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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1907.

VOLUME LXXVIII.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

PREPARED AND EDITED BY
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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JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, 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.	Leander M. Pemberton.....	Beatrice.
		John B. Raper.....	Pawnee City.
Second.....	Cass and Otoe.....	Harry D. Travis.....	Plattsmouth.
Third.....	Lancaster.....	Albert J. Cornish	Lincoln.
		Lincoln Frost.....	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day.....	Omaha.
		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran..	York.
		Benjamin F. Good...	Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck..	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
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Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	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	O'Neill.
		William H. Westover	Rushville.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1907.

PATRICK J. FITZGERALD v. STATE OF NEBRASKA.

FILED JANUARY 5, 1907. No. 14,751.

1. **Rape:** EVIDENCE. The testimony of the prosecuting witness alone will not support a conviction of the crime of rape. Her testimony must be corroborated by other evidence.

2. ———: CORROBORATIVE EVIDENCE. Evidence that a young man has been "keeping company" with a young woman under 18 years of age, and that they were frequently together, does not of itself corroborate her testimony that he was guilty of the crime of rape under the statute.

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

W. S. Morlan and *C. W. Meeker,* for plaintiff in error.

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

SEDGWICK, C. J.

In the district court for Chase county the defendant was found guilty upon an information charging him with the crime of rape. It was alleged that the prosecuting witness upon whom the crime was committed was then under 18 years of age and not previously unchaste, and that the defendant was more than 18 years of age. The de-

fendant has brought the case here for review upon petition in error. Several errors are assigned, but the principal question presented is as to the sufficiency of the evidence to support the conviction. The prosecuting witness testified positively to facts constituting the crime, and the defendant as positively denied that he ever had sexual intercourse with her. In this state the testimony of the prosecuting witness must be corroborated by other evidence or the conviction cannot be sustained. The important question, then, in this case is whether there is sufficient evidence in this record supporting the testimony of the prosecuting witness to justify the conclusion, beyond reasonable doubt, that she ought to be believed rather than the defendant. If there is some testimony given, or some circumstances proved, substantially corroborative of the testimony of the prosecuting witness, the issue of guilt or innocence of the defendant must be submitted to the jury, and the finding of the jury is conclusive of the matter.

It appears from the evidence of the prosecuting witness that she first became acquainted with the defendant about one week prior to the first day of June, 1904. She became 18 years of age about four months later. The defendant was then about 29 years of age. They were in each other's company more or less for several weeks, when she went to Colorado. He also went away and was gone until some time in October. They then were in each other's company more or less until the following February, when she testifies: "He was engaged to another girl, and I did not have anything more to do with him." In the following June the defendant was married to a Miss Hoffmeister. On the 20th of September, 1905, the prosecuting witness gave birth to an illegitimate child. She at once caused the defendant to be arrested upon a charge of bastardy. She testifies that she never told anyone of her condition prior to the time of the birth of her child, and never charged the defendant with the crime for which he is now being prosecuted until that time. No

one but the prosecuting witness testifies to any improper conduct between herself and the defendant during the time that they were keeping company together. Soon after the hearing before the examining magistrate upon the charge of bastardy, the prosecuting witness made this complaint charging the defendant with rape. The intercourse which resulted in her pregnancy took place in December, 1904, three months at least after the prosecuting witness became 18 years of age. If he was guilty of the crime of rape the act took place during the few weeks of their acquaintance from the latter part of May to early in July of 1904. She testifies that it took place on the evening of the first of June, about one week after she first knew him. It will be seen that there are many things connected with the history of these transactions that tend to weaken the force of her testimony. The jury might properly consider these things in weighing her testimony as against the positive denial of the defendant, but, in the absence of circumstances of this nature, it is still necessary that her testimony should be corroborated. The necessity of corroboration in such cases was conceded upon the argument by counsel who appeared in behalf of the state, and it was insisted that corroboration of the testimony of the complaining witness is found in the fact that the parties were frequently together, thus showing an opportunity to commit the crime, and also in the testimony of the defendant himself. The defendant was asked how many times he called upon the young woman, how often he saw her and where, and was asked to fix the dates of these matters. He testified that he saw her several times during the few weeks immediately after becoming acquainted with her; that on some occasions he took her out to ride; that he called at her father's house to see her, and spent the evening with her on several occasions, and that on one occasion he spent an evening with her at the house of a neighbor where two other young people also were, on which occasion the prosecuting witness testifies that the alleged crime was com-

mited. The defendant was unable to state the exact number of interviews that he had with the prosecuting witness, and was wholly unable to fix the dates of these respective interviews. Upon some other similar matters his testimony was also indefinite. That he was not able to be more definite upon these immaterial matters does not tend to corroborate the testimony of the prosecuting witness, particularly in view of the fact that she was unable to be any more definite upon these matters herself. The evidence was taken nearly two years after the matters inquired about, and it is possibly not strange that neither party could be more specific in regard to these particular dates. That these young people were keeping company together, and so were frequently by themselves, and had opportunities to commit such a crime, does not tend to prove that a crime was in fact committed. All of the circumstances proved by evidence other than that of the prosecuting witness were equally as consistent with innocence as with guilt. The argument for the prosecution upon this point was somewhat confused with conditions that sometimes exist in prosecutions for seduction. When the act of intercourse is proved, and the question is whether it was under promise of marriage, the evidence of courtship and intimate relations between the parties furnishes evidence of the promise which legitimately follows. But such evidence does not prove, nor tend to prove, the commission of the act itself which in this case constitutes the crime. The evidence of the prosecuting witness as to the act is wholly uncorroborated. She testifies that on the evening of the first of June, 1904, which was, as before stated, about one week after her first acquaintance with defendant, she and the defendant were invited to spend the evening at the house of a neighbor with another young woman and gentleman; that accordingly they went early in the evening, and, after some considerable conversation with the other young couple, the defendant and the prosecuting witness went into an adjoining room, and there, while the door between the

two rooms was left open, and the other couple remained in the room they had left, the criminal act was committed by the defendant while she was resisting to the extent of her power. This is denied by the defendant, and the evidence of the gentleman who was in the adjoining room tends strongly to corroborate the defendant, rather than the prosecuting witness. He testifies that he knew nothing of the transaction testified to by the prosecuting witness, and that he did not know of anything that indicated any such transaction nor any impropriety between the defendant and the prosecuting witness on that occasion. The prosecuting witness says that she was crying afterwards, and that the young lady who was with them observed it, but the young lady herself was not put upon the stand.

2. There is another matter connected with this prosecution that ought to be mentioned. It is contended on behalf of the defendant that there was misconduct on the part of the attorneys for the prosecution in two particulars. The county attorney who assisted in the prosecution was first employed to conduct the proceeding upon the charge of bastardy, and it is contended that, after having been so employed, he should not be allowed to prosecute the defendant upon the more serious charge of rape. The statutes in this state are very jealous of the conduct of the members of the bar in prosecuting criminal cases. Chapter 7 of the Compiled Statutes relates to the qualifications and relations of attorneys, and section 22 of that chapter provides: "No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted shall depend." A prosecution for bastardy is a civil action. The object is to require the father to assist in

the support of his child, but the form of the proceeding is criminal, and it may be brought in the interest of the mother of the child, or in the interest of the public, or in the interest of both, and it is generally presumed to be in the interest both of the mother of the child and of the public. There might be circumstances under which it would be improper for an attorney to prosecute a defendant upon the charge of rape arising out of the same transaction in which he had been employed to conduct bastardy proceedings. If he had conducted bastardy proceedings in the interest of the mother of the child, and his compensation therefor was expected solely from the proceeds of that litigation, and the circumstances were such that there might be a justifiable suspicion that, to aid his proceedings in bastardy, he had caused a charge to be preferred against the defendant charging him with rape arising out of the same transaction, the court might justly interfere to protect the defendant. But, on the other hand, it is proper, where circumstances require it, that the county attorney should, in behalf of the county, assist in the prosecution of the proceedings in bastardy, and his having done so would in nowise disqualify him from performing his duties in behalf of the state in prosecuting the defendant for the crime of rape, if the evidence seemed to justify it. We do not find in this record any evidence tending to show any disqualification of the county attorney to prosecute this case in behalf of the state. The objection, therefore, based upon this ground was properly overruled. The county attorney, however, did not prosecute this case alone. Other counsel assisted him. Such counsel should observe the same care that the law requires of a sworn officer of the state to avoid violating the rights of the accused. He must "employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with truth." He must not pervert or misrepresent the evidence against the defendant, nor state things not in the evidence as facts, nor appeal to passion or prejudice or any other un-

worthy motive to obtain a conviction, nor urge anything against the defendant that does not legitimately and fairly tend to establish his guilt. The complaint in this case is that the assisting counsel in his argument to the jury used inflammatory language; that he stated matters to the jury as facts that were not in the evidence; and that he assured the jury of his positive belief as to the defendant's guilt. There is no doubt that such conduct on the part of the prosecuting attorney would require the interposition of the court. A conviction obtained by such methods could not be sustained. There is in the record what purports to be a part of the argument of counsel who was assisting the official prosecutor. It does not appear to be sufficiently authenticated to justify us in acting upon it. We have, however, in view of the importance of the question presented, examined it with care. It does not appear that statements were made by counsel of such important facts, not justified by the record, as to require a reversal of the judgment on that account. The appeals for conviction are not in all respects as calm and deliberate as might be expected from counsel occupying so responsible a position, but we do not find in them any deliberate and vicious appeals to the passions and prejudices of the jury. No particular expressions in this argument are pointed out by opposing counsel as objectionable, and we find none so violent and prejudicial as to vitiate the verdict of the jury. If the attention of the trial court had been called to the character of the remarks of counsel, he would no doubt have been advised to use more temperate language. It does not appear to be necessary to discuss other matters mentioned in the briefs.

Because the evidence of the prosecuting witness is not corroborated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

DELL TITTERINGTON V. STATE OF NEBRASKA.

FILED JANUARY 5, 1907. No. 14,651.

1. **Evidence** examined, and *held* sufficient to sustain the verdict.
2. **Rulings** of the trial court upon the introduction of evidence and the giving and refusal of instructions examined, and *held* not prejudicial to the defendant.

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

J. G. Beeler and *A. Muldoon*, for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson, L. E. Roach and *Wilcox & Halligan, contra.*

LETTON, J.

This is the second time this case has been before this court. Upon a former appeal the judgment of the district court was reversed for the refusal to give an instruction requested by the defendant. A new trial has been had and the defendant has again been convicted, from which judgment he appeals.

The defendant contends that the evidence in the case is insufficient to sustain a verdict of conviction. The evidence shows that Bentley, the prosecuting witness, had delivered certain cattle to the defendant to be pastured at an agreed price; that part of the cattle had been returned by the defendant; that part of them had died, leaving five animals in the defendant's hands which he had not accounted for. The prosecuting witness testifies that he never consented to the conversion of these cattle by the defendant, and that the same have not been returned to him. On the other hand the defendant testifies that in October, 1903, Bentley purchased a mare from him for $125; that no time was fixed for the payment of the money and that no note was taken for it; that on August 27,

1904, the defendant, with one Hostetter and Etchinson, and the restaurant keeper, Otto Weil, were in the Vienna restaurant at North Platte, Nebraska, when Bentley came in; that they had a conversation there with reference to the amount owing from Bentley to him for pasturage, and that it was there agreed that Titterington should apply the value of the five head of cattle in his possession upon the amount Bentley was owing him for the horse. Since the main controversy in the case is as to whether or not there was a settlement between the parties at this time whereby the title to the cattle passed to Titterington, it is necessary to scrutinize the testimony as to this conversation very closely. Titterington testifies that he, Etchinson and Hostetter were in the restaurant at dinner; that "Bentley came in, and he asked me, as usual, how much he owed me yet. I told him that I did not know. He said: 'How much do I owe you on the pasture bill?' I told him that I did not think the pasture bill was very big, but that he still owed me for the mare. He said his horses were knocked out; that his crop had been knocked out, and that he did not know when he would ever get the money to pay it. I asked him if he would turn the remainder of these cattle on the account. He said he would. Q. What if anything was said about the mare? A. Nothing, only my remark that there was not much upon the pasture bill and that the mare was back yet, and I asked him to turn the five head of heifers on the whole account. * * * Q. Have you related the whole conversation with reference to what took place there in the Vienna restaurant? A. In regard to the trade, I think I have. Q. As to the trade, that you took in the heifers on the account that was due you for pasturage on the cattle? A. Yes, sir."

Hostetter testifies: "Bentley came in there, and asked Titterington how much he owed him, and Dell told him he did not think the pasture bill was very much. He asked him something about a horse. I do not remember exactly what he did say, and Dell asked him about turning those

cattle over to him that was up there upon the bill, and he said: 'All right.'" He further testifies that they were still talking when he went out. Etchinson says: "We were in there eating dinner, and Bentley came in, and sat down opposite him, and asked him how much he owed him. Titterington says: 'I don't know how much it is exactly.' Q. Go ahead and tell what you heard. A. He spoke about those cattle then. Bentley says: 'Have you got the five head of cattle yet?' And Titterington says: 'Yes.' Titterington says: 'We can just turn them on this.' And Bentley says: 'Yes.' Q. Do you recollect anything further that was said there? A. No, sir." He further testifies that he remained there after Hostetter went out. Otto Weil, the restaurant keeper, testifies that he remembered of Titterington and the others being in his place in August, 1904, and heard some talk about cattle, but could not state what was said. This is all the evidence to support the defendant's contention that the title to the cattle passed from Bentley to him. Bentley admits that he was present at the restaurant at about this time, and thinks they had a talk about the cattle, but did not think they spoke about the pasture bill. He denies positively that he ever bought a mare from Titterington, and testifies that he did not remember of Titterington making the statements in the restaurant testified to by him. He further testified upon rebuttal, when asked if in the conversation at the Vienna restaurant, or any other time, he said to Titterington that he would sell him the cattle to apply on the payment of the mare. "No, sir, as I said before, I have no recollection of anything of the kind. I cannot see why I could agree in any such way. I never owed Titterington for any mare or any horse at any time. Q. Did you ever sell these cattle to Titterington? A. As I said today, I do not remember ever selling any cattle to Titterington. Q. Did he ever pay you for them? A. No, sir." Roy Spurrier testified that about October 10, 1904, he asked Titterington what had become of the Bentley cattle, and he said that he had hid them; that Bentley owed him for a horse,

and that whenever Bentley paid him what he owed him he would get him the cattle or some others in place of them. George Garman testified that in December, 1904, he went to Titterington's house to see him about some cattle they were short of, and that in the conversation Titterington said: "The only crooked work I have done is I stole the Bentley cattle and killed them. He owed me some money and he would not pay it, and I just took the cattle." Upon cross-examination the witness would not swear positively that Titterington used the word "stole," but he was positive that he used the words "crooked work," with reference to the Bentley cattle. This witness is corroborated by his brother Frank Garman, who was with him at the time. Other witnesses testified that Bentley went to Titterington's place, and bought the mare which has been spoken of, while Bentley and one Mrs. Ingersoll testified that Mrs. Ingersoll bought the mare early in October, 1903, to match another horse she owned, and that she sent Bentley to Titterington's place to get the mare later in the month, at the time when the defendant's witnesses testified they saw him there driving the mare.

In this state of the testimony it is apparent that, if the jury believed the witnesses for the state, there was sufficient evidence to sustain the verdict. It is also clear that the jury were not impressed with the veracity of the witnesses for the defendant. If they had given them any credence, there was a sufficient volume of testimony, not only to raise a reasonable doubt, but to convince them of the defendant's innocence. It is impossible for this court to say from the cold pages of the transcript which of these witnesses should have been believed, and it is not our province so to do. The matter was exclusively for the jury to determine, and with their conclusions upon the facts we are not disposed to interfere.

Error is assigned for the refusal to give an instruction to the effect that, if the defendant honestly believed he had a right to butcher or ship the cattle, under the con-

tract of purchase made with Bentley, then the jury should find the defendant not guilty. This assumes there was a contract of purchase, which is the point in dispute, but if it be construed as submitting that question to the jury, it was not so favorable to the defendant as the one given by the court on its own motion. The court instructed the jury that, if the evidence showed a settlement, or if it was sufficient to raise in their minds a reasonable doubt as to whether or not the defendant and Bentley had a settlement of their accounts whereby the defendant became the owner of the cattle, they should give the defendant the benefit of the doubt, and acquit him. It is clear that the jury must have entirely disbelieved the testimony of Titterington, Hostetter and Etchinson as to what took place in the restaurant, otherwise this instruction must have resulted in the defendant's acquittal, and it was as favorable to him as the evidence warranted.

Other errors are assigned with reference to the refusal of other instructions and to the rulings of the court upon the introduction of testimony. We have examined these instructions and the rulings as to the evidence, and find nothing prejudicial to the defendant.

Lastly, the instruction given by the court upon the question of reasonable doubt is assailed as being prejudicially erroneous. The instruction is prolix and unwieldy, and no doubt it would have been better to have omitted it entirely or to have given a short and clear instruction upon that point. We have often criticised the practice of the district courts in giving long instructions attempting to define reasonable doubt, and think the instruction under consideration was entirely too long to serve a good purpose. However, we find no erroneous statement of the law therein, and certainly find nothing which is prejudicial to the defendant. The defendant appears to have had a fair and impartial trial. His rights were properly protected by the court in its instructions to the jury.

The judgment of the district court is therefore

AFFIRMED.

JOHN T. CATHERS, APPELLANT, V. FRANK E. MOORES ET AL., APPELLEES.*

FILED JANUARY 5, 1907. No. 14,588.

Cities: TORTS OF OFFICERS: ACTION. Unofficial citizens cannot maintain an action on the behalf, and practically in the name, of public corporations to recover for the conversions or embezzlements, or other torts or misdeeds of officials of municipalities and of persons having dealings with them.

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

Byron G. Burbank, for appellant.

Weaver & Giller and *W. J. Connell, contra.*

AMES, C.

The petition alleges that the plaintiff is a citizen, resident and taxpayer of the city of Omaha, and that he prosecutes the action for the benefit of all other persons similarly situated for the use and on behalf of the city, and that he has requested the city attorney to begin and prosecute a like suit in the name and on the behalf of the city, but that he has refused so to do, giving as his reason for such refusal that such an action would be without authority of law. The action was begun against Frank E. Moores, then mayor of the city, but now deceased, August H. Hennings, then treasurer of the city, but now deceased, Charles O. Lobeck, comptroller of the city, and four other persons, members of the city council. The city is also named as defendant, and the suit has been revived against the personal representatives of the deceased defendants.

* Rehearing allowed. See opinion, p. 17, *post.*

The petition alleges, in substance, that in May, 1904, the council of said city passed, with the concurrence of such of the defendants as were members of that body, and that the mayor approved and signed an ordinance purporting to appropriate the sum of $15,539.75 for the payment of certain persons for services rendered by them as common laborers in cleaning the streets of the city, and that the mayor, treasurer and comptroller had by their concurrent action disbursed that sum from the treasury in the making of the payments mentioned. But it is alleged that all the foregoing proceedings were without warrant or authority of law, and resulted in an injury and damage to the city in the sum so paid out, because the laborers for whose services the payments were made had not, previous to the rendition thereof, been employed, nor had their wages been fixed by any authority empowered by law to do said acts or either of them, although the city charter expressly enacts that "no laborer or employee shall receive any compensation whatsoever for services rendered prior" to the time of their employment and the fixing of their compensation by the board of public works and the mayor and council, as provided by the act. The petition therefore alleges, in effect, that the persons named were by their conduct, recited, guilty of a tortious conversion of the moneys so disbursed, for which they and their personal representatives were and are jointly and severally liable to the city. The prayer of the petition is that the defendants, except the city, be charged with, and required to account for, the moneys so paid out as trustees, and that the plaintiff have and recover said sum, with interest, for the use and benefit of the city, and for such further and other relief as may be just and equitable.

We fail to discover any ground for the interposition of the equity powers of the court. The cause of action on behalf of the city, if there is one, which we do not decide, is in tort for a wrongful conversion or embezzlement, for which the law furnishes a plain, adequate and speedy remedy.

There was an answer somewhat in the nature of a confession and avoidance, in which it was alleged, among other things, that the services in question had been actually rendered, and that the payments complained of were not in excess of their fair value, and that the city authorities and the citizens and taxpayers generally, including the plaintiff, had had full knowledge of all the circumstances, but had made no objection by appeal from the allowance or payment of the claims or otherwise, except by the beginning of this suit some months afterwards. There was a trial without a jury and a judgment of dismissal, from which the plaintiff has appealed.

The transcript is not accompanied by a bill of exceptions, but there are annexed to the judgment entry, as though a part thereof, certain special findings of fact upholding the allegations of the answer, and "by reason" of which, as the journal recites, the court "found generally against the plaintiff," that is, found, in effect, that the plaintiff is without equity. What the force and effect of these special findings might in other circumstances be, it is, in our opinion, unnecessary to decide. If, as we have already intimated, the petition had been filed by and in the name of the city of Omaha as plaintiff, we are of opinion that it would have presented no matter of equitable cognizance; but we are equally convinced that it presents no matter which the plaintiff is entitled to litigate in any form of action in any court. The courts in this country have gone to extreme lengths in entertaining suits by taxpayers against local boards and officers to restrain the latter from entering into unauthorized or irregularly executed contracts, and from wrongfully and unlawfully, or, perhaps, negligently, disbursing public moneys or disposing of public property; but the origin and foundation of jurisdiction in all such actions is that the plaintiff and others similarly situated are without other remedy; that is to say, that, unless the court shall exert its equity powers to prevent the doing of the threatened act, the plaintiff or taxpayers will have no means of repairing the damage

after it has been committed. But this, in our opinion, is the limit to which the court could go with safety, even if principle were supposed to extend further. The result of an action like the present, if one could be maintained, would, of course, have the same quality of conclusiveness with respect to parties and privies as has a final judgment in other similar cases. It seems to us that the truth of the proposition is so obvious as to call for no argument in its support; that the policy would be an extremely hazardous one which would permit unofficial citizens to constitute themselves public agents, and to begin and prosecute actions on the behalf, and practically in the name, of public corporations to recover for the conversions and embezzlements, or other torts or misdeeds of officials of municipalities and of persons having dealings with them. The opportunities for collusive actions and judgments, and for taking advantage of the incompetency and irresponsibility of plaintiffs, which such a practice would afford are too manifest to require specification. Only less injurious to the public interests would be the confusion and embarrassment into which municipal affairs would be thrown by the encouragement that such a practice would afford for the gratification of personal and political prejudice and rancor, and the multiplicity of litigation to which they would almost inevitably give rise. It may well be doubted whether under such circumstances honorable and responsible persons could be induced to accept office, or, if they should do so, whether they would not be so hampered and annoyed as to render the due discharge of their necessary functions extremely difficult, if not practically impossible.

Section 40, ch. 12*a*, Comp. St. 1905, provides that "the city attorney shall attend to all cases in any court in this state, except in the police court, and appeal cases therefrom, wherein the city may be a party, plaintiff or defendant, or a party in interest," except in those cases in which he shall have a personal interest, and in such cases the mayor and council are directed to appoint some other

person to act temporarily in his stead. By sections 143 and 144 the mayor and council are given general legislative and administrative control over the affairs of the city, and of the prosecution and defense of suits by it and on its behalf. In our opinion, these provisions are exclusive, and the city or its officers cannot be put to the trouble, annoyance or expense, or required to incur the risk, of litigation in suits of this character instituted by persons having no special or peculiar interest, and suffering no particular injury.

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

OLDHAM and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed July 12, 1907. *Judgment of affirmance adhered to:*

1. **Cities: TORTS OF OFFICERS: ACTION.** A resident taxpayer of a municipal corporation may maintain an action against its officers who have squandered or dissipated its funds, or paid them out for an unlawful or unauthorized purpose, to recover such funds for the use and benefit of the corporation where its proper law officer neglects and refuses to prosecute such an action.

2. ———: ———: ———. To entitle a taxpayer to a judgment in such a case, it must appear that the municipality could have maintained the action in the first instance.

3. ———: LIABILITY. Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received; and where it has paid for such benefits it cannot maintain an action to recover back such payment.

4. ———: CLAIMS: ACTION BY TAXPAYER. A taxpayer who has full knowledge of the allowance of a claim by the municipal authorities, and is afforded an opportunity to appeal from such allow-

ance, and fails to avail himself of that remedy, is not thereafter entitled to maintain an equitable action against the officers of the municipality to recover the money disbursed upon such allowance.

BARNES, J.

By our former opinion, *ante,* p. 13, where a general statement of the facts of this case will be found, it was held that "unofficial citizens cannot maintain an action on the behalf, and practically in the name, of public corporations to recover for conversions or embezzlements, or other torts or misdeeds of officials of municipalities and of persons having dealings with them." Having been convinced by appellant's brief, on his motion for a rehearing, that the rule above quoted is too broadly stated, a rehearing was allowed, and it is now strenuously contended by the appellant that we are committed to a contrary doctrine. In support of this, our attention is directed to *Shepard v. Esterling,* 61 Neb. 882, where it was said: "There is, it is believed, no serious question about the right of a taxpayer to maintain a suit to restrain the governing body of a municipal or public corporation from making an illegal disposition of public funds or property. *Tukey v. City of Omaha,* 54 Neb. 370. And on principle it would seem that a taxpayer should be permitted to enforce for the benefit of such corporation a right of action which its governing body has refused to enforce. If a taxpayer, to avoid the burdens of needless taxation, may sue to prevent public officers from squandering public money, there is, it seems to us, no good reason why he may not also commence and prosecute to judgment an equitable action for the enforcement of a corporate claim which the officers of the corporation have refused to enforce. *Estate of Cole,* 102 Wis. 1; *Quaw v. Paff,* 98 Wis. 586; *Frederick v. Douglas County,* 96 Wis. 411." We are satisfied that the rule above stated is supported by the weight of modern authority, and it may be said that a resident taxpayer of a municipal corporation may maintain an action against

its officers who have squandered or dissipated its funds, or paid them out for an unlawful or unauthorized purpose, to recover such funds for the use and benefit of the corporation where its proper law officer neglects and refuses to prosecute such an action, and to this extent our former opinion is hereby modified.

This brings us to a consideration of the merits of this controversy. The record is composed of a transcript of the pleadings and the findings and judgment of the trial court, but contains no bill of exceptions. It appears that the pleadings are sufficient to support the findings, both general and special, and so it only remains for us to determine whether the proper judgment has been rendered. It appears that the legislature of 1903 passed an act creating a new charter for the city of Omaha. This act, for some unexplainable reason, contained an emergency clause and went into effect on the 2d day of April, 1903, which was the date of its approval. Among other provisions it contained the following: "The board of public works shall appoint all inspectors, laborers and all other employees necessary to carry out the provisions of this section, subject to the extent and limit of the funds provided by the mayor and city council for the purpose; and said board of public works shall present the names of all such inspectors, laborers and all other employees, together with the time covered by such employment and their compensation for the same to the city council and city comptroller, and said appointments shall be confirmed and the compensation shall be fixed by the mayor and city council before said inspectors, laborers and all other employees shall enter upon their duties as such. any compensation whatsoever for services rendered prior And no inspector, laborer or other employee shall receive to such fixing of the compensation and confirmation." Comp. St., ch. 12*a*, sec. 101*a*. When the act took effect there were working upon the streets of the city a large number of persons who had theretofore been regularly employed for that purpose. The city, through its board

of public works, mayor and council, failed to comply with the charter provision above quoted until after the expiration of the months of April and May of that year. The laborers did full service, and earned the money which they subsequently received from the city, and the city itself was benefited to the full extent of the money paid out for the labor thus performed, which was actually necessary to keep the streets of the city clean and in a sanitary condition. In fact, the services performed were necessary for the health and welfare of the city. The pay-rolls of said employees, which formed the basis of the claims in question, were duly certified to by the foremen in charge of the different departments under which the employees were working, and were finally certified and sworn to by the city engineer before they were presented to the city council. The claims were also investigated by the proper committees, and on February 19, 1904, a concurrent resolution was adopted by the mayor and city council, as follows: "Resolved by the city council of the city of Omaha, the mayor concurring, that the pay rolls of the board of public works for the months of April and May, 1903, now in the hands of the city comptroller be, and the same are hereby, allowed, and the city comptroller is hereby instructed to amend the same into the pending appropriation ordinance." Of the adoption of this resolution the plaintiff had full knowledge. The claims in question were not paid, however, until May 3, 1904, when they were amended into the then pending appropriation ordinance, and such payment constitutes the basis of this action. It thus appears that, although the services in question were performed in the year 1903, they were not paid for until 1904, and were then paid out of the funds appropriated for that year. The trial court found generally for the defendants, and also specially, among other things, as follows: "The court further finds that none of the defendants in any way were interested in the claims in question, or the claimants thereof, or actuated by mercenary motives, and that each in his several relations in

which he acted believed that said city was morally liable for said claims, and believed that said city had received the full benefit of the labor so paid for, and that all that was lacking was the sole fact of the omission by the board of public works to transmit the list of employees at the proper time to the comptroller and council. And the court finds that each of said defendants were warranted in so believing, and the court finds in accord with the said belief of defendants so referred to.

"These defendants having nothing to do, by reason of their several functions, with the employment of the labor in question in the first instance, nor said labor being in any manner under their control, either jointly or severally, and said city's having received the full benefit of the labor had, as paid for, and no mercenary corruption in any manner appearing, and the plaintiff not having availed himself of his right to compel the submission of the list of labor, whereby the charter formalities would have been complied with, nor having availed himself of his right of appeal upon the allowance of said claims, this court refuses in an equitable proceeding to mulct these several defendants in a judgment, as prayed by plaintiff."

The plaintiff, however, contends that the acts of the defendants who participated in the transactions complained of are absolutely void, and they should be compelled to refund the money thus expended to the city. We do not so view this question. Here we have a case where the city had the power to contract with persons to keep its streets clean and in proper repair. It also had the power to pay for the services rendered under such a contract, and while it may be said that its authority was so irregularly exercised as to render the proceedings illegal, still there was not an entire lack of power to perform the acts complained of. In *Rogers v. City of Omaha,* 76 Neb. 187, it was said: "There is a clear distinction between contracts outside of the powers conferred upon municipal corporations and contracts within the general scope of the powers conferred, but which have been irregularly exer-

cised. Contracts falling entirely outside of the powers delegated to the corporation are absolutely null and void, and no right of action against the corporation can be founded upon them. The rule with reference to the liability of the corporation on contracts within the general scope of the powers granted, but which have been irregularly exercised, is well stated in 2 Dillon, Municipal Corporations (4th ed.), sec. 936, as follows: 'A municipal corporation, as against persons who have acted in good faith and parted with value for its benefit, cannot * * * set up mere irregularities in the exercise of power conferred, as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys.' "

The action of the defendants in this case was not *ultra vires* in the proper sense of that term, and we are of opinion that the city would be estopped to set up the irregularities complained of as a defense to an action brought against it by the employees to recover the value of their services. This principle seems to have been recognized in *Clark v. Saline County,* 9 Neb. 516, and *Grand Island Gas Co. v. West,* 28 Neb. 852. *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70, was a case where the city entered into a void contract with the land company to pay certain hydrant rentals. Water was furnished the city according to the contract, and in a suit to recover the value thereof it was said: "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." To the same effect is the case of *Ward v. Town of Forest Grove,* 20 Or. 355, 25 Pac. 1020. The claim in that case was one made by a physician for attending persons afflicted with smallpox. The power to employ a physician was restricted to an employment by ordinance only. The physician was employed by resolution. The court said: "The plaintiff rendered the services at the request of such committee,

with full knowledge and consent of the town authorities, and the defendant, having received the benefit of his services, should compensate him therefor." In *Shepard v. Esterling, supra,* which is the case most relied on by the plaintiff to support his contention, it was said: "The services were undoubtedly extra-official; they were outside of and beyond the duties which the law imposed upon the defendant as judge of the county court; he could not have been compelled to perform them; they might have been performed by any one employed for the purpose. The county got the benefit of Esterling's labor, and it is plain, according to equity and good conscience, that it should render an equivalent therefor. * * * The method by which the county board undertook to compensate the defendant for his services was, of course, irregular, but it worked no real injury to the plaintiff or any other taxpayer of the county. It is not claimed that the amount allowed the defendant was excessive, or that a less amount would have been allowed if the usual procedure had been followed. The plaintiff is not entitled to any relief, either in law or in equity, and hence the trial court did not err in dismissing the action."

From the foregoing authorities it seems clear that the city in this case could not have successfully defended an action by the employees to obtain payment for the services it is shown they had performed, and it follows that, having paid for such services, it cannot maintain an action to recover back such payment. It seems equally clear that, before a taxpayer can maintain an equitable action to recover money expended by the officers of a municipality, it must appear that the city itself could have maintained such an action in the first instance. And so it may be said that the plaintiff's suit is without equity, and he was not entitled to a judgment against the defendants.

Again, the trial court found, and it appears rightly so, that the plaintiff had an opportunity to appeal from the allowance of the claims on which the money sought to be recovered was disbursed. Having failed to prosecute an

appeal and thus avail himself of his remedy at law, the plaintiff was not entitled to maintain this action.

So we are of opinion that our former decision, by which the judgment of the trial court was affirmed, was right, and it is adhered to.

AFFIRMED.

JAMES W. JOHNSTON, APPELLEE, V. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, APPELLANT.*

FILED JANUARY 5, 1907. No. 14,602.

1. **Negligence:** INJURY TO CHILD. In an action for damages for personal injuries to an infant alleged to have been caused by the negligence of another, the foundation for recovery, if there is any, is not the tender years of the child, but the culpable negligence of the defendant.
2. ———: DAMAGES. In an action for damages for personal injuries alleged to have been inflicted by the negligence of another, a recovery can be had for such consequences only, of the act complained of, as ought reasonably and probably to have been anticipated to flow therefrom.

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

Greene, Breckenridge, Matters & Kinsler, for appellant.

T. W. Blackburn and *R. S. Horton, contra.*

AMES, C.

This is an appeal from a judgment for damages for a personal injury to a son of the plaintiff, a lad 12 years of age.

There is a foot passage way or sidewalk along the side of a viaduct in the city of Omaha. On the outside of this walk, and along the edge of the viaduct, is an iron railing or fence 44 to 46 inches in height, and constructed

* Rehearing allowed. See opinion, p. 27, *post.*

of three horizontal rails connected with cross-pieces or lattice work. On the outside of this fence and fastened thereto, and to the substructure of the viaduct, a street railway company has erected and maintains trolley poles. From the outside of these poles brackets or arms are extended, and upon insulators at the ends of the arms wires are suspended for the carrying of currents of the defendant, which is an electric lighting company. The apparatus of the defendant was erected in compliance with regulations of the city authorities with reference to the subject, and under the supervision of the city electrician. The distance to the wires from the top rail of the fence is not less than 18 and is perhaps 30 inches, much the greater weight of the testimony favoring the latter. On the occasion of the happening of the injury, the plaintiff's son and four other boys of about the same age approached the viaduct on foot for the purpose of crossing it, when one of them remarked that another boy, not then present, had received a shock some days before from a wire on one of the poles, which was designated. When the party had arrived at this place one of the boys climbed on the second or middle rail of the fence and proposed to grasp the wire, but was dissuaded from so doing by his companions. After that the plaintiff's son proposed that he would climb on the fence "and see if he could get a shock." All the other lads warned him against so doing, but he persisted, telling them to stand at one side, so that if, when he should touch the wire, he should fall he would not hurt them, and after making a second attempt did succeed in touching the wire, from which he received the injury complained of. There is no evidence with respect to the insulation of the wire, except what may be inferred from the circumstances just narrated, and none that the defendant, its agents or servants had any knowledge or notice of the previous occurrence mentioned by the boys, or that their apparatus was out of repair, if it was so. At the close of the trial the defendant asked a peremptory instruction in its behalf, which the court refused, and

submitted the case to the jury, who returned a verdict for the plaintiff, from a judgment on which this appeal is prosecuted.

We think that the instruction ought to have been given. It does not appear that the defendant's structure was unskillfully or negligently made, or that it differed in any respect from such as are required by the regulations and authorities of the city and are in general use for like purposes elsewhere. If the wire lacked insulation it is not shown that that fact was known to the defendant or its employees, or had existed for so long a time that knowledge thereof by it or them may be presumed, or that want of knowledge was due to negligence. The wire was not within the public highway or so near thereto that travelers thereon were likely to come in contact with it, nor does it appear that any such persons had ever done so. The structure is not of such a character as to be obviously attractive to children or likely to be used by them as a plaything, nor does it appear that it ever was so used, except on the occasion under inquiry. The hearsay testimony about another boy having received a shock at another time is, of course, not evidence, and the event, if it happened, is not shown, even by hearsay, to have come to the notice of the defendant. Even if the wire was negligently allowed to remain insufficiently insulated, of which we think there is not sufficient evidence, the injury complained of is not such a one as could reasonably and naturally have been anticipated would result therefrom, and it is only for the natural and probable consequences of negligence that a person accused of it is responsible. *Cole v. German Savings and Loan Society*, 124 Fed. 113, and authorities cited; *Stark v. Muskegon T. & L. Co.*, 141 Mich. 175; *Powell v. New Omaha T.-H. E. L. Co.*, 74 Neb. 280; *City of Crete v. Childs*, 11 Neb. 252. This rule is too well settled to require further citation of authority in its support, and we do not understand that it is at all interfered with or affected by the fact that a person who may accidentally suffer an injury is a child of tender years.

We have not seen occasion for discussing the character and intelligence of the plaintiff's son, which, if there was evidence of negligence by the defendant, would ordinarily be a question for the jury. He showed a somewhat remarkable persistence in the pursuit of a known danger, and seems to have fully and accurately anticipated and appreciated the injuries likely to be, and which were, consequent upon it, namely, a burning of his hand and a considerable shock to his nervous system. It appears to us at least doubtful if a person thus competent to judge of his own conduct, in connection with known circumstances, can be excused from the charge of contributory negligence because of his youth. But in all such cases the foundation of a right of recovery, if there is any, is not the tender years of the plaintiff, but the culpable negligence of the defendant, which latter is in this case wholly unproved.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded.

OLDHAM and EPPERSON, 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.

The following opinion on rehearing was filed October 16, 1907. *Former judgment of reversal adhered to:*

1. Negligence: INJURY TO CHILD. An ordinarily bright and intelligent boy twelve years old, living in a city in which electric light and power wires are in constant use on nearly all of the principal streets and highways, who, having knowledge of the danger but not of its extent, purposely takes hold of such a wire in order to obtain a shock, and is injured thereby, is, as a matter of law, guilty of contributory negligence.

2. ———: DAMAGES. One who is negligent in a situation of danger, the existence and nature of which he knows, is not entitled to recover damages for an injury which his negligent conduct invites because such injury is greater than he anticipated.

AMES, C.

A reargument has been heard in this case because a motion for a rehearing complained of certain misstatements of fact in the former opinion, *ante,* p. 24. The opinion says that at the time of the happening of the injury in suit the defendant was not aware that its wire was without insulation at the point of contact therewith by the plaintiff's son, and was at that time without knowledge of a previous injury therefrom to another boy. Both these statements are erroneous, but to what extent either is material may be a subject of debate. The second of them is better described as inaccurate than erroneous. It is not shown what was the age of the boy formerly hurt, or how or in what circumstances the mishap took place, or that it was such a one as would reasonably have been anticipated to recur. It was these matters upon which the mind of the writer of the opinion dwelt and to which he intended to give expression. There is, in our view, nothing in the nature of an electric light wire, placed eighteen or more inches outside a public way and defended by a substantal fence four feet high, which would lead a person to suppose that it is attractive to children of tender years as a plaything, and there is no evidence that the defendant knew or apprehended the wire in question to be so. Decided cases involving the right of children of tender years, or their parents or guardians, to recover for the consequences of negligent injuries fall into several classes. One of them is of those instances where the child is employed or is rightfully present in a place of danger, and does or omits an act or acts which in a person of mature years and ordinary experience and intelligence would be admittedly negligent, but for which conduct the child, on account of his supposed lack of these qualities, is either absolutely excused, as a matter of law, or the degree of his incapacity or lack of discretion, and consequent irresponsibility, is left to the jury as a question of fact. The line of discrimination between these two

subdivisions, in one of which the injury is disposed of as a matter of law and in the other of which it is treated as a question of fact, is extremely obscure and uncertain, if there can be said to be any such distinct line, and its discovery in every instance is largely dependent upon the peculiar circumstances of the particular case, and perhaps upon the unconscious bias and preconception of the court who decides it. But with neither of these subclasses or with their definition have we anything now to do. Another class of cases is composed of instances in which the party by or on behalf of whom the complaint is made was not an employee or rightfully present, and was one toward whom the person owning the instrument inflicting the injury owed no duty, except to abstain from malicious or wanton misconduct. Ordinarily, in such cases, if the person injured is an adult, the question of negligence or of contributory negligence, properly speaking, does not arise, the trespasser assumes the risk of his own conduct, and no liability exists. But if the person injured is of immature years several questions arise, all of which, to justify a recovery, must be answered in the affirmative: *First.* Is the machine or appliance of such a character as to be generally known, or was it or should it have been known to the proprietor, to be likely to inflict the same or a similar injury if unguardedly dealt with? *Second.* Was it of such a character that a reasonably prudent man would have known, or did the proprietor in fact know, that it was of such a character as to attract or induce young and indiscreet persons to employ it as a plaything, in mental obliviousness, or nearly so, to their peril in so doing, or at least of the nature or degree of such peril? *Third.* Was the party injured of the description last given? Obviously the last question may be solved in one of two ways. Either discretion or indiscretion may be conclusively presumed, as a matter of law, from the age and experience of the child, or the age may be regarded as raising a presumption susceptible of rebuttal by evidence. And here, too, the authorities speak with no certain or un-

equivocal voice. We think it would render this opinion uselessly prolix to make an attempt, necessarily fragmentary and imperfect, to cite and criticise the hundreds of reported decisions treating of this and allied questions. A comprehensive and masterly collection and review of them may be found in 1 Thompson, Commentaries on Law of Negligence, secs. 306-349. It seems sufficient to refer to that work and to state our own conclusions as to the principles deducible therefrom and as to their application to the pending case.

One inference from these decisions seems to be quite clear, and that is that the rules of law and practice relative to the weight, sufficiency and conclusiveness of evidence with respect to any of the foregoing questions, in cases in which they are to be decided upon evidence, are not different from such as are applicable to the trial of other cases. Now, we are far from assuming, in the absence of proof, that an electric light wire situated as was the wire of the defendant is an object of such a nature, or is so generally known to be such that the defendant must be presumed to have known it so to be, as to attract and induce children of tender years, or boys of ten or twelve years of age, to make use of it as a plaything. Neither do we think the evidence sufficient to prove that the defendant had such knowledge, or that the wire was in fact of such a nature. So far as our own observation goes or legal literature discloses, the casualty complained of was singular and peculiar. The circumstances of the former mishap are unknown, and it is a matter merely and wholly of conjecture whether it occurred in circumstances like those in the pending case or otherwise. And one swallow does not make a summer. Even if the circumstances had been shown to be similar, the defendant might have been excused from apprehending, because of its knowledge of one such happening, that so singular and improbable an event would be repeated, and have been permitted to rest securely upon its knowledge that its wire, though the insulation was slightly impaired, was so guarded as to

insure the safety of the traveling public and of all others who had a right or could be expected to meddle with it. But the circumstances of the accident themselves are such that all these questions may be resolved in favor of the plaintiff and still there can be no recovery. There were five boys in the party. One of them climbed upon the fence as if to touch the wire, but his companions "scared him down." Then the plaintiff's son climbed partly up the fence, apparently with like intent, and his companions "scared him down." Then he told them to go on one side so as to be out of the way if he happened to fall, and then he climbed up again and touched the wire and received the shock and consequent injury of which complaint is made. The evidence establishes several things without contradiction and conclusively. Electricity is a mysterious power, but in many of its common manifestations is not and has not been for many years an unknown force. It is a matter of common knowledge that electric light and power wires carry powerful and death dealing currents, and that they are the frequent cause of severe and fatal accidents, and that ordinary prudence requires all persons to avoid contact with them, especially if they are imperfectly or defectively insulated. The evidence establishes conclusively that the plaintiff's son was an ordinarily bright and intelligent lad, twelve years of age, who lived in the city and knew that the wire carried a current sufficiently powerful to light the circuit of which it was a part, and knew that, because of defective insulation or other defect at the place in question, such current was capable of being diverted into the body of any person coming in contact with it, and knew that shortly before that time it had been so diverted and had thereby caused a shock or injury more or less serious to the person of another boy. That he anticipated an injury of some degree to himself is undeniable, because what he deliberately sought was a "shock," which is nothing less than an injury. Whether he also anticipated its extent or degree is not known, but that he supposed that it would be of

considerable severity is shown by his caution to the other boys to stand out of danger in case of his fall.

We know of no rule of law to the effect that, when one is negligent in a situation of danger the existence and nature of which he knows, he may nevertheless recover damages because the resulting injury is greater than he anticipated. We think the case falls precisely within the rule which governed the decision of *Frauenthal v. Laclede Gas Light Co.*, 67 Mo. App. 1, in which the plaintiff's son, a boy seventeen years old, purposely took hold of the end of a broken electric light wire, knowing the danger of so doing, but not its extent, and was killed. A recovery was denied and the deceased was held to have been guilty of contributory negligence as a matter of law. Irrespective therefore of the question of negligence of the defendant company, we are of opinion that the former judgment of this court should be adhered to because the negligence of the plaintiff's son was a contributory, if not the sole, cause of the injury complained of. The case appears to us to be quite unlike the turntable cases and others of like kind, where children are injured by machinery and appliances attractive as playthings and left unguarded in such situations as to invite them to gratify their impulses without knowledge or apprehension of danger, and it is only in accordance with the principle of those cases that the plaintiff seeks to recover.

We therefore recommend that the former decision of this court be adhered to.

JACKSON, C., concurs.

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

REVERSED.

STATE, EX REL. OMAHA GAS COMPANY, APPELLANT, V. CHARLES H. WITHNELL, APPELLEE.

FILED JANUARY 5, 1907. No. 14,820.

Cities: BUILDING ORDINANCE: VALIDITY. An ordinance enacted by the mayor and council of the city of Omaha regulating the construction of buildings in said city, which provides that it shall be unlawful to erect a gas tank or holder therein without the written consent of the owners of all the property within a radius of 1,000 feet from the site of such structure, is, as to such proviso, void.

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

George E. Pritchett and *John C. Cowin,* for appellant.

H. E. Burnam and *I. J. Dunn, contra.*

AMES, C.

The charter of the city of Omaha, besides conferring upon the mayor and council of the city the usual powers to abate nuisances and to provide, by ordinance, police regulations for the good government and the preservation of the general welfare, health, safety and security of the city and its inhabitants, contains the following specific grant of authority: The mayor and council may "regulate or prohibit the transportation and keeping of gunpowder, oils and other combustible and explosive articles." They are also given the usual powers to prescribe fire limits and to regulate the erection of all buildings within the corporate limits. In the supposed exercise, more particularly, of the last two mentioned powers, the mayor and council enacted an ordinance containing two sections numbered, respectively, 96 and 97, of which the following is a copy:

"Section ninety-six (96). It is hereby declared unlawful to erect any tanks, or to build any storage reservoirs,

for the purpose of storing either illuminating or fuel gas, or to remodel any existing tank, reservoir, building or structure for such purpose not actually in use for the same at the time of the passage of this ordinance at any place in the city of Omaha, except upon the conditions in section ninety-seven (97) of this chapter prescribed.

"Section ninety-seven (97). Before constructing any building or structure to be used for the manufacture of illuminating or fuel gas, and before erecting any tanks, storage reservoir or other receptacles for the purpose of storing either illuminating or fuel gas, and before remodeling or using any building, structure, tanks or reservoir for such purpose, the party or parties desiring such privilege shall first obtain the written consent of all the property owners within a radius of one thousand feet of the proposed building, structure, tank or reservoir to be used for such purpose, and file such permission with the building inspector of the city of Omaha and comply with all other ordinances, rules and regulations relating to buildings."

The Omaha Gas Company is a corporation of this state having its principal place of business at Omaha, and authorized and required by law and by municipal ordinance to construct, maintain and operate gas works in said city, and to manufacture and transmit and distribute, through mains and pipes in and under the streets and public grounds, illuminating and fuel gas for the use of the public and individuals, and for that purpose has erected, and for several years last past has maintained, a gas manufacturing plant upon grounds belonging to it in said city. In 1906 the gas company, for the purpose of increasing its capacity to a degree requisite to supply the needs of a rapidly growing community, it being the only institution of its kind in the city, applied to the building inspector for a permit to erect and maintain upon its grounds and in connection with its existing works a reservoir or "gas holder" capable of storing 1,200,000 cubic feet of gas. The application complies with

all municipal regulations with reference to the subject contained in the ordinance mentioned elsewhere, except the requirement of the above mentioned section 97, of the written consent of all property owners within a radius of 1,000 feet of the site of the proposed structure. Because of such omission, and for that reason alone, the inspector refused to honor the application. This is an application to the district court for a writ of mandamus compelling the issuance of the permit. The writ was denied, and the relator appeals. It thus appears that the sole question in controversy is the validity of that provision of section 97 requiring a written consent of property owners.

The ordinance does not purport to be, and was not intended to be, prohibitory, but to be regulatory only; nor is it sought to declare the manufacture and distribution of gas, or the maintenance and operation of works therefor, or the storage of gas in connection therewith, within the city, by the relator or others, a nuisance *per se;* nor is it disputed that the conduct of such a business under proper regulations is a legitimate and under existing conditions a necessary, enterprise, indispensable to the health, happiness and prosperity of the modern city and its inhabitants, or, as is said in *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S. 650, "is a business of a public nature," and is "one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety." The ultimate inquiry is, therefore, whether the provision in question is a reasonable exercise of the regulatory powers of the mayor and council. Counsel for the relator contend that it is not such for two reasons: First, because it is, or in practical operation may readily become, prohibitory, on account of the difficulty or impossibility of procuring the unanimous consent of all the owners of property in any locality of the city; and, second, because it assumes to confer upon individual property owners within the pre-

scribed radii absolute and arbitrary powers, whose exercise is dependent solely upon caprice, and which have no necessary connection with the public safety, health or morals, and are of such a nature that the governing body itself could not safely or lawfully be entrusted with them. These objections appear to us to have great force. As respects the former of them the city attorney urges that, although it is true, as his adversary contends, that it may be impossible to procure the requisite consent of property owners within any assignable district in the city, and therefore the regulation may be in practical effect prohibitory, still that result would amount to no more than an indirect exercise of the power of prohibition which is expressly granted by the charter. But this reasoning seems to us to be fallacious, because in such a case the prohibition, if and when it should take effect in any particular case or cases, would do so, not in obedience to the will of the responsible governing body of the city but at the instance or because of the inaction of an individual or of individuals who might be influenced by caprice or malice or favoritism or ignorance, or access to whom on account of their absence or other cause might be impossible. And the grant would in any case be made or withheld, not by the mayor and council, but by some one or more of the property owners. But it is urged that whether or not the proposed work or any like structure would be a nuisance in any particular neighborhood or district of the city would be dependent upon its immediate surroundings and the purposes for which property in the vicinity should be in use, and that it would be reasonable to permit the property owners to determine whether, or to what extent, they would submit to annoyances and to danger to their health and persons, that is, whether they would waive objection to a public nuisance for the sake of promoting or permitting an enterprise otherwise beneficial and desirable. This argument we think proves too much. The whole theory of police regulation is that people in their individual or private ca-

pacities cannot be, and ought not to be, entrusted with the guardianship of their own health, safety and social well-being. Men, women or children are not permitted, even voluntarily, to expose themselves to needless perils, nor are property owners, merely because they are such, entrusted with the power to expose others to danger. It is clearly the duty of the mayor and the council to devise, and to prescribe by ordinance, general rules by which it may be determined, by inspection of a given district or neighborhood, whether it is one within which a proposed structure or business may lawfully be erected or maintained. Such rules are necessary, equally for the protection of those who are, or are contemplating becoming, inhabitants of a given locality, or are engaged in business therein, as for persons seeking to enter upon dangerous or annoying enterprises, and for women and children, lessees and employees, and other classes of the community, as for owners of real estate. Under the ordinance in question it, indeed, might well happen that the ultimate decision would be made by one residing at the antipodes, and not a citizen of the city or even of the nation. Whether or not it is competent for the mayor and council absolutely to prohibit the maintenance of gas works within the city limits, it is not necessary and it is not intended now to decide; but what we do say is that they cannot shift their responsibility, either of prohibition or of regulation, upon any class or classes of the community, or, as it might happen, upon nonresidents, and it is this latter proposition that the argument of counsel controverts.

We are not without judicial precedent of the highest character for our conclusion, and it has been held not only that the governing body cannot commit the exercise of its legislative discretion to property owners or other private persons, but that it cannot entrust it to the caprice of any of the officers of the city, and even that it cannot reserve to itself, in its administrative rather than its legislative capacity, an absolute and despotic power to grant or refuse permits of the character in question,

in particular cases and in the absence of, or without reference to, prescribed and duly enacted rules and regulations. Thus, in *Mayor & City Council of Baltimore v. Radecke,* 49 Md. 217, an ordinance which provided that no steam sawmill or machinery, or any steam engine for any purpose, should be erected in the city without first obtaining the consent of the mayor and council was for the reason stated void. And in *City of Sioux Falls v. Kirby,* 6 S. Dak. 62, 25 L. R. A. 621, an attempted delegation of power to a building inspector to grant or refuse permits to erect, alter or repair buildings accordingly as he should be "satisfied" that the proposed structure would or would not be in compliance with the requirements of a certain regulatory ordinance was held to be void, the court saying that "the right of a person to use and improve his property as he may deem proper, consistent with law, is a constitutional right, of which he cannot be deprived at the mere will and pleasure of a city council, or of any officer appointed by it." In *Yick Wo v. Hopkins,* 118 U. S. 356, an ordinance purporting to make unlawful the "carrying on a laundry within the corporate limits of the city and county of San Francisco without first having obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," was held to be violative of the constitution of the United States and void. Mr. Justice Matthews, speaking for the court, in the opinion, said: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." And in *City of St. Louis v. Russell,* 116 Mo. 248, 20 L. R. A. 721, an ordinance providing that no livery stable should be located in any block of ground in the city without the written consent of the owners of one-half the ground of said block was held to be void. In *Ex parte Sing Lee,* 96 Cal. 354, an ordinance providing that a license to carry on

a laundry business in certain blocks should not be granted without the written permission of the village board of trustees, and permission should not be given without the written consent of the owners of certain property, was held to be void, the court saying: "It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority, or any number, of those owning property surrounding that which he desires to use." A great number of other decisions of like import might be cited, but we forbear. The city attorney cites and quotes at length from a single authority to the contrary effect, to wit: *City of Chicago v. Stratton,* 162 Ill. 494, in which an ordinance is upheld that prohibits the maintenance of a livery stable in any block in which two-thirds of the buildings are devoted exclusively to residence purposes without the written consent of the owners of a majority of the lots in such block. We are unable to reconcile this decision with principle or with other decisions by the same court, or with *City of St. Louis v. Russell, supra,* which the opinion cites and approves. But the decision does not now call for careful criticism, because the distinction which it makes, whether valid or not, is fatal to the ordinance in controversy in this action. The latter is infected with the identical virus which the Illinois as well as the Missouri court found in the St. Louis ordinance, and it is immaterial whether the same or an equally fatal malady also afflicted the Chicago enactment.

We are of opinion that the ninety-seventh section of the Omaha ordinance, in so far as it requires the written consent of the property owners, is void, and recommend that the judgment of the district court be reversed.

OLDHAM and EPPERSON, 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 in accordance with this opinion.

REVERSED.

ZACK THOSTESEN, APPELLEE, V. CHARLES W. DOXSEE ET AL., APPELLANTS.

FILED JANUARY 5, 1907. No. 14,470.

Lease: LIEN ON CROPS. A clause in a lease attempting to create a lien on the crops to be raised on the leased premises for the payment of rent reserved is ineffectual to create either a legal or an equitable lien on the crops grown thereafter on the leased premises. *Brown v. Neilson*, 61 Neb. 765, followed and approved.

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

R. A. Moore, for appellants.

H. M. Sullivan, contra.

OLDHAM, C.

On the 5th day of March, 1904, plaintiff leased to the defendants in writing a certain tract of land described in the lease and situated in Custer county, Nebraska, for a period of one year. The conditions of the lease material to the controversy were that the defendants were to pay $125 for the use of the pasture land on the leased premises, this agreement being evidenced by two promissory notes, one for $50 due October 1, 1904, and one for $75 due January 1, 1905, and that they were also to pay $1 an acre for all the land cultivated in millet, and to deliver to the plaintiff on the premises one-third of all the corn raised thereon. Plaintiff agreed to make certain repairs on the windmill on the place, and also reserved

the right, if it should be necessary to protect the crops, to employ men to cultivate and harvest the same at defendant's expense. The lease also contained the following condition: "It is further expressly agreed and understood between the parties hereto that all crops planted upon and all hay upon said land shall be charged with the payment of the rent thereof, and said second party agrees that the rent and the charges aforesaid are and shall remain a first mortgage lien on said product until fully paid." The defendants took possession of the premises under this leasehold agreement, and it is without dispute that they cultivated the premises in a good husbandman-like manner. The $50 note was paid without controversy, but in January, 1905, a dispute arose as to the amount due to plaintiff, because of a set-off claimed by the defendants for repairs that they had made on the windmill, and there was a dispute as to the amount due on the millet ground, and a further dispute as to whether or not the defendants were fairly dividing with the plaintiff the corn they had raised on the premises. Plaintiff thereupon sued out an injunction in the first instance to restrain defendants from prohibiting him from entering on the premises and taking his share of the corn, and by a supplemental order he asked to have the defendants enjoined from removing any of the crop from the premises until the rent had been fully paid. The clause of the lease before set out was alleged on in the petition, with an allegation that defendants were insolvent. A motion to dissolve the injunction and an answer to the merits of the petition were consolidated by agreement, and a hearing was had to the court, which found, in substance, that the defendants had tendered into court the proper amount due on the $75 note and for the rent of the ground planted in millet, but that there were 329 bushels of corn still due the plaintiff as rent corn, and the injunction was made perpetual, restraining the defendants from moving or feeding any of the corn raised on the leased premises until a commissioner appointed by the court should separate

from the corn on the place the 329 bushels found owing to the plaintiff. To reverse this judgment and order of the district court the defendants have appealed to this court.

The testimony in the record is neither clear nor convincing on the question of the insolvency of the defendants, nor is it satisfactory on the allegation that the corn was not properly divided by the defendants with the plaintiff when it was gathered. At the time the suit was instituted there were between 600 and 700 bushels of corn still standing in the field ungathered, but the evidence shows that this was not through the neglect of the defendants, but because of a snow storm in the month of December which covered up so much of the standing corn that it could not be gathered without waste until the snow melted. In fact, the record shows that the plaintiff requested the defendants not to gather this corn until the snow was gone, so that, as we view it, there is no ground for equitable relief disclosed by the evidence and pleadings, unless the clause in the lease providing for a lien on the crop raised for payment of the rent operated as an equitable mortgage upon the grain raised upon the leased premises. The question as to the validity of a similar clause in a lease was before this court and received careful consideration in the recent case of *Brown v. Neilson,* 61 Neb. 765, and it was there held that such a clause in the lease is ineffectual to create either a legal or an equitable lien for rents due and in arrears on the crop raised thereafter on the leased premises. The case is to be distinguished from *Ryan v. Donley,* 69 Neb. 623, in which an agreement to give a mortgage when the crops were in existence was enforced.

We are therefore of opinion that the learned trial judge erred in making the injunction prayed for perpetual, and we recommend that the judgment of the district court be reversed and the cause be remanded, with directions to dissolve the injunction heretofore granted, and to retain

the cause for a trial at law on the issues joined on the allegations of the conversion of the plaintiff's rent corn.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with directions to take further evidence, if offered, as to the insolvency of defendants and the equities of the parties.

REVERSED.

THOMAS R. SHIPMAN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 5, 1907. No. 14,493.

1. **Railroads: EVIDENCE: PRESUMPTION OF NEGLIGENCE.** In an action against a railroad company for damage for loss by fire alleged to have been set out from one of defendant's engines, proof of the fact that the damage did result from fire so set out, without any fault on the part of the complainant, is sufficient to raise a presumption of negligence in the management or equipment of the engine.
2. **Instruction: REVIEW.** In such a case, however, it is prejudicial error to instruct the jury that, if the evidence is evenly balanced on the question of defendant's negligence, they should find a verdict for plaintiff.

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

N. K. Griggs, for appellant.

J. E. Porter, contra.

OLDHAM, C.

This was an action for damages for the destruction of a stack of straw and fodder by fire alleged to have been

started by sparks from an engine of the defendant. There was a trial of the issues to the court and jury, verdict and judgment for plaintiff, from which the defendant appeals.

The evidence with reference to the origin of the fire is that the stack of straw was about 200 feet north of defendant's line of railroad; that a long and heavily loaded freight train passed the stack about five or ten minutes before the fire was discovered; that the engine of the train was puffing and laboring in an effort to increase its speed at the time it passed the straw stack; and that there was a strong wind blowing from the southwest when the train passed. The fire was first discovered by the crew in charge of a second freight train that followed about ten minutes after the first train. It is testified, without dispute, that the straw stack was burning before the second train reached it, so that it is clear from the record that, if the fire started from defendant's engine, it must have been from the engine pulling the first train. There was no rubbish or combustible material along the right of way near the stack, and no cinders or ashes were found along the track, and no evidence of any fire between the track and the stack of straw, so that it is clear that, if the fire came from the engine, it must have been communicated by a spark or sparks which escaped from the smokestack of the engine, and not from coals and cinders dropping from the firebox. Evidence was introduced on the part of the railroad company tending to show that the engine which pulled the train first passing the stack was in first-class condition and contained all modern equipment for the prevention of the spread of fire, and that it was being operated on a trial trip by a skillful engineer under the supervision of an inspector of engines; that the engine was examined and reported on by the expert in charge at Ardmore, the last station passed before the fire, and again at Crawford, the first station reached after the fire; and that each of these examinations showed the engine in perfect condition.

In this state of the record, the court, in paragraph 2

of instructions given on its own motion, after stating correctly the general rule of liability of railroads for negligently setting out fire from their passing trains, gave the following direction: And in this case if you find that plaintiff has established by a preponderance of the evidence that fire did escape from the engine of defendant, and caused the destruction of plaintiff's property, and that plaintiff's property was destroyed without any carelessness or negligence on his part, then your verdict should be for the plaintiff, unless the defendant has established by a preponderance of the evidence that its engine was fully supplied with a spark arrester and other contrivances of the most approved style and pattern to prevent the escape of fire from the engine, and that the defendant's engine was being operated by careful and skillful men, and that said fire did not originate from defendant's engine by the carelessness and negligence of defendant's servants having the same in charge. And if the defendant has established, by a preponderance of the evidence, the facts as indicated in this instruction which the defendant is required to establish, then your verdict should be for the defendant. But, if the evidence as to these facts should be evenly balanced, or should preponderate in favor of the plaintiff, then your verdict should be for the plaintiff, and it will be your duty to assess plaintiff's damage at such sum as you think the evidence shows plaintiff has sustained, if you find for the plaintiff." Neither in this country nor in England are steam railroads, in the absence of a statute to the contrary, held liable for the accidental escape of fire in their operation. Negligence in the spread of fire is the gist of an action for damages against them. But, while railroad companies are not insurers against accidental fires started from their engines, they are required to use a proper degree of care both in the appliances used and in the operation of their trains to avoid liability. In other words, they must use the best modern appliances known to the occupation, and must keep them in good repair and have them operated

with care and caution by those in charge of the trains. 2 Thompson, Commentaries on Law of Negligence, sec. 2232. In this jurisdiction proof of the fact that damage has resulted from a fire started from a railroad engine, without any negligence on the part of the complainant, is sufficient to raise a presumption of negligence in the management or equipment of the engine. *Burlington & M. R. R. Co. v. Westover,* 4 Neb. 268; *Union P. R. Co. v. Keller,* 36 Neb. 189. While there is, perhaps, sufficient circumstantial evidence in the record to support the finding of the jury that the fire originated from defendant's engine, yet the evidence of such fact is not wholly convincing, and it is clear, as before stated, that, if the fire came from the engine, it must have been from a spark thrown from the smokestack of the engine. It is in evidence, and also a matter of almost common information, that no modern appliance has yet been devised that will absolutely prevent the escape of sparks from the best constructed engines. Consequently, where the only proof of escape of fire is by reason of a spark from the smokestack of the engine, presumption of negligence from such fact is much less convincing than is proof of the escape of fire by cinders and coals dropping from the firebox, since experience shows that the fixebox can be so constructed and handled as to absolutely prevent the escape of fire therefrom. We think, therefore, that the instruction above set out was erroneous and prejudicial in saying: "But, if the evidence as to these facts should be *evenly balanced,* or should preponderate in favor of the plaintiff, then your verdict should be for the plaintiff."

This court is now committed to the doctrine that the burden of proof does not shift during the progress of the trial. While the necessity of the case has induced us to go to the limit in indulging presumptions as substitutes for proof in establishing negligence in the spread of fires from railroad trains, yet in the absence of a statute making railroads insurers against loss by fire started from their engines, we see no reason to extend the rule of

liability beyond the doctrine announced in *Burlington & M. R. R. Co. v. Westover* and *Union P. R. Co. v. Keller, supra.* Especially should this not be done in a case like the one at bar, in which plaintiff's showing of negligence hangs only on the eyebrows of a very weak and emaciated presumption.

We therefore conclude that the giving of the instruction above set out was prejudicial to the rights of the defendant, and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

OAKDALE HEAT & LIGHT COMPANY, APPELLEE, V. GEORGE N. SEYMOUR ET AL., APPELLANTS.*

FILED JANUARY 5, 1907. No. 14,564.

1. Judgment: DEFAULT. It is error for a county court to enter final judgment against a defendant on the day of his default.
2. County Courts, Error to. Proceedings in error from a county court are governed by the statute providing for error proceedings from a judgment of a justice of the peace.

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

O. A. Williams, for appellants.

M. D. Tyler and *George F. Boyd, contra.*

OLDHAM, C.

This action was instituted as a term case in the county court of Antelope county, Nebraska, on the 15th day of

* Rehearing allowed. See opinion, p. 50, *post.*

February, 1904. The case was continued in that court and dilatory motions were filed until the 5th day of September, 1904, when the case was continued by agreement to October 13, 1904, and defendant allowed 20 days to answer. Before the expiration of the 20 days defendant, instead of answering, filed two motions, one of which was to require the plaintiffs to make their petition more definite and certain. When the case was reached on the 13th of October, the court sustained defendant's motion to require plaintiffs to make the petition more definite and certain. Plaintiffs acquiesced in the ruling on this motion, and filed an amended petition instanter in the absence of the defendant. On the filing of the amended petition plaintiffs called a witness, made proof of the account, and the court rendered judgment in their favor, and adjourned the day's sitting. At the next term of court defendant filed a motion to set aside the judgment for various reasons. This motion being overruled, defendant, within the time prescribed by statute, filed a bond and a petition in error in the district court for Antelope county, praying to have the judgment of the county court set aside for irregularity in the manner in which it was entered, and for other reasons which need not be considered. On the hearing in the district court the petition in error was sustained, the judgment of the county court set aside, and the cause set down for trial in the district court. To review this judgment of the district court in setting aside the judgment of the county court, the plaintiffs have appealed to this court.

It is contended by the appellants that, as defendant was in default of answer on the day that the judgment was rendered, the action of the county court in rendering judgment was regular and not subject to review in error proceedings. If the county court had stricken from the files the two motions filed by the defendant, and left the defendant in default as of the day on which it had been ordered to answer, there would be much in this contention. But the record shows that the

court entertained the motions, overruling one and sustaining the other, and that plaintiffs acquiesced in the ruling of the court and filed an amended petition instanter. When the motion of the defendant was sustained and the amended petition filed, defendant was not, at that instant, in default. Section 12, ch. 20, Comp. St. 1905, reads as follows: "If no answer is filed on or before the first day of the term, in any action to be tried during such term, the plaintiff may have the default of the defendant entered, and may proceed to judgment on any succeeding day during the term, upon proving his cause of action." This section anticipates that a final judgment shall not be entered by the county court on the day of the default of the defendant. It is plain that, if defendant had been present when the amended petition was filed, it would have been entitled to a reasonable time to plead to it, if it had so requested, and that it would have been erroneous to force defendant to an immediate trial without allowing it a chance to plead. Consequently, when it was absent the most, we think, the court could have done with propriety would have been to enter a default against the defendant, and, having done so, it should have waited until a succeeding day of the term before entering its final judgment.

It is urged by the appellants that the motion to set aside the judgment, filed in the county court, was insufficient and did not allege the ground of irregularity relied upon in the petition in error, and that, consequently, the hearing in the error proceedings should have been confined to the allegations of error contained in the motion to set aside the judgment. By section 26, ch. 20, Comp. St. 1905, error proceedings from a probate or county court are governed in the same manner as provided by law for error proceedings from a judgment of a justice of the peace. In error proceedings from a justice of the peace, there is no provision for the filing of a motion for a new trial, or to set aside the judgment sought to be reviewed. Consequently, the filing of this motion in the county court was superfluous and of no effect.

For the reasons stated, we think that the trial court did not err in sustaining the petition in error, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed January 8, 1908. *Former judgment of affirmance vacated, judgment of district court reversed and judgment of county court affirmed:*

1. **New Trial:** COUNTY COURT. The county court in term cases has jurisdiction to grant a new trial under section 602 of the code.
2. **Judgment:** DEFAULT. The county court cannot enter judgment by default on the answer day; that is, on the first day of the term at which the cause first stands for trial. But, when both parties have appeared and the cause has been by agreement continued to a day certain, the parties are bound to attend on that day, and if the defendant fails to do so the cause may be tried in his absence.

SEDGWICK, C. J.

The first proposition stated in the syllabus of the opinion upon the former hearing is: "It is error for a county court to enter final judgment against a defendant on the day of his default." We are satisfied that this is a correct proposition of law only as it relates to the default for answer upon the first day of the term. Section 12, ch. 20, Comp. St. 1905, we think has been misapplied in the opinion. Section 10 of that chapter provides: "In all civil actions in the county court, where the amount claimed exceeds the jurisdiction of a justice of the peace," the petition must be filed before the summons is issued, and that "the defendant shall also, on or before the first day of the term at which the cause stands for trial, file in

such court his answer." The first day of the term is made the answer day, and section 12, quoted in the former opinion, provides that, "If no answer is filed on or before the first day of the term, in any action to be tried during such term, the plaintiff may have the default of the defendant entered, and may proceed to judgment on any succeeding day during the term, upon proving his cause of action." The next preceding section provides that motions and demurrers shall be allowed as in the district court, and section 12 must be, of course, understood in the light of the preceding section. If a motion or demurrer should be pending on the first day of the term, and for that reason no answer filed, the plaintiff would not be allowed, solely because no answer was on file on the first day of the term, to have the default of defendant entered, and exclude the defendant from any participation in the trial. It is because the defendant is given the whole of the first day of the term by section 10 to file his answer that judgment cannot be taken against him upon that day by default, and this provision of the statute does not apply to any other day. In the case at bar the answer day was long past. The parties had entered their appearance in the cause and had agreed upon a time for the trial. The cause had been continued to that time accordingly, and it was undoubtedly the duty of both parties to be present at the time fixed by the order of the court for the hearing. The court properly allowed the plaintiff to file an amended petition, and the defendant, no doubt, would have been allowed suitable time to answer thereto if he had requested it. He wilfully absented himself from the court at the time fixed for the hearing of his cause, and he brought himself within the plain rule announced in *Naracong v. Graves*, 8 Neb. 443:

"But when a party obtains leave of the court to amend his pleadings in open court, no notice of such amendment need be served on the opposite party, and if the opposite party desires time to answer the amended pleading he must apply to the court for it. And in proper cases the cause

will be continued even over the term to give sufficient time to answer such amended pleading. Sec. 147, p. 546, General Statutes. In this case the county court was governed by the laws then in force as to the rule of pleading in that court to take notice of the order granting to the court being in session—it was the duty of the defendant in that court to take notice of the order granting to the plaintiff below leave to amend his pleading; and if upon such amended pleading being filed he desired time in which to answer it, it was his duty to apply for it to the court."

The company had all of the answer day—that is, the first day of the term at which its cause first stood for trial—in which to file its answer, and after that day was passed the rules of practice concerning pleadings and processes in the district court were applicable (sec. 11); and, when the cause was set down for a specified day, there is no provision of the statute exempting counsel from the necessity of attending upon that day to look after the interests of their clients and they are bound to take notice of the proceedings had in open court when the cause regularly stands for hearing.

2. It was also said in the opinion upon the former hearing: "By section 26, ch. 20, Comp. St. 1905, error proceedings from a probate or county court are governed in the same manner as provided by law for error proceedings from a judgment of a justice of the peace. In error proceedings from a justice of the peace, there is no provision for the filing of a motion for a new trial, or to set aside the judgment sought to be reviewed." Section 610 of the code provides: "The provisions of this title subsequent to section 601 shall apply to the supreme court and probate court, so far as the same may be applicable to the judgments or final orders of such courts." This makes the provisions of section 602 of the code applicable to probate courts, and also the following sections which prescribe the practice to be pursued in the court in which it is sought to vacate or modify judgments and orders. Do

these sections apply to the county court when not exercising its probate jurisdiction? It appears that some confusion exists in the decisions of this court upon this question. In *Cox v. Tyler,* 6 Neb. 297, which was decided in 1877, it was held: "The jurisdiction of the county courts in the granting of new trials, is the same, and no greater, than that given to justices of the peace, and is derived from the same statute." In that case the amount involved was more than $200, and so the question was squarely presented. It will be noticed, however, that no reference was made in the opinion in that case to section 610 of the code. Again in *Vaughn v. O'Conner,* 12 Neb. 478, it is held in general terms that "county courts are governed by the same provisions of the statute in granting a new trial as a justice of the peace," and *Cox v. Tyler, supra,* is cited for this proposition. Section 610 is not referred to, and there is but little discussion of the question, and no distinction is made between the jurisdiction of the county court in term cases and the jurisdictions of the judge of that court when sitting as a justice of the peace. These two cases have been referred to in some later cases, but we do not find that the proposition here contended for has any considerable support in the later decisions.

In *State v. Holmes,* 38 Neb. 355, the district court refused to allow a writ of mandamus to compel a justice of the peace to issue an execution upon a judgment rendered by him. After the judgment had been rendered by the justice a motion was filed before him to vacate the judgment. The justice sustained the motion, set aside the judgment, and set the cause down for trial. Before the time for trial so fixed had been reached, the action was begun to compel the justice to issue an execution upon the judgment, for the reason that he had no power or authority to vacate the judgment and grant a new trial. The court held that under the circumstances of the case the justice had no such power, and so sustained the decision of the district court. It was, of course, not neces-

sary in that case to consider the question here presented, but the court cited *Cox v. Tyler, supra,* and other cases, as authority upon the question.

In *Bond v. Wycoff,* 42 Neb. 214, the district court, upon petition in error from the judgment of the county court, affirmed that judgment, and this court affirmed the judgment of the district court. The county court of Lancaster county in a term case entered judgment by default. More than four days afterwards a motion was filed to vacate the judgment, which was overruled by the county court. No question appears to have been raised as to the jurisdiction of the county court in a term case to consider and act upon a motion for a new trial in the same manner that the district court might do. The decision was put entirely upon another ground. It was assumed by all that the county court had such jurisdiction.

In *Ritchey v. Seeley,* 73 Neb. 164, it was said: "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." Plainly this language has no application to the point presented in this case. The expression quoted should be understood as though it read: But in our opinion sections 602 *et seq.* of the code have exclusive reference to happenings incident to procedure in the court which has jurisdiction of the cause in which they occur.

The constitution of 1866 provided for probate courts, and provided that the jurisdiction of such courts shall be fixed by law. By the Compiled Statutes of 1866 these courts were given only probate jurisdiction, but the acts of 1870 and 1873 gave to the judge of the probate court the jurisdiction of a justice of the peace and concurrent jurisdiction with the district court in civil cases, by the one act in sums not exceeding $300, and in the other in sums not exceeding $500. The act of 1870 provided that "the code of civil procedure and the code relative to justices of the peace (in the absence of special provisions

of the act itself) * * * shall apply to all civil proceedings of said probate court." Laws 1870, p. 7. The act of 1873 enacted: "The provisions of the code of civil procedure, relative to justices of the peace, shall, where no special provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges." Gen. St. 1873, p. 263. This last act repealed the act of 1870, and also chapter 1 of title 25 of the code of civil procedure. The chapter repealed was entitled "Probate Courts," and the new act of 1873 was supposed to take the place of the chapter of the code which was repealed thereby, and so the words "by this subdivision" were understood in *Cox v. Tyler, supra,* to exclude the general provisions of the code not embraced in the justice act, nor in the act defining the jurisdiction of probate courts, from any application to proceedings had in such courts. And so that decision and those which appear to follow it may be considered to be in direct conflict with the later decisions which consider that section 610 of the code of civil procedure applies to county courts.

The constitution of 1875 provided for county courts, and by section 15, art. XVI, it was declared that "county courts * * * shall be the successors * * * of the probate courts, having jurisdiction under the existing constitution." By the legislation enacted under the new constitution the practice in county courts in cases in which the amount involved exceeded the jurisdiction of a justice of the peace was conformed, as far as practicable, to the practice obtaining in the district court. Pleadings are required as in the district court, and the petition is required to be verified "in like manner as a petition is required to be verified in the district court." Comp. St. 1905, ch. 20, sec. 10. Motions and demurrers are allowed, and the rules of practice concerning pleadings and processes in the district court "shall be applicable, so far as may be, to pleadings in the county court." Sec. 11. The provisions of the code relative to the trial docket in the

district court are made to apply to the county court (sec. 15), and regular terms are established. Sec. 8.

In *Mordhorst v. Reynolds,* 23 Neb. 485, it was held: "Where, during the pendency of an action in the county court in a term case, the plaintiff and defendant enter into a verbal agreement that the cause shall be continued, and in violation of such agreement the plaintiff, without notice to defendant, fraudulently procures a judgment to be rendered, the decision of the county court in granting a new trial will be sustained." The petition for a new trial was filed more than four days after judgment was entered, so that as a justice of the peace the court would have had no jurisdiction to grant the petition.

In *Ley v. Pilger,* 59 Neb. 561, the defendant, against whom a judgment had been rendered in a term case by the county court of Stanton county, prosecuted a petition in error in the district court, where the judgment of the county court was affirmed. The judgment was by default, and the error complained of was in the issuing and service of process. The defendant did not move in the county court to quash the summons and did not file any motion for a new trial. The court said: "The right to correct this error belonged, in the first instance, to the county court, and could not be raised, primarily, in the district court. The matter is governed by sections 597 and 598 of the code of civil procedure." The sections referred to were then quoted, and the court continued: "The attention of the county court not having been called to the error committed by it in rendering judgment against the defendant at the May term, its action in the premises cannot be reviewed," thus making these general sections of the code applicable to proceedings in the county court. From these later decisions it appears that this court is committed to the proposition that the county court in a term case has the same jurisdiction over a motion for a new trial as is given to the district court; that is, in such case section 610 of the code applies. The question is one of practice. In such case we ought to adhere to

the later decisions. The cases above referred to holding a contrary doctrine are therefore overruled.

In its motion for a new trial in the county court the defendant formally alleged five assignments of error. The first assignment was: "Because said pretended judgment is erroneous, and because the same is not based upon any finding of fact." The second, third and fourth were essentially the same as the first, and the fifth was: "Because said judgment was rendered for an amount greatly in excess of the amount, if anything, due the plaintiff." As there was a general finding for the plaintiff, the first four assignments of error were, of course, unavailing; and as the evidence upon which the judgment was rendered was not preserved in the record in the district court, and the petition was sufficient to support the judgment, that court, of course, could not reverse the judgment on the ground that it was excessive. It follows that the district court erred in vacating the judgment of the county court.

The judgment heretofore entered in this court is therefore vacated, the judgment of the district court is reversed, and the judgment of the county court is affirmed.

JUDGMENT ACCORDINGLY.

LIND NELSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 5, 1907. No. 14,595.

1. Carriers: SHIPMENT OF CATTLE. When cattle have been delivered to and accepted by a railroad company in its loading pens for immediate shipment, the company is liable as a common carrier for damages to the cattle from the time of such delivery. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. Neb. 816, examined and distinguished.

2. ——: DELAYED SHIPMENTS. A railroad company is not an insurer of the arrival of its trains on schedule time in the transportation

of live stock, but, where there is a material delay in the delivery of the stock, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence.

3. ———: ———. Under the constitution and statutes of this state, the liability of a railroad company for unnecessary and unreasonable delay in the shipment of live stock is the same whether the contract of shipment is a written or an oral one.

4. Instructions: REVIEW. Action of the trial court in giving and refusing instructions examined, and *held* not prejudicial.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Affirmed.*

J. W. Deweese, F. E. Bishop, W. S. Morlan and *Dorsey & McGrew,* for appellant.

George W. Prather and *G. M. Caster, contra.*

OLDHAM, C.

This was an action to recover damages for an alleged delay in the shipment of nine car-loads of fat cattle from Franklin, Nebraska, to St. Joseph, Missouri, on the 4th day of January, 1904. Defendant answered plaintiff's petition with a general denial. On issues thus joined there was a trial to the court and jury, verdict and judgment for the plaintiff. To reverse this judgment defendant has appealed to this court.

There is very little dispute as to any material fact involved in the controversy, the evidence tending to show that on the last day of December, 1903, plaintiff, who had been engaged in shipping live stock for a number of years over defendant's line of railroad, arranged with one of defendant's agents in St. Joseph for nine cattle cars to be delivered for his use at Franklin, Nebraska, on Saturday, January 3, 1904. It was the understanding that plaintiff would bed the cars on Saturday, and have them loaded with cattle on Sunday morning, for transportation on the regular train, known as train No. 64, which was

scheduled to leave Franklin at 9:15 o'clock A. M. It appears that the plaintiff went to Franklin on Saturday for the purpose of bedding his cars, but was informed by defendant's agent that, through some mistake at Red Cloud, the cars had been carried west of Franklin on train No. 63, but would be returned to Franklin on train No. 64 on Sunday morning. Plaintiff drove his cattle to the depot at Franklin at about 8 o'clock on Sunday morning and put them into the yards for shipment, then notified defendant's agent of this fact. The agent told him that was all right, but that the train was probably an hour late. Instead of being but an hour late, the train did not arrive until after 3 o'clock P. M., when it was loaded with cattle and left the station about 4 o'clock, and arrived at St. Joseph between 11 and 12 o'clock M. on Monday, being about nine hours behind its schedule time. There is no evidence introduced by the defendant tending to explain this delay, which appears to have been largely due to its failure to arrive at Franklin on schedule time.

The first contention urged by the appellant is that the company owed no duty to the defendant with reference to the cattle shipped until they were actually loaded on its cars and a contract or bill of lading was made out and signed. In the recent case of *Chicago, B. & Q. R. Co. v. Powers,* 73 Neb. 816, which is relied on as supporting this contention, the facts were that the cattle were put in the stock pens, not for the purpose of immediate shipment, but rather for the convenience of the owner in herding them, and with the intention of taking the stock from the pens on the following morning for the purpose of grazing and feeding them before the shipment was to begin. Under this state of facts we held that the company had not received the stock for immediate shipment, and that the liability of the company in such a case was but that of an ordinary depositary, or bailee. But in the opinion we took occasion to say: "We think the rule well established that, when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation,

and the carrier so accepts them, the liability of the carrier * * * at once attaches." In the case at bar, the cattle were delivered in the pens at or about the time that the shipment should have been made. Defendant's station agent was informed of this fact, and said that it was all right, but that the train would be about an hour late. Defendant challenges the sufficiency of this testimony to show that the liability of the defendant as a common carrier attached when the cattle were placed in the pens. We think this evidence fairly tends to show a delivery of the stock in defendant's pens for immediate shipment. In *Cleveland & T. R. Co. v. Perkins,* 17 Mich. 296, it was held that, when cattle have been delivered to and accepted by a railroad company for immediate shipment, the railroad company is liable as a common carrier for damages to the cattle from the time of the delivery to it. See, also, *Ayres v. Chicago & N. W. R. Co.*, 71 Wis. 372.

The next contention is that plaintiff's evidence is not sufficient to establish an unusual delay in the transportation of the cattle. His evidence did show that the usual time of transportation from Franklin to St. Joseph was about eighteen hours, and whether or not a nine hours' delay in this shipment, wholly unexplained, was unreasonable, we think, was a question of fact for the jury. While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of live stock or other freight, yet, where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence. *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140; *Galena & C. U. R. Co. v. Rae,* 18 Ill. 488; *Ayres v. Chicago & N. W. R. Co., supra; Baltimore & O. R. Co. v. Morehead,* 5 W. Va. 293; *McCoy v. K. & D. M. R. Co.*, 44 Ia. 424.

It is next contended that there is a fatal variance between the allegations of plaintiff's petition and the proof offered, in that plaintiff alleged on an oral contract with defendant for the shipment of the stock in controversy,

and that on his cross-examination by the defendant he admitted that he received a written bill of lading, containing certain conditions in the nature of a contract of shipment, after the stock was loaded in the cars. When a breach of plaintiff's contract for shipment, whether written or oral, occurred, he had the privilege of election, either to sue on the conditions of the contract of shipment, or to bring his action in damages for defendant's failure to observe the public duty enjoined upon it as a common carrier. He chose the latter. Consequently, his allegation of a contract for shipment was made by way of inducement to show his right to maintain the action against the defendant for a breach of its duty enjoined upon it by statute. *Denman v. Chicago, B. & Q. R. Co., supra.* Under the laws of this state, defendant's liability for unreasonable delay in the shipment was the same whether the contract on which the shipment was made was a written one or an oral one. Defendant pleaded no exemption from liability by reason of any contract. Consequently, it was wholly immaterial whether the contract was oral or written.

Complaint is lodged against the action of the trial court in giving and refusing instructions. We have carefully examined the instructions given and think they fairly submitted the issues to the jury. The instructions put the burden on the plaintiff to show an unreasonable and negligent delay in the transportation of the cattle, and specifically told the jury that it could not allow damages for delay, unless it found that such delay was caused by the want of ordinary care and diligence on the part of the defendant. The instructions refused were on the question of variance and on the question of plaintiff's contributory negligence in not feeding the cattle while waiting for shipment in the pens at Franklin. The question of variance we have already discussed, and, as there was neither allegation nor attempted proof of plaintiff's contributory negligence, the court was justified in not submitting these questions to the jury.

The quantum of damages is not alleged against in defendant's brief, and, as we find no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

H. H. NORTHUP ET AL., APPELLEES, V. E. W. BATHRICK, APPELLANT.

FILED JANUARY 5, 1907. No. 14,610.

1. **Appeal:** DISMISSAL. It is error for the district court to dismiss an appeal from the judgment of a county court for an insufficient bond, where the bond given contains all the statutory provisions and is signed by a surety and approved by the county judge.
2. ———: BOND. If such bond is defective appellant should be allowed to provide a new and sufficient bond.
3. **Appeal Bond:** SIGNATURE. The word "Cashier" appended to the signature of a surety on an appeal bond is merely *descriptio personæ*.

APPEAL from the district court for Furnas county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan, for appellant.

John Stevens, Jr., contra.

OLDHAM, C.

This was an action on an account, originally instituted in the county court of Furnas county, Nebraska, where the plaintiffs had judgment. Defendant appealed from the judgment, and gave a bond duly approved by the county court, conditioned as required by law. When the

cause was docketed in the district court, plaintiffs filed a motion to dismiss the appeal, because "the pretended bond was signed by 'C. E. V. Smith, Cashier,' as surety, and said 'C. E. V. Smith, Cashier,' is not authorized to sign said bond, and the same is not binding upon him personally." This motion was taken up by the district court in the absence of the defendant and his attorney and sustained, and the appeal was dismissed. To reverse this order and judgment of the district court defendant has appealed to this court.

As the bond was in compliance with the statute governing appeals in form and condition, and as it was duly approved by the county judge, it gave the district court jurisdiction of the cause on appeal. And, even if it had been defective and insufficient in security, the defendant should have been allowed to provide a new and sufficient bond, without having his appeal summarily dismissed. *Rube v. Cedar County,* 35 Neb. 896. Again, there was no objection to the bond on account of the solvency of the security, the objection being that the word "Cashier," appended to the signature, showed that the bond was intended to be executed in a representative and not in the personal capacity of the surety. The condition of the bond bound the surety personally, and the designation "Cashier" after the signature was pure surplusage and mere *descriptio personæ. Thomas v. Carson,* 46 Neb. 765; *Farrell v. Reed,* 46 Neb. 258.

We are therefore of opinion that the district court erred in dismissing defendant's appeal, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

ROBERT F. COOK ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JANUARY 5, 1907. No. 14,621.

1. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court under the instruction given.
2. **Law of Case.** Where an instruction of the trial court is concurred in by each of the parties to the action, it will be treated on review as the law of the case.
3. **Contributory negligence** is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury.
4. **Carriers: SHIPPING CONTRACT.** A condition in a contract for the shipment of live stock by a railway company, which provides that, unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability, is in violation of the prohibition of section 4, art. XI of the constitution of Nebraska.
5. **Evidence: FOREIGN STATUTES.** The statutes and constitution of another state or territory cannot be proved by parol, under the provisions of section 396 of the code.
6. ———: ———: **PRESUMPTIONS.** In the absence of proof to the contrary, the constitution and laws in force in this state will be presumed to have been in force at the place of the making of the contract which is in issue.

APPEAL from the district court for Pawnee county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

M. A. Low, L. M. Pemberton and *Hazlett & Jack*, for appellant.

Stewart & Munger, contra.

OLDHAM, C.

This was an action to recover damages against the defendant railway company for its failure to properly trans-

port fifteen car-loads of sheep from Roswell, Colorado, to South Omaha, Nebraska, and Chicago, Illinois. The negligence relied on consists in not furnishing proper facilities to plaintiffs for feeding and watering their sheep at convenient places along the line of shipment. The answer of the defendant admitted that it conveyed the sheep between the points named in the petition, and alleged that it did so with proper dispatch, and that it did, at plaintiff's request, stop the train at proper places on its line of railway for plaintiffs to feed and water the sheep. The answer also pleaded that defendant took the sheep under a written contract for an interstate shipment from Hailey, Idaho, to the points of destination, and that this contract included the conveyance of the sheep over a portion of the lines of the Oregon Short Line and the Denver & Rio Grande Railroad, as well as the line of the defendant; that the written contract entered into was valid where made, and provided for a lower rate than the regular tariff rates of transportation. The conditions of the contract pleaded, which are material to the present controversy, are as follows: "The shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk, while it is in any stock yards, whether the same be operated, owned or controlled by said carriers or otherwise, and while on the cars or at feeding points or at any place where the same may be unloaded for any purpose whatever. The shipper expressly agrees to load, unload and care for said stock, while upon the cars or premises of the carriers, in a careful and humane manner, in strict compliance with the laws of the United States, and of each and every state through which said stock may be transported. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be dis-

charged from liability." The reply of the plaintiffs admitted the signing of the contract with the Oregon Short Line Company at the time of shipment from Hailey, Idaho, but alleged that a new contract was signed with the defendant when the shipment reached Roswell, Colorado, and denied each and every other allegation in the answer, except such as admitted the allegations of the petition. On issues thus joined there was a trial to the court and jury, a verdict for the plaintiffs, and judgment on the verdict. To reverse this judgment defendant appeals to this court.

The first alleged error called to our attention in the brief of the appellant is that "the verdict is contrary to law as given by the court." This contention rests on the proposition that the trial court, in the seventh paragraph of instructions given on its own motion, correctly stated the law governing defendant's liability under the contract for furnishing proper facilities to plaintiffs for feeding and watering the sheep while in transit, and that there is not sufficient evidence in the record to support a verdict under this instruction. The instruction given is as follows: "It was the duty of the defendant to use reasonable care to provide reasonable facilities for both feeding and watering said sheep at the stations along the line of its road, and any failure in the reasonable performance of that duty would be negligence on the part of the defendant. On the other hand, under the written contract entered into by the plaintiffs with the Oregon Short Line Railway, it was the duty of the plaintiffs to feed, water and care for said sheep, and it was not the duty of defendant company to furnish feed and water; and if the defendant company, at the times requested by the plaintiffs, gave the plaintiffs opportunity to unload, care for, feed and water said sheep, and provided plaintiffs with reasonable facilities for so doing, then the defendant company performed its full duty to the plaintiffs. You are further instructed, in connection with this said contract, that its terms, in so far as they are set out in defendant's

answer, are admitted by the plaintiffs' reply, and the terms in said contract are presumed to continue in force, in the absence of evidence that they were changed or modified by a subsequent contract between the plaintiffs and defendant in this case, and the same inures to the benefit of each and every carrier over whose line the said sheep were carried and passed over, and the defendant railway company, from the evidence, the court instructs you, was a connecting carrier in this instance." As this instruction is relied on by defendant as a proper direction to the jury of all the elements entering into defendant's liability to plaintiffs for furnishing proper facilities for feeding and watering the sheep under the contract of shipment, and as it was not excepted to by the plaintiffs when given, we will, for the purpose of the conclusion to be reached, regard it as the settled law of the case and examine into the sufficiency of the testimony to support a verdict under it.

It is without dispute that the contract for the shipment of the sheep from Hailey, Idaho, was procured through the solicitation of Eugene Fox, one of the traveling freight agents of the defendant railway company. It is also in evidence that the plaintiffs, who were extensively engaged in feeding and shipping sheep, had never before shipped to the points in controversy from Idaho over these lines of railroad, but that they had heretofore shipped to points east over the Union Pacific lines of railway; that Fox, as an inducement for shipment over the route in controversy, represented to one of the plaintiffs that convenient and proper places for feeding and watering the sheep were provided at Grand Junction, Colorado, or at Tennessee Pass, a point further east on the route, and at Goodland, Kansas, and at either Belleville, or MacFarland, Kansas, and that pasture and green feed could be obtained at these places. It is also in evidence that one of the plaintiffs in shipping from the state of Kansas had fed and watered his shipment of stock at Belleville, in that state, the year before, and that he inquired if the facilities were the same

as then existed, and was assured by Mr. Fox that they were. This witness described the ample facilities which were afforded him the year before for feeding and watering at this place. After the conversation with Mr. Fox the contract for shipment was entered into, and on the 22d day of June, 1901, the sheep were loaded at Hailey and conveyed to Grand Junction, Colorado, where they were unloaded and rested, and where proper facilities for feeding and watering are conceded to have been furnished. After a proper rest at this point the sheep were reloaded and conveyed, by a run of about 28 hours, to Roswell, Colorado, where the shipment was transferred to defendant's line of railway. The evidence introduced by the defendant tends to show that there were at least some facilities for feeding and watering at Roswell, and Mr. Fox, the freight agent, says that he thinks he named this and one or two other points on the route not named in plaintiff's testimony, as a proper place to feed and water. But this is all the testimony that tends to show that plaintiffs had any information that they might unload at Roswell for that purpose, while plaintiffs' testimony was that his directions were to go to Goodland, Kansas, to unload and feed.

It is in evidence that answers were received in response to telegrams sent ahead to Goodland, informing plaintiffs that feed could be obtained at that place, and that thereupon the shipment proceeded to Goodland, after a run from Roswell of about 10 hours, and the sheep were again unloaded. The evidence is in conflict with reference to the facilities furnished at Goodland. Plaintiffs contend that the only pasturage that they could procure was of a very inferior quality, and that the water had to be taken from a tank and furnished to the sheep in troughs of an inferior quality, so arranged that the sheep would not drink from them. On the contrary, the defendant contends that the facilities for water were ample, and that, because of the wild nature of the sheep, they refused to drink, and that if plaintiffs had made more strenuous efforts they could have procured ample facilities from

neighboring landowners for pasturing their sheep during their stay at this point. The conflict arising between these theories was, to our minds, one to be determined by the triers of the facts.

Before arriving at Goodland, defendant had notified plaintiffs through a telegram that there were no facilities for feeding at Belleville, and after reloading at Goodland it also notified them through a telegram that there were no facilities at MacFarland. When this last telegram was received, plaintiffs asked to have provision made for feeding and watering at the nearest point. Defendant's agents then telegraphed to Belleville, and finally received a communication that they would try to make arrangements for feeding and watering at that place. When Belleville was reached, after an all night's run from Goodland, plaintiffs were informed by defendant's agent that facilities could be procured for pasturing but two or three car-loads of sheep and dry feed could only be had for about the same number. A stop of several hours was made at Belleville, the time being consumed in telegraphing to neighboring stations for facilities for feed and pasture, but, being unable to procure them, the train was run to Lincoln, Nebraska, a distance of abut 100 miles, where ample facilities were procured, and the sheep were unloaded. Plaintiff's evidence tends to show that the sheep were in such a starved and famished condition on their arrival at Lincoln that about 80 of them died in the yards from overeating and overdrinking, and that many of them became sick and disabled, so that they had to be retained for 35 hours at the Lincoln feed yards to put them in condition for reshipment. Five of the car-loads of sheep were taken to South Omaha and placed on the market there, and ten car-loads were transported to Chicago. There is no serious criticism of the facilities furnished for feed and water between Lincoln and Chicago.

As there is no complaint lodged in the brief against the measure of damages awarded, we need only review the sufficiency of the evidence as tending to show plaintiffs'

right to recover under the instruction given for actionable negligence on defendant's part in not furnishing reasonable facilities for feeding and watering the stock while in its charge. It will be noticed that the instruction only imposes upon the defendant the duty of furnishing reasable facilities for feeding and watering the stock at proper places on the line of transit, and does not attempt to impose any duty on the defendant to furnish feed and water at the places of stoppage. Here we might say that, outside of any question of the law of the case, we think the instruction fairly reflects the duty and obligation attaching to the defendant under the contract. Defendant through its agent, who solicited the contract of shipment, knew and should have known what, if any, facilities it had to offer for furnishing feed and water of the kind and character required for the sustenance of the sheep while *en route* to the eastern markets. The evidence shows that the plaintiffs had no information, except such as was communicated to them by defendant's agents, as to where suitable facilities for this purpose could be found along the connecting lines of railway from Hailey, Idaho, to the points of destination. Consequently, plaintiffs had a right to rely on defendant's statements as to the points at which proper facilities would be afforded for the care of the stock. And the evidence offered in their behalf strongly tends to show that they did so.

We think there is competent evidence in the record tending to show that defendant failed in its duty to provide proper and reasonable facilities for the care of the sheep when unloaded, particularly at the points it had suggested in the state of Kansas. After the shipment had begun, the first telegram received from one of the defendant's agents with reference to preparations for feed and water was as follows: "We have no pasture at Belleville, but have plenty of pasture at MacFarland, close to the yards, with good grass and water." This telegram was received on leaving Roswell, Colorado. At Goodland the following telegram was received: "Notify parties in charge of sheep

that there is no facilities at MacFarland for unloading or feeding the sheep there, and wire Mr. Rain what he says." Then, after these two telegrams, a third was received, saying: "Advise men in charge of stock that you will reach Belleville about 5 A. M., the first feeding point. Will arrange for them to feed there. Advise from Smith Center if arrangements are O. K." We think that the confusing nature of these telegrams, first telling them that arrangements had been made at MacFarland for the reception of the stock, and then telling them that no such arrangements had been made, and then finally telling them that arrangements would be made at Belleville, and failing to make proper arrangements for them there, is evidence tending to show actionable negligence on defendant's part in furnishing proper facilities for the care of the stock.

It is next contended that the evidence shows conclusively that plaintiffs were guilty of contributory negligence in permitting the stock to be hauled for such long distances without demanding intermediate stops, and particularly in not feeding and watering the stock at Roswell, Colorado. Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact to be determined by the jury. The court submitted this question to the jury in two instructions, neither of which is assailed in the brief of the appellant, and we think there is no such conclusive and convincing proof of plaintiffs' negligence as would warrant us in saying, as a matter of law, that they cannot recover. Again, this defense is not specifically pleaded, and this is a sufficient answer to defendant's contention.

The next alleged error called to our attention is in the action of the trial court in giving paragraph 10 of instructions given on its own motion. That was an instruction which, in substance, told the jury that the notice which plaintiffs had given defendant of their loss was sufficient. The notice referred to was a complaint, which plaintiffs had made to defendant's agent at Lincoln, and a subsequent one, which plaintiffs made to defendant's

agent at Salt Lake City, and a written claim of loss filed with the company more than ten days after the sheep had arrived at Chicago. It is urged against this instruction that it ignored the condition of the contract before set out, which required the claim for damages to be presented within ten days of the date of the unloading of the stock at the destination and before the stock had been mingled with other stock. The court evidently regarded this condition of the contract as being in violation of section 4, art. XI of our constitution, which provides that the liability of railroad corporations as common carriers shall not be limited. Similar conditions in like contracts have been before this court for consideration, and in the very recent case of *Union P. R. Co. v. Thompson*, 75 Neb. 464, after a review of our former decisions, it was determined that they would be adhered to in construing such contracts as being in violation of the prohibition of this section of the constitution.

It is urged, however, in the brief of the appellant that the only contracts in which a provision similar to the one in issue has been held void were those entered into in this state, or in a foreign state for shipment of goods into this state, and that, as it was pleaded in the answer that the contract was entered into in Idaho for shipment of stock to either Chicago, Illinois, St. Joseph, Missouri, or South Omaha, Nebraska, and that, as in fact ten car-loads of sheep were shipped and delivered in Chicago, the condition of the contract with reference to notice should be upheld at least as to the sheep that were delivered in Chicago. It is true that the answer alleged that the contract was valid in the state of Idaho, where it was entered into, but the only evidence offered tending to show that the contract was valid in that state was as follows: "Alfred Hazlett, called by the defendant and sworn, testified as follows: Q. Where do you reside? A. I reside at Beatrice, Nebraska. Q. You may state, Mr. Hazlett, if you have examined the constitution of the state of Idaho in force in June, 1901, and now in force, concerning the

question as to whether or not the constitution of that state prohibits a common carrier from limiting its liability as a common carrier in the shipment of live stock or other freight. A. I have. Q. Now you may state what, if any, provision the Idaho constitution contains concerning such limitation." This question was objected to and the objection sustained. Defendant offered to prove by the witness that the constitution of Idaho contained no provision against a common carrier limiting its liability as a common carrier, and this offer was denied. The same questions were offered with reference to the statutes of the state of Idaho, and the same objections were sustained, and the same offer made and denied. Section 396 of the code provides for the proof of statutes, codes, and other written law of other states and territories, by the production of printed copies in volumes of statutes, duly authenticated or published by authority of such states or territories, and provides for proof by parol of only the unwritten or common law of any such foreign state or territory. Defendant made no effort to prove the unwritten or common law in force in the state of Idaho by this witness. Hence, the trial court properly excluded the testimony as to the contents of the constitution and the statutes. In the absence of proof to the contrary, we will presume the constitution and statutes in force in the state of Idaho to be the same as our own. *Smith v. Mason*, 44 Neb. 610.

What is said here in support of the instruction given justifies the action of the trial court in refusing the instructions requested by the defendant. Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

WILLIAM ALBIN, BY GEORGE N. LA RUE, GUARDIAN, APPELLANT, V. CHARLES C. PARMELE ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,730.

Judgment: MANDATE. The judgment of the district court examined, and *held* in conformity with the directions contained in the mandate of this court in the case of *Albin v. Parmele*, 73 Neb. 663.

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

Matthew Gering, for appellant.

Jesse L. Root and *Samuel M. Chapman, contra.*

OLDHAM, C.

The only question at issue in this appeal is as to whether or not the district court for Cass county, Nebraska, has rendered an accounting for rents and profits of the premises in dispute between the parties in conformity with the mandate issued by this court on April 19, 1905, in the case of *Albin v. Parmele*, 73 Neb. 663. The full history of this litigation and all the issues determined therein appear in the former opinions rendered by this court in *Albin v. Parmele*, 70 Neb. 740, 746, and 73 Neb. 663. By reference to these opinions it will be noted that, at the first hearing of this cause in this court, it was determined that, under the will of Benjamin Albin, deceased, William Albin was devised a life estate in the premises in controversy without the power of alienation or incumbrance, and that the deed from William Albin and wife to defendant Parmele, and the deed from Parmele to Carey, and the mortgage from Carey to Parmele were properly canceled and held for naught by the district court, but that the court had erred in incumbrancing the estate with a judgment lien for the purchase money paid by Parmele to William Albin. In the memorandum opin-

ion on the motion for rehearing the cause was remanded for a determination of the rights of the parties under a five years' lease, executed by William Albin to his brother Frank Albin, and assigned to defendant Parmele. At a retrial of the cause, the court, in attempted conformity with this mandate, held the lease absolutely void, and without effect, and rendered judgment against the defendants for possession of the premises and the full amount of the rents and profits accruing during their occupancy of the same. On a review of this judgment, at the last hearing of the cause in this court, it was determined that the lease for a term of years was an incumbrance on the estate, and as such was executed without authority, but that, in an equitable accounting for rents and profits, the occupancy of the premises under the lease should be treated as the holding of a tenant at will. The judgment was reversed, with directions to the court below "to take an accounting of the amount due for rents and profits of the premises in controversy during the time they were occupied under the lease, and to credit this accounting with such sums as William Albin has received from the lessees during the existence of the lease." In conformity with this direction the trial court found that the amount stipulated in the lease was the reasonable value of the leasehold interest for the first year that it was occupied by the lessees, and that the amount therein stipulated had been paid to the guardian of the lessor for his support and maintenance. The court further found that, for the three succeeding years, in which the premises were occupied by the defendants under the assignment of the lease and their void deeds, the value of the premises was in excess of $200 a year, the sum named in the lease, and of the total value of $370, and that during said time William Albin had received from the lessees the sum of $1,000, and, consequently, was not entitled to any further recovery for rents and profits. The decree found that the defendants had delivered the peaceable possession of the premises to the plaintiff at the expiration of the lease, in March,

1905, and judgment was entered quieting the title to the land and canceling all the conveyances thereon, in conformity with the judgments and mandates of this court. From so much of the judgment as denied plaintiff's claim for rents and profits, plaintiff appeals to this court.

It seems to us that the judgment of the district court is in strict compliance with the directions contained in the mandate. We directed an equitable accounting between the parties, not under the terms of the leasehold contract, which was invalid, but rather by treating the occupancy as if it were a tenancy at will, and charging the occupants for the actual value of the use of the premises, and crediting them with the amount paid plaintiff during the time of such possession. The court charged defendants with the occupancy as directed by this mandate. Defendants were credited with the $1,000 paid to William Albin by defendant Parmele at the time the deed was executed and the lease assigned, and it is of this credit, and not of the charges in the accounting, that complaint is made. We held at the first hearing of the cause that a judgment for the purchase money could not be taxed as a lien against the land in controversy, because there was no authority under the will to incumber it. But we did not hold that the amount actually paid by defendant Parmele to William Albin might not be taken into consideration in an equitable accounting for rents and profits. The testimony tends to show that the $1,000 received from Parmele was largely used for the support and maintenance of William Albin and his family, and, as the court did not render judgment over against plaintiff for the remainder due, but merely dismissed plaintiff's claim, we think the judgment was in conformity with the mandate, and recommend that it be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

JOHN F. HOYE, APPELLANT, V. CHARLES S. DIEHLS ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,533.

1. **Highways: LOCATION.** A commissioner appointed to examine into the expediency of a proposed road should, upon recommending its establishment, cause it to be surveyed and plainly marked, if the precise location cannot otherwise be given.
2. ———: ———: WAIVER. An irregularity in the report of a road commissioner, such as an indefinite description, is waived by the filing of a claim for damages on account of the establishment of such road.
3. ———: INJUNCTION. An injunction cannot be maintained to prevent the establishment of a highway by one who has filed a claim for damages on account of the establishment thereof.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Frank Dolezal, for appellant.

Robert J. Stinson and *John W. Graham, contra.*

EPPERSON, C.

This action was brought June 15, 1904, to enjoin the county officers of Dodge county from opening a proposed road. The special commissioner appointed to examine into the expediency of the proposed highway recommended that the road described in the petition be established, but did not cause the road to be surveyed and plainly marked as required by section 6014, Ann. St. No objections were filed to the establishment of the road in the first instance, but plaintiff, who owns all the land through which the proposed road runs, filed a claim for damages, which was allowed in an amount less than that claimed. Two days after the allowance of the claim, the proper officers prepared to establish the road, and placed stakes and monuments showing the course of the highway.

Plaintiff contends that he is entitled to an order restraining the opening of such road because it is not

located where the appraisers considered it would be when they appraised his damage. The report of the commissioner recommending the establishment of the road should have been definite as to the location and he should have caused the road to be surveyed and plainly marked out. The reason for this is more apparent because the description in the petition was not definite, fixing the commencement of the road at or about a certain point, "thence east about 100 rods." On account of his omission the proceedings were irregular, but not void. Plaintiff should have objected to the sufficiency of the report and caused a definite description to have been filed. Instead, he acquiesced in the proceeding by filing his claim for damages, and thereby waived this irregularity. In *Davis v. Boone County,* 28 Neb. 837, it was held: "Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road."

Plaintiff contends that the irregularity here complained of did not exist when he filed his claim, and therefore was not waived. The road marked out conformed with the indefinite description in the petition, and lies 55 feet or less farther north than plaintiff considered it when his claim for damages was heard by the county board. It appears that the only irregularity in the proceeding was that found in the report of the commissioner, which, as above shown, was waived. The record discloses that subsequently to the marking of the proposed road plaintiff herein perfected an appeal from the order of the county board allowing him damages. That appeal is now pending in the district court for Dodge county, and therein plaintiff claims a greater amount than allowed by the county board. Plaintiff is only entitled to recover damages, and in that appeal he has an adequate remedy.

The judgment of the lower court was for the defendants, and we recommend that it 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.

LYMAN RICHARDSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,374.

1. Cities: ASSESSMENTS: RELEVY: NOTICE. Under the provisions of the statute of 1893, when it was proposed to equalize the benefits to, and relevy and assess special taxes against, a part only of the property benefited by a public improvement, notice to the owners of other property benefited, who had paid taxes formerly assessed to their property on account of benefits arising from the same improvement, was not required.
2. ———: ———: INJUNCTION. The city council of the city of Omaha will not be restrained from passing an ordinance levying special taxes, equalized by it, when sitting as a board of equalization, in the absence of proof of fraud, gross injustice or mistake in such equalization.

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

H. W. Pennock, for appellants.

Harry E. Burnam, I. J. Dunn, John P. Breen and *W. H. Herdman, contra.*

EPPERSON, C.

In 1892 the city of Omaha established sewer districts Nos. 164, 166 and 172, in each of which the plaintiffs owned several tracts of land. In the same year sewers were constructed in each of said districts as provided by law, and the city authorities, to pay the expense thereof, attempted to levy a special tax upon all real estate benefited by such improvements. Later, in an action brought by the plaintiffs herein, the court declared such pro-

ceedings irregular on account of a defect in the notice of the sitting of the city council as a board of equalization at the time such levy was attempted, and restrained the defendants and the city treasurer from collecting the taxes thereby levied against all the property of the plaintiffs. The evidence herein discloses that all the taxes then levied, except that charged to plaintiff's property, had been paid prior to the proceedings herein complained of. Prior to the sitting of the city council as a board of equalization in June, 1902, it caused a notice to be published, in substance, that it would sit as a board of equalization, commencing June 10, for the purpose of considering and equalizing the proposed levy of special taxes and assessments as shown by proposed plans of assessments prepared by the city engineer; said special taxes and assessments proposed to be levied being necessary to cover the cost of special improvements duly authorized to be made and now completed as follows: To cover the partial cost of constructing sewer in sewer district No. 164, said partial cost amounting to the sum of $659.73, which sum it is proposed to assess upon the lots and real estate specially benefited by reason of said sewer construction as follows (here follows a description of plaintiffs' property in sewer district No. 164). Said notice contained similar provisions pertaining to districts Nos. 166 and 172. Depending upon this notice, the city council as a board of equalization recommended that there be levied against the plaintiffs' property, and each tract thereof, the amount of taxes recited in the notice (the amount named being only a small portion of the total cost of the sewer in each district).

Plaintiffs' principal contention is that the public notice of said proposed equalization was directed only against the property of the plaintiffs, and no notice was served on or directed to the owners of the other property benefited by, and within, the sewer districts in controversy, alleging that by reason of this failure of notice to the property owners the said board of equalization had no juris-

diction to authorize assessments in either of said districts. Section 161, ch. 12*a*, Comp. St. 1901, which plaintiffs contend was not complied with by the city council, is as follows: "All special taxes to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate bounding, abutting or adjacent to such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvement, such benefits to be determined by the council sitting as a board of equalization, after publication of notice to property owners as herein provided, and in cases where the council sitting as a board of equalization, shall find such benefits to be equal and uniform, such assessment may be according to the foot frontage, and may be prorated and scaled back from the line of such improvement according to such rules as the board of equalization shall consider fair and equitable; and 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."

The principal question to be determined in this case is whether or not, under the terms of this section, the notice given to the plaintiffs was sufficient to confer upon the city council jurisdiction to determine the amount of benefits to the plaintiffs' property by reason of the construction of the sewers, and to determine the amount of taxes for which said property was liable. It must be borne in mind that the proceeding complained of was one for reassessment, and not the original assessment of the property. All other interested property owners submitted to the assessment made by the city council in their levy, which on the suit of the plaintiffs herein was found to be irregular. Other property owners had waived the irregularity of the former levy and had, prior to the reassessment of plaintiffs' property, paid the amount

thereof. There was no necessity of serving notice upon them of the proposed reassessment of plaintiffs' property, nor can we see the propriety of such a notice, when it was not proposed to reassess their property, and no action affecting their rights was contemplated. It was decided in the case of *Mercer Co. v. City of Omaha*, 76 Neb. 289, that the city council had the power to reassess property to pay the expenses of such improvements. Under section 161, *supra*, it will be noted that the jurisdiction of the board vests only after publication of notice to property owners. And in an original levy, when all property benefited is to be assessed and the liability equalized, we have no doubt that all property owners must be notified of the proposed equalization. But on a reassessment of a part only of the property benefited, and after the liability of the other property has ceased, it would be unnecessary to give notice to such property owners, either that their assessments would be equalized, or that the liability of the plaintiffs' property would be determined. The proposition simply was to determine the liability of the plaintiffs' property and to equalize, so far as it was concerned, the amount of the special taxes. We are satisfied that the notice given was sufficient to give the council jurisdiction over the plaintiffs' property, determine its liability, and to assess against the same a just proportion of the expenses. If such proceedings were unjust, the plaintiffs had their remedy by direct proceedings to review the action of the city council.

2. Plaintiffs contend that the city council equalized the assessment by attempting to charge their property according to the foot-frontage rule, without making a finding that all property concerned was equally benefited. The determination of the matter, as shown by proof of the proceedings had by the city council, is found in this language: "Resolved, that it is the final determination of the city council sitting as a board of equalization that levies of special taxes to cover the cost of the several improvements referred to in said notice, to the extent of the

special benefits accruing to the property by reason of such improvements, and as shown by the plans of proposed levies prepared by the city engineer, approved by the board of public works, and now on file in the office of the city clerk, should be made in accordance with said plans, the several lots and pieces of real estate therein described being specially benefited to the full amount in each of said proposed levies." Whether or not the foot-frontage rule was followed does not appear in the minutes of the city council. The plans for the assessment before the city council were introduced in evidence upon the trial of this cause, from which the inference may be had that the foot-frontage rule was followed; but from the body of the resolution it was determined that the plaintiffs' property had been benefited to the extent of the levy made and should be taxed accordingly. In *Morse v. City of Omaha*, 67 Neb. 426, it is said: "Where the council fails so to find, a taxpayer with notice, dissatisfied with the rule per foot-frontage adopted, should cause such action to be reviewed, and on failure so to do he will not, in a proceeding to enjoin the collection of such tax, be heard to say that the tax is void." The case at bar was instituted to enjoin the city council from passing an ordinance levying a special assessment as equalized or established by the board of equalization; but, as jurisdiction was acquired, the proceedings of the board of equalization, in the absence of proof of fraud, gross injustice or mistake, which was neither alleged nor proved, should not be disturbed.

The judgment of the district court denying the plaintiffs the relief prayed for should be affirmed, and we so recommend.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

HENRY A. WYMAN, RECEIVER, ET AL., APPELLEES, V. FREDRICK C. EMBREE, APPELLANT.

FILED JANUARY 5, 1907. No. 14,523.

Judgment: RES JUDICATA. When a party who claims a lien on real estate on account of detached interest coupons is properly made a party in an action by another to foreclose the mortgage, and makes default therein, he is barred from bringing an action to foreclose on his coupons, after foreclosure and sale in the former proceedings, when the petition therein sufficiently puts in issue the facts upon which he must rely to recover.

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

H. M. Sullivan, for appellant.

R. A. Moore, contra.

EPPERSON, C.

Plaintiff as assignee seeks to foreclose on past due detached coupons. The mortgage and debt thereby secured were assigned to one Cox within a short time after they were executed. Later, the coupons here in controversy were reassigned to the mortgagee. Later, Cox foreclosed upon the principal note and other coupons. In that case the mortgagee and its receiver, who then held the coupons in controversy, were made parties defendant, and were served by publication. They also had actual notice of the proceeding, but made default. A decree was rendered in favor of the plaintiff, Cox, and against the defendants. The land was sold under the decree, and later the mortgagor, defendant herein, again became the owner thereof by purchase. He pleads as a defense that this action is barred by the proceedings had in the former case. The plaintiff herein is the assignee of the receiver, taking the coupons after maturity. He contends that the petition for foreclosure in the former case was insufficient to

require the defendants therein to answer, and therefore that proceeding is no bar to this action. An assignment of interest coupons is an assignment *pro tanto* of the mortgage. *Whitney v. Lowe,* 59 Neb. 87. On account of the reassignment of the coupons, the mortgagee and its receiver were proper parties to the former suit.

In his petition for foreclosure, Cox alleged the facts above set forth regarding the giving of the mortgage and its assignment, without, however, alleging the reassignment of the interest coupons. He further alleged that he was the holder and legal owner of the note and mortgage, and that the interests of the defendants, the mortgagee and its receiver, were junior and inferior to his lien; that said debt has not been paid, except the interest coupons maturing prior to the first day of November, 1895, which are the coupons in controversy herein. By their default the defendants admitted these facts, which we hold were sufficiently alleged. In *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, it was held: "The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint. But a recognized exception to that rule is that where in a foreclosure or other kindred proceeding a defendant, who is called upon to disclose and set up his supposed but unknown interest in the subject of the action, makes default, he will be held to have admitted that his interest therein is subject to that of the plaintiff." Where the petition is sufficient to put in issue the facts upon which the defendant must rely to recover in an action to foreclose on his own lien, and he defaults, the matter is terminated effectually, and is as binding as it would be had he answered and gone to trial upon his alleged cause of action, and the matter had been decided against him. In his petition Cox substantially alleged that the coupons here declared upon were paid, and that the amount thereof was no longer a lien upon the land. The petition was sufficient, in our opinion, to require the defendants to answer and protect the interests which the plaintiff herein

as assignee now asserts. The case at bar falls under the general rule, as announced in *Bank v. Virgin, supra,* rather than the exception. They not only admitted the superiority of plaintiff's claim, but other facts alleged against them. By the sale had under the decree of foreclosure and the proceedings had in the case instituted by Cox, the rights of the parties thereto were barred, and the plaintiff cannot maintain this action.

The judgment of the district court was for the plaintiff, and we recommend that it be reversed and the case 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 this case dismissed.

REVERSED AND DISMISSED.

HERMAN E. BOSLER ET AL., EXECUTORS, APPELLEES, V. JOHN A. MCSHANE, APPELLANT.*

FILED JANUARY 5, 1907. No. 14,589.

1. **Limitation of Actions: PAYMENTS.** Under the provisions of section 22 of the code, any payment upon a written contract for the payment of money made through the arrangement of the maker, or such payment as is the natural and reasonable sequence of his agreement, will stay the running of the statute of limitations.
2. ———. The payment of dividends upon the stock of a corporation assigned to the payee by the maker of a note as collateral security, and the application thereof as payments upon the note, will stay the running of the statute of limitations.

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

* Rehearing allowed. See opinion, p. 91, *post.*

W. D. McHugh, for appellant.

Joel W. West, contra.

EPPERSON, C.

Plaintiffs, as executors of the last will and testament of J. H. Bosler, deceased, obtained judgment in the court below upon a promissory note. The defense was that the note was barred by the statute of limitations. The defendant, when he executed the note, assigned 100 shares of stock of the South Omaha Land Company as collateral security to plaintiffs' decedent, the payee. The original certificate was surrendered to the corporation, and in lieu thereof a new one issued to plaintiffs. The corporation paid to plaintiffs certain dividends upon the stock, which were indorsed upon the note. The note was barred unless the payment of the dividends tolled the statute.

Section 22 of the code provides: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise."

Defendant contends that such dividends do not constitute a payment upon the note such as will arrest the running of the statute, citing *Moffitt v. Carr,* 48 Neb. 403. It was there held: "Part payment, within the meaning of section 22 of the code of civil procedure, is a voluntary payment made by the debtor himself or by some one authorized by him to make such payment." The payment controlling the disposition of the question in that case was money realized from the sale of real estate in Missouri pledged by trust deed, and sold under the provisions of the trust deed by legal proceedings which were held equivalent to a judicial foreclosure in this state. The court held that the creditor therein obtained the payment through

the agency of the law, and that it was not a voluntary payment which would arrest the running of the statute. In *Whitney, Clark & Co. v. Chambers,* 17 Neb. 90, it was held: "The payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, under section 22 of the code, take the residue of the debt out of the statutory limitation, as against such debtor." In the opinion by COBB, C. J., it was said: "Here the application of any portion of the property to the part payment of the notes and account sued on was not necessarily or probably in the mind of the defendant in error when he made the assignment for the benefit of his creditors. * * * And as it appears to me, the payments made by said assignee on the said notes and account were made as the agent of the law and of the said creditors rather than as the agent of the said assignor." This rule was adhered to in *Connor v. Becker,* 62 Neb. 856. The cases above cited establish the rule that payments made by virtue of legal proceedings, or through the agency of the law, are not sufficient to stay the running of the statute.

Going now a little deeper into the above cited cases, and similar decisions of the courts of sister states, we find that the reason for the rule is that to bind a debtor, even to the extent of continuing the existence of a cause of action against him, the payment upon his debt must have been made with his consent, or through an agency created by him; in other words, it should be voluntary on his part. In *Whitney, Clark & Co. v. Chambers, supra,* it was further said: "As I understand the reasoning of the cases upon the section of the statute under consideration, it amounts to about this, that a part payment in order to bar the statute must be equivalent to an acknowledgment of an existing liability or to a promise to pay the same." And in *Moffitt v. Carr, supra,* it was said: "Such payment was not a voluntary one on the part of Carr, but one made *in invitum* and by operation of law, and that it did not arrest the running of the statute of limitations." See, also, *Kallenbach v. Dickinson,* 100 Ill. 427; *Hughes v.*

Boone, 114 N. Car. 54; *Harper v. Fairley,* 53 N. Y. 442; *Wolford v. Cook,* 71 Minn. 77. In *Adams v. Holden,* 111 Ia. 54, cited by defendant, it was held: "Application of rents and profits of lands by a grantee in possession, under deeds operating as mortgages, to the payment of the debt secured, will not operate to take a suit by the grantor to recover the lands from the bar of the statute of limitations, no voluntary payment by the grantor having been made." This case, we consider, had it been based on a statute similar to our own, would support defendant's contention. However, under the provisions of our statute, section 22 of the code, and the decisions of this court, we are unable to adopt defendant's view.

In *Sornberger v. Lee,* 14 Neb. 193, it was held: "The receipt and indorsement on a promissory note by the holder of money realized from a collateral left with him by the maker for that purpose will remove the bar of the statute." This case has been cited with approval by this court in the following cases: *Whitney, Clark & Co. v. Chambers, supra; Ashby v. Washburn & Co.,* 23 Neb. 571, and *Moffitt v. Carr, supra.* In the opinion in the last cited case we find the following with reference to *Sornberger v. Lee, supra:* "We have not the slightest doubt of the correctness of that holding; but the decision rests upon the correct principle that the debtor, by delivering to his creditor collateral notes, authorizing him to collect them and indorse the amount of the proceeds on the original note, thereby constituted the holder of the note his agent, and everything that the holder did in the premises was, in effect, the act of the maker of the note. In other words, the transaction amounted to a voluntary payment on the note by the maker." We are unable to detect any difference in principle between the collection of a part of a collateral note and the collection of dividends on stock assigned as collateral. We do not understand the law to require the debtor to have actual knowledge of the exact time and the amount collected from collateral deposited with his

creditor, nor that he needs to positively acquiesce in the indorsement at the time it is made in order to stay the statute. If so, we would have to read into the statute words which are not there. "When any part of the principal or interest shall have been paid" the statute is tolled. This cannot be construed so as to permit a payment made by a volunteer, nor a payment made through the agency of legal proceedings, to have that effect. A partial payment tolls the limitation because of section 22, *supra*, by virtue of which such payment fastens upon the maker an implied renewal promise to pay the indebtedness or an acknowledgment of liability. In *Ebersole v. Omaha National Bank*, 71 Neb. 778, it was held: "A part payment operates to revive a contract debt, barred by the statute of limitations, of its own vigor and not as evidence of an acknowledgment or new promise." The same effect must be given to a payment upon a debt, even though it was not barred at the time of payment. This rule excludes from consideration the idea, if any such exists, that to prevent the running of the statute the maker must have known of, or acquiesced in, the indorsement or payment when made. This being true, it necessarily follows that any payment made through the arrangement of the debtor, or such as is the natural and reasonable sequence of his own agreement, legal proceedings not being invoked, will stay the running of the statute.

In the case at bar, the certificate was assigned to the holder of the note. He, or his legal representatives, collected dividends, as they had the legal right to do, and credited the amount thereof on the note. The maker of the note intended that they should do this. He could not have known the date of payment or the amount of the dividends when he assigned the stock, but he assigned it with an understanding that whenever dividends were paid they would be applied on the note. This was his contract, and, under the statute, was as effectual to stay the limitation as though he had collected the dividends and handed the amount thereof to the creditor. By the assignment of

the stock he, in effect, gave the officers of the corporation authority to pay the dividends to the holder of the certificate of stock—the payee. We cannot see that the surrender of the certificate and the issuance of a new one in lieu thereof to the plaintiffs in any way changes the rights of the parties. The duty of the plaintiffs to restore the collateral security upon the payment of the debt applies to the stock assigned, whether it be evidenced by the new certificate or the old one. The surrender of the old certificate did not change the character of the assignment to the payee of the note.

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 rehearing was filed November 21, 1907. *Former judgment of affirmance adhered to:*

Limitation of Actions: PAYMENTS. The payment of dividends upon the stock of a corporation assigned to the payee by the maker of a note as collateral security, if paid within the statute of limitations after such assignment, and the application thereof as payments upon the note, will stay the running of the statute of limitations.

GOOD, C.

This case is before us on rehearing. A statement of the facts may be found in the former opinion, *ante,* p. 86. The only question for determination is as to whether or not the payments credited upon the note were such as to arrest the running of the statute of limitations. The payments made were the proceeds of dividends upon corporate stock, which had been pledged as collateral security to the note. The rule is well established in this state, and is quite generally recognized in other states, that any

voluntary payment made by the debtor, or by his authority, will be sufficient to arrest the running of the statute. The vital question, therefore, in this case is: "Were the payments that were credited upon the note voluntary payments? It is generally recognized that any payment made as a result of legal proceedings, or that is made as the result of the operation of law, is not held a voluntary payment. A payment made as the result of the foreclosure of a chattel mortgage is held not to be a voluntary payment. *Westinghouse Co. v. Boyle,* 126 Mich. 677. A payment resulting from the sale of land under a trust deed given to secure the payment of the debt is held not to be a voluntary payment. *Moffitt v. Carr,* 48 Neb. 403. A payment by an assignee for the benefit of creditors is held not to be a voluntary payment. *Whitney, Clark & Co. v. Chambers,* 17 Neb. 90; *Connor v. Becker,* 62 Neb. 856. And the weight of authority is, perhaps, to the effect that a payment upon a note derived from the sale or collection of other notes pledged as collateral to the principal note is not a voluntary payment. But the rule is otherwise in this state. In the case of *Sornberger v. Lee,* 14 Neb. 193, it was held that such a payment was voluntary, and was sufficient to stay the running of the statute of limitations. This opinion has been cited and quoted with approval in the following cases: *Whitney, Clark & Co. v. Chambers, supra; Ashby v. Washburn & Co.,* 23 Neb. 571; and *Moffitt v. Carr, supra.* And it is, and ought to be, considered as the settled rule in this state. Our attention has not been called to, nor have we been able to find, any cases directly in point, and it is doubtful if the precise question involving stock certificates held as collateral, has ever been adjudicated in this country.

In order to properly determine the question as to whether the payment is a voluntary one, it becomes necessary to consider what are the rights and duties of the parties arising out of the pledge of the corporate stock as collateral security. In this case the corporate stock was pledged, and there was a delivery of the stock cer-

tificate with power of attorney in blank to transfer the same on the books of the corporation. The certificate and power of attorney were delivered at the time of the giving of the note. By this act McShane transferred to Bosler the right and power to have the certificate surrendered and a new one issued, and divested himself of the right thereafter to draw any dividends upon the stock, and Bosler became entitled to collect any dividends declared upon the stock while he held it as collateral. It is true that Bosler did not have the stock transferred upon the books of the corporation for a period of about three years, and that McShane during that time collected the dividends. But this did not change the rights of the parties, for Bosler was entitled not only to have the stock transferred upon the books of the corporation, but was entitled to draw the dividends not only from the time of the transfer of the stock on the books of the corporation, but from the time of the delivery of the certificate to him when the stock was pledged as collateral. The fact that the stock had not been transferred upon the books of the corporation was wholly immaterial as to the rights of Bosler to collect the dividends. The rule is thus laid down in 22 Am. & Eng. Ency. Law (2d ed.), 906, 907: "Where stock is pledged in the ordinary mode and the pledgor executes an irrevocable power of attorney, authorizing a transfer of the shares of stock on the books of the corporation, the pledgee has the right to cause a proper transfer of the stock to be made to him. * * * Where corporate stock is pledged, and there is a delivery of the stock with a power of attorney in blank to transfer on the books, and an assignment in blank on the back of the certificate, the pledgee has the right to receive from the corporation any dividends accruing while he holds the stock. It is not only the right but the duty of the pledgee of the stock to collect such dividends; and the fact that no transfer has been made on the books of the company is immaterial." McShane did all that was in his power to do to transfer the stock when he delivered the certificate of stock with a

power of attorney in blank to Bosler. Then and there McShane's right to the dividends ceased, and Bosler's commenced. This right to the dividends was the result of the voluntary act of McShane. While Bosler had the right to the dividends, he also owed a duty to McShane and was under obligation to him to apply the dividends so received as payments upon McShane's note. The only right to retain the dividends was as payments upon the note to which the corporate stock had been pledged as collateral. It was Bosler's duty, therefore, to credit the dividends received upon the note as part payments thereof. It was to the interest of McShane that Bosler should collect the dividends and apply them in part payment of the note. Counsel for appellant contends that Bosler acted against the interest of McShane when he had the stock transferred upon the books of the corporation and thereafter collected the dividends, and that, therefore, the proceeding was adversary in its nature and the payments not voluntary. The vice of this argument lies in the fact that he assumes that McShane was deprived of the right to the dividends by the transfer of the stock upon the books of the corporation. While it was, doubtless, the intention of the parties, at the time of the giving of the note and the pledging of the stock as collateral thereto, that the stock would be immediately transferred upon the books of the corporation to Bosler, yet, as we have seen, the right of Bosler to the dividends did not depend, at least as between him and McShane, upon the transfer of the stock upon the books of the corporation, but it depended upon the voluntary act of McShane in delivering to Bosler the certificate with the assignment and power of attorney indorsed thereon. McShane was not deprived of any right to collect the dividends by the transfer of the corporate stock upon the books, for the reason that his right to those dividends had ceased by his previous act. The dividends that McShane collected after he pledged the stock were wrongfully received by him. We have no doubt that, had McShane abstained from receiving and collecting the divi-

dends from the stock, as it was his duty to do, and, if Bosler had neglected to collect the dividends and apply them upon McShane's note, and the dividends, through the failure of the corporation or otherwise, had been lost, Bosler would have been liable for such loss. Only the rights of third parties could have been affected by the transfer of the corporate stock upon the books. The object of such transfer is that the corporation and third parties may be advised as to who has the right to control the stock and to collect the dividends thereon. As far as McShane was concerned, and as between him and Bosler, the transfer was complete at the time of the pledging of the stock and the delivery of the certificate. It, therefore, became the duty of Bosler, and of his executors, who succeeded to his rights, to receive the dividends and credit them upon the note, and in so doing they acted in the interest of McShane, and as his agent and in pursuance of his voluntary act. The payments were, therefore, voluntary and operated to arrest the running of the statute of limitations.

It is clear to us that the conclusion reached on the former hearing is the correct one, and that the judgment of the district court should be affirmed. However, we are of the opinion that the rule was too broadly stated in the first paragraph of the syllabus in the former opinion and that it was going too far to say that "any payment upon a written contract for the payment of money made through the arrangement of the maker, or such payment as is the natural and reasonable sequence of his agreement, will stay the running of the statute of limitations." The statement of law as therein enunciated might reasonably be construed as covering a case where the money was derived from the operation of law. The first paragraph of the syllabus in the former opinion is, therefore, disapproved. For the reasons stated, we recommend that the former decision be adhered to, but that the first paragraph of the syllabus in the former opinion be disapproved.

EPPERSON, C., concurs.

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

AFFIRMED.

SEDGWICK, C. J., concurring.

It seems to me that the former decisions of this court upon the question involved are not reconcilable. In *Sornberger v. Lee*, 14 Neb. 193, the law is stated to be: "The receipt and indorsement on a promissory note by the holder of money realized from a collateral left with him by the maker for that purpose will remove the bar of the statute." It will be noticed that this makes no distinction between negotiable and nonnegotiable collaterals; and in *Moffitt v. Carr*, 48 Neb. 403, the foregoing syllabus is quoted and appears to be approved. *Moffitt v. Carr* holds that money realized from the proceeds of a sale of land under a trust deed, given to secure the claim, is not such payment as will stop the running of the statute, and the opinion says: "We have not the slightest doubt of the correctness of that holding" (in *Sornberger v. Lee*). The reason given for the distinction between the two cases is that, in turning over the collaterals as security, the debtor makes the creditor his agent to collect the collaterals and apply them upon the principal debt, so that the action of the creditor in so doing is also the act of the maker of the note. The better rule undoubtedly is that the collection of the collateral securities and the application of the proceeds by the creditor upon his claim will not stop the running of the statute. After the debtor has transferred the collaterals he may pay the principal claim. The statute of limitations presumes that he has done so, and the fact that the creditor has collected the collaterals and applied the proceeds on the principal claim is no proof as against the debtor that the claim had not been paid in full after the collaterals were turned over to the creditor and before the payment was made on the collaterals.

This is in accordance with the weight of authority. There are cases that hold the same principle as is held in *Sornberger v. Lee*, but the ground of the holding always is that, in transferring the collaterals, the debtor transfers the property itself, and the collection and application of the money on the collaterals is referred to the act of the debtor in transferring the collaterals and so made his act. These cases generally hold that the application of the money upon the principal claim must be within the time of the statute of limitations after the assignment of the collaterals; that is, payments made by the proceeds of the collaterals are considered as made, so far as the debtor is concerned, at the time the debtor consents to the application of such proceeds upon the principal claim, which he does by the assignment of the collaterals for that purpose. If, therefore, sufficient time elapses for the running of the statute from the assignment of the collaterals to the application of the proceeds thereof upon the principal claim, such application of the proceeds will not remove the bar of the statute. In the opinion of the court this rule will most nearly harmonize the decisions of this court. By assigning collaterals to secure the principal claim, the debtor assigns the property itself represented by the collaterals, and, if the proceeds of such collaterals are applied upon the principal claim within the statute of limitations after such assignment, it will be a payment as of the time of the assignment of the collaterals, and will interrupt the running of the statute at that time, so that action may be maintained on the claim within the statute of limitations after the assignment of the collaterals. This rule of law justifies the conclusion reached in the opinion.

MILAN D. BAKER, APPELLEE, V. JOHN R. MONTGOMERY, APPELLANT.

FILED JANUARY 5, 1907. No. 14,607.

1. **Reformation of Instruments.** A court of equity will reform a written contract when the proof is clear, convincing and satisfactory, and free from reasonable controversy that a mistake was made in omitting a material provision agreed to by both parties.
2. **Contracts:** VACATION: EVIDENCE. Evidence examined, and *held* to require a finding that a written contract prohibiting a physician from practicing medicine and surgery within a certain territory was not set aside, canceled and superseded by a subsequent parol agreement.
3. **Harmless Error.** Rulings of the trial court on the admission and rejection of evidence examined, and *held* not prejudicial error.

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

Allen & Reed, for appellant.

M. B. Foster and *E. A. Baker, contra.*

EPPERSON, C.

On July 10, 1905, the plaintiff, Milan D. Baker, and the defendant, John R. Montgomery, two physicians residing in Madison county, entered into the following written contract (Exhibit B): "This agreement made and entered into this 10th day of July, 1905, by and between Dr. John R. Montgomery of Madison, Nebraska, party of the first part, and Dr. M. D. Baker of Tilden, Madison county, Nebraska, party of the second part, Witnesseth: That said Dr. John R. Montgomery for the consideration of one thousand dollars in hand paid by Dr. M. D. Baker, as per bill of sale entered into herewith, including office furniture and fixtures thereunto appertaining, and also together with the good-will of his profession heretofore carried on there by said Dr. John R.

Montgomery, agrees to remain in the office with said Dr. M. D. Baker for the period of one month as a professional introduction of the said Dr. Baker to the people of Madison and vicinity. And it is further agreed that during the time of this introduction, which may extend beyond the period of one month or as long as parties agree, shall share and share alike both the profits and the bad accounts of the business done during the said time of introduction. The said Dr. John R. Montgomery shall not at any time after retiring from the period of introduction of said Dr. Baker, either alone, or jointly with, or as agent or representative of any person or interest whatsoever, or upon any account or pretense set up, exercise, carry on, be interested in, or encourage said profession within Madison, Nebraska, or encourage any opposition to said profession carried on by his successor in the same, nor disclose or make known any of the accounts, secrets or transactions relating to said profession, for a period of 15 years, unless within the office of Dr. M. D. Baker, or with his written and authorized consent. Witness our hands this 10th day of July, 1905, at Madison, Nebraska. (Signed) John R. Montgomery, M. D. (Signed) Milan D. Baker, M. D. Fred H. Davis."

Upon the execution of this agreement, plaintiff and defendant immediately began the practice of their profession as Montgomery & Baker in office rooms formerly occupied by defendant in the city of Madison and continued their joint practice until October, 1905. At that time Montgomery published notice of dissolution, withdrew from the office jointly occupied with Baker to other rooms in the same building, and, without Baker's consent and in violation of the above contract, practiced as a physician and surgeon in Madison, Nebraska. Thereupon plaintiff brought this action and secured a reformation of the written agreement and an injunction prohibiting defendant from practicing in the city of Madison and vicinity for a period of 15 years. Defendant appeals.

1. Defendant's first insistence is that the court erred in

decreeing a reformation of the written contract. The agreement (Exhibit B) prohibits Dr. Montgomery from practicing medicine and surgery "within Madison, Nebraska." The contract as reformed by the court prohibits Montgomery from practicing "within Madison, Nebraska, or its vicinity." Whether it was necessary to reform this agreement before issuing an injunction restraining defendant from practicing in Madison and vicinity may well be doubted. It would seem that a fair construction of the agreement, as written, is that Baker purchased Montgomery's practice, which both parties understood to extend half way to neighboring towns and to include country as well as city practice. However this may be, we are convinced that the trial court was justified in reforming the instrument. The evidence clearly and satisfactorily shows that the scrivener, through mistake, omitted to insert the words "or its vicinity" after "Madison, Nebraska." This clause was discussed by the parties, and plaintiff suggested that it be written "Madison and vicinity," while the defendant said: "Make it Madison county, if you want to." The scrivener testified that he took notes of the terms agreed upon by the parties; that he was in somewhat of a hurry to get to a train, and that it was his error in failing to insert in the contract the words "or its vicinity." It is true the parties read the document before signing it, but plaintiff explains that he glanced it over hurriedly because the scrivener wished to reach his train, and because it was understood that defendant was going to leave on account of his wife's health, and he (plaintiff) had no idea that the contract would ever be called in question. It is also true that plaintiff took no steps to rectify the mistake until this litigation was commenced, and that defendant denied the existence of any error in the wording of the agreement; but defendant's testimony on this point was contradicted by a disinterested witness, and, in view of other disinterested witnesses challenging the truth of defendant's statements concerning other material matters during the trial, we think the lower court was justified

in rejecting his testimony, and holding that the proof was clear, convincing and satisfactory, and free from reasonable controversy that a mistake was made by the omission of this provision in reducing the contract to writing.

2. Defendant's second contention is that the written contract was set aside, canceled and superseded by a subsequent parol agreement. Defendant testified that about two weeks after the execution of the written contract he and plaintiff abandoned the same and made a new arrangement; that a partnership was formed by parol agreement under the name and style of "Montgomery & Baker"; that defendant "was to put up his experience against plaintiff's investment"; that the proceeds and expenses were to be equally divided, and that the firm advertised their business and practiced medicine and surgery in Madison under this arrangement until October, 1905. The testimony is undisputed that defendant introduced plaintiff to many persons as his partner, and that all business was transacted as Montgomery & Baker and their accounts kept as such. It is certain that the parties practiced medicine under a partnership arrangement of some kind. But the existence of a partnership subsequent to the date of the written contract is not the disputed question in the case. The real conflict here is whether plaintiff and defendant practiced as partners under a subsequent parol agreement, as contended by defendant, or under the terms of the original written contract, as claimed by plaintiff. Upon the solution of this question of fact depends the result of this suit.

The original contract contemplated that the parties should practice together for a month or longer, sharing the profits and bearing the losses equally. Hence, their relation during this period of introduction might well be construed as constituting a partnership under definitions, approved by this court. *Gates v. Johnson,* 56 Neb. 808; *Waggoner v. First Nat. Bank,* 43 Neb. 84. Plaintiff testified that he and defendant practiced under the original contract as Montgomery & Baker for three months

immediately following July 10, 1905 (the date of Exhibit B), and that he thought they were partners under that agreement during the period of introduction mentioned therein. Plaintiff positively and specifically denied defendant's testimony that an arrangement or agreement for a partnership other than the written contract was entered into, and denied that there was any conversation on that subject as testified to by defendant. Plaintiff's testimony that whatever partnership relation existed between them was by virtue of the original contract is strongly corroborated. It appears that while the original contract was in process of preparation Dr. Montgomery proposed that possibly it would be better for them to pose as partners during the period of introduction. It also appears that on the day the original agreement was executed the parties began advertising under the name of "Montgomery & Baker," and ordered stationery to be printed in the firm name; that on the same day the sign on the office door was ordered changed so as to read: "Doctors Montgomery & Baker"; that on the same day defendant began introducing plaintiff as his new partner, and their professional card as "Montgomery & Baker" was published in the first issues of the local papers after July 10, 1905. Written by defendant above the entries of July 10 in the account book used by the parties are the words: "Dr. Baker begins." Nowhere after this entry is there any indication that a different arrangement was subsequently made. Plaintiff's positive testimony that no partnership agreement was entered into after the execution of the original contract, corroborated as it is by disinterested witnesses, and found true by the trial court, leads irresistibly to the conclusion that no subsequent partnership arrangement was made; that the original written contract was not set aside, canceled or superseded by a subsequent parol agreement, and that defendant's second contention is devoid of merit.

3. Finally, defendant calls our attention to rulings of the court in admitting evidence offered by plaintiff over

objection. We find sufficient competent evidence in the record to sustain the judgment, and the admission of the evidence complained of was without prejudice.

The judgment of the district court is clearly right, and we recommend that it 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.

JOHN TOMSIK, APPELLEE, V. ANNA TOMSIK ET AL., APPELLANTS.

FILED JANUARY 5, 1907. No. 14,627.

Cancelation of Instruments. Plaintiff sued his son and his son's wife to set aside certain conveyances on the ground that defendants had failed to perform an agreement to support plaintiff during the remainder of his life. Evidence examined, and *held:* (1) That plaintiff was entitled to have the conveyance set aside and a decree entered adjudging him to be the equitable owner of the premises; and (2) that defendants were entitled to a lien on the premises for $840 for money advanced by them.

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

R. R. Dickson, for appellants.

M. F. Harrington and *R. M. Johnson, contra.*

EPPERSON, C.

The plaintiff, John Tomsik, brought this action in the district court for Holt county, alleging, among other things, that on May 19, 1898, he was the owner of a quarter section of land in that county and also the owner of certain lots in the village of Atkinson; that on said

day plaintiff conveyed his farm by warranty deed to the defendant Anna Tomsik, who is the wife of plaintiff's son, the defendant Anton Tomsik; that the consideration for said conveyance was an agreement on the part of said Anna Tomsik to support, maintain, clothe, and care for plaintiff and his wife during the remainder of their lives; that plaintiff's wife died some time after the making of the deed, and that plaintiff remained on the farm until January, 1902, when defendants drove him from the premises, and refused to support him, and have at all times since refused to fulfil their part of the agreement. Plaintiff further alleges that, in addition to making said deed, and to aid in paying off a $700 mortgage on the land at the time of the conveyance, he turned over to defendants certain personal property valued at $600, which was used by defendants in payment of the mortgage indebtedness; that defendants have had the use of the land and have realized therefrom, in addition to the personal property, sufficient funds to pay the mortgage; that plaintiff is unable to read or speak the English language, and that defendants fraudulently secured from him a deed to his town lots in the village of Atkinson, and that he did not discover the fraud until several years thereafter. Plaintiff prays that the deeds to defendant Anna Tomsik be set aside; that he be decreed to be the equitable owner of the land, and that there be an accounting between the parties.

Learned counsel for defendants epitomizes their defense about as follows: That plaintiff was the owner of the land and town lots on May 19, 1898; that plaintiff was also the owner of personal property at that time worth the sum of $390, and that the real estate was incumbered by a mortgage and taxes; that the mortgage was past due; that the holder of the mortgage was about to foreclose, and that plaintiff was unable to pay the mortgage and was about to lose the land by foreclosure, and that the improvements were in a bad state of repair; that plaintiff and defendants at the time of the making and delivery of the deeds to the farm and town lots entered into a verbal

contract, wherein it was agreed that defendants should support the plaintiff and and his wife as long as they lived and at their death to defray their burial expenses; that in consideration thereof the plaintiff and his wife made and delivered to defendants the deeds to said farm and town property; that, in addition to said real estate, the defendants were to have the personal property then on the farm; that deeds were made, and the defendants went into the possession of the said real estate and are now in possession of the same; that at the time of the making of the deeds it was further agreed that the defendants were to pay off and discharge the mortgage and unpaid taxes against the land and lots, and also to pay certain other debts owing by the plaintiff; that they did pay off the mortgage and the unpaid taxes against the land and lots, and also paid the personal debts and obligations of plaintiff as contracted; that plaintiff and his wife were furnished the necessaries of life and were taken care of in a proper manner. Defendants specifically deny that they ever refused to support plaintiff or to furnish him the necessary care and clothing required, and that at all times they stood ready and willing to care for him in a suitable and proper manner, and to furnish him a suitable and proper home, and that they are still ready to comply with the terms of the verbal contract made at the time of the execution and delivery of the deeds to the farm and town property. Defendants also deny that they drove plaintiff from the farm, and allege that they have advanced large sums of money for the payment of the mortgage, interest and taxes, and plaintiff's personal obligations, and for improvements, etc.

The district court found the issues for plaintiff, set aside the deeds to defendant Anna Tomsik, and decreed that plaintiff was the equitable owner of the premises, and ordered a conveyance from defendants to plaintiff, subject to a lien of $840 in favor of defendants for money advanced. Defendants appeal and urge two grounds for a reversal: (1) The finding of the district court that plain-

tiff is the equitable owner of the land is not sustained by the evidence; and (2) if plaintiff is the equitable owner, the evidence requires a decree that defendants are entitled to a lien for more than $840. There is no question of law to be determined in this case. The propositions presented for decision are purely questions of fact.

1. We are convinced from a review of the evidence that defendants failed to comply with their agreement to support their father, and that the district court was justified in setting aside the conveyances to the defendant Anna Tomsik and decreeing that plaintiff was the equitable owner of the premises. No useful purpose will be subserved by setting forth the evidence contained in this voluminous record, or even the substance of it. Regardless of the finding of the district court in plaintiff's favor, we are of opinion that this part of the decree should be affirmed.

2. Defendants' second contention that they are entitled to a lien for more than $840 for moneys advanced in payment of mortgage, interest, taxes, improvements, etc., presents the most serious question in the case. Upon our first review of the evidence on this point we were inclined to increase the amount of the lien. A thorough examination of the evidence, however, constrains us to allow the decree of the trial court to remain undisturbed. The lower court awarded a lien for $840. One view of the record would seem to justify a decree for a much larger amount; another would greatly reduce the sum allowed by the district court. The evidence is irreconcilable as to the rental value of the land, also as to many items of expenditure in the alleged payments by defendants for certain improvements upon the land and debts of the plaintiff. There is also a conflict in the testimony which we cannot harmonize regarding the proceeds of personal property owned by plaintiff when he made the conveyances to his son's wife, the difficulty being to determine which party received the proceeds. There were a great many transactions, all of which are important in the accounting.

Defendants claim to have expended $2,183.79, and seek to charge to plaintiff the value of the personal property, $446. Plaintiff alleges that defendants received the proceeds from the personal property, and denies nearly every item of expenditure, some the full amount, others only in part. In view of the breach of their contract by defendants, we consider that the value of the personal property is immaterial and that defendants may not charge the same to plaintiff. We take it that defendants proved the expenditure of $1,268.93 in the payment of the mortgage, interest, taxes and funeral expenses. This leaves in dispute $914.86. On the other side of the account there is chargeable to defendants the rental value of the land for eight years and whatever proceeds of the personal property they received. The rental value was from $100 per annum, as claimed by defendants, to $200, as contended by plaintiff.

There is ample evidence to support the judgment of the trial court, and we recommend that it 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.

JOHN C. VERMILLION ET AL. V. STATE, EX REL. JOHN T. ENGLEHARDT.

FILED JANUARY 5, 1907. No. 14,340.

1. **Schools:** EXPULSION OF PUPILS. School boards are, by section 11079, Ann. St., authorized to suspend or expel a pupil from the public schools of this state for gross misdemeanors or persistent disobedience, and this without notice to the pupil or his parents and without any formal trial.

2. ———: REINSTATEMENT OF PUPILS. The board may adopt any mode of procedure in obtaining information or evidence of the conduct

of the pupil which it deems best, but in an action brought against its members to procure the reinstatement of the pupil his misconduct can only be shown by witnesses cognizant of the facts.

3. Mandamus: PROCEDURE. If the relator in an action for a writ of mandamus refuses to produce evidence in support of the allegations of his petition on the case being called for trial, the case on motion of the respondent should be dismissed; but the respondent, by assuming the burden and introducing evidence in support of his defense, waives the error and the case must then be determined on the evidence. *Union P. R. Co. v. Mertes*, 35 Neb. 204.

ERROR to the district court for Merrick county: JAMES G. REEDER, JUDGE. *Reversed.*

W. T. Thompson and *John C. Martin*, for plaintiffs in error.

Patterson & Patterson, contra.

DUFFIE, C.

November 1, 1904, the school board of district No. 9, Merrick county, was notified by Miss Cunningham, the principal, that she had expelled Edith Englehardt from the school for gross misdemeanors and persistent disobedience. The record made by the board relating thereto is to the following effect: "The board met at the school house during the noon hour, all the members being present. After finding that Miss Cunningham had only carried out the instructions of the board authorizing her to expel the pupil, it was moved and seconded that the action of Miss Cunningham in expelling Edith Englehardt be sustained. Motion carried. Board adjourned." The minutes of the board under date of November 7, 1904, contain the following: "The school board met at the school house at 4 P. M. for the purpose of explaining to Mr. Englehardt the charges against Edith. The minutes of the meeting containing the charges were read. The request of the attorney that the case be opened and reconsidered was refused. It was moved and seconded that the action of the board

be final. Motion carried." Thereafter, and on November 16, 1904, John T. Englehardt, the father of the expelled pupil, commenced this action in the district court for Merrick county against the trustees of said district, alleging that said defendants arbitrarily, capriciously, unlawfully, and without any just cause or reasonable excuse, expelled the said Edith Englehardt from said school for the remainder of the present school year, ending about the month of June, 1905, without giving any notice to the said Edith Englehardt or to this plaintiff, her father; that said board, although requested so to do by the plaintiff, refused to reinstate the said Edith Englehardt and allow her to attend said school, as she is lawfully entitled to do, and refused to grant a hearing to said plaintiff and said Edith Englehardt as to why said board expelled her as aforesaid, and denied her the privileges and advantages of said school. It is further alleged in the petition that the plaintiff and his said daughter are not advised in any way concerning the fact or facts, if any exist, on which the action of the school board is based. A writ of mandamus is prayed for.

The case was submitted to the court, who took the same under advisement, and thereafter entered a judgment awarding the writ as prayed in the petition, and taxing the costs to the defendants. From a written opinion filed by the trial judge it is apparent that the judgment entered was based principally upon the fact that no notice was given to the pupil or her parents that the board was to meet and consider the matter of her expulsion. We quote from the opinion: "By section 11079, Ann. St., the school board may authorize or order the suspension or expulsion from the school, whenever in their judgment the interests of the school demand it, of any pupil guilty of gross misdemeanors or persistent disobedience, but such suspension shall not extend beyond the close of the school term. The construction placed on similar statutes by the courts of Michigan, Massachusetts, Indiana and Illinois is that the misdemeanors and disobedience must be wilful

and malicious on the part of the pupil in order to warrant the exercise of the power of expulsion. It is also held in Massachusetts 'that the suspension of a pupil is unlawful' when he has been suspended for alleged misconduct without 'giving the pupil an opportunity to be heard upon the question of fact involved in his alleged misbehavior by the board of directors.' In other words, the board, on whom the authority is conferred by statute, must determine and find from an examination into the case the necessary facts upon which to base their decision. This rule is not complied with by simply ratifying what is done by another. To so hold would permit the substitution of the judgment of the teacher for that of the school board. It is clear from the evidence that in this case the board has not so acted, and peremptory writ will issue as prayed. The application of respondents for a supersedeas will be denied."

The statute under which the board is authorized to expel a pupil does not, in terms, provide for any notice, either to the pupil or to the parents, that a hearing is to be had or action taken. It is probably true that in such proceedings the board acts in a *quasi* judicial manner, but that no trial in the sense of a judicial inquiry is contemplated by the statute is evident. By what process is the attendance of witnesses to be secured, or, if they attend, who is to administer the oath or punish for a refusal to be sworn? What punishment could be inflicted upon those giving false testimony? The proceeding, in our judgment, is more like the action of an administrative board in making inquiry as to existing facts upon which they are required to act. In doing this they may use their own judgment and pursue any course which, in their opinion, will fully inform them of the facts attending the subject matter of the inquiry. In case of the suspension or expulsion of a pupil; the necessities of the case may often require immediate action on the part of the teacher or of the board. To require notice and a formal trial would in many cases defeat the object of the statute. Where the

pupil is guilty of "gross misdemeanors and persistent disobedience," summary action may be required, and this was undoubtedly the view of the legislature in not providing for notice and a formal trial. The authorities are generally to the effect that, where a pupil is guilty of such misconduct as to interfere with the discipline and government of the school, he may be suspended or expelled. *State v. Hamilton,* 42 Mo. App. 24; *McCormick v. Burt,* 95 Ill. 263, 35 Am. Rep. 163; *Peck v. Smith,* 41 Conn. 442; *State v. Williams,* 27 Vt. 755; *State v. Burton,* 45 Wis. 150, 30 Am. Rep. 706; *Watson v. Cambridge,* 157 Mass. 561; *Hodgkins v. Rockport,* 105 Mass. 475; *Sherman v. Inhabitants of Charlestown,* 8 Cush. (Mass.) 163; *Stephenson v. Hall & Van Ornum,* 14 Barb. (N. Y.) 222; *Board of Education v. Helston,* 32 Ill. App. 300; *Scott v. School District,* 46 Vt. 456. In *Board of Education v. Purse,* 101 Ga. 422, 41 L. R. A. 593, pupils were suspended without notice, and, on the report of a committee of the board appointed to investigate the facts the superior court granted a writ of mandamus to reinstate the pupils, but, upon appeal to the supreme court and on an extended examination of the authorities, the order of the superior court was reversed.

We are of opinion, also, that the teacher, when the interest of the school requires it, may suspend or expel a pupil, making, as in this case, a report to the board of such action. Upon this question the supreme court of Wisconsin, in *State v. Burton, supra,* has used the following language: "While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by it for the government of the school, and execute all its lawful orders in that behalf, yet, in matters concerning which the board has remained silent, he has authority, as *in loco parentis,* to enforce obedience to his lawful commands; subordination, civil deportment, respect for the rights of other pupils, and all obligations inherent in every school system constituting

the common law of the school which every pupil is presumed to know. In a proper case and where not deprived of the power by affirmative action of the board, such teacher has the inherent power to suspend a pupil from the privileges of the school; though such suspension should be promptly reported to the board, with the reason therefor." See, also, *Bourne v. State,* 35 Neb. 1. Our examination of the authorities and the necessities requiring it lead us to believe that the rule is this: That the teacher, when occasion demands, may suspend or expel a pupil; that the board, upon such inquiry as their own judgment may suggest and approve, may, without notice to the pupil or to the parents, suspend or expel a pupil who, in the language of the statute, is guilty of "gross misdemeanors or persistent disobedience," and that the welfare of our common school system requires that they be invested with this authority. While the board is invested with this power, a more satisfactory method of procedure in ordinary cases would probably be to suspend the accused pupil for the present, fix an early day for examining the case, giving all parties interested an opportunity to be heard.

Complaint is made by the plaintiffs in error that the burden was cast upon them to show the legality of their action. When the case was called for trial, the relator refused to produce any evidence in support of the allegations of his petition, and thereupon the respondents moved a dismissal of the case. This motion was overruled, and respondents proceeded with their evidence. In *Jackson v. State,* 57 Neb. 183, it was held that "an action of mandamus will lie and may be maintained to reinstate a pupil in a school, if the action of the officer or officers by which the party was refused admission to or continuance in the school was an arbitrary or capricious exercise of authority." Under this holding certainly something more than a petition alleging arbitrary or capricious conduct in expelling or suspending a pupil is necessary, and the general rule is that the relator has the burden of establishing the allegations of his complaint. Until it was shown that

the respondents in this case acted capriciously, arbitrarily and without sufficient reason for their action, the court ought not to set aside the order made by them.

Complaint is made by the respondents that mandamus is not the proper proceeding to review the action of the board, but that an appeal is their only remedy. We cannot concur in this view. If the board may proceed without notice, and without a formal trial, to expel a pupil, no opportunity is offered to make or preserve a record. Again, an appeal would not afford a speedy and adequate remedy. The privileges of the common school are awarded to every resident of the state of school age. The success of our form of government is largely dependent upon the intelligence of the people, and this is recognized in the facilities provided by law for the education of our people. One who is unjustly deprived of the privileges of the public school is entitled to a speedy and adequate remedy. This has been recognized by this court in several cases, and the right to a mandamus in this class of cases upon a proper showing has never been denied. *State v. School District,* 31 Neb. 552; *Board of Education v. Moses,* 51 Neb. 288. The record before us indicates that the respondents believed that the law invests them with a discretion in the matter of suspending or expelling a pupil, which is not subject to review by the courts, and probably because of this they failed to introduce evidence relating to the conduct of Edith Englehardt or the claimed misbehavior on her part, although the trial court cast on them the burden of justifying their action. It is true that on the cross-examination of respondents' witnesses it was shown that one or more members of the board had received complaints from the teacher that Miss Englehardt was violating the rules of the school, and that they had made inquiries of other pupils regarding her conduct, but no witnesses having personal knowledge of the matter were put upon the stand by the respondents for the purpose of showing any violation of the rules or other misconduct by Miss Engle-

hardt. If the case was one in which the parties to the action alone were interested, we would not hesitate to affirm the judgment of the district court upon the ground that, having accepted the burden cast upon them by the court of justifying their action, they attempted to justify only by showing that complaint had been made of misconduct on the part of Miss Englehardt, that some inquiries had been made, and that her expulsion followed. Of what acts Miss Englehardt had been guilty, and whether such acts constituted a breach of the rules, or could be classed as "gross misdemeanors or persistent disobedience," there is nothing in the record to inform us or the trial court. The case, however, is one in which the welfare of the school and its patrons are involved, the public have an interest in the outcome, and, for this reason, we think another trial should be ordered. As the case will have to be reversed and a new trial ordered, because of the errors above pointed out, a discussion of the taxation of the costs becomes immaterial.

We recommend a reversal of the judgment appealed from and that the cause be remanded for another trial.

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

REVERSED.

STULL BROTHERS, APPELLANTS, V. WALTER R. BEDDEO ET AL., APPELLEES.*

FILED JANUARY 5, 1907. No. 14,454.

1. **Bankruptcy: DISCHARGE: DEBTS FRAUDULENTLY CONTRACTED.** One who collects rents as the agent of another is acting in a fiduciary capacity and holds the amount so collected in trust for his principal; or if, without authority so to do, he collects rents due his employer and converts the same, he becomes indebted to his em-

* Rehearing allowed. See opinion, p. 119, *post.*

ployer to the amount of the rents collected and the debt so created is fraudulently contracted. In either event a discharge in bankruptcy does not release him from the debt so contracted.

2. **Injunction: ACTION ON BOND: DAMAGES.** The plaintiffs took out an execution on a judgment in their favor against one Beddeo, and the sheriff levied on property of Beddeo sufficient to satisfy the same. Beddeo thereupon obtained an injunction against the enforcement of the judgment, and one Means became his surety on the injunction bond. Within four months from the levy of the execution Beddeo was, on proceedings duly instituted in the district court of the United States, by his creditors declared a bankrupt and subsequently duly discharged. The trustee appointed in the bankruptcy proceedings took possession of the property levied on by the sheriff and administered the same as a part of the bankrupt estate. The injunction action instituted by Beddeo was dismissed and the injunction dissolved. An action was brought on the injunction bond, in which it was sought to recover the full amount of the judgment enjoined by Beddeo and other damages alleged in consequence of the wrongful issue of the injunction. *Held*, That as the sale under Stull Brothers' execution would have taken place prior to the institution of bankruptcy proceedings against Beddeo, the injunction issued against the sale was the direct cause of Stull Brothers' inability to collect their judgment, and the amount of that judgment a proper element of damages in a suit on the injunction bond.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

John Everson, for appellants.

Flansburg & Williams, contra.

DUFFIE, C.

In January, 1903, Stull Brothers recovered a judgment in justice court of Douglas county against Walter R. Beddeo for $113, and costs taxed at $6.40. A transcript of this judgment was filed in the office of the clerk of the district court for Douglas county and afterwards duly transcribed to the district clerk's office in Harlan county, Nebraska. February 7, 1903, an execution was taken out on this judgment and delivered to the sheriff of Harlan county, who on February 18, 1903, levied on personal

property of Beddeo of sufficient value to satisfy the judgment and costs and all accruing costs. On the same day Beddeo commenced an action in the district court for Harlan county to enjoin said judgment, and procured a temporary order of injunction, which remained in force until June 6, 1904, when the injunction action was dismissed and the injunction dissolved. Means was surety on the injunction bond given by Beddeo. In his petition for an injunction Beddeo attached a transcript of the judgment against him which, among other matters, recites the following: "January 9, 1903. Plaintiff filed bill of particulars, alleging that the defendant is indebted to plaintiff in the sum of $107 for rents collected by defendant while in the employ of plaintiff, which said sum defendant has failed, neglected and refused to pay, or any part thereof, but has converted the same to his own use." June 4, 1903, a petition in involuntary bankruptcy was filed in the district court of the United States for the district of Nebraska against Walter R. Beddeo, and on September 11, 1903, Beddeo was adjudged an involuntary bankrupt, and thereafter, on proceedings duly had, he was discharged. The judgment of Stull Brothers against him, above referred to, was duly scheduled in the bankruptcy court, but no personal notice thereof was given to Stull Brothers, notice by publication only being had. Pending the proceeding in bankruptcy against Beddeo, the trustee in bankruptcy took possession of the personal property on which the sheriff of Harlan county had levied and scheduled the same as a part of the bankrupt estate, and thereafter administered upon the same. The sheriff of Harlan county returned his writ issued upon the judgment of Stull Brothers against Beddeo, setting forth that the property levied on by him had been taken by the trustee in bankruptcy and that he was unable to repossess himself of the same. This action was brought by Stull Brothers upon the injunction bond filed in the district court for Harlan county in the action in which Beddeo obtained his injunction against the enforcement of the

Stull Brothers' judgment. The facts above set forth all appear from a stipulation entered into between the parties on the trial in the district court. The district court gave judgment for the defendants, and Stull Brothers have taken an appeal.

If we understand the position of the defendants, it is that Beddeo's discharge in bankruptcy relieved him from liability on this judgment, as well also as upon the bond given when he procured the injunction against its collection. The plaintiffs, on the other hand, claim that the judgment is of that character that a discharge in bankruptcy does not release Beddeo from liability thereon and that it is still a valid claim against him. The seventeenth section of the bankruptcy act provides: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * were created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." U. S. Comp. St., vol. 3, p. 3428, sec. 17. The bill of particulars filed in justice court recites that Beddeo, while in the employ of the plaintiffs, collected rent due them, which he converted to his own use, and it was upon this claim that the judgment in favor of Stull Brothers was rendered. While the bill of particulars does not disclose the nature of Beddeo's employment with Stull Brothers, it must, we think, receive one of two constructions—either that he was employed as their agent to collect rents for them, or that while he was in their employ he did, without authority, collect rents belonging to them and converted them. In the first case he would be acting as their agent in making the collection, and the rents collected by him would be a trust fund in his hands. In the second case, if he collected without authority and converted the rents, it would be a debt created by his fraud. In either event we think that he falls within the exception to section 17 of the bankruptcy act, and the debt is one from which he would not be released. *Clark v. Iselin,* 21 Wall. (U. S.) 360; *Fulton v. Hammond,* 11 Fed. 291. It follows from

this that Stull Brothers held a valid judgment against Beddeo which they were entitled to enforce.

The next question is the measure of damages. The plaintiffs claim that, where an injunction against the collection of a judgment is procured by the execution defendant, the measure of damages in a suit upon the bond, in case the injunction is dissolved, is the amount of the judgment, interest and costs, and such other damages as have been sustained. Authorities in support of this position are cited, but from states having a statute differing from ours and where the conditions of the bond were different from the one in suit. The ordinary measure of damages has, we think, been settled in this state by our former holding. *Gibson v. Reed,* 54 Neb. 309, was an action on an injunction bond given by an execution defendant in an action to restrain the sale of property taken on execution against him. The measure of damages fixed by this court was the depreciation in value of the property levied on while the injunction was in force, reasonable fees of counsel, costs and expenses which plaintiff had incurred, or for which he had become liable in consequence of the injunction. The condition of the bond is to pay all damages sustained if the writ was wrongfully obtained, not the judgment, the collection of which is enjoined. In this case, however, Beddeo's property was levied on February 18, 1903, and had it not been for the injunction the sale would have taken place and Stull Brothers received their money upon the execution long prior to the institution of bankruptcy proceedings against Beddeo. There is nothing in the record tending to show that Stull Brothers had knowledge of the insolvency of Beddeo at the time the levy was made, nor, in fact, at any time prior to the filing of the bankruptcy proceedings against him, or that their proceedings were in fraud of the act of bankruptcy. Consequently, they could retain any money received from a sale of the property seized on their execution. The injunction which prevented the sale was, therefore, the direct cause of their inability to collect their

judgment, and they have been damaged in consequence to the full amount of that judgment.

We recommend an affirmance of the judgment of the district court.

ALBERT and JACKSON, 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 May 10, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Principal and Surety:** DISCHARGE OF PRINCIPAL IN BANKRUPTCY. A surety on an injunction bond, given in a suit brought to restrain the enforcement of a judgment, is not released from liability thereon by the discharge of his principal in bankruptcy.
2. **Injunction:** ACTION ON BOND: DAMAGES. In an action on such bond, the extent to which the amount collectible on the judgment has been reduced in consequence of the injunction is a proper element of damage.
3. **Bankruptcy:** PRINCIPAL AND AGENT: MISAPPROPRIATION OF FUNDS. Whether a debt due from an agent to his principal for rent collected and converted to his own use is one created by fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity, within section 17 of the bankruptcy act, *quære.*
4. **Former opinion modified, and former judgment vacated.**

ALBERT, C.

An opinion was filed in this case at the present term, which is reported *ante,* p. 114, where the facts are set out at length. The cause, coming on for hearing on a motion to vacate the judgment of affirmance entered by this court, and to enter a judgment of reversal, was reargued at length.

On the reargument the defendants renewed their contention that Beddeo's discharge in bankruptcy operated as a release of his codefendant. We do not think this con-

tention can be sustained. This is not a suit to enforce the judgment against which the injunction was leveled, but an action on the injunction bond, which the defendant Means signed as surety for Beddeo. It constitutes a new contractual obligation, wholly independent of the judgment, save to the extent that the judgment affects the question of damages, which we shall notice presently. Section 16 of the bankruptcy act (U. S. Comp. St., vol. 3, ch. 3), provides: "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." The language "in any manner a surety for a bankrupt" is certainly broad enough to include a surety on an injunction bond. We have not overlooked the numerous cases cited by counsel, wherein sureties have been held to be released from liability by the discharge of their principals in bankruptcy. In each of those cases, however, it is clear that, in consequence of the discharge in bankruptcy, the contingency upon which the liability of the sureties had been dependent could never happen. *Wolf v. Stix,* 99 U. S. 1, which is included among the citations referred to, furnishes an apt illustration of that class of bonds. There the court said: "The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend." But in the case at bar the condition of the bond is that "plaintiff shall pay to the defendants all damages which they may sustain by reason of said injunction, if it be finally decided that the injunction ought not to have been granted." The contingency upon which the liability of the surety was made to depend by the condition of this bond was a final decision that the injunction ought not to have been granted. That contingency happened, and the

liability of the surety on the bond became fixed on the 6th day of June, 1904, when the injunction was dissolved and the suit in which it had issued was dismissed. *Gibson v. Reed,* 54 Neb. 309; *Gyger v. Courtney,* 59 Neb. 555.

But it is argued that the condition of the bond is to pay the damages sustained by the plaintiffs when those damages are ascertained against the principal, and, as they cannot now be thus ascertained on account of the discharge in bankruptcy of the principal, the contingency upon which the liability of the surety depends can never happen. This argument, pushed to its logical conclusion, would render section 16 of the bankruptcy act above quoted almost, if not entirely, nugatory, because it is hard to conceive of a contract of suretyship to which it would not apply with as much force as to the one under consideration. The obligation is to pay the damage on the happening of a certain event. That event has happened. Section 16, *supra,* is to the effect that the discharge of the principal in bankruptcy does not release the surety from his liability to pay such damages. Before he can pay them they must be ascertained, that is, the parties must agree upon the amount or it must be established in an action on the bond. A statute which preserves a surety's liability, notwithstanding the discharge of the principal, but which at the same time forbids the taking of a step essential to enforce the liability against the surety, would be a mockery.

On the reargument the soundness of our conclusion in the former opinion that the amount of the judgment against which the injunction was directed is a proper element of damage in an action on the injunction bond, on the facts stated, is challenged. It is argued with much plausibility that the bankruptcy proceedings, and not the injunction, made it ultimately impossible to enforce the judgment. This argument appears to prove too much. The bond was given to indemnify the plaintiffs against loss by reason of the injunction, in case it was wrongfully allowed. One source of danger of loss to the judgment creditor in such cases is that the judgment, while the in-

junction is in force, may be rendered uncollectible by a transfer of the debtor's property, its seizure by other creditors or his insolvency. If the loss resulting from such causes is not covered by the bond, then the value of an injunction, as a means of avoiding a judgment, has never been fully appreciated. But it does not follow that the full amount of the judgment is always recoverable in actions of this character. A judgment might remain collectible, in whole or in part, after the dissolution of the injunction, or the injunction may have been directed against the enforcement of the judgment in a particular manner, or against particular property, leaving the judgment creditor free to enforce it in some other way or against other property of the debtor. In either case it would be the duty of the judgment creditor to make reaonable use of the means at hand to protect himself against loss and he would not be entitled to recover the full amount of the judgment in an action on the bond. The record before us does not furnish sufficient data to say that the plaintiffs are entitled to recover the full amount of the judgment. While it shows that the judgment would have been collected, but for the injunction, that it is wholly unpaid and that Beddeo is now insolvent, it does not show the extent to which the plaintiffs were restricted in the enforcement of the judgment by the injunction, nor that they might not have realized at least a portion of the judgment, notwithstanding the injunction. These matters will be cleared up, no doubt, on another trial.

We have not overlooked the cases cited by plaintiffs in support of their contention that they are entitled, in any event, to recover the full amount of their judgment. Those cases are based on bonds conditioned to pay judgments already existing or to be subsequently recovered. See *McCombs v. Allen,* 82 N. Y. 116; *Harrison v. Balfour,* 13 Miss. 301; *Hunt v. Burton,* 18 Ark. 188; *Hillyer v. Richards,* 13 Ohio, 135. In the case at bar, the bond contains a condition that the obligors shall pay such damages as the plaintiffs may sustain by reason of the in-

junction. The distinction is obvious. The record is clear, however, as to one element of damage, namely, the amount plaintiffs are entitled to recover on account of attorney's fees expended in resisting the injunction, which by stipulation is placed at $25. They were entitled to a judgment of that amount at least. Consequently, a judgment denying a recovery in any amount whatever is erroneous.

While what we have said disposes of this case, it is proper to notice another question discussed at some length on the reargument. Does plaintiffs' judgment against Beddeo fall within any of the exceptions from the general provisions of section 17 of the bankruptcy act (U. S. Comp. St. vol. 3, ch. 3), providing that a discharge in bankruptcy shall operate as a release of the bankrupt from his debts? In the former opinion we held that it did, but our confidence in that conclusion has been somewhat shaken on an examination of the authorities presented. But it would seem that the question is not necessarily involved in this case. This action, as we have seen, is on the injunction bond. It is a new contractual obligation. It is not claimed that it was scheduled in the bankruptcy court, nor that the plaintiffs had notice or actual knowledge of the proceedings in bankruptcy. It comes, therefore, within the provisions of subdivision 3, sec. 17, *supra,* which expressly excepts from the general provisions for the release of the debtor debts not thus scheduled, unless the creditor had notice or actual knowledge of the bankruptcy proceedings. If the judgment debtor were solvent, whether the judgment had been released would be material as affecting the question of damages, because if the judgment is still in force and is still collectible, in whole or in part, that fact would go in mitigation of damages. But, as he is confessedly insolvent, it would seem immaterial on the question of damages whether the judgment had been released by the judgment debtor's discharge in bankruptcy or had become uncollectible because of his insolvency. The result, so far as concerns the question of damages, would be the same

in either event. The question is one of some importance, and one upon which the court should not commit itself until it is squarely presented. For that reason, it would seem best to withdraw what has been said on that question in the former opinion, and refrain from expressing any opinion thereon at this time.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

THOMAS L. WRIGHT, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED JANUARY 5, 1907. No. 14,577.

1. **Cities: INJURY TO WIFE: LIABILITY TO HUSBAND.** The city of Omaha, under its charter of 1903, is liable to the husband for consequential damages suffered by him in consequence of injuries to his wife caused from a defective street or sidewalk in the city.

2. **Written notice** to the city given by the wife and conforming to the provisions of section 22, ch. 12*a*, Comp. St. 1903, which notice by its wording, or from the signature thereto, brings home to the city knowledge that the injured party is a married woman whose husband may suffer consequential damage arising from her injury, is sufficient to enable the husband to maintain the action.

3. ———. Whether the husband may maintain such action without notice of any kind given to the city, not discussed or determined.

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

F. T. Ransom and *J. F. Moriarty,* for appellant.

John P. Breen, W. H. Herdman, I. J. Dunn and *H. E. Burnam, contra.*

DUFFIE, C.

The plaintiff brought this action to recover from the city of Omaha damages alleged to have been sustained in consequence of expenses incurred by him for physician's and nurse's services in the treatment of his wife for injuries received by her upon one of the public streets of the city of Omaha. Damages were further claimed for loss of services and the society of his wife during the illness resulting from her injuries. Facts are stated in the petition showing negligence on the part of the city in the care of the street where the injury occurred. It is further alleged that written notice of the injury and the time and place of its occurrence was served by leaving the same with the clerk and the mayor of the city. A copy of the notice is in the following words: "Omaha, Neb., February 5, 1903. To the Honorable Mayor and City Council—Gentlemen: Take notice that on January 20, 1903, at about 8 o'clock P. M., while walking north on the sidewalk on Fifteenth street, about thirty feet north of Spring street, in the city of Omaha, Neb., the undersigned stepped into a graded place about fourteen inches deep, slipped on the ice accumulated in said place, fell and struck the back part of her head against the wooden sidewalk. She was unconscious for two hours, has been under medical care ever since, is still unable to be out of bed, and has suffered great pains, and is still suffering great pains from said fall. The place where she fell was graded by the city in order to place there a permanent sidewalk. There was no light there to warn the public of the dangerous condition of said place, and I, therefore, hold the city responsible for the injuries sustained by the undersigned. Lizzie Wright, by T. L. Wright, her husband. 1423 Canton street."

A demurrer to this petition was sustained by the district court upon the ground that the plaintiff had not, in his own behalf, given, or caused to be given, notice to the city of the damages sustained by him because of the injuries to his wife. The statute then in force relating to notices to be given the city authorities, precedent to maintaining an action for damages, is in the following words: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city, unless actual notice in writing of the accident or injury complained of with a statement of the nature and extent thereof, and of the time when and place where the same occurred, shall be proved to have been given to the mayor or city clerk within twenty (20) days after the occurrence of such accident or injury. And it is hereby made the duty of the city clerk to keep a record of such notice, showing time when and by whom such notice was given and describing the defect complained of; to at once file such notice, and report the same to the city council at its next meeting. Any person or persons claiming to have been injured from or by reason of the cause herein indicated, shall at any time after the giving of the notice contemplated, be subject to a personal examination by the city physician and such other physican as the city attorney may indicate, or by either thereof, for the purpose of determining the character and extent of the injuries complained of; and failure or refusal to submit to such examination shall prohibit the maintaining of any action against the city or recovery of any damages therefrom."

Is this notice sufficient under the statute to entitle the plaintiff to maintain an action for consequential damages sustained because of the injury to his wife? It is nowhere provided in the statute that the injured person, or the person whose property is damaged, shall himself give the notice provided for. The provision is that the city shall not be liable for damages arising from defective streets, sidewalks, etc., unless actual notice in writing of the acci-

dent or injury complained of, with a statement of the nature and extent thereof, and the time when, and place where, the same occurred, shall be proved to have been given to the mayor or clerk within twenty days after the occurrence of such accident or injury. It may be that it was in the contemplation of the legislature to provide that the party injured, or claiming damages, should give this notice, or that it should be given on his behalf or for his benefit, but, if so, the language used is wholly inadequate for that purpose. In cities of the first class, the notice provided for in case of injuries arising from defective streets or sidewalks, the statute, in plain language requires the parties claiming the damage to give or cause the same to be given. Comp. St. 1901, ch. 13, art. II, sec. 183. The purpose of such notice is to allow the city to promptly examine the place where the accident occurred, to confer with and secure witnesses, and generally to prepare itself for a trial of the case and establish its freedom from negligence if a suit be ultimately instituted against it. The notice in this case gave the city information relating to every matter required by the statute. It is nowhere required that the notice shall state that the party giving the same will claim damages, nor the amount or kind of damages which have been suffered.

The case is almost identical with the Connecticut case of *Peck v. Fair Haven & W. R. Co.*, 77 Conn. 161. In that state the statute provided that no action to recover damages for an injury, or for the death of any person, or damages to personal property caused by negligence, shall be maintained against any electric, cable or street railway company, unless a written notice containing a general description of the injury, and its time, place and cause, be given within four months after the neglect complained of. The notice in that case was given by a married woman for an injury suffered by her in consequence of the alleged neglect of the Fair Haven Company. The husband instituted an action for his consequential damage, relying upon the notice given by his wife. Speaking of the suffi-

ciency of this notice to enable the husband to maintain the action, the court said: "This section does not provide that the notice shall contain a statement of the character or amount of the claim of the injured person for damages, nor that a claim for damages is made, or is intended to be made, nor is it expressly provided that the notice must be given by the injured person. * * * The words of the statute requiring a description in the notice of the 'time' and 'place' of the occurrence of the injury, mean a statement of the day and hour when, and a description of the locality where, the person injured received the direct injury to his person or property from the defendant's negligent act, as nearly as these facts can be given. The description to be given of the 'cause' of the occurrence of the injury is of the alleged negligent act of the defendant, or its servants, which caused the injury, and 'the general description of the injury' required is of the direct or immediate injury to person or property caused by such described act of negligence, and not of consequential damages which have or which may result from such injury. It is the purpose of this law that the officers of the corporation receiving the notice shall obtain by it such early information regarding the facts required to be described therein, as will enable them to investigate such facts within a reasonable time after their occurrence. * * * If, in order to maintain the present action—due notice having been given by his wife of her injury—the plaintiff was also required to give the notice provided by section 1130, his notice, had it been given, would have stated only those facts described in the notice given by his wife, and of which facts the defendant had already been duly informed by a written notice by the person receiving the injury from which the plaintiff's injury resulted. Considering the real purpose of giving the notice, we see no reason why the statute should be construed as requiring such additional notice to be given to enable a husband to maintain an action for consequential damages resulting

from an injury to his wife, of which injury she has already given the required statutory notice."

The notice informed the city officials that the party injured was a married woman and that the plaintiff was her husband, and the law informed them that he was liable for the necessary expenses attending her injury, and they knew that he would be deprived of her services and society so long as she was disabled by the accident. There were damages necessarily growing out of the accident, though accruing to a person other than the one suffering the direct injury, and the notice given not only complied with the statute, but put the city in possession of every fact necessary to an investigation of all damages arising therefrom. As said by the Connecticut court, the notice given by the wife was sufficient to enable the husband to join with her in maintaining an action for her injury, and in any event we cannot read into the statute words omitted by the legislature, especially with a view of depriving a party of the right to a hearing in court for a wrong alleged to have been sustained. The cases cited by appellee in support of the ruling of the district court are all cases where the statute provided that notice should be given by or on behalf of the party claiming damages. In our opinion, the ruling of the supreme court of Connecticut upon a similar statute was based upon principle and should be followed. The notice being sufficient under the statute, the right of the husband to maintain an action for consequential injury without notice of any kind, in support of which *McDevitt v. City of St. Paul,* 66 Minn. 14, is cited, will not be discussed.

We recommend that the judgment appealed from be reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment appealed from is reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

EDWARD B. COWLES, APPELLANT, V. MARGARET ADAMS, APPELLEE.

FILED JANUARY 5, 1907. No. 14,605.

1. Taxation: TAX SALE: EVIDENCE. Evidence examined, and *held* not sufficient to overcome the presumption of regularity attending a private tax sale arising from the issue of a tax sale certificate.
2. ———: ———: VALIDITY. The failure of the county treasurer to file with the county clerk duplicate tax receipts on payment of taxes due on lands sold for taxes is not such an irregularity as will affect the sale or the rights of the purchaser.

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

E. B. Perry, for appellant.

Foss & Brown, contra.

DUFFIE, C.

This is an action to foreclose a tax sale certificate issued on a private sale made by the treasurer of Hitchcock county. The district court entered a decree foreclosing the certificate, but allowed the owner thereof only 10 per cent. interest, and refused to allow the attorney's fee provided by statute upon the ground that the sale was irregular. Cowles, the plaintiff, has appealed.

The principal question in dispute is the sufficiency of the evidence to overcome the presumption of regularity in the sale arising from the issue of the certificate. It is claimed by Mrs. Adams, the appellee, that the county treasurer failed to make any return to the county clerk of the public sale of lands for taxes for the year 1901, the

date of the tax sale certificate sought to be foreclosed. We have uniformly held that the county treasurer is without authority to sell lands at private tax sale until he has made and filed in the office of the county clerk the report required by section 112, art. I, ch. 77, Comp. St. 1901. *Gallentine v. Fullerton,* 67 Neb. 553. The evidence is undisputed that such return could not at the date of the trial, and prior thereto, be found in the office of the county clerk. The present treasurer, who was employed in the office at the time the sale was made, testified to the uniform custom of making such return at the close of the public sales, and the treasurer's book bears a notation showing that such return was made. The evidence further discloses that, some time after the sale, the vaults in the treasurer's office were taken down for the purpose of enlarging them, and it is not unfair to presume that during such work some of the papers contained therein were either lost or mislaid. The fact that the report cannot now be found is not, in our opinion, sufficient, under the circumstances disclosed, to overcome the presumption of regularity given by statute to the issue of the tax sale certificate.

Another point urged by the appellee is that the treasurer did not, when he made the sale, cause a duplicate certificate to be issued and filed with the county clerk. The statute requiring such duplicate to be filed with the county clerk was not passed until 1903, and no such requirement existed at the time the sale in question was made. From a reading of appellee's brief we are led to believe that the allegation in her answer relating to the failure of the treasurer to file with the county clerk a duplicate certificate was intended to cover the point that the treasurer did not file duplicate tax receipts with the county clerk for the years for which the land in question was delinquent, and for which delinquent taxes it was sold. The object of the statute requiring the treasurer to file such duplicate tax receipts is for the purpose of showing the amount of money received by the treasurer at such

tax sale, and to allow the clerk to keep proper account with the treasurer. The failure to file such duplicate receipts does not, we think, affect the validity of the sale or prejudice the purchaser. The law does not impose upon the purchaser the duty of seeing that the treasurer files duplicate tax receipts for the taxes paid by such sale, and his rights as such purchaser cannot be affected by the failure of the treasurer to perform the duty which can be done only after the sale is completed.

The defendant made a special appearance questioning the jurisdiction of the court, and in her answer she urges that the court had no jurisdiction of her person because of the defective character of the affidavit for publication made and filed by the plaintiff. As she has not appealed from the decree entered against her, the action of the court in overruling her objection to its jurisdiction cannot be considered. An examination of the record presents no matter seriously affecting the validity of the sale, and we recommend that the judgment appealed from be reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff for the amount of the tax sale certificate and all subsequent taxes paid, together with interest thereon and attorney's fees as provided by statute.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff for the amount of the tax sale certificate and all subsequent taxes paid, together with interest thereon and attorney's fees as provided by statute.

REVERSED.

STATE, EX REL. HENRY RICKGAUER, RELATOR, V. JOHN KLOKE, RESPONDENT.

FILED JANUARY 5, 1907. No. 14,623.

Mandamus: JUSTICE OF THE PEACE: APPEAL BOND. Where the only objection made to an appeal bond is that the surety did not sign in the presence of the justice, the party tendering the bond is entitled to a mandamus directing the justice to approve the same.

ORIGINAL application for writ of mandamus to compel respondent, a justice of the peace, to approve an appeal bond. *Writ allowed.*

W. R. Mack, for relator.

G. A. McCutchan, contra.

DUFFIE, C.

The relator asks a writ of mandamus directed to the respondent, John Kloke, a justice of the peace for Boyd county, commanding him to approve a certain appeal bond tendered by the defendant in a case tried before him. It conclusively appears from the record before us that the appeal undertaking was presented within the time required by statute, and that the only objection made to the bond by the respondent was that the surety thereon did not sign the same in his presence. In *State v. Clark,* 24 Neb. 318, it was held that the sureties on an appeal bond need not sign the same in the presence of the justice. If the justice requires proof of the genuineness of the signatures or of the sufficiency of the surety, he should make it known when the bond is received by him or soon thereafter. Otherwise the objection will be waived. This case was referred to with approval in *McKinley & Lanning v. Chapman,* 37 Neb. 378, and *Deere, Wells & Co. v. Hodges,* 59 Neb. 288, and is the rule now well established in this state. There being no objection to the bond other than that the surety did not sign in the presence of the

justice, the relator is entitled to have the same approved, and we recommend that an order be entered directing the writ to issue.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, an order is entered directing the writ to issue.

WRIT ALLOWED.

JOHN CERNY ET AL., APPELLEES, V. PAXTON & GALLAGHER COMPANY, APPELLANT.

FILED JANUARY 5, 1907. No. 14,532.

1. Petition examined, and *held* to state a cause of action for fraud and deceit.
2. **Fraud:** ACTION. Ordinarily, deceit to ground a recovery must relate to existing facts; but if one person by means of a promise which he makes with the secret intention of not performing it induces another to part with his money or property, he is guilty of actionable fraud.
3. **Fraud:** CONTRACT: CONSIDERATION: STATUTE OF FRAUDS. Where a creditor induces his debtor to secure a debt by a mortgage on a stock of goods on the faith of his promise that he will not permit a sale thereof under foreclosure at public auction below a certain price, and that, in case such amount is not bid, the creditor will bid in the stock and dispose of the goods at private sale, accounting to the debtor for the surplus after the satisfaction of the debt, such promise is not a collateral undertaking, but a part of the original consideration whereby the debtor was induced to execute the mortgage, and is not within section 9, ch. 32, Comp. St. 1905, relating to the sale of personal property.
4. **Damages.** In an action for fraud and deceit grounded on such promise, the creditor having permitted the goods to be sold at public auction below the price fixed, the amount of plaintiffs' recovery is to be determined by the position they would have occupied had there been no fraud, and they are entitled to the benefit of their bargain on that basis. Hence, the measure of damages in such case is the difference between the price the goods brought, as thus sold, and the market value thereof.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

L. J. Piatti and *George W. Cooper, contra.*

ALBERT, C.

The record presented for review shows an action brought by John Cerny, and another, against Paxton & Gallagher Company, a corporation. The material allegations of the petition are, in substance, as follows: That on and prior to the 30th day of July, 1897, the plaintiffs were engaged in a general mercantile business in the village of Dodge, in Dodge county, carrying a stock of the value of $5,200 and book accounts of the value of $1,400; that the liabilities of the plaintiffs at that time did not exceed $2,300, of which amount about $1,000 was owing to the defendant; that on or about said date the defendant, acting through its duly authorized agents, falsely and fraudulently represented to the plaintiffs that if the plaintiffs would secure their indebtedness to the defendant by a first mortgage on their stock, fixtures and book accounts, and the indebtedness due to other creditors, aggregating a little over $1,000, by mortgages on the same property, subject to defendant's said mortgage, the defendant would take possession of the property under the mortgages and sell the same thereunder, except the book accounts, which were to be collected, and at said sale would bid in and buy the property and prevent a sale thereof, unless it sold for at least $3,800, exclusive of the book accounts; and that, in case the property was so as aforesaid bid in and bought by the defendant, in order to prevent a sale thereof for less than $3,800, the defendant would place the plaintiffs in charge thereof as its agents, and sell the same at retail for cash, and apply the proceeds, with the amount collected on the book accounts, to the discharge of the mortgage indebtedness, and that, when such indebtedness was thereby satisfied, the defendant would turn over the

remainder of the stock and book accounts to the plaintiffs; that the plaintiffs relying upon the said representations and promises of the defendant, and believing the same to be true and to have been made in good faith, gave the defendant a first mortgage on the said stock, fixtures and book accounts, and subsequent mortgages thereon to the said four other creditors, and surrendered possession of the mortgaged property to the defendant; that the said representations and promises of the defendant, with respect to bidding upon the said property at the foreclosure sale thereof, and buying the same in and thereby preventing a sale thereof for less than $3,800, were made by the defendant without any intention on its part to keep and perform the same, but were made with the fraudulent design and purpose of thereby inducing the plaintiffs to execute the said mortgages, and surrender possession of the property thereunder to the defendant, to be sold for the satisfaction of the said indebtedness; that in pursuance of said fraudulent design and purpose the defendant, after the execution of said mortgages, took possession of the property thereunder, and at the foreclosure sale thereof made no bid on the property, but permitted the same, exclusive of the book accounts, to be sold to a third party for the sum of $2,555, he being the highest bidder; that by reason of the defendant's said false and fraudulent representations, and wrongful acts in the premises, the plaintiffs have been damaged in the sum of $10,000.

The answer admits the execution of the mortgages mentioned in the petition, the foreclosure sale thereunder, but denies all other allegations. The trial resulted in a verdict and judgment for the plaintiffs, and the defendant appeals.

One contention of the defendant is that the petition does not state a cause of action. The cause was tried and submitted on the theory that the action was one for fraud and deceit, and the sufficiency of the petition, therefore, should be tested by the rules of pleading applicable to actions of that character.

The contention that the petition is fatally defective is based on two grounds, the first of which is that fraud cannot be predicated on a promise not performed; that to constitute actionable fraud there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or property. There can be no doubt that such is the general rule. *Perkins v. Lougee*, 6 Neb. 220; *Foley v. Holtry*, 43 Neb. 133; *Moore v. Scott*, 47 Neb. 346; *Crosby v. Ritchey*, 47 Neb. 924; *American B. & L. Ass'n v. Bear*, 48 Neb. 455; *Cohn v. Broadhead & Sons*, 51 Neb. 834; *Esterly H. M. Co. v. Berg*, 52 Neb. 147; *Canon v. Farmers Bank*, 3 Neb. (Unof.) 349. But an apparent exception to the general rule is that, if the intention not to perform exists when the promise is made, the promise is fraudulent. This exception was recognized by this court in *McCready v. Phillips*, 56 Neb. 446, where the court held that "deceit to ground a recovery must relate to existing facts; but if a man buys property on credit with the intention at the time of not paying therefor, his promise to pay is but a false token whereby the fraud is effected. The real fraud is the expressed or implied false representation of his intention to pay." *Ayres v. French*, 41 Conn. 142; *Dowd v. Tucker*, 41 Conn. 197; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218; *Goodwin v. Horne*, 60 N. H. 485; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536. In *Dowd v. Tucker, supra*, the third head note states this proposition: "The procuring of property upon a promise which the party at the time does not intend to perform is a fraud. And it makes no difference whether the property is real or personal." In *Goodwin v. Horne, supra*, the rule is thus stated: "Ordinarily, false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable. * * * But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." The holding of this

court in *Pollard v. McKenney,* 69 Neb. 742, is to the same effect. The false promise, therefore, charged to the defendant, coupled with the charge that it was fraudulently made without any intention to perform it, but to induce the plaintiffs to part with their property, constitutes actionable fraud.

Counsel for the defendant appear to recognize the exception, to a certain extent at least, but argue that the promise was a mere collateral promise, given as an inducement to the giving of a chattel mortgage, for which the plaintiff's indebtedness was a complete and perfect consideration. There is no doubt the indebtedness would have been a sufficient consideration to support the chattel mortgages, and would have been sufficient for all purposes, had the plaintiffs been of that mind. But they were under no legal obligation to give the chattel mortgages. They had a right to name the terms upon which they would do so. The defendant made the promise, and the plaintiffs parted with their property on the faith of it. The promise was not a collateral undertaking, but a part of the consideration upon which the plaintiffs parted with their property.

The other ground upon which the sufficiency of the petition is challenged is that the alleged fraudulent promise is one for the purchase of goods in the future, for a price exceeding $50, and that as no memorandum thereof was reduced to writing, no part of the price paid nor goods delivered, it is within section 9 of the statute of frauds and void; that such promise, being one that could not have been enforced, does not amount to a material representation, and, consequently, that actionable fraud may not be predicated thereon. There is no want of authority to the effect that, if a promise be unenforceable under the statute of frauds, it will not sustain an action for fraud and deceit. See *Dung v. Parker,* 52 N. Y. 494; *Haslock v. Fergusson,* 7 A. & E. (Eng.) 86; *Gallager & Mason v. Brunel,* 6 Cow. (N. Y.) *346; *David v. Moore,* 9 Rich. (S. Car.) 215; *Dawe v. Morris,* 149 Mass. 188; *Boyd v. Stone,* 11 Mass. *342. But one reason why that

rule does not apply to this case is that the alleged fraudulent promise was not one to purchase goods at a future day. No purchase of the defendant at a future day was thereby contemplated. If the defendant in pursuance of such promise had bought in the goods at the foreclosure sale, in order to prevent a sale thereof at public auction for less than $3,800, it would not have become thereby the absolute owner of the goods, because in such event its promise required it to proceed to sell at private sale, and to account to the plaintiffs for such portion of the goods as remained after the satisfaction of the mortgage indebtedness. Its title, therefore, would still be that of a mortgagee in possession. In other words, all that the promise contemplated was that, in case no sale of the property was made at public auction for $3,800 or better, the attempt to dispose of it at public auction should be abandoned, and the defendant should proceed to dispose of a sufficient amount thereof at private sale to discharge the mortgage indebtedness, allowing the plaintiffs to act as its agents in that behalf. It contemplated a mere change in the foreclosure proceedings in case a certain amount could not be realized from the property at public sale, and was in no true sense a promise to buy.

The court instructed the jury, in effect, that in case they found for the plaintiffs they would be entitled to recover the difference between the price the goods brought at the foreclosure sale, namely, $2,555 and $3,800, the amount below which it is alleged the defendant agreed it would not permit the goods to be sold. The defendant complains of this instruction, and we think justly. The plaintiff's right of recovery is determined by the position they would have occupied had there been no fraud, and they are entitled to the benefit of their bargain on that basis. *King v. White,* 119 Ala. 429, 24 So. 710; *Drake v. Holbrook,* 78 S. W. 158, 25 Ky. Law Rep. 1489; *Krumm v. Beach,* 96 N. Y. 398; *Bergeron v. Miles,* 88 Wis. 397, 43 Am. St. Rep. 911. There is no presumption that, had the defendant bid at the foreclosure sale, the goods would

have sold for $3,800, neither is there any presumption that such amount would have been realized therefrom had they been bid in by the defendant and resold at private sale, as contemplated by the parties. The evidence is clear that the defendant never agreed to buy the property outright at any price. In this particular case, the measure of damage is precisely the same as though the action had been brought and prosecuted for a breach of contract instead of fraud and deceit, and in such case the measure of damage would be the difference between the amount realized from the sale of the goods and the amount that would have been realized therefrom had the defendant fulfilled its promise, namely, the market value of the goods, not exceeding $3,800.

For the error in the measure of damages adopted by the trial court, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, 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.

MARY KAFKA, ADMINISTRATRIX, APPELLANT, V. UNION STOCK YARDS COMPANY, APPELLEE.

FILED JANUARY 5, 1907. No. 14,550.

1. **Trial**: SPECIAL FINDINGS: MOTION FOR JUDGMENT. Where the special findings of a jury can be reconciled with the general verdict under any proof that might have been made under the issues, a motion for judgment on the special findings, and notwithstanding the general verdict, should be denied.

2. **Special findings examined, and *held* not irreconcilable with the**

general verdict, in view of the proof which might have been made under the issues, and insufficient to sustain the judgment.

3. Verdict: EVIDENCE: REVIEW. Whether the evidence in an action at law is sufficient to sustain the verdict, or special findings of the jury, must be brought to the attention of the trial court by motion for a new trial, and a ruling had thereon, before a review thereof can be had in this court.

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

S. A. Searle and *J. L. Kaley,* for appellant.

M. A. Hall and *F. T. Ransom, contra.*

ALBERT, C.

Mary Kafka, as administratrix of the estate of James Kafka, deceased, brought an action against the Union Stock Yards Company of Omaha, Limited, to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. The petition, among other allegations, contains the following:

"Fourth. That on or about the 24th day of February, A. D. 1903, at about 12 o'clock, noon of said day, the said James Kafka, deceased, then in full life, and good health, was walking east on the sidewalk on the south side of, and on and along the said Q street, in the said city of South Omaha, at the aforesaid point, where the said street is crossed by said railroad tracks, built alongside of said Swift & Company's office building (when without his fault or neglect), the defendant by its servants, in the charge and control of a locomotive engine, and cars thereto attached, of the defendant then on the said railway, near to the point aforesaid, so negligently, carelessly, and unskilfully moved said engine and cars on and along the said railroad track, and in the direction of the point aforesaid, that the said engine and cars were by the negligent, careless and unskilful act of said servants, in the management of said engine and cars, run against the said James Kafka, deceased, who was by the said negligence,

carelessness and unskilfulness of the said servants aforesaid, then and thereby with great force and violence knocked to the ground, onto the rails and track of said railway, and under the footboard of said engine, with his neck and face and side and body upon the rails of said track, pushed and dragged along, about the space of 20 feet, then and thereby breaking and crushing and bruising the ribs and shoulder and body of said James Kafka, deceased, and bruised and injured him, the said James Kafka internally, and that by reason of the said striking and bruising and crushing, and injuries to the body of him, the said James Kafka, so by him received at the hands of said defendant and its said employees in the said management of its said engine and cars, the said James Kafka languished, mortally sick, for the space of three days, and died as the result of said injuries and the sickness caused thereby on the 27th day of February A. D. 1903.

"Fifth. That the defendant and its employees aforesaid were especially negligent, and guilty of extreme negligence, in approaching said crossing; at the time they struck and injured the said James Kafka, as aforesaid, in the manner in which they did, at a high and dangerous rate of speed, to wit, while running at the rate of at least 15 miles an hour, and without sounding or blowing the whistle of said engine, and without ringing the bell thereon, or giving any notice or warning whatever of the approach thereof till within about two or three feet of the said crossing where they struck the said deceased, and at a time of day when there were large numbers of people crossing said street and tracks at that point, and without using ordinary and necessary and proper precautions for the safety of said deceased and other pedestrians at that point, in not placing, having or maintaining any watchman at said street crossing to warn him and others of the approach of its said engine and cars, which precautions were in this instance and at that time made all the more necessary from the fact that great and constant noise prevailed at said

crossing, and the said tracks at that point are hidden and obscured by a high tight board fence, and high tight board gates, across said tracks and along the same, about the height of 10 feet or more, and that said track is close to the side of the said office building of said Swift & Company, a two story building, that abuts upon said street at that point, shutting off the view of deceased and others approaching thereto from the west, that being the direction, to wit, from west to east, which said deceased was walking along said street at the time said injuries were inflicted by defendant, and that by reason of said failure of said defendant to use said necessary and proper precautions, and by reason of their said failure to have a watchman at that point to warn deceased and others of its approaching engine aforesaid, and by reasons of said defendant's negligence and failure to use proper care and precautions as aforesaid, all of which said conditions were well known to defendant, and had been in that condition for a long time prior to said 24th day of February, A. D. 1903, the said injuries causing his death as aforesaid were inflicted upon the deceased without fault upon his part, contributing thereto."

The answer admits that the intestate was injured by being struck by an engine belonging to the defendant at the time and place alleged in the petition, but denies that such injury was the result of any negligence on the part of the defendant, but that it was wholly due to negligence on the part of the intestate in attempting to cross its tracks immediately in front of a moving engine. The reply is a general denial. A large amount of evidence was taken, and in addition thereto the jury were permitted to view the *locus in quo*.

The cause was submitted to the jury with instructions to find a general verdict in favor of one or the other parties, and also to answer certain interrogatories submitted at the request of the defendant. A general verdict was returned in favor of the plaintiff. The interrogatories submitted, with the answers thereto as returned by the

jury, are as follows: "(1) When James Kafka reached the point five feet west of the west rail of the track upon which he was injured, how far could he have seen an engine approaching from the south on that track? Answer. 100 feet. (2) At the time that James Kafka stepped upon the track, how far south of that point was the engine which afterwards struck him? Answer. About 1 foot. (3) When James Kaafka was within five feet of the west rail of the west track, how far south of that point was the engine which afterwards struck him? Answer. 21 feet." The defendant then moved for judgment on the special findings of the jury, notwithstanding the general verdict. The motion was sustained, and judgment given accordingly. The plaintiff appeals.

We do not think the judgment of the district court can be sustained. It is well settled that where the special findings can be reconciled with the general verdict, under any proof that might have been made within the issues, a motion for judgment on the special findings, notwithstanding the general verdict, should be denied. *Lockwood v. Rose,* 125 Ind. 588; *Odell v. Brown,* 18 Ind. 288; *Diamond Plate Glass Co. v. DeHority, Adm'r,* 143 Ind. 381; *Salander v. Lockwood,* 66 Ind. 285, and cases cited. This court held that to entitle a party to judgment on the special findings of the jury, where the general verdict is against him, such findings must establish all ultimate facts from which his right to a judgment results as a necessary legal conclusion. *Omaha Life Ass'n v. Kettenbach,* 55 Neb. 330. See, also, *Schlageck v. Widhalm,* 59 Neb. 541; *Citizens Nat. Bank v. Wedgwood,* 45 Neb. 143; *Williams v. Eikenberry,* 22 Neb. 210; *Krundick v. Chicago & N. W. R. Co.,* 90 Minn. 260. The most that can be said of the special findings is that, if the deceased had looked in the proper direction when he was within five feet of the track, he could have seen the approaching engine in time to have avoided the catastrophe. But that does not of itself convict him of contributory negligence. In *Chicago, B. & Q. R. Co. v. Pollard,* 53 Neb. 730, the duty

of a person approaching a railway crossing to look and listen for an approaching train was under discussion, and this court said: "When the view of the road is so obstructed as to render it difficult to see an approaching train, the question whether a traveler was wanting in due care is one for the jury to determine; and it is also a question for the jury under complicated circumstances, calculated to deceive and throw the traveler off his guard. Beach, Contributory Negligence (2d ed.), sec. 195. It was not for the trial court, and is not for this court, to determine and say as a matter of law just at what exact point in the plaintiff's approach to the railroad he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose. The question was, did he, under his surroundings and all the circumstances, observe the care which ordinarily would have been taken by a prudent person?"

The conditions which prevailed at the crossing, at the time the injury occurred, are described in that portion of the petition heretofore quoted. It there appears that the crossing was on a busy street of a populous city; that the tracks were obstructed by a high and tight board fence and a building owned by the defendant; that loud noises prevailed which were calculated to distract the attention of pedestrains crossing the tracks, and other conditions which might excuse a person intending to cross the track for a failure to maintain a constant lookout in any one direction. As was said in the *Pollard* case, neither the district court, nor this court, has a right to say, as a matter of law, that because the deceased failed to look in the proper direction when he was within five feet of the track he was guilty of such contributory negligence as would preclude a recovery. The negligence of the defendant, as well as every other fact essential to a recovery on the part of the plaintiff, is conclusively established for present purposes by the general verdict.

Granting that the facts found by the special findings are true, they are not necessarily irreconcilable with the general verdict. They are not ultimate facts, but evidential facts, which the jury had a right to weigh, and presumably did weigh, in connection with all the other facts and circumstances shown in evidence, in arriving at the general verdict.

A considerable portion of the argument on this case is devoted to a discussion of what the evidence shows or fails to show. The sufficiency of the evidence, either to sustain the general verdict or the special findings, is a question not presented by this appeal. As was said in *Stevens v. Logansport,* 76 Ind. 498: "In considering whether the facts specially found are irreconcilable with the general verdict, no reference can be made to the evidence actually adduced on the trial. The question to be decided is not whether, in the light of the evidence adduced, the general verdict is inconsistent with the facts found; the remedy in case of such an inconsistency is a new trial."

For the insufficiency of the special findings to sustain the judgment, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, 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.

CLEMENT STEINER V. STATE OF NEBRASKA.

FILED JANUARY 5, 1907. No. 14,560.

1. **Criminal Law:** PLEA IN ABATEMENT. A plea in abatement in a criminal prosecution is proper where there is a defect in the record shown by facts extrinsic thereto. Cr. code, sec. 441.
2. **Pleading** examined, and *held* not to constitute a plea in abatement within the meaning of the statute.
3. **Demurrer.** Where a so-called plea in abatement does not state facts sufficient to constitute such plea, and contains no negation of any element of the offense charged, a demurrer thereto is properly sustained.
4. **Municipal Courts:** ORDINANCES: JUDICIAL NOTICE. Municipal courts will take judicial notice of the ordinances of the city, and on an appeal therefrom to the district court from a conviction of a violation of a city ordinance the latter court will upon a trial *de novo* take notice of whatever facts the former court was required to notice judicially before the removal of the cause. *Foley v. State*, 42 Neb. 233.
5. **Judgment:** REVIEW: PRESUMPTIONS. But a different rule prevails in this court, where such cases are not triable *de novo*, and such matters must be included in and made a part of the record presented to this court for review, otherwise the correctness of the rulings of the district court with respect thereto will be presumed.

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

James E. Philpott, for plaintiff in error.

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

ALBERT, C.

An information was filed against Clement Steiner in the police court of the city of Lincoln, charging him with the sale of beer, contrary to the ordinances of the city. The complaint contains three counts, which are substantially the same. The defendant was convicted, and ap-

pealed to the district court, where he filed what is designated a plea in abatement, which may be reduced to two propositions: (1) That at the time of the alleged sales of beer, the firm, of which the defendant was a member, held a druggist's permit, in full force and effect, to sell malt, spirituous and vinous liquors for medicinal, mechanical and chemical purposes in the city of Lincoln, and that the defendant made no sales thereof to the purchaser named in the information, or to any other person, "other than as a druggist and as a member of said firm"; (2) that the municipal ordinances provide no punishment for the unlawful sale of intoxicating liquors by persons holding a druggist's permit, other than the revocation of the permit to sell such liquors. A demurrer to this plea was interposed and sustained by the court, whereupon the defendant elected to stand on his plea in abatement. He then filed an objection to the jurisdiction of the court. His objection was overruled, and a trial was had which resulted in his conviction on the first two counts. A motion for a new trial and one in arrest of judgment on the alleged want of jurisdiction were overruled, and the defendant was sentenced to pay a fine. He now brings error.

It is first contended that the court erred in overruling the demurrer to the plea in abatement. A plea in abatement at common law was founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or upon some matter of fact outside the record which would render the indictment insufficient. 1 Chitty, Criminal Law, *445. Under our practice, it is proper when there is a defect in the record shown by the facts extrinsic thereto. Cr. code, sec. 441. The matters set forth in defendant's plea do not bring it within either of the foregoing definitions. While the defendant appears to concede such to be the case, he insists that the state waived the irregularity by demurring, and that it thereby admitted the facts pleaded, whether such facts are such as might be shown in abatement of the prosecution or

under a plea of not guilty. Whether that is a correct rule of practice is a question that does not concern us at this time. A demurrer does not admit all the facts set forth in the pleading against which it is directed, but only such as are well pleaded.

As to the first proposition covered by the plea in abatement, the defendant stood charged with the sale of beer for purposes other than that allowed by the permit under which he claims immunity. By his plea the defendant impliedly admits having made the sales, but avers that he made no such sales, "other than as a druggist," and as a member of the firm holding the permit. This falls far short of a plea of not guilty or of a negation of any fact charged in the information. The material question is not in what capacity or relation he acted when he sold the beer, but for what purpose he sold it. The first proposition, even were it to be held to stand admitted by the demurrer, does not negative a single element of the charges upon which the defendant was prosecuted.

As to the second proposition, the prosecution was begun in the police court of the city, and that court, as well as the district court on appeal, was required to take judicial notice of the ordinances of the city. *Foley v. State,* 42 Neb. 233. The second proposition, therefore, is a mere conclusion of law and is of no issuable value. We are satisfied that the plea was properly overruled.

It is also contended that the court erred in overruling the objections to its jurisdiction, and the motion in arrest of judgment. The argument in support of this contention proceeds on the assumption that the ordinance under which the prosecution was commenced had been repealed before the trial in the district court. Neither the ordinance nor any record of its repeal is before us. It is true, in *Foley v. State, supra,* this court held that municipal courts will take judicial notice of the ordinances of the city, and that "on appeal from a judgment of conviction before a police judge for the violation of a city ordinance the district court will upon a trial *de novo*

take notice of whatever facts the former could have noticed judicially before the removal of the cause." But a different rule will prevail with respect to this court, where such matters are not triable *de novo*. This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record.

In this case there is nothing in the record tending to support the defendant's contention that the ordinance had been repealed, save the recitals contained in the written objection to the jurisdiction. That this court cannot accept such recitals as showing a repeal of the ordinance goes without saying. The judgment of the district court comes here attended with the usual presumptions of regularity. The record shows that the jury were instructed that the facts charged in the information were in violation of the ordinances of the city. In the absence of a showing to the contrary it will be presumed that the facts before that court, including those of which it was required to take judicial notice, justified the court in so instructing.

The record does not affirmatively show error, and we recommend an affirmance of the judgment.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

MICHAEL F. LYONS, APPELLANT, V. ARTHUR F. MULLEN ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,587.

1. Dedication: HIGHWAYS: ACCEPTANCE. The acceptance of a grant of land to a county for road purposes may be shown by proof that the public authorities afterwards assumed control over it and improved a portion of it, and that it was used by the public as a highway.
2. Evidence examined, and *held* insufficient to show the abandonment of a public road.

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

R. R. Dickson, for appellant.

Arthur F. Mullen and *E. H. Whelan, contra.*

ALBERT, C.

This suit was brought by Michael F. Lyons against the county of Holt and others to restrain the doing of certain acts, among which are going upon, taking possession and using a certain strip of land as a highway. It is not necessary to mention specifically the other acts sought to be restrained, because the parties have acquiesced in the decree of the district court with respect thereto. The defendant county filed a cross-petition, alleging the existence of a highway on the strip of land in question, and that the plaintiff was unlawfully obstructing the same, and asking that he be enjoined from interfering with the use thereof as a public highway. The court found for the defendants on this branch of the case, and granted the relief prayed by the defendant county in its cross-petition. The plaintiff appeals from this part of the decree.

The land in dispute is referred to as the "Malloy road." It begins at the south terminus of what is known as

Main street in the village of Emmett, which is located wholly on the east half of the northwest quarter of section 23, town 29, range 12 west, in said county. From its starting point it extends south about 16 rods, having the west line of said street extended as its western boundary; thence it extends west to the section line of said section, having the quarter-section line between the northwest and southwest quarters thereof for its northern boundary. It was conveyed to the defendant county for road purposes in 1885 by one Malloy, who was then the owner of the land it traverses. The plaintiff now claims to be the owner of the land adjoining this road on either side. His title to the southwest quarter of the section above referred to is reasonably clear from the evidence; his title to the remainder of the adjacent land is not so clear, but for the purposes of this case it may be assumed without inquiry. Some two years after Malloy conveyed this strip of land to the county, the authorities of the county bridged a slough, which to some extent interfered with travel thereon, and put it in condition for public travel. It sufficiently appears from the evidence that at least for sometime thereafter the road was used and regarded by the public as a highway. In 1892 the planking or a portion thereof was removed from the bridge and was never replaced. In 1897 the entire structure was removed and has never been rebuilt. Some three or four years before the commencement of this suit the plaintiff erected a fence along the northern boundary of this road to its terminus at the west section line of section 23, thence extended the fence south across the road and around the quarter section. This left a space north of the road to which the greater portion of the travel was diverted. The plaintiff, however, specifically denies that such space was left for the accommodation of public travel. From the time the land was deeded to the county by Malloy, down to the time the plaintiff erected the fence just referred to, the land adjacent to this road on the south was wholly uninclosed, and the public apparently

traveled over it at will, as best suited their purposes. In 1903 the county board of the county established a new road about a quarter of a mile north of the "Malloy" road, leading into the village of Emmett from the west.

The plaintiff first contends that the Malloy grant was never accepted by the public. This contention, we think, is without merit. It is true there is no evidence of a formal acceptance. But the fact that the public authorities entered upon the land, put it in condition for public travel, and that thereafter it was used, for some time at least, by the public as a highway, is sufficient to show that it was accepted by the public. *Streeter v. Stalnaker,* 61 Neb. 205. See, also, *Cassidy v. Sullivan,* 75 Neb. 847; 9 Am. & Eng. Ency. Law (2d ed.) 47.

The next contention of the plaintiff is that the road had been abandoned. The grounds upon which this contention is based are shown by the following taken from the brief filed by his counsel: "I am not contending that the statute of limitations runs against the county or this road district, nor that the public would not get good title to a road by a continuous adverse user, nor that the acceptance of this dedication by Malloy would not be binding upon the parties to this action if there had not been an intentional abandonment of the easement acquired by the Malloy road. My position is that the Malloy road was abandoned by the taking up of the bridge, and by the acceptance of the lane left by Lyons, and that, by petitioning the county board * * * there was an absolute abandonment of any rights that the public had to travel over what is termed the 'Malloy road.' If the Malloy road had not been abandoned, then why was it that these people asked the board to establish this road north of the railroad, and why did they travel this established road and permit the fencing of this entire southwest quarter, unless there was an intentional abandonment thereof with the intention of accepting the road north of the railroad track (the road established in 1903)."

The fact that the bridge was removed would be entitled

to more weight on the question of abandonment, were it not clear from the evidence that the greater portion of the road could be traveled at all times without a bridge across the slough, and that the slough did not render the road impassable in the winter or in dry seasons. In fact, we are satisfied from the evidence that the removal of the bridge never seriously interfered with travel on this road; the adjacent lands were uninclosed until recently, and the slough was easily avoided. As to the diversion of travel to the lane left by the plaintiff north of the "Malloy road," and the establishment of a new road still farther north, they are insufficient to show an abandonment. Neither the lane nor the new road, nor both of them, diverted the travel entirely from the road in question. Both were established less than five years before the commencement of this suit. Section 30, ch. 78, Comp. St. 1903, provides that "the establishment of a new road on the route of a road already established according to law shall not vacate the road previously established, unless such vacation is prayed for in the petition, and so declared in the order establishing a new road." The obvious purpose of this provision is to provide against the implication arising from the establishment of a new road which answers the same purpose as that of a road already established, and it must be held to apply to the lane referred to as well as the new road regularly established by the county board, because it would be unreasonable to hold that, while an implication of abandonment could not arise from a new road regularly established, it would arise from the mere user of a new way by common consent Besides, both the lane and the new road were established within about four years preceding the commencement of this suit, so that, granting that there bad been a complete nonuser of the "Malloy road" after the lane and the new road were established, it would still be insufficient in duration to show an abandonment.

The plaintiff complains that he was not permitted to amend his petition to conform to the proof. We have

examined the evidence with that complaint in mind, and it is clear that the amendment would not have been of any avail to the plaintiff had he been permitted to make it.

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

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

ROBERT W. BRYANT, APPELLANT, V. BEEBE & RUNYAN FURNITURE COMPANY, APPELLEE.

FILED JANUARY 5, 1907. No. 14,591.

1. **Negligence: PROXIMATE CAUSE OF INJURY.** To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances.

2. **Master and Servant: INJURY: PRESUMPTIONS.** Ordinarily, in forecasting the probable consequences of his own acts or omissions, an employer may rely on the presumption that each employee will exercise due care not only to avoid injury to himself, but to his coemployees.

3. ———: **DEFECTIVE APPLIANCES.** Although it may be shown that a truck furnished by an employer was defective, and that the defect therein was one of the factors which combined to produce an accident in which an employee was injured, yet if the employees were chargeable with notice that such truck was liable to be or to become defective, and voluntarily placed themselves in a position of peril with respect to it, and the injury was one that could not have occurred but for their having taken such position, the negligence of the injured party and coemployees, and not that of the employer, is the proximate cause of the injury.

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

George W. Cooper, for appellant.

C. C. Wright and *B. H. Dunham, contra.*

ALBERT, C.

Robert W. Bryant brought an action against Beebe & Runyan Furniture Company to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendant as a result of the defendant's negligence. In addition to a denial of negligence on the part of the defendant, the answer alleges that the injuries were sustained by the negligence of the plaintiff himself and one of his employees. It appears from the pleadings and the evidence that at the date of the injury, and for almost three years prior thereto, the plaintiff was employed by the defendant in its warehouse in the city of Omaha, where it was engaged in selling furniture at wholesale. That a platform, about 100 feet long and 6 feet wide, extends southward from the warehouse on a line with the west side thereof. This platform is about two feet lower at the end adjoining the warehouse than at the opposite end. A railroad track parallels this platform, where goods shipped by the company are loaded on cars. The shipping room of the warehouse is on the first floor, and is connected with the platform above described by a door. Large trucks are used for the purpose of transferring goods from the warehouse to the cars. These trucks consist of a large platform, under which are four wheels. The platform balances on the axis of two of these wheels, one of which is set at each side. At each end of the platform, and half way between the sides, is a smaller wheel called the "guide wheel." The guide wheels are so adjusted that both do not touch the floor at the same time. The height of the platform, measured from its top to the surface

supporting the two side wheels, is from 10 to 12 inches. At each end of the platform two upright bars are bolted which support a handle at a convenient height for pushing or pulling the truck. The defendant kept several of these trucks about its warehouse. The evidence shows that the fastenings of the guide wheels are easily broken, and that it was quite common for a truck to be without a guide wheel at one end of the platform or the other. The plaintiff testified that on the morning of the day the injury occurred he called the attention of the defendant's foreman to the fact that a guide wheel was broken from some of the trucks, and that they were dangerous in that condition, and that thereupon the foreman ordered two of them to the repair shop, and they were taken away, and that he did not notice any other broken trucks that morning. He further testified that on the evening of that day, just at quitting time, the foreman directed him and some other employees to truck some merchandise from the warehouse to a car standing on the warehouse track, near the middle of the platform, extending from the warehouse. Three of the employees, the plaintiff, Weston and Hansen, each took a truck loaded with merchandise, to carry out the order of the foreman. The plaintiff pushed his truck to the car and unloaded it, but, owing to the width of the platform, could not pass the other trucks to return to the warehouse, so he pushed his truck farther southward, and waited for his companions to unload theirs. Weston next unloaded his truck, and pushed it out of Hansen's way. Hansen then unloaded his truck, and started to pull it to the warehouse. Plaintiff followed, pushing his, and Weston followed the plaintiff, also pushing his truck. They were moving down grade to the warehouse in this order when the accident occurred, resulting in plaintiff's injury. His account of the accident, as shown by his examination on the stand, is as follows: "Q. What occurred, if anything, after you and Mr. Hansen had started to the building with your trucks? Just state to the jury what occurred. A. We was

going down the platform at a fair gait, going towards the annex door to put our trucks away. It was quitting time in the evening. Just before I got to the door, or near that time, I heard a racket behind me, and, thinking Mr. Weston's truck was loose, coming down the grade towards me, I cast my eyes across my shoulder to see, and I throwed out my right foot, aiming to catch the truck, and just at that time my truck struck ahead of me, and I fell over the handle of my truck, and I glanced forward as I fell, and I seen Mr. John Hansen jerking up with both hands on his truck, and my truck was up close against his. Q. What did your truck strike, if anything, at that time and place? A. Struck Mr. Hansen's truck, the man that was running ahead of me. Q. What occurred immediately after your truck struck Mr. Hansen's truck? A. Immediately afterwards I was struck with Mr. Weston's truck from behind. Q. Where were you struck in the person? A. On the left leg between the knee and the hip joint. Q. You may state to the jury, at the time you were struck—just immediately before you were struck—what did you see in front of you? A. I saw Mr. Hansen with a truck in front of me going toward the door. * * * Q. What was the position of Mr. Hansen's truck at the time your truck struck it? A. At the time that my truck struck Mr. Hansen's I heard the crash at the time I glanced ahead to see what was there, and I saw that I was hooked in Mr. Hansen's truck, his truck, the front end, was down and my truck was up against it. Just about that time I was struck from behind and fell, and I went over the handle of my truck. The front end of my truck was under the hind end of his." There is evidence sufficient to sustain a finding that there was no guide wheel at the front end of the truck used by Hansen the evening of the accident, and the evidence might also warrant the inference that the stopping of Hansen's truck, in the manner described in the plaintiff's evidence, was due to the absence of a guide wheel from the front, which would permit the front end to fall to the floor

and stop suddenly, on account of the bolts projecting on the underside coming in contact with the floor on which the truck was being moved. The court directed a verdict against the plaintiff, and judgment went accordingly. The plaintiff appeals.

The plaintiff's position is that his injury was the proximate result of the absence of a guide wheel on Hansen's truck, and that the omission of the defendant to provide such wheel constitutes actionable negligence. In order to warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of such act or omission, and that it ought to have been foreseen in the light of attending circumstances. *City of Crete v. Childs,* 11 Neb. 252; *Wood v. Pennsylvania R. Co.,* 177 Pa. St. 306, 55 Am. St. Rep. 728; *Block v. Milwaukee Street R. Co.,* 89 Wis. 371, 46 Am. St. Rep. 849; *Davis v. Chicago, M. & St. P. R. Co.,* 93 Wis. 470, 57 Am. St. Rep. 935; *Cole v. German Savings & Loan Society,* 124 Fed. 113, 63 L. R. A. 416. As was said in *Roach v. Kelly,* 194 Pa. St. 24, 75 Am. St. Rep. 685: "A man is answerable for the consequences of a fault only so far as the same are natural or proximate, and as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." It may be said to be elementary that, ordinarily, an employer may rely on the presumption that due care will be exercised by each employee to avoid injury to himself, and by each employee to avoid injury to his coemployees. 1 Labatt, Master and Servant, secs. 30*a*, 30*b*.

The foregoing proposition, applied to the facts in this case, are sufficient, we think, to justify the court in holding, as a matter of law, that the defendant's negligence was not the proximate cause of the injury. Assuming that Hansen's truck had no guide wheel on the front end of the platform, and that for want of such wheel the front end

dropped to the floor and caught, and that in consequence the collision occurred, it is clear from the evidence of the plaintiff himself that it occurred almost at the very instant that Hansen's truck dropped, and, consequently, the trucks must have been moving in dangerously close proximity to each other. The plaintiff and his companions were men of mature years and of experience in working with and among these trucks. They were chargeable with knowledge that the guide wheels were liable to be broken off, and of the dangers incident to the use of a truck in that condition. With those facts before their minds, the plaintiff followed Hansen's truck, and Weston followed plaintiff's, down the incline, with so little space between the trucks, at such a rate of speed, and under such circumstances, that they must have known as reasonable men that, in case Hansen's truck from any cause should suddenly stop, the inevitable result would be a collision which would probably result in serious injury to the plaintiff at least. There was no urgent necessity for haste, nor were they acting under any command of a superior requiring them to act without reflection or due regard for their own safety or the safety of each other. They voluntarily placed themselves in a position of peril, and the plaintiff's injury was one of the natural and probable consequences, and one which they ought to have foreseen in the light of attending circumstances. In other words, the plaintiff and his companions, in moving down that incline with their trucks at such a rate of speed, and with such a distance between them that in case of accident to the foremost truck the other two would be unable to stop in time to prevent a dangerous collision, were guilty of negligence but for which the accident would not have occurred. As we have seen, the defendant had a right to presume that they would exercise due care to protect themselves and each other, from injury. Their failure to do so was not one of the circumstances which it was required to foresee as one of the probable consequences of the use of a truck without a guide wheel. It

seems clear to us, on the record presented, that it must be held that the proximate cause of the plaintiff's injury was not the alleged negligence of the defendant, but that of the plaintiff and his coemployees.

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

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

GEORGE E. HIBNER, APPELLEE, V. JOHN A. WESTOVER, APPELLANT.

FILED JANUARY 5, 1907. No. 14,608.

1. **Trial:** WITHDRAWAL OF INSTRUCTIONS. A court may recall its instructions to a jury at any time before a verdict is reached.
2. **Directing Verdict:** REVIEW: PRESUMPTIONS. It is not only within the power, but it is the duty, of a trial court, in a proper case, to direct a verdict; and, when it does, and the pleadings warrant the verdict, and the evidence is not preserved, it will be presumed that such power was properly exercised.
3. **Appeal:** INSTRUCTIONS. The rule to the effect that, in the absence of a bill of exceptions, it will be presumed that the instructions are based upon the evidence, has no application to instructions recalled before a verdict was reached.

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

J. E. Philpott, for appellant.

H. J. Whitmore and *G. E. Hibner, contra.*

ALBERT, C.

This is an appeal from a judgment rendered in a cause wherein the court, after the submission of the issues to the

jury, and after they had deliberated some time, withdrew the instructions given and peremptorily directed a verdict for the plaintiff.

Two assignments of error are now relied on by the defendant for a reversal of the judgment: (1) The withdrawal of the instructions upon which the issues were submitted to the jury; and (2) the direction of a verdict in favor of the plaintiff. As to the first, a court may recall its instructions at any time before a verdict has been reached. Hughes, Instructions to Juries, secs. 38-40; 2 Thompson, Trials, sec. 2363. As to the second, it is not only within the power, but it is the duty, of a court to direct a verdict in a proper case. What is a proper case depends upon the pleadings and the evidence. In this case the pleadings are amply sufficient to support the verdict, and the evidence does not accompany the record in the form of a bill of exceptions or otherwise. Error, therefore, does not affirmatively appear, and we must assume that the authority of the trial court to direct a verdict was properly exercised.

But the defendant invokes the rule that, where the evidence has not been preserved by bill of exceptions, the presumption is that the instructions which refer to the testimony are based upon and supported by the evidence, and contends that, as the instructions which were given and withdrawn, tested by that rule, show there was sufficient evidence to require the submission of the issues to the jury, it was error to direct a verdict. The rule invoked refers to instructions given and which guided the jury in reaching a verdict. It has no reference to instructions not given, or to instructions given but recalled before a verdict had been reached.

The judgment should be affirmed, and we so recommend.

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

HUGH MURPHY, APPELLANT, V. CITY OF PLATTSMOUTH, APPELLEE.

FILED JANUARY 5, 1907. No. 14,861.

1. Cities: IMPROVEMENTS: ESTIMATE OF COST. The statute which requires an estimate of the cost of a public improvement to be made and submitted to the city council by the city engineer before a contract for such improvement is let, is mandatory, and a contract made without complying with such requirement is void.
2. ———: CONTRACTS: ESTIMATE OF COST. Where such statute further provides that such estimate shall be published with the advertisement for bids for making such improvement, and that no contract shall be let for a price exceeding such estimate, the inhibition against letting a contract at a price in excess of the estimate cannot be evaded by raising the estimate after the bids have been made and opened.
3. ———: ———: LETTING TO LOWEST BIDDER. Any material departure in a contract of that character from the terms and conditions upon which the bidding was had, is an evasion of a statute requiring a contract to be let to the lowest responsible bidder.
4. ———: ———: ASSIGNMENT. Where a contract with a city for a public improvement expressly provides that it shall not be assigned, such provision is enforceable, and an assignee thereof cannot recover the money due thereunder, or any part thereof.

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

Matthew Gering and *E. C. Strode,* for appellant.

H. D. Travis and *Jesse L. Root, contra.*

ALBERT, C.

Suit was brought by Hugh Murphy against the city of Plattsmouth to recover a small balance due on a written

contract alleged to have been made between the defendant city and one Fanning for the paving of certain streets in that city. The plaintiff claims this balance as Fanning's assignee. On a former appeal to this court a judgment in favor of the plaintiff was reversed on the ground that the contract was made without an estimate of the cost of the improvement having been made and submitted to the city council by the city engineer, as required by section 20, p. 197, laws 1879, and was therefore void. *City of Plattsmouth v. Murphy,* 74 Neb. 749. After the cause was remanded another trial was had. At the close of the testimony the court directed a verdict in favor of the plaintiff for $381.42, and gave judgment accordingly. Both parties appeal.

At the last trial the plaintiff sought to avoid the effect of the rule applied by this court on the former appeal by evidence tending to show that such estimate was made and submitted to the council by the city engineer, and published with the advertisement for bids. But from the evidence introduced for that purpose it also appears that the estimate was raised by the engineer after the bids were opened, in order to avoid that provision of the section of the statute above referred to, which prohibits the city council from entering into a contract for such improvements for a price exceeding the estimate made and submitted by the engineer, and that there was a material departure in the contract from the terms and conditions upon which the bids were submitted. It is too plain to admit of serious dispute that the city council could not thus evade the mandatory provisions of the statute. As was said in *Inge v. Board of Public Works,* 135 Ala. 187, 93 Am. St. Rep. 20: "Any material departure in the contract awarded from the terms and conditions upon which the bidding is had, renders the contract, in a sense, a private one. To permit such in the awarding of public contracts by public officers would be to open wide the door for favoritism, and defeat the thing which the law intended to safeguard in requiring the contracts to be let

upon bids made on advertised specifications. It is unimportant whether the additional stipulation contained in the contract awarded to one, who is not the lowest responsible bidder, be in itself an advantage to the city or not, if it constitutes a material change, and, therefore, a departure from the basis of the bidding, and becomes an element or consideration in the determination of who is the lowest and *best* bidder, it will invalidate the contract entered into." See, also, *Chippewa Bridge Co. v. City of Durand,* 122 Wis. 85; *Diamond v. City of Mankato,* 89 Minn. 48.

The principle involved does not differ from that involved in *Fairbanks, Morse & Co. v. City of North Bend,* 68 Neb. 560, where it was held: "A city or village can enter into a valid contract for the erection or construction of any work authorized by section 69, article I, chapter 14, Compiled Statutes, only after it has advertised for bids as required by subdivision XV of such section, and then only with some person in accordance with a bid tendered by him in response to such advertisement." It seems to us, in view of the change made in the estimate after the bids were opened, and the departure from the terms upon which the bids were submitted, the plaintiff stands in no better position than if no estimate had been made or submitted. The effect of such omission is discussed at length in the former opinion, where the contract on that account was held void. It follows, therefore, that the judgment of the district court is erroneous.

There is another reason why the judgment must be reversed. The contract in express terms provides that "the second party (Fanning) shall not assign or transfer this contract or sublet any of the work embraced in it." The terms and conditions of a contract have the force of law as to those who are parties thereto. *Lowry v. Inman,* 46 N. Y. 129. In *City of Omaha v. Standard Oil Co.,* 55 Neb. 337, the plaintiff claimed as assignee under a contract containing a stipulation of this character, and this court held that the contract was nonassignable. Counsel there advanced the proposition that the stipulation was merely directed

against the assignment of the obligation resting upon the assignor by virtue of the contract, and was not intended to prevent an assignment of the money to be earned thereunder. But this court refused to adopt that view, and disposed of the matter in these words: "But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract would be, it seems to us, an inexcusable perversion of its terms."

We can conceive of no theory upon which the plaintiff is entitled to recover on the cause of action alleged in his petition, and it is recommended that the judgment of the district court be reversed and the cause remanded, with directions to dismiss the action.

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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 dismiss the action.

REVERSED.

JOHN F. REAMS, APPELLANT, V. GEORGE CLOPINE, SR., ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,534.

Waters: ACTION: DEFENSE. In an action against mere trespassers for damages to land occasioned by their release of water from an artificial ditch, the fact that the plaintiff was not the owner of the land on which the ditch was maintained and had no easement therein is no defense.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed.*

G. M. Caster, for appellant.

J. P. A. Black and *Dorsey & McGrew, contra.*

JACKSON, C.

The action is for damages claimed by the plaintiff because of the wilful acts of the defendants in releasing the waters from a drainage ditch, causing an overflow on the plaintiff's land and the destruction of his crops. A general demurrer to the plaintiff's petition was sustained, and the plaintiff appeals.

The appellees justify the judgment of the trial court upon four specific grounds, as follows: "First. There is no averment that the appellees, or either of them, ever owned or had title in or to any of the land on which the ditch is alleged to have been located, nor is it alleged who owned the land in section 2, on which a portion of the ditch was located, at the time of the commencement of this action, or since the year 1901. Second. The appellant being the lower proprietor, no easement by adverse user can be claimed by him in a ditch located entirely outside his land, on the upper or dominant estate; and he cannot complain of the obstructions placed in the ditch that result simply in restoring the flow of the water to its natural course over his land. Third. The allegations of the petition are insufficient to set up a prescriptive right in appellant to the ditch in question, because there is no averment that the user claimed by him was with the knowledge and acquiescence of the owner or owners of the land through which the ditch ran, or was adverse to them. Fourth. It is not alleged that the appellees acted in an unreasonable manner or with negligence."

If we assume that the first three objections would be available to the owner of the land on which the ditch is located, which we do not determine, it would not follow that the petition stated no cause of action against the defendants, who, in so far as the record discloses, are

mere trespassers. In fact, they assume that attitude in the presentation of the case. Nor is it important, as claimed by the appellees, that the owners of the title are not parties to the action. A judgment favorable to the appellant against the appellees would not determine the rights of the owners of the title and they would in no respect be bound thereby.

As to the fourth objection, it is charged in the petition that the defendants, without the consent and against the command of the plaintiff, dammed up the ditch in different parts, obstructing the flow of water, and caused the overflow resulting in the damages. The charge is sufficient to show a wilful act on the part of the defendants, for which they would be liable.

We are of the opinion that the district court erred in sustaining the demurrer, and we recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

FIRST NATIONAL BANK OF PERRY, APPELLEE, V. AUGUSTA E. PILGER, APPELLANT.*

FILED JANUARY 5, 1907. No. 14,554.

1. **Quieting Title: ACTION BY REMAINDERMEN.** An action to quiet the title to real estate may be maintained by the remaindermen during the continuance of the particular estate.

2. **———: LIMITATIONS.** In such case the statute of limitations commences to run at the time the adverse claim attaches.

* Rehearing denied. See opinion, p. 172, *post.*

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

R. J. Nightingale, for appellant.

J. H. Broady, Giddings & Winegar and *T. S. Nightingale, contra.*

JACKSON, C.

On July 17, 1889, Abel Gates died intestate in Sherman county, leaving a widow, Jane A. Gates, and five children, four of whom were adults. The widow and five children were his sole heirs. At the time of his death he owned and occupied with his wife, as a family homestead, 160 acres of land. On February 8, 1890, letters of administration were issued by the county court of Sherman county for the purpose of administering the estate of the deceased, and on that day the county judge commissioned the county treasurer, county clerk, and another freeholder of the county, to appraise the homestead. On the 14th of the same month the appraisers reported, finding the value of the homestead to be $900. The incumbrance consisted of a mortgage to the Lombard Investment Company of $600. Jane A. Gates, the widow, on the day the report was made, filed a written acceptance of the homestead, subject to the incumbrance. The estate appears to have been administered on the theory that the widow took absolute title to the homestead under the provisions of chapter 57, laws 1889. On September 5, 1891, the widow conveyed the premises by warranty deed to M. D. Green, and through mesne conveyances by warranty deed the title finally vested in John Horn on May 15, 1894, who gave a purchase price mortgage to his grantor. The conveyances were all recorded at about the date of their execution. The Lombard Investment Company mortgage was paid and released as a result of the transaction with Horn. On October 30, 1899, Horn and wife conveyed the premises by warranty deed to Theodore L. Pilger and John

Kahl, subject to the Horn mortgage, which had been assigned to the plaintiff herein. On April 16, 1902, the Horn mortgage being unpaid, plaintiff proceeded in the district court to foreclose the same, and such proceedings were had as resulted in a decree and sale of the premises to the plaintiff under the decree, confirmation of the sale, and the execution and delivery of a sheriff's deed. Thereafter Augusta E. Pilger, wife of Theodore L. Pilger, procured from each of the five children of Abel Gates, all of whom were then of age, quitclaim deeds, paying each the sum of $10 as a consideration for the conveyance. These deeds were placed of record, and thereupon, on January 3, 1905, the plaintiff, being in possession, commenced this action in the district court to quiet its title as against these conveyances. The defendant filed a cross-bill asking similar relief. In the trial court the finding was for the plaintiff as to an undivided four-fifths interest in the land, and for the defendant as to the remainder; the finding being that the plaintiff had acquired title to four-fifths interest by adverse possession; that by reason of the fact that one of the heirs of Abel Gates was a minor the statute had not run as against his share, and the title to the four-fifths interest was quieted in the plaintiff, and the remainder in the defendant, Augusta Pilger. The defendant appeals.

The questions presented by the appeal are the rights of the plaintiff under the provisions of chapter 57, laws 1889, as affected by the legalizing act found in chapter 32, laws 1895; and, second, whether the statute of limitations has run against the cross-bill of the defendant. Jane A. Gates, the widow, died only a few months prior to the commencement of the foreclosure proceedings under which the plaintiff acquired title to the land, and the appellee, claiming title through the remaindermen, the children of Abel Gates, insists that no action on behalf of the remaindermen or their grantees could be maintained to quiet their title in the real estate until after the death of the widow, who held the life estate. She bases this con-

tention upon the provisions of section 61, ch. 73, Comp. St. 1905. Three sections of that chapter should be noticed in connection with this claim; they are sections 57, 59 and 61, as follows:

Section 57. "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in the actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."

Section 59. "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act."

Section 61. "The provisions of this act shall not in any respect apply to the settlement, partition, or division of real estate among the heirs of a decedent, where the same is provided for by the intestate laws of this state."

On the last section appellant bases her contention. We do not think that section 61 has any application to the facts involved in this action; in fact the question seems no longer to be an open one. In *Hall v. Hooper,* 47 Neb. 111, it was held that any person claiming title to property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting the title, citing *Foree v. Stubbs,* 41 Neb. 271; and, further, that such an action might be maintained by the remainderman during the continuance of the particular estate. The recording of the warranty deed from Jane A. Gates, the widow, was notice to the world that the grantee claimed an interest in the land such as the deed purported to convey. *Murray v. Quigley,* 119 Ia. 6. It is clear that an action to quiet the title might have been maintained by the children of Abel Gates immediately after the recording of the first warranty deed by the widow on September 5, 1891, and that the statute of limitations commenced to run against such an action from that date. The purpose

of the statute is well stated in *Murray v. Quigley, supra*, where a similar statute is in force. It is there said: "Without such statutory authority, a reversioner out of possession, and with no right thereto, could not maintain an action against one in possession as a life tenant, and it was undoubtedly the thought of the legislature that the welfare of those interested as well as of the public in general would be best subserved by providing a means whereby apprehended litigation affecting the use and enjoyment of real property might be at once settled." This form of action must, of course, be distinguished from one where the right of possession is involved, and is not affected by the rule that an action for possession cannot be maintained by the remainderman until the life estate is terminated by the death of the life tenant. It follows that the cause of action set out in the cross-bill of the appellant was barred by the statute of limitations at the time of the commencement of the action, at least to the extent that it was so held in the trial court, and that she has obtained all of the relief to which she is in equity entitled. This conclusion renders a discussion of the other question unnecessary.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

The following opinion on motion for rehearing was filed March 21, 1907. *Rehearing denied:*

SEDGWICK, C. J.

We think that in the brief upon the motion for rehearing section 61, ch. 73, Comp. St., is misunderstood. That section has no application to these proceedings. This

action does not have to do with the settlement, partition or division of real estate among the heirs of the decedent under the intestate laws of this state, and is therefore not affected by section 61.

Upon the death of Abel Gates in 1889 his heirs became the owners of the real estate in question, subject to the interest of the widow, Jane A. Gates. The widow disposed of her interest in September, 1891, and Mr. Green, who bought the land from her, from that time claimed to hold the whole title thereto. His possession was, therefore, adverse to that of the heirs, and the heirs might at once have begun this action to quiet their title. The plaintiff in this case is claiming under the title acquired by Mr. Green from the widow, and Mr. Green and those claiming under him, including this plaintiff, have had adverse possession of the land for more than ten years, so that the title under which the plaintiff claims has become complete. This is an action to quiet that title, and the plaintiff was not given any more relief by the district court than it was entitled to.

The motion for rehearing is

OVERRULED.

WALTER J. STEVEN, APPELLANT, V. E. J. HENDERSON ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,582.

Evidence examined, and *held* insufficient to sustain the judgment.

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

E. C. Calkins, for appellant.

C. A. Robinson, contra.

JACKSON, C.

The plaintiff's action is on a promissory note for the sum of $130. The defendants admit signing the note,

but allege that it was obtained by fraud, and was without consideration. The trial resulted in a judgment for the defendants, from which the plaintiff appeals.

It appears that James Steven was an implement dealer at Shelton, through whom the defendants purchased a second-hand threshing machine engine and a grain weigher. The plaintiff claims that the consideration for the note in suit was $100 of the purchase price of the engine and $30 of the purchase price of the weigher. The principal controversy is over the purchase price of the engine. The plaintiff claims the fact to be that the price agreed upon for the engine was $1,050, for which notes in the sum of $950 were to be delivered by the defendants, payable to the Massillon Engine & Thresher Company, and the remaining $100 was to be paid by an assignment of a claim against another machine company, then in litigation; that, when the engine was delivered and settlement finally made, the defendants requested Steven to take their note for $100 in lieu of the assignment of the claim, which he agreed to do, and that the $100 was included in the note in suit. The defendants claim that the total consideration to be paid by them for the engine was $950, for which they executed their notes, and that the notes were subsequently paid.

Whatever may be said about the merits of the controversy over this part of the transaction, we are of the opinion that the evidence fails to disclose a total failure of consideration for the note in suit. The order for the weigher contains an agreement on behalf of the defendants, providing for the payment of the regular list price, and the evidence shows without dispute that the list price of the weigher was at least $100, probably $110, and it is not claimed by the defendants that they have paid but $80 of the purchase price of the weigher. Under this state of facts, the plaintiff was entitled to judgment, at least for the difference between the contract price of the weigher and the amount paid. This conclusion is met by counsel for appellees with the suggestion that Steven

was the agent of the Russell company in the sale of the weigher; that the title passed direct from the Russell company to the defendants, and that the excess over the $80 paid by the defendants belonged to the principal, and not to the agent. That question, however, is not in the case. The evidence discloses that Steven had a net price from the Russell company, and made his own price to his customers.

The judgment of the district court is not supported by the evidence, and we recommend that it be reversed and the cause remanded for further proceedings according to law.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

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.

MABEL HARR, APPELLEE, V. HIGHLAND NOBLES, APPELLANT.

FILED JANUARY 5, 1907. No. 14,601

Insurance: POLICY: CONSTRUCTION. In case of conflict between the provisions of a life insurance policy and the statements contained in the application for insurance, the provisions of the policy will control.

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

W. C. Saul and *John N. Dryden,* for appellant.

H. M. Sinclair, contra.

JACKSON, C.

On September 22, 1902, the defendant, a fraternal-beneficial association, issued its benefit certificate covering the

life of George T. Harr, payable in case of death to Mabel Harr, his wife, containing this clause: "This certificate shall be incontestable after two years from the date of this certificate given below, except only for under statement of age." The written application signed by the assured contained this stipulation: "Should my death occur within three years from the date of my initiation into the order, caused by suicide or attempted suicide, whether sane or insane, my benefit certificate issued upon this application shall be null and void." On December 9, 1904, Harr, while temporarily insane, took his own life. He was in good standing at the time of his death. Mabel Harr, the widow and beneficiary, made due proof as required by the laws of the order, and the society refused payment. She thereupon instituted this action in the district court for Buffalo county, where the facts were admitted, and the plaintiff had judgment. The defendant appeals.

The question presented by the appeal is whether the contract of insurance is to be governed and controlled by the stipulation contained in the application for insurance, or by the terms of the certificate itself. If the stipulations in the application are to control, then the beneficiary could not recover, because the contract was one which the parties had a right to make, and the death of the assured, occasioned by suicide, occurred within three years from the date of his initiation. On the other hand, if the provision of the certificate is to govern, then the plaintiff was entitled to recover, because the death of the assured occurred more than two years after the date of the certificate. While the stipulation contained in the application was one which the parties had a right to make, it was also one which the society might waive, and, in our opinion, it did waive that stipulation when it issued its certificate providing that it should be incontestable after two years from the date of the certificate, except only for under statement of age.

One of the provisions of the policy is: "That the application of said member, for which this certificate is issued,

is hereby referred to and made a part hereof." And it is insisted on behalf of the appellant that the stipulation with reference to death by suicide is as much a part of the policy as though it were incorporated into the policy itself.

That construction of the contract, however, would not aid the appellant. We would then have two conflicting provisions in the policy—one that it shall be incontestable after two years, except for misstatement of age, and the other that the policy should be void in case of death by suicide within three years from the date of the certificate —and under a well-settled rule we would be bound to give effect to that provision most favorable to the assured. An instructive case, where the same principle was involved, is that of *Goodwin v. Provident S. L. A. Ass'n*, 97 Ia. 226. It was there held that, in case of conflict between the provisions of a policy and the statements in the application for insurance, the former will control. The stipulations of the policy itself are presumably the last expression of the agreement of the parties and the one most in mind at the time of its execution. It will be adopted, therefore, as the contract of the parties.

It follows that the judgment of the district court was right, and it is recommended that it be affirmed.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. OMAHA COUNTRY CLUB ET AL., APPELLEES.

FILED JANUARY 5, 1907. No. 14,611.

1. **Judgment:** VACATING: FRAUD. Under the provisions of section 602 of the code, the courts will relieve against a decree on the ground of fraud committed by the successful party.
2. **Taxation.** Courts will not aid in the depletion of the public revenues by permitting private property to escape taxation, except in obedience to positive law.

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

Norris Brown, Attorney General, W. T. Thompson, W. W. Slabaugh and *A. H. Murdock,* for appellant.

Edgar M. Morsman, Jr., and *W. J. Connell, contra.*

JACKSON, C.

The facts are involved, and an extended statement is necessary to a correct understanding of the issue.

In 1896 Connell, being the owner of a fifty-two acre tract of land in Douglas county, obtained a decree in an original action in the district court reducing the valuation for the purpose of assessment from $5,200 to $5,000. The decree provided: "That the county treasurer shall correct upon the books of his office the assessed valuation of the real estate set forth in said decree for the years 1892, 1893 and 1894, so as to correspond with the valuation herein specified, and that the taxes so carried forward upon each and all of said tracts and pieces of land shall stand as a legal, valid, and duly authorized and subsisting lien thereon; and that the county treasurer is required to accept and receive in satisfaction and payment of each of said liens the amount thereof, respectively, with lawful interest on such liens." It was further found in the decree that

the taxes levied for the years stated, except as therein authorized, were excessive and void. No action was taken by the county treasurer, and the taxes are still unpaid. In July, 1904, the tract was included in a scavenger suit instituted on behalf of the state for the collection of delinquent taxes. In the meantime Connell had deeded the tract to the Omaha Country Club. In this action the Omaha Country Club and Connell joined issues, claiming, in effect, that the taxes for the years 1892, 1893 and 1894 were void, and had been declared void by the proceedings of 1896. On November 29, 1904, notice was served on the county attorney that the defendants would ask a hearing on December 3, 1904, or as soon thereafter as they could be heard. It appears from the record that on December 3 the court postponed the hearing, on request of counsel, to December 17, and that on the latter date, the court being engaged in the hearing of another case, it was ordered that the hearing be postponed until Saturday, December 24. On December 24 the defendants appeared and demanded an immediate hearing, the court being in session, Honorable A. C. Troup, presiding. The state was not represented, and proceedings were had which resulted in a decree finding for the defendants that the taxes had been declared void; that they were void, and that, notwithstanding a reasonable time had intervened so to do, the taxes had not been canceled, and it was ordered that the treasurer of Douglas county cancel upon the tax record of his office the several items of taxes so found to be void. The decree was filed on January 6, 1905, after the expiration of the term of office of the county attorney who had instituted the scavenger suit. On March 27, 1905, the present county attorney instituted this proceeding, by petition under the provisions of section 602 of the code, to set aside and annul the decree of December 24, 1904, the term at which said decree was rendered having adjourned without day on January 24, 1905, it being charged, in substance, that the decree was obtained by fraud. Upon this petition issues were joined, and the trial resulted in

an order denying the prayer of the petition. The state appeals.

At the hearing upon the petition to set aside the decree, Judge Troup was called as a witness on behalf of the state, and testified as follows: "A. As I recall the facts now, it was in the month of December, 1904, probably the latter part of the month. Mr. Connell came into my court, and while I was on the bench, and said that there was and had been a matter involved in the so-called scavenger suit, involving certain taxes upon his property, which the decree at that time, or in a general way, and, as I understand, was this country club property, which ought not to be in that scavenger decree which had been rendered some time before that; and that it had evidently got in there by mistake or oversight or error of some kind. Afterwards there was a decree of this court to enter same before he considered all of that tax void, and, as I recall, canceled or disposed of; and that it was error to have it in this scavenger suit; that he had served a notice upon the county attorney to take this matter up and have a decree entered which would exclude this other, or scavenger decree. Q. What county attorney was it, Mr. English? A. Yes, sir, I think it was. At that time Mr. Connell said that he had had negotiations with Mr. Magney, one of the deputies, in respect to it; and I think that he said that he had been there several times to have it taken up, but that the county attorney or his deputy at one time or another had postponed it until that date, when he wanted it taken up. And I asked him if he had a decree, as I understood, all prepared, and I asked him if it was O.K.'d. Q. By whom? A. By the county attorney or some one in that office. And I think I took the decree at that time to see if there was an O.K. to it, and he said that that was not O.K.'d, and the county attorney didn't care to O.K. the decree. And I then said I thought attorneys ought to O.K. a decree to which they had no objections, or if they had objections they should be willing to appear before the court to satisfy the court that he was correct.

I thought it should be signed and entered by the court, and to that Mr. Connell, I think, said that—I do not know but that he consented to that, that they ought to do so, but that he didn't want to O.K. the decree for some reason, and he said, as I recall, that the taxes—it was the decree to which there could not be any valid or rightful objection, and I think he either—I think he offered to be sworn to give testimony. He had a decree in his hand purporting to be the decree that this court had previously entered for said taxes, and I think offered to hand it to me, and I may have taken it, but I don't recall taking it, at least I did not examine it, or indicate to any one as to its contents. Q. Did Mr. Connell state what its contents were? A. I do not know that he stated all the contents, only upon the statement that he believed that tax void, and disposed of the question, as I recall it. Q. Did Mr. Connell at this time state, in substance, that the county attorney had no objections to the court signing this decree? A. I could not say that he said they had no objections. I do not know about that, he may, and I do not know that this statement is it, but he may have said that there could not be any valid objections. I do not know that he said the attorneys didn't care to appear. Q. Or that the county attorney didn't desire to appear in the case? A. I think that he said they didn't desire to O.K. it, and I do not remember whether he had, and that he didn't desire to appear in court. I do not remember. Q. State upon what you based your decree in that case? A. It was upon the whole of the statements and circumstances of Mr. Connell's presentation of the case that I based that decree. If he was sworn it would include what he said upon oath, rather than upon any examination of any decree myself. I did not examine any decree."

James P. English, who was county attorney at the time the scavenger suit was instituted, testified, in substance, that he did not know the case had been reached in court, and that he had no knowledge that the decree had been entered until after his term of office expired; that he had

not consented to having decree entered on behalf of the defendants; that, in fact, the question of a decree had never been discussed between himself and the defendants, that the only discussion of the merits of the case that had ever occurred involved the question of whether the taxes found to be legal by the decree of 1896 should bear interest from the date they became delinquent at the rate of 10 per cent., or whether at the rate of 7 per cent., or whether, as claimed by Connell, they should not bear interest at all, the county treasurer having failed to comply with the provisions of the decree. He also testified that he had never stated that he did not desire to resist the claim made by the defendants in their answer. On cross-examination he was asked by Mr. Connell: "Q. Further in that connection, Mr. English, isn't it true that you did say to me, 'Well, I don't care to appear, you can make your showing,' or words, in substance, to that effect? A. I can say positively that I did not."

Connell testified on his own behalf, his evidence being somewhat at variance with that of Mr. English. He stated that a day or two before December 24, 1904, he met Mr. English on the sidewalk past the court house at the foot of the stone steps, and told him that the case would come up on Saturday, being the time fixed by the second postponement, and he wanted to have the hearing and would insist upon it at that time; that English said, all right, I could make my showing to the court, that he didn't care to appear. Concerning his statement to Judge Troup he said: "I called Judge Troup's attention to the fact while he was on the bench a short time after the hour specified in the notice, stating, in substance, that this was the third time the matter had been brought before him; that I had given the other side written notice of the hearing; and that it had been delayed and postponed at the request of the county attorney, and that I now desired a hearing; and that I offered myself as a witness, and was sworn and took the witness stand. I stated the facts as I understood them, both in regard to the original hearing and decree

rendered by Judge Powell (1896). I stated to him on oath that I had made demand on the county treasurer soon after the entry of the decree to comply with its terms; had produced and shown to the county treasurer a true copy of the decree, but that no action had been taken by the county treasurer, and it was my contention and best judgment that the taxes were absolutely void, not only by reason of being declared void by the court in the decree mentioned, but also and by reason of an invalid and irregular assessment, to which I made reference. I had a copy of the decree among the papers in my hand, and when referring to the decree I passed it toward the judge and laid it on his desk. My recollection is that Judge Troup took it up and glanced at it, but did not read it through, without giving it a careful reading, but evidently accepting my sworn statement as to the nature and effect of it. Judge Troup thereupon allowed the decree declaring the taxes void."

From a consideration of all the evidence, it seems to be the fair inference that the decree, which it is sought to annul by this proceeding, was entered under a misapprehension of the facts. It is clear, both from the evidence of Judge Troup and that of Mr. Connell himself, that the court understood that the state did not care to resist the entry of the decree, that the taxes had already been declared illegal, and that, while the county attorney did not care to O.K. the decree, he was satisfied to have the defendants make their showing and take a decree canceling the taxes. The testimony of Mr. English seems to be the most reasonable. It is hardly conceivable that a public officer, charged with the performance of a duty so important to the state and to his constituents, would consent to the cancelation of the taxes involved, which, it should be stated, are the state, county and school district taxes. As affecting the merits of the controversy involved in the scavenger suit, and the defense of the state to the claim of the defendants arising out of the decree of 1896, it is apparent from the face of the decree that the most that may

be claimed for it, if anything, is that only such portion of the taxes as are levied on the valuation in excess of $5,000 are unenforceable by reason of the decree, and no facts are pleaded from which it could be inferred that any part of the taxes are void for any other reason. Courts should not permit the dissipation of public revenues by permitting private property to escape taxation, except in obedience to positive laws. The burdens of taxation rest lightly upon none. They are oppressive enough when all property bears its just proportion of the expenses of the government.

We are convinced that the decree was obtained under such circumstances as to amount to fraud, under the rule announced in *Klabunde v. Byron Reed Co.*, 69 Neb. 126, and followed in *Arnout v. Chadwick*, 74 Neb. 620, and it is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to vacate the decree of December 24, 1904, according to the prayer of the petition.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to vacate the decree of December 24, 1904, according to the prayer of the petition.

REVERSED.

J. I. CASE THRESHING MACHINE COMPANY, APPELLEE, V. FRED C. ROSSO, APPELLANT.

FILED JANUARY 5, 1907. No. 14,625.

Replevin: AFFIDAVIT. A writ of replevin issued without the filing of the affidavit required by section 182 of the code should, upon proper application, be set aside.

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

E. C. Calkins, for appellant.

O. A. Abbott and *Warren Pratt, contra.*

JACKSON, C.

The action is one in replevin instituted in the district court. No affidavit was filed. The petition, in substance, recites the execution and delivery of a chattel mortgage on the property taken; contains a description of the property and of the notes secured thereby; that the plaintiff claimed a special interest in the property by virtue of the mortgage and was entitled to immediate possession of the same; that the property was of the value of $1,500; that the defendant wrongfully detained the same and refused to yield possession, although the indebtedness secured by the mortgage was then due and payable under the conditions of the mortgage; and the plaintiff claimed damages in the sum of $150. Judgment was asked for the return of the goods and chattels, or for the value if the same were not returned, together with damages and costs. The petition was positively verified. The property was taken on a writ and delivered to the plaintiff, who had judgment in the district court, from which the defendant appeals.

Many assignments of error are presented, only one of which we deem it important to notice. The defendant first appeared by motion to quash and set aside the order of replevin on the ground that no affidavit was filed in the case, as required by section 182 of the code. This motion was overruled and proper exceptions taken. The question was preserved by answer, and presented in the motion for a new trial, and is now assigned as error. It is provided by section 182 of the code: "An order for the delivery of personal property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there shall be filed in his office an affidavit of the plaintiff,

his agent, or attorney, showing: First. A description of the property claimed. Second. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same. Third. That the property is wrongfully detained by the defendant. Fourth. That it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any fine, tax, or amercement assessed against him, or by virtue of an order of delivery issued under this chapter, or any other mesne or final process issued against him; provided, that such affidavit may omit the first and last clause of this subdivision and in lieu thereof, show that the property was taken in execution on a judgment or order, other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state." It is further provided by section 197 that: "Any order for the delivery of property issued under section one hundred and eighty-two, without the affidavit required thereby, shall be set aside at the cost of the clerk issuing the same, and such clerk, as well as the plaintiff, shall also be liable in damages to the party injured." Construing these sections of the code it was held in *Bardwell v. Stubbert,* 17 Neb. 485, that in replevin, where the object of the action is to obtain a delivery of the goods which it is claimed are wrongfully detained by the defendant, the filing of an affidavit setting forth substantially the facts required by the statute is a condition precedent to the order of delivery, and without it the order will be a nullity if issued. Such an affidavit, where required by the code, is an essential prerequisite to securing the order, and especially before a levy. *Westenberger v. Wheaton,* 8 Kan. 169; *Williams v. Gardner,* 22 Kan. 122; *Paul v. Hodges,* 26 Kan. 225; 20 Am. & Eng. Ency. Law (1st ed.), p. 1081.

It is argued, however, on behalf of the appellee that the petition itself, when properly verified, should be held to take the place of the affidavit. That question we do

not determine, because in no event could the petition be held to supply the want of an affidavit, unless the petition contained all that the plaintiff was required to set forth in an affidavit, and it will be observed that nowhere in the petition are those facts required to be stated under the fourth subdivision of section 182 to be found. But it is said that sufficient facts are stated from which an inference necessarily follows that the property was not taken from the plaintiff under any of the provisions of subdivision 4. A sufficient answer is that all the facts stated in the petition are necessary, in addition to the facts required by subdivision 4, and no exceptions are permitted except those designated in that subdivision.

It follows that the district court erred in refusing to quash the writ as required by section 197, and it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

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.

FIRST NATIONAL BANK OF MADISON, APPELLANT, V. CHARLES W SPROUT, APPELLEE.

FILED JANUARY 5, 1907. No. 14,629.

Notes: ACTION: EVIDENCE. The transferee of a negotiable promissory note who has purchased the same in the usual course of trade for value may maintain an action at law against the maker without proof of indorsement.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Reversed.*

Allen & Reed and *W. V. Allen,* for appellant.

M. B. Foster, contra.

JACKSON, C.

Plaintiff sued the defendant to recover on a promissory note. The petition sets out the execution and delivery by the defendant of a note payable to the order of the Eureka Seed Meal Company, and alleges that "Thereafter, and before maturity, the plaintiff for value, in due course of trade, purchased said promissory note of the said Eureka Seed Meal Company, who then and there indorsed the same, as follows: 'Eureka Seed Meal Company, by A. L. Glover, Manager'; that the plaintiff is now the owner and holder of said promissory note, and that the same is due and unpaid." The answer is a general denial. At the trial the plaintiff produced the note, had it identified as an exhibit, and proved that it purchased the same and paid a valuable consideration therefor. It also produced evidence tending to show that the signature to the note was the genuine signature of the defendant. The note was offered and received in evidence, and at the close of the plaintiff's case the trial court, on the motion of the defendant, directed a verdict for the defendant. The plaintiff appeals.

It appears from the discussion of counsel that the reason which prompted the trial court to direct a verdict for the defendant was that the offer of the note in evidence did not include the indorsement of the payee, and because of the failure to prove the indorsement the plaintiff was not entitled to recover. Proof of the indorsement, however, under the allegations of the petition and the evidence of ownership, was not indispensable to the plaintiff's case. In *Michigan Mutual Life Ins. Co. v. Klatt,* 2 Neb. (Unof.), 870, it was held that possession of a promissory note is *prima facie* evidence of its ownership. That action was one in equity for the foreclosure of a real estate mortgage, and the holding was in accord with the equi-

table rule; but it does not follow that under the same statement of facts an action at law could not be maintained against the maker of the note. A parol transfer by the payee without indorsement of a check payable to order, accompanied by manual delivery, is valid. *Freund v. Importers & Traders Nat. Bank,* 76 N. Y. 352 A transferee of negotiable paper, without indorsement may recover thereon by proving consideration. *Farris v Wells,* 68 Ga. 604. In *Tullis v. Fridley,* 9 Minn. 68, it was held that, where a promissory note payable to the husband is transferred by him directly to his wife without indorse ment, the title thereto vests in her so far as the maker is concerned, although she paid no valuable consideration for such transfer. A person who has acquired the ownership and possession of a promissory note may bring suit thereon in his own name as the real party in interest, though no indorsement of the note has been made to him by the payee. *Pearson v. Cummings,* 28 Ia. 344. It will be observed from the allegations of the petition that the plaintiff does not claim title to the note in suit by indorsement alone, but alleges specifically that "the plaintiff for value in due course of trade, purchased said note." This allegation of the petition, as we have already shown, is supported by proof of the details of the transaction. Under our code the plaintiff, as the real party in interest, is the only one entitled to maintain the action.

The evidence was sufficient to justify the submission of the case to the jury, and it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

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.

PORTER F. DODSON, APPELLEE, V. CHARLES E. BOWLBY, APPELLANT.

FILED JANUARY 17, 1907. No. 14,881.

1. **Elections**: CONTEST: PLEADING. In a contest of the office of county treasurer under sections 5682 and 5683, Ann. St., it is necessary to allege and prove that the contestant is an elector of the county in and for which the contestee is declared elected.

2. **Constitutional Law**: STATUTES: TITLE TO ACT. Section 10 of the general election act (laws 1879, p. 240) is not unconstitutional. The subject of the section is germane to the act, and sufficiently expressed in the title.

3. **County Treasurer**: QUALIFICATIONS. By section 10 of the general election law a county treasurer is disqualified to be elected to office for more than two consecutive terms. An appointment to complete the term of another is not an election to office for a term, and such appointment and holding for ten months thereunder does not disqualify one to be elected to the office for the two consecutive terms immediately following the term during which he was so appointed.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Reversed and dismissed.*

Hastings & Ireland and *John B. Lindsey,* for appellant.

J. H. Grimm, B. V. Kohout and *F. I. Foss, contra.*

SEDGWICK, C. J.

In March, 1903, the contestee, Bowlby, was appointed to the office of county treasurer of Saline county and has held that office from that time. At the general election of the same year he was elected county treasurer for the term commencing on the first Thursday after the first Tuesday of January, 1904, and again at the general election in 1905 he was elected for the term beginning in January, 1906. Thereupon this contest was begun in the county court of Saline county, and by appeal taken to the district court, where judgment of ouster was entered against the contestee, who has appealed to this court.

1. The first question presented upon this record is as to the sufficiency of the evidence. The statute under which the contest was begun provides: "The election of any person declared elected to any office, other than executive state officers and members of the legislature, may be contested by any elector of the state, judicial district, county, township, precinct, city, or incorporated village in and for which the person is declared elected.

"The contestant shall file in the proper court, within twenty days after the votes are canvassed, a complaint, setting forth the name of the contestant, and that he is an elector competent to contest such election, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which complaint shall be verified by the affidavit of the contestant that the causes set forth are true as he verily believes. The contestant must also file a bond, with security to be approved by the clerk of the court, or county judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail." Ann. St., secs. 5682, 5683.

It is alleged in the complaint that the contestant is a resident elector of Saline county, Nebraska, and that he has been such resident elector for 16 years last past. The allegations of the complaint were denied, and upon these issues no evidence was offered in support of the allegation that the contestant was a resident elector of the county. It is contended that, as the complaint was verified and the answer was not verified, no evidence was necessary to support the allegation. It has been determined by this court that an elector of the county cannot in his own name contest an election for the relocating of a county seat. This is placed upon the ground that there is no special statute authorizing such a contest. In passing upon the question the court said: "When one elector of a county, in his own name and on his own behalf, seeks to defeat the presumed will of the people of his county upon any subject as declared by a canvass, by their votes at an election

and for that purpose invokes the provisions of a special statute for contesting the validity of such election, then the special statute invoked must expressly, or by necessary implication, authorize such elector to maintain in his own name and on his own behalf such proceeding, or it will be dismissed." *Thomas v. Franklin,* 42 Neb. 310. A private individual not a resident elector of the county could not maintain this action, and it seems that evidence showing that the contestant was qualified to prosecute the action was necessary to sustain the judgment of the court.

2. Section 10 of the general election law of 1879 (laws 1879, p. 240) is as follows: "A county treasurer shall be ineligible to office for more than two consecutive terms." The act is entitled "An act to provide a general election law, the procedure relative to contested elections, and the filling of vacancies in office." It is insisted that section 10 above quoted is invalid as in conflict with that part of section 11, art. III of the constitution, which is in these words: "No bill shall contain more than one subject and the same shall be clearly expressed in its title." The section of the statute thus attacked has, so far as we know, been regarded as valid for more than 16 years. The section was construed by this court as early as the case of *State v. Stein,* 13 Neb. 529, which was decided in 1882. The question of the constitutionality of the section was not discussed by the court and does not appear to have been insisted upon by counsel. The action was brought to test the right to hold the office of county treasurer. If the section in question is unconstitutional and void, that fact would have been a complete defense in the action, so that it may be said that the constitutionality of the section was brought in question, and no one appears to have doubted its validity. The case has very many times been cited as authority in the subsequent decisions of this court. So far as we have observed, it has not been mentioned as determining the constitutionality of the section in question, unless it is so regarded in *State v. Stuht,* 52 Neb. 209. If this section is unconstitutional, it is because the title of the act of which it is a part is not

sufficiently comprehensive to include the subject matter of the section. The objection is that to prescribe the qualifications necessary for election to an office is not within the scope and purview of a general election law. This proposition is not so clear as to require us to overrule *State v. Stein, supra,* which has been so long regarded as recognizing, if not declaring, the validity of the section in question.

3. To find the true meaning of the section in question is a more difficult matter. The wording of the section is peculiar. We have seen no other statute or constitutional provision in precisely the same language. The constitution of Kansas provides: "No person shall hold the office of sheriff or county treasurer for more than two consecutive terms." Under this provision of the constitution it was held that a county treasurer cannot hold for a longer time than is included in two regular terms of that office. The court said: "The constitution says two 'terms,' not four years, and that the treasurer shall not hold the office 'for more than two consecutive terms.' Now if he should hold the office for a part of one term, and then for the whole of the next term, he could not be eligible to be elected for still another term, for that would give him the office 'for more than two consecutive terms.'" *Horton v. Watson,* 23 Kan. 229. So strictly was this language of the constitution construed that the court held that one who had held the office of county treasurer for two regular consecutive terms could not continue to hold until his successor was elected and qualified, as other county officers might do, under another provision of the constitution which provided that "all county officers shall hold their office for two years and until their successors shall be qualified." In this connection the court used the following language: "When their second term ends, their right to hold the office ends. They cannot then hold over and into their successor's term, as at the close of the first term they might, or as other county officers might. The constitution does not say that

they may hold the office for two consecutive terms, *and until their successors are qualified;* but it says that they *shall not hold for more than two consecutive terms.*" *Horton v. Watson, supra.* Perhaps the limitation that no person shall *hold* the office of county treasurer for more than two consecutive terms will require a more strict construction than would the provision of our statute that "a county treasurer shall be ineligible to office for more than two consecutive terms."

The provision of the constitution of Washington is: "No county officer shall be eligible to hold his office for more than two terms in succession." Under this provision it was held that the time an office was held by a territorial officer, under a provision of the schedule to the constitution that such officers "shall continue to hold their offices until suspended by authority of the state," was not to be considered as a term under the constitution; so that one who had so held the office of county attorney was eligible for two full terms under the constitution. *Smalley v. Snell,* 6 Wash. 161. It may be noticed that under their constitution the officer was not "eligible *to hold* the office," whereas the wording of our statute is that he shall be "ineligible *to the office.*"

In endeavoring to ascertain the intention of the legislature from the language of our statute, we notice the use of the word "ineligible." The word eligible is derived from a Latin word which means to elect, and has been variously construed by the courts. In *Taylor v. Sullivan,* 45 Minn. 309, it was held: "The constitution making persons of foreign birth, who have not declared their intention to become citizens of the United States, ineligible to any elective office, disqualifies such persons from being legally elected. They are not entitled to hold office even though, after being elected, they declare their intention to become citizens." This would seem to be the view taken by this court in *State v. Boyd,* 31 Neb. 682, 707. It is said in the opinion in that case: "The word 'eligible' is defined in the Century dictionary to be 'qualified to be chosen; legally qualified

for election or appointment.' Substantially the same definition of the word is given in Webster's dictionary. In this sense the word 'eligible' is used in the constitution. The above constitutional provision was intended as a restriction upon the electors in choosing their governor and lieutenant governor. The people are prohibited from selecting any person to fill either of these offices who has not been a citizen of this state and of the United States for at least two years next preceding the election at which such officers are to be chosen, or who is under the age of thirty years." The language of our statute which is now being considered strongly indicates that that was the idea in the mind of the legislature when it was adopted. It is not provided that he shall be ineligible to hold the office, but that he shall be ineligible to the office; that is, not capable of being elected to the office, and, if the expression is given this meaning, then the meaning of the statute is that a county treasurer shall not be capable of being elected to the office for more consecutive terms than two; and, if such reading of the statute is justifiable, the respondent does not come within its provisions, as he has not been elected to the office for more consecutive terms than two Again, if this construction of the statute is not justifiable, then it must be confessed that the legislature has chosen language that is indefinite, from which it is impossible to determine the real intention of the legislature. If it cannot be determined from the language used whether the legislature intended that the holding of a part of a term by appointment should be counted as a term of office, or intended that only terms to which the incumbent was regularly elected should be considered in ascertaining his qualifications for future election, it must be because the attention of the legislature was not at the time called to the fact that such a contingency might arise. It would have been easy to have chosen language that would have removed all doubt upon this point. If they did not have in mind at the time that one appointed to the office to fill a vacancy for a short time might afterwards be elected to

the office for two successive terms, then it follows that they have not legislated for such a contingency, and the statute is only intended to apply to county treasurers regularly elected to the office for two full terms. This brings us to the same conclusion. This construction of the statute is strengthened by several further considerations, of more or less weight. Our constitution (art. V, sec. 3) contains a provision applying to the office of state treasurer as follows: "The treasurer shall be ineligible to the office of treasurer, for two years next after the expiration of two consecutive terms for which he was elected." This language of course is not capable of misconstruction. "Two consecutive terms for which he was elected," excludes the idea that the time for which the office might be held under appointment should be construed as a term. If the legislature had this provision of the constitution in mind, and intended to put similar limitations upon the office of county treasurer, it may be supposed to have done so by using the words "ineligible to office for more consecutive terms than two." Again when one who has been a candidate for election to an office challenges the right of the incumbent, who has been indorsed by the electors, he should be able to point to some positive law which makes it the duty of one who was the choice of the voters to resign the office in his favor. In such case there may be some reason for applying the maxim which favors the defendant's position.

We fully appreciate the difficulty of determining the real intention of the legislature, but believe, on the whole, the conclusion which we have reached is better supported than is the opposite conclusion. As the respondent has not been elected to the office of county treasurer for more consecutive terms than two, the statute in question has not been violated, and he is entitled to hold the office for the present term.

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

REVERSED.

LINCOLN TRANSFER COMPANY, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLEE.

FILED JANUARY 17, 1907. No. 14,499.

1. Taxation: LISTING PERSONALTY. By the provisions of section 28, art. I, ch. 77, Comp. St. 1903, every person in the possession and control of personal property in this state, either as agent, trustee, bailee, or otherwise, is required to list the same for taxation, and return in the schedule furnished him by the deputy assessor a description of the property, the name or names of the owner or owners thereof, and its value.
2. Assessment: REFUSAL TO LIST. Where a warehouseman, in possession and control of personal property as bailee for hire, fails to make the proper return thereof for assessment, and refuses to furnish the deputy assessor the name or names of the owner or owners, a description of such property, and the value thereof, and prevents him from examining the same, it is the duty of that officer to inform the assessor of such facts, and assess the property as goods under control of such warehouseman, by the best description he is able to make, and value the same according to his best judgment.
3. ———: SETTING ASIDE. Such an assessment will not be set aside on the application of one whose conduct has made it necessary.

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

Berge, Morning & Ledwith, for appellant.

James L. Caldwell, F. M. Tyrrell and *Charles E. Matson, contra.*

BARNES, J.

The appellant, the Lincoln Transfer Company, is a corporation of this state, having a warehouse in the city of Lincoln, Lancaster county, in which it carries on the business of storing the personal property of individuals for hire. The company retains a key to and a general control over the building, and, while it stores the property on

the system of the rental of floor space, yet it is responsible to the owners for the safe-keeping of the goods so deposited, and exercises to that extent control of such goods. In the spring of 1904 the county assessor of Lancaster county assessed the appellant company $15,000 for goods and merchandise so held in storage. Thereupon the appellant filed a complaint with the county board of equalization as follows: "I hereby protest against the assessment of $15,000 as returned by assessor for household goods in storage with us, for the reason that we do not own these goods, and are not agents for the parties that do own them. Lincoln Transfer Company, by A. Urbahn, Treas." On a hearing of this complaint the board refused to change the assessment, and the transfer company thereupon appealed to the district court, where a trial resulted in a dismissal of its appeal and an affirmance of the action of the board of equalization.

The complaint lodged with the board limited the hearing before that tribunal to the following questions: First, the ownership of the property, which was never in dispute; and, second, whether the appellant held it in the capacity of agent for the owners thereof. These questions were quite immaterial, as we shall presently see, and we would be justified in affirming the judgment of the district court for that reason alone. *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405. The discussion in this court, however, has taken a much wider range, and therefore we will decide the questions thus presented.

The evidence contained in the bill of exceptions, as found in the record herein, establishes the following facts beyond controversy: The schedule provided for by section 48, art. I, ch. 77, Comp. St. 1903, was furnished to appellant by the deputy assessor of Lancaster county on or about the 1st day of April, 1904. The appellant, thereupon, filled out such schedule, made affidavit thereto, and returned it to the assessor, but failed to list therein the property in question, or give any information to the assessing authorities in relation thereto. Thereafter the deputy assessor

called upon the appellant, and requested its officers to furnish him with a list of the names of the persons having such property in storage in its warehouse, and demanded an opportunity to examine said property. The appellant refused to furnish either the names of the owners of the property, or a list thereof, and also refused to allow the deputy assessor to enter the warehouse and examine the property at all. After repeated efforts to obtain such information the deputy assessor made return to the assessor of $15,000 of goods and merchandise held in storage by appellant. No claim was made, either before the county board or on the trial in the district court, that the property in question was assessed too high, but it was claimed, notwithstanding the refusal of the appellant to furnish the assessor any information upon which a proper assessment could be made, that the assessment in question was void, and that appellant was not liable for taxation upon the property so held by it in storage.

Section 28, art. I, ch. 77, Comp. St. 1903, provides: "Personal property shall be listed in the manner following: First, every person of full age and sound mind, being a resident of this state, shall list his moneys, credits, * * * and all other personal property. Second, he shall also list all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons * * * whether in or out of the county." By section 40 of the same chapter, it is provided: "Persons required to list property on behalf of others shall list it in the same place in which they are required to list their own; but they shall list it separately from their own, specifying in each case the name of the person, company, or corporation to whom it belongs." The schedule furnished to the appellant, and by which it listed and returned its own property to the assessor for taxation, required it to make due return of the property in question, setting forth the facts in relation thereto, which would include, of course, the names of the owner or owners, together with a description of

such property, and the value thereof. Appellant failed to give such information by its schedule, and at all times thereafter refused to furnish it to the deputy assessor when called upon so to do. By the sections above quoted it was made the plain duty of appellant to furnish to the assessing officers a list of the goods in question, together with the names of the owners of such goods, and the value thereof. The statute is comprehensive in its terms, and it was the intention of the legislature by its enactment to render it impossible for any property in this state to escape taxation. That the property was under the control of the appellant is beyond question, and the statute is broad enough to require it to list it and furnish to the taxing authorities the information above set forth.

It is provided by section 55, art. I, ch. 77, *supra:* "In every case where any person shall refuse to make out and deliver to the proper deputy assessor the statement required under this act, or shall refuse to make and subscribe to any of the oaths or affirmations required, the deputy assessor shall proceed to ascertain the number of each description of the several enumerated articles of property and the value thereof, and such deputy assessor shall make a note of such refusal in a column opposite the person's name, and the county assessor shall add to such valuations, when returned by the deputy assessor, fifty per centum on the value returned." It appears from the evidence that the deputy assessor, acting under the provisions of this section, proceeded as best he could to ascertain the number and description of the articles of property in question; that he went further and attempted to ascertain the names of the persons to whom it belonged; that, being unsuccessful in these attempts, he made a statement of the facts to the assessor, and thereupon listed the property for assessment under such description as he was able to make, and fixed the valuation of it according to his best judgment. Such action resulted in the assessment complained of.

It is contended, however, on the part of the appellant,

that the proceedings above described were wholly void, and that the assessment should be set aside, and the property in question be permitted to escape taxation. This contention cannot be sustained. As above stated, the law is broad and comprehensive in its terms, and any one who has control of personal property situated in this state at the time it should be listed for taxation is required to either list it as his own, or as the property of the owner, giving a description of it, together with its valuation, and a statement of the facts relating to his possession or control. This return should be made in the schedule furnished him by the assessor for the assessment of his own property. This the appellant not only failed to do, but upon direct application by the deputy assessor it repeatedly refused to list the property, to furnish a list of the names of the persons owning the same, to give him any description of it, or fix any value thereon. Nay, more, it prevented the taxing authorities from examining the property. So there was nothing left for the deputy assessor to do except to return such general description of the property as he could, and place such value thereon as the facts, in his best judgment, warranted. This was done, and upon this basis the property in question was assessed to the appellant as above stated. It is contended that the evidence of A. Urbahn, appellant's treasurer, tends to show that at the time of the hearing before the board of equalization, and perhaps before that time, he offered to furnish a list of the property to the deputy assessor if he would go with him to the warehouse and examine the property. This testimony, however, is disputed, and the evidence preponderates so strongly against this theory that we are unable to give it any credence whatever.

It is further insisted that, in any event, all the assessor could do was to add 50 *per centum* to the value of the property returned by his deputy; that this was not done, and therefore the assessment is void. We are unable to understand how the appellant was in any manner injured by the failure of the assessor to add the penalty to the

assessed valuation of the property. Such leniency on his part certainly gave to appellant no cause for complaint.

In conclusion, appellant urges as a reason for setting aside the assessment that, if it is required to pay the tax based thereon, it will be unable to recoup itself out of the property of its patrons. In view of the position it has voluntarily assumed, and the course it has deliberately pursued, it is in no position to complain of the result of such conduct. It is disclosed by the evidence that appellant was simply carrying out its agreement with its patrons in relation to this matter of taxation, and it should be required to apply to them for relief.

In view of the evidence, we are unable to see how the district court could have arrived at any other conclusion, or have rendered any other judgment than a judgment of dismissal of the appeal, which, in effect, was an affirmance of the order of the board of equalization.

We are satisfied that the record contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. DELILAH RUTLEDGE, RELATOR, V. H. M. EATON, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, RESPONDENT.*

FILED JANUARY 17, 1907. No. 14,696.

1. **School Lands: SALE: APPRAISAL.** By the provisions of section 19, art. I, ch. 80, Comp. St. 1881, the county treasurer, county judge and county clerk are required, in appointing appraisers to value school lands for the purpose of sale, to act together or collectively. An appointment otherwise made is invalid.

2. ———: ———: ———. Where a lessee of school land exercises his option and makes an application to purchase, the board of educational lands and funds may, in the exercise of a reasonable discretion, reject the appraisement, if it appears that the amount of such appraisement is so much less than the actual value of the

* Writ of mandamus allowed. See opinion, p. 208, *post*.

land as to lead to the conclusion that the appraisement was the result of fraud or mistake.

3. Mandamus: SCHOOL LANDS: SALE. Where a mandamus is sought to compel the commissioner of public lands and buildings to execute a contract of sale for school lands, the writ will be denied unless it is clear that the lessee has substantially complied with all of the provisions of the law, and the board of educational lands and funds has been guilty of an abuse of discretion in rejecting the application to purchase.

ORIGINAL application for a writ of mandamus to compel respondent to execute to relator a certificate of purchase for 80 acres of school land. *Writ denied.*

C. H. Denny, for relator.

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

BARNES, J.

This is an original application to this court for a writ of mandamus to compel the commissioner of public lands and buildings to execute to the relator a certificate of purchase for 80 acres of school land in Jefferson county. The petition for the writ shows that, under the provisions of section 19, art. I, ch. 80, Comp. St. 1881, in force at the time the lease was executed, she is entitled as lessee to exercise her option to purchase, and this is not disputed by the respondent. The other principal allegations of the petition are, that the relator, at the time of the commencement of the action, was the owner and holder of leases from the state for the land in controversy; that on the 10th day of December, 1905, the relator applied to the county treasurer of Jefferson county to have the land appraised for the purpose of sale, and deposited at that time with such county treasurer the sum of $6; that an appraisement was made fixing the value of the land at $1,400, and on January 5, 1906, the relator paid the county treasurer the sum of $140, made a written surrender of her lease to the respondent, performed such other acts as were required

of her by law, and thereupon demanded of the respondent a certificate of sale of the land in question, which demand was refused. The respondent alleges as a defense to the application for the writ that the land was grossly undervalued; that its just and full value, at the time it was sought to be purchased from the state, was $2,400; that, on the application of the relator to purchase, the board of educational lands and funds made the following order relating thereto: "The following applications to purchase school land by lessees, together with appraisements heretofore referred to the commissioner for review, were submitted: S. E. ¼, N. E. ¼ and N. E. ¼ of S. E. ¼ 36-4-2, and it was moved that the same be rejected on account of insufficiency of appraisements, and the motion was agreed to."

It is contended on the part of the relator that the board of educational lands and funds had no power or discretion to reject her application, but was compelled to execute and deliver to her a contract of purchase at the price fixed by the appraisement. The respondent, however, contends; First, that the relator had not performed the conditions which would entitle her to a certificate of purchase prior to the commencement of this action; second, the value at which the relator seeks to purchase the land is not its just and full value; third, the board of educational lands and funds have the right to protect the state, and refuse an appraisement when below the actual value of the land.

An examination of the record discloses that the respondent's first objection is not well founded. It appears that, by the terms of her leases, the relator had the right to purchase the land in question at the time she made her application therefor; that she paid the cost of the appraisement, forwarded through the county treasurer one-tenth of the purchase price to the respondent, and stood ready to execute the notes in the manner provided by law, for the deferred payments, strictly in accordance with the provisions of the statutes relating thereto. There-

fore this objection to the issuance of the writ cannot be sustained.

The respondent's second objection, however, presents a more serious question. It appears from the record that, when the relator made her application to purchase the land, she served upon the county treasurer, the county judge and the county clerk of Jefferson county, separate notices of her application; that, thereupon, each of said officers, by a separate order, appointed an appraiser, and the appraisers who were so appointed made the appraisement upon which the respondent bases her right to a certificate of purchase. The original application made by the respondent to the county judge of Jefferson county is in the record, and has indorsed thereon the following: "In accordance with the above application I hereby appoint Isaac S. Gardiner, as such appraiser. Dated Fairbury, Neb., Dec. 13, 1905. (Signed) C. C. Boyle, County Judge. (Seal of the county court.)" On the original application made to the county clerk of said county, we find the following: "In accordance with the above application, I hereby appoint Wesley W. Simmons, as such appraiser. Dated Fairbury, Neb., Dec. 1905. (Signed) F. A. Houston, County Clerk. (Seal of Jefferson County.)" While there are affidavits in the record stating that "said officers, acting together, appointed the appraisers," yet we deem them insufficient to overcome the evidence furnished by the original notices, since they merely state a conclusion, and do not state the facts relating to such appointment. It further appears that Henry T. Bowers, the appraiser who was appointed by the county treasurer, was not a disinterested party. His testimony shows that his son was married to the relator's daughter; and, while it may be said that he was not interested in the land, and so was a disinterested party, yet he can hardly be said to be disinterested in the result of the appraisement. It was the duty of the county treasurer, county judge and county clerk, in appointing the appraisers, to act together, or collectively. That their action was not the collective or

concurrent action of the three officers together can scarcely be doubted. The appointment was therefore contrary to the provisions of law; for section 19, art. 1, ch. 80, Comp. St. 1881, provides: "The county treasurer, together with the county clerk and county judge, shall appoint three disinterested freeholders of such county, whose duty it shall be to appraise the lands designated at their just and full value."

The rule is fundamental that a writ of mandamus will not be granted unless the right of the relator thereto is clear. *State v. Nelson,* 21 Neb. 572; *State v. Bowman,* 45 Neb. 752. And, where it appears that the provisions of the law on which the relator bases his right to the writ have not been substantially complied with, the writ will be denied. There is, however, another and more cogent reason why the writ should not be allowed. It is contended on the part of the respondent that the board of educational lands and funds has a right, and it is its duty, to exercise a reasonable discretion to protect the rights of the state; that it can disapprove of an appraisement, and require the respondent to refrain from entering into the contract, when it is shown that the appraisement is grossly below the actual value of the lands sought to be purchased. Section 1, art. VIII of the constitution, defines the powers and duties of the board of educational lands and funds, as follows: "The governor, secretary of state, treasurer, attorney general and commissioner of public lands and buildings 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, and for the investment of school funds, in such manner as may be prescribed by law." By an act passed for that purpose, the legislature has prescribed the manner in which such powers and duties shall be exercised. The power thus conferred upon the board carries with it a duty to exercise a reasonable discretion in executing the trust with which it stands charged. It will hardly be contended, where the appraise-

ment appears to be so grossly inadequate as to amount to a constructive fraud, that the board would have no discretion and could not refuse to authorize the sale of the lands sought to be purchased thereunder. A mere statement of that question is its own solution, and, while we are not prepared to say that the appraisement in the case at bar is so low as to be fraudulent, yet it seems clear that such appraisement is from $400 to $600 less than the actual value of the land, which might reasonably be regarded by the board, in the exercise of a reasonable discretion, as being the result of mistake. This of itself is sufficient to require the board to exercise its discretionary power and reject the appraisement.

In *State v. Scott,* 18 Neb. 597, it was said: "The board of educational lands and funds is a trustee for the sale and leasing of the land set apart for the support of educational institutions, and to justify the interference of a court there must be an abuse of the trust. This question was before this court in *State v. Scott,* 17 Neb. 686, and it was held that a writ would not be granted against the board unless there was an abuse of discretion, which, in our view, there was not in this case. It is the duty of the board to sell or lease the educational lands of the state for the highest price possible to be obtained, and increase and protect by all honorable means, the funds for the support of the educational institutions and so long as the board is faithfully performing its duty in that regard, this court will refuse to interfere." In *State v. Scott,* 17 Neb. 686, it was held that, "where a mandamus is sought to compel the board of public lands and buildings to accept the highest bid for the leasing of certain school lands, the writ will be denied unless it is clear that there is an abuse of discretion, and that the sum bid is the full rental value of the lands." The rule thus stated seems applicable to the present case. From the evidence it appears that the land is worth at least $400 more than the value fixed by the appraisements, and this of itself would seem to require the

board to reject the appraisements, and would justify the respondent in refusing to execute the contract of sale.

For the foregoing reasons, the writ should be denied. It is urged, however, by the relator that her leases have expired since the commencement of this proceeding, and unless the writ is allowed her rights thereunder may be forfeited. This should make no difference with her right to purchase the land at its actual fair valuation, and it is our opinion that she still has the right to renew her application therefor; that upon a fair and just appraisement, and a tender to the respondent of one-tenth of the amount thereof, together with her notes properly and legally executed for the deferred payments, she will be entitled to receive her contract of purchase, and that thereupon this proceeding will be dismissed at her costs.

JUDGMENT ACCORDINGLY.

The following opinion on a new application for writ of mandamus was filed June 7, 1907. *Writ allowed:*

School Lands: SALE: APPRAISAL. The board of educational lands and funds is vested with a discretionary power in passing on appraisements of school lands under an application of a lessee to purchase; but such discretion is a reasonable one, and must be fairly and reasonably exercised, and the arbitrary or unreasonable refusal of the board to approve of a fair appraisement will not justify the commissioner of public lands and buildings in refusing to issue a certificate of purchase which the lessee would otherwise be entitled to receive.

BARNES, J.

When our former judgment in this case was rendered, we declined to dismiss the action, and purposely retained jurisdiction of the matters in controversy, so as to make such further orders herein as would be found necessary to finally determine the right of the relator to purchase the land in controversy. This is fairly disclosed by our opinion, *ante,* p. 202. Since that time the relator has renewed her application, has caused the land to be reappraised, has

complied strictly with all of the requirements of the statute which entitle her to a contract of purchase, and has demanded the same of the relator, who has again refused to comply with her demand. She has, by motion, renewed her application for the writ, and the respondent now justifies his refusal on the ground that the board of educational lands and funds is of the opinion that the new appraisement is too low and has directed him not to issue a certificate of purchase thereon.

From the evidence before us it appears that the land in question was valued by the first appraisement at $1,400; that the respondent, being of the opinion that the appraisement was too low, caused the land to be reappraised for and on behalf of the state, and the amount of such appraisement was $1,800; that the board of educational lands and funds caused that appraisement to be set aside, and the respondent refused to issue a certificate of purchase to the relator thereunder; that the application for a writ of mandamus was thereafter made, and on the issues joined the testimony of a large number of witnesses, both for the relator and the state, was taken as to the value of the land in controversy. By this evidence it is shown that the value of the land was between $1,400 and $2,000; the state contending that it was worth $2,000, while the relator insisted that it was worth only $1,400. It was our opinion that the evidence then taken showed the value to be somewhere between $1,800 and $2,000, and in consideration of that fact we declined to issue the writ, holding that the board was invested with a reasonable discretion in the matter, and could reject an appraisement and refuse to order the respondent to issue a certificate of purchase of school lands, where it appeared that the appraisement was so much less than the fair value of the land as to amount to a constructive fraud, or to make it clearly appear that the value fixed thereby was the result of a mistake. It now appears, by the new appraisement, that the value of the land is $1,600. It is

conceded that the new appraisers are men well qualified and competent to judge of the value of real estate in Jefferson county, in the immediate vicinity of the land in question, and in fact of the land itself; that they are men of excellent character and good judgment, and would in no way favor either party at the expense of right and justice. So we are constrained to hold that the value thus fixed is the fair and reasonable value of the land in question.

The respondent, however, insists that the order of the board is final and conclusive as to the rights of both parties, and compels him to reject the application. We cannot so hold. It must be conceded, however, that where the board, exercising a reasonable discretion in such a matter, has determined that the appraisement is too low, and it appears that such judgment or determination is well founded, then its order would justify the respondent in refusing to execute a contract of purchase, and would be a complete defense to a petition for a mandamus to compel him to perform that act. But, where it appears, as it does in this case, that the appraisement represents the fair value of the land, that the difference between the several appraisements, if any, is so small in amount as to be readily accounted for by an honest difference of opinion on that question, the board cannot reject the appraisement and arbitrarily direct the respondent not to execute the contract of purchase.

Upon a careful consideration of the evidence and of the whole record before us, we are of opinion that the relator is now entitled to the relief prayed for, and a writ of mandamus will issue directing the respondent to execute and deliver to the relator a certificate of purchase as prayed. The relator is required to pay the costs of her first application, and the costs of the present proceeding will be taxed to the respondent.

JUDGMENT ACCORDINGLY.

WATSON TYSON ET AL., APPELLANTS, V. WASHINGTON COUNTY ET AL., APPELLEES.

FILED JANUARY 17, 1907. No. 14,600.

1. **Constitutional Law: GOVERNMENTAL POWERS.** The division of powers between the several branches of the state government, made by article II of the constitution, is comprehensive and final, and the legislature can neither add to nor subtract from the classes or character of questions with which the courts are entitled to deal.

2. ———: ———: **DRAINS.** Whether a drainage ditch proposed to be constructed pursuant to article I, ch. 89, Comp. St. 1905, will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute.

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

W. C. Walton and *Frank Dolezal,* for appellants.

E. B. Carrigan, John C. Wharton and *Herman Aye, contra.*

AMES, C.

Certain citizens of Washington county filed a petition with the county board, praying for the construction of a drainage ditch under the provisions of article I, ch. 89, Comp. St. Appellants filed a remonstrance or objection to the proposed drain on the grounds: First, the ditch will not be conducive to the public health, convenience or welfare; second, the route is not practicable; and, third, sufficient outlet is not provided for the ditch. The board overruled the remonstrance, and entered an order of record to the effect that the proposed improvement will be conducive to the public health, convenience and welfare; that the proposed route is practicable; and that sufficient out-

let is provided. Remonstrants filed a notice of appeal, gave bond, and brought the case before the district court. Appellees filed a motion to dismiss the appeal, because said order of the county board is not judicial, is final, and is not appealable. The district court sustained the motion and dismissed the appeal. Appellants present for our determination the sole question of whether an appeal lies from such final order and decision of the county board.

Sections 15 and 16 of article I of the statute above cited are as follows:

Section 15. "Any person or corporation feeling aggrieved thereby may appeal to the district court within and for the proper county from any final order or judgment of the commissioners made in the proceedings and entered upon their journal determining either of the following matters, to wit: First, Whether said ditch will be conducive to the public health, convenience, or welfare. Second. Whether the route thereof is practicable. Third. The compensation for land appropriated. Fourth. The damage claimed to property affected by the improvement, which appeal may be taken and prosecuted in the manner provided by law for appeals from the decision of the county board on claims against the county."

Section 16. "No appeal taken in pursuance of the provisions of section fifteen shall in any manner affect the progress of the construction of the proposed improvement; provided, the petitioners shall enter into a good and sufficient bond to be approved by the said district court as (or) by the judge thereof at chambers, and filed with the clerk of said court, conditioned for the payment of all damages and costs that the appellant may sustain on the trial of said appeal."

Just what the legislature intended should be accomplished by such a proceeding, with reference to the first two numbered subdivisions of section 15, it is dificult, if not impossible, to say; for, manifestly, during the pendency of the appeal the county board, in the exercise of the authority expressly granted to them, or rather in the performance

of the duty expressly imposed upon them by section 16, might, and probably would, proceed with and complete the construction of the proposed ditch, so that, before a judicial determination could be reached, all the remaining provisions of the statute would have been complied with, the necessary public expenditures incurred, and the contemplated public work irrevocably established. In such a case no function would be left to the courts, in these regards, except an impotent expression of approval or disapproval of the official conduct of a local board, concerning which the judges could have, at the best, but very limited and imperfect information. It does not appear to us that the legislature can require of the courts the performance of a so futile, not to say ridiculous, task. We conjecture that the remarkable provisions of these two sections are due to the fact that the draughtsman of the statute had in mind the impracticability, if not impossibility, of requiring of the courts the making of investigations and determinations which are in their nature as far as possible from the exercise of judicial functions, and of withdrawing the exercise of local political and administrative matters to the final decision of distant and illy qualified tribunals. Such a system would savor more of centralization and bureaucracy that a democratic local self-government, and would be much more easily adaptable to a Russian autocracy than to a free American commonwealth.

Article II of the constitution of this state is as follows: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." In recent years the courts of sister states have been particularly zealous in giving effect to the foregoing principle, whether the same has been explicitly stated in the constitutions of their states or not. Thus in the Connecticut constitution there is no such express provision, but in *Norwalk Street R.*

Co.'s Appeal, 69 Conn. 576, 39 L. R. A. 794, the court held that the principle "is fundamental to the very existence of constitutional government as established in the United States." The precise proposition involved in that case arose in this way: A corporation that had been created, known as the Norwalk Street Railway Company, had applied, pursuant to a statute of the state, to the mayor and council of the city for an approval of its route and plans of construction in and over certain of the streets of the city, and for permission to construct and maintain its proposed road, and had met with refusal. Pursuant to another statute, assuming to confer express authority for such a proceeding, the company appealed to the circuit court for the county, which entertained the appeal, and accepted and adopted the proposed plan, and entered an order assuming to authorize the construction of the road. The mayor and council appealed to the supreme court of errors, which reversed the decision and dismissed the proceeding. The nature of the proposition of law involved is stated by the court in the beginning of the opinion, as follows: "The act of 1893 confers upon city councils certain powers in establishing regulations for the location, construction and operation of street railways; and requires a council, if requested by a railway company, to take some action within sixty days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895 confers the same powers upon the 'superior court or any judge thereof,' to be exercised on application of a railway company, and calls this application an 'appeal.' The power so conferred on the court is described in the act of 1893 as the power to approve and adopt a location and layout of a street railway, with such modifications therein as shall seem proper, in respect to the streets to be occupied, the location of the same as to grade and to the center line of the streets, and changes to be made in the street, the kind and quality of the track to be used, the motive power to be used, and the method of applying the same. Can such powers be con-

ferred on the superior court? The limitation of their exercise to cases where there has been a prior failure of the municipal board to act, cannot affect the principle involved. If the legislature can confer the power in a limited class of cases, by calling an original application for its exercise an 'appeal,' it can confer the power in all cases without limitation." The opinion is long and elaborate, citing a large number of authorities, and discussing at length the principles of constitutional law involved, and arrives at the conclusion expressed in the syllabus as follows: "The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government fairly embodied in the constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States." *Norwalk Street R. Co.'s Appeal,* 39 L. R. A. 794.

In 1898 the legislature of the state of Kansas passed an act "creating a court of visitation, declaring its jurisdiction and powers and providing for proceedings and procedure thereon," and assuming to confer upon such court jurisdiction, upon the complaint of a law officer of the state, to inquire into the reasonableness of railway rates, and the sufficiency of train service, and a large number of other matters pertaining to the maintenance and operation of railroads, and to enforce its findings by judicial decrees in like manner as other courts determine other issues in ordinary actions. The Kansas constitution contains no express provision such as that above quoted from our own, but the supreme court held the act to be void, as an attempt to confuse judicial and legislative powers and to confer both on the same tribunal. Discussing the underlying principle involved the court say: "The framers of the constitution of the United States were influenced by

the doctrine of Montesquieu, then in the height of his influence, that the powers essential to governments should be distributed among three separate bodies of magistrates, viz., legislative, executive, and judicial. Madison, in No. 47 of the Federalist, p. 375, affirmed that such doctrine was recognized by the convention as the foundation of its labors. Montesquieu wrote: 'There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'" *State v. Johnson,* 61 Kan. 803, 49 L. R. A. 665.

In *State v. Barker,* 57 L. R. A. 244, 116 Ia. 96, the supreme court of Iowa held that a statute assuming to confer upon one of the constitutionally constituted courts power to appoint trustees for a water supply system for the city of Sioux City was void, saying in the syllabi: "The establishment and control of a water supply system is a matter that pertains to the municipality, and the legislature cannot take the management of the system away from the appointees of the municipality, and vest it in persons for whose selection it provides. The power of choosing the managers of a municipal water supply system cannot be vested by the legislature in the judges of a court created by the constitution." The body of the opinion quotes substantially the above copied excerpt from the opinion of the supreme court of Kansas, and holds that "powers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the constitution as a part of the judicial department of the state," citing a large number of authorities, and quoting the following from Cooley, Constitutional Limitations (7th ed.), p. 132: "That which distinguishes a judicial from a legislative act is, that the one

is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions."

In *Board of Supervisors v. Todd,* 62 L. R. A. 809, 97 Md. 247, the court of appeals of that state held, quoting the syllabus: "The legislature cannot impose upon a court the duty of receiving and acting on petitions for the submission to the voters of the question whether or not intoxicating liquors shall be sold, under a constitution separating the departments of government." In the body of the opinion the court, after citing and commenting on previous decisions of that state, say: "It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall, not only, not be required but shall not be permitted to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge."

The opinions of the courts in the above cited cases comprise a thorough, complete and exceedingly able collection and review of the judicial decisions and opinions of leading text-book writers on the subject under discussion, and a present attempt at such a task would be a work of supererogation. We think they point unmistakably to the rightful disposition of this case.

The last two named subdivisions of section 15 of our statute are with respect to matters affecting the rights of individual citizens, viz., the amount of compensation to which they may become entitled for land taken for the public work, and the amount to which they may be dam-

aged by its construction, but the two former of such subdivisions have reference to matters of purely public concern, and of legislative and administrative policy, with which the courts have not, and, in our opinion, cannot have, any concern or any duty to perform. The consensus of authority and of reason clearly is that, when the rights of a citizen are invaded or threatened by the taking of his property for a public use without just compensation, or when under the form and guise of a statutory or administrative proceeding an attempt is made or threatened to take or damage his property for a use that is not in fact in its nature public, the courts, with or without express statutory authority, may interfere for his protection. This is the precise point decided by *Lynch v. Forbes,* 161 Mass. 302, and *Chicago, R. I. & P. R. Co. v. Town of Lake,* 71 Ill. 333, cited and approved by this court in *Dodge County v. Acom,* 61 Neb, 376, which latter decision is followed and reaffirmed in *Gutschow v. Washington County,* 74 Neb. 794, 105 N. W. 548. And this, we think, is the limit of the extent to which the authorities or principles extend in permitting judicial interference in cases of this kind.

But this court has repeatedly held that the creation of drainage and irrigation districts, and construction of ditches under statutes substantially like that under discussion, are matters of governmental policy falling within the province of legislative discretion, and that such works may be performed at public expense by general tax or local assessment of especially benefited lands, or both, and may be aided by the issuance of bonds to be paid out of the general revenues of the community. We think that no authority can be found holding that the policy or expediency of constructing any such public work, the exercise of discretion as to which is vested in any administrative board or official, can, in the absence of statutory permission, be interfered with or controlled by the courts; and, if it cannot be so, the reason must be that the exercise of such discretion and functions raises no ques-

tion of judicial cognizance, because the powers exerted are political and governmental in their nature. If the powers so exerted are of such character, exercise or control over them cannot be by the legislature conferred upon the courts; and, on the other hand, whenever a judicial controversy does in fact arise, the courts have an inherent right to intervene without the permission, and even against the expressed will, of the legislature. It is entirely clear, we think, that, if the division of powers, established by the constitution and discussed by the foregoing authorities, in fact exists, the legislature are equally powerless to add to and to subtract from the classes and character of questions with which the court are entitled to deal.

Doubtless, however, it is competent for the legislature to prescribe whatever mode of procedure they may see fit for bringing judicial questions before the courts for determination, or for the multiplication of cumulative remedies, and a majority of the court are of the opinion that so much force and effect can be given to the first and second subdivisions of section 15 of the statute, *supra*, that, when it shall have been made to appear upon the face of the record that the board is attempting or threatening to proceed in usurpation or excess of powers, viz., without jurisdiction of the subject matter or in fraudulent or oppressive exercise of its authority, the court will upon appeal entertain jurisdiction of those questions, which are judicial in their nature, and will, if necessary, order issues to be made up by formal pleadings so as to present them properly for trial. These are questions which the authorities above cited, and others to be found elsewhere, have held to be judicial in their nature, and which the courts may not only be required in any appropriate proceeding to hear and decide, but which they cannot be deprived of the right and power to try and determine whenever they are brought before them in the regular course of judicial procedure. *Coen v. White,* 8 Ohio St. 228; *Bowersox v. Watson,* 20 Ohio St. 496; *Zimmerman v. Canfield,* 42 Ohio St. 463;

Sample v. Carroll, 132 Ind. 496; *Amoss v. Lassall,* 122 Ind. 36; *Heick v. Voight,* 110 Ind. 279; *Meranda v. Spurlin,* 100 Ind. 380; Elliott, Roads and Streets (2d ed.), secs. 276, 664.

But it follows inevitably from what has been said that, when, as in this case, the record raises no question like any of those just mentioned, and none with respect to compensation for land appropriated or with reference to damage claimed for land affected, it presents nothing of merit for judicial determination, and the only judgment the court can render is one dismissing the appeal.

We are of opinion, therefore, that the apparent apprehension of the draughtsman of the statute that the courts are incompetent to decide whether a proposed ditch "will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable," was well founded, and that section 15, in so far as it assumes to authorize an appeal from a decision of those questions by the county board, is inoperative and void.

For this reason, it is recommended that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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 A. HUSENETTER, APPELLEE, V. DAVID LITTLE, APPELLANT.

FILED JANUARY 17, 1907. No. 14,624.

Trial: DIRECTING VERDICT. The weight and credibility of testimony are for the determination of the jury, and not of the court, however conflicting or otherwise they may appear to the latter.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Reversed.*

Allen & Reed, for appellant.

H. H. Halderson, contra.

AMES, C.

This is an action to recover $20 alleged to be due the plaintiff as a part of the purchase price of a cultivator and corn planter sold and delivered by the plaintiff to the defendant. The answer admits the purchase of the corn planter, but as to the cultivator avers that at the time of its delivery there was an agreement between the parties that, if, after due trial, it should not work properly or should fail to give the defendant "good satisfaction," the plaintiff would take it back and refund to the defendant $5 paid by the latter on account of it, the corn planter having been fully paid for at the time of the delivery. Upon the issues thus joined there was a trial, in which the defendant testified that he had made due and speedy trial of the cultivator, but that it did not work properly or to his satisfaction, of which facts he had notified the plaintiff, who, however, had refused to take the implement back or to refund the $5, both of which things he had agreed to do. The defendant's story was corroborated to some extent and in some respects by a disinterested witness, but the court peremptorily instructed the jury to return a verdict for the plaintiff, which they did, and the defendant appealed.

We think it unnecessary to cite authorities to the effect that the weight and credibility of testimony are for the determination of the jury, and not for the court. We therefore recommend that the judgment of the district court be reversed and a new trial granted.

OLDHAM and EPPERSON, 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.

CLYDE WALTERS, APPELLANT, V. VILLAGE OF EXETER, APPELLEE.

FILED JANUARY 17, 1907. No. 14,635.

Appeal. If a plaintiff is denied an opportunity to prove his cause of action upon a sufficient pleading, it matters not whether such denial be upon motion or demurrer, he is entitled, if he has not waived his right, to have an adverse judgment reviewed in this court.

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

F. B. Donisthorpe, for appellant.

C. H. Sloan, F. W. Sloan and *J. B. Smith, contra.*

AMES, C.

This is an action to recover damages accruing, as it is alleged, from a negligently dangerous condition of a culvert for the passage of water at a street intersection in the defendant village. Paragraphs numbered 5, 6 and 7 of the petition are as follows: "(5) That on the 28th day of January, A. D. 1905, and for a long time prior to said date, there was and had been a culvert running east and west under the side-walk or crossing located on the north side of said South Depot street, where the same connects with said Exeter avenue; said culvert being made of lumber, which was rotted, and for many months prior to said 28th day of January, 1905, had, through gross negligence and want of care of the defendant, become filled with debris, until no water could pass through said culvert.

"(6) That previous to said 28th day of January, 1905, the defendant had caused some grading to be done at the intersection of said Exeter avenue and South Depot street, and immediately west of the crossing, as aforementioned, whereby a sag or basin was left, capable of holding a

large amount of surface water, and that on the said 28th day of January, 1905, the low place, sag, or basin had become filled with water, which said water had become frozen, said water not being able to escape because of the aforementioned condition of said culvert, and being lower and deeper than said culvert.

"(7) That on the morning of the said 28th day of January, 1905, a heavy snow commenced to fall, so that by two o'clock P. M. on said day nearly two inches of snow had covered all the streets in said village, including the location herein specified; that defendant had actual and constructive notice of the condition of said streets, the accumulation of water, its frozen and snow-covered condition and the stoppage of said culvert; and in not repairing said culvert, filling in said basin or sag, whereby said water could be carried off, and in not providing means to prevent or warn persons from passing or driving over said ice covered with snow, was guilty of gross negligence and carelessness."

The defendant attacked these paragraphs by a motion to make more definite and certain, as follows: "(1) To state in paragraph 5 of said petition where the water would go if said culvert therein described was not filled with debris, and whether there was any drainage possible therefrom, and whether said culvert would in proper condition convey water from or into the part of the street complained of, or whether it had any relation to the drainage thereof.

"(2) To state in paragraph 6 whether or not there was any drainage, natural or artificial, from the part of the street complained of, or whether such drainage was possible.

"(3) To state in paragraph 7 in what manner the defendant had notice, 'actual and constructive,' of the alleged defect in said street, and for how long prior to said accident."

The motion was sustained, and the plaintiff excepted. The court thereupon granted the plaintiff leave to file an

amended petition within 20 days, but it does not appear that such leave was granted at the request or instance of the plaintiff, who ignored it, and made no further appearance in the case. At a subsequent term the court, on motion, dismissed the action for want of compliance with the foregoing order of amendment, to which judgment the plaintiff excepted, and from which he appeals.

It appears to us that the petition is sufficient in those respects in which the court ordered its amendment. It alleged the ultimate facts, which is all that the rules of good pleading require or even permit. The motion called for the pleading of evidence, which, if it had been inserted in the first instance, might have been stricken out, on a motion for redundancy, as unnecessarily incumbering the record. Furthermore, it may have been extremely difficult, or even impossible, for the plaintiff to anticipate and allege with accuracy what evidence, in the respects named in the motion, would develop upon a trial, and, if a pleading of such evidence is requisite, a material variance is of necessity fatal. In other words, it appears to us that a compliance with the order of amendment, besides being uncalled for by the code of civil procedure, may have been, and probably was, practically impossible.

It is objected by appellee that the order of amendment was interlocutory only, and not final, and that such orders are not reviewable in this court. The objection is in its proper connection sound. The same may be said of orders sustaining or overruling demurrers, or admitting or rejecting evidence, and a variety of other orders occurring during the progress of a trial. But if such orders, or any of them, are erroneous, and are not corrected by the trial court, they inhere in the final judgment, which is reviewable, and infect it with their own vice, and if duly excepted to are sufficient reason for its reversal. In other words, if a plaintiff is denied an opportunity to prove his cause of action upon a sufficient pleading, it matters not whether such denial be upon motion or demurrer, he is entitled,

if he has not waived his right, to have an adverse judgment reviewed in this court.

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

OLDHAM and EPPERSON, 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.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND ET AL., APPELLANTS.

FILED JANUARY 17, 1907. No. 14,639.

1. **Cities:** IMPROVEMENTS: BENEFITS. Ordinarily the question whether property will be especially benefited by a street improvement is one of fact for the determination of a local board or officer making it, and, in the absence of fraud, mistake or a transgression of authority, such determination will not be reviewed by the courts.

2. ———: ASSESSMENTS. One whose property is not taken or damaged by a street improvement cannot defeat a special assessment for benefits accruing to his property from such improvement, on the sole ground that others, whose property has been taken or damaged thereby, have waived their right to compensation in money and have accepted something else in lieu thereof.

3. ———: IMPROVEMENTS: PETITION. An omission by a petitioner for a street improvement to note in the petition the date of his signature, as required by statute, will not have the effect to render the proceedings wholly void, and defeat an assessment for special benefits accruing from such improvement after the latter has been completed without objection by anybody.

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

G. W. Shields, for appellants.

John P. Breen, W. H. Herdman and *H. E. Burnam, contra.*

AMES, C.

This is an appeal by a lot owner in the city of Omaha from a decree of foreclosure, in an action under the so-called scavenger act, of liens of three several special assessments for local street improvements. There is no dispute relative to the facts.

One of the streets for the improvement of which an assessment complained of was levied is called "Central Boulevard," and the objection made is that there were and are between it and the property assessed "certain other streets and alleys (neither the record nor briefs of counsel inform us how many) opened and in use as public highways," and it is contended that, therefore, the improvement of the boulevard was not and could not have been a particular benefit, although it may have been a general one, to the property in question, for the making of which a special assessment was or could have been lawfully made. It is manifest that from so vague a statement one not familiar with the locality, and with the character and situation of the property, and of its surroundings and accessibility, can form no intelligible opinion as to whether it was at all, or, if at all, to what degree or amount, especially benefited by the improvement in question. Ordinarily such inquiries are questions of fact for the determination of some local board or officer making them, and, in the absence of fraud, mistake or transgression of authority, such determination will not be reviewed by the courts. *Hart v. City of Omaha,* 74 Neb. 836.

Another of the cases complained of is an instance in which the city appropriated certain lands for the establishment and opening of a public street, and levied against a lot belonging to appellant the sum of $7 as the assess-

ment for special benefits accruing to it from the operation. It is alleged against this transaction that property owners to whom were awarded damages for the taking of or injury to their property waived their right under the statute to be paid the same in money and accepted city warrants in lieu thereof. How such conduct injuriously affected appellant, whose property was not taken or damaged, or in what manner it affected the validity of an assessment previously lawfully made, or defeated or diminished special benefits accruing to appellant's ground from the opening and improvement of the street, has not been explained to us, and we do not know.

A third instance is one of repavement of a certain street. There was exactly the requisite number of signers upon a petition conferring jurisdiction upon the mayor and council to make the improvement, and it is not complained that the procedure was in any respect unlawful or irregular, except that one signer owning property abutting for a distance of 101½ feet on the street improved did not attach to his signature the date of making it, as he was required by statute to do; but he is not the complaining party, nor does it appear that any one else has complained, except the appellant, who is not a petitioner. What the object of the legislature was in requiring the date to be noted we do not think it necessary now to inquire. We cannot see any reason to suppose that it was intended that so comparatively trivial an omission shall have the effect wholly to avoid the proceedings, and defeat assessments for the improvement after the latter has been completed without objection by anybody. We think the trial court was right in holding that in a suit of this kind the requirement will be held as directory only. Minor regulations of like kind are commonly so regarded, when objection to their omission is not seasonably taken, and it is not shown to have resulted injuriously to the public or individuals. *Hart v. City of Omaha,* 74 Neb. 836; 2 Lewis' Sutherland, Statutory Construction (2d ed.), sec. 611.

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

OLDHAM and EPPERSON, CC., concur.

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

AFFIRMED.

SARAH E. PATTERSON, APPELLEE, V. FIRST NATIONAL BANK OF HUMBOLDT, APPELLANT.

FILED JANUARY 17, 1907. No. 14,812.

1. **Contract:** CONSTRUCTION. "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Code, sec. 341.
2. **Instructions** examined, and *held* to have fairly submitted the issues to the jury under a correct view of the law.
3. **Evidence** *held* sufficient to support the verdict.

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

Francis Martin, Edwin Falloon and *Stewart & Munger,* for appellant.

J. H. Broady, contra.

AMES, C.

Mrs. Patterson was a creditor in the sum of $450 upon open deposit or check account of the defendant bank. She desired to convert this credit into a time deposit or loan bearing interest. She made her wish known to Liggett, the cashier of the bank, who informed her that the institution would pay her only 4 per cent. interest on a time deposit, but that perhaps private parties would pay her more; but she objected to lending to private

parties, and, at his suggestion, she said she would see Mr. Samuelson, the president of the bank. She did see him, and have some talk with him, the exact purport of which is in dispute, but as a result of it he accepted her check for the money, and delivered to her husband for her a paper, of which the following is a copy: "F. W. Samuelson. Loans. Humboldt, Neb., Jan. 4, 1902. Pay to the order of Mrs. Sarah E. Patterson ($450) four hundred fifty and no-100 dollars. 12 mos. at 5 per cent. interest. To the First National Bank, Humboldt, Neb. F. W. Samuelson." After this transaction had taken place, Mrs. Patterson's account on the books was charged with the amount of her check, and the same sum was credited to the account of Samuelson. At the expiration of one year from the date of the instrument above copied, namely, on January 5, 1903, it was surrendered by Mrs. Patterson, and a new document of exactly the same tenor, except as to date, delivered to her in its stead by Samuelson, who at the same time gave her his personal check on the bank for the then accrued interest $22.50, of which she received $10 in cash and deposited the residue upon her open account. Samuelson subsequently became insolvent. This is a suit on the open deposit or check account for the remainder due thereon, ignoring the transaction with Samuelson. The answer admits the indebtedness, but pleads payment by means of the circumstances above recited. The reply admits the happening of the transaction, but impeaches it for misrepresentation and fraud, averring that the plaintiff was led by the bank officials to believe, and that she did believe at all times until after the Samuelson failure, that she had dealt with him in his official capacity as a representative of the bank, and not in his individual or personal character, and that she had also at all times, relying upon the representation and circumstances aforesaid, supposed and believed that the documents he had given her were the obligations of the bank and in substitution, merely, for its obligation to the same amount upon the open account. Both the plain-

tiff and her husband were persons advanced in years, and of foreign birth, and farmers by occupation, and but little capable of speaking or understanding the English language and having but little knowledge of banking or business transactions, all which circumstances were known to the bank and to Samuelson. It seems to us that the issue was purely one of fact, and very plain and extremely simple. The bank officials were under obligation to treat the plaintiff with the uttermost fairness and candor. If the conversations and circumstances were such as to fully inform her, or such as, in view of her known mental capacity and knowledge of affairs, justified the bank officials in believing, and they did in consequence thereof honestly and in good faith believe, that she knew and intended that the effect of the transaction was to substitute the personal obligation of the president of the bank for that of the institution, then the defense of payment is made out, but as to all these matters the burden of establishing them by a preponderance of the evidence is upon the defendant.

The foregoing, we think, is a fairly accurate, practical application of the abstract rule enacted by section 341 of the code, which is: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." If, therefore, Mrs. Patterson understood, and the bank officially had reason to suppose that she understood, that Samuelson, who was the president of the bank, was acting on its behalf in executing and delivering to her a document by which he directed the bank to pay her at a time certain a specified sum of money, the institution is bound by that understanding, and it is not inevitable that either party shall be convicted or accused of active or deliberate fraud. Upon a trial there was a verdict and judgment for the plaintiff, from which the defendant has appealed.

If the foregoing considerations are sound, the court did not err, as counsel for appellant contends that he did,

in permitting the plaintiff and her husband to testify what was their understanding and belief as to the effect of the transaction upon the obligation of the bank. Nor do we think that the court was guilty of reversible abuse of discretion in sustaining an objection to an inquiry upon the cross-examination of the plaintiff as to what she would have done, or whom she would have sued if Samuelson had remained solvent and the bank had failed. The question was directed to a conjectural course of conduct consequent upon supposed events that did not happen, and, at the most, had no bearing except upon the credibility of the witness. A contrary ruling would perhaps not have been erroneous, but it does not follow that the one made was so.

Error is assigned for the giving and refusal of a large number of instructions and proposed instructions. It would extend this opinion to an undue length to discuss them in detail, nor do we think that such a course would be profitable. Considering them as a whole, we are satisfied that the issues were fairly stated to the jury and submitted to them under a correct view of the law, and that there is sufficient evidence to support their verdict.

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

OLDHAM and EPPERSON, 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.

GERMER STOVE COMPANY, APPELLANT, V. HAWS HARDWARE & FURNITURE COMPANY, APPELLEE.

FILED JANUARY 17, 1907. No. 14,634.

Evidence examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

G. L. Godfrey, for appellant.

M. D. King, contra.

OLDHAM, C.

This was an action by the plaintiff, Germer Stove Company, against the defendant, Haws Hardware & Furniture Company, for the remainder due on goods sold and delivered. The defendant answered with a counterclaim for damages on a contract with the plaintiff for the purchase of a car-load of hard coal. The cause was originally instituted before a justice of the peace, where plaintiff had judgment for $10. On error taken to the district court by the plaintiff, this judgment was set aside, and on a trial of the issues to the court and a jury plaintiff had a verdict and judgment for $7.59. To reverse this judgment plaintiff appeals to this court.

The only error assigned in the brief relates to the sufficiency of the evidence to sustain the judgment on defendant's counterclaim. We have examined the testimony, and find that by correspondence between plaintiff's agent and the managing officer of the defendant, plaintiff offered to sell and deliver a car-load of hard coal to defendant for a sum named in the offer, and that this offer was accepted in writing by the defendant. The plaintiff was unable to comply with its contract and deliver the coal, because of its inability to procure the coal or have the same delivered to defendant without the written consent of defendant's

coal dealer. Under these circumstances the quantum of defendant's damage was a question of fact, which appears to have been properly submitted to the jury under evidence sufficient to support the amount found.

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

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

MINNEAPOLIS THRESHING MACHINE COMPANY, APPELLEE, V. HOWARD W. OTIS ET AL., APPELLANTS.

FILED JANUARY 17, 1907. No. 14,638.

Parol Evidence: FRAUD. The defense of fraud and want of consideration may be shown by parol, not to contradict or vary, but to destroy the legal and binding effect of a written contract.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Reversed.*

Allen & Reed, for appellants.

M. B. Foster, contra.

OLDHAM, C.

This was a suit on four promissory notes, given for the purchase of a threshing outfit. Defendants' answer admitted the execution of the notes, and pleaded rather voluminously a failure of consideration, breach of warranty, fraudulent misrepresentations inducing the purchase, and the statute of limitations. Plaintiff by way of reply alleged that the machines were purchased under the terms of two written contracts, which were incorporated in the

reply, and alleged payments on certain of the notes, which tolled the statute of limitations, and denied the other allegations of defendants' answer. At the trial of the cause plaintiff introduced its notes and rested, without offering any proof tending to show payments on two of the notes, which appeared upon their face to have been barred by the statute of limitations. When one of the defendants took the stand in their behalf, after a few preliminary questions had been propounded by their counsel, plaintiff's attorney, for the purpose of objecting to questions touching on the representations alleged to have been made by its agent to induce the purchase of the machines, was permitted to cross-examine the witness as to whether or not the contracts in writing pleaded in the reply had been entered into between the plaintiff and the defendants when the machines were purchased. The witness answered that he had signed such contracts. The court then excluded the testimony offered by defendants tending to show false representations relied upon as an inducement to sign the contracts, and also evidence tending to show deceit and fraud alleged to have been practiced by plaintiff's agent in procuring defendants' signatures to the contracts, as well as evidence offered tending to show an alleged failure of consideration. It then directed a verdict for defendants for the two notes, which appeared to have been barred by the statute of limitations, and a verdict for the plaintiff for the sum due on the other two notes, and entered judgment upon this verdict. To reverse this judgment defendants have appealed to this court.

The learned trial court appears to have proceeded on the theory that the evidence offered by defendants was for the purpose of contradicting or varying the terms of the written contracts pleaded in plaintiff's reply. If this had been the only purport of the testimony offered by defendants, the conclusion of the trial court would have been fully warranted. But, from an examination of the testimony offered and excluded, we are clearly of the opinion that its purport was not to contradict, but to destroy and

annul the effect of the written contracts relied upon by plaintiff. Under the provisions of our code, when new matter is pleaded in the reply, it may be controverted by the adverse party "as upon a direct denial or avoidance." Consequently, any testimony which would have the effect of avoiding these contracts was properly admissible under the provisions of the code. If the evidence offered had been admitted, and not denied by the plaintiff it would have destroyed the effect of the contracts relied on by the plaintiff, and would have shown that, while they appear to be legal and binding, in fact they were not, and never constituted a legal and binding obligation.

We are therefore of opinion that the trial court erred in excluding the testimony offered by the defendants, and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

PETER R. PETERSON, APPELLEE, V. GEORGE D. RAMSEY ET AL., APPELLANTS.

FILED JANUARY 17, 1907. No. 14,646.

1. **Estoppel.** A person claiming title derived under a decree of court will not be heard to dispute the authority of the attorney to enter into the stipulation upon which the decree was based.
2. **Quieting Title: MORTGAGES: LIMITATIONS: EQUITY.** Where the holder of a mortgage which is barred by the statute of limitations comes into court and asks for affirmative relief upon the mortgage, the court may, on proper proof, declare such mortgage barred by the statute, without requiring the holder of the legal title of the mortgaged premises to do equity by tendering payment of the amount due thereon.

3. **Specific Performance: SUBSEQUENT PURCHASER.** An action for the specific performance of a contract for the sale of real estate may be maintained against a subsequent purchaser, when he takes with notice of the contract; but, as against him, it is inequitable to require of him a higher deed of conveyance than the one by which he holds.

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

H. M. Sullivan, for appellants.

Beall & Shinn, contra.

OLDHAM, C.

In 1897 one C. W. Young was the owner of tax certificates issued against certain lands situated in Custer county, Nebraska. In July of that year he brought an action in the district court for said county to foreclose these tax certificates. This suit was prosecuted to final judgment and sale, and on April 5, 1902, a deed was executed to him as purchaser. Soon thereafter the land was sold to the plaintiff, Peterson, and a written contract was entered into by him with Frank H. Young, who represented the purchaser, C. W. Young, at the judicial sale. In July, 1903, Ramsey, who is made one of the defendants in this action, filed his petition in the district court for Custer county, the object and prayer of which were to set aside the judgment in the tax foreclosure proceedings and cancel the deed. In this action Peterson was made a defendant, and filed his answer, setting up his contract of purchase and the amount paid thereon. The defendants, Rublee and Morley, were also parties defendant, and filed their answer, setting up an ancient mortgage thereon, of which they alleged ownership. Before the trial of this action the plaintiff therein and the said Frank H. Young, for Charles W. Young, entered into the following stipulation: "Comes now the plaintiff, George D. Ramsey, and the defendant, Charles W. Young, and agree that judgment may be rendered for the plaintiff in this

action quieting title to said premises involved, to wit: The south half of the northeast quarter and the east half of the northwest quarter of section twenty-six (26) in township seventeen (17) north, range nineteen (19) west of the 6th P. M. That the said Ramsey is to pay all costs of said suit, and the said Young is to assign to said Ramsey a certain contract of purchase with one Peter Peterson, and the said Ramsey is to make and execute a new contract with said Peterson, identical in terms with the one now existing between him and the said Young. The said Young is to pay to the said Ramsey the sum of $200 received by him from said Peterson on said purchase contract. Geo. D. Ramsey, Ex., by his atty, H. M. Sullivan. Charles W. Young, by his atty, Alpha Morgan." It seems that this stipulation was acquiesced in by all the parties, as the $200 was paid to Ramsey's attorney, and he was allowed to take his decree accordingly, to which no one objected or excepted on the record. After obtaining the decree Ramsey, instead of complying with the terms of the stipulation and executing a new contract to Peterson, made and delivered to defendant Rublee a quitclaim deed to the lands.

This action was brought by Peterson for the specific performance of his contract of purchase of the lands in dispute, and in his petition he alleged his original contract with Young and the stipulation above set out, under which the title to the premises was quieted in Ramsey, and alleged that defendant Rublee had conspired with Ramsey for the purpose of cheating and defrauding plaintiff of his rights in the land, and in furtherance of such purpose had procured a quitclaim deed from Ramsey with full knowledge of plaintiff's rights therein. The petition prayed that the title be quieted in the plaintiff against Ramsey and Rublee and all others claiming under them, and for general equitable relief. Ramsey was served by publication, and did not answer. Rublee answered, setting up his title to the lands by purchase under his quitclaim deed from Ramsey, and also alleged his ownership of a certain

note secured by a mortgage on the lands, and prayed that, if the court found that he took no title by virtue of his quitclaim deed, his mortgage should be foreclosed. Plaintiff's reply was in the nature of a general denial. On issues thus joined there was a trial to the court, and judgment in favor of the plaintiff quieting his title to the premises on payment into court of the amount due under his contract of purchase. To reverse this judgment defendant Rublee has appealed to this court.

The first objection urged against this decree is that the stipulation under which the decree quieting title in Ramsey was procured was entered into without authority from Ramsey by his attorney, who is now attorney for Rublee, and as such urges this contention. As Rublee derives his title of ownership in the premises through a quitclaim deed from Ramsey, whose title rests on the decree procured by this stipulation, he cannot with one breath assert a title based on this decree, and with another deny the obligations of his grantor under the stipulation under which the decree was granted. Rublee's right, as a mortgagee, was in nowise affected by this stipulation, and the court denied him relief on his prayer for foreclosure, not because of the stipulation, but because the note and mortgage were each clearly barred by the statute of limitations.

It is next urged that, in any event, the decree is erroneous in quieting the title to the premises in Peterson as against Rublee's mortgage, even if the mortgage were barred by the statute of limitations, because, in order to obtain equitable relief against a mortgage barred by the statute, the party seeking such relief must do equity. There would be much force in this contention if it were not for the fact that defendant Rublee asked for affirmative relief in his answer on his note and mortgage by praying for a decree of foreclosure thereon, if the court should find the quitclaim deed from Ramsey insufficient to quiet title in him. Having thus asked for affirmative relief on his outlawed mortgage, and having thus voluntarily invoked judicial action on his rights under it, it was proper and

competent for the court to make a finding, under the evidence, that the mortgage was barred by the statute of limitations. While it was perhaps technically erroneous to direct that the mortgage be canceled and held for naught, yet such error was of slight prejudice to the appellant, and, were it not for another defect in the decree, we would hesitate to even modify it for this inaccuracy.

The other defect is that the decree directs that, on the payment into court of the money due on the contract, defendant Rublee execute a deed of general warranty to the premises to plaintiff Peterson. We think this part of the decree inequitable, in view of the fact that Rublee only holds the land by quitclaim deed from Ramsey. While it is true that, under the proof in the record, it is made clear and convincing that Rublee took this quitclaim deed with full knowledge of Peterson's rights in the premises under his contract with Young and under the stipulation, in furtherance of which the title was quieted in Ramsey, yet, as the deed which he took gave him no recourse upon Ramsey, we do not think the trial court was justified in compelling him to warrant the title to the lands to Peterson.

We therefore recommend that the decree of the district court be modified by a simple finding that the note and mortgage owned by defendant Rublee are barred by the statute of limitations, and by directing that Rublee execute a quitclaim deed, with covenants against his own acts or omissions, and not a deed of general warranty, to plaintiff Peterson, on payment by the latter of the amount due on his contract of purchase within the time specified in the decree, and that the judgment, as so modified, be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified by a finding that the note and mortgage owned by defendant

Rublee are barred by the statute of limitations, and by directing that Rublee convey the premises to plaintiff Peterson by quitclaim deed, with covenants against his own acts or omissions, on payment by the latter of the amount due on the contract of purchase within the time specified in the decree, and it is ordered that the judgment of the district court, as so modified, be affirmed.

AFFIRMED AS MODIFIED.

NELLIE L. WHITNEY, APPELLEE, V. GEORGE D. WHITNEY, APPELLANT.

FILED JANUARY 17, 1907. No. 14,503.

1. **Judgment:** RES JUDICATA. In an action for a divorce by a wife on the grounds of extreme cruelty and failure to support, the court will not consider evidence of the husband's alleged cruelty and failure to support prior to a judgment of dismissal in a former suit between the same parties based on the same grounds, when there was a trial on the merits and no appeal taken.
2. **Divorce:** EVIDENCE. Evidence examined, and *held* insufficient to sustain the allegations of extreme cruelty and failure to support.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed and dismissed.*

George W. Wiltse and *R. R. Dickson,* for appellant.

M. F. Harrington and *A. F. Mullen, contra.*

EPPERSON, C.

The plaintiff, Nellie L. Whitney, and the defendant, George D. Whitney, were married in Cedar county, this state, in 1886. They lived together happily until 1904, when Mrs. Whitney brought an action for divorce in the district court for Cedar county, alleging cruelty and failure to support. On November 15, 1904, a trial was had

on the merits, which resulted in a judgment for defendant. No appeal was taken, and the judgment dismissing plaintiff's action is in full force and effect. Shortly after the trial Mr. and Mrs. Whitney returned to their home and lived together until December 29, 1904, at which time the husband insisted that they occupy a common bed, and for this reason Mrs. Whitney left and has not since lived with defendant. Soon thereafter she went to Holt county, and consulted an attorney who advised her to move into that county. She arrived in Holt county January 17, 1905, and rented a house for three months, stating to the landlord that perhaps she would not want it longer than that time. Four days thereafter she brought this action in the district court for that county, again asking a divorce on the ground of defendant's extreme cruelty and failure to support, and was granted a decree, from which defendant appeals.

We entertain serious doubts concerning the good faith of plaintiff's residence in Holt county. It is clear that the sole purpose of her residence there was to institute divorce proceedings, and we are urged to condemn such conduct and reverse the decree for this reason. It does, indeed, seem to be taxing the courts to thus shift one's residence so soon after being denied relief in another jurisdiction, and applying again for a divorce on the same grounds. Were we required to determine the question of residence, we doubt very much whether we could sustain the jurisdiction of the court. However, a judicial pronouncement as to this question is unnecessary as the decision may be placed on other grounds. We therefore pass over this—defendant's first contention—and take up his insistence that the decree granting plaintiff a divorce is not sustained by the evidence. The discussion here proceeds under two heads:

1. Was it shown by a preponderance of the evidence that defendant had been guilty of extreme cruelty? The district court considered immaterial all evidence as to the conduct of the parties prior to November 15, 1904, the

date of the former decree, and based its judgment upon acts occurring subsequently thereto. Hence, the inquiry is: Has defendant been guilty of cruelty since November 15, 1904? Plaintiff testified, among other things, that her husband charged her with unchastity; that he called her a "damned fool," and told her that she was "crazy"; and that he offered their 13-year-old son money to watch her to see what fellows she met when she went up town. Plaintiff, in her zeal to secure a divorce, testified to other acts of cruelty unnecessary to describe in this opinion, but it is significant that she did not mention this alleged conduct on the first trial in Cedar county, and did not sustain a shock to her sensibilities or suffer injury to her health by its effect upon her feelings. In view of all the circumstances disclosed in the record, we do not feel justified in giving plaintiff's testimony the credence which otherwise we would be inclined to do. This court has adopted a liberal rule in divorce cases, and has construed the term "extreme cruelty" to mean "any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony." *Ellison v. Ellison,* 65 Neb. 412, and cases there cited. But we are of opinion that the rule announced in *Ellison v. Ellison* cannot be extended to the case at bar. The evidence before us utterly fails to show that defendant's conduct subsequently to November 15, 1904, so grievously wounded his wife's mental feelings, or so utterly destroyed her peace of mind, as to seriously impair her bodily health and endanger her life. Counsel do not point out, and upon examination of the record we are unable to find, evidence tending to show what effect defendant's alleged conduct subsequently to November 15, 1904, had upon plaintiff's mental feelings or her health. We therefore cannot say that plaintiff proved by a preponderance of

the evidence that defendant was guilty of extreme cruelty as defined by this court.

2. The most serious difference between these parties, and the real trouble in this home, is the controversy over family expenses. We find that the testimony on this subject has taken a wide range, and refers principally to alleged misconduct prior to the unappealed from decree of the district court for Cedar county denying plaintiff a divorce on the identical grounds here urged. We therefore do not place our decision upon evidence relating to transactions prior to November 15, 1904. What provision has defendant made for his family since that date? He possesses property (mostly farm land) worth $15,000 above incumbrances. His income is perhaps $700 or $800 a year. As required by the decree in the former divorce suit, he paid plaintiff $30 a month alimony until December 1, 1904. It therefore cannot be said that defendant failed to support his wife from November 15 to December 1, 1904. Defendant testified that he expended $75.20 for provisions from December 1 until his wife left him December 29. Mrs. Whitney testified: "When I went out to my daughter's to spend Christmas, he went and put in the biggest supply I ever knew to be in the house. * * * I wasn't there long enough to go through it all, I seen that there was a lot of things there that wasn't there when I went away. * * * There was more than I was used to, it shocked me with surprise." Counsel argue that defendant refused to pay plaintiff's bills, but the evidence discloses that the bills were contracted while defendant was paying plaintiff $30 a month alimony under decree of court. Dr. Kerley, a disinterested witness, was asked whether the Whitneys were as well situated as the average people in the village as to house, clothing and surroundings, and answered: "Well, as to that class of people, I should say, 'yes.'" We are convinced from a review of the evidence that plaintiff did not successfully carry the burden of proving that defendant subsequently to the former decree had "grossly or wantonly and cruelly

refused or neglected" to support her, within the meaning of section 5329, Ann. St. A few concessions by each party to this litigation would make possible the restoration of their home and the continuation of the marital relation as it existed for 18 years prior to their recent trouble.

We recommend that the judgment of the district court be reversed and plaintiff's 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 plaintiff's action dismissed.

REVERSED AND DISMISSED.

BEE PUBLISHING COMPANY, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED JANUARY 17, 1907. No. 14,562.

1. **Taxation**: FORECLOSURE: PUBLICATION OF NOTICE. Upon the filing of a petition for the foreclosure of taxes under the provisions of article IX, ch. 77, Comp. St. 1905, the county treasurer has authority to designate a paper for the publication of the notice of the pendency of the action if the county commissioners have failed so to do.
2. ———: PUBLICATION OF NOTICE: COMPENSATION. As compensation for publishing such notice the printer is entitled to receive the sum of $1 for each square of 10 lines for the first insertion, and 50 cents a square for each subsequent insertion, including matters of description.

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

W. J. Connell, for appellant.

W. W. Slabaugh and *E. W. Simeral, contra.*

EPPERSON, C.

In 1904 the county treasurer of Douglas county instituted an action under the provisions of article IX, ch. 77, Comp. St. 1905 (the scavenger law), to foreclose all delinquent taxes in that county. The petition was filed on July 1, and on the morning of July 2 the treasurer designated the Omaha Evening Bee as the paper in which the notice of the suit and list of lands involved should be published. The same were published in the paper designated, and the publisher, the appellant herein, filed its claim for printer's fees with the county board. From the decision of the board an appeal was taken to the district court for Douglas county. Before the county board, and also in the district court, appellant contended that it was entitled to compensation for the publishing of the notice and list of lands at the rate of $1 a square for the first publication, and 50 cents a square for each subsequent publication. The intervener, the World Publishing Company, contended that the county was not liable in any amount, for the reason that appellant's paper was not legally designated for the publication of the notice and tax list. The law directs that the petition in the foreclosure case shall be filed after June 1, and on or before the 1st day of July. Comp. St. ch. 77, art. IX, secs. 5, 6. Section 7, among other things, contains the following: "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 petition was filed on July 1, the last day provided by statute. Early the next day, as shown by the evidence, the county treasurer made inquiry of the proper officer to ascertain whether or not the county commissioners had designated a paper for the publication of the notice. He received accurate information that the commissioners had made no

designation. Thereupon he designated appellant's paper, and provided for the publication of the notice therein, and so notified the county commissioners. The commissioners, undoubtedly believing that this duty still rested upon them, and not content with the selection of the county treasurer, designated the intervener's paper.

1. Intervener contends that the designation was not legal and that appellant's claim for compensation cannot legally be allowed in any sum. The authority of the county treasurer to designate depended upon the failure of the county commissioners to do so. The statute does not fix a limit within which they shall designate the paper. According to the provisions of section 7 above quoted the county treasurer had the legal right, and it became his duty, to designate the paper whenever the time came to place the notice with the publisher and the county commissioners had failed to act. The petition might have been filed at any time after June 1. The designation by the county board could have been at any time in June, or even prior thereto. The county treasurer, in the case at bar, waited until the last day provided by statute for the filing of the petition. Still the board had not acted. Thereupon he handed the notice and tax list to appellant. Section 7, *supra,* requires the county treasurer to cause the notice to be published within 10 days after the filing of the petition. In view of the time required by the printers to prepare the notice for publication, it was necessary, as shown by the proof, that the manuscript reach the publishers as soon as possible after the filing of the petition. The county treasurer was not required to wait longer. It was his duty to designate a paper and his privilege to favor the Omaha Evening Bee. But the intervener argues that he was hasty in not waiting still longer for the county board to act, and cites section 45, art. IX, ch. 77, Comp. St. 1905, which provides that a substantial compliance with the act on the part of the officers is sufficient, and that no variation in the time and manner of performing such act shall be deemed or held to be jurisdictional; that

when such acts cannot be reasonably performed within the times permitted, additional time may be given without notice by proper order of the court. It will be observed that the statute provides for additional time only when the acts required cannot reasonably be performed within the time therein designated. It is apparent that the foreclosure case could reasonably have been filed within the time provided by law, for it was so filed; and to hold that the designation of a paper could not, prior thereto, reasonably have been made, when the county board was in session on June 30, is ridiculous. Under such a showing no court would have allowed additional time for the filing of the petition, or designating the newspaper in which the notice thereof should be published. It is unnecessary, however, to pursue this matter further, because in *State v. Fink*, 73 Neb. 360, the notice in question was upheld, and we are of opinion that the designation of appellant's paper was legal and proper, and the publication was in all respects valid.

2. The county, by its answer in the district court, denied that the appellant was entitled to the amount of compensation claimed by its petition, and that question was thus put in issue. Section 17, ch. 28, Comp. St. 1905, provides that the compensation for printing and publishing legal advertisements in newspapers shall be for each square of 10 lines the sum of $1 for the first insertion, and for each subsequent insertion 50 cents. It is also provided in the latter part of said section that the compensation for publishing the list of lands upon which taxes are delinquent shall be for each description 20 cents; for publishing the list of town lots upon which taxes are delinquent, for each description 10 cents. Appellant contends that the first provision of the section, instead of the last, determines the amount it is entitled to recover in this action, while the county insists that the compensation is fixed by the clause of the statute last above quoted.

It will be observed that the publication in question is a notice to defendants in a suit or proceeding actually com-

menced and pending in the district court for Douglas county. By the statute this notice is required to be published four times, instead of three, the number of publications required in publishing a delinquent tax list under the general revenue law. It is also provided that the notice must contain the names of the owners of the land and town lots against which foreclosure is sought, opposite each description thereof; while in publishing the delinquent tax list under the general revenue law nothing but descriptions are required. It is further provided that all errors made in the scavenger tax law publication are at the loss of the publishers. Again, under this law the sum of $1 for each description is added to the amount of the tax and interest, whereas the general revenue law for the publication of notices of sale of lands for delinquent taxes specifically provides that there shall be added to each description of farm land the sum of 20 cents, and to each description of city property the sum of 10 cents, to defray the cost of such publication. So we are of opinion that, by adding the sum of $1 to each description contained in the foreclosure petition, the legislature intended to provide for the payment of the costs of such foreclosure, including the publication of the required legal notices at the rates fixed by law therefor.

In an action to foreclose a mortgage it is not only proper, but necessary, to include in the summons by publication a description of the land and lots covered by such mortgage; and it has never been suggested that the fees for publishing such a notice should not be computed on the basis of $1 for each square of 10 lines for the first publication, and 50 cents for each publication thereafter, because such notice contained a description of the real estate upon which the mortgage was a lien. It is necessary to the validity of a mortgage foreclosure that the notice shall contain a description of the mortgaged property, and it would seem to be equally necessary that the notice of the pendency of the scavenger tax suit should, even in the absence of statutory provision, contain a de-

scription of each tract of land against which a foreclosure of the tax lien is sought. It would be just as reasonable to hold in one case as in the other that the compensation for matters of description should bear a different rate than the compensation for other parts of the notice. So we are of opinion that the fees for the publication of the notice in question should be determined and computed according to the provisions of the first subdivision of section 17, as above quoted.

It appears that the trial court allowed the appellant $1 a square for the first publication, and 50 cents additional for each of the three subsequent publications, of that part of the notice exclusive of the descriptions, and 20 cents for each description of farm land, and 10 cents for each description of city property, with interest thereon from January 4, 1905, the day that the claim was filed with the county board, to the date of judgment, and instructed the jury to return a verdict accordingly. In thus fixing the compensation to which the appellant was entitled, the trial court erred. The jury should have been instructed to make the computation at the rate of $1 a square for the first publication, and 50 cents additional for each of the three subsequent publications, including the descriptions of farm land and city property contained in said notice. It will be observed that no issue of fact was presented to the trial court for determination, and a verdict should have been directed for the amount ascertained in the manner above stated.

We therefore recommend that the judgment of the district court, in so far as it erroneously fixed the amount of appellant's compensation, be reversed; that in all other things the said judgment be affirmed, and that a mandate issue to that court directing it to compute the amount due the appellant in accordance with the rule announced in this opinion, and enter judgment therefor accordingly.

AMES and OLDHAM, CC., concur.

By the Court: For the foregoing reasons, the judgment

of the district court, in so far as it fixes the amount of the publication fees in question, is reversed, but in all other things said judgment is affirmed; and it is ordered that a mandate issue directing the district court of Douglas county to compute appellant's compensation for publishing the notice in question herein according to the rule announced in this opinion, and to enter judgment for the appellant for the amount so ascertained.

JUDGMENT ACCORDINGLY.

OTILA PRUSA ET AL., APPELLANTS, V. FRANK J. EVERETT ET AL., APPELLEES.*

FILED JANUARY 17, 1907. No. 14,630.

Executors and Administrators: SUIT BY HEIRS. A suit in equity, brought to recover money due an estate of a deceased person alleged to be held in trust by defendants, cannot be maintained by the heirs or devisees before the administration of the estate is terminated in the county court.

APPEAL from the district court for Colfax county: JAMES G. REEDER, JUDGE. *Affirmed.*

James A. Grimison, for appellants.

Martin & Ayers, contra.

EPPERSON, C.

The plaintiffs, as heirs at law and devisees of Anton Prusa, by their guardian, brought this action in the district court for Colfax county against the defendants, attorneys representing the estate of said Anton Prusa, for an accounting and for a certain sum of money alleged to be held by defendants for said estate and for plaintiffs as beneficiaries under the will of the deceased. All debts of the estate have been paid, but the administrator *de bonis*

* Rehearing allowed. See opinion, p. 251, *post.*

non has not rendered his final account in the county court. The administrator *de bonis non* refused to bring an action against defendants for the sum herein sued for by the plaintiffs.

The district court sustained a demurrer to the petition, and the sole question for determination on this appeal is whether heirs or devisees can maintain an equitable action to recover assets, which would increase the value of the estate, while the estate is in process of administration in the county court. We consider this question answered in the negative by this court in *Cox v. Yeazel,* 49 Neb. 343, where it was held that an action cannot be maintained by the heirs at law to recover a debt payable to an intestate unless there be no demands against the deceased ancestor and there has been no administration, or the administration has been closed. We are cited to no authority, and we have been unable to find one, holding a different rule in actions in equity. We find no occasion to depart from the rule of *Cox v. Yeazel, supra,* in actions in equity to recover money held in trust for the estate. The petition seems to state a cause of action in favor of the estate, and the administrator *de bonis non* will no doubt protect the interests he represents.

We think the judgment of the district court should be affirmed, and so recommend.

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 rehearing was filed October 16, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Administrator De Bonis Non.** The term "administrator *de bonis non*," used in reference to the administration of estates by the courts of this state, means an administrator who has been ap-

pointed in the place of a former administrator or executor who has ceased to be such after partial administration of the estate.

2. ———: POWERS. The administrator *de bonis non* has all the powers of his predecessor, and may sue to recover funds in the hands of agents employed by his predecessor.

3. **Executors and Administrators: SUIT BY HEIRS.** When all the debts and charges against an estate of a decedent have been paid, nothing remaining but the formal statutory proceedings to settle the estate, and the administrator *de bonis non* refuses to bring an action to recover assets of the estate, the only heir at law and beneficiary under the will may maintain such action in equity, making the administrator *de bonis non* a party.

4. **Case Distinguished.** *Cox v. Yeazel*, 49 Neb. 343, distinguished, and our former opinion, *ante*, p. 250, vacated.

EPPERSON, C.

We were wrong in our former opinion, *ante*, p. 250, in holding that this case was ruled by *Cox v. Yeazel*, 49 Neb. 343.

The plaintiffs are the only heirs at law and beneficiaries under the will of Anton Prusa, deceased, and by their guardian bring this action, alleging, in substance, that Mary M. Prusa, executrix of the estate of said Anton Prusa, deceased, employed the defendants herein as attorneys at law in all matters pertaining to the settlement of the estate; that pursuant to an order of the county court procured upon the application of the executrix, assisted by the defendants herein as attorneys and counselors at law, the executrix offered for sale at public auction to the highest bidder three promissory notes for $1,000 each, given to the testator by Joseph Prusa, and sold the same to the defendants herein for $1,025. Soon after the sale of said notes the executrix died, and an administrator *de bonis non* was appointed. Defendants paid to him $1,025, the amount bid for said notes, and thereafter presented them to the legal representatives of Joseph Prusa, deceased, and received therefor the sum of $2,600. It was alleged that the proceedings resulting in a sale of the notes were had at the solicitation and request of the

defendants, with the fraudulent intent of becoming themselves the purchasers, and that the executrix was so debilitated physically and mentally by long continued illness that she was wholly incapable of transacting business, but trusted to the fidelity and skill of her said attorneys. It is further alleged that all debts and charges of every kind and nature against the estate of Anton Prusa have been paid, and that the administrator *de bonis non* has refused and neglected to prosecute any action to recover the trust funds alleged to have been owing by defendants. The administrator *de bonis non* was made a party defendant. Plaintiffs pray for a decree declaring the fund to be a trust fund, for an accounting, and for a judgment for the amount found due.

It is contended by plaintiffs that the administrator *de bonis non* could not maintain a suit against the defendants upon the cause of action alleged, and that the beneficiaries under the will are the only persons who have a litigable interest—citing, in support of their contention, *Beall v. New Mexico,* 16 Wall. (U. S.) 535; *United States v. Walker,* 109 U. S. 258; *Wilson v. Arrick,* 112 U. S. 83. These cases, and many others, are to the effect that the administrator *de bonis non* is empowered to administer only the things not administered by his predecessor; that upon a conversion of the personalty it becomes administered, and the right to sue for such conversion does not rest in the administrator *de bonis non.* Authority is given to the administrator *de bonis non* to administer only the goods, chattels and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former administrator or executor as such and kept by itself will pass to the administrator *de bonis non* as a part of the estate of the deceased, but if mixed with the former representative's own funds, it is considered as administered. Such is the common law rule, and prevails in jurisdictions where a different rule has not been established by legislative enactment. See *Hodge*

v. Hodge, 90 Me. 505, 40 L. R. A. 33, and note. The same reasoning would apply to goods and chattels or credits converted by an agent of the former representative. In fact, such is the reasoning in *Wilson v. Arrick, supra,* and such is the contention of plaintiffs herein.

No fraud on the part of the executrix is alleged, but instead the existence of a trust fund in the hands of the defendants. Section 5027, Ann. St., provides: "The word 'executor' in this chapter shall be construed to include the administrator with the will annexed." Section 5034 declares that such administrator shall give bonds in the same manner and with the same condition as is required of an executor, and shall proceed in all things to execute the trust in the same manner that an executor would be required to do. Section 5029 provides, among other things, that the executor is "to administer according to law and to the will of the testator all his goods, chattels, rights, credits and estate which shall at any time come to his possession, or to the possession of any other person for him, and out of the same to pay and discharge all debts, legacies, and charges chargeable on the same." Section 5051 provides: "When any such executor or administrator shall die without having fully administered the estate, the probate court may grant letters of administration with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased not already administered." Section 5067 gives to the executor the right to the possession of the personal property of the deceased. It will be observed that nowhere in our statutes appears the term "administrator *de bonis non.*" This expression is frequently used by the courts and by attorneys with reference to an administrator appointed in the place of a former administrator or executor. See *Ellyson v. Lord,* 124 Ia. 125. Such an appointee receives his authority from the statutes and looks to the same to ascertain his duties. His power is greater than that implied by the term "administrator *de bonis non*" at common law. The

petition herein refers to the subsequently appointed administrator as an administrator *de bonis non.* We must construe this to mean the appointment of an administrator having all the powers and duties which our statute vests in an administrator appointed to succeed the executrix. And such includes the power and duty to take up the administration and settlement of the estate and prosecute the same to the same extent as the executrix would in law have been required to do had she lived and continued in office.

The petition herein shows that at the death of the executrix the notes had been sold, but the defendants had not paid the alleged purchase price to her. Afterwards they paid that amount to the administrator *de bonis non.* Defendants did not collect the $2,600 upon the notes until after the appointment of the administrator *de bonis non.* The cause of action alleged arose in favor of the estate against the defendants when they collected the $2,600, and not before; and it was the duty of the defendants to account to the legal representatives of the deceased, the administrator *de bonis non,* for the fund which they collected in their fiduciary relation with the estate. They were the attorneys for the estate employed by the executrix. Whatever they did by virtue of that employment was for the benefit of the estate. In *Ellyson v. Lord, supra,* the court, construing statutes similar to ours above cited, held: "An administrator *de bonis non* has all the powers of his predecessor, and is entitled to receive from him all the assets of the estate held by him as executor or administrator." (99 N. W. 582.) The administrator *de bonis non* could maintain an action against the defendants herein, but it is alleged that he refused to do so.

The debts against the estate have been paid. Plaintiffs are the only beneficiaries under the will of the deceasd and the only persons having an interest in the subject matter of this litigation. Because of these facts, and because the administrator *de bonis non* refused to bring this action, plaintiffs contend that they have a right to

sue. In *Cox v. Yeazel,* 49 Neb. 343, it was held: "Generally, an action to recover a debt payable to a deceased intestate must be brought by the administrator of the estate. Such an action cannot be maintained by the heirs at law, unless there be no demands against their decedent ancestor and there has been no administration, or the administration has been closed." The above is the general rule, but upon a further consideration of this case we have reached the conclusion that it should not be followed here. In *Cox v. Yeazel* the heirs filed a claim against the estate of their ancestor's debtor. They did not make their ancestor's legal representative a party. The estate had been declared insolvent. It was not alleged that the costs of administration had been paid. It does not appear that the administrator *de bonis non* ever refused to bring the action. Nothing appears in *Cox v. Yeazel* which would remove it from the operation of the general rule. But, where the administrator refuses to bring an action, must the heirs or legatees first cause his removal and the appointment of one who will proceed with the litigation? Perhaps the order of removal would be appealed from, and there would be long and vexatious delay. Must the heirs look to the administrator and his bondsmen to recompense them for the damage done by his refusal? We think not. Justice should be administered quickly, and, where it is possible for the courts to grant a hearing to one alleging a cause of action, the hearing should be had, though by delay the same relief might be granted in some other way. Again, the administrator may honestly believe that no cause of action exists in favor of the estate which he should prosecute. And upon a hearing before the county judge to remove him, that court may not think there is sufficient ground to justify removal. Should plaintiffs herein be denied a hearing upon their alleged cause of action because of these facts, and perhaps be required to delay the prosecution of the same until an appeal is litigated through the higher courts? Perhaps if another should be appointed he too might refuse to

sue. We can plainly see that after preliminary litigation which itself might be protracted, and after long and vexatious delay, the administrator or his successor might be compelled to institute an action. If so, the action would be instituted in the district court. But why should there be required this delay? The defendants are not injured. There is no danger of a second suit. The administrator *de bonis non* is made a party defendant to this suit, and will be barred by the judgment herein, if one is obtained. Neither himself nor the estate will be permitted to recover, if recovery be had herein. In *Moore v. Waldstein,* 74 Ark. 273, 85 S. W. 416, it was held that, under a statute providing that the executor or administrator may sue in chancery to set aside a transfer for the benefit of the heirs at law, if the administrator refused to sue, the heirs at law could bring the action. In *Randel v. Dyett,* 38 Hun (N. Y.), 347, a case instituted by an heir, the court having under consideration a transfer by the legal representative alleged to have been fraudulently made said: "The person, however, who represents the estate will not defend it. He will not bring an action to set aside the transfer made by himself under these circumstances. To meet this state of facts it is an acknowledged principle in our law that when a person whose duty it is to act refuses, a party injured by the refusal may act in behalf of the injured estate." In *Bem v. Shoemaker,* 10 S. Dak., 453, 74 N. W. 239, it was held: "On the refusal of the administrator to bring an action for the recovery of lands alleged to belong to the estate, the heirs may bring such action." In the opinion it is said: "In none of the cases is the remedy proposed by the learned counsel for appellants, namely, application to the probate court for a removal of the administrator, and the appointment of another in his place, suggested or referred to by the court, but the decisions are placed upon the broad ground that, when a party whose duty it is to protect the interests of the estate refuses so to do the party beneficially interested may take the necessary proceedings to so protect it. It will thus

be seen that the court, in holding that the heirs of the estate, after the refusal of the administrator to act, could maintain the action, announced no new doctrine, and established no new theory, but simply followed in the line of the adjudicated cases." See, also, *Long v. Majestre,* 1 Johns. Ch. (N. Y.) 305; *Hagan v. Walker,* 14 How. (N. Y.) 28; *VanDyke v. VanDyke,* 31 N. J. Eq. 176; *Bate v. Graham,* 11 N. Y. 237. This court in *Cox v. Yeazel, supra,* recognized this rule. In the opinion we find the following: "Where there are no liabilities or debts against the estate of an intestate, there is no necessity for increasing the expense of administration, and in such case the heirs may maintain an action to recover a debt owing the estate." In *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709, this court, while recognizing the general rule as announced in *Cox v. Yeazel, supra,* recognized, also, exceptions to the rule, and held "that the order of the trial court, substituting an heir at law and permitting her to prosecute the action for her interest in the claim in controversy in her own name, the other heirs having settled and compromised theirs, was not erroneous." It is true the conclusion there reached was based in part upon the doctrine of estoppel, but another reason is also expressed in the opinion as follows: "We may presume, in the absence of this evidence, that it was shown that the estate was settled up, or so far that all necessary arrangements had been made for the satisfaction of all claims against the estate and the costs of administration, leaving the subject of the present controversy purely one affecting the rights and interests only of the heirs at law."

From the petition herein it appears that there are no outstanding claims against the estate; that the interests of all concerned have been settled; that the beneficiaries under the will are the only persons interested; that but for the claim alleged to be due from the defendants nothing remains but the statutory and formal proceedings to settle the estate. Personally the administrator *de bonis non* has no interest in this claim. Were he to sue, it would

be solely for the benefit of the plaintiffs herein. Under these circumstances, we think this case is not within the rule of *Cox v. Yeazel, supra,* but that a court of equity should entertain the action.

We therefore recommend that our former opinion be vacated, and the judgment of the district court reversed and the cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

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

REVERSED.

WILLIAM B. BISHOP, APPELLANT, V. JAMES H. FULLER, TREASURER, ET AL., APPELLEES.

FILED JANUARY 17, 1907. No. 14,644.

1. **Schools:** OFFICERS DE FACTO. If, pursuant to an opinion of the state superintendent of public instruction, one of two contestants for the office of school director assumes the duties of the office and acts as such officer, he is while so acting a *de facto* officer of the district.
2. **Corporations:** CONTRACTS: RATIFICATION. It is a general rule that corporate authority may ratify any act or contract made in its behalf which it might have lawfully done or made originally.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

E. O. Kretsinger, for appellant.

Rinaker & Bibb and *H. E. Sackett, contra.*

EPPERSON, C.

Plaintiff Bishop, as a resident and taxpayer, brought this action in the district court for Gage county to enjoin

Fuller, the treasurer of school district 29, from paying two school warrants, one for attorney fees in the sum of $163.81, and the other for $56.35 court costs. A temporary injunction was issued, and, upon Fuller's refusal to defend, Babcock, Sackett & Spafford, attorneys at law, and H. B. Smith, moderator of the district, were permitted to intervene. Upon final hearing the temporary injunction was dissolved and judgment entered for interveners for costs. Plaintiff appeals.

It appears from the record that in June, 1902, Bishop received a plurality of the votes cast for director. Afterwards it was contended by Smith that Bishop, not having received a majority of all votes cast, was not duly elected. Within a few days after the election the matter was submitted to the state superintendent of public instruction, who ruled that Bishop was not elected, and advised a special election to elect a director. A special meeting was called in September, 1902, at which McIntosh was declared elected director and entered upon the discharge of the duties of the office. Bishop and the treasurer of the district refused to recognize McIntosh, and the moderator, Smith, refused to sign orders bearing Bishop's signature as director. Thereupon Bishop secured writs of mandamus and compelled Smith to sign the orders. Finally Bishop brought quo warranto proceedings, and on February 9, 1903, secured a judgment against McIntosh ousting him from the office of director. The mandamus suits were instituted and disposed of subsequently to the election of McIntosh as director and prior to the judgment ousting him from office. Attorneys Babcock, Sackett & Spafford appeared and resisted the suits instituted by Bishop. Thereafter their attorney fees and the costs expended by Smith were allowed by a majority of the school board and the warrants in question drawn in payment thereof. Smith, as moderator, and McIntosh, claiming to act as director, attempted to control the affairs of the district during the time in controversy. Fuller was considered by them the duly elected treasurer, but he did

not participate in their official acts because he did not recognize the latter as director, and refused to cooperate with him in anything pertaining to the affairs of the district. Smith, with the consent of McIntosh, and in a few instances with his actual participation, employed the firm of attorneys to advise and assist him in the several actions instituted. The attorneys considered the litigation that of the district, and made their charges against the district, and not against Smith individually. Plaintiff contends that McIntosh was not director, and that he and the moderator could not bind the school district, and that to bind the district the contract employing attorneys should have been made by the treasurer under the provisions of section 11062, Ann. St.

The question first arising is: Who was the director from September, 1902, when McIntosh was elected, to February, 1903, when he was ousted from office. By the judgment of ouster the court found that Bishop was elected in June, 1902. It was therefore established that there was in fact no vacancy in the office when McIntosh was elected. His election would have been void had it not been for the decision of the state superintendent in June, 1902, to the effect that Bishop was not the director. Section 11128, Ann. St., provides: "He (the state superintendent) shall decide disputed points in school law, and all such decisions shall be held to have the force of law until reversed by the court." The legality of Bishop's election was a disputed question, and under the opinion of the state superintendent McIntosh assumed the duties of the office. He was by reason of his election at the special meeting, and acting as director thereafter, a *de facto* officer of the district. As the treasurer refused to recognize his authority, we think there is no doubt that he and moderator Smith, being a majority of the board, could bind the school district by contract.

Section 11062, Ann. St., provides: "It shall also be the duty of the treasurer to appear for and on behalf of the district in all suits brought by or against the same, when-

ever no other directions shall be given by the qualified voters in the district meeting, except in suits in which he is interested adversely to the district; and in all such cases the director shall appear for such district, if no other directions shall be given as aforesaid." Plaintiff argues that by reason of the statute no one other than the school treasurer had authority to bind the district to pay the expenses involved, no other directions having been given by the electors. The suits in question were not brought in the name of the district, nor was the district a party defendant. The nature of the actions would not permit it. But it does not follow that the district was not interested. The above statute is not broad enough to require the treasurer to control the prosecution or defense of suits by or against school district officers suing or sued in their official capacity where the district is not named as a party. The general duties of such officers require them to look after the interests of the district, and they should defend suits if it appears that the interests of the district demand it. Plaintiff cites *People v. Peters,* 4 Neb. 254, where it was held: "The action of a majority of a school district board will not bind the district, without notice to or participation therein of the other members." It is true Treasurer Fuller was not notified of the proceedings had by the moderator and director; but throughout the entire period of contention he refused to recognize McIntosh as director. He never entered upon the administrative duties of his office, but instead treated Mr. Bishop as director, who as above shown was not such officer. On account of his attitude the business was necessarily conducted by the other members of the board, and we doubt very much that the rule in *People v. Peters, supra,* is applicable. We consider it unnecessary to distinguish that case here, for the reason that after all litigation had ceased the school board, with a full attendance, by a majority vote, ratified the contracts made by Smith and McIntosh by allowing the claims the payment of which plaintiff seeks to enjoin. In *Saline County v. Gage County,* 66 Neb. 844, it was

said: "It is a rule subject to few, if any, exceptions, that a corporate authority may ratify and confirm any act or contract in its behalf or for its benefit which it might have lawfully done or made originally. We do not think that this case furnishes an exceptional instance. When, therefore, the county board of Gage county, in good faith and in the exercise of its corporate powers, allowed the claim in controversy, it cured any informality or insufficiency in the contract for the building of the bridge, as effectually as though a formal and express ratification of it had been made before the work was begun."

It also appears that at the school meeting following, the same items of expenditure were reported by the director and his report was adopted. At no time since has the action of the board or of the annual meeting been repudiated or set aisde. It seems clear that a school district has power to expend money for legal services and costs, and such indebtedness, although irregularly contracted in the first instance, may be ratified afterwards by its officers and the electors of the district.

We think the judgment of the district court is right, and recommend that it 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.

JOSEPH WAGMAN, APPELLANT, V. JULIUS KESSLER & COMPANY, APPELLEE.

FILED JANUARY 17, 1907. No. 14,486.

Sales: RESCISSION. The vendee commenced an action to recover partial payment made on a sale of personal property after the vendor had fully complied with all the conditions of the agreement on his part. While the action was pending the vendor

sued out a writ of replevin, making the vendee and a railroad company, which had possession of the goods, parties defendant, alleging that it was the absolute owner of the property. *Held*, That under these facts a rescission of the contract of sale was effected, and that the vendee was entitled to recover advanced payments made upon the sale.

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

T. W. Blackburn, for appellant.

A. G. Ellick, contra.

DUFFIE, C.

Action for money had and received. The court directed a verdict for the defendant, and the plaintiff appealed. The facts are these: October 31, 1903, plaintiff, who resides in Omaha, gave the defendant, in business in Chicago, a written order for five cases of whiskey in bond, agreeing to pay therefor $33, $13 cash, and $20 on January 1, 1904. The goods being in bond, the plaintiff was to pay the internal revenue amounting, with exchange, to $15.45. November 12, 1903, plaintiff wrote defendant to ship the goods at once. Complying with this request defendant shipped four cases November 14, 1903. The other case was omitted by oversight, but was shipped a few days later and reached the freight house of the railroad company at Omaha November 21, 1903, the four cases having been received at the same place a few days earlier. A bill of lading, to which was attached a draft for the amount of the internal revenue, was sent to one of the banks in Omaha, and the plaintiff notified to pay the draft and take it up, which he did upon receipt of the notice. The bill of lading for the goods last shipped was sent directly to, and received by, the plaintiff. Plaintiff made inquiry at the different freight houses in Omaha for the goods after they had been received there, but was informed that they had not arrived. These inquiries were made about Christmas. Afterwards, and on December

26, 1903, he brought this suit in justice court to recover his cash payment of $13 and the $15.45 which he had paid as internal revenue, his action being based upon the claim that the goods were to be delivered for the holiday trade.

The written order is silent as to the time of delivery, and delivery within a reasonable time is all that could be demanded. Aside from this, the goods were promptly forwarded to the plaintiff on his request, and it is quite plain that on the facts then existing no cause of action had accrued in his favor. While this action was pending, and on December 31, 1903, the defendant obtained possession of the goods under a writ of replevin issued in an action brought by defendant against the plaintiff in this case and the railroad company which held the goods at Omaha, and wherein the defendant in the case at bar claimed the goods as absolute owner. Under this state of facts it seems clear that the judgment of the trial court must be reversed. It is true that the defendant had fully performed its contract by shipping the goods and by delivering to the plaintiff the evidence of title, the bills of lading issued by the railroad company, and it is evident that it could have successfully defended the suit brought by the plaintiff to recover the money paid by him on the sale of the goods had it seen fit to do so and to stand wholly upon the defensive. By commencing this action the plaintiff attempted to rescind the contract of sale, at least the commencement of his action to recover the money paid amounted to a tender of rescission. Instead of simply defending the action, defendant repossessed itself of the goods, and this must be regarded as an acceptance of the tender and, in our view, worked a total rescission of the contract of sale. Having in this way agreed to a rescission of the sale, defendant must return that part of the purchase price received. The court erred, therefore, in not receiving evidence offered by the plaintiff showing that the defendant had repossessed itself of the

goods and held possession of the same as absolute owner when the action was tried.

We recommend a reversal of the judgment and remanding the cause for another trial.

ALBERT and JACKSON, 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 another trial.

REVERSED.

WALTER MOISE ET AL., APPELLANTS, V. CHARLES F. WEYMULLER, APPELLEE.

FILED JANUARY 17, 1907. No. 14,573.

1. **Intoxicating Liquors: SALES.** A party having no knowledge to the contrary may deal with a person having charge and control of a saloon licensed to sell intoxicating liquors, on the presumption that such person is the owner and licensee thereof, or the duly authorized agent of such licensee.
2. ———: ———: **VALIDITY.** The courts will not enforce payment for a sale of liquors made by one possessing no license therefor.

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

I. J. Dunn, for appellants.

Hamilton & Maxwell, contra.

DUFFIE, C.

Walter Moise & Company, the appellants, are wholesale liquor dealers in Omaha. Weymuller, the appellee, is, or was in 1902, a licensed saloon keeper in that city. Moise & Company brought this action against Weymuller, claiming a balance due for liquors sold during the years 1902 and 1903. In their petition the appellants allege

that the defendant is indebted to them for goods and merchandise, consisting of malt, spirituous and vinous liquors sold and delivered to him in March and April of the year 1902, and in January of the year 1903, in the sum of $148.75, with interest from January 12, 1903; that the goods were sold to the defendant at his request, and received by him while he was engaged in conducting a saloon in the city of Omaha under a license duly issued to him by the proper authorities of said city; that Moise & Company during the time referred to were licensed liquor dealers in the city, and that no part of the amount sued for has been paid. The answer of the defendant was a general denial. For reply Moise & Company allege that during the years 1902 and 1903 Weymuller was a licensed liquor dealer at No. 4,506 North Thirtieth street in the city of Omaha, and conducted a saloon at said place under his said license, selling intoxicating liquors by his servants and employees who had charge of the saloon; that the liquors sued for were bought by the person in charge of the saloon to replenish the stock kept for sale, and said liquors so bought were sold in said saloon by the person in charge in the ordinary course of business under the license granted to appellee under which said saloon was conducted; that appellants sold and delivered said goods to the saloon referred to under the belief that those in charge were the agents of appellee, and that as a matter of law they were appellee's agents, regardless of any contract or agreement between said persons and the appellee. Upon the issues thus made the case was brought to trial before a jury, and after the appellants had introduced their evidence and rested the court directed the jury to return a verdict for the defendant. Plaintiffs' motion for a new trial was overruled and judgment entered upon the verdict, from which Moise & Company appealed.

The evidence shows that Weymuller, the defendant, obtained a license to conduct a saloon at No. 4,506 North Thirtieth street in the city of Omaha for the year 1902; that Moise & Company were licensed liquor dealers in

Omaha during that year; that during the years 1902 and 1903 Moise & Company sold to J. E. Lupton, "agent," liquors of the value of $188.75; that Lupton had charge of the saloon at No. 4,506 North Thirtieth street, and stated to plaintiffs' salesman that he was the buyer; that a license issued by the proper authorities of the city of Omaha running to the defendant was hung on the walls of the saloon; that $103.13 had been credited upon the bill. That the saloon in question was being operated under a license issued to the defendant is a question not in dispute, and the only question in controversy is the sufficiency of the evidence to warrant the court in submitting to the jury the fact of the relation, if any, which Lupton, the buyer of the goods, sustained to Weymuller, the defendant.

This court has held that a license to sell intoxicating liquors under the provisions of our statute is a personal trust, and that the party to whom it is issued assumes personal duties and responsibilities relating thereto; that he must either personally conduct the busines or place it in charge of an agent for whose acts he is responsible. *State v. Lydick,* 11 Neb. 366; *In re Tierney,* 71 Neb. 704; *In re Krug,* 72 Neb. 576. In this state of the law, one who finds a party in charge of a saloon, conducting the business, may presume that he is either owner, or agent of the owner, and deal with him as such. If owner, he may purchase such goods as he chooses. If agent of the owner, in charge of the business, he may purchase such goods as the business requires, and bind his principal therefor. There is no evidence in the record tending to show that Moise & Company had knowledge or notice that Lupton was not the agent of Weymuller, and nothing tending to show that he was not in fact such agent. Under the circumstances the law raises a presumption that he was agent of the party licensed to run a saloon at the place where the liquors were sold, and in the absence of evidence overcoming this presumption the jury should have been directed to find for the plaintiff.

We have not overlooked the case of *Moise & Co. v. Krug,* 72 Neb. 43, relied on by defendant to support the action of the district court, and which is commented on with needless asperity by counsel for appellant. It was there held that "the holder of a saloon license, who permits other parties to conduct a business under it in his name, is not liable for liquors furnished to those other parties by one who is aware of the situation, and deals with such parties on their own credit. As against such a claim, the license holder is not estopped to deny having made the purchase." No argument is needed to show that a person who conducts a saloon in his own name and for his own profit under a license issued to another is engaged in an unlawful business, and parties who furnish him goods for the purpose of conducting such illegal traffic cannot have the aid of our courts in enforcing payment of their claims. The law and good morals both demand that one who encourages the conduct of an unlawful trade or business by furnishing goods to be used therein shall be barred of an action against the purchaser, and the case referred to might well have been put upon that ground. *Storz & Iler v. Finklestein,* 46 Neb. 577, and 48 Neb. 27.

One other matter should be noticed. There is an entire absence of evidence showing that either Weymuller or Moise & Company had a license to deal in intoxicating liquors for the year 1903. This being so, the sales made during that year were illegal and cannot be recovered for. There was a small balance due upon sales for the year 1902, and for this, under the evidence in the record, the plaintiff should have judgment, with costs of suit.

We recommend a reversal of the judgment and remanding the cause for another trial.

ALBERT and JACKSON, 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 another trial.

REVERSED.

CITY OF WAYNE, APPELLANT, V. JANE DIXON, APPELLEE.

FILED JANUARY 17, 1907. No. 14,641.

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

A. R. Davis, for appellant.

F. A. Berry, contra.

DUFFIE, C.

The appellant, city of Wayne, asks us to reverse a judgment rendered against it in favor of the appellee on account of an injury alleged to have been sustained on account of the defective condition of a sidewalk in said village. The grounds urged for a reversal are: First, that the verdict is not sustained by the evidence; and, second, that the verdict is contrary to law.

The injury complained of was sustained on June 21, 1904, and evidence was introduced by the city tending to show that the walk, upon notice given by it to the owner of the adjoining lot, was repaired by such lot owner some time in May and was in good condition at the time of the injury. The evidence was conflicting. Witnesses for the appellee testified that an examination of the walk immediately after the injury disclosed that there was no stringer extending under one side of the walk. Another witness testified that the walk was patched up with old boxes and rotten lumber for sills; that the boards were rotten and in many places there were no boards at all. The rule has always prevailed that we will not interfere with a judgment upon conflicting evidence.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. BOONE COUNTY ET AL., APPELLEES.

FILED JANUARY 17, 1907. No. 14,782.

1. **Highways: EMINENT DOMAIN.** The statutes of this state relating to the establishment of public roads do not authorize the taking of public lands for road purposes not on section lines.
2. **Eminent Domain.** The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is express or clearly implied authority to extend them to public property.

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

Norris Brown, Attorney General, W. T. Thompson and *H. C. Vail,* for appellant.

C. E. Spear, contra.

DUFFIE, C.

Steps were being taken by the county authorities of Boone county to establish a public road angling through the interior of section 16, township 20, range 8, a portion of the school lands of the state. The state appeared by the attorney general, and objected to the proceedings on the ground that the board had no jurisdiction to enter a petition establishing a highway over lands belonging to the state. The board overruled the objection, to which the state excepted, and now prosecutes an appeal from

an order of the district court affirming the action of the county authorities in establishing the road.

The sole question presented by the record is: Can a public road be established over the property of the state without express permission of the legislature extended for that purpose? It was a well-established principle of the common law that the crown was not bound by a statute unless named in it, for the reason that the law is presumed to be made for subjects only, and that the crown was not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest. *Ex parte Russell,* 19 Ves., Jr. (Eng.) *163; *Ex parte Postmaster General,* 10 L. R. Ch. Div. (Eng.) 595; *In re Cuckfield Burial Board,* 19 Beav. (Eng.) 153. In this country it is generally held that the sovereign power is not bound by general words in a statute, but only when included expressly or by necessary implication. *United States v. Herron,* 20 Wall. (U. S.) 251; *Jones v. Tatham,* 20 Pa. St. 398; *Stoughton v. Baker,* 4 Mass. *522; *State v. Kinne,* 41 N. H. 238; *People v. Rossiter,* 4 Cow. (N. Y.) 143; *Seattle & M. R. Co. v. State,* 22 L. R. A. 217, 7 Wash. 150. In the latter case it is expressly said: "The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is either express or clearly implied authority to extend them to public property." We think the legislature of this state has clearly indicated its purpose not to allow any of the public property of the state to be interfered with or taken by the power of eminent domain, as it has been careful in all cases where such power is conferred to give its consent to taking the property of the state for such purposes only as it deemed expedient. In providing a system of irrigation it extends to all persons, companies, corporations or associations constructing any of the works provided for by our irrigation statutes, authority to occupy state lands and to obtain right of way over and through any highways in any county of this state. Comp. St. 1905, ch. 93*a*,

art. II, sec. 40. The same right was extended to the United States in its construction of the irrigation projects contemplated by the late act of congress. Comp. St. 1905, ch. 83, art. XIII, sec. 27. In extending the right of eminent domain to railroad companies the right is given by the provisions of section 83, ch. 16, Comp. St. 1905, to occupy any road, street, alley, public way or ground of any kind, and to agree upon the manner and upon the terms and conditions upon which such public street, alley, public way or ground may be used or occupied, with the public authorities having the same in charge, and, if no agreement can be reached, to appropriate the same in the same manner and upon the same terms as is provided for the appropriation of the property of individuals. By the terms of section 46, ch. 78, Comp. St. 1905, all section lines are declared to be public roads, and by the enactment of this statute the state, in express terms, gave its consent to the establishment of public roads over the exterior lines of all school sections. We have not been referred to any statute, nor are we able, after considerable search, to find a statute, which either in express terms or by necessary implication authorizes the county authorities to establish a public highway through a school section or any public grounds. If, as contended, a reversal of this case will have the effect to invalidate portions of many highways already established, we can only say that it is our duty to declare the law as we find it to exist, and that any inconvenience arising therefrom must be remedied by the legislature. There is no doubt that the legislature, on its attention being directed to the subject, will legalize necessary highways attempted to be established through the school lands of the state, and authorize the establishment of such highways as the convenience of the public may demand, but, until the legislature has spoken on the subject and given its consent, the county authorities are without authority to act in the matter.

We recommend a reversal of the judgment, and that

the cause be remanded to the district court for further proceedings not inconsistent with this opinion.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

IN RE ESTATE OF MILTON CHENEY.

MARILLA CHENEY, APPELLEE, V. ELIHU CHENEY ET AL., APPELLANTS.

FILED JANUARY 17, 1907. No. 14,439.

1. **Pleading**: WAIVER. Where no reply is filed, and a cause is tried and submitted on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted comes too late, when made for the first time after verdict.
2. **Wills**: EVIDENCE. Where the mental capacity of a testator to make a will is put in issue when the will is offered for probate, a question calling for the opinion of a witness as to whether, at the time the will was made, the testator had sufficient mental capacity, or was able to make a last will and testament, is improper, and the answer should be excluded.
3. **Trial**: OBJECTIONS. An objection to such question, that it is incompetent and calls for the opinion of the witness, is sufficiently specific.
4. ———: WAIVER. Where a party objects to the reception of such evidence, and preserves his exception, he does not waive the error by subsequently introducing similar evidence for the purpose of meeting his adversary's case, rebutting the evidence to which he excepted, but without any intention of abandoning his exceptions.

APPEAL from the district court for Butler county: ARTHUR J. EVANS, JUDGE. *Reversed.*

L. S. Hastings, for appellants.

C. H. Aldrich and *L. B. Fuller, contra.*

ALBERT, C.

This is an appeal from a judgment admitting a will to probate. The will was contested on the ground that at the time it was made the testator was not of sound and disposing mind, and that in the making thereof he was unduly influenced by his wife, who is the proponent and principal beneficiary.

One question now argued at length was presented to the trial court by a motion on behalf of the contestant for judgment notwithstanding the verdict. This motion is based on the fact that no reply was filed by the proponent denying the allegations of undue influence. The record shows that the cause was tried and submitted to the jury on the theory that those allegations were denied. The question therefore was raised too late. *Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb. 64.

A more serious question arises from the admission of certain evidence offered by the proponent. She called several witnesses to testify to the mental condition of the testator at the time the will was made. One of these witnesses, after testifying to his acquaintance with the testator, and to certain facts and circumstances sufficient to enable him to form an opinion as to the testator's soundness of mind, was asked this question: "Now you may state whether or not on February 20, 1897 (the date of the will), in your judgment Milton Cheney (testator) was able to make a last will and testament." An objection was interposed by the contestants, which was overruled, and the witness answered: "He was." A similar record was made with respect to at least three other witnesses produced by the proponent, and the case was submitted to the jury on the theory that such opinions were competent evidence on the question of testamentary capacity.

The contestants contend that the court erred in overruling their objections to the question put to these witnesses, calling for an opinion as to the testamentary

capacity of the testator, and we think their contention is well founded. The question required the witnesses to usurp the functions of both court and jury, because it required them to determine the degree of mental capacity required to make a will, which is a question of law, and whether the testator, when the will was made, was possessed of such capacity, which was the principal issue for the jury to determine. As has been said: "Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must *not usurp the province of the court and jury* by drawing those conclusions of law or fact upon which the decision of the case depends." 2 Jones, Law of Evidence, sec. 374. Dealing with the precise question now under consideration, the court in *Kempsey v. McGinniss,* 21 Mich, 123, said: "If each witness is allowed to fix his own legal standard of testamentary capacity, no two of them will be likely to fix upon the same; and there may be an apparent agreement while they differ in fact, and an apparent conflict when there is a real coincidence in opinion; and the jury have no means of knowing the real meaning of the witnesses or judging of the value of their testimony." The same question was under consideration in *May v. Bradlee,* 127 Mass. 414, where the court said: "What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requisites of testamentary capacity were stated in the interrogatory, or otherwise explained to him. Without some such explanation, it would be impossible to say that the witness, the jury and the judge were not each governed by a different standard in settling the question." To the same effect are the following: *Runyan v. Price,* 15 Ohio St. 1; *Pclamourges v. Clark,* 9 Ia. 1; *In re Betts' Estate,* 113 Ia. 111; *Marshall v. Hanby,* 115 Ia. 318; *Buys v. Buys,* 99 Mich. 354; *Fairchild v. Bascom,* 35 Vt. 398; *In re Estate of Taylor,* 92 Cal. 564; *Hall v. Perry,* 87 Me. 569; *Brown v. Mitchell,* 88 Tex.

350. See 17 Cyc. 238. Cases directly opposed to the foregoing are not wanting, but they are against the decided weight of authority and contrary to settled principles.

It has been suggested that the jury would give no weight to such evidence, and consequently that its reception was error without prejudice. The suggestion is entirely without merit. On whatever theory, or at whatever stage of the trial it was received, it went to the jury under the sanction of the court as part of the evidence in the case. No one can say with certainty that it was not considered, or had no weight with the jury. They were instructed to weigh the evidence, and the presumption is they did so. While such evidence would have little weight with some men, it appeals strongly to a type of mind, by no means uncommon, ready to accept any solution of a problem offered rather than undertake an independent investigation.

But it is argued that the objections to these questions were not sufficiently specific to save the record. The office of an objection is to direct the attention of the trial court to the objectionable character of the evidence and the grounds upon which it is challenged, and it should be sufficiently specific for that purpose. In this case, as often as the question was propounded, it was objected to on the grounds, among others, that it was incompetent and called for an opinion of the witness. Taking into account the form of the question, it seems to us the objection was sufficiently specific to call the attention of the court to the objectionable character of the evidence sought to be elicited and the grounds upon which the reception was resisted.

It is also claimed that the contestants have waived error in the admission of this testimony, for the reason that they propounded similar questions to their own witnesses. It is true the general rule is that an error in the admission of evidence is waived where the party aggrieved thereby subsequently introduces the same evidence. *Thorne v. First Nat. Bank,* 6 Kan. App. 194, 51 Pac. 300;

Ward v. Abbott, 14 Me. 275; *Coit v. Waples*, 1 Minn, 110. But a different rule obtains where a party, after objecting to evidence and excepting to the ruling thereof, introduces similar evidence, as in this case, solely for the purpose of meeting his adversary's case, rebutting or combating the evidence to which he excepted, but without any intention of abandoning his exceptions. *Richardson v. City of Webster City*, 111 Ia. 427, 82 N. W. 920; *Washington Township F. C. F. & G. L. Co. v. McCormick*, 19 Ind. App. 663, 49 N. E. 1085.

It is also claimed by the proponent that the verdict is the only one that would have been warranted by the record, even if the evidence in question had been excluded, and consequently that its reception, if error, is without prejudice. This claim, we think, is unfounded. We have examined the evidence at length, and, while we express neither approval nor disapproval of the verdict, we are satisfied that, had it been the other way, it would not have been set aside by this court for want of sufficient evidence to sustain it.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, 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.

JOHN H. ROBERTSON, GUARDIAN, APPELLANT, V. AMBROSE C. EPPERSON ET AL., APPELLEES.

FILED JANUARY 17, 1907. No. 14,509.

Guardian and Ward: REVOCATION OF APPOINTMENT. Where a guardian places himself in a position with respect to the estate which brings his interests in conflict with those of his ward, he should be discharged and his letters revoked.

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

T. H. Matters, for appellant.

A. C. Epperson, Paul E. Boslaugh and *M. V. Hart, contra.*

ALBERT, C.

On the 6th day of November, 1884, John H. Robertson, the appellant, was appointed guardian of Thomas Edmondson, an insane person, by the county court of Clay county. The estate consisted of personal property, appraised at $372.58, and 80 acres of land, appraised at $1,800. The personal estate was practically exhausted the first year in the payment of certain debts of the ward and expenses incident to the trust. From that time the land was the only source of income. The ward is confined in an asylum, and the estate has not been charged with his support, save $60 for the first year. A share rent was taken for the land in 1885, the proceeds of which amounted to $60. The following year it yielded a cash rent of $60. From that time to 1903 the appellant farmed the land himself, charged himself with $60 rent therefor each year, except for the years 1901 and 1902, for which he charged himself with an annual rental of $100. The appellant moved upon the land in 1894, and has ever since resided thereon with his family. In February, 1903, the appellant leased the land to his own son, who resided on the land with him, for the sum of $600, which was paid

in advance. The last report filed in the county court by the appellant includes this item of $600 and shows a balance due the estate from the appellant of $61.31. Taking into account the six year term beginning March 1, 1903, the appellant has received the rents and profits of the land for a period of 24 years, aggregating, according to his own reports, $1,760. His reports show that more than $1,100 of the rents and profits were expended in repairs in the house, the erection of corncribs, hogpens and other improvements on the land. From the date the appellant moved upon the land to January 22, 1898, the expenditures for such improvements amounted to $700; the remainder was expended between the latter date and February, 1903. It is worthy of note that there was no corresponding change in the annual rental accounted for by the appellant until 1901, when it was raised from $60 to $100.

In March, 1903, the county court of Clay county, on its own motion, cited the appellant to appear and show cause why he should not be removed from his trust. On the return day the court appointed a guardian *ad litem* for the ward, who thereupon filed a petition asking for the removal of the guardian. A like petition was also filed by Anne Edmondson, a sister of the ward. The charges in the petitions are substantially the same, and, so far as material at present, are to the effect that the guardian had neglected to give due care to the management of the estate, that the rents and profits of the real estate accounted for by him were grossly below the actual rental value of the land, and that he had occupied and used the land for his own profit, and had laid out and expended the income derived therefrom in improvements and repairs on the premises for his own use and benefit, and not for the benefit of the estate. The petitions contained the further charge that the lease of the land to the appellant's son for the term of six years was not made for the benefit of the estate, but to serve the private ends of the guardian himself. The issues were made up and a

hearing had on the merits, whereupon the county court entered an order removing the guardian, revoking his letters, and appointing L. G. Hurd as guardian in his stead. The appellant appealed to the district court, where substantially the same charges were made against him. A trial was had, which resulted in a judgment for the removal of the appellant and a revocation of his letters, from which he now appeals to this court.

The appellant's use and occupancy of his ward's land, the amount with which he charged himself therefor, his expenditures for improvements thereon, and the leasing thereof to his son, a member of his own household, stand admitted. His position throughout with respect to this land has been antagonistic to that of his ward. The improvements, in which the greater part of 24 years' rental have been swallowed up, appear from the evidence to have been made largely for his own accommodation. The order discharging him is the only one the facts conclusively established would have justified. That being true, the numerous questions of practice raised, which go merely to the form, and not to the substance, do not merit serious consideration.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

JACOB J. VAN WANNING, APPELLEE, V. GEORGE W. DEETER, APPELLANT.*

FILED JANUARY 17, 1907. No. 14,653.

1. **Public Lands:** HIGHWAYS. Under the provisions of section 2477, Revised Statutes, United States, lands of the general government not reserved for public purposes may be taken and used for public roads. *Streeter v. Stalnaker*, 61 Neb. 205.

2. ———: ———: DEDICATION: ACCEPTANCE. An acceptance of the dedication made by said section may be shown by the acts of the public authorities, or by the acts of the public itself.

3. ———: ———: RIGHTS OF SETTLER. A settler upon the public lands of the general government, upon which there is a road in common and general use as a highway, takes subject to the public easement of a right of way on such road, although the same was never established by the public authorities under the general road laws of the state.

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

C. H. Denney, for appellant.

Heasty & Barnes, contra.

ALBERT, C.

This is an appeal from a decree enjoining the appellant as road overseer from removing a fence which the appellee had commenced to build on and along that portion of a section line forming the north boundary of a quarter section of land, to which the appellee holds the title in fee. The only question in the case is whether there is a public road along that portion of the section line. If there is, the appellant, in the discharge of his official duty, had a right to remove the fence, and the decree should be reversed.

While there is no evidence that the road was ever formally established and opened by the county authorities,

* Rehearing allowed. See opinion, p. 284, *post*.

we think the evidence leaves no room for doubt that the road was established by dedication and acceptance. The evidence shows that the earliest settlers in that locality found the strip of land in question in common use by the public as a highway, and that such use has continued without substantial interruption ever since, until shortly before the commencement of this suit, when the appellee interrupted it by the erection of the fence in question. Prior to 1892 it appears to have been kept in condition for travel by the private efforts of those using it. In that year the public authorities put in a small culvert, and subsequently had some labor performed on it at the public expense. It was in common use as a highway when the person under whom the appellee claims title took title from the United States.

It seems to us that the case falls within the doctrine announced in *Streeter v. Stalnaker*, 61 Neb. 205. There, in dealing with a similar case, the court said: "In 1866 congress passed an act declaring that 'the right of way for the construction of highways over public lands not reserved for public uses is hereby granted.' U. S. Rev. St., sec. 2477. By this act the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or by the public itself, a highway was established. *McRose v. Bottyer*, 81 Cal. 122. What the Hamilton county authorities did was perhaps insufficient to show the establishment of a road under the general road law, but was enough, we think, to indicate an acceptance of the government's bounty, and that is all that was required to create an easement. * * * In this case there was not only evidence of user, general and long continued, but also proof that the public authorities had assumed control over the road and had worked and improved a portion of it. Both facts were competent evidence tending to show an acceptance

of a dedication." One point made clear in the foregoing is that the acceptance of the congressional grant could be shown, not only by acts of the public authorities, but by the acts of the public itself. In the case at bar, as in that case, there is evidence of user, general and long continued. The right of the public to the easement was never challenged until after it had been enjoyed for more than 30 years. This, we think, is amply sufficient to show an acceptance by the public of the congressional grant, and that the party under whom the appellee claims title took subject to the easement. See *Cassidy v. Sullivan,* 75 Neb. 847; *Eldrige v. Collins,* 75 Neb. 65. In this case, as in the *Streeter* case, *supra,* it may be said that the travel along this road deviated more or less from time to time, but the evidence justifies the conclusion that such deviations were neither substantial nor permanent, and that through all those years a portion of the road was used some of the time and all of it was used a part of the time.

It is recommended that the decree of the district court be reversed and the cause remanded, with directions to dismiss the suit.

DUFFIE and JACKSON, 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, with directions to dismiss the suit.

REVERSED.

The following opinion on rehearing was filed June 22, 1907. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Public Lands:** EVIDENCE. Record reexamined, and found not to sustain the assumption in former opinion that the land in question was a part of the public domain at the time of the passage of the act of congress in 1866 granting right of way over public land for highway purposes.

2. **Highways:** INJUNCTION: BURDEN OF PROOF. In an action to restrain a road overseer from removing plaintiff's fences from land

claimed by such overseer to be a highway, the plaintiff alleging that no highway existed, and the defendant alleging that there was a lawfully opened road at the point in dispute, the burden was on defendant to establish the existence of the highway. *Henry v. Ward*, 49 Neb. 392, followed.

3. ———: ESTABLISHMENT. The act of 1873 declaring section lines public roads (Gen. St. 1873, p. 959) did not of itself create a lawful public highway along such lines. Before it can have such effect, the proper authorities must provide for the payment of damages for the right of way.

4. ———: ———. A highway over wild, uninclosed prairie lands cannot be established by user without the knowledge or consent of the owner.

CALKINS, C.

1. The opinion filed in this case, *ante*, p. 282, reversing the decree of the lower court, was based upon the assumption that the land in question was a part of the public domain at the time of the passage of the act of congress granting the right of way over public lands for highway purposes in 1866. U. S. Rev. St., sec. 2477. The correctness of this assumption having been challenged, we have carefully examined the record, and are now convinced that it was erroneously made. The nearest approach to evidence on this point is found in the testimony of Mr. William Cowdry, who, in response to a question as to how long the land had been settled, answered: "From 1869." The word settled is not synonymous with entered, and leaves us in the dark as to when or in what manner this land was segregated from the public domain.

2. It was upon the last argument contended that the burden was upon the plaintiff to prove that the land was entered prior to 1866. It is a general principle that where a bill alleges a negative, and the defendant affirmatively pleads the fact negatived, the burden is upon the defendant. *Carroll v. Malone*, 28 Ala. 521. And see *Burgess v. Lloyd*, 7 Md. 178. This principle has been recognized by our own court in *Henry v. Ward*, 49 Neb. 392. This was an action to restrain county commissioners from moving plaintiff's fence from land claimed by the commissioners

to be a highway, the plaintiff alleging that no highway existed, and the defendant alleging that there was a lawfully opened road at the point in dispute; it was held that the burden was upon the defendant to establish the existence of the highway. This decision, being in point, disposes of the contention that the plaintiff was bound to prove that the land was entered before the passage of the act of 1866, and makes it necessary for us to determine the case without reference to the effect of that statute.

3. The defendant's answer alleges that the section line on the north of the land in question was established and opened as a public highway by and according to law on the 24th day of February, 1873, and that said road and highway so opened and established has been continuously traveled and worked as a public highway at all times since. There is no evidence that the county authorities ever attempted to formally establish or open the road, or took any steps with reference to the assessment of damages therefor; but the contention of the defendant is that the act of February 24, 1873 (Gen. St. 1873, p. 959), had the effect of establishing this as a public highway without any action of any kind on the part of the county authorities. It has generally been held that the rights of the owners of land over which a section line extends are the same with reference to the assessment of damages for the location of a highway thereon as those of the owners of other real estate. *Henry v. Ward*, 49 Neb. 392; *Howard v. Board of Supervisors*, 54 Neb. 443; *Scace v. Wayne County*, 72 Neb. 162. And before a county can appropriate land to public use for a public road it must provide for the payment of damages for the right of way. *Zimmerman v. County of Kearney*, 33 Neb. 620; *Livingston v. County Commissioners*, 42 Neb. 277; *Lewis v. City of Lincoln*, 55 Neb. 1. Counsel for defendant seeks to distinguish the present case from those where the use of the road began after the taking effect of the law of 1879, and calls our attention to the fact that in the case of

Henry v. Ward, supra, the decision was placed upon the ground that the road was not used until 1884, and after the act of 1873 had been modified by the act of 1879. This is true; but the court in its opinion doubts whether it was within the power of the legislature to condemn private property without compensation, unless claims were made for damages within 90 days; and in the case of *Livingston v. Commissioners, supra,* it is said that the duty to take such steps as may be necessary to determine the amount of damages resulting from the appropriation of private property for public use should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken; and that he cannot be required to take affirmative action as a condition upon which depends his right to compensation for taking his property for public use. In *Lewis v. City of Lincoln, supra,* and *Kime v. Cass County,* 71 Neb. 680, this statement of the law is approved. We are therefore constrained to hold that this section line did not become a public highway by force of the law of 1873.

4. It only remains to inquire whether there was evidence of such user as would establish a road by prescription. It appears that up to about the time of the commencement of the action the land in question was prairie, unbroken, uncultivated and uninclosed; that since the first settlement of the country there had been more or less travel along or near to this section line, except in one place where a detour was usually made to pass around the head of a draw; that some time in 1892 the road supervisor had put a small culvert on the section line in this draw; and that on one other and later occasion he had done a little work to make the draw passable, but that the road otherwise had been unworked, and that the owner of the land was a nonresident, and did not know of this use, or of any road work being done upon the land. In *Graham v. Hartnett,* 10 Neb. 517, it was held that, while the existence of a legal public highway over

the premises of a private person may be shown by user alone, if it has been with the knowledge of the owner, and continued for the length of time necessary to bar an action to recover the title to land, such user does not suffice when it is of wild and uninclosed prairie land. This case is followed, and the rule therein stated applied, in the case of *Shaffer v. Stull,* 32 Neb. 94, and it must be regarded as the settled law of this state. It necessarily follows that the user in this case being of wild, uninclosed prairie land, and without the knowledge of the owner, it was insufficient to establish a road by prescription, and that the judgment of the district court was correct.

We therefore recommend that the former judgment of this court be set aside, and that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is set aside and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LUCY A. COLBY, APPELLANT, V. MARY J. FOXWORTHY, APPELLEE.

FILED JANUARY 17, 1907. No. 14,778.

1. Appeal: REMAND: PROCEDURE. Ordinarily, where the judgment of a trial court is reversed on error and the cause remanded without specific directions, the trial court should retrace its steps to the point where the first material error occurred, and from that point the trial should progress anew, unless from the nature of the error or the connection in which it occurred a trial *de novo* is necessary to correct it.

2. ———: ———: ———. But the foregoing rule is not inflexible, and whether to proceed from the point where the first material error occurred or award a trial *de novo* is within the sound dis-

cretion of the trial court, and in the absence of an abuse of such discretion its decision will not be disturbed.

3. ———: ———: ———. A judgment was reversed because of an erroneous conclusion of law drawn from the facts found, and the cause remanded without specific directions. After it was remanded the trial court overruled a motion for judgment on the findings and proceeded to try the case *de novo*, and additional testimony was adduced by either party bearing on one of the vital issues in the case. The trial court without passing on the evidence adduced at the second trial adopted the findings made at the first trial and entered a decree thereon. *Held*, Error; the court having proceeded to a trial *de novo* should have found on the evidence adduced at such trial.

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

Flansburg & Williams, for appellant.

L. C. Burr, contra.

ALBERT, C.

Lucy C. Colby brought suit against Mary J. Foxworthy to foreclose a real estate mortgage executed by the latter to the Lombard Investment Company to secure the payment of a certain bond and interest coupons, which, with said mortgage, had been assigned and transferred to the plaintiff. The defendant answered, alleging, in substance, that after the execution and delivery of the bond and mortgage, and without her knowledge or consent, the same had been fraudulently altered by the mortgagee by inserting therein the word "gold" before the word "dollars." The plaintiff filed a reply, denying the fraudulent alteration, and alleging certain facts relied on as an estoppel against the defendant to urge the alteration of the instruments as a defense to the suit. At the request of the defendant, a jury was called to try the issues of fact. In addition to a general verdict in favor of the defendant, the jury returned a special finding to the effect that the bond and mortgage "had been wrongfully altered and changed, without the knowledge or consent of the defend-

ant, by inserting therein the word "gold" before the word "dollars." The next step in the litigation appears from the following, taken from the record: "This cause came on to be heard before the court and the jury and the jury having determined the fact submitted to them in favor of the defendant, Mary J. Foxworthy, finding that the note and mortgage in controversy in this case were wrongfully altered and changed after the execution thereof, without the knowledge or consent of the defendant, Mary J. Foxworthy, by the insertion of the word 'gold' before the word 'dollars' as used and appears in said note and mortgage; this cause comes on to be further heard before the court upon the questions of law arising herein, and the court, being fully advised in the premises, finds the following facts and conclusions of law thereon herein fully set forth: * * * (2) That after the execution and delivery by the said Mary J. Foxworthy of the coupon bond and mortgage aforesaid the same was altered and changed without her knowledge and consent by some one stamping the word 'gold' immediately in front of the word 'dollars' wherever the same appeared in either the said note or said mortgage with a rubber stamp in red ink, thereby making the said indebtedness evidenced by said bond and mortgage payable in gold, which was a different contract than was made by the said Mary J. Foxworthy at the time of the execution and delivery of the said bond and mortgage as aforesaid. * * * (6) The court farther finds that after the execution and delivery of the bond and mortgage described herein the said defendant, Mary J. Foxworthy, paid the interest semi-annually, as represented by the coupons to said bond attached, up to and including the interest coupon which became due on the first day of May, 1896, and that all of said coupons so paid by the defendant were delivered to her, and that all of such coupons so paid by and delivered to her contained the word 'gold' stamped with a red ink stamp as herein found, and that thereby from the date of the payment of the first coupon on said bond attached down to

the first day of May, 1896, the said defendant Mary J. Foxworthy might have had knowledge of the change and alteration in said bond and mortgage contained as herein described, exercising due care and diligence, but made no complaint thereof, but continued to pay said coupons in manner and form as therein written, and so altered and changed. Wherefore the court finds the following conclusions of law: (1) That said alteration of such bond and mortgage described herein was a material alteration and would invalidate the said contract of the said Mary J. Foxworthy, and the plaintiff would not be entitled to recover thereon, were it not for the fact that it was the duty of the said defendant, Mary J. Foxworthy, upon the discovery of such alteration, to have immediately complained and refused payment thereon, but having so failed and having continued to pay, having knowledge of such alteration and change, she thereby ratified such alteration and change in such contract as herein found, and could not be heard to complain at this time, but would be bound thereby as though said bond and mortgage were in the same condition as at the time of their execution and delivery."

From a decree of foreclosure the defendant mortgagor prosecuted error to this court, where the decree was reversed and the cause remanded for further proceedings, this court holding that the alteration was material and that the defendant mortgagor was not estopped to urge such alteration as a defense. See *Foxworthy v. Colby,* 64 Neb. 216. The plaintiff thereupon filed an amended petition in the district court, alleging, among other things, that the bond and mortgage were given without the word "gold" therein, but that after the execution thereof, some person, unknown to plaintiff or the mortgagee, and without their knowledge or consent, inserted the said word therein, and asked that the bond and mortgage as they stood originally, and before such spoliation, be enforced. A motion to strike the amended petition on the ground that it was a departure from the cause of action alleged in the origi-

nal petition was sustained. The defendant mortgagor then moved for judgment on the record. The motion was also sustained, and judgment given accordingly. The plaintiff thereupon prosecuted error to this court, where the judgment was reversed and the cause again remanded for futher proceedings, this court holding that the amended petition stated a cause of action and did not constitute a departure from that originally pleaded. See *Colby v. Foxworthy,* 72 Neb. 378. After the cause had been remanded the plaintiff refiled her amended petition, and the defendant filed an answer, again urging the fraudulent alteration of the note and mortgage as a defense, and asking that they be canceled and annulled. The reply thereto was a general denial. Subsequently the plaintiff withdrew her amended petition, and elected to stand on the original. Whereupon the defendant mortgagor again moved for judgment on the record. Her motion was overruled, and she then filed a supplemental answer, wherein, after reciting the facts hereinbefore stated, and protesting against the overruling of her last motion for judgment on the record, she insists that the findings first made in the case are conclusive and final, and that she is entitled to judgment thereon, and in the same pleading alleges the fraudulent alteration of the bond and mortgage, and prays their cancelation. The plaintiff filed a reply, joining issue on the charge of the fraudulent alteration of the instruments. A trial was had, wherein each of the parties introduced additional evidence bearing on the issue of the fraudulent alteration of the instruments in suit. The following is the record of the findings and decree of the trial court at the close of the last trial: "This matter having been heretofore tried on the petition of the plaintiff, filed January 8, 1898, the supplemental and separate answer and cross-petition of Mary J. Foxworthy, filed March 1, 1906; and plaintiff's reply thereto, filed March 5, 1906, and the evidence taken, and the court, being fully advised in the premises, finds that heretofore, and at a prior term of this court, the

question of when the word 'gold' was inserted in the note and mortgage in controversy was submitted to a jury, which said jury found that said note and mortgage in controversy had been wrongfully altered and changed after the execution thereof, without the knowledge or consent of the defendant, Mary J. Foxworthy, by the insertion of the word 'gold' before the word 'dollars' as used and appears in said note and mortgage. The court further finds that thereafter the judge before whom said jury trial was had adopted and incorporated the finding of said jury in his decree heretofore rendered herein, to which findings and decree the plaintiff took no exceptions. The court therefore adopts and accepts the findings of the court theretofore made, and finds that the word 'gold' was inserted before the word 'dollars' in said note and mortgage after their execution by the defendant, Mary J. Foxworthy, and without her knowledge or consent. It is therefore ordered, adjudged and decreed that the plaintiff take nothing by this suit; that defendant go hence without day, and that this case be, and the same hereby is, dismissed; that the title to the premises be quieted and confirmed in the defendant, free from the lien and claim of the mortgage of the plaintiff, and that the defendant recover of and from the plaintiff her costs therein expended taxed at $—. To each of which findings, and to the decree, the plaintiff duly excepts, and is allowed 40 days from the adjournment of this term of court to reduce her exceptions to writing. Plaintiff's supersedeas bond herein is fixed at the sum of $200 conditioned as required by law." From the foregoing decree the plaintiff appeals to this court.

At the last trial the pleadings presented substantially the same issues as those tried and determined at the first trial, because the plaintiff had withdrawn her amended petition, and the supplemental answer of the defendant, aside from facts appearing of record in the case and which the court was bound to notice without a pleading, tendered no other or different issues than those upon which

the first trial was had, and which, in each instance, were met by a general denial in the reply. The general rule, deducible from the cases cited, appears to be that, where the judgment of a trial court has been reversed on error and the cause remanded without specific directions, the trial court should retrace its steps to the point where the first material error occurred, and from that point the trial should progress anew, unless from the nature of the error or the connection in which it occurred a trial *de novo* is necessary to correct it. *Troup v. Horbach,* 57 Neb. 644; *Badger Lumber Co. v. Holmes,* 55 Neb. 473; *Oliver v. Lansing,* 51 Neb. 818; *Bush v. Bank of Commerce,* 38 Neb. 403; *Brown v. Rogers,* 20 Neb. 547; *Missouri, K. & T. T. Co. v. Clark,* 60 Neb. 406. When the cause was first reversed by this court and remanded for further proceedings, it was the duty of the district court to consider and determine whether the mandate of this court required that a decree should be entered upon the prior findings of the district court or required a new trial of the issues. The trial court allowed the plaintiff to file an amended petition. This, of course, was upon the theory that the case was not to be determined upon the findings already made, and when this case was the second time before this court, and was remanded to be tried upon the amended petition, this was in effect a determination that the case was not to be decided upon the findings made upon the first trial in the district court. We think that all parties were then concluded upon that question, and when the cause was remanded the second time it was too late for either party to insist that the first mandate required a decree to be entered upon the findings made at the first trial in the district court. The court therefore did right in proceeding to take further evidence, and, after having done so, was not at liberty to disregard the evidence so taken.

Some question is raised as to the weight and sufficiency of the evidence adduced at the last trial. We do not think this court should usurp the functions of the trial

court. This court has a right to the judgment of the trial court on the evidence and, until its weight and sufficiency is determined by the trial court, this court should decline to review it.

For the error pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

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.

RACHEL MARKHAM, APPELLEE, V. SUPREME COURT, INDEPENDENT ORDER OF FORESTERS, APPELLANT.

FILED JANUARY 17, 1907. No. 14,633.

Insurance: BENEFICIAL ASSOCIATIONS: PUBLIC POLICY. A rule of a fraternal benefit association, which requires an appeal from the action of its officers vested with authority to allow or reject death claims to the supreme body, whose action thereon is declared to be final, is unreasonable, and is void as against public policy.

APPEAL from the district court for Jefferson county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

M. A. Hall, for appellant.

J. C. Hartigan, contra.

JACKSON, C.

The defendant has appealed from a judgment in favor of the plaintiff in an action on a life insurance certificate. The appeal involves two questions: First, that the action is prematurely brought; and, second, that the evidence is insufficient to sustain the judgment.

The defendant is a fraternal association with its head-

quarters at Toronto, Canada. Its governing body is called the "Supreme Court" and the rules of government require that it shall meet in regular session triennially or quadrennially in any country in which it has branches, at such time and place therein as may have been selected, as provided by the constitution and laws. The principal officer of the society is the "Chief Ranger," to whom all claims for death benefits are required to be submitted for approval or rejection according to his will. His action is final except upon appeal to an "Executive Council," and the action of the "Executive Council" is final except upon appeal to the "Supreme Court" of the order, whose decision is final upon all questions. Proof of death in this case was submitted to the "Chief Ranger," the claim was by him rejected, and without resorting to the appeals provided for in the law of the order this action was instituted in the district court for Jefferson county, where the defendant, in answer, set up the provisions referred to as a bar to the right of the plaintiff to proceed in law, and also denied liability, alleging the suicide of the deceased, a risk not assumed.

Provisions somewhat similar in the fundamental laws of other fraternal societies have been sustained, notably by the courts of Michigan; but these decisions are not in harmony with the holdings of this court. The laws of fraternal and mutual societies should be reasonable, and not contrary to public policy. To pursue the remedy provided by the laws of the defendant would require probably three, and possibly four, years to present the claim finally to its "Supreme Court," and for the purpose of the appeal, perhaps, to follow that body into a foreign land, a course that practically amounts to a denial of justice. The provisions are not only unreasonable in substance, but more so in the length of time and expense involved in following them to the legitimate end. The collection of indemnity provided by life insurance should be a speedy and simple process, and it is a praiseworthy fact that most life insurance societies are constantly simplifying

the forms of proof and avenues of collection, an example that might well be followed by all. It is equally true that some of the so-called fraternal societies appear to think it wise to pursue another course.

The provisions of the laws of the defendant society with reference to the finality of its own adjudications involve a principle not unlike that of some insurance societies which provide a method of arbitration. Such provisions have been by this court uniformly held to be void as against public policy, the effect being to deprive courts of their legitimate jurisdiction. *German-American Ins. Co. v. Etherton*, 25 Neb. 505; *Union Ins. Co. v. Barwick*, 36 Neb. 223; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537; *National M. A. Ass'n v. Burr*, 44 Neb. 256. In justice to counsel for appellant we should say that he does not contend that resort might not be had to the courts after the claimant had exhausted her remedy within the order, but after three or four years spent in a fruitless pursuit of the defendant through the operation of its own machinery, followed by the delays incident to an action at law, but little would be left of the $1,000 certificate involved to reward the widow, if in fact she lived to see the end.

Before leaving that branch of the case it would not be amiss, perhaps, to suggest that the denial of liability might well be held to be a waiver of the defense of the failure to appeal. *Wuerfler v. Trustees of Grand Grove, W. O. D.*, 116 Wis. 19.

The question of the sufficiency of the evidence arises over a dispute as to whether the death of the deceased was accidental or was caused by his own acts with suicidal intent. It is not disputed that his death resulted from a gun-shot wound inflicted in the forehead while in his own bedroom. The explosion of the gun aroused his wife and children, who were in the kitchen preparing breakfast. They went to the bedroom, where he was found sitting in a low rocking chair with a gun, a 22-calibre rifle, between his knees, his arms folded across it on his breast. The circumstances testified to by witnesses were

sufficient to have sustained a verdict finding that death was caused by suicide, but it cannot be said that other evidence is of so insufficient a character as to justify setting the verdict aside. Neighbors were called, who assisted in placing the wounded man upon his bed. He was apparently in an unconscious condition. A physician was sent for, whose arrival was delayed from an hour to an hour and a half after the injury. The first indication of consciousness was while he was being examined by the physician. Prior to that time he had uttered no sound. The physician cut the skin down to the bone, and made an examination with his finger to see whether the bullet had gone into the skull. After he had ascertained that fact, and by the use of a probe determined that the bullet had gone through the skull into the brain, he informed the injured man that he was dangerously hurt, and asked him what made him shoot himself. He said: "I didn't shoot myself." The doctor answered: "Yes; you have, here is the gun." The injured man tried to put up his hand, and said: "Where?" The physician said: "Here, and the bullet has gone into your brain and is likely to kill you." Markham answered: "I haven't shot myself, I didn't do it at all." He made that statement several times before he died on the following day. These statements amount to direct evidence as to the purpose to commit suicide, and, together with other circumstances testified to by men skilled in the use of fire arms, were sufficient to justify the submission of the case to the jury.

The admissibility of Markham's statements, however, is assailed. We think, by reason of the facts already stated, that they were properly admitted for two reasons: First, because they appear to be the spontaneous statement of the injured man as soon as he regained consciousness; and, second, because they were made after his condition had been explained to him by the physician and with the knowledge of impending death. The weight to be given to this evidence was a question for the jury.

There is no error in the record, and we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

GEORGE H. SANDS ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 17, 1907. No. 14,640.

Evidence examined, and *held* sufficient to sustain the judgment.

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

J. W. Deweese, F. E. Bishop and *O. A. Abbott,* for appellant.

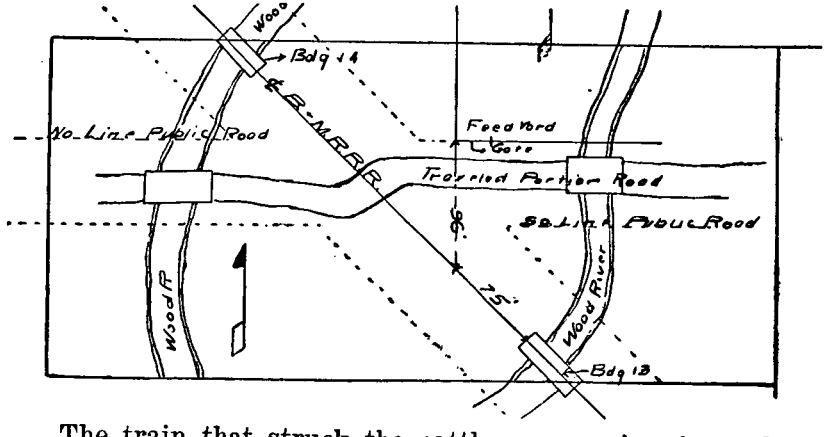
R. R. Horth and *Charles G. Ryan, contra.*

JACKSON, C.

The plaintiff had judgment for the value of ten head of cattle which were killed by one of the defendant's trains at a point where, it is claimed, the defendant was required to fence its right of way and neglected to do so. The defendant, on appeal, presents the question of the sufficiency of the evidence to sustain the judgment.

The location of defendant's track with reference to other objects involved in the inquiry presents a situation somewhat confusing and difficult to state so that it may be understood. The cattle were killed at a point distant about two miles from Grand Island. The railroad at that place extends from the southeast to the northwest, and crosses two forks of the Wood river. The railroad

bridges at this point are numbered 13 and 14, No. 13 being the eastern bridge. Between the two bridges a public highway 66 feet wide crosses the defendant's right of way and track east and west. As the traveled portion of the road approaches the railroad from the east, it turns somewhat to the south and crosses the railroad track at nearly a right angle. East of this public crossing the defendant's right of way is not fenced on the north side. North of the public highway and east of the railroad crossing the plaintiffs have a feed yard, where, at the time the cattle were killed, they were feeding about 150 head of steers and heifers. A gate at the southwest corner of the yard opens into the public highway. One of the plaintiffs, who made the measurements, testified that the distance from the gate south to the railroad track was 96 feet, and from the point where the line south to the railroad track crossed the track to the west end of bridge 13 the distance is 75 feet. The distance from that line west to the railroad crossing is not given, although the distance from the west end of bridge 13 to the railroad crossing is variously estimated from 75 to 80 feet. The accompanying plat, although not drawn to scale, may assist in understanding the situation:



The train that struck the cattle was coming from the east, a little behind time, and was running at the rate

of from 60 to 75 miles an hour, before daylight in the morning, which was somewhat foggy on the river bottom. Some time during the night the gate leading into the plaintiff's feed yard was opened, and some of the plaintiff's cattle, probably 50 in number, escaped into the road and onto the company's right of way. The carcasses of the animals were found, one on the south side of the railroad track ten feet east of the crossing, the others west of the crossing, some of them east of bridge 14, others in the west fork of the river, indicating that the force with which they had been struck carried the bodies to the north and west. The testimony of the plaintiff's witnesses tends to prove that the cattle, when they escaped from the yards, crossed the public highway onto that triangular tract between the public road and the defendant's right of way, where there was a small patch of grass north of the railroad track, and thence onto the right of way. Tracks were found very close to the west end of bridge 13, and disclosed that the cattle went from there toward the crossing of the public highway onto the railroad, and that they were running. One of the plaintiff's witnesses testified that the first carcass to the east was found about 60 feet west of bridge 13. The plaintiff's theory is that the cattle, after they escaped from the feed yard, crossed the public highway onto the defendant's right of way, where it should have been fenced, but was not, were scared by the approaching train, and ran west on the company's right of way, and onto the railroad track, where they were struck and killed.

The defendant's section foreman, who was the first man on the ground after the cattle were killed, testified to having been notified that the train had struck some cattle near Wood River; that he went to the crossing at 5:30 o'clock in the morning, found the gate open and the animals lying dead along the track, one about ten feet east of the crossing. It was his judgment that the cattle were struck at the crossing, because of the fact that there was a clot of blood on the planks at the end

of the crossing. He followed cattle tracks from the gate immediately to the crossing. The engineer in charge of the engine testified that the train usually carried from eight to thirteen coaches, he did not know how many they had that morning. The cattle were struck somewhere between 4:45 and 5 o'clock in the morning. The engine was equipped with an electric headlight. The first that he noticed was the eyes of the animals, which he described as green lights, 50 to 100 of them. He applied the brake, the dust flew, and it was all over. He thought the cattle were from six to ten rods away when he first noticed them. He said the traveled portion of the public highway showed white, and that the cattle were all bunched on the crossing—possibly not all of them on the crossing; that they were standing still when he struck them. The fireman testified that when the engine went onto bridge 13 he ceased firing, as was his custom on approaching Grand Island, and dropped his shovel. He saw the engineer make a move, and looked ahead and saw the eyes of the animals. He was on the left side of the engine, and saw one of the animals struck. It fell forward and to the side of the track, evidently the one found east of the crossing, although his judgment was that the cattle were all struck on the crossing. It is the theory of the defendant that the cattle that were killed came directly from the gate, along the public highway, onto the crossing, where they were struck by the passing train, and that any other theory is based upon a mere conjecture not supported by the evidence.

An analysis of the direct evidence, in connection with the facts and circumstances shown to exist, has led us to a different conclusion. When we stop to consider that the entire distance involved in the inquiry would be covered by a train running as this one was in probably less than a second's time, and the tremendous force of a train, carrying from eight to thirteen coaches, running at that rate of speed, it becomes apparent that when the engine struck the cattle, which were shown to have

weighed about 1,000 pounds each, they would be likely to be thrown or carried many feet forward, and it would not be at all improbable that some of them should be found at a distance of 100 or more feet from the point where the collision occurred. The fact that one of the carcasses was found a distance of ten feet east of the crossing indicates that they were struck still farther east of that point; and if the cattle were bunched together on the track, as testified to by the engineer, he was clearly mistaken in stating that they were on the crossing. In fact, it seems remarkable that in the length of time allowed him for observation he should have anything more than a general idea of the location. The direction of the travel of the cattle and the presence of their footmarks on the company's right of way near the east end of bridge 13 disclose that they entered upon the company's right of way at a point where it should have been fenced, and we do not think the finding of the jury was an unreasonable inference from all the facts. In fact, it can hardly be said that it was not the most reasonable. The presence of the blood on the planks of the crossing is hardly to be taken as evidence of the fact that the cattle were struck at that point. It would rather indicate that some one of the cattle, struck at a point farther east, was thrown onto the planks, or, possibly, after the train had passed struggled over the crossing before death overtook it.

Other assignments of error relate to the admission of evidence and the giving of instruction No. 9. It is said that the court erred in permitting witnesses to testify where the ten head of cattle entered upon the defendant's right of way and that there was no fence at the place where they so entered. That particular portion of the evidence to which our attention has been called relates to the direction in which the tracks led from the gate, and, in our judgment, was admissible, as was the evidence that the company's right of way was not fenced at that point where the cattle entered.

The instruction complained of is as follows: "You are further instructed that, if you believe, from a preponderance of all of the evidence in this case, that the cattle of the plaintiffs in question went onto the right of way of the defendant at a place where under the law it was required to fence its right of way, but had failed to do so, and had there gone onto the railroad track, and had from there been driven by defendant's engine and train, or wandered onto the public road or crossing, and were there killed or injured, then and in that case the defendant would be liable; and, if you so find, then your verdict should be for the plaintiffs for such an amount of damages as you believe, from all of the evidence, the plaintiffs have sustained, not exceeding the amount claimed in plaintiffs petition." The objection to this instruction is based upon the assumption that there was no competent evidence in the record upon which it could be based. If we are correct in the conclusions already reached the objection is not well taken, and we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

HAROLD BELL, APPELLEE, V. WILLIAM R. ROCHEFORD ET AL., APPELLANTS.*

FILED JANUARY 17, 1907. No. 14,645.

Master and Servant: INJURY. Where one servant is placed in a position of subordination to, and subject to the control of, another servant of a common master, and is injured, without fault of his own, in the performance of his duty, and through the negligence of his superior, while acting in the common service, an action lies against the master.

* Rehearing denied. See opinion, p. 310, *post*.

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

Greene, Breckenridge, Matters & Kinsler, for appellants.

Weaver & Giller and *J. M. Macfarland, contra.*

JACKSON, C.

The plaintiff had judgment for damages on account of an injury sustained while in the employ of the defendants. The defendants appeal.

The facts concerning the injury are not disputed. The defendants were independent contractors engaged in the erection of a power house for the Omaha Street Railway Company, and were, at the time of the accident, putting in a concrete floor in the second story. That portion of the floor at the point where the accident occurred was above a room 9 by 40 feet, with a 10 foot ceiling. To support the concrete steel I beams were placed crosswise of the room at a distance of 8 or 9 feet apart. They rested at either end upon a concrete wall, in which openings were left for that purpose. The steel beams were from 4 to 6 inches wide at the base and top, 10 inches deep, and weighed 150 pounds. The pockets into which the ends were placed were about 10 inches wide. For the purpose of holding the concrete in position until it hardened, wooden forms were built so that they might be removed after the concrete became self-supporting. These forms were constructed by placing a 2 by 12 inch plank lengthwise under each I beam, and were held in place by means of 4 by 4 inch pieces extending from the lower floor to the under side of the plank, leaving a margin of from 3 to 4 inches on either side of the steel. The space between two I beams was called a section. Other planks were then placed crosswise of the section, the ends resting upon the edge of the 2 by 12 inch pieces. The forms were being

constructed under the supervision of a carpenter, named Wooley, and by a carpenter, named Turner. The plaintiff was a common laborer engaged in wheeling concrete, handling lumber and other material. He assisted in knocking down the wooden forms after the concrete was hardened, and was subject to direction, both from Wooley and Turner, when his assistance was desired in bringing material and placing timbers in the construction of the forms. The first service performed by the masons in laying the concrete floor was to secure the I beams at either end by filling the pockets around the steel with concrete. This had not been done at the time of the injury.

On the day of the accident the plaintiff was engaged, during the forenoon and that portion of the afternoon up to the time the accident occurred, in another part of the building. Turner was employed constructing the forms at the place described. He commenced at the west end and was working east. He had completed 3 or 4 forms and was working, perhaps, on the fifth. The 2 by 12 at the east side of this form had been placed in position, and was supported by a 4 by 4 placed in the center of each end of the plank, leaving a projection of 4 inches of plank on each side of the support. Other planks had been laid crosswise to complete the bed of the form, with the exception of a single plank, when Turner left his work and went to the tool house for tobacco. Wooley called to the plaintiff to come and assist him in putting this last plank in place. Wooley was at the west side of the form and the plaintiff at the east. The plank selected was a little wide for the opening, and in order to crowd it into place one edge of this plank and the edge of an adjoining plank were raised, placed together in a V shape, and the plaintiff, in a stooping position, was attempting to crowd it into place. His weight and the pressure caused the 2 by 12 on the side where he was at work to tip, the steel beam turned over, and the form of that entire section fell with the plaintiff into the base-

ment below, resulting in the injury on account of which damages are claimed. The appeal involves the sufficiency of the evidence to sustain the verdict and judgment, and the giving of an instruction by the court on its own motion.

It is said that the accident was the result of a danger incident to the employment and was voluntarily assumed by the plaintiff; that it resulted from the incomplete condition of the form, and, if the the result of a negligent act, it was the negligence of a fellow servant. It appears that when the forms were completed, ready to bear the weight of the concrete, the 2 by 12 planks forming the base of the bed were supported each by 4 or 5 4 by 4 inch pieces, according to the weight to be carried, and that when the forms were all completed each extension of the plank beyond the base of the beam would carry an equal weight; that the dangerous condition of the form was open and obvious to all persons alike, and that the plaintiff, knowing of this condition, voluntarily assumed the risk of danger when he entered upon the form. It is true that to any person who knew the condition of the substructure the danger was obvious. It required no unusual power of observation and skill to determine that fact; but the plaintiff did not know the condition of the substructure. He was at work on the floor then being laid. The bed of the form was all in place with the exception of a six-inch plank. The substructure was hidden from his view. When he entered upon the superstructure at the command of Wooley, he would be justified in believing that the substructure was completed so that the element of obvious danger did not exist. It can not be said that the accident was the result of the negligence of a fellow servant.

It is true that one of the defendants, the only witness called on behalf of the defense, testified that either he or his partner were present all the time during the construction of the building and personally superintended the work, and that they had no foreman; that they some-

times sent directions to laborers through other workmen. It appears, however, without contradiction, that when Turner went into the employ of the defendants he received his instructions from Wooley. The plaintiff and other laborers testified to having been directed and controlled in their work by Wooley.

Where one servant is placed in a position of subordination to, and subject to the orders and control of, another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant, while acting in the common service, an action lies in favor of the inferior servant so injured against the master. The relation does not arise out of the fact that Wooley was the higher grade workman, but because of the fact that he was vested with authority to and did control and direct the labor of the plaintiff. To a somewhat less extent this was also true of Turner, who disclosed by his own evidence that, when he desired the assistance of a common laborer, he called and directed him at his pleasure. The mischief of the case lies not alone in the incomplete condition of the form, but is rather due to the fact that the plaintiff was directed to enter upon it in its unsafe condition by his superior. The case is not to be tested by the rule that prevails where workmen are provided with material to erect a trestle upon which they are to work. Had the plaintiff himself constructed the form after being provided with suitable material for that purpose, or had he directed or controlled its construction, it may be conceded that he could not recover; but he was charged with no such duty. On the contrary, the defendants, through Wooley, assumed the supervision and control of its construction, and were bound to exercise ordinary care and make it reasonably safe and secure for those who might be called upon to use it.

The instruction complained of is as follows: "You are instructed that it is the duty of the master to use ordinary care to provide his servant with a reasonably safe working

place, and with reasonably safe appliances with which to work; but an employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objections as to the hazards. Where, however, the servant, in obedience to the requirements of his master, incurs the risk of appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident, provided such accident results directly from the negligence of the master." The objections to the instruction may, perhaps, be best stated in the language of counsel: "When we consider that the form or structure collapsed under the weight and pressure put upon it because of its unfinished condition; or, in other words, that because of the particular stage of the work it was too weak to sustain the weight, and not through any defect either in the material or the construction, it is obvious that an instruction which assumes that the master was furnishing the form or structure for the workmen to use, and therefore was bound to exercise reasonable care for their safety while using it, is not only inapplicable to the circumstances of the case, but is entirely misleading and confusing." We do not regard the instruction as being open to the criticism made, especially in view of the conclusion of fact already reached.

We find no error in the record, and recommend that the judgment be affirmed.

DUFFIE and ALBERT, 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 rchearing was filed July 12, 1907. *Rehearing denied:*

1. **Master and Servant:** INJURY: LIABILITY. Defects in scaffolds, forms and temporary structures, not intended to become a part of the completed building, are not defects of the structure due to its unfinished state.
2. **Negligence:** PROXIMATE CAUSE. The proximate cause is the primary fault where no intermediate cause, disconnected therefrom and self-operating, intervenes to produce the effect.

CALKINS, C.

This cause was submitted upon an oral argument of a motion for rehearing. The former opinion by JACKSON, C., *ante* p. 304, contains a statement of facts, which is accepted by counsel for both parties as sufficient.

1. It is urged that the infirmity which made the section unsafe at the moment it fell was due solely to its unfinished state, and therefore, that it was an inevitable risk of construction which the plaintiff assumed. This argument was met in the former opinion, and we are satisfied with the reasons there given. It is, however, proper to say that the case of *Armour v. Hahn,* 111 U. S. 313, cited by defendant in support of his argument, presents facts essentially different from those we are now considering. In that case, the timber which gave way was not a scaffolding or temporary structure intended to facilitate the execution of the work and then to be removed, but a component part of the building, insecure because incomplete, not intended to support the weight of the workman and upon which he was not instructed to go. In this case, the structure which gave way was a form designed to support the cement until it had hardened, and incidentally the weight of workmen during construction, after which it would, in the regular course of the work, be removed. Defects in scaffolds, forms and temporary structures, not forming part of the building, serving only as aids in construction, are not defects of the structure due to its unfinished state.

2. The defendants insisted that the plaintiff knew, or should have known, the defects in the structure, and that he therefore assumed the risk in going upon the same. This contention is disposed of in the former opinion upon the ground that, when the plaintiff entered upon the superstructure at the command of Wooley, he was justified in believing that the substructure was completed so that the element of obvious danger did not exist, and this still seems to us to be the correct view. It is now urged that the pleadings are insufficient to sustain the verdict upon this theory of the case. The amended petition described the construction of the forms, set forth the particular facts which it was claimed made the structure insecure, and alleged that the plaintiff, in obedience to the direction of the defendant's foreman, went upon the structure, and, while engaged in his work thereon, was by the falling of the structure precipitated to the floor below, thereby suffering the injuries complained of. If we understand the contention of the defendant's counsel, it is that, since the petition does not state that the weight of the plaintiff and his efforts to crowd the plank in place caused the collapse of the section, it fails to allege the proximate cause of the accident. The argument of the defendant proceeds upon the theory that placing the weight of the plaintiff upon the structure, and his effort to put the plank in place, was the proximate cause of the accident. It is the same as if, in a case where A, owing a duty to B to construct a bridge in a safe and secure manner, negligently leaves it unsafe and insecure, and B, relying upon its apparently safe condition, or, as in this case, upon the express direction of A, goes upon it and it falls, we should say that the proximate cause of the catastrophe was the weight of B, and not the negligence of A. Such is not the law. The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time to the injury. *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469; *Aetna Fire Ins. Co. v. Boon,* 95

U. S. 117. The inquiry must be, says Mr. Justice Strong, "whether there was any intermediate cause, disconnected with the primary fault and self-operating, which produced the injury." It is clear that the weight of the plaintiff, and his efforts to place the plank, was not such intermediate cause, disconnected from the primary fault and self-operating, and was not, therefore, in the meaning of the term as applied in the law of negligence, the proximate cause of the injury, and it was neither necessary nor proper to plead it as such in the petition.

We are therefore of the opinion that the motion for a rehearing should be overruled, and we so recommend.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the motion for a rehearing is

OVERRULED.

CITIZENS BANK OF STANTON, APPELLANT, V. W. W. YOUNG ET AL., APPELLEES.

FILED FEBRUARY 8, 1907. No. 14,366.

Judgment Record: ERROR: BONA FIDE PURCHASER. A judgment of a county court against Alex Simon, filed in the office of the clerk of the district court and entered in the judgment docket of that court, but not indexed alphabetically therein, is not a lien on the lands of Simon Alexander, as against a subsequent *bona fide* purchaser without any actual notice of its existence.

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

G. A. Eberly, for appellant.

W. W. Young and *A. A. Kearney, contra.*

BARNES, J.

During the pendency of an action in the federal court to foreclose certain real estate mortgages, the plaintiff, a creditor of the mortgagor having knowledge of the pendency of said action, sued the latter by a name other than the one by which he held title to and mortgaged the land, and acquired two judgments against him in the county court. Transcripts of the judgments were filed in the office of the clerk of the district court for the county in which the lands lay, and were entered in the judgment docket, but were not indexed therein. They were, however, indexed in another book called the "general index." The foreclosure suit proceeded to a decree and sale, without intervention of the judgment creditor, and the land in question was bid off by a person not a party to the record for its full value, which was a sum much less than the amount of the mortgages and judgment liens established by the decree. After the sale the defendants, Young and Kearney, for a valuable consideration, obtained from the mortgagor a conveyance of the premises by warranty deed, subject, however, to the decree of foreclosure, and upon application to the federal court were let in to redeem, and did redeem, by paying the purchaser the amount of his bid with 12 per cent. interest from the date of sale, pursuant to the last clause of section 497*a* of the code. There can be no doubt that this transaction freed the defendants' title from all the liens of the mortgages and the several judgment liens established by and included in the decree of foreclosure. It will be observed, however, that the plaintiff's judgments were not among those established by the decree. After the proceedings in foreclosure and redemption therefrom had been completed, the plaintiff caused executions to be issued and formally levied upon the land in question, and thereupon began this suit in equity, praying for a decree establishing its judgments as liens thereon prior and superior to the title and interest of the defendants, Young and Kearney, and directing a

sale thereof for their satisfaction. The district court found on the issues joined for the defendants, and dismissed the action, and from that judgment the plaintiff brings the case here by appeal.

The evidence shows that the title to the land, as it appeared upon the public records, was in Simon Alexander, and in that name the mortgages, which were foreclosed, were executed; that the foreclosure and redemption proceedings were prosecuted and completed in that name, and the title so remained until the land was conveyed by a deed made by Simon Alexander to the defendants, Young and Kearney, while the plaintiff's judgments, which are the foundation of this suit, were recovered against one Alex Simon. It further appears that the transcripts of the judgments, which were filed in the office of the clerk of the district court, were entered upon the judgment docket of that court, but not indexed therein; that they were indexed in a book, called by the clerk, a "General Judgment Index"; and it is a fact, which is not disputed, that wherever they were recorded or indexed they appeared as judgments in favor of the plaintiff and against Alex Simon. It further appears that the defendants, Young and Kearney, had no actual knowledge or notice of the existence of said judgments until after they had acquired the land by purchase and redemption, as aforesaid. They now contend that the filing of said transcripts did not create a lien upon the lands as against them, and the records are insufficient to impart even constructive notice of their existence.

This contention appears to us to be well founded. At the common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. If we inquire, therefore, for the basis of the lien of a judgment on land, it must be found in statutory authority. Since such liens are exclusively the creatures of statutes, they can only be obtained by a compliance with the statutory provisions by

which they are created. Under our statutes the lien of a judgment is not an interest in the real estate of a debtor. It merely confers the right to levy thereon to the exclusion of other adverse interests acquired subsequent to the judgment. As above stated, the record title to the land in question was in Simon Alexander, taken so regularly, without fraud or concealment, while the plaintiff's judgments were rendered against Alex Simon, without any showing, by allegation in their petitions or elsewhere, that the defendant therein was known by both the name of Simon Alexander and Alex Simon; nor was there any statement or finding as to which was his true name. As before stated, they were filed in the office of the clerk of the district court, and were entered in the judgment docket as judgments against Alex Simon only, and were not indexed alphabetically in said record. Therefore we are of opinion that our decision herein should be ruled by *Metz v. State Bank of Brownville*, 7 Neb. 165. It appears in that case that on the 21st day of September, 1874, the State Bank of Brownville, Nebraska, recovered a judgment against one William Hall in the probate court, and on the 13th day of February, 1875, procured a transcript of the judgment, and filed the same in the office of the clerk of the district court for Richardson county. Hall at that time was the owner of certain real estate in said county. The cause of action upon which the judgment was recovered was a promissory note given by Hall to the bank, which was signed by Theodore Hill and Lewis Hill as sureties. No service was had upon either of the sureties, and no judgment taken against them. The transcript was entered on the judgment record as "State Bank of Brownville, Neb., v. William Hall, Theodore Hill and Lewis Hill, partners, as Theodore Hill & Co." The judgment was not indexed in the judgment record in which it was entered, but was indexed in a book called a "General Index," as "State Bank of Brownville v. Theodore Hill & Co." On the 22d day of September, 1875, Hall sold the real estate in controversy to the plaintiff, Metz, who

had no actual notice of the existence of said judgment. Upon these facts it was held that the lien of the judgment did not attach to the land, so as to affect the rights of the subsequent purchaser. In the opinion it was said: "In addition to the general index provided for by statute, in which the names of parties, both direct and inverse, shall be entered, it is also provided that the judgment record shall contain the *judgment debtor* and the judgment creditor, arranged alphabetically, etc. It is apparent, therefore, that the legislature intended that an alphabetical index should constitute a part of the record. Therefore judgments, which are valid as soon as rendered, do not become liens upon real estate as against subsequent purchasers, without notice, until properly indexed. And such purchasers are not required to search for judgment liens further than to examine the proper index." It was further said "It is an indispensable element in a judgment record, in order to give subsequent purchasers notice of the filing of a transcript, that the names of the parties, plaintiff and defendant, be entered in the alphabetical index."

In the case at bar the names of the plaintiff and defendant were not entered in the alphabetical index to the judgment record, and, even if they had been so entered, such entry of the judgments against Alex Simon, without further explanation, would have been insufficient to impart even constructive notice to a subsequent purchaser of land owned by Simon Alexander. So we conclude that the finding of the district court that the proceedings in question were not sufficient to make the judgments liens upon the land as against the title and interests of the defendants, Young and Kearney, was right, and is fully sustained by the evidence.

The judgment of the district court is therefore

AFFIRMED.

GEORGE VAUGHN V. STATE OF NEBRASKA.

FILED FEBRUARY 8, 1907. No. 14,655.

1. **Rape: EVIDENCE.** In a prosecution for rape, resistance by the female is an issue only so far as it is involved in the proof of her want of consent. To show that the assault was against her will, her resistance must be proportionate to the occasion, under the circumstances, and at the time of the act complained of. In ordinary cases there must be resistance to her utmost, or at least to the extent of her ability. In peculiar cases and under peculiar circumstances, a less degree may be sufficient.

2. ———: INSTRUCTIONS. Where the evidence shows that at the time of the commission of the alleged offense the prosecuting witness made no outcry and did not complain of the offense to others, but concealed it for about twenty days, an instruction that the jury should take these circumstances into consideration, with all the other evidence in the case, in determining the question of the guilt or innocence of the accused, is proper, and under the circumstances of this case it was prejudicial error to refuse to give the same when requested by the defendant, no instruction covering the same ground having been given by the court upon its own motion.

3. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

T. S. Stevens and *Stull & Hawxby,* for plaintiff in error.

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

LETTON, J.

George Vaughn, a young man 22 years of age, was tried in the district court for Nemaha county upon an information in two counts, the first count charging him with rape with force and violence, and the second charging him with the crime of rape with consent, upon the person of one Mina C. Holly. From a verdict of guilty upon the first count he prosecutes error.

1. It is urged that the court erred in refusing a con-

tinuance and in refusing a new trial upon the ground of newly discovered evidence material to the defense. These assignments it is unnecessary to consider since, in our view, the judgment of the district court must be reversed upon other grounds. We may say, however, that under the peculiar circumstances of this case, where all the witnesses resided at a distance from the place of trial and where the defendant had so little opportunity to prepare for his defense, a continuance would have been entirely proper.

2. It is next assigned that the verdict is not supported by the evidence. This requires a recital of the main facts as disclosed by the testimony. The offense was alleged to have been committed in Island precinct, in Nemaha county. This precinct was originally a peninsula nearly surrounded by the Missouri river upon the Nebraska side of the stream, but by a sudden avulsion many years ago the river changed its course, and the land lying to the east of the present channel was cut off and thus physically attached to Iowa and Missouri, while legally still a part of Nebraska. Mina Holly, the prosecutrix, lives in Missouri near the boundary line. The defendant, who had lived in the neighborhood several years, at the time of the alleged offense was working for one Cal Taylor, who lived in Island precinct a few miles from the residence of the prosecutrix. Early in January Taylor's wife left home upon a visit, leaving the defendant and Taylor living upon the farm. Taylor's house is distant about four or five miles in a southeasterly direction from the home of the prosecutrix, which is situated about 5 miles southwest of Hamburg, Iowa. On the evening of January 9, 1906, Taylor and Vaughn drove to Hamburg. Vaughn's sister, Rhoda Vaughn, had been visiting the prosecutrix, who had taken her to Hamburg in a buggy. On her way home she met Taylor and Vaughn on the road. Both parties stopped, and Vaughn got out of the buggy, went to the side of the buggy in which Miss Holly was seated, and asked her, as she testifies, to go to a dance that night, which

she consented to do, if his sister Rhoda Vaughn went. The men went on to Hamburg and made arrangements with Jennie Fletcher, a cook in a hotel there, and evidently a woman of easy virtue, to go out with them that night. About 8 o'clock Taylor, Vaughn and Jennie Fletcher went to Holly's in a single seated buggy. Holly's house was situated at some distance from the road, at the end of a lane. The buggy was stopped some distance from the house and at a point where it was not uncommon for vehicles to stop when parties were coming to the house. Vaughn went to the door and got Miss Holly, who accompanied him to the buggy. When she got there she found Taylor sitting on Miss Fletcher's lap. She testifies she thought it was Rhoda Vaughn and one Cheney until she got in the buggy when Taylor spoke to her and she knew who it was; that she got in and sat in the seat, and Vaughn sat on her lap until they drove along the lane to the main road, a distance of about a quarter of a mile, and that when Vaughn got out to open the gate at the main road she started to get out, but could not because Taylor held her, though Taylor was sitting on Miss Fletcher's lap, holding the lines and the whip, and she was sitting on the seat on Taylor's left side; that after they left the gate Taylor let her get up and sit on Vaughn's lap; that they went rapidly two miles east, past Jennings', Lane's and Bush's houses; that when they got to Bush's house she took the lines and got the team almost stopped, when Taylor took the whip and hit the horses and made them go faster and took the lines away from her. Her testimony was, in substance, that she was kept in the buggy against her will and was driven from her father's house at a rapid rate of speed to the house of Cal Taylor; that there she was taken into the house; that Taylor and the Fletcher woman went up stairs, leaving her and Vaughn in the kitchen, and that, after prolonged resistance upon her part, Vaughn threw her upon the floor and violently ravished her against her will; that he then pushed her up stairs into a bedroom and repeated the act; that she then went down

stairs, and Taylor came down, and Vaughn went up stairs; that Taylor then had forcible intercourse with her against her will; that she ran out of the house and ran as far as she could go, when Taylor came after her and took her back to the house; that after this the others had supper, and that she again tried to get out of the house, but was prevented; that, after the team was hitched up to leave, Taylor and the Fletcher woman again went up stairs, and Vaughn again had forcible intercourse with her. She further testifies that when she was trying to get away from Taylor she ran to the window and he shut it down, when she kicked one of the window lights out and kicked the screen off, then ran back to the door and tore part of the latch off the door in trying to get out.

The story told by the prosecutrix upon her direct examination, if true, would sustain a conviction of the defendant upon the charge of which he was convicted; but upon cross-examination the prosecutrix testified to matters in detail which are extraordinary and so inconsistent and contrary to the nature of things and to the story told upon direct examination that we have serious doubts whether her evidence, taken as a whole, sustains the verdict. She testifies that, though the buggy was driven for four or five miles along a road with six or seven houses standing near, neither along the road nor in front of any of these houses did she make any outcry or in any way resist her forcible abduction by all the means within her power. She did not attempt to turn the horses when she was driving them or to drive up to a house, and after they had turned south on the Island road, and she found she was not going to a dance, they passed several houses. One of them was lighted and was not more than fifteen or twenty feet from the highway. She testifies that when they got to Taylor's house she got out of the buggy herself; that she had a long coat on, reaching below her knees, and it was buttoned the whole evening; that she also wore a heavy wool skirt and a wool waist and had a heavy wool shawl over her head, body and shoulders, reaching nearly

to her waist line, and she also wore a fur collarette, and that she did not take her shawl or coat off at any time that night. She had known Taylor all her life, and Vaughn about a year, and had gone to a neighborhood dance with Taylor and Vaughn in September.

The details of her first encounter with Vaughn upon the kitchen floor fall far short of indicating the degree of resistance to a violation of her person which is necessary to constitute rape. Neither she nor the defendant seem to have suffered any bruises, scratches nor evidence of conflict of any kind, and her outer clothing and underskirts, it appears, bore no evidence of disturbance, though she testifies her drawers were torn; and there was no evidence of tears or anger on her part at that time, or of such nervous disturbance as would be expected in an outraged woman. Her general health was so little affected that, in the short time that intervened between the time of the alleged offense and the trial, her weight apparently increased, since at the trial she weighed 132 pounds, but says she might not have weighed more than 125 pounds at the time of the alleged offense. There was evidence of a bruised condition of the parts, but the examination was not made for several weeks after the event. After the party left Taylor's house she was taken home to her father's house. She made no complaint of any kind however at that time. She went riding with other young men to church and to dances in the neighborhood and the usual current of her daily life seems to have been undisturbed. She did not keep silent on account of any fear compelling threats, for she testifes that no threat was made to compel her silence, except that Vaughn said that if she told they would "put the fixings on her," and that Taylor dared her to tell. She testifies she made no complaint until January 29, when she told one Cass, a young man with whom she had at one time kept company more or less.

The story she tells of the transaction up stairs seems inconsistent with the idea that she resisted in good faith

to the extent of her ability under the circumstances. In fact her testimony as to her resistance to the act of Taylor is much stronger and more definite than anything she discloses in the way of opposition to the acts of Vaughn. She did not tell her mother about the matter until February 4, some days after she had told Cass, and nearly a month after the alleged rape. She is corroborated to some extent by the fact that a window light was missing and a screen was loose on one of the windows of the Taylor house immediately after the occurrence, though Taylor testifies this condition existed before that time.

Taylor and the Fletcher woman testified for the defense. Their story as to the occurrence tends to show that Miss Holly knew at the time she agreed to go with Vaughn that night that they were not going to a dance, but were going out upon a pleasure excursion, and that when she got in the buggy she was not surprised to find Taylor and the Fletcher woman there; that she went with them cheerfully and voluntarily, and at no time protested or objected. They further testified that when they arrived at Taylor's house the couples separated; that Taylor and Miss Fletcher went up stairs and occupied a room together, as Miss Holly relates, but they say that she voluntarily assisted in getting supper and ate it with them, and that together with the Fletcher woman she cleared up and washed the dinner and supper dishes, and that at one stage in the proceedings she danced a jig. It is very evident that Taylor committed perjury as to what took place between himself and the Fletcher woman when they went up stairs, but the testimony of the Fletcher woman in many respects is similar to that of the prosecutrix as to their doings at the house. Her testimony tends to show that after she and Taylor had been up stairs awhile Vaughn came up and made some remarks indicating that he had found resistance in his efforts to have intercourse with the prosecutrix, and to this extent also her evidence corroborates that of Miss Holly. There is testimony in the

record tending to show a lewd disposition upon the part of the prosecutrix.

The conclusion we draw from the evidence is that Miss Holly went voluntarily with Taylor and Vaughn that night; that she objected to and resisted some of the acts of intercourse testified to, and more especially did she resist the act she swears that Taylor accomplished, but that as to her relations with Vaughn her resistance was not such as might be expected from a woman earnestly seeking to protect her virtue against a ravisher. She was a young woman, apparently in good health, weighing from 125 to 132 pounds, yet she testifies that the defendant pushed her up stairs by the shoulders; that she took hold of the door and he struck her elbow and made her let go, and then, without putting his hands upon any part of her person except her shoulders, he pushed her up the stairway to the bedroom above. This is incredible, if she resisted.

The story also as to the forcible violation of her person in the manner she testifies after they reached the bedroom seems difficult to credit. The fact that she made no complaint for over three weeks, and then told a young man associate, is also a circumstance to be considered.

In *State v. Cowing,* 99 Minn. 123, there is a lengthy examination of the decisions with reference to the degree of resistance and lack of consent on the part of the injured female which is necessary to make the forcible and carnal knowledge of her person constitute the crime of rape. In that case the facts recited as to the assault are somewhat similar to those recounted by the prosecutrix in this case with reference to the first assault upon her by the defendant in the kitchen, as to which she goes most into details. The Minnesota court points out the fact that the testimony did not show that the female used her natural means of defense, and it is said in the opinion: "Not only is she not shown to have used or tried to use her hands, but there is no testimony that she used or tried to use her body, legs, or any other ordinary means of reprisal. Neither the victim nor the perpetrator appear to have borne any

bruise or mark resulting from the struggle. There is confused testimony that one of her skirts was slightly torn, but no evidence that her clothing had been touched or torn. Nor does the record show any threats or intimidation on the part of the defendant, or any intent on his part to use any means necessary to accomplish his purpose, nor any reasonable ground for apprehension of bodily harm, nor such a place or position of the prosecutrix as would have rendered resistance useless." This discussion is as relevant to the facts in this case as if it had been written with reference thereto. In that case it is said that "in a prosecution for rape, resistance by the female is of necessity an issue only as it is involved in the proof of her want of consent, which is always required. To show such unwillingness her resistance must be proportionate to the occasion under the circumstances and at the time of the act complained of. In ordinary cases, there must be resistance to her utmost, or at least to the extent of her ability. In peculiar cases, a less degree may be sufficient." And this is in accordance with the former holdings of this court. *Olsen v. State*, 11 Neb. 276; *Mathews v. State*, 19 Neb. 333.

3. It is urged by the state that further resistance or any outcry made by Miss Holly would have been useless under the circumstances under which the assault was committed upon her, but this is predicated upon the thought that both Taylor and Miss Fletcher would have consented to a forcible outrage of the prosecutrix, at least to such an extent that they would have refused to come to her assistance. We can hardly believe that if the prosecutrix had resisted to the extent of her ability, had called for help in her extremity or tried to raise an alarm, she would not have found assistance at their hands. Viewing the case as a whole, we think there is not sufficient evidence in the record to sustain a conviction.

4. The defendant requested an instruction that, if at the time the offense is alleged to have been committed the prosecuting witness made no outcry and did not imme-

diately complain of the offense to others, but concealed it for a considerable length of time, the jury should take these circumstances into consideration, with all the other evidence and circumstances in the case, in determining the question of the guilt or innocence of the accused. This instruction was refused by the court. No instruction covering the same ground was given by the court upon its own motion, and, under the peculiar circumstances of this case, we think the jury should have been instructed as requested. There appears to be no conflict in the testimony that the prosecuting witness was with the defendant at Taylor's house, and the important inquiry under the first count of the information was whether or not the intercourse, if any had, was by force and against the will of the prosecutrix. This being the case, this instruction, which was based upon the testimony, and which called to the attention of the jury facts which were material to be considered as bearing upon the degree of credit to be given the prosecutrix, and which strongly affected the credibility of her story of the occurrence, was proper, and it was prejudicial error for the court to refuse to give it. A cautionary instruction was also requested and refused, and this instruction also, we think, under the peculiar circumstances of this case, should have been given.

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

REVERSED.

STATE, EX REL. LINCOLN TRACTION COMPANY, RELATOR, V. LINCOLN FROST, JUDGE, RESPONDENT.

FILED FEBRUARY 8, 1907. No. 15,013.

1. **Street Railways: CITY ORDINANCES: VALIDITY.** An ordinance of a city, which requires street railway companies and other corporations holding franchises to use the streets of the city to file an application for a permit before entering upon and obstructing the streets, and which requires the applicant to file specifications of

the manner in which the work is to be constructed, and to fix the location thereof, and requires it to give bond to hold the city harmless for damages caused by the proposed work, and which gives the city council power to grant or refuse such permit, is not invalid as interfering with or violating the franchise rights of the company in the streets.

2. ———: ———: OFFICERS: PRESUMPTIONS. The court will not presume that under such an ordinance the city authorities will act arbitrarily or abuse their discretion, but will presume that the ordinance will be construed according to its legal effect, and that if the proper conditions are met the permit will not be refused.

ORIGINAL application for a writ of mandamus to compel respondent, as district judge, to vacate such portion of a temporary injunction as required relator to remove its tracks from a certain street. *Writ denied.*

Clark & Allen, for relator.

E. C. Strode, contra.

LETTON, J.

This is an original application for a writ of mandamus. The relator, a street railway company which is the owner of a franchise to construct and operate a line of street railway on certain streets in the city of Lincoln, among which are N street and Twenty-first street, had commenced to build a line of railway upon N street, when an injunction was issued at the instance of the city of Lincoln, restraining it from further proceedings. A mandatory order was contained in the temporary injunction issued, commanding it to remove from the street the rails and ties already laid and put the street in the same condition in which it was found. This order was not final, but was merely interlocutory; and since the relator was unable to appeal from the same it began this action, praying for a writ of mandamus to require the respondent to vacate so much of the temporary order as requires it to take up and remove its tracks on Twenty-First street and on N street. The application for the writ alleges that the sole

ground for the injunction was that the relator had not obtained from the city council a permit in conformity with a certain ordinance of the city, and further alleged that the ordinance in question is void for various reasons set forth in the petition and which will be hereafter noticed. It was conceded upon the hearing that the question of whether or not the relator was entitled to a writ in this case depended upon the question whether the ordinance in question is void, or is a valid and proper exercise of the police powers of the city in the matter of the regulation of the construction of street railways.

The ordinance in question is entitled "An ordinance regulating the construction of new street railway tracks, gas mains, or other constructions or works of whatever kind in streets, public ways or grounds; to prohibit additional construction of street railway lines, except by consent of the mayor and council; and to amend and repeal all ordinances in conflict herewith." The first section provides in substance that no street railway company, gas company or owner of any system of public works, having or claiming a franchise within the city, shall construct any new lines of tracks, mains or works, or the repair thereof, that requires obstruction of the use of the streets, except in accordance with the terms and conditions following. Section 2, so far as material here is as follows: "Any street railway company desiring to construct new tracks on streets not by it previously occupied * * * shall file with the city clerk a written application for permit to construct such track, stating location thereof, with complete specifications and plans of its proposed manner of construction and material to be used" (omitting the remainder of said section, which provides for the deposit of a certified check for and an estimate of the cost of paving on streets already paved). Section 3: "On filing such certified check, application, and estimate of the city engineer, the matter shall come for consideration of the council, who shall cause publication of notice in two daily papers published in the city for not less than one

week that the matter of such application will be considered by the council at a meeting, the time of which shall be therein stated, at which any persons interested may appear and show cause, if any there be, why such permit should not be granted. Such application shall then come before the council to be considered and may then be granted or refused as the mayor and council determine. If the permit is refused the certified check shall be returned to the company applying for such permit." Section 4 makes similar requirements as to gas companies or other companies having franchises for underground construction. Section 5 recites: "Every such applicant, street railway or other owner shall with their application file its undertaking to hold the city of Lincoln harmless of all claim for loss or damage that may at any time accrue to any person whomsoever or to any property by reason of such proposed work, or for the manner of its execution and construction, and thereupon, except as hereinbefore provided, permit shall be granted to such company and it shall be authorized to proceed with such work." Section 6 provides penalties for a violation of the ordinance.

The relator contends that the ordinance is void because it empowers the city council to grant or refuse a permit to street railways to construct tracks, and thereby enables the council to prohibit the exercise of the franchise and destroy the franchise itself, and that it is not a regulative ordinance, since it does not contain any terms or conditions whereby the exercise of the franchise is regulated. In support of this contention it shows that in the state of Nebraska street railway franchises are granted not by the municipalities, but under the provisions of section 2, art. XI*b* of the constitution, which provides that "no general law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof," and of sections 1-5, art. VII, ch. 72, Comp. St. 1905. These sections require the organization of a corporation;

that the termini of the proposed street railway must be fixed and the precise route described in its articles of incorporation, naming the streets through which the railway is to be constructed; the consent of a majority of the electors of the city to be given at a special election; the canvass of the vote by the council, and the recording in the office of the county clerk of a certificate of the city clerk of the result, showing the consent of a majority of the electors: whereupon such company shall be authorized to construct and operate a street railway, "subject to such rules and regulations as may be established by ordinances of such city."

Construing these sections of the constitution and the statutes, we have held that there is no authority given to a city to grant charters to street railways; that the only authority given the city is to submit the proposition to the electors; for the consent of a majority of the electors is a condition precedent, on the happening of which depends the right to construct and maintain the railway. The grant by the legislature under general law is ineffectual to give street railways the right to operate upon the streets of a city, unless such company has obtained consent of a majority of the electors. The constitution and the statutes and the articles of incorporation constitute the charter of the company, and the consent of the electors properly certified and recorded give it the license and authority to enter upon the streets, and the city can never add to nor take away any of its charter rights. *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109. Since, therefore, the city of Lincoln has no power to grant or withhold a franchise to the corporation, and since the ordinance confers upon the city council the power to refuse the company permission to enter and construct its lines upon the streets upon which the consent of the electors has already been given it to operate, the relator argues that it is void, being in contravention of both the statutes of the state and the constitution.

On the other hand, the respondent contends that, grant-

ing that the position of the relator is correct, and that the franchise of the company is derived from the general law and the articles of incorporation, and its right to use the streets in question has been given by the electors of the city and cannot be rescinded by the city, still its use of the streets must be and is subject to such reasonable regulations as the city authorities may prescribe and require for the protection of the public and for the orderly and proper use of the streets of the city, and that an ordinance which requires a street railway corporation which desires to construct new tracks upon streets not previously occupied by it, or to place additional tracks upon streets already occupied, to file with the city clerk a written application for a permit to construct such tracks, stating the location, with complete specifications and plans of its proposed manner of construction and of the material to be used, is a reasonable exercise of the police powers of the city in the regulation of streets and highways; that it impairs no contract and violates no franchise. It is pointed out that the authorization to construct and operate such street railway is granted under the statute, "subject to such rules and regulations as may be established by ordinances of such city." The respondent admits that such rules and regulations must be reasonable in their operation, and must not be so harsh and arbitrary as to result in a violation of the franchise rights and privileges granted to the corporation, but insists that the ordinance in question is not of such a nature, but is a valid and proper exercise of the right of regulation.

It will be observed that the provisions of this ordinance are not confined to street railway companies alone, but apply to "gas mains, or other constructions or works of whatever kind in streets, public ways or grounds." It would seem that the object of this enactment is to procure and provide a permanent record of both surface and subsurface construction in the streets of the city, so that the exact location of street railway tracks and of gas mains, water mains and other underground construction may be

preserved of record for the use and benefit of the city authorities. It needs no argument to show that such a record is not only useful, but well-nigh essential for the proper control and regulation of the use of the streets of a modern city. While the main purpose of the street is for passage by the general public and for the carrying on of traffic over its surface, still, in the present age, gas mains, water mains, conduits for the carrying of telephone, telegraph and electric light wires, sewers, and pipe lines for other purposes are carried beneath the surface of the streets, and, unless an accurate record were kept by the city authorities of the depth and location of such lines, inextricable confusion and great damage might easily ensue. And so with the surface of the street. In a wide street the construction of a street railway with double tracks might be both reasonable and proper, while in a narrow street the construction and operation of more than one line of track might make the street practically useless for ordinary traffic. It is highly proper, therefore, that, before a street railway company enters upon the construction of its railroad in a street, it submit the location of its proposed line of road, together with the specifications and description of materials proposed to be used, to the city authorities, to the end that it may be constructed with due and proper regard to the interests of the community in general, and with proper regard for public safety and convenience. In this discussion we have assumed that the purpose of the city in the passage of the ordinance is what it appears to be upon the face of the enactment. The court will not presume that the city authorities intend to act arbitrarily, and without due and proper regard for the rights and franchise of the relator. It is said that the terms of the ordinance permit the council to grant or refuse a permit, and that the whole matter of whether the relator may enter upon a street or not is left to the uncontrolled judgment of the city council; but this, we think, does not follow, and if it should ever happen that the city authorities acted, not in good

faith, but arbitrarily and by an abuse of their discretion, and refused to permit the relator to construct and operate its line upon a street over which it was licensed to operate, the courts would afford a remedy.

The relator contends that the provisions of the ordinance requiring notice to be given and a time fixed for all parties interested to show cause, if any there be, why a permit should not be granted, evidences that it was the intention of the council to construe the ordinance to mean that the city council may grant or refuse a permit at their will, but this is not a necessary deduction. The notice is designed to apprise the public generally, and persons living along the line of the proposed construction in particular, of the place and manner in which the railway is intended to be built. There may be circumstances, well known to the people living upon a street, why a railway should not be constructed upon a certain portion of the street or in a certain manner, which might not be clearly obvious to the members of the council, and the object of the notice and the time and place fixed for hearing is to give every person interested an opportunity to be heard upon all such matters or others suggested by the plan proposed.

It is argued by the relator that other ordinances prescribe full regulations for the construction of street railways, and hence this one is useless and arbitrary; but the provision of this ordinance which requires specifications of the manner in which the line is proposed to be built is proper and necessary for the purpose of furnishing the city authorities with information as to whether it is the intention of the railway company to construct the line in accordance with the rules and regulations contained in such ordinances. As the respondent contends, the practice is similar to that of obtaining an ordinary building permit. The ordinances of the city prescribe the manner in which buildings shall be erected within certain limits, and require intending builders to apply for permission to erect buildings and to furnish such details of the pro-

posed erection to the city engineer as will enable that officer to determine whether or not the proposed construction is permissible under the requirements prescribed by ordinance; and so here, since other ordinances exist prescribing the manner in which street railways shall be constructed, the detailed information required by this ordinance is necessary to allow the city authorities to determine whether the company proposes to comply with such restrictions. Further than this, the requirement that, before a permit shall be granted, an undertaking shall be given by every such applicant to hold the city of Lincoln harmless for all claims for loss or damage which may accrue to any person or to any property by reason of the proposed work or by the manner of its execution and construction, is a very proper and necessary condition, and one which the city authorities would be derelict in their duty if they did not require as a condition precedent to opening up and incumbering the streets. It is the duty of the city to use ordinary care to see that the streets are reasonably safe for public travel. If it permits individuals or corporations to dig holes and pile obstructions in the streets without exercising due care, it may be compelled to incur a liability to pay damages which in the ordinary use of the streets would not occur.

Under the conceded facts, the relator has entered upon the construction of a street railway without making any attempt to test the temper of the city authorities upon the question of whether permission would be granted it. It has not tendered any bond to hold the city of Lincoln harmless from any damages that may accrue from the opening and incumbering of the streets. It has not described the location of its proposed railway or the manner in which it intends to build it. It seems to have assumed that the city council intended to violate its duty by arbitrarily refusing a permit. The matter seems so plain as not to require further discussion. We are of the opinion that the ordinance is a just and valid exercise of the police power of the city authorities for the care and

regulation of the streets and for the protection of the public; that, properly construed and administered, it is neither harsh nor arbitrary in its operation. As the stipulation of the parties makes the decision of this case depend upon the invalidity of the ordinance, the relator is not entitled to a writ of mandamus. The writ is therefore denied.

WRIT DENIED.

NEBRASKA HAY & GRAIN COMPANY, APPELLANT, V. FIRST NATIONAL BANK OF FALLS CITY, APPELLEE.

FILED FEBRUARY 8, 1907. No. 14,669.

Banks: FORGERY: COLLECTION: LIABILITY. A bank that, without notice or suspicion of wrongdoing, receives a draft from the drawer for collection, and demands and obtains payment of it from the drawee, and in good faith pays the proceeds over to its employer, is not liable to the payor in damages because the latter made payment without consideration, and in reliance upon a forged bill of lading which the drawer had attached to and caused to be forwarded with the draft.

APPEAL from the district court for Richardson county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Reavis & Reavis and *George A. Magney,* for appellant.

P. B. Weaver and *C. Gillespie, contra.*

AMES, C.

The following is a brief statement of the facts alleged in the petition: On the second day of February, 1905, one J. C. Smith made and subscribed, apparently in his own name, a draft upon the plaintiffs, as drawees, for the sum of $900 payable to the order of the defendant bank, an institution doing business in Falls City, in this state. To the draft he attached what purported to be a bill of lading, indorsed in blank by himself, and signed by a station

agent of the Missouri Pacific Railway Company at Reserve, Kansas, of a shipment of corn from the latter point to the plaintiffs at Omaha, Nebraska. The two documents he delivered to the bank, with instructions to forward them for collection to Omaha and to account to him for their proceeds. Reserve is about five miles distant from Falls City. Smith was an utter stranger to the bank officials, who knew nothing about the transaction except what was represented on the face of the papers, which indicated nothing irregular or out of the usual course. They accepted the documents, and indorsed the draft to the Omaha National Bank, or order, for collection, and forwarded them to their correspondent, the latter named bank, for collection and credit, according to the custom of banks in such matters. Under the same date, at Falls City, Smith wrote and sent to the plaintiffs, by mail, a letter, saying: "I ship you today car No. 20,332 Mo. P., loaded 62,300 pounds wheat. See what you can do for me. Have another small car later." On the following day the Omaha bank received the draft and bill of lading, delivered them to and received the amount of the former from the plaintiffs, credited the sum to the account of the defendant and notified the latter of the fact. Without further information or notice, the defendant paid the amount over to Smith, who has not since been seen or heard from by any of the parties. After a delay of several days, the plaintiffs learned that the supposed bill of lading was a forgery and that no grain had been shipped to them as consideration for the draft. Having demanded, and being refused, repayment of the money by the defendant they brought this action for its recovery. There was a judgment for the defendant upon a demurrer and the plaintiffs appealed.

The petition alleges that the plaintiffs had never previously had any knowledge of or dealings with the man Smith, and that they accepted and paid the draft solely in reliance upon the known respectability and financial responsibility of the defendant, who was named as payee

of the draft, and appeared as if assignee of the purported bill of lading, and had presumably satisfied itself of their genuineness, and the plaintiffs regarded, and were justified in regarding, the transaction as being, in effect, a representation by the defendant that they were genuine. The contention of the plaintiffs is, therefore, that the payment was made through a mistake of facts occasioned solely by the fault or negligence of the defendant, and for which they are themselves in no way responsible. But it is alleged in the petition that the defendant had no interest in the papers or transaction, except as a mere agent of Smith for collection, a fact which the plaintiffs do not deny having known, and which they may well be inferred to have known, at the time of the payment, from the nature of the transaction. The letter written by Smith to the plaintiffs on the day the draft was drawn indicates that the amount of the latter was less than the value of such a quantity of wheat as was named in the bill of lading, and contains a request that the residue or balance be paid by the plaintiffs, by check, to Smith himself at Falls City. This circumstance, if the transaction had been genuine, would have given rise to two inferences: First, that the title to the shipment of corn had not passed to the bank by the indorsement of the bill of lading; and, second, that settlement was not to be made until the shipment had reached the consignees at Omaha, when the latter were requested to "see what you can do for me," that is, we suppose, determine how large a sum they could pay him.

We adopt, without qualification, the contention of counsel for appellant that the principles of the law merchant are without applicability to the case made by the petition, and that the latter is to be decided in accordance with the rules of law governing the relation of principal and agent, and having adopted it there appears to us no doubtful problem for solution. The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger

boy. What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrongdoing by his principal, matters of no importance. He performs his whole duty by delivering what he is charged with delivering and receiving what he is entrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness or validity of either the one article or the other. The case of *First Nat. Bank v. State Bank*, 22 Neb. 769, appears to us not to be in point. In that case the purported check, that is to say, the supposed order upon the Alma bank for the payment of the sum of money in question, was a forgery. In other words, no authority for the collection of the sum existed, and the principle involved is the familiar one that an assumed agent who acts without authority is himself liable as a principal. But in the case at bar the draft was genuine, and the defendant, in demanding and receiving the money and paying it over to the drawer, acted strictly within the scope and limits of its employment. The case of *La Fayette & Bro. v. Merchants Bank*, 73 Ark. 561, 68 L. R. A. 231, recently decided by the supreme court of Arkansas, upon which counsel for appellants seem chiefly to rely, does not appear to us to differ in principle from that just cited. In that case the defendant bank had forwarded and collected a draft, negotiable in form, upon which a purported indorsement by the payee, as well as a purported signature by the payee to an accompanying bill of sale, had been forged, and the defendant was held liable to the drawee to whom it had presented the draft and who had paid it in reliance upon the supposed indorsement and signature. The court discusses at considerable length the facts that the draft purported to have been drawn pursuant to a previous arrangement between the drawer and drawee, according to which it was to have been accompanied by

a bill of sale of certain cattle purchased by the drawer from the payee, and that it was apparent upon the face of the papers that the draft was not drawn against funds of the drawer in the hands of the payee, but was to be paid upon the strength and credit of the supposed bill of sale, and decides that the defendant was negligent in purchasing the documents and forwarding them for collection without first having assured itself of their genuineness. Admitting that this opinion is in all respects sound, of which we do not feel at all convinced, it does not appear to us to be decisive of this case, because the defendant was destitute of authority from the payee of the draft, to whose order alone it was payable.

In the case at bar the draft was, as has been already said, genuine. Whether it was signed by the real name of the drawer is not known and is immaterial. It was signed by him by such name as he chose to use, and that fact sufficed to establish his legal relations to it and to the parties with whom he dealt, whatever may have been his true name. The defendant bank was innocent of any notice or of any participation in any wrongful act. The plaintiffs assert and the defendant admits that the defendant assumed simply and solely the functions of a collecting agent. The obligations of such agency it performed promptly and with fidelity, and without guile or suspicion of evil, and by so doing it discharged its whole duty. The business of banking and of collection agencies could not be carried on safely, or at all, if such institutions were held to be liable for the frauds and forgeries of their principals with respect to collateral documents and transactions of which they were ignorant, or if their failure to inquire into and ascertain the genuineness and good faith of such matters was held to be actionable negligence. The plaintiffs were not bound to make payment until they received a satisfactory consideration, nor, even then, unless they had chosen so to do. If, as they allege, they paid a draft drawn by an entire stranger, with whom they had had no previous dealings, and in reliance upon

a spurious bill of sale, without ascertaining the genuineness of the documents and without an inspection and delivery of the grain, their loss is due to their own rashness and negligence, and not to that of the intermediate parties through whom they dealt.

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

OLDHAM and EPPERSON, CC., concur.

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

AFFIRMED.

LUCY ORTLEY, APPELLEE, V. JOHN ROSS ET AL., APPELLANTS.

FILED FEBRUARY 8, 1907. No. 14,656.

Indians: MARRIAGE: VALIDITY. Marriages valid under the customs of an Indian tribe, which were performed among members thereof while the tribal relation existed, will be considered valid in the courts of this state, and children of such marriages will be regarded as legitimate.

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

John R. Hays and *Isaac Powers,* for appellants.

W. A. Meserve, contra.

OLDHAM, C.

This was an action instituted by the plaintiff in the district court for Knox county, Nebraska, for the purpose of quieting her title to an undivided one-half interest in a tract of land situated in that county, and for a partition of the land among the heirs of Daniel Paypay, deceased. Daniel Paypay was a Santee Sioux Indian, who had taken

the land in controversy as an allotment, under the provisions of the treaty entered into with the Santee Sioux tribe by the United States on February 24, 1869, by which the United States agreed to give a patent to any male Indian of that tribe for 160 acres of land under the conditions named in the treaty. By the provisions of this treaty, any Indian receiving a patent under it became a citizen of the United States. Prior to the receipt of the patent in 1884 Paypay had been a member of the tribe of Santee Sioux Indians, and not a citizen of the United States. After the receipt of the patent he appears to have remained on his allotted lands in Knox county, and died there intestate in 1889. The main question at issue in this suit was as to who were his legal surviving heirs at the time of his death. The petition alleged that plaintiff and Sarah Ross, mother of the defendants, were the sole surviving legal heirs at the death of the ancestor, and that Sarah Ross had departed this life intestate on the 14th day of May, 1903, leaving the defendants named in the petition as her heirs at law. The answer denied the heirship of the plaintiff, and alleged that the defendants, heirs of Sarah Ross, were entitled to the entire estate. There was a judgment for the plaintiff in the court below and to reverse this judgment defendants have appealed to this court.

It is urged against the decree by appellants that there was a misjoinder of causes of action in plaintiff's petition, in that no partition of lands could be awarded until the title of the plaintiff therein had been established, and, as the title was in dispute, partition would not lie. This is an objection first interposed in this court, and which, as far as the record shows, was not called to the attention of the trial court. No motion was filed or demurrer interposed against the petition for misjoiner, but, on the contrary, an answer was filed which put in issue plaintiff's claim of heirship in the property in dispute. It appears from the record that the trial court first determined the question of heirship in favor of the plaintiff, and quieted her title

to an undivided one-half interest in the premises, and, having done so, proceeded to a decree of partition of the lands in conformity with the judgment quieting the title thereto. The court, being possessed of the cause and having all the parties in interest before it for the purpose of quieting the title in the lands, might, unless opportune objections were interposed, proceed to do full equity in the cause by awarding a decree of partition in conformity with the judgment.

This brings us to the real question at issue, which is as to the sufficiency of the proof of plaintiff's heirship. It is apparent from what has been said that each of the parties claim as heirs of Daniel Paypay. Defendants' claim of heirship is admitted, and the plaintiff's claim is in dispute. Plaintiff's claim is based on an alleged marriage, according to the custom of the Indian tribe, between Daniel Paypay and a squaw called Quadan, said to have been celebrated at Redwood, Minnesota, in the year 1869, the allegation being that plaintiff was the issue of this marriage. The evidence shows that the laws and customs of the Santee Sioux Indians place slight restrictions on matrimonial alliances between members of the tribe; that polygamy was practiced with impunity; that the only ceremony requisite was a mutual agreement between the parties to live together as husband and wife, and that this relation might be dissolved by mutual consent at any time, leaving the parties free to marry again at their pleasure. It appears that both Paypay and Quadan were members of the tribe at the time of their marriage, and both had been married under this custom one or more times before they united with each other. But the testimony all shows that, by the rules and customs of the tribe, they were recognized by all the members thereof as husband and wife during the year or more that they lived and cohabited together as such. While there is some conflict in the testimony as to the date of the marriage and the year that they lived together, all of the witnesses connect the time with plaintiff's birth, which,

they all say, occurred shortly after Paypay had repudiated the union and come back from Redwood, Minnesota, to the reservation in Nebraska. There is also evidence in the record showing that Paypay recognized plaintiff as his daughter during his lifetime.

Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the state of Minnesota, where the parties then resided, nor in the state of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs and to control the intercourse between the sexes by their own customs and usages. Consequently, when a member of an Indian tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged. The rule so applied is that marriages valid by the law governing both parties when made must be treated as valid everywhere. *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, and cases there cited. The question of the legitimacy of offspring of a marriage of members of this same tribe in Minnesota, under very similar circumstances to those in the case at bar, was before the supreme court of that state in the case of *Earl v. Godley*, 42 Minn. 361, and it was there said: "An Indian tribe within the state, recognized as such by the United States government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations; and those persons belong-

ing to the tribe who are recognized by the custom and laws of the tribe as married persons must be so treated by the courts, and the children of such marriages cannot be regarded as illegitimate."

We are therefore of opinion that the evidence is sufficient to support the judgment of the district court, and we recommend that it be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

MELVIN T. ROWLAND, APPELLANT, V. WILFORD STANDIFORD, RECEIVER, ET AL., APPELLEES.

FILED FEBRUARY 8, 1907. No. 14,662.

Judgment: EQUITY: INJUNCTION. Equity will not enjoin the collection of a judgment at law, in which the defendant has been served by legal process, unless it be made to clearly and conclusively appear that the default of the defendant was without fault or negligence on the part of the one complaining, and that a valid and legal defense exists against the judgment rendered in the law action.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

John C. Martin, for appellant.

Patterson & Patterson, contra.

OLDHAM, C.

This was an action instituted in the district court for Merrick county, Nebraska, for the purpose of enjoining the collection of a judgment, which had been transcribed from the county court of Boyd county, Nebraska, to the district court for Merrick county, in an action in which

Wilford Standiford, receiver of the Farmers and Merchants Bank of Butte, Nebraska, was plaintiff, and the plaintiff in this cause of action was defendant. In substance the plaintiff's allegations are that the judgment was rendered in the county court of Boyd county without personal service upon him, and that the note on which the judgment was based was never signed and executed by him. On a trial of the issues the district court found no equity in the bill and dismissed plaintiff's petition. To reverse this judgment plaintiff has appealed to this court.

The facts underlying this controversy are: That the note on which the judgment was rendered in the county court of Boyd county appears to have been executed by the plaintiff to the Farmers and Merchants Bank of Butte, Nebraska, on the 20th day of January, 1899; that, subsequently, the bank failed, and the note passed into the hands of the receiver of the bank, who instituted suit thereon, and service of summons was had upon plaintiff by leaving a copy thereof at his usual place of abode in Boyd county. Judgment was rendered by the county court in July, 1900, and the judgment was later assigned to defendant Forbes, who purchased it at the receiver's sale. It appears from the testimony that the plaintiff had been a resident of Boyd county for a number of years preceding the suit, and owned a homestead in that county, which was occupied by his family at the time service of summons was had upon him; that in 1896 plaintiff went to Nome, Alaska, to engage in mining, but left his wife and family on the homestead; that in 1897 he returned to Boyd county and remained with his family until December of that year, when he went back to Alaska and remained there until November, 1900, when he again returned to his home in Boyd county, and shortly afterwards removed to Merrick county, where he now resides. While in Alaska plaintiff communicated with his family as often as the imperfect mail facilities between Boyd county and that place would permit. Plaintiff, however, says that he was never informed that any suit had been instituted

against him on the note in controversy. He further says that he had no knowledge whatever of any judgment having been rendered against him in Boyd county, until he was advised of that fact in 1903 by defendant Ross, who, as attorney for Forbes, notified him of such judgment and requested a settlement. In reply to the question, "I will ask you to state to the court if you ever signed a note for that amount, or of that description," plaintiff answered: "No; I never remember of signing a note for that amount. Q. Did you sign a note of that character or description at that time, at Boyd county, Nebraska? A. I have no recollection of ever signing any such note or of ever hearing from the bank regarding such a note. Q. Have you ever signed any such note? A. No, sir; not to my recollection." The witness, in his further testimony, says that he had signed a note for $100 at the bank before going to Alaska, and explained at length how he came to sign it. When notified through the mail by defendant Ross that he had the judgment in controversy for collection, plaintiff answered this notice in a letter to Mr. Ross, dated December 15, 1903, in which he says that the note on which the judgment was rendered was given to Samuel C. Sample, president of the Farmers and Merchants Bank of Butte, before the death of Mr. Sample and the failure of the bank. He then discussed in a caustic manner the conditions which caused the failure of the bank, the shock of which, he says, occasioned the death of Mr. Sample. The purport of the letter is that he would have paid any amount claimed, to have saved Mr. Sample, whom he described as "the soul of business honor," but that the judgment had passed into the hands of the parties who were responsible for the failure of the bank and the financial ruin of its president, and that, for that reason, he would only pay the amount actually received at the receiver's sale for the note, and 10 per cent. interest thereon. In this letter he also claimed that there was no service of summons upon him when the judgment was procured, and that he had no knowledge that judgment

had been rendered against him on the note. He also says that the amount due on the note, at the time of the failure of the bank, was not to exceed $140, if proper credits were allowed.

This is all the material testimony bearing on the issues, and from an examination of it we think it sufficient to establish the fact that plaintiff, although legally served with summons, had no actual knowledge of the proceedings in the county court of Boyd county, until informed by Mr. Ross of the judgment rendered against him. But we do not think the testimony sufficiently clear and conclusive to warrant us in finding that the judgment was rendered on a forged note. While the plaintiff says that he has no recollection of signing a note for the amount sued upon, yet his testimony on this point is too indefinite and evasive to overcome the presumption of the verity of the judgment, which he seeks to enjoin. We concede the contention of the appellant that equity can relieve from the collection of a judgment procured in a law action, where service has been legally had upon the defendant in such action; but, to warrant such relief, the evidence must be clear and convincing that the failure to defend in the law action was without the fault or negligence of the party complaining, and that a perfect and valid defense exists to the action. *Radzuweit v. Watkins,* 53 Neb. 412. Being of the opinion that the evidence in this case is insufficient to clearly and conclusively establish a good defense to the original action against the plaintiff in the county court of Boyd county, we think the finding of the district court that there is no equity in the bill is fully supported, and we therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

WILLIAM P. HESS, APPELLANT, V. FREDERICK HESS, APPELLEE.

FILED FEBRUARY 8, 1907. No. 14,617.

1. **Justice of the Peace:** JUDGMENT ON SET-OFF: APPEAL: DISMISSAL. Upon appeal to the district court from a judgment against a plaintiff upon a set-off rendered in a justice of the peace court, the plaintiff cannot defeat the judgment by a dismissal of his action.
2. ———: APPEAL: DEFAULT. Under the provisions of section 1011 of the code, a district court may render a judgment against a plaintiff in favor of a defendant for the amount recovered by the latter against the former in the lower court, without notice, when plaintiff fails to file his petition as required by the statute.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

L. W. Colby, for appellant.

E. O. Kretsinger, contra.

EPPERSON, C.

Plaintiff sued the defendant in a justice of the peace court to recover a small amount due on a book account. The defendant pleaded a set-off. Upon trial, defendant recovered a judgment against plaintiff for $75. Plaintiff filed an appeal bond and caused a transcript of the proceedings had before the justice to be filed in the district court on December 30, 1904. On May 29, 1905, plaintiff's attorney moved for a dismissal of the action, without prejudice to the rights of the plaintiff. Thereupon the court entered the following order: "It is therefore considered by the court that the above entitled action be, and the same is hereby, dismissed without prejudice, and that the defendant recover of and from the plaintiff herein the costs of this suit herein expended taxed at the sum of $19.25, with the complete record waived."

The question here presented is whether or not the plaintiff can, by proceeding as above, defeat the judgment obtained against him by the defendant in the justice of the peace court. Section 431 of the code provides: "In any case where a set-off or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear." Plaintiff failed to file his petition on appeal as provided by statute, and, upon the application of defendant, the district court entered a judgment under section 1011 of the code, which provides, in part, as follows: "If the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, and after having filed his transcript and caused such appeal to be docketed according to the provisions of this chapter, shall fail to file his petition within twenty days thereafter, unless the court, on good cause shown, shall otherwise order or otherwise neglect to prosecute the same to final judgment, the said plaintiff shall become nonsuited, and it shall be the duty of said court to render judgment against such appellant for the amount of the judgment rendered against him by the justice, together with interest accrued thereon, and for costs of suit, and to award execution therefor, as in other cases."

Plaintiff alleges error in that no notice was served upon him of defendant's application for judgment. He was not entitled to notice. Defendant's right to the judgment in such case arose by reason of plaintiff's default, and by operation of the statute. The court could have rendered such judgment had no application therefor been made.

We find no error in the judgment of the district court, nor in its order overruling a motion to set the same aside, 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.

AXEL GRANDJEAN, APPELLANT, V. JEROME BEYL ET AL., APPELLEES.*

FILED FEBRUARY 8, 1907. No. 14,660.

1. **Descent and Distribution:** LAND CONTRACT: INTEREST OF VENDEE. A vendee in possession of land under a contract of purchase, on which part of the purchase price has been paid, holds equitable title to the land, which on his death descends to his heirs.
2. **Curtesy.** Under our statute the husband is not entitled to an estate by the curtesy in lands of his deceased wife held by her under a contract of purchase. The estate of the wife to which the estate of curtesy may attach must be at the least a freehold.

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

H. M. Sinclair and *Warrington & Stewart*, for appellant.

J. H. Linderman, contra.

DUFFIE, C.

Brief of counsel for appellant contains so plain and fair a statement of the facts in the case that we adopt it here: "Marie Grandjean died intestate in Dawson county on the 3d day of January, 1902. She left no children, but did leave surviving her Axel Grandjean, her husband, who is the appellant, and three brothers, who are the appellees. At the time of her death she was the owner of an undivided one-half interest in four certificates of purchase of certain school lands of the state of Nebraska, the principal to become due on March 13, 1913, with interest

* Rehearing allowed. See opinion, p. 354, *post.*

payable annually. This constitutes her estate. Probate of the estate was begun, and in that court arose the present controversy, which is: Has the surviving husband any rights in the estate? It is contended on the part of the husband that these certificates and the interest created by them are choses in action—personalty—and descend to him under the statute. On behalf of the brothers it is claimed that these are executory contracts for the purchase of land, and the interest created by them is realty, and as such descends to them under the statute freed from any claim or right of the husband arising from the marital relation. In reply to this claim the husband asserts that, if the court should determine this estate to be realty, he then has an estate by the curtesy therein, which should be adjudged him. These several contentions were heard in the probate court and were determined against the appellant. He appealed to the district court and was again beaten. The district court found that the estate was realty and descended to the brothers freed from curtesy. He appeals to this court, and for grounds of reversal, alleges: (1) The appellant is entitled to a judgment on the pleadings; (2) the judgment is not sustained by the evidence; and (3) the judgment is contrary to law."

The facts above set forth require us to determine (1) whether the interest in the lands held by Mrs. Grandjean under her school land sale contracts was personal property or real estate which descends to her heirs; and (2) if her interest was real estate which her heirs would inherit, is her husband, the appellant, entitled to an estate by the curtesy therein? In *Hendrix v. Barker,* 49 Neb. 369, the following was held: "In an executory contract for the sale of real estate equity treats the vendor as the trustee of the purchaser and the purchaser as the trustee of the purchase money for the vendor. This rule rests upon the doctrine that equity considers that done which ought to be done." This rule was followed in *Jewett v. Black,* 60 Neb. 173, and it is the generally prevailing rule adopted

by all courts. Another principle is deducible from this rule, viz., that, where there is a contract for the purchase of land on which partial payments have been made, the vendee holds the equitable title, which, on his death, descends to his heirs. *Smith v. Smith,* 55 Ill. 204; *Champion v. Brown,* 6 Johns. Ch. (N. Y.) *398; 10 Am. Dec. 343; 2 Story, Equity Jurisprudence (13th ed.), secs. 790, 1212. This interest is in equity real estate and descends to the heirs of the purchaser. *Strauss v. White,* 66 Ark. 167; *Braxton v. Braxton,* 20 D. C. 355; *Smith v. Smith, supra*; *Kellogg v. Logan,* 38 Ia. 688; *Griffith v. Beecher,* 10 Barb. (N. Y.) 432; *Champion v. Brown, supra.* It is true, as stated in appellant's brief, that the principles above announced are based upon the doctrine of equitable conversion, *i. e.,* that a court of chancery will treat personalty as realty and realty as personalty when the equities of the case demand it.

It is insisted by appellant that, when the contract of sale is executory, equity will not apply the doctrine as a matter of course; that equity will not regard that as having been done which may not be done for some cause arising out of the contract, the relation of the parties, or the law; that, if sufficient cause appear upon examination of the contract, equity will not convert what is primarily personal property into real estate. Without doubt this is the general rule, and so, too, the further rule obtains that, in order to work a conversion of a contract for the sale of real estate into realty, "the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce." 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1161; *Keep v. Miller,* 42 N. J. Eq. 100. In the case last cited it is said: "A valid and binding contract of sale, such as a court of equity will specifically enforce against an unwilling purchaser, operates as a conversion. The cases in which the court has refused to decree that a contract for sale works equitable conversion, are those in which the contract was such as equity would not enforce." The cases above cited

undoubtedly announce a rule generally adopted, but it must be accepted with this qualification: That to bring the rule into operation the cause which renders the contract unenforceable must apply to the contract itself. *Curre v. Bowyer,* 5 Beav. (Eng.) 6, and note.

The appellant insists that the contracts held by Mrs. Grandjean are unenforceable against her, and constitute only an option on her part to purchase at the price named therein upon payments of principal and interest to be made at the several dates specified. The contracts recite: "That the state of Nebraska has sold unto E. M. F. Leflang the lands therein described for the sum of $400, one-tenth of the purchase price cash in hand and the remainder in 20 years time, with interest at the rate of 6 per cent. per annum, interest payable annually in advance on the first day of January of each year according to the tenor and effect of a certain promissory note given by the said E. M. F. Leflang for the unpaid purchase money for said lands." It is true that the purchaser did not sign this contract, but the contract recites that he has signed a note by which he has bound himself to pay the purchase price, both principal and interest, and, while it may be true that there is no special provision of our statute relating to the sale of school lands directing the execution of a note by the purchaser, or directing the officer having charge of such sales to institute suit upon such note, we know of no principle of law which would prevent the state from enforcing payments thereon. Nor do we think it can be denied that, upon full performance on the part of the vendee, the state would be compelled to execute a deed. In this state we have held that an agreement signed by the vendor alone, if accepted by the vendee, is valid and may be specifically enforced. *Robinson v. Cheney,* 17 Neb. 673. We hold therefore, that a vendee in contracts of the character of the one in question is the equitable owner of the lands described in such contracts, and that on his death they descend to his heirs.

Having determined that the interest held by the deceased

was an equitable interest in land which descends to the heirs, the second question is: Did she hold such title thereof or interest therein as entitles her husband, the appellant, to an estate by curtesy? In *Butler v. Fitzgerald,* 43 Neb. 192, it was held: "The statute of this state, prescribing in what real estate of the husband a wife shall be entitled to dower, is but declaratory of the common law." The same may be said of real estate held by the wife and in which the husband is entitled to an estate by curtesy. The language of the statute, so far as it relates to the facts in this case, is as follows: "When any married woman, seized in her own right of any estate of inheritance in lands, shall die leaving no issue, the land shall descend to her surviving husband during his natural lifetime as tenant by curtesy." Section 29, ch. 23, Comp. St. 1905. At common law the husband was entitled to an estate by curtesy only in lands of which his wife was "seized" at the time of her death, and seizin is defined to be "the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. Ordinarily, a possession in fact by one having or claiming a freehold interest." Anderson's Law Dictionary, 933. The estate of the wife to which the estate by curtesy may attach must be a freehold of inheritance. *Mildmay's case,* 1 Coke (Eng.), 175; *Mullany v. Mullany,* 4 N. J. Eq. 16. To be tenant by curtesy the wife must be seized in deed. *Stevens v. Smith,* 4 J. J. Marsh. (Ky.) *64, 20 Am. Dec. 205; *Jackson v. Johnson,* 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Tayloe v. Gould,* 10 Barb. (N. Y.) 388. An estate by curtesy is analogous to the estate of dower, and in *Greenbaum v. Austrian,* 70 Ill. 591, it was held that the widow of one who in his lifetime had not paid the entire purchase money on a contract of purchase is not entitled to dower in such land, when there is not sufficient personal estate of the deceased out of which to complete the payment of purchase money. In *Walters v. Walters,* 132 Ill. 467, 23 N. E. 1120, the court

said: "The holder of a contract to convey upon the performance of certain conditions, which have not been fully complied with at the time of his death, has no estate to which a right of dower will attach." To the same effect is *Pugh v. Bell,* 2 T. B. Mon. (Ky.) *125, 15 Am. Dec. 142. These cases are in accord with our former holdings in *Crawl v. Harrington,* 33 Neb. 107; *Hall v. Crabb,* 56 Neb. 392, and *Cutler v. Meeker,* 71 Neb. 732. Our statute declares that the wife must be seized of an estate of inheritance in the lands in order to entitle her husband to curtesy. The term "seized" has always been construed in its common law sense as applicable to legal estates only, and the statute has been received as a declaration only of the common law rule of curtesy. *Cornog v. Cornog,* 3 Del. Ch. 407. The decedent neither held nor claimed a freehold interest in the land described in her school land contracts. She was not, in the language of our statute, "seized" of those lands, and her husband is not entitled to curtesy therein.

We recommend an affirmance of the decree appealed from.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed December 18, 1907. *Former judgment of affirmance adhered to:*

Courts: STARE DECISIS. When a former decision of this court has established a rule of property, which has been relied upon for many years as the foundation of real estate titles, the court will not overturn such rule although it cannot assent to the reasoning upon which it is based.

SEDGWICK, C. J.

The opinion upon the former hearing, which states the facts involved in this controversy, may be found *ante,* p.

349. Two principal questions were there determined—that a vendee in possession of land under a contract of purchase upon which he has paid a part of the purchase price has equitable title in the land which on his death descends to his heirs, and that a surviving husband is not entitled to an estate by curtesy to the lands of a deceased wife held by her under such contract of purchase. Both of these propositions are vigorously attacked.

1. This court is fully committed upon the first proposition. In *Dorscy v. Hall,* 7 Neb. 460, it was said: "Where a contract is made for the sale of real estate, equity considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor." This holding was approved in *Burrows v. Hovland,* 40 Neb. 464, and in many subsequent decisions. There may be some reason for argument as to the application of this principle to contracts of purchase of school lands from the state. The law provides that the title to school lands vests in the state upon the failure of the purchaser to make the payments provided for in his contract. No proceedings for that purpose are necessary on the part of the state, but by the mere failure to make the payments the rights of the purchaser in the land are forfeited. This court has refused to make such a distinction. In *Cutler v. Meeker,* 71 Neb. 732, the contract was one for the sale of school lands by the state, and it was held: "The interests of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title." The law therefore must be considered settled in this state upon this point.

2. The reasoning supporting the second proposition is not so satisfactory. In *Crawl v. Harrington,* 33 Neb. 107, it is said: "The legal title still remained in the state. It was not, therefore, an estate of inheritance, and the wife

took no dower therein. This disposes of the case without considering the other questions presented." Thus it appears that in this case the wife was not allowed dower in the land solely because the estate was not an estate of inheritance.

In *Hall v. Crabb,* 56 Neb. 392, it is said: "The equitable interest which Lorina McCully had in the land in controversy at the time of her death was less than a freehold estate, and consequently, under the authority above cited was not an estate of inheritance. Her husband was, therefore, not entitled to a tenancy by curtesy in this land, and accordingly the judgment of the district court is affirmed." Thus, it appears that in this state the surviving husband was denied the right of curtesy in the land held by his deceased wife under contract solely because the estate of the wife in the land was not an estate of inheritance. This court has many times held, as already shown, that one who holds a contract of purchase of real estate, has made payments thereon, and is in full possession of the real estate, has an interest in land that upon his or her death descends to his or her heirs; that is, the heirs inherit the estate, and yet for the purpose of denying the right of dower or curtesy we are compelled to hold that an estate which the heirs take by inheritance is not an estate of inheritance. This apparent absurdity seems to have been derived from some supposed technical definitions of the common law, yet it is difficult to see how they can be applicable under the provisions of our statutes. So far as we can see the position is wholly indefensible upon reason.

There are, nevertheless, very strong reasons for adhering to the rule established in *Crawl v. Harrington* and *Hall v. Crabb, supra,* upon the ground that it has become a rule of property. The statute under which these decisions are made has been repealed and a new statute substituted therefor. Thousands of acres of land have been conveyed in this state by the two great land grant railroads, one of whose lines extends through the state the

entire length from east to west, and whose land grant took every alternate section for a width of twenty miles. Thousands of acres have been sold under contract also by the state in the conveyance of its school lands. Much of this land in the natural course of events must have descended to the heirs of the original purchasers, and in all probability much of it has been sold by them under the authority of these decisions free from any cloud or claim created by the assertion of the rights of dower or curtesy. To overrule these cases would in all probability be provocative of much litigation and controversy. People who purchased relying upon the strength of these decisions being the settled law of the state would find their titles clouded by an outstanding dower right or right of curtesy, and find themselves liable to be called upon to account for rents and profits during the time the outstanding estate existed or at least as long as the statute of limitations will permit. To overrule these cases would penalize many persons whose money was invested on the strength of these decisions and would introduce uncertainty into the law relating to real property. The courts have always been reluctant to change or overrule decisions which have established rules of property under which rights may have been acquired. *Reid v. Wayne Circuit Judge,* 132 Mich. 406, 93 N. W. 914; *Sacramento Bank v. Alcorn,* 121 Cal. 379, 53 Pac. 814; *Smith v. Ferries & C. H. R. Co.,* 51 Pac. (Cal.) 710; 11 Cyc. 755. The fact that this is the first action in which the right has been asserted during all these fifteen years shows that the people of the state have doubtless relied upon these decisions. In *Brader v. Brader,* 85 N. W. 681, 110 Wis. 423, it is said: "Where valuable property rights have grown up in reliance on a rule established in a decision rendered ten years prior, the court will not depart from the rule, though it does not assent to the reasoning on which it was based." The legislature has already abolished the estates of dower and curtesy, and we deem it improper and at variance with the ordinary prac-

tice of courts to overturn a rule of property which has been in existence for so many years.

For these reasons, we are compelled to adhere to our former decision.

AFFIRMED.

BARNES, J., dissenting.

I find myself unable to concur in the conclusion reached by my associates, and the discussion contained in the prevailing opinion furnishes me a sound reason for my dissent. It is there clearly shown that the conclusion is wrong and amounts to a nullification of a positive statute which gives the appellant an estate of curtesy in the land in controversy. While I recognize the binding force of the doctrine of *stare decisis* and of the rule of property, I do not think they require us to adhere to a former decision where it is clearly wrong and is opposed to a plain provision of our own statutes. When there are two reasonable solutions of a question, both having support in principle and precedent, and the court has adopted one of them and has adhered to that view, until it has become a rule of property, then that rule applies, but it should not be invoked to sustain a rule which was absurd and clearly wrong in its inception. Again, I am not able to convince myself that the serious consequences anticipated by my associates would follow a correct decision of this case. I think I may say that it is a matter of common knowledge that the land grant railroads, mentioned in the prevailing opinion, adopted and, so far as we know, have carried out a rule which required both husband and wife to join in the assignment of its contracts of sale; and, so far as state school land contracts are concerned, the records of this court show so few cases where any controversy has arisen over the matter here in question that I am persuaded that no serious disturbance of property rights will arise by reason of a decision which will give to the appellant what in law and reason he is clearly

entitled to receive. I am therefore of opinion that our former judgment should be set aside, and the judgment of the district court should be reversed.

KATE L. SMITH, ADMINISTRATRIX, APPELLANT, V. ARTHUR M. BARTLETT ET AL., APPELLEES.

FILED FEBRUARY 8, 1907. No. 14,790.

1. **Costs, Retaxing After Term.** While the award of costs made in a judgment cannot be changed after the term, except for some cause provided by statute for modifying a judgment after the term at which it was entered, this rule does not apply to an application made by a party to retax items of the costs illegally or through mistake taxed against him.
2. ———: MILEAGE. Witnesses in a civil action are not, under our statute, required to attend for examination except in the county of their residence, and the rule should obtain generally that traveling fees should be taxed in their favor for the distance only that a subpœna compels their attendance.

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

Allen G. Fisher, for appellant.

A. W. Crites, contra.

DUFFIE, C.

This is an appeal from an order of the district court for Sheridan county retaxing costs and granting an offset of costs adjudged against the appellant on a former appeal of this case to this court. On the first trial of the case the appellant recovered in the district court. Upon appeal to this court the judgment was reversed, with costs amounting to $92.50, which is the item offset against the costs in favor of the appellant. A second trial in the district court resulted in favor of the appellant, and on

error this judgment was affirmed. The costs, aggregating $653.41, were taxed against the appellees, whereupon they filed a motion to retax the costs by striking out certain items, which, coming on to be heard, was in a large part sustained by the district court, and an offset of the costs adjudged against the appellant in the first error proceeding was allowed. The present appeal is from that order.

The appellant insists that the court had no jurisdiction to entertain the motion to retax costs, for the reason that it was filed after the final adjournment of the term at which the judgment was given. We have no hesitation in saying that this position is not well taken. An award of costs to the successful party is as much a part of the judgment entered as the damages allowed, and the court cannot, after the term, change this award except for some statutory cause allowing the court to set aside or modify its judgments at a subsequent term. *Meade P., H. & L. Co. v. Irwin*, 77 Neb. 385. This rule does not apply to a motion made by either party to have the costs retaxed and to have mistakes in taxing the same corrected or costs illegally charged up against a party eliminated. If the clerk erroneously or illegally taxes up any item of costs in favor of a party, the other party may, by motion made at any time, call the attention of the court to such items and insist that only proper and legal costs be assessed against him. The court, by making such an order, does not change the judgment awarding costs, but uses its power to see that the award of costs is not improperly or illegally taxed. As said in the case above cited: "Any mistake made by the clerk in taxing fees in favor of or against a party may be corrected by the court on motion at any time."

The jurisdiction of the court to act in this case is undoubted, and the only question to be considered is: Did the court err in the exercise of that jurisdiction? In some instances, as appears from the record, witness fees were duplicated, and in others fees were taxed in favor of witnesses who were neither summoned nor testi-

fied in the case. In the case of three or four witnesses mileage was taxed in their favor from Missouri Valley, Iowa, to the place of trial, approximating $44.40 each. One witness in whose favor mileage was taxed was an attorney in the case, and, as we read the record, one or more of the parties to the action were allowed witness fees. Section 354 of the code is as follows: "A witness shall not be obliged to attend for examination on the trial of a civil action, except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpœna is served upon him." As a general rule mileage for witnesses should be taxed for the distance only that a subpœna will run and become effective. We believe that the practice has almost universally obtained, where a witness attends without being subpœnaed, or where, being in attendance, he is called to give evidence in a case, to allow him for one day's attendance and the statutory traveling fees for one mile. The cases are exceptional where the deposition of a witness living beyond the reach of a subpœna will not answer every purpose in a civil action, and the rule should ordinarily be to tax the losing party with mileage for witnesses for the distance only that such witnesses must, under our statute, obey the subpœna served on them.

No complaint is made in appellant's brief of the action of the court in offsetting the item of $92.50 taxed against the appellant on the former appeal in this court. The record does not disclose any reversible error on the part of the district court in retaxing the costs, and for that reason we recommend an affirmance of the order appealed from.

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

AFFIRMED.

WILLIAM A. PALMER, APPELLANT, V. JOHN STILES, APPELLEE.

FILED FEBRUARY 8, 1907. No. 14,637.

1. **Justice of the Peace:** JUDGMENT, OFFER TO CONFESS. Section 1004 of the code, which provides that, in an action brought before a justice of the peace, if the defendant, at any time before trial, offer to allow judgment to be taken against him for a specified sum, and the plaintiff reject such offer and fail to recover a sum equal to the offer, he cannot recover costs subsequently accruing, contemplates an offer made in terms that, when accepted as made, entitles the plaintiff to judgment therefor, and costs, without further litigation.

2. ———: ———: ACCEPTANCE. An acceptance of such offer, coupled with the condition that the judgment shall include costs, is an acceptance of the offer according to its legal effect, and entitles the plaintiff to judgment for the amount offered, and costs, without further litigation.

3. ———: ———: WITHDRAWAL OF OFFER. Where such condition is coupled with an acceptance of the offer, and is rejected by the defendant, his rejection thereof amounts to a withdrawal of his offer, and leaves the parties standing, with respect to costs, as though the offer had not been made.

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

C. W. Shurtleff and *Boyle & Eldred*, for appellant.

J. W. Cole, contra.

ALBERT, C.

William A. Palmer sued John Stiles in the county court for an amount within the jurisdiction of a justice of the peace. The defendant appeared, and filed the following: "Comes now the defendant, and says that prior to the commencement of this suit defendant offered to pay plaintiff $4.50. And this defendant now offers to allow plaintiff to take judgment for ($4.50) four dollars and fifty cents." The plaintiff filed an acceptance of the offer, con-

ditioned that the defendant should also pay the costs accrued at that date. The defendant rejected the condition attached to plaintiff's acceptance, and the cause was tried on the merits. Judgment went in favor of the plaintiff, and the defendant appealed to the district court. A trial to a jury resulted in a verdict in favor of the plaintiff for an amount less than that named in the defendant's offer to confess judgment. After judgment on the verdict for the amount found due and costs of suit, the defendant filed a motion to retax the costs. The motion was based on two grounds: (1) That he had tendered the plaintiff more than the amount found due by the jury before the commencement of the suit in settlement of his claim; (2) that he had offered to confess judgment in the county court for an amount in excess of the amount found due by the jury in the district court. The first ground was abandoned. The court sustained the motion on the second ground, and taxed all costs accruing subsequent to the offer to confess judgment in the county court to the plaintiff. The plaintiff appeals.

The only question in this case is whether the court erred in its ruling on the question to retax the costs. Section 1004 of the code, which is relied on to sustain this ruling, is as follows: "If the defendant, at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have a judgment therefor, with the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him. But the offer and failure to accept it cannot be given in evidence, to affect the recovery, otherwise than as to costs as above provided." The object of this section is to encourage litigants to compromise their differences. It contemplates an offer made in terms that, when accepted as made, entitles the plaintiff to judgment for the amount specified, with the costs then accrued, without further litigation. It was unnec-

essary for the plaintiff to couple with his acceptance the condition that the judgment should include costs, because that would have followed as of course by virtue of the statute. But that he did so did not vitiate his acceptance, nor amount to a rejection of the offer as made, because, while his acceptance unnecessarily included the condition with respect to costs, it amounted to an acceptance of the offer according to its legal effect. That being true, the defendant's rejection of the condition attached to the acceptance—a condition which the statute itself would have supplied, had it been omitted—amounted to a withdrawal of his offer, and left the rights of the parties, with respect to costs, precisely as though the offer had not been made. It follows, therefore, that the district court erred in sustaining the motion to retax costs.

It is therefore recommended that the order of the district court taxing the costs to the plaintiff be reversed and the cause remanded, with directions to tax the entire costs of the action to the defendant.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court taxing the costs to the plaintiff is reversed and the cause remanded, with directions to tax the entire costs of the action to the defendant.

REVERSED.

WILLIAM F. HAYWARD, APPELLEE, V. ALLEN G. FISHER, APPELLANT.

FILED FEBRUARY 8, 1907. No. 14,666.

1. Appeal: PROCEDURE. In case of an attempted appeal to the district court before a final judgment has been rendered by the inferior court, the district court has no authority to remand the cause, with directions to the inferior court to render judgment and file a supplementary transcript and return thereof in the dis-

trict court for the purpose of perfecting the attempted appeal, the proper course in such case being to dismiss the attempted appeal.

2. **Judgment:** VALIDITY. While section 7, ch. 20, Comp. St. 1905, provides that the terms of the county court shall begin on the first, and end on the third, Monday of each month, a judgment rendered by consent of parties, in a term case, outside the statutory term is not for that reason void for want of jurisdiction.

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

Allen G. Fisher, pro se.

A. W. Crites and *D. B. Jeeckes, contra.*

ALBERT, C.

At the annual election in and for the city of Chadron, for the year 1905, the parties hereto were rival candidates for the office of mayor. On the face of the returns Fisher had a majority and was given a certificate of election. Thereupon Hayward instituted a contest in the county court. In that court the taking of testimony was concluded on the 28th day of August, 1905, at which time the case was continued by consent of parties to September 19 of that year. The date to which the cause was continued was not within the statutory term of the county court. On that date the court found that Fisher had received a majority of the votes cast, but was ineligible to the office, and gave judgment declaring the election with respect to the office of mayor null and void, and dismissing the contest. Hayward appealed to the district court. The district court took the position that the judgment of the county court, having been rendered out of the statutory term time, was void, and, acting on the suggestion of Hayward's attorneys, remanded the cause to the county court, with directions "to give judgment on the merits of the said cause with all convenient speed, but during the regular term of said county court, and thereupon make a supplementary transcript

and return thereof to this (district) court." The mandate was filed in the county court, and on the 20th day of November, 1905, that court, in the absence of both parties, made a finding to the effect that they had received an equal number of votes, and entered an order that the contest be determined by lot. As neither party was present, the drawing was made by the sheriff. The lot fell to Hayward, and the county court gave judgment in his favor. From this judgment Fisher appealed to the district court. Hayward moved to dismiss the appeal, assigning the following grounds: (1) That after the contest had been instituted Fisher had ceased to be a resident and qualified elector of the city, and had voluntarily resigned the office of mayor. (2) That no full, true and complete transcript of the record of the county court had been filed as required by law, and in consequence of such omission the district court had no jurisdiction to entertain the appeal. The district court sustained the motion and dismissed the appeal. From the judgment of dismissal Fisher appeals to this court.

As to the first appeal, we know of no rule which permits a district court, in case of an attempted appeal before a final order or judgment has been entered by the county court, to remand the cause, with directions to enter a judgment and file a supplementary transcript and return thereof in the district court and thus perfect the attempted appeal. If, as assumed by the trial court on the first appeal, the judgment was void and of no effect, there was then no judgment rendered in the case by the county court. The district court could not divine that a judgment to be rendered in the future would be unsatisfactory to either party, or anticipate that either of them would appeal therefrom. A proper order in a case of that kind would be to dismiss the attempted appeal. Either party could then appear in the county court, and move for judgment on the findings.

But the assumption of the district court that the judgment was void and of no effect was unfounded. It is

true the statute provides that a regular term of the probate (county) court shall be held on the first Monday of each calendar month, and that such regular term shall be deemed open until the third Monday of the same month, when all cases then not finally determined shall be continued to the next regular term. Comp. St., ch. 20, sec. 7. But in *Hansen v. Bergquist,* 9 Neb. 269, this court, dealing with that section and section 15 of the same chapter, said: "Section 15 provides for setting the causes for trial upon convenient days of the term. If the court may at any time enter judgment by consent, why may it not by agreement hear and determine any matter submitted to it? The statute is merely for the direction of the court. A party cannot be compelled after the *third* Monday in each month to take up a new case and proceed to trial. But with the consent of the parties the court may do so. It has authority, with the consent of the parties, to render judgment at any time during the month. And where, as in this case, there is nothing shown to the contrary, such assent will be presumed." That case was quoted with approval and followed in *Cozine v. Hatch,* 17 Neb. 694. In the case at bar, the record shows affirmatively that the contest was continued to the 19th day of September, 1905, the date of the judgment of the county court, by consent of the parties. On the authority of the cases cited, which meet our unqualified approval, the first judgment of the county court was not void for want of jurisdiction, but was valid, and conclusive and binding upon the parties until reversed on error or appeal. That being true, the case was fully disposed of on the entry of that judgment, and the county court at a succeeding term had no jurisdiction to vacate or set it aside, except upon proceedings instituted for that purpose, and its jurisdiction was not extended in that behalf by the mandate of the district court. The mandate of the district court did not dispose of the first appeal, consequently it is still pending. As the second judgment was rendered in the county court without jurisdiction, the district court

acquired no jurisdiction to hear and determine the cause on an appeal from that judgment. *Best v. Stewart*, 48 Neb. 859. And, as the district court then had no jurisdiction to hear and determine the cause on the second appeal, it was not error to dismiss it. It is true, it was not dismissed on that ground, but, since an order of dismissal was the only proper order to make in the case, the judgment of dismissal will not be reversed on account of the grounds upon which it was based.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

COMMONWEALTH REAL ESTATE COMPANY, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED FEBRUARY 8, 1907. No. 14,498.

1. **Municipal Corporations:** INCORPORATION. Towns and villages are incorporated in this state under the provisions of a general statute, by resolution of the board of county commissioners, whose acts in that respect are ministerial.
2. ———: ———: POWERS OF COUNTY BOARDS. County boards have not been vested with authority to include large rural districts, not urban in character and having no unity of interest with the platted portion in the maintenance of municipal government, within the corporate limits of cities and villages.
3. ———: ———: REVIEW BY COURTS. Where the county board, in the incorporation of a village, has exceeded its powers and included within the corporate limits of the village agricultural land, not urban in character and having no unity of interest with the platted portion in the maintenance of municipal government, the courts will, in a proper action, assume jurisdiction over the subject matter at the instance of the aggrieved parties and grant such relief as the circumstances may require.

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

Lambert & Winters, for appellant.

E. M. Morsman, Jr., contra.

JACKSON, C.

The plaintiff had judgment in effect disconnecting a tract of 39.7 acres of agricultural land from the city of South Omaha. The city appeals.

The action seems to have been treated as one in the nature of a *quo warranto.* No bill of exceptions was preserved, and the question presented by the appeal is whether the district court had jurisdiction over the subject matter. The appellant's case is thus broadly stated: The power to create municipal corporations and to enlarge or restrict their boundaries are solely matters of legislative enactment, with which the courts have no power to interfere. The rule thus stated finds support in City of *Hastings v. Hansen,* 44 Neb. 704; but, in view of the subsequent holdings of this court and the limitations imposed upon the legislature by our constitution, we have made a further investigation with a view of harmonizing what appears to be a conflict in conclusions reached in this class of cases. By section 15, art. III of the constitution, it is provided: "The legislature shall not pass local or special laws in any of the following cases, that is to say, * * * incorporating cities, towns, and villages, or changing or amending the charter of any town, city, or village." It will thus be seen that cities and villages in this state must be incorporated, if at all, under the provisions of some general law, and that any attempt on the part of the legislature by special act to incorporate any city or village or define the boundaries thereof would be void as within the inhibition of this constitutional provision. The statutory provision with reference to the incorporation of towns and villages is found in section 40, art. I, ch. 14,

Comp. St. 1905, and is as follows: "That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village; and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated." The authority thus delegated to county boards is ministerial, and may be exercised only in strict accord with the letter of the statute, and where the proper petition is presented, complying with the jurisdictional provisions, the county board has no discretion, and a failure on their part to act would justify the interference of the courts by mandamus to compel the performance of this statutory duty. The only statutory provisions conferring jurisdiction on the courts to disconnect territory from the corporate limits of cities and villages are those of section 101, art. I, ch. 14, Comp. St. 1905. Under that section the court is authorized to act whenever a majority of the legal voters residing in any territory within and adjacent to the corporate limits of any city or village, or the owner or owners of any unoccupied territory so situated, shall desire to have the same disconnected therefrom, and shall file their petition in the district court for the county in which said city or village is situated, praying that such territory shall be disconnected therefrom. The provisions of this section, however, do not apply to cities of the class to which the defendant belongs.

With these statutory and constitutional provisions before us, we will proceed to analyze the various decisions

of this court, in so far as it is important to do so in the determination of the question involved. In *City of Hastings v. Hansen, supra,* it is said that, in the absence of express statutory authority, the courts of this state possess no jurisdiction to disconnect, by decree, any part of the territory of a municipal corporation at the suit of the owner of such territory. It is, however, expressly stated in the opinion that what the boundaries of a municipal corporation are, where they are, and, consequently, whether a particular piece of territory lies within or without the corporate limits of the municipality, are all matters for judicial determination. Construing the provisions of section 40, art. I, ch. 14, *supra,* it was held, in *State v. Dimond,* 44 Neb. 154, that the word villages, as there used, applies to villages in the ordinary and popular sense of the term, and that it was not intended to clothe large rural districts with extended municipal powers or subject them to special taxation for purposes to which they are in nowise adapted; that lands adjacent to the town or village might be incorporated therewith, provided they were in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government, but that the statute did not contemplate the incorporation of remote territory, having no natural connection with the village and not adapted to municipal purposes. Other cases holding substantially the same are *Village of Hartington v. Luge,* 33 Neb. 623; *State v. Mote,* 48 Neb. 683; *Village of Osmond v. Smathers,* 62 Neb. 509; *State v. Clark,* 75 Neb. 620.

The principle underlying these decisions is that county boards have not, by the legislature, been invested with power to include in incorporated cities or villages property not urban in character. It follows that when a county board exceeds its powers in that respect its acts in excess of its authority are voidable, and it is the duty of the courts, upon complaint of the person aggrieved, in the absence of grounds constituting an estoppel, to restore the

parties to their rights, and it was held in *State v. Dimond, supra,* that the courts are vested with power to inquire into the procedure leading to the incorporation of cities and villages, independently of the provisions of section 101, *supra,* and that the owner of the land illegally inclosed within the corporate limits of a city or village might proceed by *quo warranto* to test the right of a municipality to exercise jurisdiction over his property. In *Village of Osmond v. Smathers, supra,* it was held that section 101, *supra,* is not a limitation on the right to institute proceedings to have territory taken out of the corporate limits of a city or village, and that such jurisdiction might be exercised independently of the statute. The doctrine is reaffirmed in *Gregory v. Village of Franklin,* 77 Neb. 62. It may be conceded that, where a county board in the incorporation of a town or village acts within the scope of its delegated power, the courts would be powerless to interfere, and the rule announced in *City of Hastings* v. *Hansen, supra,* is to that extent correct, and not in conflict with the conclusion here reached.

The city of South Omaha was incorporated as a village in 1886. During the progress of its growth to a city of more than 25,000 inhabitants, charters for the government of cities of the class to which it belongs have been the subject of frequent legislative consideration, and on each such occasion it was provided that the boundaries should remain as heretofore. This, it is contended, amounts to a legislative enactment defining the boundaries of the city, with which the courts could not interfere. The purpose, however, of the several enactments, all of which were general in nature, was to provide a plan of city government. The matter of the boundaries of the cities affected by the legislation was never the subject of legislative inquiry, nor could the legislature, under the limitations imposed by the constitution, pass any special act defining the boundaries of the city of South Omaha.

The action of the legislature was not such as to preclude inquiry by the courts. No question of the form of action

is involved, and, as the allegations of the petition are ample to support the finding, we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

ANN THOMPSON, APPELLEE, V. D. FRANK MARSHALL ET AL., APPELLANTS.

FILED FEBRUARY 8, 1907. No. 14,516.

Evidence *held* to be insufficient to sustain the decree.

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

A. W. Crites, for appellants.

A. G. Fisher and *W. H. Fanning, contra.*

JACKSON, C.

The action is one to enforce the specific performance of a contract for the sale of land. From a decree for the plaintiff the defendants appeal.

It is alleged in the petition that the defendant, the Equitable Land Company, a corporation, with its principal place of business at Hastings, Nebraska, was the owner of the title, and that on the 6th day of October, 1902, it entered into a written contract with the plaintiff for the sale of the real estate at an agreed consideration of $320, of which sum $120 was to be paid in cash, $100 in one year, and $100 in two years thereafter, the deferred payments to bear interest at the rate of 7 per cent. per annum; that pursuant to the terms of the agreement

plaintiff paid the sum of $120, and entered into possession of the land; that the defendant thereafter refused to perform the contract, and the plaintiff tenders the remainder into court and asks specific performance.

The facts with reference to the title appear to be that one J. F. Wells died intestate siezed of the title to the land in dispute. His heirs were Sophia A. Wells, widow, and Jennie W. Ruedi, a daughter, residents of the state of Ohio. These heirs conveyed the title to the defendant, Equitable Land Company, in trust, to be by that company disposed of for their benefit. On October 3, 1902, the plaintiff procured her brother-in-law, James F. Walpole, to write to McKinley & Lanning of Hastings, Nebraska, relative to the purchase of the land. This letter is not in evidence. To this letter of inquiry McKinley & Lanning answered as follows: "Hastings, Neb., 10-6-02. James P. Walpole, Carey, Nebraska. Dear Sir: We have yours of October 3d, and note contents. We think the W½ SE¼, W½ NE¼, 9-32-53, in Sioux county, known as the George Brown land, can be sold for $320. If $120 is paid in cash, three years time can be given on the remainder at 7 per cent. interest, with the privilege of paying $50 or any multiple thereof at any interest payment and stopping interest on the amount paid. Yours truly, McKinley & Lanning." On October 15 of the same year plaintiff deposited in the Commercial State Bank of Crawford, Nebraska, $120, and procured the cashier of that bank to write the following letter to McKinley & Lanning: "Crawford, Neb., October 15th, 1902. Messrs McKinley & Lanning, Hastings, Neb. Gents: Yours of the 6th inst was handed to me by Jas. F. Walpole, Carey, Neb., for reply, who desires that a warranty deed for the following described land: W½ SE¼ and W½ NE¼, 9-32-53, Sioux Co., Neb., be executed in favor of Ann Thompson of Sioux Co., Neb., who upon receipt of same, accompanied by an abstract of title showing title perfect and no incumbrance, will adjust in the following manner; Cash down, $120; Note due in one year, $100; Note due in two years, $100—$320; with interest at

7 per cent. payable annually. She has deposited in our hands $120 for cash payment. She would prefer to have the notes read 'On or Before.' This lady is a sister-in-law of Mr. Walpole. Yours truly, O. K. Eastman, Cash." They answered as follows: "Hastings, Neb., 10-16-02. The Commercial State Bank, Crawford, Neb. Gentlemen: We have yours of October 15, with reference to the purchase of land in 9-32-53, Sioux county. We do not own this land. It is owned by a client of ours. We send today the abstract to this land to Harrison to be extended to see if the title is satisfactory and on receipt of the same will submit it to you. Do we understand that Ann Thompson to whom we are to convey this land and who is to make mortgage for deferred payment is an unmarried woman? If not, will you kindly give us the name of her husband. Yours truly, McKinley & Lanning." Considerable correspondence followed, covering a period of several months, during which time an abstract of the title was submitted by McKinley & Lanning to Mr. Eastman, who objected to the title, and no agreement was ever reached. In the meantime the plaintiff, without permission or authority from any one, entered into the possession of the land and made some improvements. The $120 deposited in the Commercial State Bank remained on deposit in the bank as the funds of the plaintiff. There is no competent evidence in the record that McKinley & Lanning were ever constituted the agents, either of the heirs of Wells or of the Equitable Land Company, for the sale of this land, or of the terms and conditions upon which a sale might be authorized.

The conclusion of the trial court is not supported by the evidence, and it is recommended that the decree be reversed and the cause remanded for further proceedings.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the trial court is reversed and the

cause remanded for further proceedings. The motion to quash the bill of exceptions is overruled.

REVERSED.

FRANK ROCKEFELLER, APPELLANT, V. MARTIN C. LARICK ET AL., APPELLEES.

FILED FEBRUARY 8, 1907. NO. 14,657.

Notes: SUBROGATION: EQUITIES. Where a bank takes collateral under such circumstances as not to be an innocent holder, a surety of the principal debtor who pays the debt and receives the collateral held by the bank takes it subject to equities existing between the parties thereto.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Affirmed.*

Kirkpatrick & Schwind, B. P. Finley and *J. P. A. Black,* for appellant.

Dorsey & McGrew, contra.

JACKSON, C.

The action was brought in the district court for Franklin county to foreclose a real estate mortgage securing a promissory note given April 1, 1901, by the defendant to the Siegel-Sanders Live Stock Commission Company of Kansas City, Missouri.

The defense is grounded upon the following facts: At the time of the execution of the note the defendant was indebted to the Siegel-Sanders Live Stock Commission Company, the indebtedness being evidenced by a promissory note secured by a chattel mortgage. The note in suit represented the balance due on the indebtedness. An agent of the payee took the new note and security upon the representation that the old note would be surrendered upon receipt of the extension note by the payee. The orig-

inal note, however, had been transferred, and was then in the hands of an innocent purchaser, who took the property covered by the chattel mortgage, applied the proceeds upon the indebtedness, and obtained judgment against the defendant for the remainder due. The Siegel-Sanders Live Stock Commission Company is a corporation organized under the laws of the state of Missouri, with the principal place of transacting its business at Kansas City in that state. The plaintiff is the principal stockholder in that corporation and one of its directors. Two banking houses were involved in the transactions, the National Bank of Commerce and the Stock Yards Bank of Commerce, both of Kansas City. The stock of the latter is owned by the former. James A. Patton is the president of the Stock Yards Bank of Commerce and also an officer of the National Bank of Commerce. The Siegel-Sanders Live Stock Commission Company was indebted to these banks in the sum of $29,896.70. They executed a promissory note for that amount payable to the National Bank of Commerce. Before delivery of the note the plaintiff indorsed his name on the back thereof, and this note, together with collateral security, including the note in suit, was placed with the National Bank of Commerce for the purpose of liquidating the overdraft of the commission company. The plaintiff ultimately paid a remainder of $23,000 and took up the note of the commission company. The collateral paper, including the note in suit, was surrendered to him. He claims to be an innocent holder of the note in suit by reason of these transactions.

Mr. Patton, president of the Stock Yards Bank of Commerce, testified as a witness concerning the note for $29,896.70, as follows: "Q. Just state, Mr. Patton, the history of that note—what became of the note finally? A. It was taken up by Mr. Rockefeller. Q. Purchased by him? A. Yes, sir. Q. Describe the course the note took from the time it got into the hands of the bank until Mr. Rockefeller acquired it. A. I took the note myself, as the agent of the National Bank of Commerce, to secure

overdrafts made by Siegel-Sanders Live Stock Commission Company on our bank, and on the National Bank of Commerce—and when I say our bank I associate the two banks together in this testimony, because my impression is the Siegel-Sanders Live Stock Commission Company kept its bank account with the Stock Yards Bank of Commerce—and that this note, being for a larger amount than the law would allow us to loan as a little bank, I took the note to the National Bank of Commerce and discounted it, and, as I say, it was to take care of overdrafts made by the Siegel-Sanders Live Stock Commission Company at our bank, and Mr. Rockefeller came over and brought over a bunch of collateral—and in the first place Mr. Rockefeller gave a guarantee. Q. Just state with reference to this particular note—just confine it to that note. A. He offered us this—rather, he says: 'How much does the firm owe,' and I figured the amount and it amounted to $29,896.70, and we loaned Siegel-Sanders Live Stock Commission Company this money on the indorsement of Mr. Rockefeller, and a deposit of about the same amount of collateral—various notes." At the trial in the district court there was a decree for the defendant and the plaintiff appeals.

His contention is that the National Bank of Commerce took the note in suit as an innocent holder, and that he as a surety to the principal debtor, having paid the debt, was entitled to hold the collateral free from all defenses which the maker might set up as against the commission company. We think it unnecessary to inquire into the relation which the plaintiff sustained toward the commission company in this transaction, because he took no greater right, at the most, than that of the National Bank of Commerce. By stipulation of the parties it is agreed: "That under the laws of the state of Missouri it it held that, 'where a negotiable note is transferred merely as collateral security for a preexisting debt, and no new consideration given for it, the assignee takes it subject to all equities existing between the parties to it.'" From the

testimony of Mr. Patton it is clear that the Siegel-Sanders Live Stock Commission Company had an overdraft both at the National Bank of Commerce and at the Stock Yards Bank of Commerce. How much at each bank it does not appear, nor does it seem to be important in view of the fact that the two banks were treated as one concern. The National Bank of Commerce took the collateral from Siegel-Sanders Live Stock Commission Company to secure a preexisting debt, and for no new consideration. It was not, under the law of Missouri, a holder of this paper free from the equities as between the parties.

It follows that the decree of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. HUDSON J. WINNETT ET AL., RESPONDENTS.

FILED FEBRUARY 21, 1907. No. 15,054.

1. **Constitution:** AMENDMENTS. The self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed.

2. ———: ———: PUBLICATION. The constitution requires that, when proposed amendments thereto are submitted to a vote of the people, said proposed amendments shall be "published once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or

rejection." Where there is a substantial compliance with this requirement, the fact that the publication was made for one week less than the required time in one county of the state will not invalidate the amendment.

3. ———: ———: MANNER OF VOTING. The manner of voting upon a constitutional amendment and the general conduct of the election are for the legislature to provide, subject to the limitation that, "When more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." And when the legislature by resolution submits such question at a general election, as required by the constitution, it will be presumed that the legislature intends that the requirements of the general election law are to be observed.

4. ———: ———: OFFICERS: ELECTION. When such amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted.

5. ———: ———: COUNTING VOTES. The act of 1901 (laws 1901, ch. 29), amending various sections of the general election law so as to provide for counting straight party votes for a constitutional amendment when such party has indorsed such amendment, does not violate the constitution, and it is within the power of the legislature to provide such regulations.

6. ———: ———: BALLOTS. It is not necessary that the entire proposed amendment be printed upon the official ballot. If enough is printed upon the ballot to identify the amendment and show its character and purpose, it is sufficient.

ORIGINAL proceeding in *quo warranto* to determine the right of respondents to hold the office of state railway commissioners. *Dismissed.*

W. T. Thompson, Attorney General, W. B. Rose and *Grant G. Martin,* for relator.

M. B. Reese, Joseph A. Williams and *Charles O. Whedon, contra.*

SEDGWICK, C. J.

The attorney general, pursuant to a resolution of the house of representatives, filed an information in *quo war-*

ranto in this court to test the right of these respondents to hold the office of state railway commissioners and to discharge the duties of that office. The first question presented to the court is as to the validity of the constitutional amendment submitted at the last election. The determination of this question depends upon the meaning and application of section 1, art. XV of the constitution, which is as follows: "Either branch of the legislature may propose amendments to this constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this constitution. When more than one amendment is submitted at the same election they shall be so submitted as to enable the electors to vote on each amendment separately." There is no dispute as to the facts, which are as follows: The resolution to submit an amendment to the constitution was introduced in the senate of 1905, and was known as "Senate File 196." The senate journal of that year records that on February 15, the 30th day of the session, "Senate File 196, Proposed Amendment to the Constitution of the State of Nebraska," was introduced and read the first time. When the yeas and nays were entered upon its passage in the senate, thirty senators voted in the affirmative and none in the negative, three being absent. The enrolled resolution was signed by the president of the senate, and by the speaker of the house, and approved by the governor, and deposited in the office of the secretary of state. Laws 1905, ch. 233. We have examined the printed copies of the journals of the respective houses and also the original records, and consider that a discussion of such matters as are shown in

the stipulation of facts presented by the parties to this litigation will dispose of all substantial questions presented by these records so far as we have observed. The stipulation of facts upon which the case is submitted recites: "On October 4, 1906, Hon. John H. Mickey, governor of Nebraska, issued his proclamation that on November 6, 1906, there would be a general election held at the usual places of voting for the election of state and district officers and the adoption or rejection of the proposed amendment to the constitution with respect to the state railway commission. A copy of the proclamation is filed herewith marked 'Exhibit 1,' and made a part hereof. Said election was also for the election of senators and representatives, and legal notice thereof was given and posted as required by law. Under the direction of the secretary of state the proposed constitutional amendment was published in at least one newspaper in each county prior to November 6, 1906, which publication contained a notice of the submission of the proposed amendment to the electors for adoption or rejection, but the notice was published in only one newspaper in Logan county, to wit, the Logan County Pioneer, and the first publication was not made until the issue of the paper dated August 9, 1906, and the last publication was made November 1, 1906. The only publication of the notice in Lancaster county was made in the Lincoln Daily Star, the first publication being Saturday, August 3, 1906, in the Saturday issue of that newspaper, and the notice was published only in the Saturday issue of that paper during the three months next preceding November 6, 1906. The Lincoln Daily Star is a daily newspaper, published seven days in the week. The only publication of the notice in Dodge county was made in a newspaper published in Fremont, known as the Fremont Tribune, the first two notices being published in the tri-weekly Tribune and the others in the daily Tribune for the remainder of the three months next preceding November 6, 1906, the tri-weekly and daily being editions of the same paper, published at the same office by the same

publishers. The only newspapers in which the notices were published in Custer county were the Callaway Queen, a weekly paper published at Callaway, and the Ansley Chronicle-Citizen, published at Ansley. The first notice in the Ansley Chronicle-Citizen was not published until the issue of that paper dated August 10, 1906, and the first notice of the proposed amendment in the Callaway Queen appeared in a supplement of that paper printed August 4, 1906. The only newspaper in which the notice was published in Brown county was the Ainsworth Star Journal, a weekly paper published at Ainsworth, and the first issue of that paper in which the notice was published was a special edition of the paper printed Saturday, August 4, 1906. The only publications in Keith and Rock counties of the proposed constitutional amendment were made in the Keith county News, and the one in Rock county in the Rock County Leader, and the first publication was made August 5, 1906, in special editions of the papers, a copy of the one in Rock County Leader being hereto attached and made a part hereof and marked 'Exhibit 3,' and the notice subsequently appeared in the regular weekly editions, the first publication in the weekly edition being August 9, 1906. The notice was published in Dixon county in the Northern Nebraska Journal, a weekly newspaper published in the city of Ponca, and the first publication appeared in a special edition of that newspaper issued Saturday, August 4, 1906. The first notice published in Otoe county appeared in a supplement dated August 3, 1906, a copy of which is hereto attached and marked 'Exhibit 4.' In the other counties of the state the notice was published in at least one weekly newspaper once each week for the three months next preceding November 6, 1906." The stipulation also shows that the three principal political parties of the state in their state conventions each "nominated three candidates for the office of state railway commissioner, and each in its respective platform, duly adopted by said conventions, declared in favor of the approval and adoption of the proposed constitu-

tional amendment, and the declaration became and was made a part of the platforms of these political parties." This action of the political parties "was duly certified to the secretary of state by the chairmen and secretaries of the respective conventions, and the question of the approval or rejection of the proposed amendment and the election of the railway commissioners was printed upon the official and sample ballots, as shown by the sample ballot heretofore referred to and attached hereto, and the ballots so printed were voted at the general election throughout the state, November 6, 1906. "The total number of votes cast at the election was 194,692, of which 147,472 votes were in favor of the adoption and approval of the proposed amendment by counting in favor of the amendment all the straight party votes of the republican, democratic, and people's independent parties, and also the votes where a cross was made in the square at the right-hand side of the ballots opposite the words 'For constitutional amendment with reference to state railway commission,' and not otherwise." The votes were duly canvassed and "Thereafter, on November 27, 1906, Hon. John H. Mickey, governor of Nebraska, issued his proclamation declaring the amendment to be a part of the constitution of the state.

1. The first point presented by the attorney general is that the proposed amendment was not "published once each week in at least one newspaper in each county where a newspaper is published, for three months immediately preceding" the election at which it was submitted to the voters as required by section 1, art. XV of the constitution." The facts above quoted from the stipulation show that there has not been a literal compliance with this clause of the constitution. The election was held on the 6th day of November. The three months named in the constitution are three calendar months and would include the period of time commencing with the beginning of the 6th day of August (*McGinn v. State*, 46 Neb. 427), and to comply literally with this provision the first publica-

tion must be before that day. There was but one paper published in Logan county, and it appears that the proposed amendment was not published in that county until August 9, four days later than the limit prescribed by the constitution. This is the most serious irregularity disclosed in the matter of the publication. It is therefore unnecessary to discuss other irregularities because, unless this failure in Logan county to comply with the letter of the constitution requires us to conclude that the amendment is invalid, the other specified irregularities, which are of a less serious nature, are not sufficient to require such conclusion. The question whether the provisions of the constitution may under any circumstances be considered as directory merely has been very much discussed by the courts of this country. In many cases it has been said that all of the provisions of the state constitution must be considered as mandatory. Judge Cooley in his work on Constitutional Limitations (7th ed. p. 114) introduces his suggestions upon this question by a concise statement of the rules for the construction of statutes in determining in what cases statutory provisions are to be considered as mandatory, and in what cases directory merely. After stating the rules of the construction of statutes in this regard the learned author says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is

lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application."

This is strong language from one of the greatest constitutional lawyers that this country has ever produced. From a careful examination of Judge Cooley's language it appears that he has not attempted to say that no case could arise in which the courts would be justified in inquiring into the purpose and intention of a constitutional provision in determining the application to be made and the force to be given the language used. Establishing a constitution is the work of the whole people. By this means they place limitations upon the powers of their

servants, and also in some respects place limitations upon themselves. There is, of course, no doubt of the power of the sovereign people to change their own work at pleasure, but the people must act by majorities, and in adopting the constitution the majority which did so has prescribed the method by which the majority of the people may alter or amend it. When an amendment is proposed, the minority may say to the majority: "You have placed certain limitations upon your power to change our fundamental law. We insist upon those limitations being observed." No doubt the majority is bound to observe such limitations. An attempt by the majority to change the fundamental law in violation of the self-imposed restrictions would be held ineffectual. Should it be held that the people have by the language used in their fundamental law placed such restrictions on themselves as might result in prohibiting any amendment, however it might be desired by the great mass of the people, and however much the officers and servants of the people might endeavor to comply with those restrictions? The limitation in question, with the construction contended for, might be so used. There are but few voters in Logan county. But one newspaper was regularly published therein. If some accident beyond the control of the publisher should prevent the publication of the paper in which this notice should first have been published, or if some oversight, or some inducement offered to the publisher, had caused the notice to be omitted from that publication, the people of the whole state, although practically unanimous, would be powerless to remedy the defect. If the purposes of the publication had been fully served in other ways, if the proposed amendment had been discussed by the people of Logan county generally, if all of the voters of the county had participated in the election, and if their vote in favor of the proposed amendment had been practically unanimous, still the result would be the same. The will of the people of the state would be defeated by an unimportant accident over which they had no control. If other

provisions of the constitution are mandatory and are to be taken literally, those provisions by which the people have consented to place restrictions upon their own power in adopting amendments to the constitution should not be so construed. We should inquire into the fair purpose and meaning of such restrictions, and should regard the substance rather than the letter of such requirements. Such conditions as now confront us were evidently not considered by the learned jurist whose language we have quoted.

This particular limitation upon the power of the people to amend their own fundamental law, clothed in the same language as is contained in our own constitution, has been construed by the supreme court of Kansas in an opinion written by Justice Brewer in *Prohibitory-Amendment Cases*, 24 Kan. 700, and, while we should have hesitated to use some of the language contained in that opinion, we think that, so far as it relates to the precise question presented here, it correctly applies the language of our constitution. Indeed, this court is already, so far at least, committed to the language there used by the opinion of this court *In re Senate File* 31, 25 Neb. 864. In the opinion the following language is quoted with approval from the opinion of Justice Brewer above referred to: "The two important, vital elements in any constitutional amendment, are the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded because, by them, certainty as to the essentials is secured. But they are not themselves the essentials. Take a strong illustration: the constitution requires that the 'secretary of state shall cause the same to be published in at least one newspaper in each county of the state where a newspaper is published, for three months preceding,' etc. Suppose a unanimous vote of both houses of the legislature, and a unanimous vote of the people in favor of a constitutional amendment, but that the secretary had omitted to publish in one county in which a newspaper was published, would it not be simply an insult

to common sense to hold that thereby the will of the legislature and people had been defeated? Is it within the power of the secretary, either through ignorance or design, to thwart the popular decision? Is he given a veto, or can he create one? This may be an extreme case, but it only illustrates the principle." After quoting this and other language of Justice Brewer this court, by MAXWELL, J., said: "The case cited from Kansas seems to state the law correctly and has our approval."

We have examined many cases arising in other jurisdictions holding a contrary doctrine, among them several cases from California, and *State v. Tooker,* 15 Mont. 8, 37 Pac. 840, cited by the attorney general. This latter case quotes largely from several strong opinions of other courts and from the language of Judge Cooley noted in this opinion, and fortifies the position taken by reasons worthy of consideration. The force of this case as authority here, however, is very much weakened by two causes. In that case there was no substantial compliance with the constitution. The proposed amendment was published "but for two weeks before the election." And the constitution of that state ordains that all of its provisions "are mandatory and prohibitory unless by express words declared to be otherwise." The court in its opinion quoted with approval the language of the supreme court of California in construing a similar clause of their constitution, as follows: "We will add here that under our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. (Art. I, sec. 22). This section, in our judgment, not only commands that its provisions shall be obeyed, but that the disobedience of them is prohibited. *Oakland Paving Co. v. Hilton,* 69 Cal. 512." We do not think that the irregularities shown in the matter of the publication of this proposed amend-

ment in the various counties of the state should be held to defeat the amendment.

2. The next objection to the validity of the amendment suggested by the attorney general is that there was no authority for electing state railway commissioners, and that no such office existed at the time of the general election in 1906. Upon the first proposition it is sufficient to say that the constitution provides that, when an amendment is proposed by the legislature, the same shall be submitted to the electors for approval or rejection at the next election of senators and representatives, and, as to the manner of submitting it, prescribes only that, "when more than one amendment is submitted at the same election they shall be so submitted as to enable the electors to vote on each amendment separately." Section 1, art. XV, above quoted. If the amendment has been submitted to the voters at the general election specified, and the manner of its submission does not violate the only limitation which the constitution provides, it may well be presumed that the intention of the constitution is that it shall be submitted as other questions are, and that the legislature intended that the means of ascertaining the will of the people upon other questions at the general election at which it is required to be submitted should be employed. It will be conceded that, where there is no office, there can be no officer. Constitutions and amendments thereto are created by the vote of the people, and not by a canvass of that vote, nor by the official declaration of the result. If this amendment was adopted, it was when a majority of the electors had voted in its favor, and, when that occurred, it became a part of the constitution and the office of state railway commissioners existed. By the same act of the people that made the amendment a part of the fundamental law, and created the office, these respondents were elected to fill that office. Both matters might properly be submitted to the electors at the same election. This is in accord with universal precedent both in this and in

other states. The practice was introduced into this state by the 6th section of the enabling act.

3. The third question submitted by the attorney general is stated as follows: "Is there authority of law for counting for the constitutional amendment the straight party votes of the republican, democratic, and people's independent party?" In 1895 a statute was enacted providing for the submission of constitutional amendments when two or more were proposed. Laws 1895, ch. 5. The title of the act is "An act prescribing the manner in which two or more proposed amendments to the constitution are to be submitted to a vote of the people and providing for the printing and distribution of ballots containing such proposed constitutional amendments." The two principal things accomplished by this act were to require the state to furnish the official and sample ballots for submitting such amendments, and to enable the voter to "vote for or against all the proposed amendments or questions printed on the ballot, by simply making a cross-mark (X) opposite the word 'Yes' or 'No,' according to the answer he wishes to give." Section 5 of the act however provided: "It shall be the duty of the county commissioners of each county to provide a separate ballot box for each voting precinct in which to deposit the ballots provided for in this act." This section was not complied with in submitting the amendment in question, and it is suggested that this invalidates the amendment. The act of 1895, however, has no application in this case, since but one amendment was submitted, and that act was intended to apply only when two or more amendments were submitted. In 1901 an act was passed by the legislature amending twelve sections of chapter 26 of the Compiled Statutes, the general election law. Laws 1901, ch. 29. Among the sections so amended was section 127, which provided for making nominations to office. The amendment consisted in inserting the following provision: "A state convention of any political party may take action upon any constitutional amendment, which is to be voted upon at the fol-

lowing election, and said convention may declare for or against such amendment, and such declaration shall be considered as a portion of their ticket to be filed with the secretary of state and by him certified to the various county clerks." Also section 129 was amended. This section related to the manner of certifying nominations to the proper officers, and the amendment to this section consisted in inserting the following provision, after stating what the certificate of nomination shall contain: "Also any party action taken relative to any proposed constitutional amendment, whether for or against, shall be in writing and shall form a part of such certificate." And also provided that certificates of nomination of candidates for certain offices "or any party action taken relative to any proposed constitutional amendment shall be filed with the secretary of state." Section 135, which is also amended, required the secretary of state to certify nominations to the county clerk of each county, and, as amended, after providing other things to be stated in the certificate, contained the following: "And also any proposed constitutional amendment, or party declaration relative thereto, or other question to be submitted to the people of the state for popular vote." Section 140, which related to the form of official ballot, was also amended and was made to contain the following: "Whenever the secretary of state has duly certified to the county clerk questions to be submitted to the vote of the people, the county clerk shall have printed below the names of all candidates upon the regular ballots the question in such form as will enable the elector to vote upon the question so presented. On constitutional amendments submitted to the voters, where a 'For' or 'Against' vote is required, and where any political party has in state convention taken action as a party either for or against such amendment, the county clerk shall have the name of such political party printed directly after the words 'For' or 'Against,' as the case may be, so as to plainly indicate to the voter the stand taken by such party on such amendment, as shown

in schedule 'A' of section 160." Section 146, which provided for furnishing the ballots to voters and for instructions to the voter, was also amended so as to contain the following: "If he wishes to vote a straight party ticket he shall make a cross in the circle at the right of the name of his party at the head of the ballot, and his vote shall be considered as a vote for every candidate and endorsed constitutional amendment of that party on the ballot. If the voter does not wish to vote a straight ticket he shall make a cross in the square to the right of every candidate for whom he desires to vote, or, in a presidential election, by making a cross in the circle to the right of the presidential electors of his choice; if he desires to vote for all the electors of one party, or by writing the name of the person for whom he desires to vote, and whose name is not printed on the ballot, in the blank space provided therefor and making a cross in the square to the right thereof; and in case of a question to be submitted to the vote of the people, by making a cross in the square to the right of the answer he wishes to give. When a voter shall have made a cross in one of the circles for a straight party ticket, and shall have also made crosses in any of the squares to the right of the name of any candidates or in either square to the right of any constitutional amendment his vote shall be so counted as a vote for said candidates and for or against said amendments, as the case may be, but for all other offices or constitutional amendments his vote shall be counted for the candidates and party action concerning amendments of that party in whose party circle he has made a cross." The requirement of the constitution is: "When more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately. Const. art. XV, sec. 1. The objection that the provisions of our statute above quoted are not such "as to enable the electors to vote on each amendment separately," when several amendments are submitted, appears to be without foundation. The voter may vote a

straight party ticket if he desires, but he is not compelled to do so. He may vote a straight party ticket in general and make such exceptions as he desires either as to the individual candidates or as to any proposed constitutional amendment. The directions for so doing in the statute appear to be practicable and without uncertainty. It is not the duty of the court to suggest methods of submitting constitutional amendments to the vote of the people. The duty of devising and applying such methods is devolved upon the legislature, and, unless the method adopted by the legislature is manifestly a violation of the constitution, and unless it clearly appears that the method adopted by the legislature will not make it practicable for the voters to express their judgment as to each amendment proposed, the courts are not at liberty to disregard the will of the legislature. A similar method of submitting constitutional amendments has been upheld by the supreme court of Ohio. *State v. Laylin,* 69 Ohio St. 1. It was evidently the intention of the legislature by enacting the amendments to the election law embraced in the act of 1901 (laws 1901, ch. 29) to revise the provisions of the statute in regard to the form of the ballot and the manner of voting in the submission of constitutional amendments. We do not think that the failure to repeal section 5 of the act of 1895 should result in thwarting this design. The provisions contained in the later act are complete in themselves and cover the whole general subject, and ought to be regarded as the final expression of the legislative will. The record shows that this amendment was submitted to the electors by a practically unanimous vote of the legislature, and that the merits of the amendment were thoroughly discussed throughout the state, and well known to the voters, and was adopted by a very large majority of all the voters participating in the election.

4. The attorney general suggests "that the entire proposed amendment to the constitution should be printed in full upon the official ballot." Of course, there is no

ground for such a supposition. The provision of the constitution is that the amendment shall be submitted to the electors for approval or rejection, but this does not require that the whole amendment so submitted shall be upon the ballot. Enough was printed upon the ballot to identify the amendment referred to and to show its character and purpose, and that is all that is required. The respondents are citizens and qualified electors of the state and appear to have properly qualified pursuant to their election. We conclude that the constitutional amendment in question has been regularly adopted and has become a part of the constitution of the state, and that the respondents are the legally elected and regularly qualified state railway commissioners.

The information is therefore

DISMISSED.

STATE, EX REL. CHICAGO & NORTH WESTERN RAILWAY COMPANY, RELATOR, V. JAMES J. HARRINGTON, DISTRICT JUDGE, RESPONDENT.

FILED FEBRUARY 21, 1907. No. 15,039.

1. **Mandamus**: NOTICE: JURISDICTION. An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court, and a notice that a person named therein will at a certain time and place apply for such a writ, served before any papers have been filed, does not confer jurisdiction to issue a peremptory writ in a case where notice must be given.

2. ———: PEREMPTORY WRIT. It is only where there is no room for controversy as to the right of the applicant, and where from the nature of the facts set forth in the affidavit a court can take judicial knowledge that a valid excuse cannot be given, that a peremptory writ of mandamus may issue without notice.

3. ———: ———. A court has no power to issue a peremptory mandamus without notice in an action brought to compel a railroad company to furnish cars to a shipper at a certain time and

place, since it cannot be "apparent that no valid excuse can be given."

ORIGINAL application for a writ of mandamus to compel respondent, as district judge, to set aside a writ of mandamus compelling relator to furnish cars, and a judgment for costs. *Writ allowed.*

B. T. White and *C. C. Wright,* for relator.

M. F. Harrington, contra.

LETTON, J.

The relator is a railroad corporation owning and operating a line of railroad in Nebraska through the village of Emmett, in Holt county. The respondent is judge of the district court for Holt county. On the 31st day of December, 1906, the respondent, as such judge, issued a peremptory writ of mandamus to the railroad company on the application of one Wilson, commanding it immediately to furnish Wilson three cars in which to load and ship thirty tons of hay from Emmett to Lincoln, Nebraska, and also rendered judgment against the relator for $6.85, costs incurred. No alternative writ was issued and served upon the company, nor was any order to show cause issued and served, but on December 29 a notice was served by Wilson upon the agent of the railroad company at O'Neill, substantially to the effect that he would apply to the district court for Holt county, Nebraska, at 10 o'clock in the forenoon, on the 31st day of December, 1906, for a peremptory writ of mandamus compelling it to furnish him immediately seven cars in which to ship hay from Emmett, Nebraska, to Lincoln, Nebraska. The relator contends that the order allowing the writ was made without power or jurisdiction, and prays for a writ to compel the respondent to set aside the order awarding the same, and the judgment for costs. The relator in its application sets up a good and sufficient defense to the mandamus proceedings

in Holt county, and further alleges that it has furnished at Emmett, to all shippers without discrimination, all the cars it was able to supply. The respondent, in answer to the alternative writ, sets forth the notice and application of Wilson and the default of the railroad company to appear at the time and place specified in the notice, and alleges that a hearing was then and there had and judgment entered, and that the court had jurisdiction to award the peremptory writ applied for; that Wilson made a case authorizing the granting of a peremptory writ without first issuing an alternative writ, and that the court determined the existence of such right, and its judgment is not subject to collateral attack. To this answer the relator has filed a general demurrer, and the cause is submitted upon the question whether the allegations of the answer are sufficient to constitute a defense.

1. The relator contends that under the rule in *Horton v. State*, 60 Neb. 701, the district court for Holt county had no power or authority to issue a peremptory writ of mandamus against the relator without the issuance of an alternative writ. In the *Horton* case it was held that the statute authorizing the issuance of a peremptory writ of mandamus without notice has reference to cases in which the refusal of a public officer to discharge official duty is so obviously inexcusable, and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice, and that no such power can be exerted against a private corporation or its officers by which its functions are performed, since no person can be deprived of property or valuable rights without notice and opportunity for a hearing. The case was in effect an action to compel a private corporation to pay a debt, and it is clear that such a proceeding was beyond the proper purpose of the writ of mandamus. The relator in this case, however, is a public corporation. Extensive powers and rights have been conferred upon it by the state in return for its assumption of the obligation to serve the public. We think that there may perhaps be a dis-

tinction between the power of a court to compel the action of a public service corporation in a proper case by peremptory writ without notice and the power to exert the same authority over a private corporation in a matter in which the public has no concern. We think it unnecessary to determine in this action whether a peremptory writ may not be issued against a public corporation without notice if an emergency should arise apparently warranting such an unusual and drastic procedure.

2. If the district court for Holt county acquired jurisdiction over the defendant in the mandamus proceedings, the answer of the respondent is a complete defense, since its judgment cannot be attacked collaterally or reviewed in such a proceeding as this. It appears that on the 29th day of December, the date upon which the notice was served by Wilson, no application had been made to that court for a writ of mandamus, and no such application was filed until on the 31st day of December, two days after service of the notice, and that the writ was issued immediately. It was impossible, therefore, for the railroad company to ascertain until the time of hearing whether or not the notice was served in good faith and whether in fact any application would ever be made to the district court for the issuance of a writ. It rested in the bosom of Wilson as to whether or not he would ever make such application. In its application in this court the relator alleges that a number of such notices have been served upon it by various parties at the village of Emmett, and that, when it appeared at the time and place specified in order to show cause, no application was in fact made to the court. This allegation is denied by the answer and, hence, cannot be taken as admitted, and yet it is a fair example of what in fact might happen if a practice of this kind can be tolerated. It is argued by counsel for the respondent that a summons is not necessary in a mandamus case, and that if the defendant received actual notice of the application it will be sufficient. He concedes, however, that notice in some form must be given in such a case as this. With-

out determining the proper manner and form of such notice, or whether or not a notice of the form served by Wilson would be sufficient to confer jurisdiction if served after proceedings were actually begun, we think it clear that, until proceedings had actually been begun by the filing in court of an application for the writ, a notice that at some future time the relator would apply therefor has no substantial basis and is of no effect whatever as a step in a legal proceeding; that, since it rested on the mere whim of the relator therein as to whether or not a proceeding would ever be begun, the railway company was entitled to entirely disregard the same, and that such a notice served at such a time was insufficient to confer jurisdiction upon the district court and was a mere private paper. Section 648 of the code provides: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must first be issued." Section 649 provides: "The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." Under these provisions an alternative writ, and not a peremptory writ, should be issued in the first case, or, if a peremptory writ is applied for, a notice to show cause why it should not issue should be given and a hearing had before its issuance. It is only where there is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice. In *Home Ins. Co. v. Scheffer,* 12 Minn. 261, it is said: "The questions to be decided in order to determine whether the right is clear, and whether no valid excuse can be given, are: *First,* is this showing true? and, *second,* does the tribunal applied to *know* it to be true, on account of the nature of the

facts shown or from the admissions of the defendant?" The facts set forth in Wilson's application were of such a nature as to admit of controversy, and the railroad company might well have, and in this application alleges that it did have, a valid and sufficient defense thereto. In such a case a court has no power or jurisdiction to issue a peremptory writ without, first, the filing of the application in the court; and, second, notice being given thereafter of the pendency of the same and of the time and place where the application will be heard. It was impossible for the district court to have knowledge that no valid excuse could be given for the railroad company not furnishing cars, and it had, therefore, no power to issue a peremptory writ without the defendant having been notified of the pending proceedings. As we have seen, the notice actually served was without legal foundation, and the writ issued was void.

The demurrer to the answer is therefore sustained, and the writ of mandamus allowed.

WRIT ALLOWED.

ISABELLE MCHENRY TOMSON, ADMINISTRATRIX, APPELLEE, V. IOWA STATE TRAVELING MEN'S ASSOCIATION, APPELLANT.

FILED FEBRUARY 21, 1907. No. 14,575.

1. **Removal of Causes**: PETITION: WAIVER. Merely formal defects in a petition to remove a cause from the state to the federal court are waived by appearing in the latter court and moving to remand on the ground that the alleged cause for removal does not exist.

2. ———: JURISDICTION. During the pendency in a United States circuit court, in a cause removed thereto from a state court, of a controversy over the question whether a sufficient ground for such removal exists, the state court is without jurisdiction to proceed, or to make any judgment or order in the suit.

3. ———: JUDGMENT, VACATION OF: REVIEW. If a state court renders

a judgment in a cause which has been removed to a circuit court of the United States, during the pendency of a controversy in the latter court over the question whether a sufficient ground for such removal exists, it is error to refuse to vacate such judgment upon a motion therefor, made at the term of its rendition, accompanied by a showing of the pendency of such controversy, although at the time of its rendition the records of the state court did not disclose that it was deprived of jurisdiction.

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

Sullivan & Sullivan and *T. J. Mahoney,* for appellant.

L. C. Burr, contra.

AMES, C.

This appeal is by the defendant to reverse a judgment of the district court as having been rendered without jurisdiction. The action was begun by petition, summons and personal service in the ordinary manner. Before the arrival of the answer day there was filed and brought to the attention of the court a purported petition and bond for the removal of the cause to the United States circuit court on the ground of diverse citizenship. No order with regard to the application was made by the state court, but the bond was approved by one of the judges of that court, and the defendant immediately procured a transcript of the record, and caused the same to be filed and the suit to be docketed in the United States court. On the 18th day of October, 1904, the plaintiff entered an appearance in the latter court and filed therein a motion to remand, in which no objection was made to the form or authenticity of the petition for removal, but in which it was alleged that the latter was insufficient in substance and that the alleged diverse citizenship did not exist. Upon the issue thus joined, proofs were taken and submitted to the circuit court,

who in consideration thereof, and on the 30th day of December, 1905, entered an order sustaining the motion and remanding the cause. On the 3d day of July, 1905, while this controversy was pending and under consideration in the United States court, the plaintiff applied to the state court for and obtained an order adjudging the defendant in default for want of an answer, none having been filed, and, pursuant thereto, a judgment was rendered in favor of the plaintiff and against the defendant for the amount prayed for in the petition of the former. At the same term of the court at which these proceedings were had the defendant applied to have the default and judgment set aside on the ground that at the time of their rendition the cause was not before the court, its jurisdiction thereof having been suspended during the pendency of the proceedings on the application for removal. The motion to vacate the default and judgment was denied, and the defendant appealed.

The sole contention on behalf of the plaintiff is that the petition for removal is insufficient in form and without due authentication, so that the state court was not required to regard it, and that, hence, no reversible error appears upon the face of the record. The precise objection to the petition for removal is that the defendant is a corporation which is incompetent to conduct any proceeding before a court of record, except through the agency of an attorney of such court, and that in this instance the instrument was signed by persons who, though attorneys of the courts of a sister state, were not attorneys admitted to practice in Nebraska and not especially admitted for the conduct of the cause in which the application was made. We understand counsel for the defendant to admit that this objection to the petition would have been fatal if it had been made and insisted upon in due season, but he contends that it goes to the form, and not to the substantial sufficiency of the petition, which is not assailed and that it was susceptible of waiver and was effectually waived by the appearance in the United States court and

the raising of an issue there with reference to the alleged ground of removal, to wit, diverse citizenship. That this contention must be upheld the authorities leave no room for doubt, nor do we understand counsel for plaintiff to controvert it. Black's Dillon, Removal of Causes, sec. 220; *Martin's Admr. v. Baltimore & O. R. Co.*, 151 U. S. 673; *Ayers v. Watson*, 113 U. S. 594.

The authorities are also unanimous to the effect that the United States court was alone competent to try the question of diverse citizenship, and that during the pendency of such trial the state court was wholly without jurisdiction to proceed with or to make any judgment or order in the cause, provided it appeared upon the face of the record in the state court that the suit was removable under the laws of congress. *Stuart v. Bank of Staplehurst*, 57 Neb. 569; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513; *Carson v. Hyatt*, 118 U. S. 279. It follows inevitably from the foregoing that the state court was without jurisdiction at the date of the rendition of the default and judgment; the informality of the petition for removal having been waived in the manner aforesaid and the question of jurisdiction submitted to the federal tribunal.

But the plaintiff urges that granting all this to be as asserted, still the state court committed no reversible error, because there appeared upon its records no lawfully authenticated application for removal and nothing to indicate ratification by the defendant or waiver by the plaintiff, and that if the defendant has any remedy it is by a suit in equity or by a proceeding under section 602 of the code to obtain a new trial, and not by appeal or error.

But at the same term at which the default and judgment complained of were rendered, and within three days after their rendition, the defendant, appearing specially, moved the court in writing to vacate them on the ground that the cause had been removed to and was still pending in the United States circuit court for this district, and that

the state court was without jurisdiction. In opposition to this motion, counsel for the plaintiff filed his own affidavit and also a certified transcript of the above described proceedings in the federal court, from all which the above recited circumstances were, so far at least as the plaintiff is concerned, conclusively established, and which, being preserved in a bill of exceptions and made a part of the record, show without contradiction that whatever may have appeared upon the face of the record at the time the court rendered the judgment complained of it was in fact without jurisdiction so to do. We think it entirely clear that this showing ought to have been given at least as much force as should have been given a sufficient proof of newly discovered evidence upon a motion for a new trial for that cause, and that the court therefore erred in denying the motion to vacate the judgment.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

OLDHAM and EPPERSON, 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.

REVERSED.

CHARLOTTE MARTIN ET AL., ADMINISTRATORS, APPELLEES, V. MABEL E. SHEARS ET AL., APPELLEES; HOWARD ABEL, APPELLANT.

FILED FEBRUARY 21, 1907. No. 14,632.

1. **Fraudulent Conveyances: PRESUMPTIONS.** Although a relationship between a grantor in fraud of creditors and his grantee may be so distant as not of itself to raise a presumption of participation by the latter in the fraudulent intent, within the rule established

by this court, yet such relationship, together with facts and circumstances of knowledge and intimacy, may suffice to that end.

2. **Evidence** found sufficient to establish the fraudulent character of the instrument in suit.

3. **Fraudulent Conveyances**: VALIDITY BETWEEN PARTIES. A contract or conveyance fraudulent as to creditors is not, for that reason only, void as between the parties to it.

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

Faircett & Abbott, for appellant.

Byron G. Burbank, H. W. Pennock and *F. A. Shotwell, contra.*

AMES, C.

On January 25, 1900, Charles J. Barber was the owner of a house and lot in Omaha and in occupancy of it, together with his family, consisting of his wife and daughter and the husband of the latter, as a homestead, and on that date conveyed it, his wife joining, to their daughter, Mabel Shears, who immediately reconveyed it to her mother. February 24 following Mrs. Barber and her husband executed a mortgage on the premises to secure the payment of a negotiable promissory note for $3,500. On September 24, 1900, the note and mortgage were transferred to Howard Abel, who was the husband of a niece of Mrs. Barber. In February of the following year Mrs. Barber and her husband conveyed the property to their daughter, subject to the mortgage. At the time when these transactions occurred the value of the unincumbered title to the homestead was $5,500. In March and April, 1900, suits were brought in Douglas county against Charles J. Barber, which afterwards ripened into three several judgments in favor, respectively, of Charles Martin, Edward Krug and the administrators of the estate of Alvin Saunders, deceased. Meantime the mortgage was assigned of record to one Amzi W. Strong, who, however, never had or claimed any real ownership or interest in it. In

August, 1903, this action was brought by Mrs. Martin against Mrs. Shears and her husband and Strong, by a petition alleging the deeds and mortgage to have been executed without consideration and for the purpose of defrauding the creditors of Charles J. Barber, especially the plaintiff, and praying to have them set aside and the property subjected to the payment of her judgment. Krug and the administrators of Saunders intervened with cross-petitions of like purport, and Abel intervened with a cross-petition pleading the mortgage and praying a foreclosure of it. Issues having been made upon these pleadings, a trial of the cause resulted in a decree adjudging the mortgage and conveyances to have been executed in fraud of creditors and to be void as against the latter, and directing the premises to be sold and the proceeds to be appropriated: First, to the payment of the costs of the action; second to the payment to Mrs. Shears of $2,000, the amount of the homestead exemption, which was held not to be the subject of a conveyance fraudulent as against creditors; and, third, to the satisfaction of claims of the intervening judgment creditors. Abel, the assignee of the mortgagee, appealed.

It is shown, without much dispute, that Charles J. Barber, who had previously been accounted wealthy, had become insolvent, or at least much embarrassed and broken in health, and had converted large values of property into money at or about the time of the execution of the deeds and mortgage; and, although Mrs. Shears testified that she paid her parents, or to one of them, as a consideration for the mortgage, $3,500 in cash, the full value of the premises in excess of the homestead exemption, she does not show whence or how she obtained the money, except that she says, generally, that it was given to her during the years 1898 and 1899 by her father and husband, but she does not say in what sums or proportions, and she had no other property or source of income, but she says that she was ignorant of her father's financial affairs. We think the circumstances already recited are sufficient

to raise a presumption of an intent on his part to place the property beyond the reach of his creditors, from which intent she has not exculpated herself to the extent which, considering her relationship, is required of her by a familiar rule of this court.

Consistently with the foregoing views, the mortgage must be regarded as having been at its inception void as against creditors. Appellant's connection therewith, so far as the same is disclosed by competent evidence, is as follows: He was a resident of the city of Chicago, and desirous of loaning money upon real estate mortgages. Relying upon his acquaintance and confidence in Barber, he applied to the latter to secure for him investments of that description. Barber does not appear to have complied with the request further than to call the attention of the appellant to the fact that his daughter, Mrs. Shears, was the owner of a note secured by a mortgage for $3,500 upon the Barber homestead, which she was desirous of selling. The mortgage had been placed for sale in the hands of an Omaha firm of brokers, who had forwarded it to a law firm in Chicago, in whose possession it then was. Appellant had visited the Barber home, and was familiar with the property, which he regarded as sufficient in value to be adequate security for the indebtedness, and by some arrangement with the lawyers procured the note and mortgage to be transferred to himself. At the time of obtaining the transfer he knew of the pendency of the suits against Barber, which resulted in judgments as above recited. He testified that he did not remember how or in what manner he paid for the transfer to himself, whether "with a certificate of deposit, with cash, or with a check drawn on his banker, or with a check which might have been drawn upon his broker." In corroboration of this somewhat vague statement there is no evidence, nor any testimony, either by the Chicago law firm or by the Omaha brokers or by Mrs. Shears, except that she testified that she received $3,500 for the note and mortgage, but she does not tell in what manner or from whom. To the

foregoing effect there is no conflict in the evidence, and we think it may fairly be inferred that appellant was acquainted with all the facts above quoted, and so far familiar with the circumstances as that he may fairly be presumed to have had sufficient notice of Barber's embarrassment, and of his intent, in the execution of the deed and mortgage, to put him upon his inquiry. So distant a relationship as that which existed between the parties may not of itself raise a presumption of fraud against the appellant, or impose upon him the burden of establishing freedom from participation in or knowledge of the fraudulent inception of the mortgage, but we think that such relationship, coupled with such knowledge as has been shown, is sufficient to raise such a presumption, which the circumstances tend rather to strengthen than to remove. The evidence does not disclose that appellant became the purchaser of any other mortgage than that in suit, and it is doubtful if the transaction can, without further explanation, be regarded as one occurring in the usual course of business. It is possible that the purchase was made in good faith, but we think there are circumstances of so suspicious a character as to call for a more satisfactory explanation than appears from the record. It seems to us that there ought, at least, to be a requirement that appellant show by something more than his own unsupported and extremely vague testimony that he paid a valuable consideration for the assignment which the record leaves us considerably to doubt. But even such payment with knowledge or notice of the fraudulent character of the instrument would not suffice to protect his title, and his actual intimacy with Barber puts him, we think, in the same category as a nearer relative, and subjects his conduct to the rule laid down by this court in numerous instances. *Smith v. Jansen*, 12 Neb. 125; *Dorrington v. Minnick*, 15 Neb. 397; *Armagost v. Rising*, 54 Neb. 763; *Marcus v. Leake*, 4 Neb. (Unof.) 354; *Fisher v. Herron*, 22 Neb. 183; *Bank v. Chapman*, 50 Neb. 484.

The conclusion thus arrived at disposes of the contro-

versy between the appellant and the intervening judgment creditors, but leaves the rights and obligations of the former and Mrs. Shears undetermined. The situation is peculiar, and, so far as counsel have informed us, is without precedent or authority. It seems to us, however, that Mrs. Shears, having at all times considered and treated the mortgage as valid and received its full face value on the occasion of its transfer to the appellant, has no ground upon which she can stand to dispute its validity as against him, although, on account of the intervention of the creditors, it is thus made to operate, contrary to her intent, upon the amount of the homestead exemption.

We therefore recommend that the judgment be reversed and the cause remanded to the district court, with instructions to enter a new decree directing the premises in dispute to be sold and the proceeds of the sale distributed: First, to the payment of the costs of the action; second, to the payment of $2,000, the amount of the homestead exemption, to the intervener Abel; third, to the proportional payment of the intervening judgment creditors; fourth, to the payment of the residue of the amount due the appellant; and, fifth, if there shall be any surplus after the payment of all such claims, to the defendant Mabel Shears.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be reversed and the cause remanded to the district court, with instructions to enter a new decree directing the premises in dispute to be sold and the proceeds of the sale distributed: First, to the payment of the costs of the action; second, to the payment of $2,000, the amount of the homestead exemption, to the intervener Abel; third, to the proportional payment of the intervening judgment creditors; fourth, to the payment of the residue of the amount due appellant;

and, fifth, if there shall be any surplus left after the payment of all such claims, to the defendant Mabel Shears.

REVERSED.

GEORGE H. BABBITT, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 21, 1907. No. 14,665.

Damages: REVIEW. An examination of the evidence discloses that the damages were assessed under the influence of passion or prejudice, and are excessive, but the court is unable to determine in what amount they are so, and a new trial, not conditional upon a remittitur, is therefore ordered.

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

John A. Sheean, Edson Rich and *J. A. Price,* for appellant.

J. M. Armstrong, J. S. Armstrong and *M. W. McGann, contra.*

AMES, C.

The plaintiff, a farmer residing in Boone county, Nebraska, was the owner of an animal called a jenny. It had no market value in that locality, and none or very little anywhere, except such as was dependent upon its breeding qualities. It was some nine or ten years old, and had not under favorable circumstances produced any offspring within the past three years. It wandered upon the railroad track of the defendant company and was killed by a passing train. In an action for damages the plaintiff recovered a verdict and judgment for $473.19. The defendant appealed.

Upon the question of value there were three witnesses only on the behalf of the plaintiff. One of these was the

plaintiff, who testified on both direct and cross-examination that he did not know the market value of the animal or that it had any either in the neighborhood or elsewhere, and had not known of any being bought or sold, except that at some previous time, not specified, he had sold a colt from the animal killed, but he did not say for how much. He was permitted to say, over the objection of the defendant, that he considered the jenny worth $1,000. Another witness testified that he did not know the value of the animal or that it had any market value, and that such value as it had was due to its breeding qualities; that if it would not produce offspring he would "give it to the kids." He did not know anything about the breeding record of this jenny, except that he had at one time, not specified, seen a colt at her side, and he thought that she was worth or "ought to be worth" $600. He had never bought or sold any such animal. A third witness had dealt a little in jacks and jennies and was the owner of several, but knew nothing about their market value except from hearsay. He would consider such an animal as that in question, if of good breeding qualities, worth $400 or $500, although not at the time in foal. If she was not a good breeder she was worthless. It was undisputed that the animal in question had not produced offspring for the three years last past. The defendant produced several witnesses who were owners, dealers in and breeders of such animals in the state of Missouri, where enterprises of that kind are carried on extensively, and who agreed with the plaintiff's witnesses that a jenny that would not breed was of little or no value, and, further, that such an animal that had not had young for three successive years was not likely to "revert" or subsequently to become fertile, and should be regarded as permanently barren.

One of the assignments of error is that the damages are excessive, and appear to have been given under the influence of passion or prejudice. In the light of the evidence, the complaint is evidently just; but the record is not such as to enable us to say that the animal was entirely

worthless, so as to entitle the plaintiff to nominal damages only, or whether it had some small value for other than breeding purposes, so as to enable the court to order a remititur, and we therefore recommend that the judgment be reversed and a new trial granted.

OLDHAM and EPPERSON, 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.

JOHN FLANAGAN ET AL., APPELLANTS, V. JOHN MATHISEN ET AL., APPELLEES.

FILED FEBRUARY 21, 1907. No. 14,668.

1. **Occupying Claimant's Act: VALIDITY: CONSTRUCTION.** The so-called "Occupying Claimant's Act" (laws 1883, ch. 59), affording protection to persons not in the possession of disputed lands who have paid taxes and made lasting improvements thereon in good faith, claiming title to the same, and having an apparent title thereto derived connectedly by the public records from the United States or this state, is valid, and is applicable to lands of which adverse claimants had actual title at the time of its enactment.

2. ———: IMPROVEMENTS: INVALID MUNICIPAL ASSESSMENT. The right, under the foregoing statute, to compensation for lasting and valuable improvements is not affected by the fact that such improvements were made in supposed compliance with a municipal regulation which was void.

3. ———: ———: ———. The owner of the real title to lands upon which improvements have been made, for which a claimant is entitled to reimbursement in a proceeding under the statute, cannot be compelled to convey the same to such claimant upon being paid or tendered the value thereof as appraised in such proceeding.

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

B. E. B. Kennedy and *C. W. Haller,* for appellants.

Myers & Ten Eyck and *Edgar Ferneau, contra.*

AMES, C.

Appellees and their predecessors in title are shown by the records of the office of the register of deeds of Douglas county to be, or to have been, the possessors by "a plain and connected title" from the government of the United States of certain lots in the city of Omaha which are the subject of this litigation. In 1876 title to these lots ripened in one John Flanagan by adverse jossession that began in 1866. In 1900 Flanagan began, and he thereafter prosecuted to a successful conclusion, an action against the then apparent record owner, one Belinda M. Engles, to quiet title in the lots in himself. The defendant in that suit had purchased, and become the record owner of, the property in 1889, and thereafter down to the beginning of the action was without knowledge or notice of the adverse claim or possession, and in good faith, believing the title to be in herself, paid the annually accruing general taxes and special assessments thereon. When the action terminated in favor of Flanagan, this proceeding was begun under the occupying claimant's statute to recover the amount of such payments, and resulted in a judgment therefor, from which this appeal is prosecuted.

The statute under which the proceeding is had was enacted in 1883. Prior to that time there was no law enabling an unsuccessful litigant, who was not in the possession of the subject of the suit, to recover for taxes paid or betterments made upon the land in controversy. Some seven years before this statute was passed, Flanagan's adverse possession had ripened into a perfect title, and the appellants contend that it was not competent for the legislature to enact that his title, or that of other persons similarly situated, should be incumbered or affected by any payments made by persons claiming in hostility there-

to without his knowledge or concurrence, although the same should be for the discharge of tax liens or the betterment of his estate. In other words, that the statute, in so far as it contemplates lands, the title of the claimants to which had been extinguished prior to its passage, is unconstitutional and void. But at all times since 1867 there has been statutory enactment in this state for the relief of occupants of lands by whom betterments have been made in good faith, and in honest reliance upon an apparent or purported record title continuous from one of the sources of all titles, the government of the United States or of this state. Similar statutes are and have been for many years in force in all or most of the states of the Union, and, as was said by Judge Caldwell in *Leighton v. Young,* 52 Fed. 439, 18 L. R. A. 266, if judicial authority can ever silence contention, their validity is no longer open to question. The act of 1883 is the last of a continuous series of such statutes in this state, and differs from its predecessors, principally, in the feature which includes within its protection persons not in possession, as well as occupants, of disputed lands. Now, it is to be observed that whether as to the one or as to the other class of claimants, or whether under the former statutes or the latter, it is not the fact of occupancy alone, nor the fact of expenditures alone, nor both together, that entitles the claimant to relief, but it is the making of the latter for the benefit of the estate upon the faith of an apparent or presumptive record title. We are unable, therefore, to discover any distinction in principle between the act of 1883 and those statutes which confine their protection to persons in possession or occupancy.

Among the items allowed in behalf of the appellees is one for the payment of an alleged local assessment for street improvements made at the instance of the city. Counsel agree that this assessment, on account of irregularities and defects of procedure, was unenforceable as a legal charge or lien in behalf of the public, but it is not

disputed that the improvements were in fact made, or that the appellees made the payment, or that the amount paid is not in excess of their value. Under such circumstances we do not see that regularity or validity of procedure by the city is material. Doubtless appellees, with the consent of the city authorities, might have voluntarily expended the same amount for the same betterments without any such procedure, and doubtless in such case they would, upon failure of their title, have been entitled to reimbursement under the statute.

Appraisers were appointed who appraised the lots in controversy at $800, and a referee appointed by the court, with the consent of the parties, ascertained the amount of taxes and special assessments paid by appellees, together with interest, for which they were entitled to reimbursement, to be $1,839.97. The decree provides, in substance, that for the term of 60 days from the date of its rendition appellants shall have an option to pay into court the amount of such taxes and assessments for the benefit of appellees, and that upon such payment being made the claim of the latter therefor shall be discharged and title quieted in the appellants, but that, if the appellants fail to make such payment within the interval mentioned, then the appellees shall have an option, for the term of 60 days from the expiration of that time, to pay to the clerk of the court, for the use and benefit of the appellants, the appraised value of the land, and that in that event appellants shall convey the land to the appellees or, in default of their so doing, such payment shall operate as such conveyance and vest the appellees with title to the land. It is further decreed that, if this last mentioned payment shall not be made within the prescribed time, the property shall be sold and the proceeds of the sale distributed among the parties in proportion to their respective interests. This decree is in substantial conformity with that directed by the United States court of appeals for this circuit, in *Leighton v. Young, supra.* But the judgment in that case was, in the respect about to be

mentioned, in excess of the prayer of the bill, and, in our opinion, erroneous. We are unable to find in the statute any warrant or authority for the second of the above mentioned so-called "options," nor are we aware of any principle of constitutional construction by which such a statute could be upheld if enacted.

At and before the time of the beginning of this litigation, and before the appellees had made any of the expenditures for which they claim reimbursement in this proceeding, John Flanagan, one of the appellants, and the grantor of the others of them, was the owner of the unqualified fee title of the lots in suit, and he or his successors in interest remain such to this day, except for the fact that because of circumstances above narrated the property has become incumbered by a lien. That the property may be sold by judicial decree and the proceeds of the sale distributed for the satisfaction of the lien, in the manner provided by statute, is one matter; but that the owner of an estate in fee of lands can be forcibly divested of his title for any purpose, other than a public use, upon being paid or tendered such sum as some third person or some public board or officer shall arbitrarily fix or prescribe, is quite another matter. It is elementary in this country, and has been so for a century, that the constitutional guaranty against the taking of private property for public use without just compensation is an implied prohibition of the taking of such property for private use at all. It cannot be necessary to cite judicial authority for so undisputed and indisputable a proposition. The confusion of the judicial mind, manifested by the decrees in this case and in that cited, evidently arose out of the obscurity of the phraseology of section 9 of the statute. That section as originally written contemplated a situation in which one out of possession successfully asserted title against an occupant of the premises, and the difficulty arises from the language of the revision in 1883, in which the word "claimant" is used ambiguously. See sec. 9, ch. 51, Gen. St. 1873. The section as it now stands would, at the date

of the rendition of the judgment, have been properly applied to the case at bar by the following statement: If Flanagan shall elect to receive $800, the appraised value of his land, and shall tender Engles a general warranty deed therefor, and Engles shall neglect or refuse to pay the sum named and accept the deed, then Flanagan shall deposit with the clerk of the court the amount of the appraised value of the improvements and become entitled to a decree quieting his possession of the land. But, as Judge Caldwell points out in *Leighton v. Young, supra,* "beyond this the statute in terms does not go. It makes no provision as to what shall be done when the owner declines to pay the appraised value of the improvements, and the occupant (or unsuccessful claimant) declines to pay the appraised value of the land." In such a case there is a deadlock, from which the statute affords no escape and a necessity arises for the interposition of the equitable powers of the court, which is accomplished by treating the parties as tenants in common of indivisible real estate, and directing the property to be sold and the proceeds distributed in proportion to the several interests or shares. But this very procedure, by principle and by analogy to the practice in partition, from which it is borrowed, negatives the idea that the owner of the fee can be compelled to surrender his title or interest upon being paid or tendered its appraised value.

It is therefore recommended that the decree of the district court be so modified as to omit all provisions requiring appellants to convey the lots in controversy to the appellees under any circumstances, and as so modified it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is so modified as to omit all provisions requiring appellants to convey the

lots in controversy to the appellees under any circumstances, and as so modified is affirmed.

AFFIRMED AS MODIFIED.

GEORGE HANSON ET AL., APPELLEES, V. AETNA LIFE INSURANCE COMPANY, APPELLANT.*

FILED FEBRUARY 21, 1907. No. 14,673.

Principal and Agent. A principal is bound by only such conduct and representations of his agent as occur in the course of his business by the latter, and are within the agent's real or ostensible authority.

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

A. W. Lane and *R. D. Stearns,* for appellant.

Harvey & Harvey, contra.

AMES, C.

On the 8th day of March, 1904, the defendant issued a policy of insurance, dated May 20, 1904, for the sum of $1,000 upon the life of one Albert Hanson for the benefit of the plaintiffs in this action, who are his parents. At the date of the issuance of the policy, the company, in consideration of a cash payment of $1.94, executed to the insured a written stipulation to the effect that such payment should put the policy in force and continue it so, until its date, to wit, May 20, 1904, and, if on such date, and at the end of every three months thereafter, the insured should make cash payments of premiums of $21 each, the policy should continue in force, but that in case of default of any such payment it should lapse and deter-

* Rehearing allowed. See opinion, p. 421, *post.*

mine. At the time of the delivery of the policy Hanson gave his note, payable April 15, 1904, for the amount of the first premium maturing May 20. On November 21, 1904, the insured died, delinquent of the premium due on the 20th of that month, about which fact there is no dispute, but in ignorance of it the defendant, through its local agent at Lincoln, Nebraska, sent through the mails to the late address of the insured a written notice designed to call his attention to the delinquency, and saying, in substance, that, if he should make the payment due November 20 on or before December 20, then instant, the policy would be continued in force, according to a custom of the company, otherwise not. This notice came into the hands of the plaintiffs, and on the 5th day of the month one of them called at the office of the agent and paid the premium, and obtained a receipt therefor. At the same time the premium note above mentioned was delivered to them upon the presumption and belief that it had been paid. Afterwards the company ascertained that, according to the records and recollection of the company and its agents having to do with such matters, neither the note nor the first or second premiums accruing under said policy had been paid, and there is no direct evidence that either of them had been. So soon as the local agent discovered his mistake, he tendered repayment of the money and demanded a return of his receipt. This is an action upon the policy, and the defense is that it lapsed and determined on the 20th day of May for default of payment of the first premium stipulated therein, and has never been revived or renewed or the default waived.

The evidence in behalf of the defendant in support of its defense is complete and conclusive and without contradiction, except the payment above mentioned, and except that one of the plaintiff's witnesses, a brother of the deceased, testified on cross-examination that he had heard the deceased tell his father that the premiums had been paid; and one Noots, a witness for the plaintiffs, was permitted to testify, over the objection of the defendant,

that on or about August 15 or 20 he had loaned to the deceased $9.50; but an attempt to prove by this witness that deceased had told him that he borrowed this money to pay insurance premiums was defeated by the court, and a statement by the witness to that effect was stricken out.

It does not appear that either party requested instructions, but the court submitted the case to the jury under a series of instructions of its own, among which was the following, to which the defendant excepted: "As to whether the premiums were paid, the jury are instructed that the receipt issued by the defendant's agent for the payment of the third premium, due under the terms of the policy November 20, 1904, would be *prima facie* evidence that all of the prior payments had been made to the defendant. On the other hand, said receipt only raises a presumption that the recitals contained therein are true and that the payment receipted for was actually made, and it is for you to say from all the evidence, including the circumstances surrounding said payment and the conversation which you find from the evidence took place at that time, also the circumstances of the giving of the note payable to the solicitor of the insurance for the first premium, and all other facts and circumstances shown in evidence bearing on that point, whether such prior premiums were paid." We think this instruction was erroneous. At the time this third premium was paid the plaintiffs knew that their son was dead, and knew that at least that premium was delinquent and that the policy contract was for that reason, if no other, at an end, and they knew also, or must have been presumed to have known, that the local agent had no authority to bind his principal by a contract with the dead, or to modify or affect the rights of the parties that had become fixed by the termination of the contract as well by the death of the insured as by his default. In other words, they knew that with respect to that policy the agent had ceased to be competent to bind his principal either by the

acceptance of money or by recitals in his receipt. The evidence is clear and undisputed that the agent received the money under a mistake of facts of which the plaintiffs were not ignorant, and nothing that he said or did while laboring under the mistake, and in excess of the scope of his powers, can be treated as an admission by his principal or as raising any presumption against the latter. The rule of law is elementary that a principal is bound by only such conduct and representations of his agent as occur in the course of his business by the latter, and are within his real or ostensible authority, or which the opposite party believes, and has reason to believe, to be so. Any other doctrine would render the employment of agents so dangerous an expedient as to be practically impossible. If the money had been paid by the insured and received and retained by the agent in the lifetime of the former, an entirely different issue would have been raised, but one upon which it is not now incumbent upon the court to decide.

The verdict and judgment were for the plaintiffs. We recommend that they be reversed and a new trial granted.

OLDHAM and EPPERSON, 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.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Insurance: ACTION: EVIDENCE.** In an action on a life insurance policy, a witness on behalf of the plaintiff testified on cross-examination to having heard the insured state, shortly before his death, that the premiums on the policy had all been paid. This testimony was permitted, without objection, to remain in the record. *Held*, To be some evidence of payment.

2. **New Trial: NEWLY DISCOVERED EVIDENCE.** In an action on a life

insurance policy issued by what is commonly called an old line life insurance company, it is not error to overrule a motion for a new trial on the ground of newly discovered evidence, where the claim of newly discovered evidence is grounded on statements alleged to have been made by the insured that he had not paid the premiums on the policy upon which the action was founded.

3. ———: EVIDENCE. The possession by the defendant of an uncanceled receipt for a premium maturing before the death of the insured is not of itself sufficiently controlling to justify the trial court in setting aside the verdict of a jury upon motion for a new trial.

JACKSON, C.

The plaintiffs had judgment for the amount of an insurance policy covering the life of their son. The application for the insurance was made February 18, 1904, and, following the practice of the defendant company where short term insurance was desired, pending the issuance and date of the policy, the applicant paid the premium demanded for that purpose, and agreed to pay the sum of $21 on the date of the policy, and a like sum each three months thereafter. The policy was dated May 20, 1904, and provided: "This policy shall not take effect until the first premium hereon shall have been actually paid during the lifetime and good health of the insured and within 60 days from March 8, 1904, a receipt for which payment shall be the delivery of this policy. If any subsequent premium be not paid when due, then this policy shall cease and determine subject to the nonforfeiting features hereinafter described, except that a grace of 30 days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken; but for any reckoning hereinafter named the time when a premium becomes due shall be the day stipulated therefor on the first page hereof. No premium shall be considered paid unless a receipt shall be given therefor signed by an executive officer of said com-

pany, and, if any obligation given in payment or part payment of any premium is not paid when due, this policy shall then cease and be treated as if no such obligation had been given. Conditions applicable during the first year only." The company denied liability and refused payment, hence this action.

The defense is grounded upon the allegation that "the first quarterly premium provided by said policy to be paid on or before its date, to wit, on or before the 20th day of May, 1904, was not paid, whereby said policy lapsed and became void, and the insurance thereunder ceased and determined; that said policy has never been revived or put in force by the payment of said premium, or by the payment of any subsequent premium, or otherwise, nor has the said defendant at any time waived the payment of any premium thereon, or any condition of said policy, but ever since said 20th day of May, 1904, said policy has been and remained wholly void." The reply is a general denial. The judgment of the district court was reversed by this court. *Ante,* p. 418. A rehearing was allowed. Upon reargument and further consideration of the case we are convinced that there is involved no question of waiver.

The case was tried and submitted on the part of the plaintiffs on the theory that all the premiums which had matured prior to the death of the insured had in fact been paid; and the defense, as already stated, was nonpayment of a premium and a consequent forfeiture of the policy. The principal contention of the defendant is that the evidence does not support the judgment. Zimri Dwiggins was the manager of the company in this state, and his son, Frank Dwiggins, the company's cashier at the manager's office. This office was authorized to collect premiums and issue receipts for the same. There a set of books was kept showing the condition of all policies in the state. It was the practice of the company to make out receipts at its home office for premiums about to mature on policies in force and forward the same to the

state offices for collection. The insured died November 24, 1904, and it will be observed that three premiums matured on the policy before the date of his death, one each on the 20th day of May, August, and November, 1904, on each of which the insured had 30 days grace, according to the provisions of the policy. At the time of the application the insured gave his note to the agent of the defendant, who solicited the insurance, for the first quarterly premium. The deceased appears to have been notified of the maturity of the premium due November 20, and, no response having been received from him, the state office, not being advised of his death, wrote him the following letter: "Omaha, Neb., Dec. 1, 1904. Mr. Albert R. Hanson, Malcolm, Neb. Dear Sir: We desire to call your attention to the fact that the time during which the company will permit us to accept the premium under your policy No. 343,489 will soon expire. If we receive the net amount of $21, with interest at the rate of 6 per cent. from date when due, on or before Dec. 20, 1904, but not thereafter, the insurance will be continued. Or, if you desire accomodation, we may be able to take your note for a short time, provided we receive a reply from you by return mail stating your wishes. Unless a settlement is made on or before the date mentioned above, the policy will lapse, according to its terms, and cannot be revived without your being successfully reexamined by our examiner, at your own expense, and furnishing a revival application. Your interests demand immediate attention, and we hope to hear from you by next mail. Yours truly, Z. Dwiggins, Manager." On December 5, 1904, the plaintiff, Katherine Hanson, accompanied by a son, Oscar Hanson, went to the state manager's office and paid the premium mentioned in the letter, and received the following receipt: "Aetna Life Insurance Company. M. G. Bulkley, President. J. L. English, Secretary. H. W. St. John, Actuary. C. E. Gilbert, Ass't Secretary. Hartford, Conn., Nov. 20, 1904. Received the quarter annual premium on policy No. 343,489

on the life of Albert R. Hanson continuing said policy in force for three months from date, ending at 5 o'clock P. M. on the 20th day of Feb., 1905. Premium $21. Not binding without date of payment and signature of agent here. Paid this 5th day of Dec., 1904, at Lincoln, Neb. Z. Dwiggins, Agent, Lincoln. J. L. English, Secretary. See notice to policy holder on the back of this receipt. N. C. R. P. R. 3." On the back—"Notice to the Policyholder: Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of 30 days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken. Any receipt given for a premium must bear the lithographed signature of the president or secretary of the company, and the only evidence to the assured of the authority of an agent to receive a premium is the possession of such a receipt, which must also be countersigned by the agent when the premium is paid. All policies and agreements made by this company are signed by its president, vice-president, secretary, or assistant secretary. No agent, general agent, or other person, except the officers above named, can grant or extend insurance, or alter or waive any of the conditions of its policies, or make any agreement binding upon the company." At the time this premium was paid, and as a part of the same transaction, Mr. Dwiggins, the company's manager, surrendered to Mrs. Hanson the canceled note which had been given for the payment of the first premium.

There is some conflict in the evidence as to what occurred at that time, however the verdict of the jury and judgment of the court necessarily involve a finding of the facts as they are claimed by the plaintiffs. This finding must be adopted in the appellate court, and briefly stated the facts are: When Katherine Hanson and her son entered the manager's office, the cashier was at the desk. They informed him that they desired to pay the premium

due on Albert R. Hanson's policy. The manager was called from another place in the office, the amount of the premium was received, the receipt countersigned, the canceled note was taken from among papers in the office, and the note and receipt both delivered to Mrs. Hanson and her son. Mrs. Hanson thereupon informed the manager of the death of the insured, and inquired if the policy was all right. An examination of the books was made, and she was informed that it was, and she was provided with blanks for the purpose of making proof of loss. They started to depart from the building when they met an acquaintance, one Coleman, who had formerly been an employee of the defendant. He knew of Albert R. Hanson's death, and after some conversation with him they again returned to the office, where he made inquiry as to the condition of the policy, and was informed that the policy was in force. Proof of loss was made, and later the management of the state office requested the surrender of receipts for the first two premiums, which were not found. The first intimation of a disclaimer of liability on the part of the defendant came from the principal office after receipt of proof of loss.

Oscar Hanson was a witness on behalf of the plaintiffs, and on his cross-examination by counsel for defendant he was asked if he did not know that the premiums on Albert's policy had not been paid. He answered that he did not; that he heard Albert tell his father shortly before he died that the premiums were all paid. This answer was permitted to remain in the record without objection, and is, of course, some evidence of payment. On behalf of the defendant the evidence tends to prove that the receipt for the November premium was sent out from the general office by mistake, and that the books at the state office do not show payment of premiums other than the November premium, and that this payment was received and the receipt issued under a misapprehension of the facts. The books, however, were not produced in evidence, and the testimony of the manager and cashier as

to what the books disclosed is of no greater weight than their statements made after an examination of the books at the time the November premium was paid. We conclude that there was sufficient evidence to justify the submission of the case to the jury, and that the verdict and judgment should not be disturbed because of a lack of evidence.

The court instructed the jury as follows: "As to whether the premiums were paid, the jury are instructed that the receipt issued by the defendant's agent for the payment of the third premium, due under the terms of the policy November 20, 1904, would be *prima facie* evidence that all of the prior payments had been made to the defendant." It is conceded by counsel for defendant that the production of the receipt raised a presumption of payment of the prior premiums upon which a verdict might have been based in the absence of evidence explaining or contradicting the presumption, but it is said that the evidence of no prior payments is so conclusive that the presumption had no weight. In view of the conclusion already reached the objection to the instruction is not well taken.

A witness, Nootz, on behalf of the plaintiffs testified to having loaned the deceased at one time $9.50 to pay insurance. Some question is raised about the competency of this evidence. The witness, however, made no claim of knowledge as to the payment of premiums on the policy in suit, and does not testify to any claim made by the deceased of the payment of premiums. The authorities go to the extent of holding that statements of an insured person as to the payment or nonpayment of premiums on a policy of insurance covering his life, where, as in this case, the insured has no control over the policy after issuance and where the beneficiary acquires a vested interest in the policy, are incompetent and should not be received over objections, but the fact of the insured having procured money for the purpose of paying premiums is an independent fact, perhaps of little value in the absence of direct proof of payment, and we do

not regard the admission of the evidence as being at all prejudicial or erroneous.

In support of the motion for a new trial certain affidavits were filed of newly discovered evidence. They relate to statements made by the deceased that his premiums on the policy in suit had not been paid. Testimony of these statements, however, could not be received over objection, and the court did not err in overruling the motion for a new trial for that reason. One affidavit disclosed that since the trial a receipt for the August premium had been discovered among papers in possession of the defendant, and that the receipt did not show the premium paid. If this receipt had been produced at the trial it might or might not have had some weight with the jury, but we do not regard the possession of this receipt as being controlling to the extent that the judgment ought to be set aside; besides, there is no sufficient reason urged why the receipt was not produced at the trial.

There is no prejudicial error in the record, and it is recommended that our former judgment be vacated and the judgment of the district court affirmed.

CALKINS, C, concurs.

AMES, C. In view of admissions made by counsel on reargument, I concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.