verdict is amply supported by the evidence. The

damages awarded are not excessive and we recommend 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.

MARY E. GAVIN V. C. T. REED.

FILED FEBRUARY 9, 1905. No. 13,571.

Judgment: VACATION. Before a plaintiff is entitled to have a judgment against him and an order overruling his motion for a new trial vacated at a succeeding term for irregularity, it must be adjudged by the court that he has a cause of action which is *prima facie* valid.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

A. N. Ferguson, for plaintiff in error.

Ed P. Smith and *J. B. Sheean, contra.*

LETTON, C.

This is a proceeding brought to review the action of the district court for Douglas county in refusing to vacate a judgment, and to set aside an order refusing a new trial in the cause. The case was tried to a jury, verdict rendered against plaintiff in error, and a motion for new trial filed. No notice was given plaintiff in error of the time the motion for new trial would be heard, as is required by the rules of the district court for Douglas county, rule 8 of which requires a notice to be given by the opposite party if a party has filed a motion which he desires taken up; but on June 17, 1902, Judge Fawcett, before whom the cause

was tried in the district court, of his own motion, caused a notice to be published in the Daily Record, a newspaper which purports to give an account of the proceedings in the several courts in that city, as follows: "Notice. Judge Fawcett will hear motions for new trial on Thursday morning in the following cases. 75-172. *Gavin v. Reed.*"

Pursuant to this notice the motion for new trial was taken up, overruled and judgment entered. It appears from the evidence that neither the plaintiff nor her counsel had any notice of any kind of the hearing upon the motion for a new trial, nor had either of them known of the publication in the Daily Record until long after the forty days allowed for the preparation of a bill of exceptions had elapsed; that counsel relied upon the provision of rule 8, knowing that if defendant desired to call up the motion for a new trial for hearing he could serve notice of the same under the rule.

Section 602 of the code provides: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made. * * * Third. For mistake, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order."

Plaintiff's motion to vacate the judgment and order is based upon "irregularity by reason of no notice being served as by law provided." As we understand, the plaintiff's contention is that the order overruling the motion for a new trial was rendered before the motion regularly stood for hearing.

Section 606 provides: "A judgment shall not be vacated on motion or petition, until it is adjudged * * * if the plaintiff seeks its vacation, that there is a valid cause of action." This requires the court to adjudge that the cause of action is *prima facie* valid before it would be authorized to take any action upon the motion. *Gilbert v. Marrow*, 54 Neb. 77.

Since the finding and order of the court assigned as erroneous is general in its terms, we are unable to say

whether the motions were overruled because the court found that the plaintiff had not a valid cause of action, or whether it was because the court found that the proceedings were not brought in time. The court had in the main action already adjudged that the plaintiff had not a valid cause of action when it directed the jury to return a verdict against the plaintiff, and there is no additional evidence in the record. It will be presumed that the court considered all the grounds set forth in the motion for new trial and that nothing was brought to its attention therein which caused it to change its views. This court said in *Cochran v. Philadelphia Mortgage & Trust Co.*, 70 Neb. 100:

"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."

There is nothing here to show that the original action of the trial court was erroneous and that the plaintiff had a valid cause of action, since no bill of exceptions of the evidence at the trial is before us.

The motion to set aside the ruling on the motion for a new trial included also a motion to vacate and set aside the judgment. Unless a motion can be granted as it is made, it is properly overruled. This motion therefore asked for relief that the party was not entitled to and was properly overruled.

For these reasons the judgment of the district court should 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.

CITY OF OMAHA V. HARRY CROCKER.

FILED FEBRUARY 9, 1905. No. 13,687.

New Trial: REVIEW. On proceedings in error from an order granting a new trial, the grounds for the sustaining of the motion not appearing in the record, it will be presumed that the action of the trial court was correct; and the plaintiff in error must show affirmatively that none of the grounds alleged in the motion for new trial was valid and sufficient to justify the order before this court will interfere.

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

C. C. Wright and *W. H. Herdman,* for plaintiff in error.

I. R. Andrews, contra.

LETTON, C.

This action was begun by defendant in error Harry Crocker, as plaintiff, against the city of Omaha, defendant, to recover damages on account of injuries alleged to have been sustained by him on account of the negligence of the city in the maintenance of one of its streets. The case was tried to a jury, and a verdict rendered in favor of the plaintiff and against the defendant, assessing the plaintiff's recovery at the sum of $50. Plaintiff then filed a motion for a new trial, assigning many grounds therefor, which motion was sustained by the court, the verdict set aside and a new trial ordered. Exceptions were properly taken and preserved by the defendant. Afterwards the plaintiff procured the action to be dismissed without prejudice, to which the defendant excepted. The city of

Omaha, plaintiff in error, seeks to review the order of the district court sustaining the motion for a new trial, and subsequently dismissing the cause without prejudice. Plaintiff in error contends that the provisions of section 315 of the code, which provides that "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," apply; that the district court granted the new trial on account of the smallness of damages, and that therefore its action was erroneous.

The record does not show upon which of the numerous grounds assigned therein as error the district court sustained the motion for a new trial, and counsel differ in their contentions as to the reason for the ruling of the court. This court will not lightly interfere with the discretion of the district court in granting a new trial. It is within the experience of every lawyer and judge that it sometimes happens that a litigant suffers grave prejudice during the trial of his case in such manner that it would be difficult to make the same appear clearly to a reviewing court, while at the same time the prejudice is obvious to the judge who presides at the trial. In such case it is the duty of the trial judge, of his own motion if need be, to grant a new trial in furtherance of justice. *Weber v. Kirkendall,* 44 Neb. 766. The presumption is that a judgment or order of the district court acting within its jurisdiction is correct. *Central City Bank v. Rice,* 44 Neb. 594.

In such a case as this, where it is impossible to ascertain from the record upon which of the many grounds assigned in the motion the court acted, it must appear affirmatively that none of the grounds of the motion for a new trial are sufficient, before the party complaining will be entitled to a reversal. *Ryan v. Topeka Bridge Co.,* 7 Kan. 207.

The plaintiff in error has failed to satisfy us that none of the grounds assigned in the motion were sufficient to justify the action of the court in granting a new trial,

and therefore we recommend that the orders allowing a new trial and allowing defendant in error to dismiss the action without prejudice 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.

JAMES C. ROBINSON V. ED. STRICKLIN.

FILED FEBRUARY 9, 1905. No. 13,692.

1. **Executory Contract of Sale: TITLE.** A contract whereby A furnishes to B seed corn for the purpose of planting a certain acreage of corn, and whereby B agrees to deliver at the warehouse of A the entire portion of the crop which comes up to certain standards of quality set forth in the contract at a certain price fixed therein is an executory contract, and no title passes to that portion of the crop sold until separation and delivery, even though the contract recites that the title to the crop is in A and that he may enter and take the same if not delivered.
2. **Quaere.** Whether such contract is of any validity in this state as a sale of things not *in esse, quœre.*

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

James H. Van Dusen, for plaintiff in error.

Nelson C. Pratt, John F. Stout and *E. S. Nickerson, contra.*

LETTON, C.

This is an action in replevin brought in the district court for Sarpy county by James C. Robinson against Ed. Stricklin to recover possession of a quantity of corn grown by the defendant on land in Sarpy county under a contract with the plaintiff. For convenience the parties

will be termed plaintiff and defendant, respectively, as they appeared in the court below. The contract is as follows:

"SEED CONTRACT.

"This agreement, between Ed. Stricklin, of Gretna, Neb., party of the first part, and J. C. Robinson, of Waterloo, Nebraska, party of the second part, Witnesseth: That the said party of the first part has borrowed and may hereafter borrow, of said party of the second part, the planting stock seeds required to plant the acreage of seeds and corn described below, and agrees to plant same in proper season, and to cultivate in a workmanlike manner; and also agrees to deliver to said party of the second part, at his seed house in Waterloo, Nebraska, the entire merchantable increase thereof, on or before the dates specified below. The party of the first part further agrees, that the said seeds and corn shall be delivered in a bright, well cured, marketable condition, the seeds to retain their natural color, and the corn to be free from impure, rotten or bad kernels.

"It is further agreed that if either seed or corn are not delivered in a merchantable condition as specified above, the party of the second part can at once have same put in a proper condition, the expense of same to be deducted from the proceeds of the crop, or at the option of the party of the second part, any part or all of such unmarketable crop can be rejected, both seeds and corn to have germinating qualities, which shall test at least eighty-five per cent. The party of the first part agrees that if, for any reason, the planting stock fails to grow, or insects or elements destroy the plants, he will at once notify the party of the second part, and if in the planting season, he will at once replant, at the direction of the party of the second part.

"The party of the first part furthermore agrees that all right, title, and interest in and to said seed and corn crops in all conditions is, and shall remain in said party of the second part, and authorizes said party of the second part,

if said seed and corn crops are not delivered as agreed above, to enter upon the premises wherever the same may be, and take immediate possession thereof.

"The party of the first part further agrees that no mortgage, bill of sale, or other lien shall be placed on said seed or corn crops, except as may be provided for by special agreements as appears on this contract.

"Upon fulfilment of the above named stipulations by the party of the first part, the party of the second part agrees to pay in cash (after satisfactory tests) to said party of the first part, for his labor and service in planting and attending and delivering said seed and corn crops at the rate per pound or per bushel specified below and in this agreement.

"Said party of the first part also agrees to notify the party of the second part, at least once in two weeks, either in person or by letter, of condition of growth of said seed and corn crops.

Acres.	Pounds.	Stock. No.	Variety.	Crop. No.	Date of Price. Delivery.
20	Sweet corn, Stowell's evergreen, sorted, not hand picked Jan. 1, 1904, $1.15 per 100 pounds.				
	Sweet corn.		Jan. 1, 190		Per 100 pounds.
45	Field corn, Mercer's Flint 3062 Jan. 1, 1904, 60c per bus. 56 pounds.....				

.....March 12, 1903. 190 (Signed) ED. STRICKLIN.

"Waterloo, Neb. Mar. 12, 1903, 190

"(Signed) J. C. ROBINSON."

The action is replevin, hence the plaintiff in order to recover, must have been the owner of the property at the time the action was begun. He bases his title to the property upon the terms of the contract, arguing, first, that the seed from which the corn grew was the property of the plaintiff; second, that the defendant was the owner or lessee of the land on which the corn grew; third, that un-

less in law the agreement is void Robinson is the owner of the corn. In support of the contract he argues that it is not one of sale, and does not fall within the rule of contracts for things not *in esse* but that it falls within the rule in *Sanford v. Modine,* 51 Neb. 728, wherein it is held that a lease wherein a cropping tenant agrees that the title to crops grown shall be in the landlord until the crop is divided is valid, and that the title to such crops is in the landlord until division is made.

On the other hand the defendant contends: First, admitting for the sake of the argument, that the contract is a valid one, it is only executory in its character, and title would not pass from the defendant to the plaintiff to the corn grown until some further act had been performed in relation to the same; second, that the contract is void for the reason that no sale can be made of property not in existence.

The contract recites that the defendant has borrowed seeds to plant a certain acreage of corn. That he agrees to plant and cultivate the same properly, and deliver to the plaintiff at his seed house at Waterloo, Nebraska, "the entire merchantable increase" thereof on or before the date specified. That the corn should be delivered in a bright, well cured, marketable condition, free from impure, rotten or bad kernels. That if the corn is not in proper condition the plaintiff can at once have the same put in proper condition at the defendant's expense, or the plaintiff may reject all or any part of such unmarketable crop. That the corn is to have germinating qualities which shall test at least eight-five per cent. The plaintiff agrees to pay in cash, "after satisfactory tests," to defendant for his "labor and service in planting and attending and delivering said corn crop" at the rates specified in the contract.

It will be observed that no specific land upon which the crop was to be grown is mentioned in the contract. That while the defendant was bound by the contract to plant a certain acreage of corn, to cultivate it and to "deliver the

merchantable increase" thereof, the plaintiff was not bound to accept the same or any part of it unless it had germinating qualities which should test at least eighty-five per cent., be delivered in a bright, well cured, marketable condition, and be free from impure, rotten or bad kernels. It is clear that the execution of this contract on the part of the defendant required a separation of the corn crop so that that which failed to germinate to the percentage specified, and the impure, rotten or bad kernels, and those that were not bright and well cured, should be separated from the remainder of the crop, and that it was only that portion of the crop which came up to the standard established in the contract which the plaintiff could, by its terms, be compelled to accept. The plaintiff, by this contract, did not agree to purchase or to pay for all of the corn grown by the defendant from the seed furnished under the contract. If the larger portion of the crop had been deficient in the qualifications required, which under the climatic conditions in this state might well happen in some years, he would have no interest so far in the crop and no right to insist upon its delivery to him.

The general rule is that, where anything remains to be done by either or both parties to a contract of sale, before delivery, either to determine the identity of the thing sold, the quantity, or the price, the contract, until such things are done, is executory and the title does not vest in the purchaser. *Holmes v. Bailey,* 16 Neb. 300.

It is true that the contract recites, and the plaintiff argues, that the payment to the defendant is to be made for his labor and services in planting and attending the crops, but since the evidence shows the plaintiff did not furnish the land upon which the crop was to be grown, and that it was the intention of the parties that it was to be grown upon land leased by the defendant, the contract failed to recite the truth. He was to be paid not for labor alone, but for that which embodies both labor and the energy of the soil and elements, a certain portion of the

crop itself. Taken as a whole, the contract is a contract of sale of a certain portion of crops yet to be planted, the portion sold to be identified by means of a certain standard set forth therein. In order to identify the portion sold, the measure and standard specified in the contract must be applied, and it would be impossible to determine to what extent the plaintiff would be liable under the contract to take and pay for the crop until this had been done. Manifestly, the contract was executory in its character. It was not the sale of the entire mass of a crop to be grown upon a certain specified tract of land which has been held by some courts to be an executed contract, and to pass title to the crop, but it was in effect a sale of a certain portion of a crop yet to be raised which was indistinguishable, and not capable of identification until separated from the mass. See Am. & Eng. Ency. Law (2d ed.), note 5, p. 1042. Further than this, the contract provides for a sale of property not *in esse*. The seed was in being at that time but that was all. It is different from a case wherein a landlord rents certain specific land to a tenant upon which the tenant agrees to raise a crop, and that the title to the crop should remain in the landlord until after division. Such a case was *Sanford v. Modine*, 51 Neb. 728, cited by plaintiff, from which this case is easily distinguishable. The contract herein recites that the defendant has borrowed the seed, but that is as far as any potentiality of the crop was in existence. Authorities differ as to how far a sale may be made of an article which is not yet in existence. The general doctrine is that, if the property has a potential existence—such, for example, as the natural increase or product of property which is already in the hands of the seller—it may be sold or mortgaged.

In the case of *Brown v. Neilson*, 61 Neb. 765, 54 L. R. A. 328, a full and exhaustive discussion is made by Judge HOLCOMB of the question as to whether a lien may be created upon property not in existence by the terms of a lease which apparently in terms granted such lien. All

the cases in this state bearing upon the point under consideration are examined and compared with the decisions in other states and in England, citing and quoting with approval *Cole v. Kerr,* 19 Neb. 553. He says in the opinion: "The natural and logical deduction to be made from the authorities above cited is that the agreement under which the plaintiffs claim, being executory in its nature and not fully executed, is insufficient to pass any legal interest in, or equitable lien on the property on which the lien is claimed, because not then in existence. * * * The contract in the present instance is not the result of a mistake or failure of the parties to correctly express their intentions in the stipulation creating the alleged lien. It amounts only to a mere license, which to become effective for the purpose of creating a valid lien requires a change of possession of the property when or after acquired. Until a new act intervenes, no sufficient title passes to the lessor which he can enforce at law or in equity, nor is he entitled to relief by the application of any recognized rule of equity, under the doctrine of specific performance." See also *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825, wherein it is held that a mortgage upon the increase of domestic animals to be thereafter begotten is only an agreement for a lien invalid without possession given by the mortgagor. *Forsyth Mfg. Co. v. Castles,* 112 Ga. 199, 81 Am. St. 28, and monographic note; *Long v. Hines,* 40 Kan. 216, 16 Pac. 339; *Townsend Brick & Contracting Co. v. Allen,* 62 Kan. 311, 52 L. R. A. 323.

A reexamination of the cases upon this point would be fruitless. We are satisfied with the principles thus laid down which have been the rule of this court ever since *Lanphere v. Lowe,* 3 Neb. 131, decided in 1873. The contract in the instant case attempted to give the plaintiff title to corn which was not in existence either actually or potentially and which after it was grown required to be separated and distinguished from the entire crop before the vendee could ascertain that portion which he was entitled to receive and pay for.

If the plaintiff had refused to accept the corn and the defendant had brought an action for damages for the breach of the contract he could not have recovered for the whole of the crop, but, if at all, merely for that portion which possessed the qualifications required, and to ascertain this, required a separation and division from the mass. Assuming that the contract is valid as an executory contract of sale of part of the crop, which we do not decide, the plaintiff can only recover by proving title in himself to the specific property replevied. Before his title to any of the crop could be completed it was necessary that it should be separated and set apart to him. This not having been done, his title never ripened into a perfect one. We conclude therefore that the contract was executory in its nature, and that the title to the property could not pass to the plaintiff until separated and delivered to him by the defendant. This not having been done, the title never passed, and he is not entitled to recover in this action.

We recommend 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.

CHAS. W. EBEL V. EDWARD STRINGER, IMPLEADED WITH SOMERSET TRUST COMPANY, APPELLANT, AND MARY BUTLER, APPELLEE, ET AL.

FILED FEBRUARY 9, 1905. No. 13,716.

1. **Attorney: APPEARANCE: PRESUMPTION.** Where an attorney appears in an action for a defendant, the presumption is that he was authorized to appear. Evidence examined, and *held* not to overcome this presumption.

2. **Judgment:** SATISFACTION. A judgment is extinguished when it is paid by one who is primarily liable for its satisfaction, and it cannot after such payment be kept alive by assignment to a third person or corporation.

3. ———: ASSIGNMENT: EVIDENCE. Under the facts, *held*, that no competent evidence of an assignment of the judgment by the judgment creditor has been adduced.

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

R. R. Dickson, for appellant.

W. R. Butler, contra.

LETTON, C.

This is a cross-action whereby the Somerset Trust Company, a corporation, appellant, sought to subject 160 acres of land in Holt county, the title to which is in Mary Butler, appellee, to the payment of a judgment. The facts are substantially as follows: In 1899 one Ralph Ege became the owner of a certain quarter section of land in Holt county, Nebraska. In 1897 he made an assignment of all his property for the benefit of his creditors, and on October 22, 1898, the appellee, Mary Butler, purchased said land at public sale from the assignees of Ege. On the 18th day of August, 1894, an action was begun by Justin McCarthy, Sr., in the district court for Holt county against Cortelyou, Ege and Van Zandt, J. G. Cortelyou, M. N. Van Zandt, A. B. Van Zandt, Ralph Ege and J. S. Van Zandt upon a supersedeas bond, and on the same day a summons was issued and served upon all the defendants except J. G. Cortelyou and Ralph Ege. Ege was a resident of the state of New Jersey and a member of the firm of Cortelyou, Ege and Van Zandt, which at that time was doing business at Ewing in Holt county as the Bank of Ewing. H. M. Uttley, an attorney of O'Neill, was employed by the firm to defend the action. He filed an an-

swer and appeared for all the defendants. A trial was had and on the 30th day of March, 1895, judgment was rendered against all the defendants for the sum of $1,021.24 and $284.38 costs. The action was carried to the supreme court, a supersedeas bond being signed on behalf of the defendants by their attorney H. M. Uttley, and by J. L. Roll and D. G. Roll with others, as sureties. The judgment of the district court was affirmed in this court, and in March, 1898, the defendants, A. B. Van Zandt and J. S. Van Zandt, J. L. Roll and D. G. Roll signed and delivered to Justin McCarthy, Sr., or his attorney, their joint promissory note in payment of this judgment. A few weeks afterwards, J. G. Cortelyou went to O'Neill with J. L. Roll, paid off the note, and the judgment was apparently assigned by J. L. Roll to the Somerset Trust Company of which J. G. Cortelyou was a stockholder, director and president. In judgment record No. 3, page 75, the following entries appear: "March 24, 1898, assignment of this judgment to Jacob L. Roll. The same on file. March 24, 1898, Assignment of this judgment from Jacob L. Roll to the Somerset Trust Company." The original assignments, if any were ever made in writing, appear to have been lost and do not appear in evidence. Roll testifies that the judgment was assigned by McCarthy or his counsel to him in trust for the signers of the note, and that the Somerset Trust Company advanced the money and he assigned the judgment to it. Upon cross-examination he says, that the judgment was first paid by the note given by the judgment debtors, A. B. Van Zandt, J. S. Van Zandt, himself and his brother. That none of the parties to the note furnished the money with which it was paid, but that it was furnished by J. G. Cortelyou, who was one of the judgment debtors and president of the Trust Company. That the note was given some time prior to the assignments. That they were made on the day Cortelyou and he came to O'Neill together, that McCarthy was not there at all, but M. F. Harrington, McCarthy's attorney, was. That the note was given to Mr. Harrington to pay

the judgment instead of to McCarthy, and that the assignments were made after the judgment was paid by the note. On the other hand, Mr. McCarthy swears positively that he never made any assignment to Mr. Roll, and never signed any kind of paper, and that the judgment was paid by J. G. Cortelyou to Mr. Harrington. That he was present at the time and received the full amount then and there, and that Mr. Roll was not present at the time the money was paid, though he had been just before.

The trial court found upon this branch of the case that the district court never acquired jurisdiction over Ralph Ege, and that no judgment was ever recovered by McCarthy against him for want of jurisdiction.

The court further found that McCarthy never sold the judgment to J. L. Roll, that he never received any money on said judgment from Roll, that Roll never was the owner of said judgment, and never assigned it to the Somerset Trust Company. The court further found that the judgment was paid by the judgment debtors, J. G. Cortelyou, A. B. Van Zandt and J. S. Van Zandt, and the lien thereof as well as said judgment satisfied and extinguished.

The case in this court is tried *de novo*. From the testimony in the record, we are of the opinion that there is not sufficient evidence to overcome the presumption in favor of the authority of the attorney H. M. Uttley to appear for Ralph Ege in the action upon which the judgment was rendered. It appears that he was employed by Ege's partners and business associates. That Ege's son, who had charge of his father's matters in that vicinity, was employed in the bank at Ewing and knew of the litigation, and that no disclaimer has ever been made by Ege of Uttley's authority.

Ege does not in this action nor has he in any other action asserted that Uttley had no authority to represent him, and as long as he makes no complaint no one else is entitled to do so for him. Uttley having appeared in the action for all the defendants, including Ege, the court acquired jurisdiction, and the judgment was properly ren-

dered against Ege, and was of full force and effect as to him.

We are satisfied, however, with the finding of the district court that the judgment was satisfied by the giving of the note by A. B. Van Zandt and J. S. Van Zandt, J. L. Roll and D. G. Roll, and the payment of the note by Cortelyou. The judgment creditor swears positively the judgment was paid and that he made no assignment of it and there is no competent proof in the record that any assignment was ever made.

It is true the judgment record recites that an assignment to Roll is on file, but it does not recite who made the assignment. Even if it had been filed and lost thereafter, there is no proof of the contents of the paper and there is nothing to show by whom it was executed, whether by McCarthy himself, or his attorney; or if made by the attorney no proof of any authority on his part to transfer the judgment in such manner is made. Taking these facts into consideration in connection with all the evidence relating to the manner of doing business of the Somerset Trust Company, the persons who constitute its stockholders, and the apparently unlimited control over its affairs exercised by its president, John G. Cortelyou, who was primarily liable upon the judgment, such control going to the extent that all its funds were intermingled with and kept by him among his own money in his private bank account, we are satisfied that whatever might have been Cortelyou's intention as to the Trust Company when he paid the money, his payment under all the circumstances was a satisfaction of the judgment. John G. Cortelyou is dead, and we, therefore, cannot hear his version of the transaction, but his memoranda and the book accounts of the Somerset Trust Company have been produced in order to substantiate the company's contention. A judgment is extinguished when it is paid by one who is primarily liable for its satisfaction and it cannot, after such payment, be kept alive by assignment to a third person or corporation. *First Nat. Bank of Plattsmouth v. Gibson*, 60 Neb. 767;

Henry & Coatsworth Co. v. Halter, 58 Neb. 685. The evidence is meager and conflicting as to whether the note given by the Van Zandts and the Rolls was accepted in payment of the judgment, but there can be no question that the money paid by Cortelyou was that which was received by McCarthy on the day that the transaction was finally closed.

If the note had been accepted in payment of the judgment, no assignment made afterwards could give new life to it, so that if we accept the transaction as to the note testified to by the witness Roll, who testified on behalf of the Trust Company, the judgment was paid before the assignments, if any, were made.

Having come to this conclusion, it is unecessary to examine the question of whether or not Mrs. Butler was a purchaser of the land without notice of the lien of the judgment, which was a further finding of the district court. If the judgment was paid it was extinguished and no one could assert any rights under it.

We recommend 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.

HITCHCOCK COUNTY v. JOHN H. BROWN.

FILED FEBRUARY 9, 1905. No. 13,654.

County Board: DISALLOWANCE OF CLAIM: APPEAL. Where an appeal is taken from the order of a board of county commissioners disallowing a claim, and a bond as required by statute is filed with the county clerk within the time allowed, and approved by him, the mere fact that such officer, who is also *ex officio* clerk of the district court of the same county, indorses the approval of the bond as clerk of the district court, is not a sufficient irregularity to defeat the ends of the appeal.

ERROR to the district court for Hitchcock county: ROBERT C. ORR, JUDGE. *Affirmed.*

C. W. Shurtliff and *W. F. Button,* for plaintiff in error.

A. A. McCoy and *J. W. Jones, contra.*

OLDHAM, C.

In September, 1901, a complaint was filed before a justice of the peace of Hitchcock county, Nebraska, charging one Grabaugh with burglary and larceny. A hearing was had on this complaint before the justice, and the defendant was held to appear at the next term of the district court for said county. The justice filed a certified transcript of the costs with the clerk of the district court, giving the items of the same and to whom each was due, and on what account; among these items of costs were the fees due the defendant, John H. Brown, as sheriff of Hitchcock county. The county commissioners proceeded to examine into the bill of costs, and upon such examination, they expressed the opinion that the defendant was only guilty of petit larceny and not of burglary and larceny as charged in the complaint, and for that reason they refused to allow the fees of the sheriff, as there were no funds in the county for paying costs in misdemeanor cases. From the order disallowing this claim the sheriff served notice of appeal upon the clerk of the county within the time allowed by statute. He also filed an appeal bond with two sureties, which was approved by the clerk, but in noting the approval of the bond the county clerk of the county, who is *ex officio* clerk of the district court, noted his approval of the bond as "clerk of the district court." The transcript of the proceedings, however, was certified to by the dual clerk as "county clerk" and the notice was served upon him as clerk of the county. When the cause was docketed in the district court the county attorney filed a motion to dismiss the appeal because the

bond had not been approved by the "county clerk." This motion was overruled, and on a trial had to the court, a jury being waived, judgment was entered in favor of the sheriff and against the county for the statutory fees to which the sheriff is entitled in felony cases. To reverse this judgment the county brings error to this court.

The only question urged in the brief of the county is that the district court erred in not dismissing the appeal of the sheriff because his bond appeared to have been approved by the clerk of the district court instead of by the county clerk. It is conceded that the county clerk in Hitchcock county is *ex officio* district clerk of the same county. While it is true that the statute requires that the appeal bond in this class of cases shall be filed with and approved by the county clerk of the county, yet it seems to us that that is just what has been done in this case. It would be running hairsplitting technicality riot for the purpose of defeating meritorious appeals to say that, when a claimant files his bond and notice of appeal with the county clerk, the mere fact that such officer in approving the bond designates himself clerk of the district court is such a substantial variance from the provisions of the statute as to defeat the ends of the appeal. If the clerk had made no notation on the bond and had simply approved it, this is all either the spirit or the letter of the statute authorizing the appeal would have demanded. This view seems to be in harmony with the doctrine announced by this court in the recent case of *Jarvis v. County of Chase*, 64 Neb. 74. In that case a motion to dismiss was urged because the record failed to show proper service of the notice on the county clerk. In disposing of this objection, SULLIVAN, C. J., speaking for the court, said: "The statute requiring notice to be served upon the clerk, must, of course, be substantially complied with; but, since the sole object of the appeal is to enable parties to obtain justice, we see no reason for judging harshly or condemning for trivial faults the proceeding by which it is sought to transfer the cause to the appellate

court. The notice here in question was addressed to the county clerk, and it is entirely certain that it was delivered to him, for he states in the transcript filed in the district court that he filed it and copied it within twenty days after the county board rendered the decision. The notice having been delivered to the county clerk within the time limited by the statute, and the appeal bond having been given and approved, the district court, when the transcript was filed, had jurisdiction of the case, and should have proceeded to a trial on the merits." In the case at bar the record clearly shows that the notice was served in time on the county clerk and that the bond was delivered to him and approved by him. The transcript was certified within the statutory period by the county clerk and it also clearly appears that the appeal stood chin deep in merit.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

JOHN H. DANIELS ET AL. V. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

FILED FEBRUARY 9, 1905. No. 13,695.

1. **Mortgages: DEFICIENCY JUDGMENTS.** The law of 1897, repealing the statute which permitted deficiency judgments, has no application to real estate mortgages executed before the passage of that act.
2. **Jury Trial.** On a motion for a deficiency judgment in the foreclosure of a real estate mortgage executed prior to the passage of the law of 1897, the mortgagors are not entitled to a trial by a jury.

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

Charles W. Haller, for plaintiffs in error.

Warren Switzler and *Clency St. Clair, contra.*

OLDHAM, C.

This is a proceeding in error to reverse the judgment of the district court for Douglas county in entering a deficiency judgment against plaintiffs in error, who were defendants in the court below, in a proceeding to foreclose a real estate mortgage. The mortgage was made and executed September 1, 1890, to secure an indebtedness maturing within five years. When the principal debt matured it was extended by a written agreement for a further period of five years, or until September 1, 1900.

Two questions are presented: First, that as the time of the payment of the indebtedness under the extension agreement did not mature until after the repeal of the act known as the deficiency judgment law, the court was without jurisdiction to enter a deficiency judgment. This question was carefully examined by this court in the case of *Burrows v. Vanderbergh,* 69 Neb. 43, and we there held, that the act of 1897 (Laws, 1897, ch. 95), did not affect the right to a deficiency judgment—an effective part of the remedy—in a foreclosure proceeding on a real estate mortgage executed before the passage of this act.

The next question urged is that the court erred in overruling the demand of plaintiffs in error for a trial by jury on the question of their liability for a deficiency judgment. The determination of this question depends on the nature of the action at its inception. If purely equitable the right of trial by jury did not exist; if legal in its nature at its inception, although equitable defenses might be interposed, the right of a trial by jury would still remain. *Schumacher v. Crane-Churchill Co.,* 66 Neb. 440. But where the action as originally instituted seeks equitable relief alone, the interposition of a legal defense does not secure

for the defendant a right to a trial by jury of the legal defenses pleaded. *Albin v. Parmele,* 70 Neb. 746; *Sharmer v. McIntosh,* 43 Neb. 509; *Morrissey v. Broomal,* 37 Neb. 766. The action to foreclose the real estate mortgage being purely equitable in its inception, the right to a trial by jury did not arise on defendants answer to the motion for a deficiency judgment.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. JOHNERSON C. ROMBOLD.*

FILED FEBRUARY 9, 1905. No. 13,963.

1. **Law of Case.** *Held,* That all questions involved in this controversy which were examined and determined in the former opinion on this case, reported in 68 Neb. 54, except the question considered in our second opinion in the same case, 68 Neb. 71, are governed by the "rule of the law of the case" and should not be reexamined unless clearly erroneous.
2. **Evidence: REVIEW.** Action of the trial court in the admission of evidence examined, and *held* not prejudicial.
3. **Instructions** examined, and *held* to have fairly covered every question at issue in the controversy.

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

W. W. Morsman and *Greene, Breckenridge & Kinsler,* for plaintiff in error.

Crane & Boucher and *T. J. Mahoney, contra.*

* Rehearing denied. See opinion, p. 272, *post.*

OLDHAM, C.

On the 12th day of June, 1899, Johnerson C. Rombold, plaintiff in the court below, filed his petition in the district court for Douglas county, against the defendant electric light company, alleging, in substance, that on March 22, 1898, he entered the employ of the defendant company as a lineman in the city of Omaha, it being his duty under the direction of the defendant to erect poles and string wires in the streets of said city, and that he continued in such employ up to and including a part of July 1, 1898, or a period of a little more than three months. He further alleged that at about five o'clock P. M. on said July first, he and his fellow workmen were engaged in stringing wires on poles and cross-arms at Jones street, between 4th and 5th streets in said city; that in the course of his employment he was directed by defendant to climb a certain pole to a height of about 45 feet, and string a wire upon the top cross-arm; that on this pole there were eight cross-arms, about 20 inches apart, and on each cross-arm from four to six electric and telephone wires 16 inches apart, about 28 of the wires being insulated electric light wires; that on the second cross-arm from the top, the first and second wires on the north side of the pole were insulated and carried a heavy current of electricity; that each of these wires were spliced at a point about two feet west of the cross-arms, the insulation being removed and the wires twisted together, the bare ends of the wires being allowed to extend out about an inch from the main wire; that the splices were negligently made, in that there was a failure to cover them with insulating material or "taping," to protect employees and others from coming in contact with such exposed wires; that plaintiff climbed up this pole on the east side of the cross-arm, strung the wire at the north end of the top cross-arm and descended to the west side of the cross-arms between the first and second wires; that when his feet were on the fourth cross-arm from the top

his right arm came in contact with the uncovered wire extending from the splices next to the pole, and at the same time his back came in contact with the uncovered wire extending out from the splices on the second wire from the pole; that he thereby became "short-circuited," receiving an electric shock which rendered him unconscious, causing him to fall to the ground, breaking both feet and right ankle and necessitating the amputation of his right foot. Because of these injuries he prayed a judgment for $25,000.

The defendant for its amended answer at the last trial of the cause in the court below denied specifically that it was its duty to insulate the wire complained of in the petition. Defendant also specifically alleged that the defects complained of were open and obvious and that the plaintiff assumed the risk, by virtue of his employment, of injuries from contact with them. That the defects could have been seen by plaintiff by the exercise of ordinary care, and that he was guilty of contributory negligence in failing to avoid them. The answer also alleged that on the 12th day of October, 1898, the plaintiff signed a release and received from defendant $325 in full satisfaction and discharge of the claim set forth in the petition. The release pleaded in the answer was as follows:

"Received of New Omaha Thomson-Houston Electric Light Co., this 12th day of October, 1898, the sum of three hundred and twenty-five dollars, in full satisfaction and discharge of all claims accrued or to accrue in respect of all injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the first day of July, 1898, while in the employment of the above. $325.

J. C. ROMBOLD.
"Witness, W. F. WHITE,
"Address, Omaha, Neb."

The plaintiff replied, denying the allegations of the amended answer, except as alleged in the petition, and alleged that he was induced to sign the release by fraud

practiced upon him by the misrepresentations of W. F. White, superintendent of the defendant electric light company, and by the pretended receipt being misread to him by George A. Gilbert, superintendent of the Employers Liability Assurance Company, as though it were but a receipt to an insurance company for his hospital expenses and medical attendance. He denies that any mention was made to him of any settlement with the electric light company for his injuries, but says that superintendent White represented to him that as soon as he had recovered sufficiently, the electric light company would give him $500 and restore him to a good position in their employ, and that plaintiff was not in a fit mental or physical condition to enter into a contract when the alleged receipt was signed. We have thus stated the issues somewhat at length, although this case is now before this court a third time for review, and although at its first hearing the issues then arising between these parties were very carefully and succinctly stated in an able and well considered opinion by HASTINGS, C., reported in 68 Neb. 54. This opinion affirmed the judgment of the district court in favor of plaintiff for $15,000 damages, but on a rehearing a second opinion was written by ALBERT, C., officially reported in 68 Neb. 71, reversing the judgment for a single error, that of the trial court in giving the eighth paragraph of instructions, and reaffirming and approving all other conclusions reached by Commissioner HASTINGS. When the cause was remanded to the district court in conformity with this latter opinion, on a second trial to a jury in the district court, plaintiff was awarded a judgment of $11,400, and to reverse this judgment the defendant electric light company again brings error to this court.

At the outset of this discussion we are confronted with a contest between the able counsel for plaintiff and defendant as to what, if any, questions now involved in this controversy have been passed upon by this court in our former opinions, so as to be governed by the "rule of the law of the case." It is contended by counsel for the

electric light company, because the opinion by ALBERT, C., set aside the former judgment of this court and remanded the cause for a new trial in the court below, no question now involved in the controversy can or should be controlled by the law of the case. While, on the other hand, it is contended by counsel for Rombold that every question determined in the first opinion by HASTINGS, C., is specifically reaffirmed in the subsequent opinion, with the exception of the action of the trial court in giving the eighth paragraph of instructions, and that each of these several questions so passed upon in our first opinion are within the rule and should not again be examined unless clearly wrong. Defendant company urged in support of its contention that the issues were changed by the filing of an amended answer at the last trial and by procuring additional testimony, particularly that of one Holdrege, its present general manager. An examination of the issues existing at the time of our former opinions shows that so far as the petition and reply of the plaintiff Rombold is concerned there has been no change whatever in the substance of the issues; that at the time of the first trial of the cause, defendant by its answer put in issue each of the defenses now relied upon, and in addition to this it put in issue the truth of the allegation of plaintiff's petition as to the existence of the untaped splices on the wires, which were alleged to have been the cause of the injury. The electric light company in its brief says that at the time of the first trial of the cause it did not believe that such untaped splices were upon the wires, but that after the trial it became convinced of the truth of this allegation, and for that reason filed an amended answer, conceding their existence. Now, the only manner in which the amended answer changed the issues, so far as the fact of the existence of the untaped splices and the manner in which the plaintiff Rombold was injured, was to admit these allegations, which were formerly denied. The company in its amended answer did plead with much more particularity and precision its defense of the assumption

of the risk by plaintiff Rombold by reason of his employment, and also of the defense that the defect was open and obvious, but each of these defenses had been offered at the first trial and were treated both by the trial court and by this court as having been sufficiently pleaded. The issue of settlement was pleaded at the first trial, and the evidence touching this issue and the fraud alleged to have been perpetrated upon Rombold in procuring his signature to the receipt are substantially the same as formerly pleaded and passed upon by Commissioner HASTINGS in our first opinion. So that the only effect of the alleged change of issues by the amended answer was to relieve plaintiff Rombold of the burden of proving the existence of the untaped splices, and the manner in which he claims to have been injured.

Nor do we see anything in the testimony of the new witness Holdrege, an electric engineer and present manager of defendant company, offered at the last trial, to make a material change in the evidence. We have carefully examined this new evidence and the witness appears to have been fair and impartial in his testimony. He knew nothing about the accident, was at the time it occurred, according to his testimony, working as lineman for a telephone company in Chicago; he has only been connected with defendant company since the first of the year as he states. He never worked as a lineman for an electric light company and admits that the wires of an electric light company are charged with a much higher and more dangerous current of electricity than those of a telephone company; that the necessity of insulation is much greater on electric light wires than on telephone wires. He also testifies from his knowledge of the business that it is the duty of an electric light company to insulate its wires, and that when a service wire, as is conceded to have been the fact in this case, has been disconnected, the splices should be immediately taped and insulated by the lineman who disconnects the wire. He also testifies that no lineman is permitted to tap the wires of an electric light com-

pany without being ordered to do so by his superiors, and that when a service wire is disconnected, it can only be done by order of the company and that a lineman ordered to do so is expected to insulate and tape the splices as soon as the wire is disconnected. He is of the opinion from his knowledge of the business that it is the duty of a lineman, whether stringing wires or otherwise employed, to look for and report or insulate any untaped splices he may discover. On this branch of the case his testimony is merely cumulative of that offered at the other trial, and only adds one more witness to a fact testified to by several others at the former hearing. We therefore conclude that all questions determined in the first opinion by Commissioner HASTINGS, except the question involved in the principle announced in the eighth paragraph of the instructions formerly given, are governed by the "rule of the law of the case" and should not be further considered unless clearly erroneous. *Mead v. Tzschuck,* 57 Neb. 615; *Home Fire Ins. Co. v. Johansen,* 59 Neb. 349; *Wittenberg v. Mollyneaux,* 59 Neb. 203.

In our former opinion on this case we held in brief that it was not error to submit to the jury whether the defendant company had taken reasonable care to provide a safe place for plaintiff to work under all the facts and circumstances surrounding the controversy; and also that whether due care was used by plaintiff in avoiding the injury was a question for the jury; that whether plaintiff had assumed the risk was also a question for the jury, and whether or not the alleged receipt had been procured from plaintiff by fraud and misrepresentations was likewise a question for the determination of the jury. In our subsequent opinion in 68 Neb. 71, we held that one of the issues of fact in this case is whether it was the duty of the defendant to protect the plaintiff from the defects in question, or whether that duty devolved upon plaintiff, and that it was error under the evidence to instruct as a matter of law that this duty devolved upon the defendant, and because the eighth paragraph of instructions declared

as a matter of law that such duty devolved upon the defendant, the instruction was condemned and a new trial ordered, which was tantamount to saying that such question should have been submitted to the jury, under a proper instruction.

It is urged strongly by counsel for the electric light company that in any view the former decision of this court in holding that the question of defendant's negligence, in not insulating the untaped splices, was one of fact to be determined by the jury, was erroneous, because the evidence establishes by a clear preponderance that the duty of discovering and insulating these splices devolved upon plaintiff, and not upon defendant under plaintiff's contract of service. We have made a further examination of the evidence contained in the present record without regard to our former holdings, and are fully satisfied from such investigation that the testimony is fairly conflicting on this question. According to plaintiff's theory, supported by his own testimony and that of other linemen who testified in his behalf, it is only the duty of a lineman to look for and repair defective wires when directed to do so. While it is conceded by plaintiff that when directed to insulate and repair defective wires it is his duty to do so, yet he contends that it is only his duty when doing construction work to protect himself against obvious dangers. He concedes that if he had been sent to look for these uninsulated splices he would have been able to have discovered them, but that having been directed to ascend the pole for the purpose of stringing wires on the top thereof, his duty was to obey this order and climb as it was necessary to do to the first cross-arm and ascend from there on the cross-arms with care and caution between the double row of wires which fenced him in on either side until he reached the top of the pole; that when he reached the top of the pole and fixed the wire, which he was stringing, in its proper place, it was necessary to descend on the west side of the cross-arms; that he looked down before beginning his descent to see that the way was

clear, but discovered no obstacle, and was carefully descending when his arm and back at the same time came in contact with the splices and formed a circuit which caused the injury. That during about twenty years experience as a lineman he had never before known of untaped splices being left on the wires. His testimony is supported by that of other witnesses experienced as linemen. It is not claimed that there was any contract between plaintiff and defendant specifically prescribing the risks he should assume or the work that he should do; he merely applied to one of the company's foremen for a job as a lineman, stating the experience he had had and that he was a member of the union, and on this statement he was offered work at $2.50 a day as lineman and entered defendant's service under this and no other contract. He had never before worked on the line at the place of his injury and was not directed to make repairs when he ascended the pole. Now, on the question as to the danger being obvious, there was likewise some conflict in the testimony which in our view on this issue clearly preponderated in favor of plaintiff's contention. In the first place, the untaped splices were in a network of wires and projecting only an inch; and were so colored by age that at a casual glance it would have been difficult to have determined whether the splices were taped or untaped. Also in descending the pole plaintiff had his face turned toward the pole and had to watch with care both for his footing and his handholds in making the descent. One of these splices came in contact with his back and the other with his arm which he had placed under a wire to take hold of the cross-arm. Under these circumstances, and in view of the fact that more than a year after the injury had occurred the company with all its employees had not yet discovered the existence of these untaped splices, although one of its linemen had ascended and descended the pole on which plaintiff was injured and strung a wire upon it a few minutes before plaintiff's injury, and its foreman had gone to the pole after plaintiff's injury and made an examination for the

purpose of discovering the untaped splices and failed to do so, consequently, we think, that there was not such an overwhelming weight of evidence in favor of the danger having been obvious as would justify us to overthrow the finding of two juries and two trial courts and our own former opinion upon this question.

Again the questions involved in this issue were submitted to the jury for special findings by request of counsel for the electric light company on the following interrogatories:

"3. Were the untaped splices on the wires between which Rombold started to descend the pole obvious and of such character as to be open to the usual view of a lineman in Rombold's situation on the pole? A. No."

"4. Did Rombold, when he was on the pole from which he fell, look at the wires to see whether he might safely pass between the wires strung on the pole? A. Yes."

"5. Could Rombold by looking to see whether there were any bare places or defective insulation on the wires between which he started to descend have avoided the electric shock which caused him to fall to the ground? A. No."

"6. Was it the duty of linemen in Rombold's situation to observe and repair or report to the foreman for repair defects in the insulation of the wires which rendered the condition of the wires unsafe for the linemen? A. No."

We are also strongly urged to reexamine the question of the sufficiency of the evidence to impeach the receipt signed by plaintiff in settlement of his injuries. The evidence on this question is practically the same as that examined by us in our first opinion, but waiving this for the sake of the conclusions to be reached, we have reexamined the testimony on this issue. According to plaintiff's testimony, on two occasions shortly before the paper was signed, superintendent White had conversed with him and told him that the company had insurance on its employees; that under their contract with the insurance company this company would pay for hospital expenses

and medical attendance of those injured in the service, whether there was any liability for the injury or not, and that he (White) promised plaintiff that he would aid him in getting as liberal an allowance as possible for his medical and hospital expenses, and that as soon as he (Rombold) had recovered the electric company would give him $500 in addition to this and restore him to work at a good salary again. With reference to this representation plaintiff is corroborated by the testimony of Mrs. Kopp. He further says that on the day the receipt was signed he had returned from the hospital where he had gone for further treatment of the leg subsequently amputated, and received a message from Mr. White to come to his office and meet Gilbert, the superintendent of the assurance company. That when he came he was suffering intense pain from his limb and his head was aching and he was suffering generally from an impending attack of typhoid fever; that when Gilbert read the paper as though it was a receipt from the assurance company for his hospital expenses and medical attendance, he signed it in duplicate without reading or further investigating it, because he relied on the representations of White and because he was not in a fit physical and mental condition to enter into a contract. That after he had signed the receipt he returned home, went to his bed and was taken down with a violent attack of typhoid fever from which he suffered for six or seven weeks before recovering. The allegation with reference to Rombold's physical condition was strongly corroborated by other testimony introduced in his behalf. In defendant's original answer it had alleged in pleading this receipt "that it had paid plaintiff the sum of $325 (claimed by him for loss of time and expenses incurred in the treatment of his injuries) and received from him, the plaintiff, a release in writing which is in the words and figures as follows:" (Here follows a copy of the release before set out.) This allegation was subsequently stricken from the answer by leave of court and was not incorporated in the amended answer. Plain-

tiff at the last trial was permitted, over the objection of defendant, to introduce this allegation from its first answer. The action of the trial court in permitting this is urged as error. We think, however, the rule is well established that an admission made in a pleading by either plaintiff or defendant may be proved by the pleading itself, although the pleading is subsequently discarded and an amended pleading filed. We therefore conclude that there was sufficient evidence that the signature to the receipt was obtained by fraud and mistake to raise a question of fact for the determination of the jury.

It is also urged that the trial court erred in admitting evidence as to the conversation with superintendent White preceding the signing of the receipt. This contention, however, is not well founded, as it is a universal rule that when fraud is alleged a broad and liberal latitude should be given the party alleging it in establishing every fact and circumstance connected with its alleged perpetration. The mental and physical condition of the party, all representations and inducements held out to him by the adverse party, should be carefully examined into, and all testimony directly connected with the transaction should be admitted. While it is the general rule that the signing of an agreement by one who can read and write without reading it, is ordinarily such a negligent act on the part of the one so bound as to deny him relief from the written contract, *Osborne v. Missouri P. R. Co.*, 71 Neb. 180, this rule has many exceptions, especially when the contest is between the original parties to the agreement and the signature is alleged to have been procured by fraud or deception. These exceptions are fully recognized in the case just cited, and the question involved in the instant case is referred to in this opinion in the following language:

"In the very recent case of *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, the plaintiff was permitted to be relieved from his signature to a release similar in substance to that pleaded in the suit at

bar, by a clear preponderance of the evidence that the receipt had been misread to him when his signature was obtained. While the judgment first rendered in this case was reversed on a rehearing on January 6, 1904, this portion of the opinion was not reversed, and is still of judicial weight in the determination of this question. But in this case, the agent of defendant purported to read the written instrument to the plaintiff, and procured his signature by deception in misreading the contents of the paper signed."

The instructions given by the trial court are assailed generally in the brief of the electric light company. The instructions on the alleged fraud perpetrated on plaintiff in procuring his signature to the release are identical with the one commented upon with favor in our first opinion, and need no further review. The other instructions covered carefully every defense interposed, and tell the jury again and again that if they believe from the evidence either that plaintiff had assumed the risk as an incident of his employment, or that the defect was open and obvious, in either instance they should find for the defendant, and in no instruction given was plaintiff permitted to recover if he had voluntarily signed the receipt without any deceit or fraud having been practiced upon him, or if it was his duty to inspect the wires for defects at the time of the injury or if the defect was open and obvious. They further tell the jury to not allow plaintiff, if permitted to recover, anything for medical services and hospital expenses. We think the instructions models of clearness and precision, which clearly covered every question involved in the controversy. Finding no reversible error in the record, it is therefore recommended that the judgment of the district court be affirmed.

AMES and LETTON, 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 December 20, 1905. *Rehearing denied:*

1. **Injury to Employee:** QUESTION FOR JURY. Whether it was the duty of the defendant due to the plaintiff to insulate the wires described and complained of in the petition, or whether because of the nature of the work, the contract of employment, or other facts and circumstances, the duty to make inspection and discover defects devolved upon the plaintiff, are, under the issues and the evidence, *held* to be questions properly submitted to the jury for its determination.

2. **Obvious Defects.** An open and obvious defect is one which is manifest to the sense of observation, open and readily discernible, whether it arises from the nature of the business, the particular manner in which it is conducted, or the use of defective and unsafe appliances.

2*a*. ———: QUESTION FOR JURY. Whether the defect complained of is open and obvious is *held* to be a question of fact for the jury.

3. ———: ———. Applying the rule of the law of the case it is *held*, "that whether or not due care on the lineman's part required that he see and avoid contact with the exposed splices was properly left to the jury."

HOLCOMB, C. J.

This cause is now pending on its second appearance in this court. The error proceedings first taken to have reviewed the record and judgment obtained in the court below resulted in a reversal of the judgment and a remanding of the cause for further proceeding. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 68 Neb. 71. The plaintiff on the second trial in the court below again obtained judgment, and defendant brings error. In an opinion prepared by the commissioners, which was adopted by the court, it was found that no prejudicial error had been committed and the judgment last obtained was accordingly affirmed. *New Omaha Thomson-Houston Electric Light Co. v. Rombold, ante*, p. 259. An application for a rehearing has been made and it is complained that the rule of the "law of the case"

was erroneously applied in the last opinion, thereby leaving unconsidered and undetermined vital questions presented by the issues and the evidence at the last trial. The plaintiff, a lineman in the employment of the defendant electric light company, received personal injuries while at work in the performance of his duties, and his cause of action for damages is grounded on the alleged negligence of the defendant in permitting and causing to exist on its main lines of wires two short pieces or splices of wire projecting therefrom, untaped and uninsulated, and that while engaged in his work he came in electrical contact with the exposed ends of said wires, receiving a shock which caused him to fall to the ground and to receive the injuries complained of. These splices of wire had been left in the condition they were in when the injury occurred by removing or detaching service wires used to carry electrical currents for electrical lighting or power purposes from the main or feed wires to the structures occupied by the customers of the defendant company.

One of the principal defenses of the company was and is that it owed no duty to the plaintiff in respect of the alleged negligent construction and defective condition of its wires which produced the injury, since the character and nature of the plaintiff's employment required of him the duty of inspecting the wires of its lines where he was working and of discovering defects and repairing the same or reporting such defects to the company in order that the same might by it be properly repaired and the defect cured.

As bearing on the issue of the alleged negligence of the company and its duty toward its employees in that regard, the trial court at the first hearing instructed the jury, in substance, that it was the defendant's duty to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among its wires strung thereon. That if such degree of care and caution required such wires to be insulated, then it was negligence to permit such wires or parts of them to be without proper insula-

tion and thereby subject its linemen to risk of injury. It is, in the opinion last filed on the first appeal, said that it is the undoubted general rule of law that the employer is bound to exercise reasonable care not to expose his employees to unreasonable or extraordinary danger by putting them to work in dangerous places or with dangerous tools and appliances. It is held, however, therein, under the issues in the case at bar as to negligence, that where from the nature of the work, the contract of employment, or other facts and circumstances, the duty to make inspection and discover defects devolves upon the employee, the employer is not liable for an injury resulting to such employee from a defect which the latter, by reasonable inspection, would have discovered. To the charge of negligence at the first trial the defendant answered by a general denial, thus putting in issue not only the alleged defective condition of its electric light wires, but also its alleged duty to the plaintiff to properly tape the exposed wires and thus prevent the risk of danger to which the plaintiff was exposed. As to the alleged omission of duty on the part of the defendant to keep and maintain its wires in a reasonably safe condition, the decision unmistakably establishes the proposition that that question was one of fact which, under the pleadings and the evidence as they then stood, should have been submitted to the jury for its determination. On the retrial the answer was changed so that it was specifically denied "that it was the duty of this defendant, due to plaintiff, to insulate the wires described and complained of in the petition," thereby narrowing the issue regarding the duty owing by the employer to the employee in respect of the uninsulated wires, and bringing the issue squarely within the rule announced in the opinion. The defective condition of the wires was conceded.

1. It is now contended that the undisputed evidence discloses that the defendant did not owe to the plaintiff the duty of inspecting the wires and repairing the defects complained of in order that the plaintiff might have a

safe place to work at the place and under the circumstances where the accident occurred, and that the opinion last filed is erroneous in holding that the evidence was conflicting regarding the defendant's duty in that regard. If there exists a substantial conflict in the evidence as to the nature of the work, the contract of employment and other facts and circumstances connected with the plaintiff's employment, as we think does, then, under the decision on the first appeal, any course other than to have submitted such question to the jury for its determination would have been error to the prejudice of the party against whom the ruling operated.

If the evidence relating to corresponding duties and obligations of the respective parties concerning the defective condition of the wires is in the last trial substantially the same as on the first, as we think it is, then the propriety of the submission of the question to the jury for its determination as to on whom the duty rested, is foreclosed by the rule of the law of the case.

It is contended that there is no averment in the pleading of the plaintiff that the defendant had actual knowledge of the defect complained of, and that there would be no cause of action unless the defendant might by reasonable inspection have obtained such knowledge. The facts out of which the alleged negligence arises do not, as it occurs to us, bring the case within the rule nor the reason of the rule invoked by the defendant. If the defect existed as complained of, it was occasioned by the active agency of the master in the construction and operation of its electrical lighting and power system. It resulted from the negligent acts of its agents and servants in stringing its wires to be used in the prosecution of its business. There would be no difference in principle had its wires, poles or fastenings been defectively arranged or constructed in the original construction of the plant and regarding which the master would be chargeable with notice. It would, by the application of like principles, be chargeable with notice of the defective character of the work-

manship characterizing the method adopted in attaching and detaching service wires to and from the main or feed wires. It is not a defect occasioned by accident, nor growing out of the ordinary use and wear of the system, nor yet because of some inherent defect in the materials and appliances obtained for use by the master, and regarding which he is required to exercise such care as the circumstances reasonably demand, to see that the material and appliances so furnished are reasonably safe for use and to thereafter maintain them in such reasonably safe condition. The defect complained of grew out of additions to, and alterations of the system and in the making of which the master is required to exercise reasonable care to the end that its employees be not exposed to unnecessary danger while working in and about the property in the prosecution of the master's business. "It is well settled that a master who, himself, manufactures and supplies an instrumentality is chargeable with such knowledge of its defects as ordinary care during such manufacture would have disclosed. Manifestly, the responsibility which is thus assumed to come into existence continues as long as the defects remain unremedied, irrespective of whether the instrumentality was or was not properly inspected after being put into use." 1 Labatt, Master and Servant, sec. 152. It is argued that even if the testimony tended to show that it was the duty of the plaintiff to look for defects only when told to do so or when engaged in inspection work with a view to the discovery and remedying of defects as distinguished from the ordinary work of a lineman, it would not tend to show that the defendant owed the duty to the plaintiff alleged in the petition, because if it were true that plaintiff's contract did not require him to look for defects in the wires unless specifically told to do so it would not necessarily follow that the law imposed on the defendant the general duty of a master to provide a safe place for his servant. It is, we think, settled by law of the case that the employer did owe to its employee the duty imposed by the law gen-

erally to provide the employee a safe working place unless the employer had been relieved of that duty by reason of the employee's contract of employment, the nature of the work to be performed and other facts and circumstances. In other words, the rule of the law of the case now to be applied is that unless the plaintiff by reason of the character of his employment has assumed the duty of making inspection for the discovery of defects of the nature and kind complained of and repairing the same or reporting them in order that they may be repaired, then the duty which the law says rests generally on the master to provide a safe working place for the servant rests upon the defendant in the case at bar, and the failure to discharge such duty where damage resulted therefrom would constitute actionable negligence. Whether the plaintiff had in fact by reason of his employment and the nature and character of the same and other facts and circumstances assumed the duty of making his own inspection to discover defects of the kind complained of and therefore relieved the master of the duty ordinarily resting on him and which would have continued to exist except as the servant may have waived it, became of vital importance to both parties. The evidence relating to this question is of such a character as to require its submission to the jury and its finding must be regarded as conclusive.

2. It is argued that the opinion handed down on the second appeal is erroneous in holding that there was a conflict of testimony relating to the question whether the defects complained of were open and obvious, the contention being that they were according to the undisputed evidence and that therefore the risk was assumed by the plaintiff.

There is no serious dispute or conflict in the testimony as to the nature and character of the defects relied on as constituting negligence. The alleged negligence was with reference to the untaped splices of wire left on the main wires where the service wires were detached therefrom. The facts and circumstances as to the size and length of

these pieces of wire, how left untaped or uninsulated, where attached to the main wires, the number and relative position of the main wires, the position of the untaped splices in relation to the pole and cross-arms on which the plaintiff was working, and the other related facts and circumstances were established by the evidence without substantial conflict or controversy. The question of importance in respect of the matter is what is the proper deduction to be drawn from the established facts, and whether the question is one to be ruled on as a matter of law or whether it is the province of the jury to say whether the defects were open and obvious within the meaning of the law. We incline to the view that the question was properly submitted to the jury and that its conclusion determines the matter. As tending to support the view that the defects were open and obvious, it may be said that the untaped splices extended about one inch from the main wires and were located about two feet from the cross-arms on the pole where the defendant was working and which he ascended and descended when performing the service he was engaged in; that in going up to the top of the pole these points were at one time on a level with his eyes and on the far side of the pole he was ascending. Had he noticed them, he must as an experienced lineman have appreciated the danger. The splices were on the main wires attached to the second cross-arm from the top, and within four or five feet of the plaintiff's face while he was at the top of the pole, and while engaged in the construction work he was sent to do. On the other hand, it may be said that he did not in fact see or discover these defects; that there were six or eight wires, one above the other, not in perfect alignment, making the apparent width of the obstructed vision when looking up or down of about one and one-half or two inches. The exposed untaped wires were discolored from age, giving them somewhat the same appearance as the insulated wires. In ascending and descending the pole, plaintiff's attention was mainly directed to the cross-

poles and wires on and between which he was climbing and his view of the defects frequently cut off by these obstructions. That before descending he looked down between the wires to see that the way was clear and in descending he had his face turned toward the cross-arms and was required to watch where he placed both his hands and his feet. It also appears that defects of the kind in question were unusual and that the plaintiff had never before in his experience observed any of that kind. With these facts before us, should it be said that the plaintiff assumed as a matter of law the risk as an open and obvious one? The defendant's view of the matter is probably best expressed in a requested instruction, which was refused, to the effect that "open and obvious defects in the sense of these instructions are those which could have been seen by the plaintiff while on the pole by the mere exercise of his sense of sight, and the danger of which would when seen be understood by him." This test does not seem to us to be correct. Of course the defect could only have been seen by the exercise of his sense of sight. It is also true that they might have been seen by the exercise of the sense of sight had attention been directed to them. But because they possibly might have been seen by the mere exercise of the sense of sight can it be said for that reason alone that they were open and obvious defects? In defining what was meant by the assumption by an employee of open and obvious dangers in connection with his employment, one court has said: "Risks which are incident to the business must not be confounded with such as are denominated 'obvious.' The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally, while the latter include such as are manifest to the sense of observation, open and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances." *Stager v. Troy Laundry*

Co., 38 Ore. 480, 53 L. R. A. 459. If the risk is assumed on the ground that it is open and obvious it must be shown either that the employee had actual knowledge of the defect or that it was so plainly observable that he may be presumed to have had actual knowledge of it. The plaintiff had no actual knowledge of the defects complained of. Were they so open and readily discernible, so obvious as that knowledge of them will be imputed to him as a matter of law? Whether or not he knew or should have known of the defects under the circumstances shown in evidence is a matter regarding which reasonable minds might very readily draw different conclusions, and for that reason the question was properly submitted to the jury as one of fact for its determination.

3. The contention now made that the undisputed evidence establishes contributory negligence cannot be sustained. The rule of the law of the case has settled the contention to the contrary. When the case was first here for consideration on facts substantially the same, it was in express terms held: "That whether or not due care on the lineman's part required that he see and avoid contact with the exposed splices was properly left to the jury." Treated as an original proposition, we are satisfied this question was rightly left to the jury. Whether or not, under the circumstances, the plaintiff exercised due care and caution in the performance of his work at the time he received the injury complained of was a question peculiarly within the province of the jury. The facts and circumstances have been heretofore briefly stated. What has been said regarding the danger being open and obvious in a measure applies here. Because the plaintiff might have discovered the defects by the exercise of greater vigilance than then displayed or of extraordinary care and caution does not for either reason establish contributory negligence as a matter of law. He was not required to be on the alert and search for defects the existence of which he had no reasonable ground to suspect. Of course, he knew danger lurked in the wires among which he was

working, and with which he was likely to come in contact in the prosecution of his business, and as an experienced lineman it was his duty to exercise all reasonable care and caution in respect thereto; but the danger resulting in the injury was not one ordinarily incident to the business, and the risk of which he assumed when he engaged in the employment, unless it was open and obvious. Negligence on his part, which would defeat a recovery, would be the failure to observe that degree of care and caution which an ordinarily prudent man of like knowledge and experience would have exercised under similar circumstances. It can hardly be said that the evidence relating to the question is open to but one reasonable construction, and that against the plaintiff.

4. The alleged errors in the rulings of the trial court with reference to the instructions given to the jury and the purported release relied upon as a defense to the plaintiff's demand have, we think, been sufficiently and satisfactorily considered in the opinion heretofore filed, and will not be at this time further discussed.

The judgment of affirmance is adhered to, and the motion for a rehearing denied.

REHEARING DENIED.

STATE, EX REL. JOHN M. MCCLAY, RELATOR, V. JOHN H. MICKEY, GOVERNOR, RESPONDENT.

FILED FEBRUARY 22, 1905. No. 13,408.

1. **Laws:** AUTHENTICATION. A law cannot be established by the certificates of the clerical officers of the senate and house of representatives, made after the adjournment of the legislature, *sine die*, for the purpose of authenticating a purported act as one having been duly passed by the legislative branch of government.

2. ———: ENACTMENT. The bill herein considered, not being authenticated by the signature of the presiding officer of either branch

of the legislature as required by section 11, article III of the constitution, which provides that "the presiding officer of each house shall sign in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature," *held* not to have become a law.

ORIGINAL application for a writ of mandamus to compel respondent to appoint commissioners to select site for monument. *Writ denied.*

A. W. Lane, for relator.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

HOLCOMB, C. J.

A writ of mandamus is applied for to require the respondent, the governor, to appoint a commission of five persons whose duty it shall be to supervise the selection of a site on the capitol grounds and the erection of a monument to be dedicated to the memory of the life and public services of President Lincoln. The application is based on what purports to be an act of the legislature which is carried into the laws of 1903, and published as chapter 157 thereof. The governor, we are advised, declines to act through no lack of sympathy for the object sought to be attained, but because of a doubt as to the validity of the law which must be looked to for authority to proceed. The right to the writ prayed for depends, therefore, upon the validity of the enactment referred to. The following certificate made by the secretary of state is found at the close of the printed laws passed by the legislature at its 28th session. Laws 1903, p. 747.

"All of the foregoing laws (except as otherwise noted in connection with the same) are signed and attested as follows, to wit: John H. Mockett, Jr., Speaker of the House of Representatives. Attest: John Wall, Chief Clerk of the House of Representatives. Edmund G. Mc-

Gilton, President of the Senate. Attest: A. R. Keim, Secretary of Senate." There is found attached to chapter 157 (house roll No. 78), the act in question, the following certificates: "I, C. H. Barnard, first assistant chief clerk of the house of representatives of the state of Nebraska, do certify that the copy of house roll No. 78, hereto attached, is a full and correct copy of said house roll No. 78 as passed by the house March 31 by a vote of 60 yeas to 12 nays; that it was transmitted to the senate on the same day, and on April 6 returned from the senate indefinitely postponed. On April 7 it was recalled from the house for further consideration and on the 8th of April transmitted to the house and passed, where, by oversight, the bill failed to be sent to the enrolling room.

"Given under my hand this 14th day of April, A. D. 1903. C. H. BARNARD,

"First Assistant Chief Clerk of the House."

"STATE OF NEBRASKA, SS:

"I, A. R. Keim, secretary of the senate of the state of Nebraska, do hereby certify that the copy of said house roll No. 78, hereto attached, is a full and correct copy of said house roll No. 78 that was read the third time on the 8th day of April, 1903, and was duly passed by the senate by a vote of 30 yeas to 2 nays, and was thereafter on the same day transmitted to the house of representatives with a certificate attached that the same had been passed by the senate.

"Given under my hand this 14th day of April, 1903.

"A. R. KEIM,

"Secretary of the Senate."

This bill appears to have been approved by the governor on April 14, 1903. An inspection of the enrolled bills in the office of the secretary of state passed by the legislature at the session mentioned discloses that the only authentication of the act under consideration is to be found in the two certificates above set forth. The bill is in no-

wise authenticated by the signature of either of the presiding officers nor do the names of either or any of the clerical officers of either house appear on said bill as attesting the signatures of the presiding officers. It may also be said that the measure in question does not appear to have the earmarks of being an enrolled bill, such as is customary after the final passage of an act through both branches of the legislature. It is in all probability a copy of the engrossed bill procured at the time it was certified to as above mentioned. The legislature adjourned *sine die* on the 8th day of April, 1903. The question presented, therefore, is whether house roll No. 78, the act in question, has been passed through both branches of the legislature, authenticated and approved with all of the formalities required to give it the force of law.

1. The only evidence of the purported law as being the measure passed by the legislature, and of its due enactment and promulgation by the legislative branch of government, is to be found in the certificates attached to the bill. To be sure, an inspection of the legislative journals discloses that an act entitled the same as the one under consideration was introduced and duly passed through each branch, with amendments; the contents of the bill and the nature of the amendments being otherwise undisclosed. The language of the body of the bill when introduced or as finally passed and after amendment is unascertainable save by resort to what purports to be the bill as finally passed, to which is attached the certificates heretofore quoted or other evidence of an extraneous character. These certificates, it will be observed, were made and attached to the purported bill after the final adjournment of the legislature. They are no part of the proceedings of either branch and are not to be found in the journals of the legislative body. They were not made by those executing them as any part of the action taken by either of said bodies. As evidence these certificates, it would seem, possess no greater value than would the sworn testimony of the parties making them. We are

then brought face to face with the proposition of whether evidence outside of the enrolled bills and the legislative journals may be resorted to for the purpose of establishing that a particular bill has duly passed both branches of the legislature with all the formalities required by the fundamental law, and has been duly authenticated and promulgated so that nothing further is required save action by the executive. In many jurisdictions it is held that the enrolled bill properly authenticated by the signatures of the presiding officers of each branch of the legislature and approved by the governor is the exclusive and only evidence of the due enactment of the measure into law. In this jurisdiction it is held that the enrolled bill may be impeached by the records contained in the legislative journals; but it has not been held that resort may be had to evidence of an extraneous character to prove or disprove the validity of a legislative enactment. In the case of *In re Granger,* 56 Neb. 260, it is held:

"Where from the journals of both branches of the legislature and from the copy of the bill sent to the governor for approval, and by him approved, and which was attested by the proper officers of both houses, it is shown that a certain bill was properly passed, that fact cannot be disproved by the introduction in evidence of what it is agreed between the litigants was the bill originally introduced and memoranda thereon indorsed tending to show that the bill approved and attested was not the one really passed by both houses." In the body of the opinion, quoting approvingly from a case entitled *Division of Howard County,* 15 Kan. 194, it is said: "It will be noticed that the legislative journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bills as a record of the legislative proceedings. And as the legislative journals and the enrolled bills are, by law, records, and the only records of legislative proceedings, they must of course import absolute verity, and be conclusive proof as to

whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. * * * Now as we have before intimated, the enrolled bills and the legislative journals, being records provided for by the constitution, importing absolute verity, we cannot take judicial notice that they are untrue, nor can we even allow evidence to be introduced for the purpose of proving that they are not true. Therefore, as the enrolled bill of the law dividing Howard county, and the journals of the legislature, would seem to prove that said bill has been legally passed by the legislature, and has been legally approved by the governor in the form as it now appears enrolled in the secretary's office, we cannot take judicial notice that said bill was not properly so passed and so approved, and we cannot even allow evidence to be introduced showing that it was not so passed and so approved." Again in *State v. Abbott,* 59 Neb. 106, it is directly held: "The enrolled bill, authenticated by the proper officers of the house, approved by the governor, and filed with the secretary of state, and the journals of the houses are the official records of the proceedings of the legislature relative to the enactment of the law, and are the only competent evidence in a controversy in regard to the due passage of the bill, or in respect to alleged material errors in its substance." In the body of the opinion, the character of the evidence which may be considered in determining whether a law has been duly enacted is thus stated: "The decisions may be classified into those in which the enrolled bill has been deemed conclusive, and those recognizing the doctrine that courts will look back of said bill and examine and consider the journals of the legislature. See 23 Am. & Eng. Ency. Law (1st ed.), 200. In some cases the courts of last resort have approved the reception in evidence of the engrossed bill. See 23 Am. & Eng. Ency. Law (1st ed.), 198; *Berry v. Baltimore & D. P. R. Co.,* 41 Md. 446, 463, 20 Am. Rep. 69; *Hollingsworth v. Thompson,* 45 La. Ann. 222, 12 So. 1. In this state we have not decided the enrolled bill to be

conclusive but have examined the legislative journals. In no case up to the present has the supreme court approved the reception and consideration of anything more or further than we have just stated. See *Hull v. Miller*, 4 Neb. 503; *Cottrell v. State*, 9 Neb. 125; *Ballou v. Black*, 17 Neb. 389; *State v. McLelland*, 18 Neb. 236; *State v. Robinson*, 20 Neb. 96; *In re Groff*, 21 Neb. 647; *State v. Van Duyn*, 24 Neb. 586; *State v. Moore*, 37 Neb. 13; *In re Granger*, 56 Neb. 260. In the case last cited the consideration of other evidence than the enrolled bill and the journals was in effect disapproved."

The opinion also discusses the method of procedure in the legislature by which an act is transformed into law, which is of interest in connection with the question under consideration, but which need not here be reiterated. The prior utterances of this court lead, we think, logically to the conclusion that the only evidence to which recourse may be had in determining whether a bill has been duly enacted into law is the duly authenticated enrolled bill approved by the governor and the legislative journals—the latter only when affirmatively showing that some vital requirement of the fundamental law to the valid enactment of a law has been ignored or disregarded. Such being the case, the attempt to establish the law in question by the certificates of the clerical officers of each branch of the legislature made after the final adjournment of the session is unauthorized. The evidence is incompetent and insufficient for the purpose of showing that the act in question was passed through each branch of the legislature in the manner provided by law, and authenticated in a manner required to give it the sanction and force of law when approved by the governor. Without the certificates, there is nowhere found any evidence that the purported act, as it is found among the enrolled bills and in the sesion laws, was in the same form in which it was when passed by each branch of the legislature. The identity and authenticity of the measure is in doubt and uncertainty, unless these certificates may be accepted

in lieu of the signatures of the presiding officers provided for by the constitution. This, in our judgment, cannot be done, and the certificates must be rejected as competent evidence for the purpose for which offered.

2. It is argued that the enrolled bills signed by the presiding officers of the legislature are *prima facie* evidence only of their due passage through that body, and that the governor in approving a measure may from other sources ascertain whether the act as approved was passed by the legislature, and that, having approved the measure, the court will presume that he had sufficient evidence before him to show that it was the bill passed by the legislature and in the same form as when finally passed. As we have seen, the enrolled bill and the legislative journals alone can be looked to in order to establish what the law is. In support of counsel's contention in this regard, we are cited to the case of *Cottrell v. State*, 9 Neb. 125. We think that a careful analysis of the decision in that case will hardly warrant us in going to the extent we are asked to go in the case at bar. In the case cited, the bill under consideration was enrolled and properly signed by the speaker of the house, and attested by the chief clerk of that body. The signature only of the presiding officer of the senate was omitted, the attestation of the secretary of the senate being attached. It is held the failure of the presiding officer of the senate to sign the bill, which the journal showed to have passed by the constitutional majority, would not affect the validity of the act. It may be presumed, say the court, that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same. The signature of the presiding officer of the house identified the bill and authenticated it as the measure which the legislative journals showed to have passed by the constitutional majority of votes. There was evidence contained in the enrolled bill and in the legislative journals, when considered together, which was deemed sufficient to warrant the governor in acting on the bill as the identical measure which the legislature had

acted upon and had passed by the requisite number of affirmative votes. If, therefore, we concede the soundness of the rule announced in the *Cottrell* case, it at once becomes apparent that in the case at bar the rule must be extended much farther in order to uphold the law in question, and this, we are satisfied, we are not warranted in doing. Our inclination is to restrict rather than to enlarge on the rule therein announced. It is quite obvious in the present case that, without the certificates of the clerical officers of the two branches of the legislature to which we have alluded, there is nothing in the bill itself nor in the legislative journals from which it may be said that the amended house roll No. 78, which the journals show to have passed both branches of the legislature by a constitutional majority, is identical with, and contains the same matter as that of the purported act found among the enrolled bills in the office of secretary of state and carried into the laws as chapter 157. There is an essential fact in the chain of evidence wholly wanting in order to authenticate and identify the act in question as having been constitutionally passed by both branches of the legislature, unless recourse be had to evidence outside of the enrolled bill itself and outside the legislative journals.

Section 11, article III of the constitution, is in part as follows: "The presiding officer of each house shall sign in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature." The object of this provision of the fundamental law is at once manifest. It is the last act of the legislative branch of government in the promulgation of the laws enacted by that body. It is the mode prescribed by the constitution of authenticating measures which have been enacted into law and await only the action of the executive. It is, in the absence of evidence found in the journals disclosing the contents of a bill and the amendments thereto which are rarely if ever found in the legisla-

tive journals, the only evidence of record authenticating the law as finally passed as being the same as that found in the enrolled bill. It is the only evidence which can be received, outside of the legislative journals, to prove that a bill has run the necessary course to become a law. It may be that a bill has been read in each house the requisite number of times, has received the requisite number of votes on its final passage, but until certified by the presiding officers of the two branches of the legislature as provided in the fundamental law, it cannot be promulgated as a law of the state. It lacks the authentication required to establish it as a legal statute. It is wanting in the constitutional evidence of its due and final enactment. The constitutional provision referred to cannot, we think, by any proper rule of construction be held to be merely directory and such as may be altogether disregarded. The affirmative declaration therein found as to the manner in which the due and final passage of an act shall be attested must, we are constrained to say, be construed as a declaration that such authentication is essential to the validity of an act, and without which it cannot be said to have the force of law. In *State v. Kiesewetter,* 45 Ohio St. 254, it is held under a constitutional provision similar to our own that a bill not authenticated by the presiding officers of the legislature does not become a law. Say the court, in discussing both sides of the question:

"On the other hand, the importance of furnishing to the people, sources of information, certain in their character and convenient of access, as to what is, and what is not law, is obvious. All are presumed to know the law, and it is of great interest to each citizen, as well as to the public officer, that there be some authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature; what control him in the daily transaction of business, and of what, at his peril, he is bound to take notice. Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction

would be wise which leaves so important a matter in doubt or confusion."

To the same effect is *Burritt v. Commissioners of State Contracts,* 129 Ill. 322.

The conclusion deducible from the foregoing is that the act in controversy, for lack of due authentication, has failed to become a valid act of the legislature and is without the force and vitality of law. The act under consideration being inoperative, the writ applied for must be denied, which is accordingly ordered.

WRIT DENIED.

MARY H. PARROTTE ET AL., APPELLEES, V. JOHN N. DRYDEN ET AL., APPELLANTS.

FILED FEBRUARY 22, 1905. No. 13,570.

1. Law of Case. Where the supreme court has in a proper proceeding declared as a matter of law that a judgment of the district court is valid and cannot be collaterally attacked, such holding will ordinarily be treated as the law of the case in all subsequent proceedings involving the determination of that question.
2. Res Judicata. A final judgment rendered on a demurrer to a petition in equity to obtain a new trial in a former suit is an effectual bar to the prosecution of another action on the same grounds and between the same parties for that purpose.
3. Suit Pending: MORTGAGE: NOTICE. One who obtains a mortgage on real estate while actions are pending which necessarily determine the rights of the mortgagor in the mortgaged premises, with full knowledge thereof, takes it subject to the judgments that may be passed in such suits, and in case the mortgagor is adjudged to have no interest in the premises he takes nothing by his mortgage.

APPEAL from the district court for Buffalo county: JOHN R. THOMPSON, JUDGE. *Judgment modified.*

John N. Dryden, for appellants.

Hamer & Hamer and *Roscoe Pound, contra.*

BARNES, J.

This action was commenced in the district court for Buffalo county, on the 13th day of May, 1901, by Mary H. Parrotte and her husband, Marcus L. Parrotte, against John N. Dryden, Lewis P. Main and others, to obtain a new trial in an action in which a judgment had been rendered against them on the 16th day of February, 1898, and to restrain said Dryden and Main, and one Funk, as sheriff, from interfering with their alleged possession of certain land situated in said county. At a later date an amended petition was filed, to which Dryden and Main answered by way of cross-petition. Proper pleadings were filed by other defendants, and on the issues thus joined a trial was had which resulted in a judgment against the plaintiffs, and by which Thomas F. Hamer, one of the defendants, was given a decree for the sum of $500, which was made a first lien on the land in question. Thereupon the case was brought here by appeal, in which all parties have joined, and was heard as a trial *de novo*.

We find from the record that many years ago a judgment (which will be called the Johnson judgment), was entered against one of these plaintiffs, and afterwards the defendants herein became the owners of that judgment and the rights which had been obtained thereunder. There has been continual litigation in Buffalo county for more than fifteen years last past in regard to this matter; the one party insisting that the said judgment under which these defendants (who are now appellees) proceeded was void, and that they obtained no rights thereunder. This action, although it involves an application for a new trial in the district court, and comes here by appeal, seems to be predicated upon the same proposition. If, however, the supposed judgment referred to is of sufficient force to resist a collateral attack, and if titles which are dependent thereon cannot be collaterally assailed, then the plaintiff below had no color or right of action, and, of course, however erroneous their first trial may have been, could not

obtain a new trial to litigate such a contention. We think that the question is settled so far as to become the law of this case in *Dryden v. Parrotte,* 61 Neb. 339. In that case it was held that the identical judgment in question was sufficient to resist a collateral attack, and that the defendants herein had obtained rights thereunder which had been settled and finally adjudicated in their favor. Considering this as the law of the case, we think the judgment of the district court, as between these plaintiffs and Dryden and Main, is correct.

But there is another and equally cogent reason why the judgment of the trial court should be affirmed. It appears that on the 15th day of February, 1899, the plaintiffs herein, together with the defendants Francis C. Grable and Katherine E. Grable, commenced an action in the district court for Buffalo county against the defendants John N. Dryden, Lewis P. Main and others, alleging that the judgment purchased by them from Johnson was void, and praying for a new trial of the cause, wherein, on the 16th day of February, 1898, it was decreed that said judgment was valid and a first lien on the lands in question herein. The defendants demurred to the petition; the court sustained the demurrer, and the plaintiffs elected to stand on their pleading. The court thereupon rendered a final judgment against them and dismissed the action at their costs. Again, on the 18th day of July, 1899, the plaintiffs commenced another action in the district court for Buffalo county against the same defendants for the same purpose, and a demurrer to their petition was again filed, which was sustained by the court. The plaintiffs again stood on their petition and refused to further plead; and thereupon final judgment was again rendered against them. On the 12th day of February, 1900, the plaintiffs commenced a third action in the district court for said county to set aside the Dryden and Main judgment and to obtain a new trial of the cause in which it was rendered. The petition therein was almost identical with the one in this suit. The parties were the

same in both actions, and Dryden and Main again interposed a demurrer to the petition, which was sustained, and the plaintiffs refusing to further plead, final judgment was again rendered against them with all due formality. No appeal was ever taken in any of the said actions; error was not prosecuted from any of these final judgments, and they are therefore in full force and effect, unreversed and unmodified, and are relied on as a bar to the prosecution of this action.

We are constrained to hold that the foregoing judgments of the district court, which are pleaded as a defense to this action, are an effectual bar to its prosecution. In each of those cases the action was between the same parties, was brought for the same purpose, and the petitions therein set forth the same facts contained in the petition in this action. The judgment in each of the cases was final; and in the last one it was "adjudged that the defendants should go thence without day and recover their costs therein expended." It is true that those judgments were rendered on demurrer, but they were final and conclusive; they have never been reversed or modified, and the time in which error or appeal may be prosecuted therefrom has fully expired. A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action. 2 Black, Judgments, sec. 709; *Alley v. Nott*, 111 U. S. 472; *Lamb v. McConkey*, 76 Ia. 47, 40 N. W. 77; *City of Los Angeles v. Mellus*, 58 Cal. 16; *Oregonian R. Co. v. Oregon R. & N. Co.*, 27 Fed. 277; *Brown v.*

Kirkbride, 19 Kan. 588; *Carlin v. Brackett,* 38 Minn. 307.

We come now to consider that part of the judgment in favor of Thomas F. Hamer, by which he is given a first lien on the land in question. This lien is derived from the title championed by the plaintiffs in this case, and arose from a mortgage executed by them to Hamer while the litigation was pending, which resulted in a determination that the plaintiffs had no title in the premises; and, as the conditions were such as to give ample notice to Hamer that the plaintiffs had no mortgagable interest therein, of course, he took nothing by his mortgage. In this respect we think the decree of the district court is wrong.

For the foregoing reasons, so much of the decree of the trial court as gives defendant Hamer a lien under his separate mortgage is reversed, and his cross-petition is dismissed. In all other things the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

JOHN CARROLL, SR., ET AL., APPELLANTS, V. MARTIN CUNNINGHAM, APPELLEE.

FILED FEBRUARY 22, 1905. No. 13,582.

Petition: DEMURRER. Petition for the dissolution of an alleged partnership and for an accounting and settlement of partnership affairs examined, and *held* to state a cause of action.

APPEAL from the district court for Custer county: CHARLES L. GUTTERSON, JUDGE. *Reversed.*

J. R. Dean and *George F. Corcoran,* for appellants.

H. M. Sullivan, contra.

AMES, C.

This is an appeal from the judgment of a district court sustaining a general demurrer to the petition and dismissing the suit for failure to state facts sufficient to constitute a cause of action. The petition, which is some eight pages in length and contains twenty-three numbered paragraphs, is unnecessarily prolix and contains some irrelevant and redundant matter, but these and similar defects, of which the appellee complains in his brief, are not fatal and are waived by the demurrer. The petition alleges with sufficient certainty that the plaintiffs and defendant have been engaged jointly, since sometime in 1887, in the business of farming in York and Custer counties in this state, under and in pursuance of an agreement between the parties that the gains and accumulations of the business should belong to the plaintiffs and the defendant jointly as partners, until dissolution by death or otherwise, when there should be an accounting, settlement and equitable division; that the partnership is terminable at the pleasure of either of the parties, and that the defendant has the possession and the apparent title of a large amount of real and personal property, accumulations of and belonging to the partnership, which he refuses to account for or make division of in compliance with the agreement and the request of the plaintiffs, but of which he claims to be the exclusive owner and which he threatens to sell and dispose of, and to squander or dissipate the proceeds or place them beyond the reach of the plaintiffs. There is a prayer for a dissolution and accounting and a division of the partnership estate, and that in the meantime the defendant be restrained from carrying his threats into execution. That these facts, if they exist, afford the plaintiffs a good cause of action, cannot well be doubted and they are not deprived of actionable quality by being set forth inartistically or with too little conciseness.

There is a second ground of demurrer that there is a

misjoinder of parties plaintiff, for the reason that it appears that, at the time that it is alleged that the partnership agreement was entered into, two of the plaintiffs, who are son and daughter of the other two, were minors and incapable of contracting. It does not appear, however, how long the minority in either case continued and it is alleged that continuously until the beginning of the action they have contributed both labor and a considerable sum of money to the partnership. Whether such contributions, all or part of them, were made during the minority or afterwards does not appear, and therefore whether they were entitled to a separate accounting in their own behalf, which would not necessarily follow from either fact, cannot be certainly made out from the pleading, but we do not think that this uncertainty is so fatal a defect as to render the petition demurrable. It is alleged that the agreement contemplated the united efforts and services of all the plaintiffs and that they have been rendered accordingly. This is clearly all that the defendant is vitally interested in. If he had desired a more definite statement he should have applied for it by motion. Perhaps a statement much more definite would be difficult to make. It was a family arrangement. The defendant is brother to the plaintiff Mary Carroll, senior, and all the parties have during all the time constituted a single household. Doubtless their exact relations and contractual obligations will have, to some extent, to be inferred or implied from their habits of life and the nature of their intercourse and manner of carrying on the business; and it would, we think, be extremely rash to hold from what appears on the face of the petition that there is a misjoinder of plaintiffs.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

LETTON 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 the cause remanded for further proceedings according to law.

REVERSED.

FRANK BAGWILL ET AL. V. WILLIAM J. WROUGHTON.

FILED FEBRUARY 22, 1905. No. 13,713.

Evidence examined, and *held* not to support the verdict.

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

W. S. Morlan and *E. B. Perry,* for plaintiffs in error.

L. J. Capps, contra.

AMES, C.

This was an action in the district court for damages for conversion. There were a verdict and judgment for the plaintiff and the defendants prosecute error. There were three counts or causes of action alleged in the petition, the first of which was abandoned on the trial and will not be further considered. The second charged a conversion of certain horses and the third a conversion of certain notes. There are a large number of assignments in the petition, but the main contention affecting the ultimate rights of the parties that is urged in the briefs and arguments of counsel is that the verdict and judgment are contrary to law and unsupported by evidence, and as this seems sufficient to dispose of the case, we shall omit to treat of the others.

The horses were mortgaged by the plaintiff to one of the defendants to secure an indebtedness by the former either to the latter or to one of his codefendants, we are not quite clear which, and were by consent of the parties

put in the possession of one Olmstead for safe keeping. Whether Olmstead served as custodian for both parties or for the mortgagee alone is disputed and is, we think, immaterial. The horses were, with knowledge of the mortgagee, taken from the possession of Olmstead upon a prior mortgage or bill of sale executed by the plaintiff, but which plaintiff contends was void for some reason not appearing upon its face, and of which it does not appear that the mortgagee had knowledge or notice. We do not think, as plaintiff contends, that the mortgagee was bound before surrendering the horses to hunt up the former and notify him of the demand, nor that he was negligent in omitting so to do. Neither do we think that Olmstead was agent for the mortgagee in such a sense that he was bound to communicate his knowledge of the invalidity of the mortgage, if he had any, which he denies, and which, we think, the evidence does not establish, to his principal. Further than this, it is not contended that the instrument upon which the horses were taken was void as against the plaintiff, but only that it was so as against his creditors and his second mortgagee. We do not think that the latter was bound to embark upon what might have turned out to be an expensive and tedious litigation for the doubtful purpose of attempting to prove the moral turpitude of his mortgagor. Olmstead had previously been an attorney of the plaintiff and was familiar with his affairs, and it is clear that the horses were left in his possession for the protection of the latter. It is not disputed that he told the plaintiff in error that the instrument upon which the animals were demanded and delivered up was a lien upon them superior to the mortgage, or that the mortgagee surrendered them in good faith and in reliance upon such advice.

As to the second cause of action, there seems to have been an entire failure of proof. The notes which were alleged to have been converted were instruments voluntarily turned over by the plaintiff to be collected and their proceeds applied toward the payment of his in-

debtedness to the plaintiff in error, the Citizens State Bank, which they are insufficient to satisfy, and his real complaint is that the proceeds of them were not fully and accurately accounted for and so applied. If such were the fact, which we do not stop to inquire, an adequate remedy would have been an action for an accounting and to compel the surrender or cancelation of the instruments and indebtedness to which they were collateral to the extent to which the latter were or should have been discharged. To that extent and for that purpose his creditor had a right to retain them, and for so doing it cannot be accused of conversion.

For these reasons, it is recommended that the judgment of the district court be reversed and a new trial granted.

LETTON 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.

FIRST NATIONAL BANK OF OMAHA V. JACOB W. DYE.

FILED FEBRUARY 22, 1905. No. 13,719.

1. **Trial:** CONTINUANCE. It is not error to deny a motion for a continuance because of the absence of an attorney, if the party making the motion is represented at the trial by other competent counsel familiar with his case.

2. **Harmless Error.** When the verdict is the only one that the evidence would uphold, the court will not inquire with respect to alleged errors occurring at the trial.

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

John W. Parish and *Walcott & Morrissey,* for plaintiff in error.

C. Patterson and *R. C. Nolcman, contra.*

AMES, C.

In September, 1902, the plaintiff bank, being the owner of a herd of a hundred head, more or less, of cattle, delivered them into the possession of one W. E. Colvin, pursuant to a written contract with him that he should feed, keep and care for them and use his best efforts to sell them on or before November 1, 1902, at a price that would net the plaintiff $30 a head for all of them. It was stipulated he should bear all the expense of the undertaking, and should have for his services and reimbursement all he should be able to obtain for the cattle in excess of the above mentioned sum of $30, reserved for the bank. It was further agreed that if on the first of November, 1902, any of the cattle remained unsold, Colvin should become the purchaser of them at the price of $30 a head, and should pay to the bank the residue of that price, for the whole herd, that should then remain unpaid, or secure the payment of that sum by his note and a mortgage upon the property purchased, but that if by the date last mentioned the entire amount had been paid to the plaintiff, the cattle should be and become the property of Colvin without further payment. The contract contained also the following agreement:

"It is hereby further mutually agreed and understood that all proceeds from sales of any of said cattle or calves are to be at once turned over to said bank and credited upon this contract. If said bank receives an offer for said cattle, it shall at once submit same to said Colvin for his approval or rejection, and, in like manner, said Colvin shall at once submit to said bank any offers which he may receive for said cattle, to the end that the best possible price may be obtained therefor."

In our opinion this paragraph cannot fairly be construed as a restraint or limitation upon the otherwise unrestricted and unlimited power of Colvin to sell the animals at his discretion. It does not purport to have that object in view, but to have been intended to serve as a pledge of co-operation between the parties for purposes of the mutual exchange of information, "to the end that the best possible price may be obtained" for the cattle. No other end or purpose is expressed or implied by the language used, nor is there any reason to suppose that any other was intended. For a breach of the covenant perhaps either party would have been liable to the other in damages, but it did not purport to limit or restrict the powers or authority of the agent, and did not have that effect.

In October, Colvin made two shipments of cattle from the herd to a commission house in South Omaha, where they were sold and the proceeds turned over to the bank, and in the same month he sold and delivered the residue of them to the defendant Dye, receiving payment in cash and shortly afterwards absconding therewith. In December following, this action in replevin was begun by th bank against Dye to recover the possession of the animals purchased by and still in the possession of the latter. Th answer is a general denial. There is no claim that the price paid was inadequate, or that the defendant had committed any act of bad faith, or that he knew or suspected that Colvin contemplated committing any. A bill of sale described the cattle as belonging to Colvin and as being sold by him, and the only conflict in the evidence is as to whether Dye supposed such to be the fact, or on the other hand knew, or had sufficient notice to charge him with knowledge, that they belonged to the bank and that Colvin was dealing with them as agent. We do not see that the question is material. Colvin did not exceed his powers. There was an actual sale and delivery of the animals, and a payment of the purchase price, and the formal incidents of the transaction, and the knowledge by

the vendee in the respects mentioned, are of no importance or legal effect. There was a trial, and the court, in substance, instructed a verdict for the defendant, upon which there was a judgment, sought to be reversed by this proceeding. It is not worth while to consider assignments for errors occurring at the trial. The verdict is the only one that the evidence would have upheld.

The plaintiff was represented on the trial by competent and experienced attorneys, Messrs. Walcott & Morrisey of Valentine, who had begun the action and had charge of framing the issues, but who were associated with Mr. John W. Parish of Omaha, as senior counsel. Parish was prevented from attendance by reason of a change of time in a train schedule of which he was ignorant at that time, and notified both of his associates and the presiding judge of the fact, and asked to have the trial postponed one day so as to enable him to be present. Such a postponement would have delayed the case beyond the term, and the local attorneys therefore prepared and filed a motion for a continuance, supported by the affidavit of one of them reciting the fact of unavoidable delay. The motion was overruled. The motion for a new trial was supported by an affidavit of Parish relating the circumstances of his delay and subsequent absence from the trial, and stating that if he had been present he would have offered his own testimony and certain documentary evidence in behalf of the plaintiff. If the evidence and testimony thus recited would have been competent or admissible if offered on the trial, which in our opinion they would not have been, they were not brought to the attention of the court by the motion for a continuance nor until after the return of the verdict, and therefore did not render the ruling on that motion erroneous. Neither can they be treated as newly discovered evidence, and there is no assignment either in the motion for a new trial or in the petition in error of unavoidable casualty or misfortune by means of which the plaintiff was deprived of a fair trial or of an opportunity to make out his case. We are unable to discover

any error in the record, and recommend that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

STATE OF NEBRASKA V. JOHN F. GOWER, COUNTY JUDGE.

FILED FEBRUARY 22, 1905. No. 13,723.

1. **Quo Warranto.** Whether an information in *quo warranto* lies against a county judge, who under color of his office has usurped public functions and powers in excess of the jurisdiction conferred upon him by law, is adverted to but not decided.
2. ———: REVIVOR. When a county judge dies pending a proceeding against him in the nature of an information in *quo warranto* for the alleged usurpation of functions and powers in excess of the jurisdiction conferred upon him by law, his successor in office cannot, upon motion of the relator, be substituted as respondent in his stead after the cause has proceeded to judgment in the district court, and while it is pending here on petition in error.

ERROR to the district court for Thurston county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Hiram Chase, for plaintiff in error.

Curtis L. Day and *T. L. Sloan, contra.*

AMES, C.

This cause originated as an information in *quo warranto* exhibited in the district court for Thurston county. The relator is county attorney, and the respondent was county judge of that county, and it is charged in the information as follows:

"That heretofore, under and by virtue of the acts of congress of August 7, 1882, and February 8, 1887, the land belonging to the Omaha and Winnebago tribes of Indians situate within the county of Thurston, was and now is allotted in severalty, in tracts of 80 to 160 acres each, to members of said tribes of Indians to the number of nearly 3,000 persons, and that each of said allotments are held upon certain trusts, conditions, restrictions and limitations contained in the said acts of congress aforesaid, as follows:

" 'That the United States does and will hold the land thus allotted, for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. * * * And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered.' " U. S. Statutes at Large, vol. 24, p. 389, ch. 119, sec. 5.

"The plaintiff shows to the court that the period of trust of 25 years concerning the allotments of land aforesaid is not as yet expired, and that the district court for Thurston county as a court of equity has original and exclusive power and jurisdiction to construe, interpret, regulate and enforce any and all trusts, equities, rights and interests arising out of the terms of the trusts aforesaid, but that the defendant by virtue and color of his office aforesaid has and does now unlawfully claim, usurp and exercise powers and jurisdiction over the trusts concern-

ing the allotments of land aforesaid, by pretended administration proceedings of deceased allottees aforesaid, wherein the allotments of land made to deceased allottees as aforesaid is the main property involved, and in which pretended proceedings the rents of said lands are treated by defendant as assets of said deceased allottees as aforesaid, and for which pretended proceedings, decrees and orders made therein the said defendant claims and receives fees therefor."

The pleading concludes with a prayer to the effect that, if it be found by the court upon investigation that the defendant is doing, under color of his office, the acts and things complained of, and that such doings are in excess of his authority as county judge, judgment be rendered ousting him of the exercise of the alleged usurped jurisdiction and powers. A general demurrer to the information was sustained by the district court, and the relator prosecutes error from the resulting judgment of dismissal.

The charge is not so definite or specific that we are able to make out with certainty what precisely was the conduct complained of, and no intendment will be entertained that would convict the respondent of wrong-doing. Respondent is not accused of having interfered or attempted to interfere with the title or possession of the allotted lands, or with having impounded or attempted to impound rents accruing therefrom to the heirs of allottees after the death of their ancestors, so that, for aught that the court is given to understand, administration may have been confined to the chattels and choses in action of deceased Indians.

But it is not worth while to pursue the matter further. At the hearing in this court the relator orally suggested the death of the respondent, and asked for an order substituting for the latter the present incumbent of the office. This, we think, could not in any event be done. But, whether the writ lies for that purpose in such a case as this need not be now decided. If it does, it could certainly not be issued against the present incumbent for conduct

of his predecessor in which he did not participate, nor even for his own misconduct, if he has been guilty of such, until he has been formally charged therewith and given an opportunity to be heard after due trial in his own defense. If he should be made a party now, he would have no opportunity to plead, but would be bound by the record made by his predecessor.

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

LETTON 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

AFFIRMED.

H. E. MCDOWELL, EXECUTOR, V. FIRST NATIONAL BANK OF SUTTON ET AL.

FILED FEBRUARY 22, 1905. No. 13,718.

1. **Executors:** EXPENSES OF LITIGATION. Where an executor in good faith expends money for court costs and attorney's fees in an honest effort to prosecute a claim in favor of the estate, he is entitled to recover for such expenses, although his suit in such behalf may be unsuccessful.
2. ———: ———. But where an executor or administrator advances money for court costs and attorney's fees for his own benefit or for the benefit of those whose claims are adverse to the estate, he cannot recover against his estate for such advances.
3. **Pleadings:** JUDGMENT. *Held*, That the pleadings in this proceeding are not sufficient to warrant a personal judgment against the executor.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Judgment modified.*

J. L. Epperson & Sons and *Robert Ryan*, for plaintiff in error.

T. H. Matters, contra.

OLDHAM, C.

On the first day of December, 1895, John Wier departed this life testate in the county of Clay and state of Nebraska. H. E. McDowell, the plaintiff in error in this cause of action, was named as executor in the last will and testament of deceased, and duly qualified and entered on the discharge of his duty as such executor. The deceased was possessed of considerable property, both real and personal, at the time of his death, and was also largely indebted to numerous creditors. Among other items of his indebtedness was a note to the Commercial State Bank of Clay Center for $1,789.45, drawing 10 per cent. interest, in which Adam Wier was principal and deceased was security. This note was allowed as a claim against the estate on the 29th day of June, 1896, the amount of the note and interest then being $1,895.81. Other claims were filed and allowed against the estate, among them the claims of the First National Bank of Sutton for $3,000 and the Union State Bank of Harvard for $1,000, and also notes to the Commercial State Bank for individual money borrowed by deceased. On the 5th day of December, 1896, the Commercial State Bank took a judgment against Adam Wier, principal on the note filed and allowed against the estate of John Wier, in the district court for Clay county, for the sum of $1,972.85, the amount then due on the note and interest. At the time this judgment was rendered, Adam Wier was the owner of 240 acres of land situated in the county of Clay, on which the judgment became a lien, and in which the interest of Adam Wier, according to the evidence, was sufficient to pay and discharge the judgment in full. In winding up the estate of the deceased, it proved to be insolvent. Dividends, however, were made on the claims allowed by the order of the court as follows: March 4, 1898, 12½ per cent.; November 5, 1898, 32½ per cent.; March 27, 1899, 11 per cent. From these dividends there was paid to the Commercial State Bank from the estate

of John Wier the sum of $1,052.11 on the note which he signed as surety for Adam Wier. H. E. McDowell, the executor of John Wier's estate, was also president of the Commercial State Bank during all the time he acted as executor. After these payments had been made on the note, the Commercial State Bank entered into an arrangement with Adam Wier to loan him money to pay off a mortgage on 160 acres of the land owned by him, and after such transaction released and satisfied their judgment against Adam Wier on payment by him of the balance of the judgment. On August 30, 1899, the executor filed a petition in the county court rendering an account of the money received and disbursed as executor of the estate, and asking for his final discharge. Objections were filed to the discharge of the executor by the defendants in error in this case and another creditor. These objections were sustained by the county court, and the cause taken on appeal by the executor to the district court for Clay county, where a hearing was had on June 21, 1900, which resulted in the following judgment and findings: That on July 24, 1895, Adam Wier, who was principal and John Wier, who was surety, made their joint note to the Commercial State Bank for $1,789.45, drawing 10 per cent. interest; that the relation of principal and surety was known to the bank, though not disclosed in the note; that this claim was filed and allowed against the estate of John Wier, of which H. E. McDowell was then the executor; that on December 5, 1896, the bank also took a judgment on said note against Adam Wier in the district court for Clay county for the sum then due; that at said time Adam Wier was the owner of land in Clay county (describing it) on which land the judgment was a lien; that during the said transactions H. E. McDowell was and still is president of said Commercial State Bank, and that said bank and all its officers had full knowledge of all facts complained of by the objecting creditors. The court then finds the amount paid on the note from the estate of John Wier

to have been $1,052.11, and found, as a legal conclusion, that the estate of John Wier became subrogated to the rights of the Commercial State Bank in said bank's judgment against Adam Wier to the extent of the amount paid thereon by said estate; that on March 29, 1899, the Commercial State Bank released the judgment of $1,972.85, and thereby rendered it impossible for the estate of John Wier, deceased, to collect the sums advanced by H. E. McDowell, executor of the estate, out of the property of Adam Wier, the principal in said note, and that the Commercial State Bank thereby became liable to the estate of John Wier for the value of the interest of the estate of said John Wier in said judgment. The court thereupon ordered the executor to proceed to collect from the Commercial State Bank of Clay Center the value of the interest of John Wier in the judgment rendered in the district court for Clay county in favor of the Commercial State Bank and against Adam Wier. No exception was taken to any of these findings, and the executor acquiesced in the order and judgment of the court, employed counsel, as he alleges, to bring a suit against the bank of which he was president in the district court for Clay county. A petition was drafted in pretended compliance with the order, which omitted to allege that Adam Wier was principal in the note and John Wier, deceased, was merely a surety. The objecting creditors, who are defendants in error in this cause, appeared in this proceeding, filed an intervening petition, and from the evidence it is fair to say that they requested the executor to file a petition properly stating his cause of action against the Commercial State Bank, and on his refusal to do so they afterwards withdrew from the cause then pending, by leave of court, without predjudice. It fairly appears from the record that the executor employed counsel not only to file a petition for him, but also consulted with officers of the bank in getting other counsel to properly defend the bank. When the petition was presented, a demurrer was filed which was sustained by the court, and the executor

pleading no further the cause was dismissed. The executor thereafter filed his supplemental petition in the county court, alleging his compliance with the order of the district court in the bringing of the suit, and asked for an accounting and final discharge. His petition was granted, and his discharge ordered by the county court, and the objecting creditors, who are now defendants in error, appealed from this order to the district court for Clay county, where trial was had on November 21, 1903, resulting in the following findings and judgment: That the judgment rendered by said district court June 21, 1900, is in full force and effect; that the requirement that the executor bring suit against the Commercial State Bank of Clay Center has not been complied with; that the executor at the time he brought said suit was president of the Commercial State Bank of Clay Center and the chief stockholder therein; that said executor neglected, failed and refused to set forth and make the material allegations set forth in said decree, and that this omission was purposely and wilfully made; "and the court finds that, by reason of said neglect, refusal and failure to prosecute said action as directed by said court on the 21st day of June, 1900, H. E. McDowell is personally liable to the estate of John Wier, deceased, in the sum of $1,052.11 principal, and $367.45, interest thereon." The court further found that the order of the court made June 21, 1900, was not properly complied with, and that the executor is not entitled to be discharged, and is accordingly refused such a discharge until such order is properly complied with. The court also refused to allow the executor costs and attorney's fees expended in the litigation against the Commercial State Bank, and in seeking to procure his discharge as executor. To reverse this judgment the executor brings error to this court.

The complications arising in this case are singularly illustrative of the wisdom of the scriptual lesson: "No man can serve two masters, for either he will hate the one, and love the other, or else he will hold to the one and

despise the other." Here was an executor of an estate, and at the same time a president and one of the managing officers of a bank, having, with others, claims against the estate. In such a position it was plainly the duty of the executor to execute his trust with an eye single to the interests of the estate, and, when a conflict arose between the interests of the two, his duty was to guard the interests confided in him as executor, and, if need be, to forget his relation to the bank. When the order of June 21, 1900, was made on him by the district court for Clay county, and he acquiesced in it without murmur or objection, it was his duty to prosecute a suit honestly, conscientiously and diligently against his bank, and recover, if possible, the claim of the estate against the bank by reason of its release of the judgment against Adam Wier. This the trial court, after hearing the testimony, held that he failed to do, and we are unable to say, after an examination of the record of the case, that this finding is not supported by sufficient competent evidence.

We are also unable to say, from an examination of the bill of exceptions, that the evidence is not sufficient to sustain the finding of the trial court that the moneys expended for attorney's fees and costs in the effort to procure his final release as executor, and in pretending to prosecute the suit against the Commercial State Bank, were not expended for the benefit of himself and the bank, rather than for the benefit of the estate. We admit, as contended by counsel for plaintiff in error, that where an executor in good faith expends money in prosecuting a claim for his estate, either in the payment of costs or in the employment of counsel for a reasonable consideration, he is entitled to be reimbursed for these expenses, although his suit may have been unsuccessful. But, on the other hand, the authorities are uniform that if the executor or administrator expends money for attorney's fees or costs for his own benefit, or for the benefit of others whose interests are antagonistic to the estate, he is not entitled to recover for such advances against his estate.

It is contended, however, by counsel for plaintiff in error, that even if every fact that could have been alleged in the order of the district court of June 21, 1900, had been incorporated in the petition, the suit would still have been unsuccessful. It will be time enough to determine this contention when a proper effort has been made, and all the material facts have been set out in a petition as directed by that decree.

It is also further contended, and we think with much weight, that the court exceeded his authority, under the issues involved in the controversy, when he found the executor personally liable for all the money and interest that had been paid by the estate on the note on which deceased was surety. We think there is no pleading in the record sufficient to warrant the trial court in surcharging the claims of the executor for the money and interest paid on the note in controversy. The proper measure of the liability of the executor of the estate would be the loss, if any, which the estate sustained by reason of the failure of the executor to promptly and diligently prosecute a suit in its behalf against the bank as directed by the order of the district court.

We therefore recommend that the judgment of the district court be modified by reversing so much thereof as adjudged the executor, H. E. McDowell, personally liable to the estate of John Wier in the sum of $1,052.11 principal, and $367.45 interest, and that the judgment as so modified be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified by reversing so much thereof as adjudged the executor, H. E. McDowell, personally liable to the estate of John Wier in the sum of $1,052.11 principal, and $367.45 interest, and the judgment as so modified is affirmed.

JUDGMENT ACCORDINGLY.

E. L. LUTZ V. PENDER NATIONAL BANK.

FILED FEBRUARY 22, 1905. No. 13,722.

Pleading. A pleader is not required to anticipate matter in avoidance of his allegations. *Larson v. First Nat. Bank*, 66 Neb. 595, followed and approved.

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

Hiram Chase, for plaintiff in error.

T. L. Sloan, contra.

OLDHAM, C.

This was a suit on a promissory note originally instituted in the county court of Thurston county, Nebraska. Plaintiff bank filed its petition, alleging that it was a purchaser for value, before maturity, of the note sued upon, and praying judgment for $324.12, the amount of the note and interest. The defendant answered, alleging, in substance, that the promissory note described in plaintiff's petition at the time it was given was and is absolutely null and void, and was made in violation and in contravention of the law of congress of the United States, approved August 7, 1882 (U. S. Statutes at Large, Vol. 22, p. 341, ch. 434), governing Indian lands held in allotment by members of the Omaha Indian tribe; that the note was given for the rental price of certain lands allotted to the Indians of the Omaha tribe (naming them, and describing the lands held by them in allotment), for the rental value of which the note was executed by the defendant; that the period of 25 years under which said lands were allotted by the 6th section of said act of congress is as yet unexpired, and any contract made touching said lands is declared to be absolutely null and void by said act. To this answer plaintiff interposed a

general demurrer, which was sustained by the county court, and defendant refusing to further plead, a judgment was rendered for plaintiff as prayed for in its petition. To reverse this judgment defendant filed a petition in error in the district court for Thurston county, together with a transcript of the proceedings in the county court. On a hearing of defendant's petition in error in the district court, the petition was overruled, and the judgment of the county court approved, and execution awarded to carry the same into effect; and to reverse this judgment of the district court, defendant brings error to this court.

The questions involved in this controversy have all been determined by this court in the case of *Larson v. First Nat. Bank,* 62 Neb. 303, and in the opinion in the same case on rehearing, officially reported in 66 Neb. 595. In fact, the only question urged in support of the ruling of the lower court is that the answer is insufficient because it failed to negative the subsequent act of congress of February 28, 1891, governing these lands, which provide conditions under which the lands held in allotment may be legally leased by approval of the secretary of the interior. But the necessity of this allegation was examined in *Larson v. First Nat. Bank, supra,* on its rehearing, by POUND, C., who, speaking for the court, said:

"The first point is that the answer, in setting up the illegality of the note sued on, does not negative the exceptions created by the act of 1891 (U. S. Statutes at Large, vol. 26, p. 794, ch. 383), and goes no further than to allege a lease in contravention of the act of February 8, 1887 (U. S. Statutes at Large, vol. 24, p. 388, ch. 119). But the act of 1891 is amendatory only. The former act furnishes the general rule, and the latter merely authorizes leases under certain special circumstances, and with certain special safeguards. The pleader states fully and explicitly that the note in suit was part of a contract of leasing, in contravention of section 5 of the act of 1887. In addition he sets forth that the

Indians who purported to make the leases in question 'had no right or authority to enter into any written contract of whatever kind or nature for the alienation, incumbrance, or leasing of the real estate allotted to them as aforesaid.' This would seem to be a sufficient allegation that the case was not within the exception created by the act of 1891. But, in any event, the defendant was not required to go further than set out the facts showing a *prima facie* case of illegality. A pleader is not required to anticipate matter in avoidance of his allegations."

It follows that if plaintiff desires to avail itself of the exception contained in the act of 1891, it should plead the exceptions in reply to defendant's answer, and that as against a general demurrer the answer is sufficient.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to sustain defendant's petition in error, and to reverse the judgment of the county court sustaining plaintiff's demurrer, and that the demurrer be overruled and plaintiff be required to further plead.

AMES and LETTON, 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, with directions to the district court to sustain defendant's petition in error, and to reverse the judgment of the county court sustaining plaintiff's demurrer, and that the demurrer be overruled and plaintiff be required to further plead.

REVERSED.

JOHN O. YEISER V. JOHN T. CATHERS ET AL.

FILED FEBRUARY 22, 1905. No. 13,916.

1. **Void Execution.** An execution issued on a satisfied judgment is void.
2. **Void Garnishment.** Where a fund is in the hands of the clerk of the district court which has been obtained by a void garnishment proceeding, the court should direct such funds to be returned to the garnishee.

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

John O. Yeiser, pro se.

John T. Cathers and *Byron G. Burbank, contra.*

OLDHAM, C.

Defendant in error John T. Cathers claimed to have an unsatisfied judgment against one Phœbe Linton. He had an execution issued in aid thereof and had process of garnishment against one William C. Potter as receiver of the Omaha Loan & Trust Company. Potter answered showing that as receiver he was indebted to the defendant Linton in the sum of $1,830.95 for rent of certain buildings occupied by him as such receiver. By order of court the garnishee was directed to pay to the clerk of the court this sum of money to aid the further order of the court. This he did. Afterwards and before the application of the money, the court found and determined that this pretended judgment had been satisfied before the proceedings in execution and garnishment had been begun, and canceled the judgment of record, but made no order touching the money of receiver Potter, which was in the hands of the clerk of the court. Consequently, the money paid in by Potter remained and still remains in the hands of the clerk of the court. The proceeding at bar is an

attempt to get possession of this money by the respective parties to this controversy.

Defendant in error Cathers asked the court by motion to give it to him, because he had obtained a later judgment against the Lintons. Plaintiff in error Yeiser intervened in the proceeding with a motion asking the court to direct the payment of the money to him as assignee of the Lintons. Receiver Potter was not made a party to the proceeding, nor was any process issued to bring in any party. Yeiser appeared as assignee of the Lintons voluntarily, but Potter was neither made a party to the transaction nor did he enter any appearance in the matter. On the issues arising between the plaintiff in error Yeiser and defendant in error Cathers, the court ordered the fund to be paid to the defendant in error; and to reverse this order John O. Yeiser brings error to this court.

We think the court below erred in making its order to pay this money to the defendant in error. Strictly speaking the fund was not *in custodia legis* after the original judgment had been canceled and the garnishment proceeding abated. The proceeding in aid of the satisfied judgment was a nullity. At this stage of the proceedings the court should have directed the money to have been returned to the garnishee. While it appeared from the answer of the garnishee that at the time of that proceeding he was indebted to the Lintons in the amount of money paid into court, yet there is nothing to show what the state of his account is with them at the present time. No claim against him in favor of the Lintons was adjudicated in the unauthorized garnishment proceeding, and it would seem that the only duty remaining for the court is to direct the repayment of the money to the garnishee, and that such should be the order unless, by proper averments in a proceeding to which the garnishee and others interested are made parties, it should be made to appear by one of the claimants that he is entitled to some legal or equitable claim to this fund.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings in conformity with this opinion.

AMES and LETTON, 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 in conformity with this opinion.

REVERSED.

FARM LAND COMPANY, APPELLEE, V. HENRY ST. RAYNER ET AL., APPELLANTS.

FILED FEBRUARY 22, 1905. No. 14,002.

Foreclosure Sale. Mere irregularities in a published notice of sale that are not prejudicial will not cause a vacation of the sale.

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

Henry St. Rayner and *Wilcox & Halligan,* for appellants.

Hoagland & Hoagland, contra.

OLDHAM, C.

This is an appeal from an order of confirmation of a judicial sale in a foreclosure proceeding.

The first objection urged is that the order of sale was issued two days before the expiration of the twenty days prescribed for the issuance thereof in the decree of foreclosure. This objection could only have been prejudicial to defendant in case he had desired to redeem from the decree within the time prescribed. But this he did not do. Consequently, the fact that the order of sale, which of itself was not necessary as the sale might

have been made under the decree, was issued prematurely could only have prejudiced him in case he desired to redeem within the twenty days prescribed in the decree. We have held that a mere irregularity in a published notice of sale which is not prejudicial will not cause a vacation of the sale. *Nebraska Loan & Trust Co. v. Hamer,* 40 Neb. 281.

It is next urged that no copy of the appraisement was deposited in the clerk's office before the publication of the sale or the sale of said lands. This objection would be meritorious if supported by the record. But the record shows by the sheriff's return to the order of sale that an appraisement was made on March 3, 1904, "a copy of which I forthwith deposited with the clerk of the district court * * * and thereupon on the 3d day of March, 1904, I caused a notice to be published in the Republican Argus, a newspaper," etc. We think this return sufficiently shows that an appraisement was filed before the publication of the notice and before the sale.

The next objection is as to the order of sale, but as no such order was essential to the validity of the sale, this objection need not be further considered.

It is last urged that the published notice is void because merely signed by "D. W. Harrington, Sheriff," without showing in what county or state he held such office. This objection is purely frivolous.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

FRED D. WEAD ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED FEBRUARY 22, 1905. No. 13,679.

1. **Taxation:** BOARD OF EQUALIZATION. Under the provisions of section 161, chapter 12*a*, Compiled Statutes, 1901, known as "Omaha Charter," a board of equalization when properly in session, with due notice given, acts judicially and its action within its jurisdiction is not open to collateral attack except for "fraud, gross injustice or mistake."

2. **Complaints.** The provisions of section 164 of the same chapter, "No court shall entertain any complaint that the party was authorized to make, and did not make to the city council sitting as a board of equalization, nor any complaint not specified in said notice, fully enough to advise the city of the exact nature thereof; nor any complaint that does not go to the ground work, equity and justice of the tax," do not apply to cases of "fraud, gross injustice or mistake."

3. **"Gross injustice"** within the meaning of this clause must be so flagrant and excessive in its nature as to substantially deprive a citizen of his property or a part thereof without due process of law and be confiscatory.

4. **Excessive Tax.** Where proceedings up to the time of assessment by the board of equalization are regular, and in its determination the board errs in such a manner as to cause an excessive and unjust apportionment of the tax upon a particular piece of property, such error, as a general rule, will not defeat the whole tax in equity.

5. **Relief in Equity.** If such excess cannot be determined by computation and without proof, the court should determine the amount of tax justly chargeable against the property as nearly as practicable from the evidence produced on the trial, and require the payment of the same as a condition of granting relief against the excess.

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

C. C. Wright, W. H. Herdman and *A. G. Ellick,* for appellants.

H. W. Pennock and *Charles A. Goss, contra.*

LETTON, C.

This action was brought by Fred E. Wead and others, as plaintiffs, against the city of Omaha to enjoin the collection of certain assessments for paving levied in paving and improvement districts 168, 225 and 542 against the property described in the petition. The district court found in favor of the plaintiffs and entered a decree accordingly. The city of Omaha complains of said decree only so far as it affects the assessments levied in district 542, and prosecutes this appeal to reverse the action of the trial court so far as it adjudges the assessment levied in that district to be void. A number of irregularities are set forth in the petition of the plaintiff with reference to the creation of said district and the levy of the special assessment therein, but since the district court found for the appellant as to such matters and there is no cross-appeal here, they will not be considered. The ground upon which the district court found for the appellee was "that the assessment which was levied upon the plaintiff's property to pay for the cost of paving and curbing in improvement district 542 was inequitable and grossly unjust; that the assessment levied upon the greater portion of the property described in the petition was practically the full value thereof after the improvement had been made; that as to the balance it was grossly excessive and unjust." The evidence in the case supports the finding of the district court that the assessment was inequitable and grossly unjust, and that it was practically the full value of the property after the improvements had been made. The appellant city contends that this is a collateral proceeding; that there is neither allegation nor proof in the record that the assessments were fraudulently or corruptly made, and that since the board of equalization had jurisdiction to determine the benefits its finding is final and conclusive in a collateral attack.

We have repeatedly held that an equalization board when properly in session, with due notice given, acts

judically and its action within its jurisdiction is not open to collateral attack. *Webster v. Lincoln,* 50 Neb. 1; *Morse v. City of Omaha,* 67 Neb. 426; *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50. We are satisfied with the rule thus laid down. It is the policy of the law to allow every person whose property may be affected by the findings of a board of equalization an opportunity for a hearing before said board. He may present his objections to their proposed action and his views as to whether or not special benefits will be conferred upon his property by the proposed improvement or as to the amount of such special benefit, and from the decision of such board he may prosecute error to the district court. Section 161 of the city charter (ch. 12*a,* Comp. St. 1901), in force at the time the taxes in question were levied, after providing that special taxes shall be levied to the extent of the benefits on abutting or adjacent lots and lands and that the assessment may be according to foot frontage if the board of equalization finds such benefits to be equal and uniform, provides that "all such assessments and findings of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake." Under these provisions of the statute, unless the assessment and finding of benefits was fraudulently made, was grossly unjust or was made by mistake, the action of the board within its jurisdiction is final. We think that without the insertion of this clause in the law the finding of a board of equalization made within its jurisdiction would no more be subject to attack collaterally than the judgment of any other inferior tribunal. This clause has in fact enlarged the field within which the decision of a board of equalization is vulnerable to attack. It includes "gross injustice" as a ground for review, while without this clause the "injustice" of the finding could not be attacked collaterally. In *Morse v. City of Omaha, supra,* it is said in the opinion, citing the clause under consideration:

"This provision, in effect, amounts to a declaration

that the action of the city council in finding that the property is benefited to the full extent of the amount levied, in order to justify an assessment per foot frontage, can be reviewed for fraud, gross injustice or mistake. The taxpayer has notice of the sitting of the city council to be held for the purpose of equalizing and making the levy, and if he is dissatisfied with the action taken concerning the assessment by front foot, it is his duty to have such action reviewed by a proper proceeding, and if he fails to take such action, he cannot be heard in a proceeding by injunction to allege that the tax is void for failure of the council to make the finding referred to."

Taking this language in connection with the facts in the case in which it was used, we have no fault to find with it. But we think that, in so far as it may imply, if it does so imply, that error is the only remedy for fraud, gross injustice or mistake in the findings made by the board of equalization, the statement is too broad as a general proposition.

It is urged by the appellant that the provisions of section 164 of the city charter, a part of which section provides, "No court shall entertain any complaint that the party was authorized to make, and did not make to the city council sitting as a board of equalization, nor any complaint not specified in said notice, fully enough to advise the city of the exact nature thereof; nor any complaint that does not go to the ground work, equity and justice of the tax," prevent any person from maintaining any action complaining of the gross injustice of a special tax unless he had first made complaint to the board of equalization. We think this position is untenable. If the party injured, before he could be heard upon the question of whether a gross injustice had been done to him by the action of the board, would be compelled to present his complaint to that body, so also under these provisions, where the board had acted fraudulently, or where it had acted by mistake, the person injured would be debarred of any remedy unless he had first presented his complaint

to that body. This, however, would be giving to an inferior tribunal an immunity from attack upon the ground of fraud which is not vouchsafed to a court of general jurisdiction. A judgment of a court may be impeached upon the ground that it was obtained by fraud, even though the rule exists that judgments are not subject to collateral attack. Further than this, if the only method of review of a decision of the board of equalization permitted by the law is by error proceedings, then of what meaning is the phrase which provides that it shall not be "subject to review in any legal or *equitable* action except for fraud," etc.? A proceeding in error is not an equitable action, and therefore the phrase "equitable action" would be meaningless. Construing these clauses of the two sections together, we are satisfied that the "gross injustice" which will permit an equitable action to be brought, which reviews the proceedings of the board of equalization, must be so flagrant and excessive in its nature as to substantially deprive a citizen of his property without due process of law, and that it is only in such an exceptional case that an independent action will lie. It may be regarded as settled law in this state that in so far as it is sought to take from the owner of private property the cost of a public improvement in excess of the special benefit which his property received by such improvement, this is, to the extent of such excess, the taking of private property for public use without compensation. *Morse v. City of Omaha, supra; Norwood v. Baker,* 172 U. S. 269, 43 L. ed. 443. In the instant case the evidence shows that the amount assessed against the respective pieces of property is largely in excess of the special benefits received. In fact, the testimony shows that the benefits to the property have been little or nothing, while the assessments have amounted to about $110 a 45-foot lot, in most instances being more than the lots are worth. This is practically the confiscation of the owner's property. It requires no argument to show that such an assessment is "grossly unjust," and therefore subject to review in an

equitable action by virtue of the statutory provision as hereinbefore quoted. *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443; *Iowa Pipe & Tile Co. v. Callanan*, 125 Ia. 358, 101 N. W. 141. The supreme court of Georgia has well said:

"As to whether he was benefited or not, is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportioned to the value of the estate sought to be improved, as that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements." As to when a court of equity is at liberty to interfere, that court then say: "The exact extent of the benefit necessary to uphold such an assessment is incapable of definition. But it may be asserted with perfect confidence, that the present is one of those extreme cases of such doubtful benefit and probable spoliation as will justify the interference of a court of equity in order to prevent the citizen from being arbitrarily deprived of his property." *City of Atlanta v. Hamlein*, 96 Ga. 381.

It was argued at the hearing that the plaintiff was not entitled to maintain his action for the reason that it was his duty, before he was entitled to the interposition of a court of equity in his behalf, to come into court with clean hands and offer to do equity by tendering to the city the amount equal to the special benefits which he had actually received by the improvement. In a case of this kind the maxim that he who seeks equity must do equity should be applied, if possible, and in a number of cases this court has applied this principle where it is sought to

set aside an illegal tax, sometimes however by compelling equity to be done as a part or condition of final decree. *Lynam v. Anderson,* 9 Neb. 367; *Hallenbeck v. Hahn,* 2 Neb. 377; *Hunt v. Easterday,* 10 Neb. 165; *Boeck v. Merriam,* 10 Neb. 199. But this argument is met by the appellee with the contention that the property in question received no benefit by virtue of the improvement, and, hence, that no sum was equitably due on account of the same; and, further, that the court cannot in a case of this kind readjust values and benefits so as to charge each property owner with the proportionate part of the cost of improvement, and that appellee cannot be required to estimate the benefit, if any, to each tract.

As to the argument that the property received no benefit, the petition alleges "that said assessment, if valid, would have been practically confiscation of all the real estate in said improvement district lying west of the Missouri Pacific right of way; * * * that said real estate west of said right of way was not and is not benefited to exceed the sum of $5 for each 50 feet abutting on said street, and the said real estate was not and is not able to bear a larger assessment for said purposes." These allegations are, in substance, an admission that such real estate was benefited to the extent of $5 for each lot, and show at least that the appellee has been able to estimate the benefit which each lot received.

As to the second argument—that it would be a hopeless task for the court to readjust the scheme of assessment—it is sufficient to say that this is not required of the court. The whole extent to which it can go in the assessment of the property is to ascertain the special benefits which each particular tract of land involved in this suit received by reason of the improvement, and to charge each tract with that amount. If the city authorities have caused improvements to be made in front of the property which cost a sum in excess of the special benefits received, such excess must be borne by the city at large and not alone by the owners of the property within the district.

We have been cited to a number of cases by the appellees which seem to hold that where such taxes are excessive, a court cannot ascertain the amount justly chargeable against the property, but that the tax must be relaid by the city authorities. In most of these cases the tax was void *ab initio* either by reason of lack of jurisdiction to levy the tax or by reason of the whole plan being so grossly inequitable and unjust as to be void on that account. In such case the whole proceedings are void, and the owner could not be charged with any part of a void tax. Cases of this class are *Howell v. City of Tacoma,* 3 Wash. 711, 29 Pac. 447; *Cain v. City of Omaha,* 42 Neb. 120, and *Hutcheson v. Storrie,* 45 L. R. A. (Tex.), 289. In these cases the whole plan and scheme of the assessment operated in such an unequal manner and with such a lack of uniformity as to the various tracts that the courts declared the whole plan void. A like case is *Norwood v. Baker,* 172 U. S. 269. In the instant case, however, the proceedings seem to have been regular. The whole scheme and plan is not so grossly unjust and unequal in its operation as to render it void, but certain property appears to have been taxed beyond the benefits received. The district court then is not required to review the whole scheme of assessment. It is only required to ascertain wherein the assessment may be excessive in amount as to each tract. We have already held in *Hutchinson v. City of Omaha,* 52 Neb. 345, that where the entire proceedings were void, "the court cannot impose, as a condition of relief against a void tax, the payment of such tax as would be lawful, where new proceedings and a different basis of assessment are necessary to ascertain what tax is lawful," and with this holding we agree. But in the instant case the board had jurisdiction to levy the tax and its only error was in levying an excessive amount upon the property of appellee. We cannot see that the district court is less able to determine what are the special benefits derived by reason of the improvement by each tract of property than the board of equaliza-

tion. The benefits found by the board are theoretically derived from evidence, and are ascertained and determined by the exercise of judicial faculties. We see no reason why the district court is not equally able to determine this question.

In *Wells v. Western Paving and Supply Co.*, 96 Wis. 116, 70 N. W. 1071, it is said: "The decisions on this line may not be in entire harmony, but the foregoing, and others hereafter referred to, clearly show that in the main they support the rule that, where a proper assessment of benefits has been made, or the groundwork for a proper apportionment of the expense of the improvement has been legally determined, errors causing an excessive apportionment of the cost of such improvement will not defeat the whole tax in equity." And the court concludes, "When, as in this case, the statutory requisites to the assessment of a tax for a street improvement upon abutting property are all complied with up to the time of filing the estimate or specifications for letting the work—that is, when the assessment of benefits has been in all respects legally made, so as to determine a proper basis upon which to apportion the cost of the improvement properly chargeable to abutting property—and the subsequent proceedings result in charging such property an excessive amount for any cause, the owner cannot wait till the improvement is completed and his property received the full benefit thereof, and then screen himself from the entire tax because of the illegal excess. If such excess can be determined by mere computation, or without proof, failure to tender or offer to pay the balance before suit will be fatal to any claim for costs, and failure to plead an offer to pay, fatal to the cause of action; but if such excess cannot be determined by computation, and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial, and require the payment of the balance as terms of granting relief against such excess." See *Barker v. City of Omaha*, 16 Neb. 269; *Darst v. Griffin*, 31 Neb. 668.

There can be no hard and fast line drawn between cases where the entire scheme of taxation is erroneous and void and those in which the amount assessed against each particular piece of property is merely excessive and unjust. In the latter class of cases, to which the instant case, as we think, belongs, the rule laid down by the Wisconsin court seems eminently fair and tending to do justice between both the individual property owner and the city. Each property owner ought to be compelled to bear his just and equitable proportion of the burdens of taxation, and as long as the system of making public improvements by special assessments prevails, he ought to pay in proportion to the amount that his property is specially benefited. If his assessment is excessive, it should be reduced, but he should not be permitted to escape his share of the tax because he was asked to pay too much.

It appears that the tax has been laid upon certain unsubdivided tracts of real estate to a greater depth than the average depth to which the subdivided lands have been assessed. The district court, however, found that this was not a jurisdictional defect, and cannot be taken advantage of collaterally in this proceeding. In holding that this matter could not be examined into in this proceeding we think the court erred, and that it was within the jurisdiction of that court to have ascertained the average depth to which the unsubdivided land should have been assessed, to have held the lien valid as to this portion, and to have declared the assessment void as to the excess.

No attack was apparently made upon the petition upon the ground that the plaintiff failed to offer to do equity until the final argument in this court, and at this stage of the case we believe that the interests of justice would best be subserved by remanding the cause to the district court for further proceedings in accordance with this opinion.

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 in accordance with the opinion.

REVERSED.

CHRISTINA S. SWOBE V. CHARLES MARSH, EXECUTOR, ET AL.

FILED FEBRUARY 22, 1905. No. 13,694.

1. **Dower:** JURISDICTION. The district court has jurisdiction in proceedings to assign dower.
2. ———: ———. The county court has jurisdiction to assign dower only when the right to dower is not disputed by the heirs and devisees or any persons claiming under them or either of them.

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

Charles W. Haller, for plaintiff in error.

Searle & Adams and *Edward M. Martin, contra.*

LETTON, C.

This action was begun by the plaintiff in error against the defendants in error in the district court for Douglas county. The petition alleges, in substance, that the plaintiff in error is the widow of one John A. Swobe, deceased. That her late husband died siezed of a certain lot in the city of Omaha, which was occupied during his lifetime by her husband and herself as a homestead, and of another lot contiguous thereto in which she was entitled to dower. The petition alleges that the defendants are the executors and heirs at law of the deceased; that she has elected not to take under the will; that all the defendants dispute her right to dower and homestead in the premises, and she prays that the court may cause her dower to be ad-

measured and set apart to her in lot 3, and that lot 2 may be set apart to her as her homestead. The defendants each demurred to the petition both generally and for lack of jurisdiction of the subject matter and for a defect of parties defendant. The demurrer was sustained by the district court, and judgment was rendered dismissing the case.

The question presented is whether or not the district court has original jurisdiction to set off dower in a case where the petition alleges that the right to dower is disputed by the heirs or devisees. The constitutional and statutory provisions as to the jurisdiction of the district courts and county courts must be examined in order to determine the question presented. Section 9, article VI of the constitution, provides: "The district courts shall have both chancery and common law jurisdiction"; and section 24, chapter 19, Compiled Statutes, 1903 (Ann. St. 4734), provides: The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." The section of the constitution specifying the probate jurisdiction of the county court is as follows (sec. 16, art. VI): "County courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by general law." The statutory provisions with reference to the county court which are applicable are as follows (sec. 3, ch. 20, Comp. St., Ann. St. 4787): "The courts of probate in their respective counties shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, and the guardianship of minors, insane persons and idiots."

Section 8, chapter 23, Compiled Statutes, 1903 (Ann. St. 4908), is as follows: "When a widow is entitled to dower in the lands of which her husband died seized, and

her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever counties the lands may lie, by the judge of probate for the county in which the estate of the husband is settled, upon the application of the widow, or any other person interested in the lands."

The first case in which the right of the county court to assign dower has been construed in this state is *Guthman v. Guthman*, 18 Neb. 98. In that case the widow filed her petition in the county court, alleging her widowhood; that her husband died seized of certain lands in Lancaster county which during his lifetime constituted their homestead; that he died testate, but that she refuses to accept the provisions of the will, and brings this action for the assignment of her dower and the setting apart of her homestead. The heir answered, challenging the jurisdiction of the court to apportion any homestead rights or dower, and denying all other allegations in the petition. The county court assigned dower and homestead as prayed, and an appeal was taken to the district court. That court found that the petitioner was entitled to dower but that she was not entitled to have a homestead assigned, on the ground that, the right to the homestead being contested, the county court had no jurisdiction to assign and set off the same. On error to this court, the judgment of the district court affirming the judgment of the county court as to dower was affirmed, and in so far as it reversed the judgment of the county court as to homestead was reversed, and the judgment of the county court was in all things affirmed. It was insisted in the district court that, because of the answer filed in the county court, the right to dower was disputed, and therefore the statute giving the county court jurisdiction did not apply. It was held that the allegations of the answer were not sufficient to raise any dispute in regard to the widow's right of dower and therefore the county court had jurisdiction. In the opinion, which was by Chief Justice COBB, it seems to be assumed that the assignment of dower is a matter

of probate or of settlement of the estate of a deceased person, and it is said:

"This provision of statute was enacted long before the adoption of the present constitution, and at most can only be construed to be a limitation upon the general power conferred upon county courts by that instrument to 'have original jurisdiction in all matters of probate, settlements of estate of deceased persons,' etc. Jurisdiction being thus conferred by the constitution, it is a question whether, even under the provisions of the above statute, it can be taken from it merely at the volition of a party respondent. But if it be granted that it can be done by pleading facts and the presentation of an issue or issues which the county court is incompetent to try—such, for instance, as the title to land, or the relationship of husband and wife—it will not be denied that such issue must be actually presented by proper pleading, and cannot arise by implication. Ordinarily a question of jurisdiction may, and in some cases must be made at the very threshold; but here the right of the petitioner to dower must be first disputed by an answer setting up facts which, when proved, will overthrow the claim of the petitioner." And it is said in the second paragraph of the syllabus: "In order to oust the county court of such jurisdiction the right of the applicant to such dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try."

The precise question presented and decided in the case is that the petition was sufficient and that the answer did not sufficiently set forth facts to show that the right of dower was disputed; but it is apparently assumed in the opinion that jurisdiction to assign dower by the county court was conferred by the constitution as a part of its original probate jurisdiction. This is based upon the false premise that the assignment of dower is a matter of probate or settlement of the estate of a deceased per-

son, is clearly wrong, and is a mere dictum not necessary to the determination of the question presented.

Serry v. Curry, 26 Neb. 353, was an action of ejectment brought by the heirs of Edward Serry, deceased, against the defendants, who claimed possession under an assignment of dower made to the plaintiffs' mother and afterwards assigned to them. The plaintiffs claimed that the assignment of dower was void and therefore the defendant had no rights in the premises, and that the petition in the dower proceedings failed to state facts sufficient to give the county court jurisdiction, because it did not allege that the right to dower was not in dispute by the heirs or devisees. This court held that such allegation was not jurisdictional; that if any person interested in the real estate disputes the right of dower he may allege such facts in his answer and establish the same by proof. Citing *Guthman v. Guthman,* 18 Neb. 98.

In *Clemons v. Heclan,* 52 Neb. 287, the plaintiff filed her petition in the district court for Lancaster county, alleging the plaintiff's widowhood and right of dower, and further alleging that the defendants, who were the administrators and devisees, unlawfully and wrongfully had possession of the property, claiming to own the whole tract thereof in fee simple, denied the right of plaintiff to any part of said premises, and had forcibly excluded her from her right of dower therein. The defendants answered, claiming title and asking that the plaintiff might be decreed to have no estate or title in the premises. The court held that the pleadings showed an actual dispute and that the district court had jurisdiction.

Tyson v. Tyson, 71 Neb. 438, was a case wherein the heir applied to the county court to have the homestead and dower right of the widow set apart. The widow answered, claiming all of the premises as her homestead, and objected to the jurisdiction of the county court. The only question the petition sought to have determined was the validity of the widow's claim to a homestead in the whole 156¾-acre tract, and the issue tried was whether

the value of this tract exceeded the amount of the homestead exemption. The plaintiff contended that the county court was without jurisdiction over the subject matter for the reason that section 16, article VI of the constitution, which gives county courts original jurisdiction in probate matters, also provides that they "shall not have jurisdiction * * * in actions in which the title to real estate is sought to be recovered or may be drawn in question." The court held that the pleadings presented no question of fact but one of law merely, and followed the *Guthman* case.

Under the common law if dower was not assigned to the widow within the time limited by will, she had her remedy by writ of dower *unde nihil habet.* Blackstone says, Book 3, sec. 183: "But if she be deforced of part only of her dower, she cannot then say that *nihil habet;* and therefore she may have recourse to another action, by writ of *right of dower;* which is a more general remedy, extending either to part or the whole; and is of the same nature as the grand writ of right is with regard to claims in fee simple."

In *King v. Merritt,* 67 Mich. 194, the statute of Michigan with reference to the assignment of dower, which is exactly the same as that of Nebraska, is construed, and it is said:

"The jurisdiction of the probate court in the matter of dower is purely statutory. It is in no way essential to the settlement of the estate. Smith, Probate Law, 214. It is a proceeding, when the estate is solvent, in which only the widow and heirs are interested. *Campbell, Appellant,* 2 Doug. (Mich.) 139, 146; Cheve, Probate Law, 246. And proceedings to assign dower may be had at any time before, during, or after administration is closed. * * * The writ is of the same nature and efficacy as the writ of right to recover the fee. 3 Blackstone, Commentaries, 182. This writ issued upon the filing of a *præcipe* wherein the widow states that she has been married, and declares herself to be the wife of the person

whom she claimed was her late husband. And the writ would be abated if this was omitted. *Fulliam v. Harris,* 3 Cro. Jac. (Eng.) 217; 1 Roper, Husband and Wife, 429; *William v. Gwyan,* 2 Saund. (Eng.) 43, and note; 3 Chitty, Pleading, 1311. * * * The statute under which this claimed dower proceeding was had is a special one, and all the facts necessary to give the court jurisdiction must in some manner be made to appear. Rev. St. 1838, p. 263; Gary, Probate Law (2d ed.), sec. 434; *Sheafe v. O'Neil,* 9 Mass. 9; *Ryder v. Flanders,* 30 Mich. 336; *Smith v. Smith,* 5 Dana (Ky.), 179; *Stevens v. Stevens,* 3 Dana (Ky.), 371."

Mr. Washburn, speaking of the modes of assigning dower says: "One mode is the common law action of dower, another is by proceedings in equity, and a third is one provided in most, if not all the states, by a cheap and summary process issuing from courts having cognizance of probate matters. In some cases these may be concurrent remedies. But, generally speaking, the last is more restricted than either of the others, and is confined to cases where the claim of the widow is upon the heir or devisee of the husband, and is not the proper one to resort to when it is necessary to determine a contested right of dower." Washburn, Real Property (6th ed.), sec. 463.

The assignment of dower is not the settlement of an estate nor any part of a settlement of the estate of a deceased person. It is not a matter of probate for it has nothing whatever to do with the probate of a will. It was a matter of which the common law courts had jurisdiction, and our district courts still retain it by virtue of the constitution and the statutes. *Sheafe v. O'Neil,* 9 Mass. 9; *Woodward v. Lincoln,* 9 Allen (Mass.), 239; *French v. Crosby,* 23 Neb. 276. Jurisdiction has also been conferred upon the county court to assign dower, but this jurisdiction is confined to those cases in which the right is not disputed, and is conferred by virtue of the constitutional provision which confers "such other

jurisdiction as may be given by general law." *Thomas v. Thomas,* 73 Ia. 657, 35 N. W. 693; Gary, Probate Law, sec. 430, *et seq.;* note to *Sanders v. McMillian,* 39 Am. St. Rep. 33. The error in the former holdings has been to assume that original jurisdiction resided only in the county court, and that the jurisdiction of the district court only attached when the right to dower was disputed. This has never been expressly decided by this court, but the language in the *Guthman, Serry* and *Tyson* cases admits of such interpretation. The jurisdiction of the district court to assign dower has in nowise been curtailed by the provisions of section 8, chapter 23, Compiled Statutes, 1903 (Ann. St. 4908). This merely confers a jurisdiction upon the county court which it did not possess before its enactment, and is cumulative in effect. The same reasoning applies with regard to the general powers of the district court to set apart the homestead. The petition sufficiently states a cause of action for the assignment of both dower and homestead and the demurrer should have been overruled.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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.

REVERSED.

FARMERS STATE BANK OF CENTRAL CITY V. JOHN YENNEY.

FILED FEBRUARY 22, 1905. No. 13,720.

1. **Evidence** of collateral facts corroborative of the statement of one party with respect to the main issue is admissible if confined to such matters as throw light upon the question. The jury are

entitled to know all the circumstances surrounding the parties with reference to the property at the time of the transaction in order that they may judge which of them is telling the truth. *Blomgren v. Anderson*, 48 Neb. 240.

2. **False Representations**: EVIDENCE. A bought eighty acres of land in M county from B, giving in payment therefor $1,800 in money, paying a mortgage of $118 and conveying a tract of land in C county. In an action for false representations as to the condition and value of the land in C county, wherein B testifies that the land was represented to him to be of the value of $800 and taken by him at such value, and A claims that no false representations were made and that no value was fixed upon the C county land, it was error to reject evidence offered to show that the land in M county was only worth $2,000 at the time of the transaction, since this evidence tended in some degree to corroborate A's testimony.

ERROR to the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

W. T. Thompson, for plaintiff in error.

John C. Martin, contra.

LETTON, C.

This is an action to recover damages for fraud and false representations alleged to have been made by the Farmers State Bank as to the value of a tract of land in Cheyenne county, Nebraska, which was given in part payment for an eighty-acre tract of land in Merrick county sold to the bank by John Yenney, defendant in error. The petition alleged that he sold the Merrick county land for $2,700, and charged false representations as to the condition, location and character of the Cheyenne county land, and claimed damages in the sum of $800. The answer alleged the purchase of the Merrick county land, and that the consideration was the payment of $1,800 in cash, the payment of a mortgage on said land for $100, and interest, the conveyance of the Cheyenne county land, no value being fixed. The reply was a general denial. The plain-

tiff Yenney recovered a verdict and judgment in the district court, and the bank prosecutes error.

There are only three assignments of error argued in the brief. The first and second are that the verdict is not sustained by sufficient evidence and that the action is not prosecuted in the name of the real party in interest. These will be considered together. The title to the eighty acres of land in Merrick county was at the time of the transaction in the name of the wife of the plaintiff John Yenney. The evidence shows, however, that the transaction whereby Yenney procured the title to the Merrick county land to be conveyed to the bank and the Cheyenne county land to be conveyed to him was entirely between him and the bank. The bank did not deal with Mrs. Yenney at all or with John Yenney as her agent. Whatever transaction or agreement there may have been between Yenney and his wife with reference to the title to the Merrick county land is of no concern to the bank, and so far as the record shows Yenney is the real party in interest. Yenney and his son swear to the making of the representations by the agent of the bank, who denies making them. If made, other evidence shows they were false. The jury believed Yenney and the evidence supports the verdict.

The next assignment of error is that the court excluded evidence with reference to the value of the Merrick county land. The value of the Merrick county land was not in issue, but it is argued that the evidence as to its value would tend to throw some light upon the transaction that actually occurred. The defendant's theory of the transaction was that no amount was agreed upon or stated as to the value of the Cheyenne county land, but that the consideration for the eighty acres in Merrick county was the payment of the $1,800 and the mortgage, and interest, and the transfer of the Cheyenne county land. It offered to prove that the Merrick county land was worth not to exceed $2,000, and it is argued that if the plaintiff in error had paid within $82 of its actual value it is highly improbable

that there would have been any inducement to represent the Cheyenne county land to be worth $800. Any fact is admissible in evidence which reasonably tends to throw any light upon the subject matter contested. The evidence offered was not admissible for the purpose of reducing the amount of recovery, if the jury believed Yenney was entitled to recover, because he was entitled to the benefits of his bargain, if any. It was merely collateral to the main issue in the case, and, if admissible, can only be considered in so far as it throws light on the main transaction.

In an action for damages for fraud in the exchange of a lot of marble, the plaintiff claimed that he exchanged a house, the price of which was fixed at $5,100, for $1,100 in cash and marble represented to be worth $3,000, the defendant to assume a mortgage of $1,000, and that the marble was in fact only worth about $1,000. The defendant claimed that he told plaintiff the value of the marble was only $1,000, and also that no fixed price was agreed upon in the exchange for the house. The defendant offered to prove that the house was not worth $5,100 or anything like that sum, which evidence was excluded. The court, however, said:

"Upon the issue thus presented to the jury we think evidence as to the value of the hotel property was admissible. The parties might, of course, in their agreement fix upon any sum as the value of the property, but when the fact as to the agreement was in dispute the real value was an element for the jury to consider in determining which version of the story was the correct one." The weight and value of the evidence was for the consideration of the jury, and we cannot say that had it been admitted it might not have led to a different result. *Weidner v. Phillips,* 114 N. Y. 458, 21 N. E. 1011.

In *Blomgren v. Anderson,* 48 Neb. 240, it was held that, in an action to recover for services rendered under special contract, where the defense alleged that the consideration for such services was the plaintiff's board and lodging

during the period, evidence that at that time a third person in the defendant's presence and hearing offered to employ the plaintiff at substantial wages for work of the same general character was properly admissible as bearing upon the reasonableness of the claim and in some degree corroborative of the plaintiff's testimony.

We are of the opinion that the testimony offered should have been admitted. If the Merrick county land was not worth more than $2,000, what motive could the bank have for misrepresenting the values of the land in Cheyenne county? There is a direct conflict in the evidence as to whether the representations were made, and in so far as the evidence offered tended to corroborate the testimony of Mr. Kerr it was admissible. The weight to be given to it, however, was for the jury. They were entitled to know all the circumstances surrounding the parties with reference to the property at the time of the transaction in order that they might judge which of them was telling the truth.

For the error in excluding this testimony, we recommend that the judgment be reversed and the cause remanded for a new trial.

OLDHAM and AMES, 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.

LOYAL MYSTIC LEGION ET AL. V. ARTHUR H. JONES.

FILED FEBRUARY 22, 1905. No. 13, 727.

1. **Party Wall Agreement: RECORDING: NOTICE.** The proper registration of a party wall agreement is constructive notice to all purchasers of the real estate affected by the agreement, and such notice is as effectual and binding as actual notice.

2. ———: CONSTRUCTION. Party wall agreement construed, and *held*, that it was the intention of the parties that the privileges, duties and liabilities given and imposed by the contract should pass to all persons obtaining title to either of the lots upon which the wall stood by grant from the original parties. *Held*, further, that the agreement itself operates as an assignment to his grantee of the claim of the builder of the wall for compensation for its use as soon as that person was designated by his deed.

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

R. A. Batty, for plaintiffs in error.

J. B. Cessna, contra.

LETTON, C.

This was an action brought by Arthur H. Jones, defendant in error, as plaintiff, against the Loyal Mystic Legion to recover for the use of a wall under a party wall agreement. In 1887 Charles L. Jones and Henry Shedd were the owners of lots 7, 8 and 9 in a certain block in Hastings, and A. S. Raymond was the owner of lot 10 in the same block. Jones and Shedd, being about to erect a brick building on lot 9, in June, 1887, entered into a written contract which recited that, whereas Jones and Shedd were about to erect a building of brick and stone upon lot 9, it is agreed that the wall may be set upon the line between lots 9 and 10, one-half upon the lot belonging to each party. Jones and Shedd agreed that the "said party of the second part, his heirs, executors, administrators or grantees" should have the privilege of using the wall as a party wall for any building "the said party of the second part or his grantees may erect." The contract also contained this provision: "Provided always, nevertheless and on this express condition, that the said party of the second part or his grantees, before proceeding to join any other buildings to the said party wall

and before making any use thereof or breaking into the same, should pay or secure to be paid to said parties of the first part or their grantees one-half of the actual cost of said party wall or so much thereof as shall be joined or used as aforesaid." The agreement was signed by the parties, acknowledged before a notary public and recorded in the miscellaneous records of Adams county on June 22, 1887. After this agreement was made, Jones conveyed to Shedd by quitclaim deed all his interest in lot 9. Shedd soon afterwards died, and lot 9 was sold at administrator's sale and bought by Rose E. Shedd, who became a party defendant to the action, claiming the money to be due her as grantee of lot 9. A. S. Raymond, after the making of the party wall contract, conveyed lot 10 through mesne conveyances to the defendant, the Loyal Mystic Legion. In 1900 the Loyal Mystic Legion erected a building on lot 10 and used the party wall. Charles L. Jones, one of the original parties to the agreement, claimed to be entitled to one-half of the money due, and assigned his claim to his son Arthur L. Jones, the plaintiff in this action, while Rose E. Shedd claimed that the whole amount was owing to her as grantee of Jones and Shedd. The court found for the plaintiff Arthur H. Jones, and the defendants prosecute error.

The principal question is whether the language of the contract must prevail, which provides that before using the wall the grantees of Raymond shall pay Charles L. Jones and Henry Shedd or their grantees one-half of the cost of it, or whether, notwithstanding this language, the money is due to the original parties. Plaintiffs in error contend, first, that the contract provides that the money should be paid to Jones and Shedd "or their grantees;" that this was the intention of the parties, which must control, and that there being no dispute but that Rose E. Shedd is the grantee it follows that she is entitled to the whole fund. Second, that the contract runs with the land, and Rose E. Shedd being the owner of the land the fund belongs to her. Third, that if the contract does

not run with the land the agreement is a personal agreement, and therefore, since the Loyal Mystic Legion did not agree with any one to pay this debt, and is neither party nor privy to the contract, there is no liability on its part to either party. Fourth, that there is no contractual relation between the plaintiffs and the defendant.

On the other hand defendant in error contends, first that money due on a party wall contract is a chose in action which is personalty, which does not pass by grant of the real estate but does pass by assignment. He further contends that the agreement or covenant by the owner of lot 10 to pay for the wall did not run with the land. Second, that, where a covenant is not of a nature that the law permits it to be attached to an estate by a covenant running with the land, it cannot be made such by an agreement, with the use of the words, heirs, executors, grantees or assigns.

In the consideration of this case we deem it advisable to examine the former decisions of this court which throw any light upon the question and to adopt a construction which is in harmony therewith.

In *Burr v. Lamaster*, 30 Neb. 688, the facts were that a contract was entered into between Lamaster and Baldwin, by which Baldwin was authorized to construct a party wall, one-half on a vacant lot owned by Lamaster, who covenanted for himself, his heirs and assigns, to pay Baldwin one-half the cost of the wall, whenever he should make use of the same. The court say:

"This agreement gave the Baldwins an interest in the nature of an easement in the Lamaster lot, and constituted an incumbrance. The obligation to pay a portion of the cost of the wall was not merely a personal covenant binding upon Lamaster, but was a burden which ran with the land and bound his grantees to pay for one-half of the wall if they used the same." It is further said: "There are cases holding that a party wall agreement like the one before us is merely personal, binding alone upon the parties to it, and does not attach to the

land, but the weight of the decisions in this country is to the effect that it attaches to and is a charge upon the land."

Garmire v. Willy, 36 Neb. 340, was an action brought by Willy against Garmire to recover one-half the costs of a party wall constructed by Willy under a written contract with Garmire's grantor. The contract provided that the covenants and agreements should extend to and be obligatory upon the heirs, administrators and assigns of the respective parties, and was acknowledged and recorded. Garmire purchased the vacant lot after the wall was built. There was a dispute as to whether Garmire had actual notice of the agreement before he purchased, but the court held that the recorded agreement was constructive notice, and held, further, that the agreement attached to the land and that Garmire was liable for the amount agreed to be paid.

In *Stehr v. Raben,* 33 Neb. 437, one Wallicks had made a party wall agreement with Henry Stehr whereby Stehr built a party wall, one-half thereof on a lot owned by Wallicks, under an agreement that when Wallicks, or his grantee, erected a building on his lot he should then pay for one-half of the party wall. Raben bought the lot from Wallicks with knowledge of the contract, taking title in the name of his wife, and executed his personal note to Stehr for the value of one-half of the party wall. The court found that both Raben and his wife were liable for the debt, and that the plaintiff was entitled to a lien upon the wall and the part of the lot on which it stood until the debt was paid. It is said by MAXWELL, Justice, writing the opinion:

"The right of the plaintiff to recover upon the note in controversy is not seriously questioned, and such a contract 'creates an equitable charge, easement, and servitude upon the lots built upon.'" Citing *Burr v. Lamaster, supra.*

In *Jordan v. Kraft,* 33 Neb. 844, the facts were that Jordan and Kraft made a party wall agreement by which

Jordan was to build a wall 100 feet long, and Kraft agreed to pay Jordan, within sixty days after completion, one-half of the cost of the north sixty feet thereof, also one-half of the cost of so much of the remainder as he should thereafter use, within thirty days after he uses the same. Before using the wall Kraft conveyed his lot, the deed providing that the grantee assumed the party wall agreement. The grantee used the wall, and this action was brought against Kraft to recover one-half of the cost of the south 40 feet. Kraft had apparently paid for the north 60 feet as the contract provided. The court held that Kraft was not liable, saying:

"The contract is not merely personal, binding only on the parties to it, but it attaches to and passed with the lot. Jamison (Kraft's grantee) had the same right to use the wall as Mr. Kraft, and no more. It was never contemplated by the parties that Kraft alone had the right to join to the wall, but rather that the owner of the lot, whoever he might be, could do so, on paying to the owner of the other lot the unpaid portion of the value of the party wall."

In a later case, *Cook v. Paul,* 4 Neb. (Unof.) 93, it is said that a more accurate statement of the law is as follows:

"The majority of the authorities maintain that these covenants are not of the nature of covenants running with the land, and that the grantees of the original parties cannot, by reason of their holding adjoining lots, take advantage of the benefit, or be subjected to the burden of the covenant to pay for one-half of the party wall, but that the right to recover is personal to the builder, and the obligation to pay, except in certain cases, rests upon the covenantor only; and an agreement of the parties that the covenant shall be binding upon their heirs or assigns, etc., or even that it shall run with the land, is ineffectual."

This doctrine is broader than the rule laid down by the prior decisions of this court. *Cook v. Paul, supra,* is one of the class of cases known in this state as "unofficial," and

as is said by HOLCOMB, C. J., in *Flint v. Chaloupka*, 72 Neb. 34, speaking of opinions of this character: "The court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It approves only the conclusions." We do not therefore consider it as in any way establishing the legal proposition contained in the opinion.

In most of these cases the question was as to the liability of the party using the wall, and the view taken by the court was that the contract so far as affects the obligation of the subsequent user of a party wall to pay for the same usually runs with the land. But in the instant case the question is different. It is to whom is the money payable. The obligation created by the contract is to pay a debt which does not become due and payable until the wall is used. The view taken by the courts of New York, Indiana, Illinois and Pennsylvania is that this is a personal obligation and passes by assignment, while Iowa, Massachusetts, Minnesota, Michigan and West Virginia hold that it is a convenant which runs with the land. In an extended note upon this subject to *Dunscomb v. Randolph*, 89 Am. St. Rep. 915, 941, the commentator concludes: "The more reasonable rule is that an agreement * * * whereby one is to build a party wall * * * and the other to pay for one-half of its construction when he uses the wall, creates cross-easements as to each owner, running with the land. * * * The title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passes by every conveyance of it until the severance of the one-half by the payment of the purchase money." In support of this doctrine he cites cases from Illinois and Pennsylvania. He examines each of the other doctrines held by the courts, citing cases, and concludes: "The decisions are in irreconcilable conflict, and almost equally divided. Even in the same state different results have been reached under facts almost similar, and prior rulings are distinguished in a manner beyond the comprehension of the ordinary per-

son." We refer to this note as giving a concise resume of the existing law upon the subject in other jurisdictions.

It will be observed that this court has heretofore adhered to the doctrine that such covenants run with the land, at least so far as the obligation of the user of the wall to pay for the same is concerned. We think, however, that in the disposition of this case it is unnecessary to pass upon this point. The contract expressly specifies that the money for the use of the wall should be paid to the parties of the first part or "their grantees." A grantee is "a person to whom a grant is made." Black, Law Dictionary. A grant is defined: "A generic term, applicable to the transfers of all classes of real property"; "A transfer by deed of that which could not be passed by livery." 3 Washburn, Real Property (6th ed.), sec. 1995; Williams, Real Property, 147, 195. The word grantee as used in this contract means therefore the person or persons to whom the real estate might be conveyed by deed.

Where the intention is to convey an interest in personalty, the transfer is usually termed an assignment, and persons who take are usually denominated in the instrument as "assigns." In most of the cases in which a similar question to that under consideration has been considered the contract has provided that the money to be paid for the use of the wall should be paid to the builder or "his assigns," and it has been held that the contract was personal in its nature, passed by an assignment of the claim as personalty, and did not pass by virtue of a conveyance of the real estate to the grantee thereof. See note to *Dunscomb v. Randolph,* 89 Am. St. Rep. 915, 941. We think such cases are easily distinguishable from the one at bar. In the contract under consideration the word "assigns" is nowhere used, but the word "grantees" is substituted. From a consideration of the language of the contract it seems clear to us that it was the intention of the parties that the provisions of the

contract should be binding upon all parties taking title to either of the lots by virtue of conveyances of the real estate, and that the intention was that the privileges, duties and liabilities given and imposed by the contract were conveyed to all persons obtaining title to either of the lots by grant from the original parties. In other words, it was their intention that whoever became the owner of either lot under them should stand in the shoes of the makers of the party wall agreement with respect to its provisions.

It is the duty of this court to carry out the intention of the parties to the contract, if it can be done without doing violence to established principles of law. We will not arbitrarily interfere with the liberty of contract. It has been said that "where a covenant is not of the nature that the law permits it to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of the parties," but it is not necessary to say that the personal obligation to pay for the wall runs with the land, in order to carry into effect the provisions of the contract under consideration. It was as much within the power of Jones to agree that the money for the use of the wall should be paid to his grantees, as it was for Raymond to agree that his grantee should pay for the wall when he used it. By his written instrument, duly acknowledged and recorded so as to give constructive notice, Jones notified all persons interested that the grantee of lot 9 was entitled to be paid for the use of the wall. The agreement itself operated as an assignment of his personal claim to compensation to his grantee, whenever that person was designated by his deed of conveyance of the lot. As soon as Jones conveyed the title to the lot, the deed, together with the contract, and by virtue thereof, operated as an assignment of his right to be paid for the use of the wall to the person who was named therein as grantee. We are satisfied this was the intention of the parties at the time the contract was made, and that there is no legal principle which prevents us

from giving effect to this intention. Jones having parted with his interest in the subject matter of this suit had nothing to assign to his son the plaintiff herein. The record shows that Mrs. Shedd has already received payment for the use of the wall, hence no judgment is necessary in her behalf.

We recommend that the judgment of the district court be reversed and the action 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 dismissed.

REVERSED.

OMAHA NATIONAL BANK v. EDWIN A. ROBINSON, JR., ET AL., EXECUTORS.*

FILED FEBRUARY 22, 1905. No. 13,920.

1. **Error**: PROCESS: ACCEPTANCE OF SERVICE. Where a person obtains a judgment in the district court, and after his death error proceedings are begun seeking to reverse the same, an acceptance of service of summons in error by his attorney of record in the district court is not sufficient to give this court jurisdiction of the error proceedings. *Ritchey v. Seeley*, 68 Neb. 129, followed.

2. **Judgment**: JURISDICTION. A judgment rendered by a court without jurisdiction of the parties is absolutely void. The supreme court stands upon no higher or different footing in this regard than a court of inferior jurisdiction.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

Will H. Thompson, *contra*.

* Rehearing allowed. See opinion, p. 353, *post*.

LETTON, C.

On May 4, 1895, in an action pending in the district court for Douglas county, one Edwin A. Robinson recovered a judgment against the Omaha National Bank. Robinson had died upon January 14, 1895, but his death was unknown to his attorneys. The bank prosecuted error to this court from the judgment. Gregory, Day & Day, who had been Robinson's attorneys in the action in the district court, entered his voluntary appearance in the supreme court, waiving the issuance and service of summons in error, and defended the case in this court. The error proceedings resulted in the reversal of the judgment, and the cause was remanded to the district court for further proceedings. In the district court the case was placed upon the trial docket and remained thereon until November 12, 1900, when, it appearing from the affidavit of J. H. McCulloch, one of the attorneys for the Omaha National bank, that Robinson was dead, that no order of revivor had been made and that more than one year had elapsed since such order could have been made, the action was stricken from the docket. The case remained in this condition until February, 1904, when a motion was made in behalf of the executors of Robinson to revive the original judgment in the district court. A conditional order of revivor was allowed, providing that, unless the defendant showed cause by March 14, 1904, the judgment should stand revived. The defendant made a return to this order to show cause by alleging the facts in regard to the death of Robinson, the reversal of the judgment and the action of the district court thereafter striking the case from the docket. Evidence was adduced, and at the hearing the district court sustained the motion for revivor and made it absolute. No motion for a new trial was filed. The plaintiff in error in its petition assigns: (1) The court erred in sustaining the motion of this defendant in error for a revivor of said judgment; (2) the court erred in signing and directing the entry of the order reviving said judgment.

The first question presented is whether or not these assignments present any question for review, in view of the fact that no motion for a new trial was filed in the district court. In the view we take of the case it is not necessary to consider this assignment. We are of the opinion that the proceedings had in the supreme court were void. That the judgment of reversal was of no validity, nor was the mandate of any force. We have repeatedly said that a judgment rendered by a court without jurisdiction of the parties is absolutely void. *Ritchey v. Seeley,* 68 Neb. 129. The supreme court stands upon no higher or different footing in this regard than a court of inferior jurisdiction. The case falls squarely within the rule of *Ritchey v. Seeley,* and the district court was right in disregarding the proceedings had in this court when it had never acquired jurisdiction. *Chicago, B. & Q. R. Co., v. Hitchcock County,* 60 Neb. 722; *Eayrs v. Nason,* 54 Neb. 143; *Johnson v. Parrotte,* 46 Neb. 51; 1 Black, Judgments, sec. 170. No question is made as to the validity of the original judgment and no sufficient cause was shown why it should not be revived.

We 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.

The following opinion on rehearing was filed October 5, 1905. *Judgment of affirmance adhered to:*

A rehearing was granted in this case upon the point that the judgment which it is sought to revive was void by reason of the plaintiff in the cause being dead at the time of its rendition. It appears that this point was not raised by the return to the order to show cause and that it is not an issue in the case.

It is recommended that the former opinion be adhered to.

By the Court: For the reason stated in the foregoing opinion, it is ordered that the former opinion be adhered to.

AFFIRMED.

HENRY KOCK V. STATE OF NEBRASKA.

FILED MARCH 8, 1905. No. 14,114.

Proceeding in Error: LIMITATION. The supreme court has no jurisdiction to review the proceedings and final judgment of the district court in a criminal case, unless proceedings in error are instituted therein within six months after the rendition of such judgment.

ERROR to the district court for Cuming county: GUY T. GRAVES, JUDGE. *Proceeding in error dismissed.*

T. M. Franse and *Moodie & Burke,* for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson and *M. McLaughlin, contra.*

BARNES, J.

At the January term, 1904, of the district court for Cuming county, the plaintiff in error was convicted of the crime of grand larceny, and the value of the property stolen was found to be $60. On the 30th day of January of that year, he was sentenced to imprisonment in the penitentiary for the period of six years. On the 24th day of January, 1905, he instituted proceedings in error in this court, and the attorney general now objects to the jurisdiction of the court and moves to dismiss the proceedings in error because they were not commenced within the period prescribed by law.

The provisions of law by virtue of which the accused seeks to have his case reviewed by this court are sections

592 of the civil code and 508 of the criminal code. We quote section 592, as follows:

"No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within six calendar months after the rendition of the judgment or making of the final order complained of; except that when the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, he shall have one year, exclusive of the time of his disability within which to commence such proceedings: *Provided,* That the provisions of this act shall only apply to judgments or decrees rendered after the date of its taking effect."

By section 508 it is provided:

"In all criminal cases, writs of error shall be issued by the clerk of the supreme court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of costs as in civil cases; *Provided,* That if any person, desiring to obtain such writ of error, shall file an affidavit with the clerk of the court that he is unable on account of his poverty to pay said costs, the clerk shall enter the suit upon the docket, and upon the entry of final judgment indorse the amount of costs upon the mandate, and the same shall be paid by the county in which the indictment was found."

The question presented is not a new one in this state. It was before the supreme court in a case wherein the accused had been found guilty of murder in the second degree, and sentenced to a term of 25 years in the penitentiary. *Kountz v. State,* 8 Neb. 294. In that case the accused was sentenced on the 17th day of April, 1877, but did not file his petition in error and the transcript until April 19, 1878, and the attorney general challenged the jurisdiction of the court on the ground that the statute of limitations had run against such a proceeding. At that time the limitation was fixed by the sections above mentioned at one year, and the court held:

"Proceedings in error in a criminal case must be instituted in the supreme court within one year after the rendition of the judgment."

The reasoning contained in the body of the opinion in that case, and which meets with our approval, is as follows:

"In this state a writ of error is a writ of right in both civil and criminal cases. And the practice in both classes of cases is assimilated as far as possible. It is evident that the language of the section referred to" (section 508 of the criminal code, now section 2644 Annotated Statutes), "includes also the time within which proceedings in error may be instituted. * * * He" (meaning the accused), "is entitled to a bill of exceptions, and after calling the attention of the court below to the errors complained of, may have the entire case reviewed on error in the supreme court. When may he do this? Can he wait until the material witnesses for the state are dead, or have gone beyond the reach of process—let that time be five, ten, or twenty years, then prosecute proceedings in error? We do not think so. If the party convicted is innocent of the offense with which he is charged—that is, if the testimony fails to establish his guilt with that degree of certainty required by the law—if error has occurred during the progress of the trial by which he has been prejudiced, the case should be reversed and a new trial awarded. There is nothing that the law abhors like the conviction of an innocent person. For this reason, among others, criminal cases take precedence in the hearing of causes, in order that the party, if innocent, may be discharged. But it is the duty of the state, while protecting as far as possible the innocent, to punish the guilty. In no other way can life and property be rendered secure. In most cases of actual guilt, if proceedings in error are prosecuted within the period required by law, and the case is reversed, the witnesses on the part of the state are at hand to testify in the case. But in many, if not most cases, in

even five years many of the material witnesses could not be found. The case may have been one of great atrocity, and the guilt of the party undoubted, yet upon a reversal of the case, as the witnesses against him cannot be found, he must be turned loose to commit other depredations upon society. The law was framed for the protection of the innocent and of society, not to offer a means of escape for the guilty, and a party must prosecute proceedings in error within the period required by the statute or be barred."

The foregoing decision was commented on and approved in *Bradshaw v. State,* 19 Neb. 644, as follows:

"In *Kountz v. State,* 8 Neb. 294, it was held, that from the peculiar language of section 508 of the criminal code, the limitation of time for taking criminal cases on error to the supreme court was the same in criminal as in civil cases. The section was copied verbatim from another state, where the allowance of a petition or writ of error involved an examination of the entire record to ascertain if there was probable error in the record. In such cases a writ of error was to be allowed *as in civil cases.* This would seem to mean in the same manner and within the same *time* as in civil actions."

The legislature of 1901 amended section 592 of the code so as to limit the time for the commencement of proceedings in error in the supreme court to six months from the entry of the final judgment or order sought to be reviewed. The law as thus amended had been in force nearly three years when the crime of which the accused was convicted was committed, and when the final judgment herein was entered. The amendment in question deprived the accused of none of his constitutional rights. It did not even change the method of procedure after the commission of the alleged crime or the rendition of the final judgment.

But it is contended by the accused that he is one of the class of persons mentioned in the statute as being under disability; and he insists that, because he was taken to

the penitentiary and imprisoned therein in compliance with the judgment of the court, the limitation does not apply to him. The mere statement of this proposition is its own refutation. If this contention should be held good, the defendant could serve out his full six years of imprisonment and still have one year thereafter in which to prosecute his petition in error. The fact is that he is under no disability by reason of his imprisonment; and in truth he is already prosecuting his proceedings in error, which he might have commenced within six months after the rendition of the final judgment, as well as one year thereafter. Again, by our previous construction of the sections of the statute above quoted, the time for commencing proceedings in error in criminal cases is now clearly limited to a period of six months from and after the rendition of the final judgment complained of, and we are bound by such construction. If we should now fix the limitation at one, two, three or five years, we would thereby substitute our own views of what the limitation ought to be for the plain provisions of the law as enacted by the legislature. This would be judicial legislation, a proceeding to which courts should never resort. So it is clear that we are without any jurisdiction to review the proceedings and judgment of the trial court herein. This is to be regretted, for the reason that the sentence in this case seems so excessive, considering the value of the property alleged to have been stolen, as to be almost unconscionable. If we were at liberty to assume jurisdiction of this case we would, under the power given us by section 509*a* of the code, reduce the sentence to a period of two years. Having no jurisdiction, we cannot grant the accused any relief, and he must resort to executive clemency.

For the foregoing reasons, the objections of the attorney general are sustained, and the proceedings in error are hereby dismissed.

JUDGMENT ACCORDINGLY.

SHELDON M. LOOMER, APPELLANT, V. REBECCA H. LOOMER, APPELLEE.

FILED MARCH 8, 1905. No. 13,721.

Evidence: SUFFICIENCY. An examination of the evidence shows that the plaintiff failed to produce a preponderance thereof in support of the grounds alleged for a divorce, and the judgment of the district court dismissing the action is affirmed.

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

A. W. Crites, for appellant.

Allen G. Fisher, contra.

AMES, C.

This is an action brought by a husband to obtain a divorce on the ground of extreme cruelty. The answer is, in substance, a general denial. The plaintiff appeals from a judgment dismissing his suit. At the time the action was begun both parties were in their 71st year of age, and the marriage, which took place after about six months of such acquaintance as was formed by written correspondence across half the width of the continent, had endured about a year and a half. That the union did not prove a happy one is abundantly proved by the record and is not the occasion of surprise. There were frequent disagreements and altercations between the parties, culminating, in one instance, in the defendant slapping the plaintiff in the face in the presence of bystanders. The blow, which was with the bare hand, was not a heavy one and was the cause of no physical injury, and just what provocation there was for it, if any, or how the quarrel begun or led up to it, the parties do not agree, and there were no witnesses produced on the trial to prove. That the plaintiff suffered, as he contends that he did, a very

severe sense of humiliation therefrom, the circumstances and antecedents, being such as he admits them to have been, do not lead us to believe. The only other charge of sufficient gravity to deserve consideration, if indeed it does so, relates to certain alleged breaches of complaisance which are denied by the defendant, and which, and their attendant circumstances, if they occurred, were of such nature as to preclude knowledge of them by third persons. A more particular description of them cannot with propriety be spread upon the pages of an official publication, and it is our opinion they are of such a character that decency excuses the court from making inquiry concerning them. It must suffice to say that the burden of proof is upon the plaintiff, and that after a careful examination of the record we concur with the opinion of the trial court that the former has not produced the required preponderance of the evidence.

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

LETTON 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

AFFIRMED.

STATE, EX REL. WORLD PUBLISHING COMPANY, V. ROBERT O. FINK, TREASURER.

FILED MARCH 8, 1905. No. 14,027.

Mandamus: FORECLOSURE OF TAX LIENS: PUBLICATION OF NOTICE. After a petition for the foreclosure of tax liens pursuant to an act of 1903, entitled "An act to enforce the payment and collection of delinquent taxes and special assessments on real property," has been filed in the office of the clerk of the district court, and the county treasurer has published the required notice in a suit-

able newspaper, he will not be compelled by mandamus to republish the same on the sole ground that such newspaper was not designated for the publication by the proper official authority.

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

Hall & McCulloch and *A. C. Wakeley,* for plaintiff in error.

W. J. Connell and *Brome & Burnett, contra.*

AMES, C.

This action was submitted by brief and oral argument as presenting a single question, to wit, the construction of section 7, chapter 75, laws 1903, entitled "An act to enforce the payment and collection of delinquent taxes and special assessments on real property" (Comp. St. ch. 77, art. IX; Ann. St. 10644-10691); and that construction, so far as was supposed to affect the present controversy, depends upon the definition of the word "fail." The act provides that the county treasurer shall between the first day of June and the first day of July in each year prepare a petition setting forth in detail all taxes in the county which have been delinquent more than one year, and a description of the tracts upon which they were levied, and file the same in the office of the clerk of the district court on or before the last named date. Section 7 enacts: "Within ten days after the filing of such petition the county treasurer shall cause a notice to be published, directed to 'All Whom it May Concern' to the effect that the state of Nebraska has filed a petition in the district court for the county in which the lands are located, praying a decree against, and the sale of, the parcels of real estate set forth in the list published therewith, for the several amounts named therein and costs of suit." It is further required that "such notice shall be signed by the county treasurer and shall be published once a week for four successive weeks in some newspaper of

general circulation in the county in which the lands are situated, or, if no newspaper of general circulation shall be published in the county," etc. But it is provided: "The county commissioners of each county shall designate the newspaper in which said notice, and in which all notices of tax sales made by the county treasurer hereinafter provided for, shall be published, *provided,* the county treasurer shall designate such newspaper where the county commissioners fail to do so." The county treasurer completed his petition and filed it with the clerk of the district court on the first day of July, and on the day previous received the following written communication from the chairman of the board of county commissioners.

"OMAHA, NEB., June 30, 1904.

"Robert O. Fink, County Treasurer Douglas county, Nebraska:

"You are hereby notified that the 'Omaha Evening World-Herald' has been designated by the board of county commissioners as the official paper for the publication of the official advertising of Douglas county, and that it is likewise designated as the newspaper for the publication of the delinquent tax notices provided for by section 7, article IX, chapter 77 of the Compiled Statutes of Nebraska for 1903, entitled 'Revenue,' in so far as said section applies to the publication of delinquent tax notices for Douglas county for the year 1904.

"Respectfully yours, R. O'KEEFE,
"Chairman Board of Co. Comr's."

At the time the petition was filed the board had not taken the action mentioned in the notice and was not in lawful session, and could not be until the following day, when they contemplated assembling as was known as well to the treasurer as to the chairman. At ten o'clock A. M. on the 2d day of July, that being the day following the last day provided by law for filing the petition, the board did assemble and take such action as was indicated by the above quoted letter. The petition had been filed late

in the evening of the preceding day, but whether the board knew of that act we are not informed. At nine o'clock A. M. on the 2d day of July, or about an hour before the assembling of the board, the treasurer, having ascertained that they had taken no formal or official action, designated the "Omaha Bee" as the paper in which said notice should be published and delivered the same to it for that purpose. It is admitted that full ten days were required for putting the notice in type and effecting its first publication, but it is provided by the act (sec. 45) that "throughout all of the proceedings it shall be the duty of the court to disregard all informalities or irregularities which may have occurred, from the inception of every state, county or city general tax up to final confirmation of sale. The performance of the various acts of officers herein enjoined shall be deemed sufficient if they shall substantially comply with the requirements of this act and no variation in the time or manner of performing such acts shall be deemed or held to be jurisdictional; and when any such acts cannot reasonably be performed within the times herein provided, additional time may be given, without notice, by a proper order of court." It is further provided that all tracts of land concerning which answers shall not have been filed on or before the first day of September shall be treated as in "default," and the issues concerning all others shall be triable on and after the first Monday of the following October. The court has no doubt power to relieve against default in pleading and to permit answers to be filed out of time as in ordinary actions. On the same 2d day of July the plaintiffs, the proprietors of the World-Herald newspaper, applied to the district court for Douglas county by a petition setting forth the foregoing facts and praying for a writ of mandamus compelling the publication of the treasurer's notice in that paper. The writ, after answer and a trial, was denied, and the plaintiff prosecutes a petition in error.

The evidence shows that the notice has been in fact published in the Bee for and within the time and manner

prescribed by the statute, and that it was a notice in all respects such as the law requires to be published. That such publication was, under the liberal provisions of the statute above quoted, sufficient to confer jurisdiction upon the court for the purposes of the act, there can be no doubt. In other words, it has not been and cannot successfully be contended that an owner of a tract of land can impeach a decree against it, either collaterally or upon proceedings in error, upon the ground that the newspaper in which the notice was published was not designated for that purpose by the proper official authority, nor would such an objection, if made by such an owner in the trial court, have relieved him from default or defeated jurisdiction over his property. It is not disputed that the Bee is a publication answering in all respects the requirements of the statute. The proceeding is in the nature of an adversary action, and all irregularities and informalities are expressly cured by the statute. Whether regularly or otherwise, the taxpayers, parties to the proceeding, have had the precise notification and opportunity to appear and defend to which the statute entitled them, and a republication of the notice in compliance with the prayer of the alternative writ would entail upon the county a very large expenditure for no useful or practical purpose. With grounds of controversy between the corporation or inhabitants of Douglas county and its treasurer or the Bee Publishing Company, if there are any, the relators have no concern, or, if they have any, they are not presented in a litigable manner by this application for a mandamus.

We think the case falls precisely within the language of the following clause of section 45 of the act: "The performance of the various acts of officers herein enjoined shall be deemed sufficient if they shall substantially comply with the requirements of this act and no variation in the time or manner of performing such acts shall be deemed or held to be jurisdictional." The most that the relator can contend for is that the Bee was not designated

in the manner prescribed by the act. Whether it was so or not, the issues in this action do not call upon us to decide. It appears, however, that the designation was made by the county board within a reasonable time, and that the designation by the respondent was therefore premature. The relator was entitled to relief when this action was begun, and the respondent should pay the costs.

For these reasons, we recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed with costs of the proceedings taxed to the respondent.

AFFIRMED.

W. W. ROBERTS, APPELLEE, v. C. W. LEMONT, APPELLANT.

FILED MARCH 8, 1905. No. 13,729.

1. **Agreement in Restraint of Trade:** INJUNCTION. A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction.
2. ———: VALIDITY. In determining the validity of a contract in restraint of trade, the test is whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so much as to interfere with the interest of the public.
3. ———: PUBLIC POLICY. A contract in restraint of trade which is not limited either in time or space is against public policy and void.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Reversed.*

M. D. Tyler, for appellant.

Mapes & Hazen, contra.

OLDHAM, C.

This suit was instituted in the district court for Madison county by W. W. Roberts, appellee, to enjoin C. W. Lemont, appellant, from soliciting or writing fire, hail, cyclone and plate glass insurance in Norfolk, Nebraska. A temporary restraining order was granted which, upon final hearing in the district court, was made perpetual. From this decree Lemont brings an appeal to this court.

The facts underlying the controversy are that prior to May, 1902, Lemont was engaged in the real estate and insurance business in Norfolk, Nebraska. Roberts, the appellee, was engaged in the same business in the same place; the two parties were then occupying the same office. During the month of May negotiations were entered into between them which resulted in the sale by Lemont to Roberts of his office furniture and insurance business for the sum of $240. After this sale Lemont retired from the insurance business and devoted his attention to real estate for about 15 months, when he attempted to reengage in the business of soliciting insurance. Roberts thereupon instituted the case at bar, alleging, in substance, that the defendant Lemont, "in consideration that the plaintiff would purchase from him his fire, hail, cyclone and plate glass insurance agency for the sum of $240, agreed with the plaintiff that he would turn over to said plaintiff the said insurance agency, furniture and the good will of said defendant and business, and that he, the said defendant, would at once cease a fire, hail, cyclone and plate glass insurance business in Norfolk, Nebraska, and not again engage in such business in Norfolk, Nebraska." The petition further alleged the compliance of plaintiff with the terms of the contract, and that the defendant, in violation of the terms and conditions of the contract, had and was engaged in the business of soliciting insurance in the city of Norfolk. The prayer was for an injunction permanently restraining the defendant from engaging in such business in the city of Norfolk. The answer admitted

the sale of the business to the plaintiff for the sum stated in his petition, and denied each and every other allegation therein. The testimony relied upon to establish the agreement is that of the plaintiff and is substantially as follows:

In answer to the question as to what his agreement was, he said: "Mr. Lemont purposed to sell out his insurance business to me, and there was considerable talk about the price, and finally we agreed on $240, and in that there was some furniture, and Mr. Lemont was to go out of the insurance business and have nothing to do with the insurance business, and I was to have nothing to do with the real estate."

Q. You may state what Mr. Lemont said?

A. Mr. Lemont said he turned over the good will and quit the business.

Q. What did he say about remaining out of business?

A. That Mr. Lemont was to stay out of business.

Q. For how long?

A. There was no stated time. He agreed to quit the business.

Q. What did he say as to again going into the insurance business at Norfolk?

A. He did not talk as if he would ever go into the insurance business at Norfolk.

Q. What did you understand as to the good will of the business?

A. I understood he was to sell his business.

Q. Good will?

A. Yes, sir.

Q. What did he (Lemont) say about remaining out of business?

A. That Mr. Lemont was to stay out of business.

Q. For how long?

A. There was no stated time. He agreed to quit the business.

There was no serious conflict between this testimony of the plaintiff and that of the defendant, so that if the testi-

mony of plaintiff is sufficient to sustain the judgment of the trial court it should be affirmed.

The first proposition that confronts us is that the contract relied upon is one in partial or total restraint of trade, and as such it is not a favorite of the law. While valid agreements in restraint of trade may be established by clear and satisfactory proof, and when so established their breach may be restrained by injunction, yet to obtain such relief there must be no doubt or uncertainty in regard to their terms, or the consideration on which they are founded. Ordinarily a contract prohibiting one of the parties from carrying on a specific trade or business, without any limitation as to time and place, is against public policy and void. *Tecktonious v. Scott*, 110 Wis. 441, 86 N. W. 672; *Berlin Machine Works v. Perry*, 71 Wis. 495, 38 N. W. 82. In *Keeler v. Taylor*, 53 Pa. St. 467, Chief Justice Woodward declared that such contracts, if they were not limited to a reasonable time, as well as confined to a reasonable space, were void at law, and that if the terms they imposed were at all hard equity would not enforce them. To the same effect is the holding in *Brewer v. Marshall*, 4 C. E. Green (N. J.), 537, 547. The general rule is that a contract in partial restraint of trade should be reasonable in its terms and limited in its extent, both as to time and space, but where the conditions appear to be reasonable, and the contract is limited as to space, it has been held that it may be enforced, even though unlimited as to time. *Gill v. Ferris*, 82 Mo. 156; *Smith v. Brown*, 164 Mass. 584. The test is whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so much as to interfere with the interest of the public. *Mandeville v. Harman*, 42 N. J. Eq. 185. Now, the contract alleged on in the case at bar and proved by plaintiff's testimony is one in total restraint of the right of the defendant to engage in the business of soliciting fire, hail and cyclone insurance. It is not limited by the testimony either by time or space.

It is urged however by appellee that we should construe this contract as though it had been made simply to limit the right of the defendant to engage in the insurance business in the city of Norfolk. If there had been testimony in the record tending to show that such was the agreement and understanding between the parties, his contention would find some support in the case of *Hubbard v. Miller*, 27 Mich. 15, and in the language used by POUND, C., in *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304, which however is not officially reported, and consequently we are not bound by the reasons. In this latter case the contract was in writing, and the agreement was to not engage in the sale of a particular line of merchandise during the term of a written lease made to plaintiff. Oral evidence was permitted to explain the ambiguity of the contract as to place, and show that the intention of the parties was to limit the right to the particular building which the plaintiff had leased, and as the contract so proved was one reasonable in terms, and limited both as to time and place, it was upheld.

The ecase of *Mollyneaux v. Wittenberg*, 39 Neb. 547, cited by appellee, is one in which the contract was limited as to both time and place. In this case, however, the action was at law for a breach of the contract, and the only question determined was as to the sufficiency of the petition to state a cause of action. We find no well-considered case that has ever upheld a contract which would absolutely prohibit one of the parties thereto from ever engaging in any legitimate occupation at any place, and if the evidence in the case at bar proves a contract at all in restraint of trade, it establishes one which would prevent the defendant in the instant case from engaging in the insurance business, not only at Norfolk, but at any other place in the state of Nebraska, or the United States, and such a contract, we think, is clearly against public policy and void. *Wright v. Ryder*, 36 Cal. 342.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings.

AMES and LETTON, 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.

LEROY B. SLUYTER V. GEORGE W. SCHWAB.

FILED MARCH 8, 1905. No. 13,733.

Title: ADVERSE POSSESSION: TACKING. Where the owner of two contiguous lots of land conveys one of such lots to A, and subsequently conveys the other to B, *held* that, in a contest between A and B concerning the boundary line between the lots, A cannot, for the purpose of establishing title by adverse possession against B, tack his own possession to that of the common grantor.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed with directions.*

William M. Clark, for plaintiff in error.

J. L. Epperson & Sons, contra.

OLDHAM, C.

This was an action in ejectment by George W. Schwab, plaintiff in the court below, against Leroy B. Sluyter, defendant in the court below, to recover possession of two feet off the south side of lot 2, block 3 of Dickson's addition to the village of Clay Center, in Clay county, Nebraska, and $100 damages for the unlawful detention of the premises. The facts underlying the controversy are that lots 2 and 3 in block 3, in Dickson's addition to Clay Center are contiguous lots, 2 lying north of 3. After the addition was platted and recorded Dick-

son conveyed lots 2, 3 and 4 of block 3 by warranty deed to one Cowen, who had a house erected on the north line of lot 3, which projected over and beyond the lot line from one to two feet. This house was erected in 1886. In March, 1887, Cowen conveyed the three lots by warranty deed to James Kinkaid, and on December 8, 1890, Kinkaid conveyed lot 3 by warranty deed to defendant Sluyter, and on April 3, 1899, he also conveyed lot 2 by warranty deed to plaintiff Schwab; after plaintiff Schwab had purchased lot 2 a difference arose as to the location of the boundary line between the two lots. Schwab procured a survey of the lots which fixed the boundary line two feet south of the line contended for by Sluyter. Schwab thereupon brought his suit in ejectment to recover possession of the disputed strip. This suit was instituted on the 4th day of December, 1900. Sluyter filed an answer to the petition which, in substance, amounted to a general denial and a plea of adverse possession. At the trial of the cause a jury was waived by both parties, and the cause tried to the court, and a judgment rendered finding generally for the plaintiff on his petition. On this judgment and finding the clerk of the court subsequently entered a judgment for $100 damages for the unlawful detention of the premises against defendant Sluyter. A motion for a new trial was filed by defendant and overruled, and error proceedings instituted in this court to reverse the judgment. After these proceedings had been instituted, counsel for plaintiffs in the court below filed a motion to have the judgment corrected by a *nunc pro tunc* entry and judgment entered finding the issues in favor of the plaintiff for the possession of the land in controversy, without any judgment for damages for the unlawful withholding of the premises. This corrected judgment was entered over the objection of defendant Sluyter.

The first error called to our attention is that the judgment in favor of plaintiff is unsupported by the evidence. This objection is based on the theory that defendant Sluy-

ter was entitled to tack his possession of lot three to that of his grantor Kinkaid, and that when this possession was so tacked, it clearly showed that he had been in adverse possession of the premises for more than ten years before the filing of the petition. The fallacy of this contention is apparent from the fact that Kinkaid during his occupancy owned both the lots in controversy, and his possession of one was in nowise adverse to his claim of ownership of the other. No adverse holding was begun until Kinkaid conveyed lot three to defendant Sluyter; from the date of that conveyance the statute began to run against Kinkaid and his subsequent grantor and in favor of Sluyter, and not until then. To tack the possession of a grantee to that of a grantor it must be against some one to whom the grantor held adversely.

It is next contended that the judgment should be reversed because the premises were occupied as a homestead by defendant Sluyter, and his wife was not made a party defendant in the action. But there is no evidence in the record tending to show that defendant Sluyter ever had a wife, or that he ever occupied the premises as a homestead.

It is conceded that there is no evidence to support the finding of the district court in awarding $100 damages for the unlawful occupancy of the premises by the defendant Sluyter. Consequently the judgment was clearly erroneous for this reason at the time error proceedings were instituted in this court. The only injury however which defendant could suffer from this erroneous judgment would be the costs which he expended in procuring a review of the cause in this court before its attempted correction in the court below.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the court below to enter a judgment in favor of plaintiff for the possession of the premises in dispute, and one cent damage for the unlawful detention thereof.

AMES and LETTON, 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, with directions to the court below to enter a judgment in favor of plaintiff for the possession of the premises in dispute, and one cent damage for the unlawful detention thereof.

REVERSED.

JOHN NOLDE V. JAMES A. GRAY.*

FILED MARCH 8, 1905. No. 13,740.

1. **Land Contract: BREACH: MEASURE OF DAMAGES.** In an action by a vendee to recover damages for breach of a contract to convey land, the measure of damages is the difference between the price agreed to be paid and the value of the land when the breach occurred with interest.
2. **Grounds of Recovery.** To recover such a measure of damages, the vendee must either be evicted from the premises or rescind his contract because of the failure or inability of the vendor to perform, and thus place the vendor *in statu quo*.
3. **Evidence** examined, and *held* not sufficient to sustain the judgment of the trial court.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed.*

L. J. Capps and *Charles H. Sloan,* for plaintiff in error.

L. B. Stiner and *Tibbets Bros. & Morey, contra.*

OLDHAM, C.

This was an action instituted by James A. Gray, plaintiff in the court below, against John Nolde, defendant, for the breach of a written contract for the sale of a quarter section of land lying in Clay county. The petition alleged

* Rehearing denied. See opinion, p. 378, *post.*

that on the 6th day of May, 1901, and prior thereto, the defendant was the owner in fee simple of the land (describing it); that on said day plaintiff and defendant entered into a contract in writing for the sale and purchase of said premises, by the terms of which plaintiff was to pay $1,000 in cash and $5,000 at his option, with interest at 6 per cent. until such payment was made; that in conformity with said agreement he entered into and still retains possession of the land in controversy. That on the 4th day of February, 1903, in pursuance of said contract, he tendered the defendant $5,000 and interest, the amount then due on said contract, and demanded a deed, which defendant refused and neglected to make. The petition alleged no facts on which any claim of special damages could be predicated, but it is alleged that the value of the land had increased between the time of the contract and the time in which the deed should have been made from $6,000 to $8,000, and that because of such increase the defendant refused to comply with the conditions of the contract and execute and deliver a deed to plaintiff. Plaintiff prayed judgment against the defendant for $8,000, with interest thereon from February 6, 1903, and costs of suit. The defendant filed an answer to this petition which, in substance, admitted the execution of the written contract, but alleged the signature thereto had been procured by fraud, and denied each and every other allegation in the petition, and, by way of counterclaim, asked for a judgment for the rents and profits of the land during the time of its occupancy by plaintiff. Plaintiff filed a reply practically in the nature of a general denial. On issues thus joined there was a trial to a jury in the court below, a judgment for plaintiff for $2,969.63, and defendant brings error to this court.

The facts underlying the controversy are that in 1901 a written contract for the sale of the lands in controversy was entered into between plaintiff and defendant by which the plaintiff agreed to purchase the lands for the sum of $6,000, $1,000 of which was paid in cash, and the

remainder, as the contract read, was to be paid at the option of the vendee, and in consideration of the payment of the amount provided defendant Nolde agreed "at his own costs to execute and deliver to said party of the second part, or his assigns, upon surrender of this contract, a warranty deed to the above described premises, together with an abstract showing title clear."

On February 6, 1903, in alleged conformity with this contract, plaintiff Gray, through his attorney, Mr. Stiner, called on defendant Nolde and told him he was willing to pay the remainder of the purchase money with interest if he (Nolde) would execute a warranty deed, and have his wife sign and acknowledge it, to the premises in controversy; that he went into the bank of Sutton with Mr. Nolde and procured the exact amount of the money that was due, and said to Mr. Nolde that he would leave that money with Mr. Dinsmore, the president of the bank, if he would execute a deed with his wife to the land; that he gave Nolde a deed and told him to execute it and bring it back to the bank, have his wife sign with him, and that Mr. Dinsmore would then give him the full amount of the money due on the contract. Mr. Dinsmore, the president of the bank, testifies that he was called in during the conversation, and that the money was left with him, with directions to turn it over to Nolde if he brought in the deed properly executed by himself and wife, and that Nolde never returned the deed. There was evidence introduced also tending to show that the price of the land in dispute had advanced about $2,000 from the time the contract was entered into and the time at which the deed was demanded. It is unnecessary, in view of the conclusion to be reached, to examine the testimony offered by defendant.

In this condition of the pleadings and the evidence the court told the jury in the third paragraph of instructions on his own motion that they must return a verdict for the plaintiff, and in the 4th instruction placed the burden on the plaintiff to prove the amount of his damages, and in the 5th paragraph of instructions he gave the following

on the measure of damages: "In arriving at the amount of damages which plaintiff is entitled to recover, you will take such amount as from the evidence you find to have been the fair market value of the land in question on February 6, 1903, and deduct therefrom the unpaid balance of the contract price of the real estate, to wit, $5,000, with interest thereon at the rate of 6 per cent. per annum from January 1, 1903, and the difference betwen said sums found is the amount which plaintiff is entitled to recover as damages." This instruction plainly resulted in the monstrous verdict and judgment complained of.

When plaintiff, under the terms of the contract alleged on, was prepared to fully comply with the conditions on his part, two remedies were plainly open to him. One was the tender of the amount due on the contract, and demand of an abstract of title and the warranty deed from the defendant, and not from the defendant and his wife, and if the defendant refused to execute and deliver such a deed, plaintiff might then pursue his remedy for a specific performance of the contract, or he might rescind the contract because of defendant's refusal to execute the deed, and sue to recover back the money paid, and the reasonable profit on his investment. But he did neither. He made an alleged tender, conditioned on the execution of a deed by both defendant and his wife, which the contract did not call for. Having done this, he withdrew his tender, retained possession of the premises and still retains them, claiming them as his own, and instituted his action to recover back the present value of the premises because of defendant's failure to give him a deed. If the judgment in the court below was affirmed, it would leave plaintiff in possession and equitable ownership of the land in dispute, relieve him of the payment of $5,000, and interest due on the purchase price of the land, and give him a judgment at law against the defendant for nearly $3,000, in return for his payment of but $1,000 of the purchase price. Such a judgment as this would fall nearly under the ban of the command handed down to the inspired Law

Giver in the awful majesty of Sinai, which says, "Thou shalt not steal."

It is contended however by counsel for defendant in error that the instruction of the trial court is supported by the holding in *Kirkpatrick v. Downing,* 58 Mo. 32, 17 Am. Rep. 678, in which the rule was laid down that, in an action by a vendee to recover damages for breach of a contract to convey land, the measure of damages is the difference between the price agreed to be paid and the value of the land when the breach occurred, with interest. The opinion in this case is a well-considered one and contains a thorough review of the cases, both American and English, on the measure of damages in an action for a breach of contract for the conveyance of real estate, and we have no quarrel with the conclusion reached in this opinion. The difference between this case and the one at bar is this: In *Kirkpatrick v. Downing, supra,* the plaintiff, who was the purchaser of the land, had been evicted from the land by the vendor before the action was instituted. *Krepp v. St. Louis & S. F. R. Co.,* 99 Mo. App. 94, 72 S. W. 479, is also relied upon by defendant in error as an authority which sustains the measure of damages given by the trial court. The facts in this case were that the plaintiff had purchased 400 acres of land from the defendant railroad company. When the railroad company proceeded to execute its deed to the land, it discovered that it had already conveyed 40 acres of this land to another vendee. It thereupon tendered a return of the purchase price, or a deed for the 360 acres to which it held the title, and $60, the amount of the purchase price of the 40-acre tract which it had previously conveyed. Plaintiff brought his suit, asking for the conveyance of the 360 acres, which the company did not resist, and also asking for $200 damages for the failure to convey the 40-acre tract for which he had paid. The court held in this controversy that the proper measure of damages was not the contract price of $60, but the actual value of the land at the time the deed should have been executed, and per-

mitted a recovery of $175 damages by the plaintiff. So while each of these cases announced a measure of damages which is supported generally by the American and modern English authorities, neither of them are in point. The whole trouble with the measure of damages allowed in this case is that it permits plaintiff to retain the land and also recover for its enhanced value at the time the deed was demanded. Under the rule submitted in the case at bar, if plaintiff had paid the full amount of the purchase price, he would have been permitted to retain the land and recover $8,000 damages for defendant's failure to execute the deed, as he had contracted to do. If plaintiff had rescinded and placed defendant *in statu quo* before instituting his action, the rule announced would have been unobjectionable, but as it is it in fact gives plaintiff both the land and a large money judgment against defendant for failing to convey it to him. Such a judgment is shockingly unconscionable and wholly unsupported by the evidence.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and LETTON, 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.

The following opinion on motion for rehearing was filed June 22, 1905. *Rehearing denied:*

Land Contract: BREACH: ACTION. A vendee of real estate, while in possession and claiming to be the owner thereof under a contract of purchase, cannot maintain an action against his vendor to recover the amount paid on the purchase price for a breach of the contract to convey, together with the difference between

the value of the land at the date of purchase and the time when the breach occurs as damages. Before he can prosecute such an action he must rescind the contract, surrender the possession of the premises to the vendor, and thus place him as nearly as possible *in statu quo.*

BARNES, J.

In our opinion in this case, written by Mr. Commissioner OLDHAM, *ante,* p. 373, we held that the measure of damages in an action for a breach of contract to convey land is the difference between the price agreed to be paid and the value of the land when the breach occurs, with interest; that to recover the amount paid on the contract and such measure of damages, the vendee must either be evicted from the premises or rescind his contract, and thus place his vendor *in statu quo.*

The defendant in error has filed a motion for a rehearing, and now contends that, while the propositions of law announced are correct in the abstract, and the facts are correctly stated in the opinion, yet the rule announced is misapplied. In support of his contention he relies on *Seaver v. Hall,* 50 Neb. 878, 882; *Winside State Bank v. Lound,* 52 Neb. 469; *Reed v. McGrew,* 5 Ohio, 375, 386, and *Taylor v. Browder,* 1 Ohio St. 225, 228. An examination of these cases discloses that they are not in point. In the leading case, *Reed v. McGrew, supra,* the court said:

"Where the plaintiff sues to recover back money paid upon a contract which has failed, he must show that he has done all in his power to restore the defendant to the same situation in which he was when the contract was made. If the possession of the property contracted for has passed to the vendee, it must be restored to the vendor; and if, owing to the negligence or any other act of the vendee, it is not in his power to restore the possession, although he is not without remedy, still he cannot have the action for money had and received. He must sue upon the contract and recover damages for its violation. For instance, A contracts to sell a quarter section of land

to B, and receives one-half the purchase money. B takes possession. The title afterward fails, or A refuses to convey. B may surrender the possession to A, thereby assenting to a rescission of the contract, and recover back the money paid, in an action for money had and received. Or he may consider the contract as subsisting, and claim damages for its breach. In the latter case, it would not be necessary, as a preliminary step, that he should surrender the possession."

It thus appears that, in case the vendee elects to sue for the recovery of the purchase price, together with his damages for the failure to convey, as was done in this case, he must surrender the possession of the premises to the vendor before he can maintain his action. It appears from the testimony in this case that the land in question between the time of the purchase and the date of the failure to convey had increased in value to the amount of about $2,000; that the vendee had paid $1,000 of the consideration money, and had entered into possession of the land. The verdict and judgment in the court below were for nearly $3,000, and were in accordance with the form and cause of action outlined by the petition. So it is evident that the vendee, while still in possession of the land, and claiming it as his own, brought suit against the vendor for a failure to convey, and recovered the full amount paid by him on the purchase price, together with nearly $2,000 damages. That such a situation calls for a reversal of the judgment below is beyond question.

It appears from the foregoing that our opinion is right, and the motion for a rehearing is therefore

OVERRULED.

FRANK E. JANDT V. SIOUX COUNTY.

FILED MARCH 8, 1905. No. 13,688.

Taxation: ASSESSMENT IN TWO COUNTIES. Certain live stock in herds was removed on the 7th day of April from Sioux county, in which it had been situated for three years and where it was legally liable to be listed and assessed for taxation, to Box Butte county, in which it was listed and assessed improperly. The owner paid the taxes in Box Butte county. *Held*, That these facts do not relieve him from paying the tax properly and legally assessed in Sioux county.

ERROR to the district court for Sioux county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

J. E. Porter, for plaintiff in error.

M. J. O'Connell and *W. H. Fanning, contra.*

LETTON, C.

This is an action brought to recover back taxes paid under protest. Frank E. Jandt was in 1898, and for some years previously, a ranchman living in Dawes county. In the spring of 1895 he was the owner of a herd of 146 horses, part of which he placed in the keeping of one Swinbank in Sioux county, and some with one Ashton in the same county, under agistment contracts which by their terms expired April 1, 1898. These horses were listed for taxation by each of their keepers in Sioux county for the years 1895, 1896 and 1897, and the taxes thereon paid by Jandt. About April 1, 1898, the agistment contracts having expired, the horses were rounded up, and on April 7, 1898, delivered to Jandt who immediately took them to Box Butte county, where he had other horses. They were kept in Box Butte county until some time in June, when they were delivered to Jandt in Dawes county, and in the same month again taken to Sioux county for a short time. On April 11, 1898, the horses were listed

for assessment in Box Butte county by the agent of Jandt, in whose possession they then were. Some time after this the horses were listed for taxation in Sioux county by Swinbank and Ashton, and taxes levied against them in that county. Jandt paid the taxes levied and assessed upon the property in Box Butte county, without any knowledge or notice that the property had afterwards been listed in Sioux county. He afterwards paid under protest the taxes assessed against the property in Sioux county, and brought this action to recover the same. The district court found that the property was properly listed and assessed for taxation in Sioux county.

He contends that Swinbank and Ashton, who had been in possession of his property under the agistment contracts, had no authority to list the horses as his property after the 7th of April, when they delivered the property to him and the relation of principal and agent had ceased. He further contends that section 10, chapter 77, article I, Compiled Statutes, 1901, should be construed liberally, so that he should not be compelled to pay his taxes twice upon the same property, and further that section 20 of the same chapter applies, which provides that "in all cases that may arise under this chapter, as to the proper place to list personal * * * property, the place for listing and assessing should be determined and fixed by the county board; and when between different counties, or places in different counties, by the auditor of public accounts," and that the county cannot collect the tax until it has submitted the question to the state auditor. Section 10, *supra*, is as follows:

"Live stock in herds or not connected with a farm shall be listed or assessed in the county where such live stock may be on the first day of April of the year for which the property is required to be listed. For the purpose of assessment and taxation the live stock mentioned in this section shall be deemed to be at the place where the owner or keeper thereof shall have his ranch, provided such ranch shall be in this state."

The horses on the 1st of April, 1898, were in herds and not connected with a farm. The keepers thereof, Swinbank and Ashton, were ranchmen living in Sioux county, and the property had been in that county for three years. For the purpose of assessment and taxation the horses were deemed to be at the ranches or residences of Swinbank and Ashton in Sioux county on April 1, and were properly assessed in that county. Since they were not in Box Butte county on April 1 they were not taxable in that county. The fact that they were afterwards removed from Sioux county to another county in which taxes were improperly levied upon them does not affect the validity of the assessment in Sioux county. Further, it is entirely immaterial that the property was listed for taxation by Swinbank and Ashton after it had passed out of their keeping. If they had not so listed it, it would have been the duty of the respective precinct assessors to have ascertained the number and value of the horses upon April 1 and listed them for taxation of their own motion. It is unfortunate that the plaintiff was ignorant of the law, and paid his taxes in Box Butte county where the property was unlawfully listed and assessed. He was under no legal or moral obligation so to do, and the fact of his having done so furnishes no ground of defense against the enforcement of the taxes in a county where the property was properly and legally listed for assessment for taxation. A "liberal construction" of the law, such as he asks for, could not aid him, since in order to hold these taxes invalid it would be necessary to annul and not construe the statute.

We think that section 20 which provides how the place of listing shall be fixed where any question arises has no application to the present controversy. If at the time the assessment was made there had been a controversy between the two counties as to the listing of this property, it would have been proper to submit the matter to the auditor of public accounts for determination, but this not having been done the section has no application. The

language of section 10 is so clear in its application to the facts in this case that further discussion is unnecessary.

The district court was clearly right and its judgment should 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.

SARAH E. PATTERSON V. FIRST NATIONAL BANK OF HUMBOLDT.

FILED MARCH 8, 1905. No. 13,724.

1. **Pleading**: HARMLESS ERROR. Where a petition is for money had and received, the answer pleads payment by check, and the reply alleges facts negativing and disputing the payment alleged in the answer, the reply is not inconsistent with the petition, and it is error to strike out its allegations. But where proof is admitted of the allegations stricken from the reply, the error is without prejudice.
2. **Checks**: PAYMENT: EVIDENCE. Where a check for $450 was drawn by a depositor in a bank upon her deposit, payable to the same bank or order, its indorsement by the bank, and return to the drawer as paid, is *prima facie* evidence of the receipt by the bank of the amount evidenced by the check. It is not conclusive, but is open to explanation or denial.
3. **Burden of Proof.** Where a depositor draws a check upon a general deposit in a bank payable to the bank or order, the purpose being, as the depositor claims, to change a general deposit subject to check into a time deposit in the same bank, and the check is returned indorsed paid, and the bank seeks to avoid liability by a plea of payment, the burden of proof is upon the bank to show that the amount of the check was paid at the depositor's request to a third party.
4. **Evidence** offered as to other transactions, *held* properly rejected as *"res inter alios acta."*
5. **Evidence.** Where the hand to pay is also the hand to receive, payment may be made by a transfer of credits upon the books of a bank.

6. Instruction. Where a depositor claims that a check for $450, payable to the "First National Bank," was given by her to the same bank for the purpose of changing her general deposit therein into a time deposit, and the only controversy is whether or not a certain "time check," signed by the president of the bank by his individual name alone, was fraudulently delivered to her in exchange for the check instead of a certificate of deposit, or whether the check was paid, the money loaned by her to the bank president individually, and the "time check" given by him as evidence of his own debt, it is error to instruct the jury that before the plaintiff can recover she must prove "not only that the $450 check was fraudulently procured from her, but that the time checks given her were fraudulent," since the plaintiff does not claim there was fraud in procuring the check.

ERROR to the district court for Richardson county: ALBERT H. BABCOCK, JUDGE. *Reversed.*

J. H. Broady, for plaintiff in error.

Francis Martin, E. A. Tucker and *E. Falloon, contra.*

LETTON, C.

This action was brought by Sarah E. Patterson, as plaintiff, against the First National Bank of Humboldt, as defendant. The petition alleges that the plaintiff deposited the sum of $450 with the defendant on the 4th day of January, 1902; that the plaintiff requested its repayment about February 1, 1903, which request was refused, and that the defendant is indebted to the plaintiff for money had and received to that amount. The defendant pleaded payment. The plaintiff's reply was a general denial. Afterwards the plaintiff asked leave to file an amended reply, alleging in substance that on the 5th day of January, 1902, plaintiff and defendant agreed that $450 of the money on deposit should be changed from open account to time deposit for one year at five per cent; that the money was transferred, and that defendant pretended to give plaintiff the usual certificate of deposit for that

amount, but that the paper was merely signed by F. W. Samuelson, who was the president of the bank; that the transaction was conducted on the part of the defendant by F. W. Samuelson, as president; that she was ignorant of the form of certificates of time deposits, and believed that she was dealing with the bank and getting a proper certificate or she would not have given the check for $450; that she did not discover the fraud until about July 1, 1903, when she offered to return the paper and demanded her money, which was refused. A motion was made by the defendant to strike all that part of the amended reply which in substance set forth fraud upon the part of the defendant, which motion was sustained. The only issue therefore presented by the pleadings was whether or not the $450 had ever been paid. It appears that in December, 1901, the plaintiff, Mrs. Patterson, received a draft for $500 from her father's estate and deposited the same in the bank; that at that time she had some conversation with Mr. Liggett, the cashier of the bank, with reference to the rate of interest the bank would pay upon a time deposit; that he told her that for a six months deposit the bank would pay 3 per cent. per annum, and if left for a year it would pay 4 per cent. per annum. She was dissatisfied with this rate of interest and did nothing with regard to the matter at that time, saying she would see Mr. Samuelson, president of the bank. Sometime between that and the 4th of January, 1902, she came to the bank again, saw Mr. Samuelson and talked with him. What was said in this conversation is in dispute. An offer to pay 5 per cent. was made to her, she claiming it was made by Samuelson, as president of the bank, while defendant claims her transaction was with Samuelson individually. She then returned home, but afterwards on the 4th day of January she sent her husband to the bank with a check for $450, payable to the First National Bank. Mr. Patterson saw Mr. Samuelson, handed him the check and received in return a time check in form as follows:

"F. W. Samuelson, Loans. $450.

"HUMBOLDT, NEB., Jan. 5, 1902.

"Pay to the order of Mrs. Sarah E. Patterson, $450, Four Hundred Fifty & no-100 Dollars. Due in 12 mos at 5% Int. F. W. SAMUELSON."

"To the First National Bank, Humboldt, Neb."

Her account was at once charged with the amount of the check, and the individual account of Samuelson was credited with it. A year after this time Mrs. Patterson took this time check to the bank, saw Mr. Samuelson and received from him $22.50 interest, together with a new time check in substance in the same form payable January 5, 1904. In July, 1903, Mr. Samuelson, who was largely engaged in enterprises outside of his banking interests, became financially embarrassed and was unable to pay his obligations. He sent a letter to each of his creditors, notifying them of this fact, and asking them to meet at the office of Francis Martin in Falls City, Nebraska, for the purpose of arranging his affairs so that his assets could be preserved for his creditors. A meeting was held on the 6th day of August, 1903. Mrs. Patterson received one of these letters, and Mr. Patterson attended the meeting, apparently taking no part therein except to listen to the conversation, and after his return home a demand was made upon the bank for the payment of the $450, which was refused. The question is whether the money was a time deposit or a loan to Samuelson individually. There is a sharp conflict in the testimony with regard to the transaction at the bank. If the story of Mr. Liggett, the cashier, Butterfield, the assistant cashier, and Mr. Samuelson is true, it is clear that the transaction was not with the bank, but with Samuelson as an individual; while if Mrs. Patterson and her husband are to be believed, the giving of the time check by Samuelson was a fraud upon her, and the bank is liable for the amount as a time deposit.

The first assignment of error is that the court erred in sustaining the motion to strike out part of the plaintiff's reply. The petition was for money had and received. The defendant admitted the receipt of the money and pleaded payment. The amended reply in substance admitted that the check for $450 was drawn upon the fund by the plaintiff as alleged in the answer; but further alleged that the check was given to transfer the $450 from an open deposit account in the defendant's bank to that of a time deposit in the defendant's bank, and that the time deposit had never been paid. The reply contained a number of other allegations, setting forth that the president of the bank, at the time the $450 check was drawn, gave plaintiff a paper signed by him individually, which she believed was a certificate of deposit, and thus perpetrated a fraud upon her.

We can see no departure in this reply from the cause of action stated in the petition. The subject matter of the action is the money which was deposited in the bank which the plaintiff claims has never been paid to her. When the bank set up payment by a check this was new matter, and the plaintiff was entitled in her reply to allege any facts which might exist, negativing and disproving the payment by check alleged in the answer. The reply is not in any manner inconsistent with the petition. In *Hoover v. Missouri P. R. Co.*, 16 S. W. (Mo.) 480, the facts were that a copartnership brought an action in the firm name; the answer set forth a release of the obligation, and the reply alleged that the release was a fraudulent contrivance collusively made between one of the partners and the defendant for the purpose of throwing the burden of the firm's indebtedness against the other partner. This was held to be a good plea to the release and properly set up in the reply. While the amended reply is not a model pleading by any means, we think that it was error upon the part of the learned trial judge to strike out all its allegations. It is apparent however from a consideration of the evidence and the rulings of the court thereupon that

the case was actually tried in the same manner as it would have been if the matter had not been stricken out. The court permitted the fullest investigation into all the facts and circumstances attending the transaction, and allowed the plaintiff to testify as to her understanding of the nature of the dealing between her and Samuelson, and to her reliance upon his official position as president of the bank when she accepted the time check and the renewal thereof. This being the case the plaintiff was in nowise prejudiced by the order striking out part of the reply.

The court properly laid the burden upon the bank to show by a preponderance of the evidence that it had paid her the amount of her deposit.

It is contended that the verdict is against the weight of evidence. Mrs. Patterson's own testimony shows that she had known Mr. Samuelson for twenty years, and that she reposed great confidence in his honesty and integrity. It was left to the jury to say whether or not the plaintiff dealt with Samuelson in his individual capacity or whether she dealt with him as president of the bank. The evidence might have supported a verdict for either plaintiff or defendant. It is in the determination of such matters as this that the peculiar benefit of the jury system lies. Experience has shown that the accumulated experience and wisdom of twelve unbiased and impartial men applied to the testimony in such a case as this is the best touchstone to discover the truth. It would be an invasion of the province of the jury to set aside the verdict as being against the weight of evidence.

Evidence was offered by the plaintiff to show that one Jacob Auch went to the bank some time in 1897, with money, and asked for a time deposit; that he was given by Mr. Samuelson a paper signed by him in his private capacity, in substance like the paper offered in evidence in this case; that he took it home before he noticed the character of the paper; that after he noticed this he took it back to the bank, and that Samuelson not being present in the bank the cashier cashed the paper. This evidence was

excluded by the court upon defendant's objections, as tending to prove no issue in the case. This evidence was apparently offered by the plaintiff either upon the theory that it tended to show a fraudulent intent by Samuelson in the transaction with the plaintiff or that it tended to show that the bank had been in the habit, custom or course of dealing of issuing paper signed by Mr. Samuelson in his individual capacity and of paying the same when it was presented. We are clear that it was not admissible under either theory. Evidence of other transactions than that under investigation is sometimes admissible. In cases of fraud, where the knowledge or intent of the person charged is in issue, such evidence within certain limits may be adduced. The extent to which this may be done however varies widely in different states. In this state in actions for relief upon the ground of fraudulent representations it is not necessary to prove *scienter* or fraudulent intent at the time of the making of such representations, and therefore evidence proving that the person to whom fraud has been imputed has dealt fraudulently at other times, and in transactions wholly disconnected with that which is being inquired into, is not competent, since it only tends to throw light upon the intention. *Johnson v. Galick*, 46 Neb. 817. But even where such evidence is admissible it is usually confined to transactions at or near the time at which the principal event occurred, and which are part of a general plan or scheme to defraud. The evidence tendered was that in 1897, two years before the transaction with Mrs. Patterson, a similar transaction was had with Mr. Auch. This evidence standing alone we think is too far removed from the transactions now being considered to be admissible, even under a more liberal rule than obtains in this state.

The deposition of M. D. Ulmer, offered by the plaintiff and excluded by the court, showed that about the month of January, 1902, he had a time deposit in the bank; that he received a paper signed only by Mr. Samuelson; that the next time he went to town he drew the money out of

the bank, and was paid either by Samuelson or Liggett, he could not say which. The testimony of the witness was too vague, indefinite and obscure to be admissible, even if it fell within the rule admitting evidence tending to show a course of dealing by the bank. His evidence as to the contents of the paper was clearly incompetent and was properly rejected.

The court gave the following instruction which is assigned as error: "The court instructs the jury that it is an elementary principle of law that fraud is never presumed, but must be clearly and distinctly proved by the party alleging it. In the case at bar, the plaintiff alleges that the giving of her check for $450 to Samuelson, the charging of her account for a like amount, and the crediting of Samuelson's account for $450, together with the two time checks given to her, each for one year, by Samuelson, were fraudulent. The law presumes that this transaction was in all respects fair and honest, and before the plaintiff would be entitled to recover she must prove to you, by a preponderance of the evidence, not only that the check drawn on the bank for $450 was fraudulently procured from her, but that the time check for $450 given her by F. W. Samuelson, due in one year, as well as the renewal of the same, due in one year, were both fraudulent."

This instruction is clearly erroneous. It tells the jury that before the plaintiff would be entitled to recover she must prove, by a preponderance of the evidence, that the $450 check given by her to the bank was fraudulently procured, and must also prove that the time check for $450 and its renewal, given her by Samuelson, were fraudulent. This is a misstatement of the issue in the case, and places the burden of proof upon the wrong party. Under the evidence the plaintiff was entitled to recover unless the bank showed, by a preponderance of the evidence, that she intended by the transaction in question to change her deposit in the bank to a loan to Samuelson individually. The check drawn by her was payable to the bank, and the burden of proof was upon the bank to show that the transac-

tion by which her money was paid to Samuelson, instead of being placed as a time deposit, for which purpose she says the check was given, was had with her knowledge and consent, and the money thus paid at her request, and it was error to state otherwise. *Ziegler v. First Nat. Bank*, 93 Pa. St. 393; *Steckel v. First Nat. Bank*, 93 Pa. St. 376; *Resh v. First Nat. Bank*, 93 Pa. St. 397.

Complaint is made of instruction No. 2, given on the court's own motion, but the plaintiff's instruction No. 8 requested and given, as well as No. 2, given by the court, are alike subject to criticism as confusing the issue, hence she cannot well complain of No. 2. In a new trial upon the same issues neither of these instructions should be given in the same form as now.

The court refused to instruct that the check given by plaintiff payable to the First National Bank was a receipt. In the absence of other evidence a paid check drawn to payee or order is *prima facie* a receipt from the payee to the drawer. It is not conclusive, but is open to explanation or denial. It is a circumstance to be considered however, and the plaintiff is entitled to the full weight of the presumption. On its face the check bore out the plaintiff's theory of the case. Unexplained it was evidence of the payment of $450 from Mrs. Patterson to the First National Bank. The bank was entitled to explain or contradict its purport, but the plaintiff also had the right to ask that the jury be instructed as to the legal presumptions arising from the paper.

We do not agree with plaintiff's contention that the facts, even if found to be as claimed by defendant, do not show payment. If the jury believed the testimony of the bank officers, the debt of the bank was paid as effectually as if Samuelson in his capacity as president of the bank had paid the money over the counter to Mrs. Patterson, and she had returned it to him in specie as a loan. It is a familiar rule that when the hand to pay is also the hand to receive, the law does not require a useless formality, but the payment is made when the accounts are credited and debited and the transaction closed.

For the errors set forth, we recommend that the judgment be reversed and the cause remanded for further proceedings.

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.

BELLE FURER ET AL. V. CHARLES T. HOLMES.

FILED MARCH 8, 1905. No. 13,739.

1. **Judgment:** REVIVOR. Where an affidavit in a proceeding to revive a judgment alleges the existence of the judgment, the fact that it is unpaid and that it has become dormant, these allegations are sufficient to justify the district court in making a conditional order of revivor, and upon proper service and default to sustain an order making the revivor absolute.

2. **Limitation:** PRESUMPTION. The five years' lapse of time from the rendition of a judgment or the issuance of an execution thereon to the time that a judgment becomes dormant, only raises the presumption of payment thereof, and does not deprive the judgment of all vitality. *Wright v. Sweet*, 10 Neb. 190.

3. **Jurisdiction.** In this case the fact that the transcript of a judgment in justice court was filed in the office of the clerk of the district court after the judgment had become dormant did not prevent the district court from acquiring jurisdiction of proceedings to revive the judgment.

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

J. L. Epperson & Sons, for plaintiffs in error.

W. L. Minor and *John C. Stevens, contra.*

LETTON, C.

This is a proceeding in error to review an order of the district court reviving a judgment of a justice's court

which had been transcribed to the district court for the purpose of becoming a lien upon real estate. It appears that the judgment had become dormant before the transcript was filed in the district court, and it is contended by plaintiffs in error that, since the judgment was dormant before the transcript was filed, the district court never acquired jurisdiction of the proceedings to revive the judgment. They further contend that the order reviving the judgment is not sustained by sufficient evidence. For convenience we will consider these contentions in their inverse order.

1. The proceedings were prosecuted in the district court by the usual method of filing an affidavit, showing the existence of the judgment, the fact that it was unpaid, and that it had become dormant, and praying for an order of revivor. Upon consideration of this affidavit a conditional order of revivor was made by the district court, ordering the judgment to be revived unless sufficient cause was shown by a certain time therein stated. At the time fixed the defendants appeared specially for the purpose of objecting to the jurisdiction of the court, alleging as grounds therefor that the judgment was dormant before the transcript was procured and filed. At the hearing the special appearance was overruled, the defendants refused to plead further, and the conditional order was made absolute. In this state of the record, the allegations of the affidavit being undisputed furnished sufficient evidence to justify the district court in making the order absolute.

2. It is contended by plaintiff in error that, since the judgment was dormant when the transcript was filed, it could in no event become a lien upon real estate, and therefore, since there could be no object in filing the same in the district court, that court never acquired jurisdiction. This argument is more specious than sound. We held in *Creighton & Morgan v. Gorum,* 23 Neb. 502, that the district court had power to revive a judgment of the county court when a transcript had been filed for the purpose of procuring a lien upon real estate. See also *Garrison v.*

Aultman & Co., 20 Neb., 311; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675. In *Snell v. Rue*, 72 Neb. 571, it is said:

"In this state a judgment does not lose its vital force by the expiration of five years after its rendition without the issuance of an execution thereupon. It is not dead, but sleepeth. This court has held that a sale of real estate made upon a dormant judgment cannot be attacked collaterally after confirmation (*Gillespie v. Switzer*, 43 Neb. 772), and that the payment of a dormant judgment cannot be recovered back (*Gerecke v. Campbell*, 24 Neb. 306). In some states, at the expiration of the statutory period, a judgment becomes actually dead and is possessed of no force or potency for any purpose whatsoever, but such is not the case in Nebraska."

The filing of the transcript in no way affected the power and force of the judgment. If an execution had been issued upon this transcribed judgment and levied upon real estate of the defendant, the property sold and the sale confirmed by the district court after due notice to all parties concerned, under the rule of *Gillespie v. Switzer, supra*, the sale could not be attacked collaterally, and the title of the purchaser would be good. The five years' lapse of time from the rendition of the judgment only raises a presumption of payment and does not deprive the judgment of all vitality. So far as the rights of the plaintiffs in error are concerned it could make no difference whether the proceedings to revive were conducted in the district court or in justice court. In either court they might be afforded the opportunity of being heard upon the question of whether or not the judgment was paid. It has long been the practice in this state to allow the revivor proceedings to be conducted in either court, and the fact that the judgment was dormant when transcribed affords no reason for changing the rule.

We recommend 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.

STATE, EX REL. W. B. EASTHAM ET AL., RELATORS, V. GEORGE W. DEWEY, COUNTY CLERK, RESPONDENT.

FILED NOVEMBER 2, 1904. No. 14,000.

ORIGINAL application for a writ of mandamus to compel respondent to place names of candidates on ballot. *Writ allowed.*

H. M. Sullivan, A. S. Tibbets and *T. J. Doyle,* for relators.

E. J. Clements and *H. M. Sinclair, contra.*

By the Court: Ordered that the demurrer to the petition for a peremptory writ of mandamus be overruled and that a writ issue as prayed for by the relators. Opinion to be filed hereafter.

BARNES, J., dissenting.

The following opinion was filed March 23, 1905:

1. **Elections:** NOMINATIONS: FILLING VACANCIES. The statute (Comp. St. 1903, sec. 136, ch. 26) provides that a candidate for public office may decline the nomination of a political convention "at least twelve (12) days before the day of election," and that a nomination to fill the vacancy so occasioned must be filed eight days before the election. The purpose is to allow four days for the proper authorities to make the second nomination. If all parties interested agree to the change of candidates, and the declination of the first nominee and the nomination of his successor are both filed eight days before the election, it is a compliance with the statute, and the name of the second nominee should be placed upon the ballots.

2. Computing Time. In the absence of a special provision in the election laws the general statute applies, and the eight days' time should be computed by excluding the day of filing the certificate of nomination and including the day of election.

SEDGWICK, J.

A candidate for the office of state senator, and two candidates for the office of representative of the respective senatorial and representative districts of which Custer county is a part, and a candidate for the office of county attorney for that county, all of whom had been regularly nominated as candidates for the election of 1904, filed with the respondent as county clerk of that county their declinations of the respective nominations pursuant to section 136, chapter 26, Compiled Statutes, 1903 (Ann. St. 5774). The proper committees which had been duly authorized for that purpose appointed other candidates for the respective offices, and filed with the county clerk the certificates of such appointments in due form as required by the statute. The county clerk refused to place the names of these appointees upon the official ballots, and declared his intention to place upon the ballot the names of the parties originally nominated, disregarding their declinations. This application was then made to this court for a writ of mandamus to compel the county clerk to regard the said declinations filed with him, and to place the names of the appointed candidates upon the ballot. The matter was ably presented in oral arguments and upon consideration the writ was allowed, but owing to the urgency of the case no written opinion was filed at the time. It is thought that the case is of such importance as to call for a brief statement of the reasons that led the court to the conclusion reached.

1. The section of the statute above cited provides that when any person nominated for public office as these candidates were "shall at least twelve (12) days before the election, * * * notify the officer with whom the original certificate of his nomination was filed, in writing,

signed by him, and duly acknowledged, that he declines such nomination, the same shall be void, and his name shall not be printed upon the ballots." The election was on the 8th day of November, and these declinations were filed with the county clerk, some of them on the 28th day of October and some still later, so that they were not filed twelve days before the election. It was for this reason that the clerk refused to regard the declinations, and supposed it to be his duty to place these names upon the official ballot.

The statute of Pennsylvania provides that such declinations may be filed fifteen days previous to the day of election. A decision of one of the district courts of that state was read upon the argument as justifying the position of the respondent. *Commonwealth v. Martin,* 7 Pa. Dist. R. 666. In that case the office in question was that of state senator, and the statute required that the declination be filed with the secretary of state. It was required that the secretary of state transmit to the commissioners of the county an official list of the candidates "fourteen days at least previous to the day of any election." The declination was filed on the 2d of November, six days before the election. The secretary refused to recognize the declination, and the court, by Judge McPherson, sustained him in so doing. The syllabus of the decision is: "The secretary of the commonwealth must refuse to recognize a withdrawal by a nominee when such withdrawal is not presented within the time fixed by statute." The opinion states two reasons for the limitation fixed by their statute which requires declinations to be made fifteen days before the election. One is that the secretary of state must transmit the official list of candidates to the commissioners of each county at least fourteen days before election. This reason has no force under our statute, since the original certificates of nomination are filed directly with the county clerk and the declinations are also filed with him. The second reason suggested by the court for the limitations of the statute is the plain intention of the statute to allow a

reasonable period for filling the vacancy. In that case the vacancy had not been filled, and to allow the declination would create a vacancy upon the ballot, unless it should be filled by another nomination after the declination had been allowed. Their statute prescribes no time within which another nomination might be made, except that it must be done before the election. The court said:

"If a candidate desires to withdraw, he must declare his intention within the time fixed by the act, in order that his party or the body of citizens that named him may have an opportunity to supply his place. This secures fair play; for if withdrawals could be made at any time, either before the ballots were printed, or before the day of election, it is manifest that a serious temptation to fraud and trickery would be presented. A withdrawing candidate could disfranchise his party by judiciously timing the date of his disappearance, and we need not suggest the dangers that lie hid in such a possibility."

If their statute had been more explicit, as ours is, and had provided that nominations to fill the vacancy upon the ticket must be made a stated number of days before the election, and if such nominations had actually been made in due time the reasoning of the court would have been wholly inapplicable. Our statute provides that a second nomination to fill a vacancy caused by a declination may be made at any time not later than eight days before the election. The law thus gives the proper authorities four days in which to fill the vacancy on the ticket. This gives "his party or the body of citizens that named him" four days' time in which "to supply his place." There can be no reason for requiring the declinations to be made more than eight days prior to the election, except for this purpose of giving an opportunity to supply the place and still have the final nominations filed with the county clerk eight days before the election. In the case at bar it seems that the declinations and the appointments to fill the places were both made upon agreement of all the parties interested, and that there was no necessity of the four days'

time in which to fill the vacancy. The declinations were made with the view of allowing the appointments to fill the vacancies to follow. It was thought that the law was complied with if the appointments to fill the vacancies were made the prescribed length of time before the election.

The statute of Kentucky provides that certificates of nomination shall be filed "not more than sixty and not less than fifteen days before the election." In *Hollon v. Center,* 102 Ky. 119, 43 S. W. 174, it was held that "the requirement of the statute that a certificate of nomination shall be filed not more than sixty days before the election is only directory." The court recognized the difficulty in stating a general rule by which to determine in all cases when a statute is intended as directory only, and quotes the following rule formulated by Judge Cooley:

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." Cooley, Constitutional Limitations (7th ed.), 113.

The object of our statute is satisfied if the certificates of nominations to fill vacancies are filed eight days before the election and if the proper authortities are afforded four days, if necessary, after the original nominations have been declined, in which to fill the vacancies. The "rights of the parties interested were not prejudiced" by the failure to allow the nominating committees the full four days in which to make the substituted nominations. See authorities cited 15 Cyc. 338.

In *Napton v. Meek,* 8 Idaho, 625, 70 Pac. 945, the supreme court of Idaho followed the case of *Commonwealth v. Martin, supra.* The court, it appears, did not have access to the opinion in the Pennsylvania case, and did not

therefore consider the reasoning upon which the conclusion was reached. The Idaho court gave its own reasons as follows:

"One purpose for its enactment was to give the party that nominated him time to make another nomination, and have the name of such nominee printed on the official ballot, and to give the voter time to investigate the character and ability of the person who takes the place of the person so declining. * * * Where a law declares in unmistakable terms that a certain act must be done before the occurrence of a certain event or date, to hold that such act may be done at any time would totally abrogate its provisions by judicial construction. While it is the legitimate province of courts to interpret legislation, they are not authorized to supply omissions or inject matters which the legislature did not place therein. If the law under consideration is obnoxious, the remedy is with the legislature, and this court will not abrogate it by judicial legislation or decision. A law should not be repealed by judicial construction. The election laws of other states that require certificates of nomination to be filed within a certain time have uniformly been held to be mandatory, and all the reasoning in those cases is, we think, applicable to the law requiring declinations to be filed a certain number of days before election."

In Idaho there seems to be, as in Pennsylvania, no limitation upon the time for making appointments to fill vacancies caused by a declination of a nomination, except that the vacancy must be filled before the election takes place. In such case, as already pointed out, there is reason for a mandatory rule limiting the time for filing declinations; but if the legislature provides what shall be a reasonable time for making appointments to fill the vacancy, and prescribes that such appointments shall be considered in time if made eight days before the election, and if the declinations are in fact made in ample time to give the proper authorities sufficient opportunity to substitute other nominations, and the nominations are made a suffi-

cient time prior to the election to satisfy the statute in that regard, the reasoning of the Idaho court upon this point does not seem to apply.

2. It was strenously contended that the appointments to fill the vacancies were not made the prescribed length of time before the election. It is undoubtedly true that the county clerk would have been justified in refusing to receive the declinations and place the names of the appointees upon the ballot, if the appointments to fill the vacancies were not made eight days before the election as the statute provides. In the statute of Pennsylvania there is a provision that, in counting the time of this limitation, the day upon which the declinations or nominations are filed shall be excluded and the day of election included in the calculation. In the absence of such a provision in our act it is to be presumed that the legislature intended that it should be governed by the general statute which provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last." Code 895. This was said in *McGinn v. State,* 46 Neb. 427, "To establish a uniform rule, applicable alike to the construction of statutes and to matters of practice." These appointments were made on the 31st day of October, and by the above rule of computation were made eight days before the election.

WRIT ALLOWED.

BARNES, J., dissenting.

The writ was allowed in this case over my objections, and I cannot agree to the conclusions announced in the majority opinion.

1. My associates hold that the provision of our Australian ballot law, which says: "Whenever any person nominated for public office, as in this act provided, shall at least twelve (12) days before the day of election * * * notify the officer with whom the original certificate of his nomination was filed, in writing, signed by him, and duly

acknowledged, that he declines such nomination, the same shall be void, and his name shall not be printed upon the ballots," is merely directory. To this I cannot give my assent. The Australian ballot law is comparatively new, and is an innovation on our former election laws. If this law is not mandatory it amounts to nothing. It has been but recently adopted by many of the states, as well as our own, and but few cases—two only—construing the provision quoted have been decided by the courts of last resort. These cases are referred to in the prevailing opinion, and an attempt has been made to distinguish them from the facts in the case at bar, and they will receive further consideration in this dissenting opinion.

The question first came before one of the district courts of the state of Pennsylvania. The statute of that state reads as follows: "Any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination, by request in writing signed by him and acknowledged before an officer qualified to take acknowledgments of deeds, and filed in the office where his nomination certificate or paper is on file fifteen days, or in the case of township and borough elections twelve days, previous to the day of election; and no name so withdrawn shall be printed upon the ballots." While the word "may" is used in the Pennsylvania statute (the word in our statute being "shall"), the Pennsylvania court held the statute of that state mandatory, and said that the secretary of the commonwealth must refuse to recognize a withdrawal of the nominee when such withdrawal is not presented within the time fixed by statute. *Commonwealth v. Martin,* 7 Pa. Dist. R. 666.

The question next arose in the state of Idaho in the case of *Napton v. Meek,* 8 Idaho, 625, 70 Pac. 945. Section 798 of the code of that state provides: "Whenever any person nominated for public office, shall, at least thirty days before election, except in the case of municipal elections, in a writing signed by him, and certified to by the registrar of the precinct where the person nominated resides,

notify the officer with whom the certificate nominating him is required to be filed, that he declines such nomination, such nomination shall be void." It appears in that case that one Allen K. Wright was nominated for the office of representative by the regular democratic convention of Canyon county, in that state; that his name was duly certifid as by law required which was the case of the regular party nominee in this proceeding; and it was alleged that at a regularly called meeting of the Canyon county central committee of the democratic party held on the 3d day of October, 1902, Wright's declination was accepted, and Houston Napton was duly nominated by said committee to fill the vacancy resulting from said declination. Thereafter, on the 13th day of October, 1902, said declination, with the certificate of the registrar, was presented to the defendant, the auditor of said county, and he was requested to file the same, which he refused to do, on the ground that it was not presented for filing thirty days prior to the day of the election. On the foregoing facts the court held:

"The provisions of section 24 of an act approved February 2, 1899, commonly called the 'Australian Ballot Law,' prescribing that declinations of persons nominated for public office shall be filed with the proper officer at least thirty days before election, are mandatory, and a nominee desiring to take advantage of said provision must file his declination with the proper officer at least thirty days before the day of election."

The foregoing cases are the only ones in point, and the reasons given in each of them for holding the statutes mandatory cannot be successfully assailed. Indeed, my associates do not attempt to question their cogency, but after quoting only a part of them they say that, because our own statute further provides that nominations to fill the vacancy upon the ticket must be made and certified not less than eight days before the election, therefore we should disregard these well considered cases, and hold the section as to declinations directory only. The reason assigned for

this holding is that the statutes of Pennsylvania and Idaho do not specify the time when nominations to fill vacancies shall be made. To my mind the fact that our statute provides that certificates of nomination to fill vacancies shall be filed at least eight days before the election is an additional reason for holding both these provisions mandatory. It was evidently the intention of the legislature to specifically point out the procedure in such cases, in order to prevent fraud and preserve inviolable the rights of the voters. As was well said in *Napton v. Meek, supra:*

"We are not authorized to construe plain provisions of a statute like the one under consideration so as to defeat the evident intent of the legislature, or at all. Where a law declares in unmistakable terms that a certain act must be done before the occurrence of a certain event or date, to hold that such act may be done at any time would totally abrogate its provisions by judicial construction. While it is the legitimate province of courts to interpret legislation, they are not authorized to supply omissions or inject matters which the legislature did not place therein. If the law under consideration is obnoxious the remedy is with the legislature, and this court will not abrogate it by judicial legislation or decision. A law should not be repealed by judicial construction. The election laws of other states that require certificates of nomination to be filed within a certain time have uniformly been held to be mandatory, and all the reasoning in those cases is, we think, applicable to the law requiring declinations to be filed a certain number of days before election." *State v. Falley,* 9 N. Dak. 464; *State v. Piper,* 50 Neb. 40; *Hollon v. Center,* 102 Ky. 119; *In re Cuddeback,* 39 N. Y. Supp. 388; *Griffin v. Dingley,* 114 Cal. 481; *Phillips v. Curtis,* 4 Idaho, 193.

A clear distinction is made by courts in the construction of election statutes, in cases like that at bar, and of the law concerning election contest cases. The former are construed to be mandatory, the latter as directory. *Jones*

v. State, 153 Ind. 440; *Sackpole v. Hallahan,* 16 Mont. 40, 28 L. R. A. 502; *Baker v. Scott,* 4 Idaho, 596.

In *Jones v. State, supra,* it is held that "all provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory * * * unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

To this reasoning, and the rule announced in the foregoing cases, I give my unqualified approval; and for these reasons, it seems to me that no vacancies on the ticket existed, or were created by the action of the regular nominees. There can be no vacancy unless one is created in the manner provided by law, and no nomination can be lawfully made by any one to fill a vacancy where none exists. It is stated in substance in the majority opinion as one of the reasons for allowing the writ that all of the parties interested agreed to and adopted the method described in the application. I do not find anything in the proceeding which indicates that the voters, who are the ones most vitally interested in the matter, and who in their regular conventions nominated the candidates of their choice, were ever consulted about the declination of their nominees, or the substitution of those named in the certificates in question; and there are no allegations in the application for the writ of any facts showing or tending to show that the relators were ever authorized to act for them in any manner whatever. Again, the majority opinion seems to establish the rule that the plain provisions of the statute may be disregarded and nullified by an agreement of the persons affected thereby. This doctrine seems to me to be not only unsound, but fraught with much danger.

2. It appears that the certificates of nominations presented by the relators purported to be nominations of a party created by the benevolent assimilation of two political entities; and such certificates were presented to re-

spondent on the 31st day of October, 1904; that the day of election in that year was November 8 following. On these facts the majority opinion holds that the statute providing for the filing of such certificates is mandatory, and that they must be filed at least eight days before the election. To this I give my approval. But it is further stated by that opinion that the certificates were filed in time. To this I cannot agree. By the usual rules of construction, in computing the time from the day of filing until the election, we are required to exclude the day of such filing. So November 1 is the first day which we can count in making this computation. This much seems to be conceded by my associates. Now counting to and including the 7th day of November, which is the last day before the election, we have but seven days. In order to escape from this dilemma, the rule provided by section 895 of the code is invoked, which reads as follows: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." It seems clear that this provision has no bearing on the question herein presented. The statute under consideration is special, and reads: "Such certificates shall be filed at least eight days before the election." This does not refer to the time *within* which an act shall be done. It is a specific declaration that the act shall be performed *before* a certain fixed time, or before the happening of a certain event. The plain language of the act excludes the day of election, because it says *before* the election. Now the election, election day, and the day of election, are synonymous terms, and to give these words their obvious meaning would exclude election day. The election embraces all of the business hours of the day on which it is held, and no part of that day can be included in the count to make the necessary eight days provided by the statute. Under such provision the day of the election should be excluded. *O'Conner v. Towns,* 1 Tex. 107; *Richardson v. Ford,* 14 Ill. 332. So I am of opinion that the certificates were not presented in

time, and for that reason, among others, the writ should have been denied.

3. Again, it was strenuously contended on the hearing by counsel for the respondent that the application was prematurely made; that the time allowed by law for him to act had not expired, and therefore the writ should have been denied. My associates have seen fit to ignore this question, but I cannot see my way clear to do so. The certificates in question were presented to the respondent on the 31st day of October, and the petition for the writ was filed on the day following. The cause was heard and the writ allowed on the 2d day of November, only two days after the certificates were presented to him. The statute gives three full days after the filing of the certificates for the filing of objections to the nominations. No duty was due from the respondent when this action was commenced, and he could not lawfully have placed the names of the candidates on the ballots until after the expiration of the three days above mentioned. This question was before the supreme court of Kansas in *State v. Carney,* 3 Kan. 88, which was a suit to compel action by the board of state canvassers. The court said:

"Is it possible that there can be an omission to perform the act before the arrival of the earliest day upon which the law authorizes it to be done? Certainly not; and no previous threat or determination not to do it can amount to an omission. The statute will bear no construction other than that the relator must, at the time of making the motion, show the defendant to be in default in the performance of his legal duty, and no threat or predetermination can amount to a default before the day upon which the act is to be done. In the case at bar the relator has shown that he demanded of the defendants the performance of the act he undertakes to enforce by the order of the court, and an express determination on their part not to perform it; but this does not and cannot amount to an omission to perform the act. * * * The showing made by the relator might convince the court that the defendants

will omit to perform the duty; but until they have omitted to perform it, the statute does not authorize the court to interfere, no matter how disastrous may be the consequences to the relator. * * * The court has taken some pains to find a case in which the writ was allowed before the time at which the law required the act to be performed had elapsed; and although the examination has extended to all the books likely to throw light upon the subject within our reach, no such case has been found, nor has one such been cited by counsel. On the contrary we have found an unbroken current the other way."

When this application was made there had been no default of duty on the part of the respondent, and the writ should have been refused.

For the foregoing reasons, I am of opinion that the petition should have been dismissed and the writ denied.

ROYAL NEIGHBORS OF AMERICA v. FRANCIS H. WALLACE.

FILED MARCH 23, 1905. No. 13,485.

1. **Life Insurance**: APPLICATION. An incorrect or untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and without intention to deceive.
2. **Untrue Answers.** An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy.
3. ———: PRESUMPTION. If an applicant has knowledge of facts that furnish sufficient reason to believe that he is afflicted with a fatal disease when he makes his application, his statement in such application that he is in good health and free from disease will be presumed to be fraudulent.

ERROR to the district court for Dodge county: CONRAD

HOLLENBECK, JUDGE. *Judgment of affirmance vacated. Judgment of district court reversed.*

J. G. Johnson, McNish & Graham, B. D. Smith, E. A. Enright and *Talbot & Allen,* for plaintiff in error.

F. Dolezal and *Cook & Cook,* contra.

SEDGWICK, J.

When this case was first considered by this court upon the former appeal, the questions and answers in the application for insurance upon which the decision now turns were set out in the opinion, 64 Neb. 330, and it was said that the answer of the company charged that the answers of the assured to the aforesaid questions "were knowingly and wilfully false, that they were material to the risk and were relied upon by the defendant." The trial court had held that these answers were representations and not warranties, and in discussing that question the opinion referred to goes on to say:

"It is fair to presume that the association dealt with the assured in good faith, and that its acceptance of her premium, receiving her into the order and issuance to her of the certificate in question, was more than an idle ceremony, and that it intended thereby to bind itself by a valid contract of insurance. There are upwards of a hundred questions in the application and medical examination. Many of them are of such a character, that no person, however honest his intentions, could answer them with any degree of assurance that each of his answers was literally true. To hold that such questions and answers amount to warranties would be to impute bad faith to the association in pretending to enter into a contract of insurance with the assured which could become binding upon it by the merest chance."

It was decided that they were representations and not warranties, and this has become the law of the case. This

was the question being discussed, and also whether these representations were material to the risk, and whether the jury should have been so instructed, and it was therefore not necessary to distinguish between the representations. This court has consistently maintained a line of distinction between questions in such applications which call for an expression of opinion, or for the statement of conclusions or facts which are not especially within the knowledge of the applicant for insurance, in regard to which the insurance company has equal means of ascertaining for itself the truth, and on the other hand questions which call for information in regard to facts which are and must necessarily be peculiarly within the knowledge of the applicant. Some of the questions set out in the opinion referred to are of the class which may be said to call for the opinion or judgment of the applicant. "Are you of sound mind and body, in good health, and free from disease?" It is clearly pointed out in the opinion referred to that such questions as these call for information in regard to which it is frequently impossible that any one should have exact knowledge, and it cannot be presumed that, where the applicant appeared to be in good health and free from disease, the company in asking this question expected to rely upon the applicant's judgment in that regard. On the other hand, if it should appear that the applicant at the time knew himself to be afflicted with some disease which afterwards resulted in death, or if the applicant knew of facts which furnished sufficient reason to believe that he was or might at that time be afflicted with such disease, then the answer of "Yes" to such a question would be false and would avoid the policy. The same may be said of all the other questions there quoted, unless it be the question, "Have you ever had any hemorrhages?" If the applicant before answering "No" to this question had a hemorrhage of blood from the lungs in such quantity as to leave no doubt upon a fair mind that it was actually a hemorrhage from the lungs, to answer "No" to this question would be a false answer and would avoid the policy. It is the

consideration of this last question and answer and the condition of the record with reference thereto which have made our investigation of this case difficult. The record discloses that several witnesses upon the trial of the case testified that they were well acquainted with the deceased; that they saw her frequently during her lifetime and especially during the last six or seven years of her life, and that on one occasion at least (and some of them testified to more than one occasion) they had seen the deceased when she was very ill, and at such times the deceased had declared to them that she had suffered a severe hemorrhage. There was no evidence of any witness who had sufficient knowledge from observation to testify that the deceased had ever had hemorrhages, and there were several witnesses who were very familiar with the deceased and with her condition (among them are her husband, her brother, and a sister), who testified positively that they had never known or heard of her ever having had a hemorrhage, so that the evidence may be said to be squarely in conflict upon this point. There is some evidence in the record that, if the deceased declared to the witnesses above referred to that she had suffered a hemorrhage, she referred not to hemorrhages from the lungs, but one that was natural and normal, except that it had been more severe than usual. The whole record shows that the question that was then being tried was whether she had suffered a severe hemorrhage of the lungs, and there was no doubt that the jury so understood it. When the court in its instructions referred to the inquiry whether the deceased had suffered a hemorrhage, the jury must have understood that reference was made to a hemorrhage of the lungs of such character that it could not or ought not to have been mistaken by the deceased. If the deceased had suffered such a hemorrhage as the defendant insisted she had, and as the evidence of the defendant tended to show, there would be no reason to suppose that she was not aware of the fact, or to find that she had acted in good faith when she denied having had such hemorrhage. These conditions and distinctions

should have been made plain to the jury in the instructions. It should have been made plain to them that, if the deceased had suffered a hemorrhage of the lungs of such severity as to leave no reasonable doubt of its nature and character, as it was claimed she had suffered, the plaintiff could not recover in this action. If it could be found from the evidence that she had suffered a slight hemorrhage from the throat or teeth, or one in the course of nature, but unusually severe, the question would be as to the good faith of the applicant in her answers. The instruction given by the court upon this question upon the first trial is quoted in the opinion upon the former appeal. 66 Neb. 543. It was there held to be erroneous to submit to the jury the question whether this question and answer related to matters material to the risk, and that feature of the instruction was eliminated upon the second trial. The instruction given was as follows:

"You are instructed that the fifth point for your determination arises from the following question and answer in said application, to wit: 'Have you ever had hemorrhages?' Ans. 'No.' If you believe from the evidence that this representation * * * was willfully and knowingly false, and intended by the assured to deceive the defendant, * * * then the plaintiff cannot recover, and you should find for the defendant; but, if you believe from the evidence that said representation * * * was not intentionally made to deceive the defendant, * * * then you should find for the plaintiff on this point."

As before pointed out, if she had suffered such a hemorrhage as the defendant claimed that she had, her answer to this question was of course false, and must have been knowingly and willfully made.

The defendant requested the following instruction:

"The fact is undisputed that, in the application for the benefit certificate herein sued on, Ada Wallace was asked the question, 'Have you ever had spitting of blood or other hemorrhages,' and that her answer thereto was 'No.' You are instructed that the matter inquired about in said ques-

tion was material to the risk. If you find from the evidence that at any time prior to the date of said application, to wit, July 2, 1897, said Ada Wallace had had spitting of blood or other hemorrhages, said answer to said question would work a forfeiture of the certificate herein sued on, and your verdict should be for defendant."

This was refused, and exception duly taken. The vital question presented in these instructions in view of the evidence and whole manner of the trial was whether the deceased, before making her application, had suffered a hemorrhage of the lungs such as claimed by defendant. If she had, she must have been aware of the fact. It was a matter of the highest importance in determining whether she was then suffering with the disease which afterwards caused her death, and her answer could not have been in good faith. Was this question fairly submitted to the jury? With some hesitancy we have concluded that it was not. If the instruction given by the court could be justified by the condition of the evidence, and the manner of contesting this point before the jury, still a more specific instruction would have been proper, and the same reasoning that would justify the one given would also justify giving the one requested by defendant.

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

REVERSED.

ROSA LEVARA ET AL., APPELLANTS, V. BERNARD MCNENY ET AL., APPELLEES.

FILED MARCH 23, 1905. No. 13,274.

1. **Attorney and Client: SALE TO ATTORNEY, SETTING ASIDE.** Where an attorney, by statements and representations made to his clients as to the condition and value of their land, the subject of the litigation, procures the sale thereof to be made to a third party

for whom he is at the same time acting in that capacity, for an inadequate price, and immediately takes a half interest therein for himself, paying one-half of the consideration, a court of equity will set aside the transaction and the conveyances, and restore the estate to the vendors on the repayment of the purchase price, with interest at seven per cent. per annum.

2. **Public Policy.** This rule is not necessarily based on fraud, but is grounded on considerations of public policy, and prevails although the attorney be innocent of any intention to deceive and intends to act in good faith.

3. **Set-Off.** In such a case the vendors may set off the rents and profits of the real estate, if any, which the vendee has collected while holding the title thereto, against the purchase price required to be repaid.

4. **Case Overruled.** The first point of the syllabus in *Levara v. McNeny*, 5 Neb. (Unof.) 318, and so much of the opinion therein as conflicts with the rule announced herein, is overruled.

APPEAL from the district court for Webster county: ED L. ADAMS, JUDGE. *Reversed with directions.*

F. A. Sweezy, A. D. Ranney and *Tibbets Bros. & Morey*, for appellants.

Bernard McNeny and *R. T. Potter, pro se.*

BARNES, J.

This case when it was before us the first time was heard by department No. 2 of the commission, and in an unofficial opinion written by Commissioner ALBERT it was held that the guardian's deed, which purported to convey the interest of the minor heirs of Wenzel Levara in the land in question to the defendant McNeny, was void, and that said heirs were entitled to recover of the appellees four-sevenths of said estate. *Levara v. McNeny*, 5 Neb. (Unof.) 318. A rehearing was granted on the application of the appellants, and the case has been reargued before the court. On the reargument it was contended that the deeds made by the adult plaintiffs should also have been set aside, and they should have been allowed to recover the land conveyed

thereby to the defendant McNeny, one-half of which it appears was at once conveyed by him to defendant Potter, who paid that proportion of the original purchase price to the appellants. We are unable to make a clearer or more concise statement of the facts than that contained in the opinion of the commissioner, and so no other statement will be attempted.

The main contention of the appellants is that the acts of the defendants, and especially those of defendant Potter, were fraudulent, and that appellants were thereby induced to sell the land to McNeny; while the appellees insist that in the performance of those acts Potter exercised the utmost honesty and good faith. The trial court so found, and refused for that reason to grant the appellants any relief. There appears to be little, if any, conflict in the evidence as to what took place leading up to the guardian's sale of the land to McNeny, and the real question presented is practically one of law. The record shows that the appellants employed one William Sweet of Friendship, Wisconsin, to look after the matter for them; that he wrote to the defendant Potter, an attorney at Red Cloud, in Webster county, this state, where the land was situated, stating, in substance, that the appellants wished to get what they could for it, and inquiring as to its value, or what it would bring in the market. Potter answered Sweet's letter, stating, among other things, that it would be necessary for a guardian to be appointed for the minor heirs, and to take the proper steps to have the land sold by such guardian; concluding his letter as follows: "Did Wenzel Levara leave any debts? I find that there is a large amount of taxes due on this land, and it will be necessary to do something at once. The purchaser at tax sale is now entitled to a tax deed to the premises. I have not seen the land, but have been informed that it is worth not less than $500 or $600. Give me all the facts as soon as convenient." Shortly afterwards Potter wrote Sweet another letter, in which he said: "Replying to yours of the 5th inst. relative to the Levara matter, I think you had better procure the

appointment of a guardian for the minor heirs in your county. You can send me an authenticated copy of the appointment, and that will be our authority for the proceedings to sell land in this state. If Levara left no debts, it may not be necessary for administration. When did Levara die? Proceedings to foreclose the tax lien against this land were commenced in our district court on the 2d inst. The petition claims due on taxes the sum of $201.68; delinquent taxes draw interest at the rate of twenty per cent. per annum, which accounts for the large sum due, for no taxes have been paid for ten years. I would advise that you secure appointment of guardian as soon as possible, and we can then sell the land subject to the taxes, and in the meantime I will see that no decree is entered in the foreclosure proceedings. Please advise me how long it will take to secure appointment of a guardian?" On November 25, 1901, Potter again wrote Sweet as follows: "What progress are you making in the Levara matter? I have a client who will pay $500 cash for the interest of the heirs in the land; pay all the taxes, and take his chances with Stephani on his claim of title to the land by adverse possession. If they wish to dispose of the land, here is an opportunity, but my client must know at once. If your clients wish to accept this offer I will forward deeds for their signature at once. As I wrote you in my last letter, I do not think there is anything to the claim Stephani makes of having title to this land, and the heirs can recover possession by bringing an ejectment suit. Our district court convenes next week, the tax case will come up at that time, and I can stand the tax matter off. Will write you as soon as court adjourns." Potter's next letter to Sweet reads as follows: "Replying to your favor of the 27th inst., a general guardian is what should be appointed in your county for the minor heirs of Wenzel Levara. It will not be necessary to have a guardian appointed in this county. All that is needed is that a certified copy of the appointment of the guardian appointed in your county be sent here, and proceedings can then be commenced to sell

the land. As to the tax proceedings: This is a regular foreclosure proceeding, and will cut off the minor heirs just the same as other defendants. I will appear as attorney for the defendants and secure a continuance of the case, if it can be done. The land has increased some in value since it was purchased by Levara. The record shows that he paid $600 for it. As my client is to assume the payment of the taxes the land will cost him over $700. The matter must be attended to at once. If the widow wishes to accept the offer I will prepare and send to you deed for signature. Send me the names of all of the heirs, including that of the widow. Kindly let me hear from you as soon as possible." Thereafter Potter wrote to Sweet another letter, in which he inclosed a quitclaim deed for all of the adult heirs and the widow of Wenzel Levara to sign and return to him. He closed that letter as follows: "Our court adjourned until the 6th of January. I secured a postponement of the tax case until that time. I doubt whether I will be able to secure another continuance, so it will be necessary to act immediately." Shortly thereafter another letter was written by Potter to Sweet acknowledging the receipt of the deeds, and informing him that McNeny's check for $500 had been received by him. He then says: "You ask me to advise you of the amount of taxes due on the land, and costs which have accrued in that case. There is something over $200 involved in the tax case, not including costs. Under the agreement the taxes and costs must be paid by McNeny. * * * It will take me at least sixty days to get authority for the guardian's deed. I had to have a copy of the proceedings before I could file a petition here asking for license to sell real estate. I shall file the petition today, and will keep you advised as to progress. You understand the sale will have to be advertised thirty days, and the sale will have to be confirmed by the court." On the 10th day of December, 1901, Potter again wrote to Sweet advising him that he had filed the petition in the district court praying for a license to sell the real estate in question, and informing him of

what proceedings would be necessary; also inclosing to him a waiver, and an entry of appearance to be signed by the persons interested in the estate. In a letter written by Potter to Sweet, January 3, 1902, he says: "As soon as you send me the waiver I forwarded you a few days ago, I will apply for an order to sell. We will then advertise and sell the land." In a letter dated January 13, 1902, Potter said to Sweet: "In a few days I will send you another paper for signature, waiving objections and requesting the court to confirm the sale. This will complete the transaction, and as soon as this is done we can then close the deal." In his last letter to Sweet, Potter says: "Inclosed herewith I hand you Chicago exchange for $486.85, and also inclose clerk's receipt for the costs in the case amounting to $12.65; the draft cost 50 cents, making a total of $500 for the Levara land. Kindly acknowledge receipt." The record also discloses that Potter appeared for the appellants in the tax foreclosure case, and filed all necessary papers therein, which he signed as their attorney. So it seems to be established beyond question that he was employed by, and acted as attorney for, the appellants in the transactions above set forth. That he also at the same time was acting as attorney for defendant McNeny, who was the prospective purchaser of the land during all of the time the proceedings and negotiations were pending, is beyond dispute. The testimony also shows that at that time the land was worth at least $1,200. No witness puts its value at less than that sum, while some of the witnesses testify that it was worth $2,400. It is probable that its actual value was somewhere between those figures. So McNeny succeeded in procuring the land from the appellants for much less than its actual value; that Potter knew that fact there can be no doubt, and it seems clear that the defendants, acting together, each with full knowledge of the situation, succeeded in purchasing the land in the manner and for the consideration above stated. It further appears that, notwithstanding Potter's claim that he did not know the actual value of the estate, he examined the

land immediately after the guardian's sale in company with the defendant McNeny, and thereupon took a one-half interest therein; that he surrendered up the $500 check deposited with him by McNeny as a consideration for the sale, and contributed $250 of his own money to the payment of the purchase price. This brings us to the question as to whether or not equity will sustain a sale made under such circumstances.

As above stated, the relation of attorney and client between the defendant Potter and the appellants was established beyond question, and it follows that the entire transaction must be viewed in the light of such confidential relation. An attorney acting for his client is bound to the most scrupulous good faith. And where the attorney purchases the subject of the suit the client may set aside the purchase at will, unless the attorney shows by clear and conclusive proof that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable. In such a case the relation is confidential, and whether the attorney acts upon information derived from the client or from any other source, he is affected with a trust. This rule is grounded on the question of public policy, not of fraud, and prevails although the attorney be innocent of any intention of deceiving, and acts in good faith. Weeks, Attorneys at Law, sec. 258; *Gray v. Emmons,* 7 Mich. 532; *Jennings v. McConnel,* 17 Ill. 148; *Brown v. Brown,* 4 Ind. 627, 58 Am. Dec. 641; *Zug v. Loughlin,* 23 Ind. 170; *Valentine v. Stewart,* 15 Cal. 387.

We are therefore of the opinion that the appellants are entitled to have all of the deeds, including the quitclaim deed made by the widow and the adult heirs of Wenzel Levara, to the land in question set aside on the repayment of the purchase money. It follows that so much of our former opinion as holds that appellees should have their title quieted to three-sevenths of the land as against the appellants must be and is hereby overruled.

It appears that Sweet, who acted for the appellants in

Wisconsin, only turned over to them $250 of the purchase price of the land, and they now contend that for that reason they should only be required to pay that sum as a condition to full relief from the effect of the transactions complained of. We cannot assent to this view of the matter. The appellees forwarded the full amount of the purchase price, to wit, $500, to Sweet, and if he overcharged them that was not the fault of either Potter or McNeny. They are entitled to receive the $500 paid by them for the land, with seven per cent. interest thereon from the date of such payment. On the other hand the appellants are entitled to set off against that amount the rents and profits of the land, if any, which the appellees have received since they purchased it. The district court correctly held that the judgment for $500 recovered against Stephani in the tax case belonged to the appellants, and our holding herein renders it wholly unnecessary for us to consider the question of the widow's dower. The condition of the record is such that we cannot determine the question of rents and profits so as to make a final disposition of the case, and for that reason the judgment of the district court is reversed at the costs of the appellees, and the cause is remanded to that court, with directions to take an account of the rents and profits; to ascertain the amount which the appellants must repay to the purchaser, and for such other and further proceedings as may be necessary in order to render a final judgment herein in accordance with this opinion.

JUDGMENT ACCORDINGLY.

OWEN W. BUTTS V. JOHN HENSEY ET AL.

FILED MARCH 23, 1905. No. 13,748.

Sale: DELIVERY. The general rule, subject to exceptions, is that a delivery to a common carrier is a delivery to a vendee or consignee.

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

E. D. Pratt, Jr., and *E. W. Simeral*, for plaintiff in error.

Crane & Boucher and *Oliver S. Erwin, contra.*

AMES, C.

The substance of the petition so far as it affects the present controversy is as follows: "That on or about the 21st day of May, 1901, the defendant's agent, F. A. Beck, called on plaintiffs at Greenland, Arkansas, and entered into agreement with said plaintiffs relative to a car of strawberries, No. 17404, whereby defendant guaranteed to plaintiffs $1.20 per crate, net to plaintiffs, for said car of berries, which car contained 484 crates, aggregating the sum of $580.80, and that thereafter on or about May 27, 1901, defendant received said car and disposed of the same. No part of said sum of $580.80 has been paid except the sum of $402, and there is due from the defendant to the plaintiffs the sum of $178.80." The response of the answer to the foregoing pleading is as follows: "That said plaintiffs on or about the 20th day of May, 1901, agreed to consign to said defendant, on commission, a car of strawberries containing 484 crates, on which said defendant gave plaintiffs a guaranty of $1.20 per crate, provided the strawberries were number one stock, which said plaintiffs warranted and represented them to be, and defendant relied on same; that the berries that were sent were not number one stock, but were soft, over-ripe and very inferior stock; that defendant sold them for the highest price obtainable on the market and remitted to plaintiffs the full amount realized less freight and commission, and that plaintiffs' first cause of action is paid in full." The plaintiffs recovered a verdict and judgment for the

amount claimed, and the defendant prosecutes error. The contract concerning the fruit was made for the defendant by an agent who visited the vendor at a town in Arkansas, where the berries were, at a time when some of them were then being loaded on the railway car, and who was assured by the latter that the whole car load would be of the same quality as were those then present. It is testified by several witnesses, without contradiction, that all the berries were of the same quality represented, and were of number one stock and of good quality and condition at the time of the shipment, but the defendant contends, and offered to prove, that they were in bad condition and almost unmarketable upon their arrival in Omaha. The evidence was excluded, and the court directed a verdict for the plaintiffs.

The sole question argued by counsel, orally and by brief, is whether the transaction was a sale of berries or a consignment of them by the plaintiffs to the defendant for sale upon commission. The question appears to us to be immaterial. The obligation to pay was absolute in either event, provided the fruit was of the quality stipulated for by the contract. If it was not, the defendant was at liberty in either case to rescind or to keep the property, and abate from the stipulated price the amount in which the value was reduced by the deterioration in quality. The amount of the reduction in price at which the defendant sold the berries would not in either case necessarily furnish the measure of damages, although in some circumstances if he acted in good faith and with prudence it might be an important item of evidence in that regard. Seemingly the litigable point in this case, if there is any, is whether fruit of the stipulated quality was by the terms of the contract to be delivered to the defendant at the place of shipment or in Omaha. But upon this point there is neither pleading nor proof; and the general rule, subject to exceptions, is that delivery to a common carrier is delivery to a vendee or consignee. Benjamin, Sales (7th ed.), par. 693.

For these reasons, we recommend that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

GEORGE B. DARR V. JOHN DONOVAN.

FILED MARCH 23, 1905. No. 13,753.

1. **Agister's Liability.** An agreement by an agister to take good care of a herd of cattle entrusted to his charge is equivalent to a contract to take such care of them as an ordinarily skillful and prudent man would take of his own animals under like circumstances.
2. **Instruction.** A party cannot complain of an instruction that is more favorable to him than he deserves, although it is technically erroneous under the issues.
3. **Evidence.** When the contract of an agister is for the care and feeding of a particular herd of cattle, evidence descriptive of that herd is admissible without special reference to the subject in the pleading.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

E. A. Cook, for plaintiff in error.

N. P. McDonald and *Warrington & Stewart, contra.*

AMES, C.

In the fall of 1901 the plaintiff below, Donovan, was the owner of a herd of high-grade Hereford cattle and two thoroughbred bulls, all of which were at or near St. Joseph, Missouri. Through an agent named Bigham he entered into a negotiation with the defendant Darr for the care

and keeping of them until the following summer upon the premises of the latter in Dawson county, in this state. In March, 1902, the plaintiff having become dissatisfied with the manner in which the animals had been fed and cared for—some of them having died and a part or all of the others having become much deteriorated in health and condition—removed them from the premises and possession of the defendant. At that time the plaintiff paid to the defendant a sum of money and delivered to him one animal in settlement and satisfaction of the residue of the contract price payable to the latter for the care and keeping of the cattle until that day. Whether the sum so paid was the whole of said residue, computed according to the terms of the contract, the parties do not agree, and does not seem to us material. It is agreed that the payment extinguished the obligation, and the defendant pleads in his answer, and the plaintiff does not dispute, "that at the time of said settlement no claim or suggestion of claim was made against defendant by plaintiff for and on account of said cattle, other than was settled and adjusted in the settlement." Afterwards this action was brought to recover damages for a breach of the contract to properly feed and care for the cattle, which resulted in a verdict and judgment for the plaintiff, and the defendant prosecutes error.

There are a large number of assignments of error, but they may be grouped with reference to their substantial import under a few heads, and will be so treated in the following discussion. As to whether the cattle were properly fed and cared for and, if not, what amount of damages, if any, resulted from the failure were, of course, questions of fact for the jury, about which there is a great deal of conflicting evidence, which this court is not at liberty to review. But the defendant complains that the court erred in permitting the plaintiff to prove, in the absence of specific allegations in the petition to the same effect, that the animals were of a superior breed, for the purpose of indicating the kind of care and feed they re-

quired, and the amount of injury they had suffered. This objection does not appear to us to be well taken. It is undisputed that the contract was made with reference to this particular herd of cattle, which the defendant saw before the former was entered into; and it is not doubted that it is competent to prove by parol what is the especial subject matter of a contract, to enable the court to put such a construction upon it as the parties presumably intended at the time of making it. The defendant undertook to feed and care for a certain herd of cattle, and it was certainly proper to identify and describe that herd.

The defendant complains because the court permitted to be proved, and told the jury that their verdict should be influenced by, the kind of care and feeding which an ordinarily prudent man would have bestowed upon his own cattle under like circumstances; the ground of the objection being that the contract as admitted by the pleadings was for "good" care and feeding, but we think the two expressions mean practically the same thing. The care of ordinarily skillful and prudent men is no doubt "good" and *vice versa.*

The defendant contends that, if there should have been any recovery at all, the damages were excessive, because there was evidence to show that some of the cattle died and some of them were reduced in condition by diseases for which he was not responsible, but there was a conflict in the testimony in this respect and the jury, no doubt, gave it such weight and credibility as they thought it deserved. The court instructed the jury in determining the amount of damages, in case they should find for the plaintiff, to ascertain the difference between the value of the cattle as it would have been if they had been properly cared for and their actual value. But they were further told that there could be no recovery for the death or depreciation of cattle due to disease or other cause than lack of care by the defendant. This is the usual and correct measure in such cases, and leaves the defendant nothing on that ground of which to complain.

The defendant complains of an instruction by which the jury were told, in substance, that the plaintiff could not recover if the damages complained of were included in the settlement and payment made when the cattle were taken by the latter in March, 1902. But besides the above quoted allegation in the answer, the defendant insists in his brief that the subject matter of damages was not discussed at the settlement, and that "the plaintiff's claim for damages by reason of death of cattle and on account of decrease in value was never raised until the beginning of this action, as shown by all the testimony." Inasmuch as it was not pleaded or proved that they were included in the settlement, the instruction was more favorable to the defendant than he deserved and he cannot be heard to complain of it.

The foregoing discussion covers the substance of all the assignments of error made by the defendant, and we do not find that any or all of them justify a reversal. We therefore recommend that the judgment of the district court be affirmed.

LETTON 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

AFFIRMED.

BANKERS UNION OF THE WORLD V. JOHN FAVALORA.

FILED MARCH 23, 1905. No. 13,745.

1. **Pleading.** The plea *nil debet* under our system puts in issue no fact and cannot be regarded as a defense. *Baldwin v. Burt*, 43 Neb. 245, followed and approved.
2. **Appeal: NEW ISSUE.** Where in the county court defendant interposed a defense of an account stated, and on appeal to the district court attempted to amend his answer by including the defense of accord and satisfaction, *held*, the latter plea to be a new ground of defense not pleaded in the court below.

3. **Judgment on Pleadings.** Action of the trial court in entering judgment on the pleadings examined, and approved.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Matthew Gering and *Frank L. Weaver*, for plaintiff in error.

Crane & Boucher, contra.

OLDHAM, C.

In this suit John Favalora filed his petition in the county court of Douglas county against the Bankers Union of the World to recover $843 on a certificate issued by said company for $1,000. In the petition it was alleged that on December 13, 1900, the defendant issued its policy of insurance on the lives of John Favalora and Catherine Favalora in the sum of $1,000, payable to the survivor; that a true copy of said policy was attached to the petition as Exhibit "A," and made a part thereof; that Catherine Favalora died May 10, 1902; that the policy of Catherine Favalora was in full force at the time of her death, and that plaintiff was the beneficiary named therein and the surviving husband of the deceased; that proof of death had been regularly made and sent to the defendant, and that Catherine Favalora was a member in good standing of the order at the time of her death, and had paid all dues and assessments provided for in her contract of membership, and that there was due on the policy $843. The copy of the policy attached to the petition showed on its face that, if the insured should die within the second year after its issue, the sum of $157 should be deducted from the amount of the policy. Accordingly, the prayer of the petition was for $1,000, less this amount. The answer of defendant admitted its incorporation and that it was doing business as a fraternal benefit society; admitted that the insured was a member in good standing in said society

at the time of her death; admitted that she died at the time and place alleged in plaintiff's petition, and that plaintiff was her surviving husband and beneficiary named in the policy; admitted that the copy of the policy attached to the petition was true and correct, and contained the conditions of said policy; and denied each and every other allegation in the petition, and contained an additional paragraph, as follows: "Further answering, this defendant avers that an account was stated between plaintiff and defendant on or about the first day of February, 1903, and there was found to be due the plaintiff from defendant on said policy or certificate mentioned in plaintiff's petition the sum of $465.80, which amount of $465.80 this defendant promised and agreed to pay plaintiff; and defendant alleges that it is willing to pay plaintiff said amount, with interest thereon, and hereby offers to confess judgment for said amount of $465.80, with interest thereon and costs of suit." Under these pleadings the case was tried in the county court, where judgment was entered for plaintiff for $465.80, in accordance with the prayer of the answer. Plaintiff thereupon appealed the case to the district court for Douglas county, and filed a petition which was an exact copy of its petition in the county court. Defendant answered with the same allegations as those contained in defendant's answer in the county court, except that the following additional paragraph, numbered 7, was added to its answer: "7. Further answering, defendant alleges that, in conformity with the agreement made between the defendant and the beneficiary of said policy, this defendant accepted a draft for $465.80, and that said draft was sent to the Omaha National Bank for collection, and attached to said draft was the policy or benefit certificate, canceled and released, and the defendant is now and has been at all times ready and willing to pay said draft, and that said draft was accepted by the plaintiff in this case in full settlement for her claim against this defendant, and in conformity with such agreement he signed a release on the back of said benefit cer-

tificate and transmitted the same to the Omaha National Bank." On plaintiff's motion, this paragraph "7" was stricken from the answer, because it presented an issue of fact not contained in the answer in the county court. When this motion was sustained, defendant tendered no further pleadings, and the plaintiff filed a motion for judgment on the pleadings for the amount prayed for in the petition. This motion was sustained, and judgment was rendered accordingly. To reverse this judgment, defendant brings error to this court. It will be noticed that the answer specifically admits the incorporation of the defendant, and that it is doing business as a fraternal benefit association under the laws of Nebraska; that plaintiff and his wife were members in good standing, and carried a certificate of insurance in the sum of $1,000 issued December 13, 1900, payable to the survivor; that Exhibit "A" attached to the petition is a correct copy; that plaintiff's wife died May 10, 1902; that plaintiff is the beneficiary and husband of deceased, and that proofs of loss were made August 15, 1902, within the time named in the policy. The conditions of the policy, admitted by the answer, show the amount to be deducted from the face of the policy where the death of a member occurs during the second year of their membership in the society. Now, then, the question arises, in view of these specific admissions, what, if any, issue is tendered by the general denial? It is claimed in the brief of plaintiff in error that the general denial puts in issue the amount due on the benefit certificate; but a denial that there is due the amount claimed in the petition puts nothing in issue. *Gray v. Elbing,* 35 Neb. 278. In *Baldwin v. Burt,* 43 Neb. 245, it is said: "The plea of *nil debet* under our system puts in issue no fact and cannot be regarded as a defense." Consequently, in view of the admissions in the answer, the general denial traverses no material issue and constitutes no defense.

The next question to consider is as to the action of the trial court in sustaining the motion to strike paragraph 7

from defendant's answer because of a departure from the issues raised in the county court. It will be noticed by an examination of the allegations of the answer in the county court that the only defense relied upon was that an account had been stated between plaintiff and defendant, on which it was found that a certain sum was due, for which defendant offered to confess judgment; while by the allegations of paragraph 7 incorporated into the answer in the district court, defendant sought to rely on the defense of accord and satisfaction. An account stated has been defined by this court in *McKinster v. Hitchcock,* 19 Neb. 100, to be "an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions and promising payment." Consequently, when an account has been stated between two parties, the presumption is that the stated account is correct; and, when suit is instituted on it, the burden is on the party denying the account to show its inaccuracy or that it was stated through fraud or mistake. An accord and satisfaction, on the contrary, is the substitution of another agreement between parties in satisfaction of a former one, and an execution of the latter agreement. An accord to be good must be in full satisfaction and must be executed. A promise to execute or to perform at a future time would not support the plea of accord and satisfaction. *Goble v. American Nat. Bank,* 46 Neb. 891. Hence, a departure from a defense of an account stated to a plea of accord and satisfaction is the substitution of a new ground of defense, and the trial court was fully supported in sustaining the motion to strike such defense from the answer because not pleaded in the court below.

The question then arises, with the seventh paragraph stricken from the answer, is any defense stated in view of the admissions of the answer. Now, by the admissions of the answer it is conceded that *prima facie* plaintiff has a just cause of action against the defendant for the amount claimed in his petition. In other words, that he has a liquidated existing claim for $843, just as much so as

though he held defendant's note of hand for such an amount. Now, supposing for the purpose of the argument that plaintiff had sued defendant on defendant's note of hand for $843, and defendant had answered, admitting the execution, delivery and consideration of the note, and that it was past due and unpaid, could he then couple with these admissions an allegation that there had been an account stated between plaintiff and defendant on which half that amount had been agreed upon, and would such a plea be consistent with the specific admissions of the answer? Would it not be necessary, to make such defense consistent with the admissions, that some fact should be stated which would show a possible dispute about some item in the account alleged to have been stated? Counsel for plaintiff in error seek to meet this suggestion by saying that the by-laws of defendant company are incorporated in the benefit certificate, and that the application, by-laws and certificate together constitute the contract; and that there might be some by-law, or some stipulation in the application for membership, that would modify and reduce the amount for which defendant appears to be liable on the face of the policy or certificate. The response to this is that, if such a thing exists, it should have been pleaded for the purpose of making the attempted defense of accord and satisfaction harmonious with the admissions contained in the answer. But as no such fact was pleaded, we think no defense was stated, and that under the admissions of the answer the court was fully justified in rendering judgment on the pleadings; and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.