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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1907.

VOLUME LXXIX.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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HENRY P. STODDART,
DEPUTY REPORTER.

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In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

SAMUEL H. SEDGWICK, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.

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AMBROSE C. EPPERSON.
EDWARD E. GOOD.

DEPARTMENT No. 2.

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WILLIAM B. ROSE ..... Deputy Attorney General
HARRY C. LINDSAY ..... Reporter and Clerk
HENRY P. STODDART ..... Deputy Reporter
VICTOR SEYMOUR ..... Deputy Clerk

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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.....	Harvey 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.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
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.
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		William H. Westover	Rushville.

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In Memoriam.

JAMES M. WOOLWORTH.

At the session of the supreme court of the state of Nebraska, February 5, 1907, there being present Honorable SAMUEL H. SEDGWICK, chief justice, Honorable JOHN B. BARNES and Honorable CHARLES B. LETTON, associate justices, the following proceedings were had:

MAY IT PLEASE YOUR HONORS:

The committee appointed to present resolutions in memory of the Honorable JAMES M. WOOLWORTH, who, after an illustrious career at the bar covering a period of fifty years, died at his home in Omaha, Nebraska, on the 16th day of June, 1906, respectfully submit the following:

Resolved, That in the death of JAMES M. WOOLWORTH the state has lost one of its most distinguished citizens, and the profession one of its most eminent members. MR. WOOLWORTH was born and bred a gentleman, and reared in an atmosphere of learning and culture. He was accomplished—a scholar, as well as a lawyer. He was deeply versed in the principles and science of his profession, and familiar with the established rules and precedents which govern the conduct of causes. He was industrious, persistent and faithful. He constructed his cases in his office, conscientiously and laboriously adjusting every detail to the minutest point. Neither inspired nor handicapped by his emotions or impulses, he was deliberate, clear and precise in all his mental processes and in what he said and did. He was as impersonal as the principles he advocated. He was also an accomplished strategist, the master of all the devices and mysteries of legal procedure, a dangerous adversary, even when his cause was weak. He was calm and considerate at the trial, and his courtesy and kindness to courts and adversaries lent dignity and grace to his persuasive arguments, and won for him the admiration and regard of litigants, lawyers, jurors and judges. He was symmetrical in per-

son, character and in the development of his carcer. He neither reached the mountain heights nor descended into the valleys. His way was along the calm levels. He was intensely conservative in feeling, thought and action. A belief in the established order was in him a habit of the blood. Institutions were a matter of historical development to be studied with the eye and enthusiasm of an architect. He was apt in tracing the evolution of society, particularly the state and church, by analysis, comparison and contrast. The passions which sweep the soul of man in his efforts to realize his wants and aspirations appealed to him less than did the forms in which they are embodied. He believed that, whatever the individual may conceive the moral right to be, the welfare of society can best be conserved by reforms accomplished with respect to the established institutions and principles embodied in them; that, although imperfect, governments are still the truest expression of the higher law, to be changed, if at all, by peaceful and progressive methods, rather than by violence or revolutionary proceedings. These talents, dispositions and tastes determined, not only his career, but likewise inspired and sustained him in the unremitting toil by which he became a great lawyer, achieving national distinction and a place among the foremost representatives of the American bar.

For many years MR. WOOLWORTH exercised an elevating and refining influence, not only upon the profession of the country, but upon the communities of the state. In his companionship there was something fine. He was a conversationalist, not a monologist; not only an interesting talker, but an exceedingly interesting listener. He was genial and inspiring. He was a constant and persistent force to raise and purify the standards and tone of living.

It is, therefore, especially fitting that this tribute should be placed upon the records of this court, and a copy of it, duly certified, transmitted to the surviving members of his family, to whom we tender our sincere sympathy.

Respectfully submitted,

CHAS. J. GREENE.
WILLIAM D. MCHUGH.
A. J. SAWYER.
SAMUEL RINAKER.
WILLIAM H. THOMPSON.

LIONEL C. BURR:

May It Please the Court: In speaking of the resolutions offered, I can add but very little to the sentiments therein expressed, or to the memory of our distinguished friend and associate; but, if I am permitted, I will call your attention to the fact that MR. WOOLWORTH took

great interest in young lawyers, and was anxious that they should succeed in the profession he loved so well. It was probably due to his deep regard for the younger members of the bar that he took some interest in myself and my practice, and it was in the interest of the young lawyers and of our profession that MR. WOOLWORTH delivered the first and opening lecture to the law school of our university here at Lincoln. There are many young men in the west who will bear witness that he was deeply interested in their progress, and helped them to success.

It is now over thirty-two years since I first met MR. WOOLWORTH, when a very young practitioner, and I came to know him in a limited way socially, and in a somewhat broader field in a professional way. Personally I owe to him a great deal of whatever merit I may possess in the practice of the profession of the law, and I know there are many members of our profession respecting themselves that will join me in this assertion. His unusual and great ability and untiring labor to his work were recognized in all the courts of America. His practice in the supreme court of the United States, in the several circuit courts of the United States, and in many of the states of the Union was very large, and covered a multitude of transactions, and his fidelity to his clients, together with his unremitting labors in their behalf, have not been equaled or questioned. It was his custom, as well as his pleasure, to go back into the principles of common law, and his researches into the early and ancient principles of law became well known, and those who have, or may hereafter investigate his briefs in his cases, will notice that he began at the foundation of law, with the authorities from the mother country, and built up from those premises to the constitution of our nation, as well as our state.

MR. WOOLWORTH did not believe in some of the latter day interpretations placed upon our national or state constitutions, and he did not accept the majority opinion, or the reasoning contained therein in the several cases that I may call the "De Lima and Downes v. Bidwell cases," but rather accepted and believed in the interpretations and reasoning found in the dissenting opinions of Chief Justice Fuller and Justice Brewer. He believed in the true meaning and interpretation of our national constitution, as defined by Chief Justice Marshall, who declared "the constitution was formed for ages to come, and that the sagacious men who framed it were well aware that a mighty future awaited their work." MR. WOOLWORTH loved especially the equity practice and the principles of equity jurisprudence. Toward the close

of his long and prosperous career he chose many such cases, which he handled with marvelous skill and wonderful ability, and all attorneys and counselors at the bar of this court may well emulate his professional conduct.

In closing my remarks, I wish to bear testimony that I loved him as a man, I loved him as a lawyer, and I loved him as my friend.

WILLIAM H. THOMPSON:

Honorable JAMES M. WOOLWORTH, as attorney for appellant, presented the first case reported to this honorable court; compiled the first two volumes of its decisions—the first in 1871, the second in 1873. He was one of the state's most active and successful practitioners. His mannerism disarmed his adversary, won the confidence of the court, and, without a seeming effort on his part, drew the jury closer and closer to a realization of his wishes. His scholarly attainments and invariable gentlemanly bearing made him a most welcome companion of one and all, high and low, learned and unlearned, rich and poor, alike. It was said by Lord Coke that "law is like unto a deep well, and each man draweth therefrom in accordance with the strength of his understanding." If this be an axiom, then truly was WOOLWORTH a great lawyer. His wide reputation and the high esteem in which he was held by all the courts of this broad land, and by the attorneys who associated with him and knew him closely, he merited. He was a philosopher as well. He realized with the poet "that it is not all of life to live or all of death to die." He lived this philosophy, believing that each word and each act, whether he willed it or not, was moulding and shaping the lives of others, passing down through the generations, either for good or for evil. Pleased we are to say, a potent factor for good was the life of this, one of the greatest of the members of the Nebraska bar. His pleasing, scholarly, gentlemanly demeanor, his courteous treatment of the young practitioner, his reverence for the aged, his unbounded confidence in the courts, and all his associates' unwavering confidence in him shall ever illumine the pathway of the lawyer, leading him to a higher and higher standard of professional life. Our friend is dead, yet he liveth. We bid him farewell, yet he lingers in affectionate remembrance. He has passed to that higher court, yet he pleads with us here.

SAMUEL RINAKER:

May It Please the Court: My acquaintance with MR. WOOLWORTH was less intimate and more limited than that of the other members

of the committee, and it would, therefore, seem somewhat presumptious upon my part to attempt to add anything to what is contained in the resolutions, and to what has been so well said by the eloquent speakers who preceded me.

MR. WOOLWORTH was a great lawyer, and therefore, necessarily, a great man. For many years he stood at the head of the bar in this state, and by the legal profession, both within and without this state, was recognized and admired as one of the ablest and most distinguished jurists of his time. The allurements of politics and the glamor of public office seemed to have little attraction for him, and failed to divert him from his devotion to the unobtrusive labors of the profession of the law. He therefore did not gain the popular fame and applause which attend the more showy services of the politician and the man of public affairs. His fame and influence were confined principally to the courts and the members of the bar, before and among whom, by his splendid natural talents, his extensive and varied scholarship, and his untiring industry, he won the highest success and honor. He gave valuable assistance to this high court and other courts, not only in the just adjudication of the particular cases, which he illuminated with his learning, logic and eloquence, but also in the establishment of the administration of justice upon sound and enduring principles. By his long and illustrious professional services, and his upright, studious and industrious life, he exerted a lasting and wholesome influence upon our jurisprudence, benefited his fellowmen, and gave to the members of the legal profession an example which will ever be a source of pride and inspiration.

BY THE COURT—HONORABLE SAMUEL H. SEDGWICK, C. J.:

The assistance which lawyers of ability and character render to the courts in their difficult and laborious duties is known and appreciated by all men who are interested in the administration of justice.

Members of the bar who are thorough and careful in the preparation of their cases, who, while neglecting nothing which can legitimately further the interest of their clients, still remember that the court is human, and that they are its trusted officers, and patiently and with candor endeavor to assist the court to reach a correct conclusion, are not always aware of the high regard in which they are held. Such a man was MR. WOOLWORTH. I never knew of an attempt by him to deceive a court, either in the essential facts of his case, or in the principles of law applicable to its solution. To lose his help is

a misfortune to every court in which he was accustomed to appear. We earnestly join with the members of the bar of this state in expressing a realization of this great loss.

The resolutions presented, and these proceedings, will be entered upon the records of the court.

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UNITED STATES.

STATUTES AT LARGE.

1878, June 14, vol. 20, p. 114, ch. 190 777

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1907.

CHARLES F. OLDFATHER, APPELLEE, V. ERIC E. ERICSON, APPELLANT.

FILED MAY 10, 1907. No. 14,763.

1. **Ejectment:** EVIDENCE. On the trial of an action in ejectment, the usual duplicate receipt of a receiver of a United States land office, in full force and unimpeached, is sufficient evidence of title, except as against one having a patent to the same land or some person or persons claiming under him.

2. **Instructions.** A cautionary instruction set out in the opinion *held* not to have been, under the circumstances, prejudicial.

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

J. G. Becler, for appellant.

Wilcox & Halligan, contra.

AMES, C.

This is an action in ejectment to recover a strip of land lying on one of the borders of the tract comprising what was formerly the Fort McPherson Military Reservation, in this state. There were a verdict and judgment for the plaintiff, from which the defendant appealed. The post was established upon unsurveyed public lands of the

United States, and the boundaries of the reservation ascertained by an independent survey made under the authority of the government, and having, of course, no relation or reference to township or section lines or other governmental subdivisions as the latter should thereafter be established. Shortly after the survey and establishment of the reservation a government survey of the adjoining public lands was also made, and the defendant made entry upon, and in due course obtained title to, a governmental quarter section adjoining the military tract. The question of fact in this action is whether the western boundary line of the reservation bisects this quarter section so as to cut off in the neighborhood of 30 acres from the eastern side thereof. In 1897 a resurvey of the reservation was made by governmental authority preparatory to opening the tract to private entry, which is alleged to be in conformity with the first or original survey thereof made in 1869, and by which the disputed strip is described as being within the reservation, and is subdivided into certain numbered tracts or lots upon which the plaintiff made entry, for which he obtained a duplicate receiver's receipt at the government land office in 1902. This receipt is the only muniment of title or of right of possession which he had or offered in evidence at the trial. The first and gravest question presented is whether this receipt, the validity of which, if the land was subject to entry, is not impeached, is a sufficient foundation for the maintenance of the action of ejectment.

Section 626 of the code enacts that, "in an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof." Such an action has always been treated in this state as a suit to try title, and it has repeatedly been held that a legal title is indispensable, an equitable right or interest being insufficient to maintain the action. *Morton v. Green*, 2 Neb. 441; *Malloy v. Malloy*, 35 Neb. 224; *Dale v. Hunne-*

man, 12 Neb. 221; *O'Brien v. Gaslin,* 20 Neb. 347; *Uppfalt v. Nelson,* 18 Neb. 533. But section 411 of the code is as follows: "The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent." Although the defendant has a patent, he is not, in this action, within the exception of the statute, because it is disputed that his patent conveys, or purports to convey, the strip in controversy, and whether it does so or not is of the very gist of the litigation. Of the two statutes quoted, one treats of the subject of pleading and the other of proof, and, considered merely by themselves and without reference to judicial interpretation, there is no obvious conflict between them and no difficulty in making them to harmonize, and we think the decisions may be made to do likewise. It is true that the action is one to try title, but the receiver's receipt is made by the statute a sufficient muniment of title for the purposes of the action, and a judgment therein is conclusive upon the parties and their privies as in other cases, but, if the entry should afterwards be forfeited and the holder of it should be evicted by a subsequent entry made under the federal land laws, the latter entryman would be in by title paramount, and there would, of course, be no privity between him and his predecessor in possession, nor between such predecessor and the United States. By forfeiture and cancelation, his title and right of possession, valid while in existence, would be wholly extinguished. The precise question does not appear to have been distinctly decided by this court, but the foregoing conclusion seems to be implied in the language of the opinions in *Morton v. Green, supra,* and *Headley v. Coffman,* 38 Neb. 68. A like practice under similar statutes prevails in other states. *Gunderson v. Cook,* 33 Wis. 551; *Davis v. Freeland's Lessee,* 32 Miss.

645; *Case v. Edgeworth*, 87 Ala. 203; *Thompson v. Basler*, 148 Cal. 646, 84 Pac. 161; *Goodwin v. McCabe*, 75 Cal. 584; *Trulock v. Taylor*, 26 Ark. 54; *Hill v. Plunkett*, 41, Ark. 465. The convenience, if not necessity, of such a rule, at least in the state courts, is too obvious to require comment.

There were three surveys made by authority of the United States government. Two of them, being of the lands within the reservation, seem to be in harmony with each other, but it is claimed that they are in conflict with the third (second in order of time), which is of the outlying territory, and under which the defendant claims, and a plat made by the surveyor general, pursuant to this last mentioned survey, indicates that the land in dispute lies outside the reservation. But the last survey, in order of time, made by the government, which was for the purpose of subdividing the tract preparatory to opening it for private entry, and the plat made pursuant thereto, indicate that the disputed land lies within the reservation. And so the defendant contends that the final survey is more likely to be erroneous as to the location of the disputed line and corner than is the survey and plat of the outlying territory which were made within a month after the survey of the reservation itself, and for the purpose of upholding his contention he introduced oral testimony of measurements made from field notes of the several surveys tending to show that the plat and survey last mentioned are in harmony with each other, and also with the first survey which was of the reservation itself. Obviously all this raises a sharp conflict of evidence upon a disputed question of fact which the jury alone was competent to decide.

But the court excluded from evidence a plat offered by the defendant which indicated the location of the lines and corners and the measurements and situation of the disputed strip according to his contention, and such ruling is assigned for error. This plat was made by one of the wit-

nesses examined at the trial, who testified that he made it under the direction of a former attorney of the defendant in the case, and that he had not himself made any survey or measurements, but was governed by the field notes which had been used by the county surveyor in the making of a survey of the locality, viz., the notes of the government survey of the territory outside the reservation. This plat was, therefore, whether accurate or not, no more than an inference by the witness from the testimony offered and introduced before the jury, and, at most, amounted, in effect, to his opinion of what their inference and verdict therefrom should be, and, while it perhaps might have been properly made use of by counsel in illustration of or as part of his argument, it was not, in our opinion, admissible in evidence for the purpose for which it was offered, and was properly excluded.

The court at the request of the plaintiff gave the following cautionary instruction, to which the defendant excepted: "You are instructed that in this action different witnesses, not surveyors or civil engineers, have testified as to the existence of government corners on the exterior line of the Ft. McPherson Military Reservation, and you are instructed that it requires no professional skill or mathematical knowledge to qualify witnesses to testify as to the existence of governmental corners; and in this case you should give the testimony of such witnesses such weight as under all circumstances of the case you think them entitled to." The specific objection to this instruction is that it gives undue prominence to the description of testimony mentioned by it. Upon our minds it makes quite the contrary impression that it admonishes the jury not to accord such testimony undue weight as being that of experts or of persons especially qualified to testify, but that it was entitled to such consideration as is due to the testimony of competent witnesses in ordinary cases and upon ordinary issues. It is not disputed that the instruction is a true statement of the law, and it does not appear to us to have been prejudicial.

The case appears to us to have been fairly tried and submitted to the jury with proper instructions, and we see no reason for disturbing their verdict or the judgment, which we recommend 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.

AGNES FORBES, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MAY 10, 1907. No. 14,808.

1. **Cities: PERSONAL INJURIES: EVIDENCE.** In an action for personal injuries as a result of negligence, the fact that the jury has, at the request of one of the parties, inspected the scene of the injury does not necessarily preclude such party from complaining that the verdict is not supported by the evidence, but in this case the evidence does afford such support.
2. **Abatement: INJURY TO WIFE.** A cause of action by a husband for a loss of services and expenditures for medical attendance, etc., occasioned by a negligent and wrongful injury to his wife, is one which survives and is assignable.
3. **Cities: NOTICE.** A statutory notice is sufficient if it contains that which the statute prescribes.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

George W. Cooper and *J. J. O'Connor, contra.*

AMES, C.

This is an appeal by the defendant from a judgment recovered in an action for damages for personal injuries,

occasioned by a fall on a walk crossing one of the considerably traveled streets of the city, which is alleged to have been negligently permitted to remain in a defective and dangerous condition.

The accident occurred on the 5th day of June. It is not alleged that the walk was dangerous or defective at the date of its construction in the month of March preceding, but the season in the interval was characterized by frequent heavy rains, which washed dirt over the walk near one end, where the accident happened, rendering it muddy and slippery, and gullied the earth out underneath it at that place, so that the structure sagged to a gradient of about one inch to the foot toward one side. The injury was suffered by slipping from the walk in the night time and falling upon an iron cover of a manhole situated close by. There is little, if any, conflict in the evidence as to any important fact. From at least the 10th day of May onward there were frequent heavy rains, which washed out a hole at the place of the accident from 16 to 18 inches deep, and the hole had been as frequently filled by the city with loose dirt, which had been banked up around the edges of the walk, but the walk itself was not raised to grade where it sagged. The walk was three feet wide, and the north side thereof became and was permitted to remain some three or four inches lower than the south side at the point where it was muddy and slippery near the manhole. One such washout had occurred and had been partly repaired, in the manner described, on the 2d of June, three days prior to the accident. We are not clear how much rain fell in the interval, but on the morning after the accident the walk was found to be slippery with mud and inclining to one side, and there was a hole some 18 inches deep underneath it and around the manhole.

At the request of the defendant the jury were permitted to visit the premises, and how much they were enlightened by viewing the scene months after the event, when the

rainy season was ended and further repairs had been made, we, of course, do not know, but we are not ready to hold, as we are urged to do by counsel for plaintiff, that such an inspection precludes in all cases the party at whose request it is made from complaining that the verdict is unsupported by the evidence. Notwithstanding such an inspection, after the surroundings are much changed, uncontradicted evidence of unquestioned certainty and evident conclusiveness might still demonstrate that the jury were misled and that their verdict lacked sufficient support. But we do not think that claim in this instance is well founded. A great number of decisions in somewhat similar cases, both by this and by other courts, are cited by counsel for both parties, but such decisions are, of course, upon the peculiar circumstances of particular cases, varying from each other much in detail and as to minor and contributing incidents, so that they can hardly be said to be authoritative upon the facts in this or any other like case. The mere inclination of the sidewalk is not alone conclusive, but must be considered in connection with the condition of its surface, and the hole underneath, and the proximity of the manhole, and the fact, known to the city, of frequently recurring floods and washouts, and the suitableness and sufficiency of the means and methods adopted by the defendant to repair the walk and surroundings, and put and keep them in a reasonably safe condition. Of all these matters, and the like, the jury were peculiarly qualified to judge, and we think that the defendant has no just ground of complaint that the question of negligence was left to their determination.

The petition alleged two causes of action, one for the injury to plaintiff's health and person, and the other as an assignee of a demand for the pecuniary loss and damage suffered by her husband by reason of being deprived of her services, and of moneys expended for medical attendance and treatment, etc. Counsel for defendant contends that this last cause of action, as alleged, is not assign-

able, and that the court erred in submitting it to the jury over his objection. Section 454 of the code enacts that, "in addition to the causes of action which survive at common law, causes of action for *mesne* profits, or for injury to real or personal estate, or for any deceit or fraud, shall also survive," and we understand counsel to concede, what seems to be settled law, that causes of action which survive are assignable. Now it is quite clear that the husband's cause of action was for injury to his personal estate arising out of his obligation to support and care for his wife in sickness and in health, and was so far disconnected from that of his wife that it would not have been affected by her death before suit begun, and that it would have survived to his personal representative in event of his own death. His cause of action is not directly in tort for trespass upon his own person, but as the older lawyers would have said, "in case" for consequential damages to his estate, and as the *bona fides* of the transfer is not questioned we think the objection is not well taken. This view is, we think, supported by the better and more recent authorities. *Baxter v. City of Cedar Rapids,* 103 Ia. 599; *Cregin v. Brooklyn C. R. Co.,* 75 N. Y. 192; *Cregin v. Brooklyn C. R. Co.,* 83 N. Y. 595; *Henderson v. Henshall,* 54 Fed. 320; Pomeroy, Remedies and Remedial Rights (2d ed.), sec. 147.

The statute provided that the city should not be liable in such actions, unless within 20 days after the happening of the accident written notice thereof, "with a statement of the nature and extent thereof, and of the time when and the place where the same occurred," should be given to the mayor or city clerk. A notice conformable to the statute was given within the time specified, but a subsequent clause of the statute requires the clerk to keep a record of the notice, "showing the time when and by whom such notice was given, and describing the defect complained of," and it is hence complained that the notice, to be effectual, must contain such description, but we think it

is sufficient to say that the statute does not expressly or by necessary implication require such description, and it is to be supposed that the legislature intended the clerk to look elsewhere for the information necessary to complete his record. The recent decision of this court in *Wright v. City of Omaha*, 78 Neb. 124, is authority, if any is needed, for holding that the notice is sufficient if it contains what the statute prescribes.

There are other assignments of error, but they are involved in and disposed of by the foregoing discussion and do not require specific decision.

We 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.

LOUIS E. TIFFANY ET AL., APPELLEES, V. FRANKLIN P. WRIGHT, APPELLANT.

FILED MAY 10, 1907. No. 14,683.

1. **Guardian and Ward.** Parents are guardians by nature and for nurture of all children born to them in lawful wedlock, under the laws of this state.
2. **Adoption.** Our statute of adoption (code, sec. 797) is based primarily on the consent of the parents, if living and accessible, and an adoption without such consent must come clearly within the exceptions contained in the statute.
3. ———. To warrant an adoption under the sixth subdivision of this section against the objection of a living parent of the child, it must be made clearly to appear that such parent had abandoned the child for a period of at least six months, and that the party consenting to such adoption has had the lawful custody during such period to the exclusion of all other control.

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

W. C. Brown, for appellant.

Lear & Wilhite and *H. M. Dural, contra.*

OLDHAM, C.

This cause was heard in the district court for Keya Paha county, Nebraska, on an appeal from a proceeding of adoption, instituted in the county court of said county, in which Louis E. Tiffany and Lilla Tiffany, husband and wife, were declared and adjudged to have legally adopted an infant child, named Minnie Wright. The appeal from the order was prosecuted by the father of the child, Franklin P. Wright, under the provisions of section 801*d* of the code, and on a hearing of the cause in the district court the appeal was dismissed and the judgment of the county court affirmed. To reverse this judgment the appellant in the court below has appealed to this court.

The facts underlying this controversy are that appellant, Franklin P. Wright, was a resident of Keya Paha county for several years prior to the year 1899, and lived with his wife and family of seven children on a farm in that county. In 1899 his wife died, leaving him with his seven children ranging in age from 4 to 14 years. After the death of his wife, the father kept the family together for some time, his oldest daughter, Ella, and his second daughter, Anna, taking care of the household for him. After living some time in this manner, Mr. Wright procured employment in Rock county, and took his family with him to that place and remained there until 1904, when he received employment at Sioux Falls, South Dakota, and went there to work. Before leaving Rock county, he arranged for homes for each of his children, including Minnie, the youngest of the family. He corresponded with the family regularly while in Sioux Falls, and was

informed as to their affairs by his daughter, Ella, who had particular charge of the youngest child, Minnie, and visited and looked after her welfare. After Mr. Wright had gone to Sioux Falls under these circumstances, Mrs. Lilla Tiffany, one of the appellees in this cause, asked Ella Wright if she might not take Minnie home with her, saying that she would clothe her, take good care of her, and send her to school, if she would consent to her going, as she (Mrs. Tiffany) had no children and wanted Minnie to stay with her for company. Mrs. Tiffany says there was nothing said as to how long the child was to stay with her, but Miss Ella Wright says that Mrs. Tiffany said she would keep her until the sister or father wanted her. After the child had lived with the Tiffanys under this arrangement for nearly a year, it appears that there was talk in the neighborhood that the child was being neglected, mistreated, and not properly cared for by the Tiffanys. When Ella Wright heard it, she communicated the rumor to her father, and went to see the Tiffanys, and told them what she had heard. They assured her there was nothing in the rumor, and indicated their willingness to give up the girl as soon as the rumors quieted down. Shortly afterwards, the second daughter, Anna Wright, took a letter from her father, and went with a neighbor woman to the Tiffanys and demanded possession of the child. It appears that Mrs. Tiffany objected to giving up the child without an order from Ella or her father, and after a conference Mr. Tiffany agreed that he would write to the father, and, if he could not get the father's consent to have the child remain, he would deliver the child to her sisters as directed. The evidence is clear that he equivocated as to the time at which he would give up the child, and, instead of doing so, he filed an application in the county court for the adoption of the child by himself and wife. Mrs. Tiffany appeared in the proceedings, and pretended to consent to the adoption as guardian and legal custodian of the child. Service of notice of the

adoption proceedings, which described the child as "the daughter of one —— Wright," was had by publication in the county newspaper, and, no one appearing to object on the day of hearing, a decree of adoption was awarded by the court on September 18, 1905. As soon as the father heard of the proceedings, he returned to Keya Paha county, and on the 3d day of October, 1905, and within 30 days of the entering of the decree, appealed from the order and judgment to the district court.

While the evidence is in sharp conflict as to the alleged mistreatment of the child by Mr. and Mrs. Tiffany during her residence with them, we think the more probable testimony tends to support the finding of the district court that the charges were not sustained, and that the Tiffanys were proper persons for the care and custody of the child. On the other hand, there is no testimony in the record reflecting in any manner on the character of the father of the child, or tending to show that he was other than a dutiful and affectionate father to all his children. While he was poor in this world's goods, he had always made every reasonable effort in his power to provide for his children according to his means. It is true that he sent no money to provide for the support of his infant daughter Minnie, while she was living with the Tiffanys, but this was accounted for by their agreement to clothe and care for her in return for her services in the Tiffany household. The evidence shows that, when the father was informed that Minnie was being mistreated, he provided a home for her with his sister, and sent money and tickets to the older girls, and directed them to bring her to him.

Both by the civil and the common law the father was the guardian by nature and for nurture of every child born to him in lawful wedlock. This natural guardianship is extended by section 5376, Ann. St. 1903, to both father and mother alike, with the provision that, if either parent dies or is disqualified, the guardianship devolves upon the other. *Norval v. Zinsmaster*, 57 Neb. 158;

Terry v. Johnson, 73 Neb. 653. This guardianship may only be tranfserred to another by consent of the parents, if living, in the manner provided by law, unless the right of such consent has been surrendered by voluntary abandonment of the offspring, or forfeited by a resort to a life of vice or debauchery, or such as renders the parent an unfit guardian for the morals and welfare of the child.

For the beneficent purpose of providing homes for homeless infants, all of the states of this Union have enacted statutes of adoption, which are of civil and not of common law origin. These statutes are all primarily based upon the consent of the child's parent, or parents, if living and accessible, and the exceptions, which permit adoption without such consent, must clearly come within the provisions of the statutes. *Fergeson v. Jones,* 17 Or. 204, 20 Pac. 842; Rice, American Probate Law and Practice, pp. 551, 552. Our statute of adoption, section 797 of the code, provides: First, for the adoption of a legitimate child by the consent of both parents, when living; second, for the adoption of such child by the consent of the surviving parent, when one of the parents is dead; third, by the consent of the parent having the legal custody of the child, when the other parent has, without good cause, contributed nothing for its support for the period of six months; fourth, for the adoption of an illegitimate child by the consent of its mother; fifth, for the adoption by the consent of the person or corporation having custody of the child by a written instrument, signed by the parent or parents, authorizing the adoption. The sixth clause, under which this proceeding is sought to be sustained, is as follows: "Any person, corporation or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding, for the support of which neither parent shall without just cause or fault have contributed anything whatever during said period, may consent to its adoption." The seventh clause provides for an adoption by consent of

a guardian appointed by the court and empowered by the court to consent, because of the cruelty, neglect, and unsuitableness of the child's parents. These last two clauses of the statute are the only ones that authorize an adoption without the consent of one or both the natural parents of the child. These two should be construed in *para materia* with the entire act. *Burger v. Frakes,* 67 Ia. 460. The sixth clause, above set out, when so construed, plainly intends to provide for the adoption of a child by consent of a guardian, when it has been abandoned and deserted by its natural parents, and the seventh clause contemplates an adoption by consent of a guardian appointed by the court, when the custody and control by the parents have been forfeited by a judgment of a court of competent jurisdiction for the vice or unfitness of the parents. We are satisfied, after a review of the evidence, that there was no abandonment of the child, Minnie Wright, such as was contemplated in the sixth clause of the statute, *supra,* nor is it contended that there was any evidence that would bring this case within the provisions of the seventh clause. We are further strongly impressed with the view that the pretended adoption proceedings were but a collusive and fraudulent attempt on the part of the Tiffanys to deprive the appellant of the natural guardianship of his child without just cause. The specious pretense of legal guardianship of the child, under which appellee, Mrs. Tiffany, assumed to consent to the adoption, gives the entire proceedings an appearance too closely resembling an attempted kidnaping under cloak of the law to find favor in this court.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to dismiss the petition for adoption.

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, with directions to the district court to dismiss the petition for adoption.

REVERSED.

ROBERT B. HOWELL, RECEIVER, APPELLANT, V. JOHN MALMGREN ET AL., APPELLEES.

FILED MAY 10, 1907. No. 14,703.

1. **Dismissal.** Under section 430 of the code, it is within the sound discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action.

2. **Corporations: INSOLVENCY: STOCKHOLDERS: JURISDICTION.** A court having jurisdiction of an insolvent corporation for the purpose of winding up its affairs has no authority to render a personal judgment against one of its stockholders who is not a party to the action by service of process or voluntary appearance. Neither has the court in such case authority to adjudicate the fact of membership in the corporation. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 61 Neb. 454, followed and approved.

APPEAL from the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

I. E. Congdon and *B. E. Hendricks*, for appellant.

Simpson & Good, contra.

OLDHAM, C.

This was an action instituted by the plaintiff in the court below, as receiver of the Merchants and Manufacturers Mutual Insurance Company of Omaha, Nebraska, against the defendants, who were policy holders of the company residing in Saunders county, Nebraska. The petition set out the proceedings of the district court for Douglas county, by which the insurance company was adjudged to have been insolvent and plaintiff was ap-

pointed as its receiver, and in which it was determined that certain assessments had been made by the company prior to the appointment of the receiver, and remained unpaid, and that other assessments were necessary to pay and discharge the indebtedness of the company, and that the defendants in this action with others were members of the company. The decree pleaded directed the receiver to proceed with the collection of the assessments made and levied against the defendants and all other members of the company. The petition then alleged that by this decree the amount due on such assessments from each of the defendants had been judicially determined, and prayed for several judgments against each of the defendants for the amount levied against them in the district court for Douglas county. The defendants severally filed a motion, asking that the petition be made more definite and certain for numerous causes. The trial court sustained the motion in part, and overruled it in part. The cause was then continued until a subsequent term of the court, when plaintiff came in with a supplemental petition, which he designated an "answer to the motion of the several defendants to require plaintiff to make the petition more specific and certain." In this supplemental pleading, plaintiff complied with the order of the court, except as to the ruling on paragraph 7 of the motion, which was as follows: "Seventh. To require the plaintiff to set forth and state fully and specifically what liabilities are referred to in the third paragraph of the first page of plaintiff's amended petition, and to require the plaintiff to set forth in his amended petition the schedule of the liabilities that were incurred by said insurance company during the time these defendants are claimed by plaintiff to have been members of said insurance company. And to also set forth in said petition how much and which of said liabilities, if any, remain unpaid. Also to require plaintiff to set forth specifically and fully what assets of said insurance company were collected during the term

of the alleged membership of these defendants, and what disposition has been made of said assets." With reference to the ruling of the trial court, requiring plaintiff to set out the information demanded in this seventh paragraph of the motion, the supplemental petition contained the following allegation: "As to paragraph seven of said motion, plaintiff renews his objection, and still insists that all questions therein presented have been foreclosed by the decree of the district court for Douglas county, Nebraska, upon which decree the plaintiff's action is based, and a copy of which decree is set forth herein, and the other reasons as set forth in the argument on said motion." No other showing was made of an attempted compliance with the order of the court, except such as was contained in the supplemental petition, which was verified by plaintiff's attorney. The defendants thereupon moved the court to dismiss the petition for plaintiff's failure to comply with the rule of the court. This motion was sustained by the trial court, and the petition dismissed without prejudice. Without a motion to reinstate the petition, or any other additional showing of an inability on the part of the plaintiff to comply with the rule imposed upon him, plaintiff has appealed from the order of the district court dismissing his petition.

It is absolutely necessary for the orderly transaction of business in trial courts that litigants should comply with all reasonable and salutary rules governing the conduct of actions therein. And, to require a compliance with proper rules of procedure in the district court, section 430 of the code provides, among other things, that an action may be dismissed without prejudice "by the court, for disobedience by the plaintiff of an order concerning the proceedings in the action." Now, unless the rule of the court, requiring the information in plaintiff's petition demanded by paragraph seven of the motion before set out, was either an unreasonable, oppressive or arbitrary exercise of the discretion reposed in the trial judge in

directing amendments to pleadings, the court was clearly justified in dismissing the action without prejudice for noncompliance with its rule. If the levy of the assessments against the various policy holders in the insolvent insurance company in the district court for Douglas county has the effect of a judgment *in personam* against each of the defendants for the amount therein named, then the information demanded by paragraph seven of the motion would be purely superfluous, and plaintiff might have been excused, if not fully justified, in declining to comply with the rule. The decree pleaded shows that in the receivership proceedings the insurance company alone was served with process, and that at no stage of the proceedings was any notice of any kind served upon the members, or policy holders, of the association, so that the question to be determined is how far these policy holders are bound by the judgment of the district court for Douglas county in the action in which they had only constructive service as members of the insolvent corporation.

In the case of *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 61 Neb. 454, this identical question was before this court and was carefully examined on a second hearing, and, after an exhaustive review and discussion of the authorities, it was there held that "a court having jurisdiction of an insolvent corporation for the purpose of winding up its affairs has no authority to render a personal judgment against one of its stockholders who is not a party to the action by service of process or voluntary appearance. Neither has the court in such case authority to adjudicate the fact of membership in the corporation." Applying the doctrine announced in this opinion to the issues in the case at bar, we conclude that the levy of assessments by the district court for Douglas county on constructive notice against the members of the association had the effect of finally determining the amount of the assets and liabilities of the insolvent corporation, and the amount of the assessment which should

be made upon the stockholders, and that it left open the question as to whether the persons sued herein were stockholders and like defenses to be litigated. 1 Cook, Corporations (5th ed.), sec. 207. Now, by the amended petition filed by the plaintiff it was made to appear that many, if not all, of the defendants sued in this cause of action were not members of the insolvent corporation at the time of the receivership proceedings. Consequently, the information demanded in the seventh paragraph of the motion "to set forth specifically and fully what assets of said insurance company were collected during the term of the alleged membership of these defendants, and what disposition has been made of said assets," was information material to the defense of the parties to this action who were not members of the association at the time of the receivership proceedings.

We are therefore of the opinion that the trial court was fully justified in dismissing the petition for noncompliance with its rule, and we recommend that the judgment 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.

HATTIE V. SIMMONS, APPELLEE, V. WESTERN TRAVELERS ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 10, 1907. No. 14,784.

1. **Insurance: CHANGE OF OCCUPATION.** A condition in the constitution of an accident insurance company provided for a limitation of liability, "if any member of the association shall, after becoming such, change his occupation to one classed by the executive board as more hazardous than that stated in his original application." The insured, who was a traveling salesman, lost his position, and

for a term of nearly two years lived upon his father's ranch while trying to obtain another position, but was paid no salary or other compensation. At the time of his death he was endeavoring to obtain another situation as a commercial traveler. *Held*, That he did not change his occupation to that of "stock farmer, owner or superintendent, supervising only," which was the occupation classed by the executive board as more hazardous than that of commercial traveler.

2. ———: PROOFS OF DEATH: FORFEITURE. A condition in an accident insurance policy providing for a forfeiture of the benefits unless proofs of the death of the assured are furnished within 30 days will be upheld; but, where the testimony shows notice of the death given within the required time, and due diligence, prompt action and good faith on the part of the beneficiary in making formal proof of death as soon as the requirements are made known to him, a forfeiture for the failure of a literal and technical compliance with the condition should not be declared.

3. **Evidence.** Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

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

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

Brome & Burnett, for appellant.

Kennedy & Learned, contra.

OLDHAM, C.

This was an action instituted by the plaintiff as widow and beneficiary named in a membership certificate issued by the defendant to one Harry A. Simmons, to recover the sum of $5,000, the amount provided for in the certificate on the death of a member resulting from external, violent and accidental means. The petition alleged in substance, that Harry A. Simmons, deceased, was a member in good standing of the defendant order, and had paid all assessments and dues arising under the constitution and by-laws of the order, and that on the 24th day of June, 1903, he was bitten by a rattlesnake in Live Oak

county, Texas, and death resulted from this violent and accidental means on the day following the injury; that notice of the death was served upon the defendant within 15 days thereof; that proofs of death were subsequently furnished in compliance with the constitution and laws of the order. Defendant's answer admitted the issue and delivery of the certificate of membership to Harry A. Simmons, deceased, and that plaintiff was the widow and beneficiary named in such certificate, admitted that notice of death was received by the defendant within 15 days of the death of Harry A. Simmons, and that he was a member in good standing in the order at that time. The answer then set up a provision of the constitution and by-laws of the order forfeiting the policy unless proofs of death are filed within 30 days of the demise of a member. It also pleaded an article of the constitution of the order providing, in substance, that, if a member should change his occupation to one classed by the executive board as more hazardous than that stated in his original application for membership, he should only be entitled to such benefits as might be fixed by the executive board for such increased hazard of occupation. It further alleged that at the time of his death Harry A. Simmons had changed his occupation from that of traveling salesman, and was engaged in the business and occupation "of ranch foreman, supervising stock farming, and supervising and superintending a ranch in the state of Texas, and was so engaged at the time of the alleged injuries and death." The answer then averred that under the by-laws of the order the amount of recovery for the death of a member engaged in the more hazardous occupation described was limited to $2,000. Plaintiff, by way of reply, alleged that within 15 days of the death of her husband she had procured notice to be served upon the defendant of such fact; that she had no knowledge or information of any by-law requiring proofs of death to be filed within 30 days; that in the notice of death she requested the defendant to send such blank

proofs of death as were required; that no answer was received to this communication from the defendant until the 28th day of July, when the 30 days had elapsed; that upon the receipt of defendant's letter containing a copy of the constitution and by-laws requiring proof of death, such proof was immediately procured and forwarded to the defendant and retained by it. The reply denied specifically that deceased had changed his occupation of traveling salesman, or was engaged in any other business at the time of his death, but alleged that in the fall of 1901 the deceased had lost his position as traveling salesman, and that by invitation of his father he had come to temporarily reside on his father's ranch in Texas until he could secure further employment as traveling salesman; that he corresponded with different firms seeking employment, and that at the time of his death he had procured a contract for employment as traveling salesman with a drug company in Chicago, and was preparing to leave for the place of his employment at the time his injury occurred. On issues thus joined there was a trial to the court and jury, verdict for the plaintiff for $5,000 and interest, and judgment on the verdict. To reverse this judgment defendant appeals.

We shall discuss the allegations of error relied upon in the brief of the appellant in the order in which counsel have presented them. The first contention urged is that the court erred in submitting to the jury the question of the deceased's alleged change of occupation, and should have declared as a matter of law that such change had been established by the evidence, and that, consequently, plaintiff's recovery in any event should be limited to $2,000. It is without dispute that at the time the indemnity certificate was issued the deceased was engaged as a traveling salesman for a wholesale medicine and drug company in St. Louis, Missouri, and that he resided in that city with his wife and family; that in the fall of 1901 he lost his position with this firm; that in the preceding

year his father, Dr. Simmons, purchased about 60,000 acres of land in Live Oak county, Texas, and engaged in the cattle business; that the tract of land owned and controlled by the father contained three ranches with ranch houses thereon, one known as the "Beall Ranch" on which the father resided, another known as the "Quartetez Ranch," and another known as the "Big Tank Ranch"; that after the deceased lost his position his father invited him to come and remain with him until he could obtain further employment. In response to this invitation the son came, and at first resided with his father on the Beall ranch. Later the wife and children of the deceased arrived with the household furniture, and moved into the house on the Quartetez ranch, about 15 miles from the father's home. They lived there nearly a year, when they removed to the Big Tank ranch, about five miles nearer to the home ranch. During the time the deceased resided on these different ranches, he was never employed for any purpose by his father, and came and went at his own will, and put in most of his time hunting or visiting from one place to the other. Six of the employees on these premises testified, without contradiction, that the deceased was never either foreman or superintendent of any of these ranches, never employed or discharged any of the hands, nor did anything else connected with the management thereof, except communicate orders or directions from his father to the employees from time to time. When the accident occurred, deceased had started on horseback to one of the ranches for the purpose of gathering up some of his effects preparatory to leaving the place. His father had requested him to stop and examine the windmills at two of his wells and see if they were pumping properly. In compliance with this request, he stopped at one of these places, known as the "Lost Tank" well, at about midday, and the foreman of the ranch, Mr. Franklin, invited him to wait for dinner. He accepted the invitation, and sat down on the ground with Mr. Franklin to eat dinner, when

a large rattlesnake came out of the grass immediately behind him, and, before he could arise, the snake bit him, and as a result of this injury he died on the following day. Doctor Simmons, the father of the deceased, is an attorney at law, as well as a physician and cattleman, and conducted all the correspondence with the defendant on plaintiff's behalf. In the communication which he wrote to the defendant in giving notice of his son's death, in detailing the particulars of the injury and where deceased was when bitten by the snake, he said that the deceased was bitten "while he was sitting quietly at dinner talking with his foreman on my ranch." This statement in the notice is relied upon by the defendant as being conclusive on the plaintiff of the fact that deceased was foreman of the ranch. Doctor Simmons, on the witness stand, stated that the expression "his foreman" was a typographical error of the stenographer to whom he dictated the letter; that the letter was dictated just after the burial of his son, and that to the best of his recollection he signed the letter without reading it. He pointed out one or two two other clerical errors in the letter, which, however, are without import. Mr. Franklin, the foreman on the ranch, testified positively that he was never employed by the deceased, never worked under his orders, never made any report to him, never received any directions from him, except in the shape of a message from his father. This testimony is corroborated by that of the other employees on the ranch, and we might add that the whole testimony offered on this question tends to support the theory of Dr. Simmons that the expression "his foreman" in the letter was a clerical error of the stenographer.

The condition of the constitution relied upon is that, "if any member of the association shall, after becoming such, change his occupation to one classed by the executive board as more hazardous than that stated in his original application for membership, he shall be entitled to such benefits only as may be fixed by the executive board

for such increased hazard of his occupation." This clause, being one in the nature of a forfeiture of a portion of the benefits provided for in the membership certificate, will be strictly construed against the association. It will be noted that the condition does not apply to the doing of any particular act connected with some more hazardous occupation, but applies only when the member changes his occupation to one classed as more hazardous, that is, when he engages in a different business or avocation, the nature of which subjects him to additional hazards. It is for the increased hazard of the new occupation in which he engages that the reduction is made. There is nothing in the contract providing for the forfeiture if the member loses his position and is out of employment for any length of time, but the conditions are changed whenever the member abandons his present avocation and enters into an employment more hazardous. It is not the doing of a particular act that might be the incident of a more hazardous calling, but it is the engaging in the calling for a livelihood, for profit or for pleasure, that works the forfeiture. If deceased, while actually engaged as a traveling salesman, had stopped at his father's ranch on a casual visit, and had received the injury in the manner described in the testimony, it could not be contended that the condition in the policy relied upon would have worked a partial forfeiture of his membership benefits, because the riding on horseback to one of the ranches after his effects, and the incidental inspection of the windmills at the request of his father, was only such a mission as might have been performed by one in any walk of life. The length of time deceased had been out of employment did not increase the hazard of his risk, unless, in the meantime, he actually engaged in a more dangerous calling. We think, from an examination of the whole record, that the question of the alleged change of occupation was one for the determination of the jury. *Travelers P. A. Ass'n v. Kelsey,* 46 Ill. App. 371; *Stone's Adm'rs v. United States Casualty Co.,*

34 N. J. Law, 371; *Miller v. Travelers Ins. Co.*, 39 Minn. 548; *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. St. 43; *Union M. A. Ass'n v. Frohard*, 134 Ill. 228.

The next question urged in the brief is as to the action of the trial court in submitting to the jury the question of plaintiff's compliance with the constitution and by-laws in furnishing final proofs of death. This question was submitted under the doctrine announced by this court in *Woodmen Accident Ass'n v. Pratt*, 62 Neb. 673, and adhered to in *Western T. A. Ass'n v. Holbrook*, 65 Neb. 469, and *Western T. A. Ass'n v. Tomson*, 72 Neb. 674. The instruction complained of told the jury, in substance, that the by-law requiring proof of death to be filed in the office of the association within 30 days from the death of the member is a part of the contract of insurance, but that a strict and literal compliance with such a provision is not in every instance necessary in order to entitle a party to recover, and that, if the jury found from a preponderance of the evidence that the delay in the proof of death was occasioned by circumstances not attributable to the neglect or bad faith of the plaintiff or her attorney, and that the proofs were filed within a reasonable time under all the circumstances surrounding the case, the plaintiff would be excused from not making proof sooner, and would be deemed in law to have complied with the contract of insurance. The principle declared in this instruction is supported by the authorities above cited, so the question to be determined is whether or not the evidence in this case warranted it. The only indorsement on the certificate in the hands of the plaintiff or her attorney with reference to notice of the injury was the following: "No claim under this certificate will be valid unless notice of the injury with respect to which claim is made is received at the office of the association within 15 days of the date of such injury." In conformity with this indorsement, plaintiff did, in less than 15 days, furnish defendant with a notice of the injury and all its surroundings, and in

the letter, written by Dr. Simmons, informed defendant that "Mrs. Hattie V. Simmons, the beneficiary, will make her home with me on my ranch at Oakville, Texas, and you will please forward to me at once, or to her in my care at Oakville, Texas, such papers as you desire to be made out to obtain the death benefit." Again, on the 5th day of July, Dr. Simmons wrote to the defendant, still requesting the proof blanks required to be sent at once to him or to the plaintiff in his care at Oakville, Texas. It is without dispute that no reply was received to either of these letters until the 28th day of July, after the 30 days had expired. It is also in evidence that on receipt of the marked copy of the constitution and by-laws, stating what proof was required, such proof was promptly furnished to the defendant and retained by it. We think, under the showing of diligence contained in the record, the court was fully justified in submitting this question to the jury under the instruction complained of.

The third and last objection is as to the action of the trial court in the admission of evidence. The first assignment under this head is that the court erred in permitting witness Brown to testify that he had seen the contract which deceased had entered into with the Chicago drug firm just before his death. The contract complained of related to the employment of the deceased as a traveling salesman. This testimony, however, was elicited in the first instance by the defendant on the cross-examination of the witness, and on re-examination plaintiff was permitted to show that the witness had seen the contract and letter relative to this employment on the day that deceased was bitten by the snake. The testimony shows that the letter and contract were burned with the clothing of the deceased after his death. Consequently, there is no merit in this contention. The next objection is as to the action of the trial court in admitting in evidence the correspondence between Dr. Simmons and the defendant with reference to the proof of death. These letters were all re-

stricted by instructions to the purpose of showing diligence on the part of the plaintiff in making her final proof. The court, also for the purpose of showing diligence in making final proof, permitted plaintiff, over defendant's objections, to testify that she had no knowledge that under the by-laws of the association final proof must be made within 30 days of the death, until she received the marked copy of the by-laws from the defendant. This testimony was confined by proper instructions to the mere purpose of showing the good faith and diligence of the plaintiff in making her proof, and for this purpose we think it was properly admissible in evidence.

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.

CONTINENTAL TRUST COMPANY, APPELLEE, V. HARVEY LINK ET AL., APPELLANTS.

FILED MAY 10, 1907. No. 14,794.

Newspapers: NOTICE OF TAX SALES. Where a board of county commissioners enters into a contract with a newspaper of general circulation for the publication of legal advertisements for a year, and for succeeding years recognizes and deals with it as the official paper of the county, such paper is, for the purpose of publication of notices of tax sales, a paper "designated by the board of county commissioners," as required by section 109, art. I, ch. 77, Comp. St. 1897.

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

H. W. Pennock, for appellants.

H. P. Leavitt, contra.

OLDHAM, C.

This was an action to foreclose a tax sale certificate upon certain lands situated in Douglas county, Nebraska, and covered the regular taxes for the years 1895, 1896, and 1897. The validity of the taxes is conceded, but the validity of the sale at which the certificate was issued is denied, for the reason that the notice of the sale was not published in a newspaper of general circulation which had been designated by the board of county commissioners of Douglas county. The defendants tendered the amount of the taxes, less the penalties which would attach if the sale were valid. The trial court held the sale valid, and rendered judgment accordingly for the amount prayed for in plaintiff's petition, and to reverse this judgment the defendants appeal.

There is no dispute as to the fact that the notice of sale by the treasurer was published for the statutory period in the Omaha Evening Bee, and it is admitted that the Bee is a paper of general circulation in Douglas county, but it is contended that the notice was invalid because the Bee had not been designated for such publication by the board of county commissioners in the year 1898. It appears from the evidence that on March 5, 1896, the board of county commissioners entered into a contract with the Bee Publishing Company, which covered all the legal advertising of the county "that may by law or by the board of county commissioners be required during the year 1896, and until a similar contract shall have been entered into by the party of the first part for the next ensuing year." No new contract was entered into with any other newspaper for legal publications by the county board for either the year 1897 or 1898, nor was there any attempted designation of any official paper by the board for these two years. At the date of the tax sale the revenue law of 1879 was still in force, and so much of section 109, ch. 77, art. I, Comp. St. 1897, as requires notice of tax sales to

be published by the treasurer "in a newspaper in his county having a general circulation therein; which newspaper shall be designated by the board of county commissioners," is relied upon to support defendants' contention of the illegality of the sale.

There is no doubt that a notice in fair compliance with the provisions of this section of the statute lies at the foundation of a legal tax sale, so that the question to be determined is whether or not the notice in the case at bar was made in substantial conformity with the requirements of this act. No newspaper had been designated specially by the board for the year in which the publication was made. If one had been, and the treasurer had ignored this designation and placed the notice in another paper, a different question would arise, because such an act would fly in the face of his plain statutory directions. No contract was entered into by the county board with any newspaper during the years 1897 and 1898, but it appears from the record that the Bee continued to act as the official paper of the county and was so recognized by the county board during these years. It appears that each of the parties to the contract of 1896 construed it as extending until a new contract should be entered into, because payment was made to the Bee Publishing Company for publications by the county board in 1898 in accordance with the terms of the contract of 1896. Under these circumstances, the Bee was the official paper of the county, at least *de facto*, if not *de jure*, for the years 1897 and 1898. *Wright v. Forrestal*, 65 Wis. 341.

As no other question is involved, 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.

RACINE-SATTLEY COMPANY, APPELLANT, V. JOHN MEINEN ET AL., APPELLEES. *

FILED MAY 10, 1907. No. 14,800.

Replevin: PETITION. Petition in replevin examined, and *held* insufficient to state a cause of action under the rule announced in *Case Threshing Machine Co. v. Rosso*, 78 Neb. 184.

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

O'Neill & Gilbert and *C. L. Richards*, for appellant.

O. H. Scott, M. H. Weiss and *W. M. Morning, contra.*

OLDHAM, C.

This was an action in replevin instituted by the plaintiff Racine-Sattley Company in the district court for Thayer county, Nebraska, for the recovery of the possession of certain specific agricultural implements described in the petition. The petition alleged that the plaintiff was the owner of the property described under a contract of conditional sale with one John Meinen, and a copy of the contract was attached to the petition. It further alleged "that defendants wrongfully detained said goods and chattels from the possession of the plaintiff, and have detained same for four days, to plaintiff's damage in the sum of twenty-five ($25) dollars." The petition was sworn to by the attorney for the plaintiff company in the following language: "That he has read the foregoing petition, and that the facts and allegations therein are, as he believes, true." Defendants answered with a general denial. A jury was waived, trial had to the court, and judgment rendered dismissing plaintiff's petition, and finding for the defendants for a return of the goods with one cent damages, and costs. To reverse this judgment the plaintiff has appealed to this court.

* Rehearing allowed. See opinion, p. 33, *post.*

There is no affidavit for replevin in the record, and, as the petition is not positively verified and omits all the allegations required in the fourth subdivision of section 182 of the code, the petition, under the recent holding of this court in *Case Threshing Machine Co. v. Rosso,* 78 Neb. 184, is wholly insufficient to sustain a judgment in plaintiff's favor.

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.

The following opinion on rehearing was filed January 9, 1908. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. Replevin: AFFIDAVIT. It is not essential to the maintenance of an action of replevin instituted in the district court that any affidavit of replevin as contemplated by section 182 of the code should be filed, nor that the facts required to be set forth in the affidavit under the fourth subdivision of section 182 should be embodied in the petition. It is necessary to set forth the facts required by the fourth subdivision of the code in an affidavit or in the petition only when an order of delivery is desired by the plaintiff.
2. Contract examined, and *held* to be one of conditional sale.
3. Sale: MORTGAGEE OF VENDEE. The mortgagee of a conditional vendee of personal property is not a purchaser within the meaning of section 26, ch. 32, Comp. St. 1907, and cannot by his mortgage acquire any rights superior to the conditional vendor, even if the contract of conditional sale is not filed as required by said section.

GOOD, C.

This case is now before us on rehearing. For the former opinion see *ante,* p. 32. This is an action in replevin, and was apparently instituted in the district court by the plaintiff to recover a quantity of agricultural implements.

All of the defendants answered by a general denial. A jury was waived, and trial had to the court. The defendants had judgment, and the plaintiff appeals.

The former opinion affirmed the judgment of the district court upon the theory that the petition did not state a cause of action, and was based upon the holding of this court in *Case Threshing Machine Co. v. Rosso,* 78 Neb. 184. An examination of the latter case will disclose that the sufficiency of the allegations of the petition was not involved in that case. It simply held that 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. The theory in the former opinion in this case seems to have been that, in order to maintain the action of replevin, it is necessary that an affidavit should be filed setting forth the things required in the fourth subdivision of section 182 of the code, or that such things should be embodied in the petition, and that for want of the affidavit and the allegations of such facts in the petition it fails to state a cause of action. An examination of the various sections of the chapter of the code relating to actions of replevin commenced in the district court convinces us that the holding was erroneous. The things required to be set forth in the affidavit of replevin, mentioned and set out in section 182 of the code, are required only when the plaintiff demands the issuance of an order of delivery. It is optional with the plaintiff whether he have the order of delivery issued or not. By section 181 it is provided that the plaintiff *may,* at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property. When he claims the immediate delivery, then it is incumbent upon him to file the affidavit provided for in section 182, or to embody the facts in his petition. But he may, without the affidavit or the averments in his petition, proceed with the action as provided for in section 193 of the code. If the order for the delivery of the property has been issued without the affidavit provided for by section 182, then, under the pro-

visions of section 197 of the code, the order may be set aside. A consideration of these various sections of the code forces us to the conclusion that the allegations as to the things required in the fourth subdivision of section 182 relate only to the order of delivery, and not to the right to a trial upon the rights of possession and the rights of property, and a failure to set forth the facts mentioned in that subdivision could only affect the right to the order of delivery. An examination of the petition shows that it sets forth, first, the corporate capacity of the plaintiff; second, that it was the owner and entitled to the immediate possession of the property, describing it; third, its value; fourth, that the defendants wrongfully detain the property from the possession of the plaintiff to its damage, etc. There is another allegation in the petition, the effect of which we will consider later. It is evident that the petition complies with all of the usual requirements in an action of replevin instituted in the district court, where the plaintiff claims a general ownership of the property. Following the allegations as to the value of the property in the petition, it is alleged "that plaintiff's title to ownership to said property is by reason of a certain contract made with the defendant, John Meinen, under and by the terms of which the goods herein were delivered to him at Belvidere, Nebraska; there being due and unpaid in cash upon said contract the sum of $975.86. The defendant, John Meinen, has not paid cash for any portion of said goods. That he has given certain notes as evidence of the indebtedness, but has made no payment upon said contract, said notes so held as evidence of indebtedness being herein tendered to said defendant."

The defendants contend that the effect of these allegations is to limit the general allegations of ownership in the petition, but a careful consideration of them fails to show that in any particular they are contradictory of the general allegations of ownership in the plaintiff. We have no doubt that, if the plaintiff, after alleging general ownership in himself, had attempted to set forth the facts con-

stituting his ownership, and the facts set forth contradicted the allegations of general ownership, then the special allegations would control the general allegations. But, as we view it, these allegations were merely surplusage and may be wholly disregarded. We therefore conclude that the petition stated a good cause of action in replevin, and that the former opinion in this case was erroneous and should be vacated.

There is another phase of the case that will make the following statement of the facts necessary: The plaintiff was the manufacturer or wholesaler of agricultural implements. The defendant, John Meinen, was a retail dealer at Belvidere, Nebraska. The personal property in controversy was sold by the plaintiff to the defendant, John Meinen, under a contract. The plaintiff claims that the contract constituted a conditional sale. The defendants claim that the contract evidenced an unconditional sale, and that the title to the property passed to Meinen. The contract, so far as necessary to a determination of this question, is as follows: "The party of the first part sells, and the party of the second part buys, the following list of goods, * * * under conditions hereinafter named, and the prices and terms hereinafter indicated. * * * It is expressly agreed that upon the receipt of goods or upon monthly balances, at the option of the second party, said party of the second part shall execute notes to the said party of the first part for the amount to be paid for the goods received according to the terms of this contract. * * * In case of the death of a member of the firm making this contract, or if the purchaser under this contract sells out, fails, or becomes insolvent, or any member of the purchasing firm fails, * * * all accounts or notes for goods purchased under this contract * * * shall then become due and payable. * * * The title to the goods (and all proceeds of any sale of the same), for which this order is given, and all goods subsequently ordered and the proceeds of the sale thereof to remain in the name of the Racine-Sattley Company until

the same are settled for with cash; and notes or accepted drafts given are not accepted as payment, but only as evidence of indebtedness." It is doubtless true that under the holdings in many of the states this contract would not create a conditional sale. In the case of *National Cordage Co. v. Sims,* 44 Neb. 148, the following language, taken from Newmark, Law of Sales, sec. 19, is quoted with approval: "Whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale, and not a bailment." In 6 Am. & Eng. Ency. Law (2d ed.), p. 437, note, it is said: "A sale and delivery of personal property with an agreement that title is to remain in the vendor until payment is a conditional sale." In the case of *Osborne Co. v. Plano Mfg. Co.,* 51 Neb. 502, the contract involved was very similar to the one in the case at bar. It was contended upon the one side that the contract was one of agency, and upon the other that it was an unconditional contract of sale, but the court held that it was a contract of conditional sale.

We think that under these authorities the contract must be held to be one of conditional sale, and that the title to the property remained in the Racine-Sattley Company, and that upon conditions broken it was entitled to maintain replevin for the goods so sold. By reference to the provisions of the contract above quoted, it will be observed that upon the failure of the purchaser all accounts or notes for goods purchased under the contract should be due and payable. The evidence discloses that some months prior to the bringing of the action Meinen failed in business. The notes were, therefore, past due. The defendant Meinen had failed to make payment as provided for in the contract, and the plaintiff was entitled, as against him, to recover the possession of the goods.

The defendants, Emma Meinen, and M. H. Weiss, and

M. H. Weiss, trustee, introduced evidence tending to show that they had taken possession of the goods in controversy under chattel mortgages executed to them by John Meinen. It is conceded that the conditional contract of sale had never been filed for record, as required by the registry laws of this state, and under the provisions of section 26, ch. 32, Comp. St. 1905, it is void as against purchasers in good faith and judgment and attaching creditors; but under the holdings of this court in *Campbell Printing Press & Mfg. Co. v. Dyer,* 46 Neb. 830, and *McCormick Harvesting Machine Co. v. Callen,* 48 Neb. 849, a mortgagee of the conditional vendee in possession of chattels is not a purchaser within the meaning of said section 26, and the rights of the conditional vendor are prior and paramount to the rights of such mortgagee. It follows that the defendants holding mortgages from John Meinen acquired thereby no rights as against the Racine-Sattley Company.

There is another reason apparent from the record why they did not have any rights as against the plaintiff, and that is that there is no evidence in the record to show that the personal property in controversy was covered by the mortgages of these defendants. There are descriptions in the mortgages of goods which are similar to that of the goods in controversy, but there is nothing in the record to identify the property covered by the mortgages with that in controversy in this action. It follows that the judgment of the district court is wrong and should be reversed.

For the reasons given we recommend that the former opinion in this case be vacated, and that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

MINNIE LANHAM, APPELLEE, V. CHARLES J. BOWLBY ET AL., APPELLANTS.

FILED MAY 10, 1907. No. 14,735.

1. **Adverse Possession: EVIDENCE.** One who enters into the occupancy of real estate under contract cannot afterwards obtain title thereto by adverse possession, without showing that his occupancy had assumed an adverse character and continued as such during the statutory period.
2. **Evidence** examined, and *held* insufficient to sustain the material allegations of the petition.

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

J. H. Broady and *M. H. Fleming,* for appellants.

T. H. Matters, contra.

EPPERSON, C.

This is either an action to quiet title or for the specific performance of a contract. It is difficult to determine which. Plaintiff relies upon title by adverse possession, and seems to have been supported in this claim by the trial court, although there was a general finding for the plaintiff. Plaintiff is an heir at law, and the grantee of all other heirs at law, of John Lanham, deceased, who died in 1900, while occupying the land in controversy. The petition alleges that in 1880 Lanham and the defendant entered into a verbal contract, whereby the defendant agreed to exchange the land in controversy for $1,100 to be credited by Lanham upon his account books, and paid for in building material and rent; that Lanham thereupon took possession of the property and held the same by adverse possession until his death; and that said Lanham performed his part of the agreement by crediting the amount of the purchase price to defendant and furnishing rent and materials. Plaintiff further alleged that, when said

John Lanham had performed his part of the agreement, he demanded a deed from defendant, which defendant refused to furnish.

The evidence clearly established that plaintiff's ancestor took possession of the property in controversy under a verbal agreement with defendant, and that he and his heirs have been in continuous occupancy from 1880 until the present time. In its inception, therefore, the occupancy of Lanham was not adverse, and the evidence fails to show that it ever became adverse by the demanding of a deed and a refusal by defendant, or otherwise. Lanham's possession under the contract could not be adverse to defendant, and, until his occupancy in some way assumed an adverse character, the statute did not begin to run. Lanham's title was subservient to the title held by his grantor, the defendant, and that condition is presumed to continue until the presumption is overcome by competent evidence. In *Beer v. Plant,* 1 Neb. (Unof.) 372, this court held: "In order to establish title by adverse possession, it is not sufficient to show continued occupancy for ten years, but it must also appear that such occupancy was with intent to claim title against the true owner." In *Smith v. Hitchcock,* 38 Neb. 104, it is said: "Where possession of real estate is the result of an entry upon the premises by permission of the legal owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title." We are convinced that under the evidence in this case plaintiff cannot recover on the ground of adverse possession.

In the second amended petition, plaintiff's allegations are inconsistent. He attempts to plead title by contract and also by adverse possession, without alleging that the contract had been fully performed on his part more than ten years before the commencement of the action, and that defendant had notice that the plaintiff during that period was claiming to hold the land adversely. The court erred in permitting two causes of action to stand in the second

amended petition. However, by taxing the doctrine of liberality in the construction of pleadings to its limit, the petition herein would limit plaintiff to recover in the event that her ancestor had paid the agreed consideration as alleged. The only evidence as to the consideration to be paid by John Lanham was the deposition of his son-in-law, agent and attorney, who says: "Mr. Lanham told me about this contract in 1888, when, at his request, I made a statement from his books, a copy of which is hereto attached and marked 'Exhibit A.' He said he was to pay $1,100 for this land, and to pay 7 per cent. interest on deferred payments. This statement shows that $600 of office rent and $338.61 worth of brick had been applied on this land contract, and in 1889 there was $100 additional office rent applied on this land contract, at which time Bowlby moved out of the Lanham building." Exhibit A, attached to the deposition, purports to be a "copy of an account made out by Guy S. Abbott from books of John Lanham, at his request," and shows a credit to the defendant for the $1,100, purchase price of the property in question, and also the charges made against the defendant of the items alleged in the petition. At best, this is not satisfactory or competent evidence, either as to the condition of Lanham's books or to show the contract relations between deceased and the defendant. It was objected to by defendant, and an exception taken to its admission.

The evidence wholly fails to prove the material allegations of the petition, and we recommend that the judgment of the district court be reversed and the cause remanded for a new 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 a new trial.

REVERSED.

GEORGE F. HOWARD, APPELLEE, V. STEPHEN MCCABE ET AL., APPELLANTS.

FILED MAY 10, 1907. No. 14,748.

1. **Intoxicating Liquors:** ACTION ON BOND. Evidence examined, and found sufficient to prove the intoxication in defendant's saloon of one who inflicted an injury upon the plaintiff.
2. **Damages:** EVIDENCE. In an action for personal injuries, the Carlisle table of expectancy may be given in evidence after the introduction of credible evidence tending to show the permanent character of the injury.
3. **Evidence.** One who has been engaged in ordinary mercantile business for a considerable time may testify as to the value of his services and attention to such business.
4. **Instructions.** The giving and refusal of instructions examined, and *held* without prejudicial error.

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

M. H. Weiss, W. M. Morning and *J. J. Ledwith*, for appellants.

C. L. Richards and *Stewart & Munger, contra.*

EPPERSON, C.

The defendant, Stephen McCabe, was a saloon-keeper in the village of Hubbell, in this state, and the other defendant was surety on his liquor bond. One day while the plaintiff, who was a retail dealer in merchandise, was standing in or near his place of business in said village, one Lee Shoup came along, and playfully took the plaintiff's hat from his head and carried it to the saloon. Shortly afterwards plaintiff followed to the saloon, where a playful, but very rough, encounter was forced upon him by Shoup, and terminated in a wrestle in which he was thrown to the floor and one of his legs was broken. This is a suit to recover damages for the injury. The plaintiff

had judgment for $1,000, and defendants appeal. There was a joint motion for a new trial, and the sole inquiry is as to whether there was reversible error as to the principal.

1. The most important inquiry is as to the sufficiency of the evidence to support the verdict. It is contended by defendant that Lee Shoup is not shown to have been intoxicated. Several witnesses testified as to his intoxicated condition, and of his indulgence in liquor on the afternoon in question in defendant's saloon. It appears that he had taken at least eight drinks of whiskey between 2 o'clock and half-past 4, the time of the injury. He was called as a witness by defendant, and, when asked if he was intoxicated, replied: "It is according to what you would call it." There was some evidence introduced tending to show that Shoup was of a boisterous disposition, with a tendency to indulge in practical jokes, when sober. Conceding his character thus established, we cannot presume that even practical jokers would, when sober, good naturedly fracture the limbs of their friends. The evidence is sufficient to sustain the finding of the jury.

2. It is further contended that the trial court erroneously admitted the Carlisle table. At the trial, one year subsequent to the injury, plaintiff testified that the injured limb continued to annoy him, causing great pain and preventing its full use. Two physicians testified that a complete recovery was improbable. We are of opinion that a sufficient foundation was laid for the introduction in evidence of the Carlisle table. *City of Friend v. Ingersoll,* 39 Neb. 717.

3. Plaintiff was, and for three years had, engaged in the mercantile business, giving his personal attention thereto. He was asked relative to the time he was incapacitated on account of the injury: "What would you consider your time and services were worth to you in and about the managing of your business?" Over objection, he was permitted to say what was the fair value of his services and personal attention to his business. This, we think, was

proper. Plaintiff's vocation was an ordinary one, and his three years' experience in business rendered him competent to answer the question. The above, with other evidence relative to plaintiff's business, was objected to on the ground that the petition did not allege damages to business. The petition alleges, among other things, that on account of the injury plaintiff could not attend to his business, and, further, that he had been damaged by the loss of time. We think the evidence competent under the pleadings.

4. Defendants requested and were refused an instruction, in effect, that if plaintiff and Lee Shoup engaged in a friendly scuffle, and it was invited or encouraged by plaintiff, he cannot recover. An instruction given was also objected to because it ignored the effect of plaintiff's voluntary participation in the scuffle. It is doubtful whether the evidence relied upon by defendants was sufficient to require a submission of the question to the jury; but the instruction given is not subject to the objection. It sufficiently states for what wrong plaintiff may recover, as follows: "It is not material whether the injuries inflicted by Shoup on the plaintiff were inflicted with a malicious intent to do him harm, or were inflicted by the said Shoup upon the plaintiff in a friendly scuffle or wrestle imposed upon the plaintiff by the said Shoup in drunken sport. The essential thing is that the injury must have occurred and resulted from the drunken condition of Shoup, and the drunken condition was contributed to by liquors sold Shoup by the defendant, McCabe, at his licensed saloon. If you find all these facts established by the preponderance of the evidence, then plaintiff is entitled to a verdict in his favor."

5. Another instruction given was that the amount allowed plaintiff should be such sum as will compensate him for the amount he is bound to pay as a just compensation for the medical attendance and nursing, etc. There was no evidence that any sum was paid for nursing, except that medical attendance and care may be considered as such.

The word "nursing" should have been omitted, but we cannot see wherein prejudice resulted to defendants. Nothing appears in the record to indicate that the jury were misled by this error.

6. Many other errors are assigned, but a discussion of them would serve no useful purpose. There is no prejudical error in the record, and we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

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

AFFIRMED.

EMIL LUSCH, APPELLANT, V. HUBER MANUFACTURING COMPANY, APPELLEE.

FILED MAY 10, 1907. No. 14,796.

Trover: DAMAGES In an action by a mortgagor to recover damages for the conversion of personal property by a mortgagee who forcibly took possession of the property after default in the payment of the debt secured by the mortgage, the measure of damages is the difference between the value of the property and the amount due upon the indebtedness secured by the mortgage.

APPEAL from the district court for Saunders county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

J. L. Saunders, for appellant.

Field, Ricketts & Ricketts, contra.

EPPERSON, C.

Plaintiff seeks to recover damages for the alleged conversion of personal property which he had conveyed by chattel mortgage to defendant to secure an indebtedness. Upon default in payment, defendant took possession and

sold the property under the mortgage. At the trial plaintiff contended: (1) That the chattel mortgage was materially altered and void; and (2) that defendant obtained possession of the property by duress. The court submitted the first theory under instructions not assailed on this appeal, but refused the instructions tendered by plaintiff submitting his second theory to the jury. A verdict was returned for defendant, and plaintiff appeals.

Did the court err in refusing plaintiff's tendered instructions submitting his second theory to the jury? The sheriff, acting as defendant's agent, exhibited a copy of the mortgage to plaintiff and demanded possession. Plaintiff testified that he surrendered the property because the sheriff threatened to arrest him if he refused. This, if true, may have amounted to an unlawful or forcible taking of the property; but plaintiff further contends that he is entitled to recover the full value of the property, and the instructions which he requested so state. We are of opinion that plaintiff was not entitled to recover the full value of the property taken under the mortgage, and hence the trial court was not in error in refusing the tendered instructions. Defendant was entitled to the possession of the property for the satisfaction of its indebtedness, and plaintiff's measure of damages for the taking of the property, if wrongful, was the difference between the amount due on the mortgage and the value of the property. *Skow v. Locke,* 72 Neb. 681. In *Kilpatrick v. Haley,* 13 C. C. A. 480, it was held that the forcible seizing and removing of property by a mortgage was wrong and rendered him liable for whatever damages were thereby occasioned, even though he has a superior lien upon the property. The court said: "This view of the case entitled the plaintiff to recover, on account of the wrongful taking of the mortgaged property, whatever sum it was worth, over and above the amount of the second chattel mortgage, which was owned by the defendant." Plaintiff cites *Murphey v. Virgin,* 47 Neb. 692; *Kingsley v. McGrew,* 48 Neb. 812; *German Nat. Bank v. First Nat. Bank,* 55 Neb. 86, in sup-

port of his contention. These cases are not in point, because the money or property in controversy was not claimed under a specific lien. We think the instructions requested by plaintiff omitted to state the correct measure of damages, and it was not error to refuse to give them.

There are other errors assigned as to the refusal to give instructions and the exclusion of evidence. We have examined the record carefully with reference to each assignment, and find no error.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

CENTRAL WEST INVESTMENT COMPANY, APPELLEE, V. BARKER COMPANY ET AL., APPELLANTS.

FILED MAY 10, 1907. No. 15,014.

1. Judgment: ENTRY NUNC PRO TUNC. Before the entry of an order or judgment *nunc pro tunc* may be be made it must appear that there was a failure to record an order or judgment which the trial court intended as the disposition of the question considered.
2. ———: ———. An order *nunc pro tunc* will be made only in the furtherance of justice, and will not be allowed for the entry of an order announced when the evidence shows that the order was vacated by the court at the same term it was rendered.

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

B. N. Robertson, for appellants.

H. P. Leavitt, contra.

EPPERSON, C.

On January 19, 1901, the trial court had before it a special appearance filed by the defendants. Upon a hearing the court announced that the special appearance would be sustained, and made an entry on his docket to that effect. Afterwards, and on the same day, the court annulled the order so announced, and drew a pen line through the entry made on the docket. Afterwards the summons, which was assailed by defendants in their special appearance, was amended, and further objection by special appearance was made and overruled, and a decree of foreclosure entered. The defendants stood upon their objection, and unsuccessfully prosecuted an appeal to this court. *Barker Co. v. Central West Investment Co.*, 75 Neb. 43. After this court had affirmed the decree of foreclosure, defendants filed a motion for a judgment *nunc pro tunc* sustaining their first special appearance as of January 19, 1901. This motion was overruled, and the defendants again appeal.

In *Van Etten v. Test,* 49 Neb. 725, it was held that, where a judgment was rendered, but not recorded, the court at any time afterwards had power *nunc pro tunc* to enter the judgment. This rule is not questioned, but before it may be applied it must appear that there was a judgment or order announced which the trial court intended as the disposition of the issue considered. Trial courts frequently modify or vacate their orders. This may be done at the same term of court (*Smith v. Pinney,* 2 Neb. 139; *Wise v. Frey,* 9 Neb. 217), although no petition or motion therefor is filed. It frequently happens also that, where an order is annulled prior to the recording thereof, no record is made of the court's adjudication. Such is the condition of the record in this case. It is apparent that, if the conclusion first announced is made of record, the subsequent order annulling it should also be recorded. A judgment or order *nunc pro tunc* will be made in the furtherance of justice, and an entry showing only a part

of the entire proceedings, where the part not entered annuls the other, would be an injustice to the party against whom the order was made in the first instance. The entry which the defendants now seek to have entered *nunc pro tunc* would not show the full adjudication of the question presented, and therefore the motion was properly overruled.

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.

WILLIAM MEDLAND, APPELLEE, V. EMMA L. VAN ETTEN ET AL., APPELLANTS.

FILED MAY 10, 1907. No. 15,043.

1. **Tax Certificate: FORECLOSURE.** Where a petition in foreclosure describes the property by lot number (the same as contained in the tax certificate foreclosed), and further by a particular description in metes and bounds, and the answer denies the particular description and alleges a different boundary, the court has jurisdiction to ascertain what is in fact the true boundary and enter a decree accordingly.

2. **Case Affirmed.** *Medland v. Van Etten*, 75 Neb. 794, reaffirmed.

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

David Van Etten, for appellants.

H. P. Leavitt, contra.

EPPERSON, C.

The foreclosure of a tax sale certificate has been had in this case. The decree confirming the sale was affirmed

by this court in *Medland v. Van Etten,* 75 Neb. 794, where a statement of the facts may be found. Subsequently to the issuing of the mandate therein the purchaser filed a motion for a writ of assistance, which was sustained, and a decree entered allowing the writ. Defendants appeal.

It is earnestly contended that the decree of foreclosure is void, because the property ordered sold is not the property described in the petition. This identical question was before the court in *Medland v. Van Etten, supra,* and determined adversely to defendants' contention. The case has once been adjudicated, and we would be justified in making no further investigation of the only question now presented. But, prompted by the earnestness of defendants' argument, we have again reviewed the entire proceeding, and are convinced that the decree assailed is not void. Even were the decree subject to collateral attack, we find no reason for annulling it. It is supported by the pleadings, and there is no variance between it and the petition. It is true the particular description was not accurate, but sublot 13 in lot 9 was described in the petition, in the decree, and in the order of sale. Upon issue joined, the court determined what was the particular description of the tract in controversy and rendered a decree accordingly. This was clearly within the power of the trial court. The proceedings gave jurisdiction over the property described in the tax sale certificate, not only for determining the amount of the incumbrance, but for the purpose of ascertaining and decreeing the exact dimensions or boundaries thereof.

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.

ALBERT HARRAH, APPELLANT, V. EDGAR C. SMITH ET AL., APPELLEES.

FILED MAY 10, 1907. No. 14,789.

1. Mortgages: CONVEYANCES: CONSIDERATION. Whether a conveyance absolute in form is intended as an unconditional conveyance or as a security must be determined by a consideration of the peculiar circumstances of each case. Where the parties sustain the relation of debtor and creditor, and the grantee surrenders to the grantor the evidence of indebtedness held against him to the full amount of the consideration for such conveyance, and such indebtedness is understood by the parties to be fully paid and satisfied thereby, the transaction will in the absence of fraud be regarded as an unconditional conveyance.

2. ———: ———: ESTOPPEL. Evidence examined, and *held* not sufficient to estop the defendant from asserting his absolute title to the property in controversy.

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

G. W. Berge and *W. A. Spurrier,* for appellant.

Smyth & Smith, contra.

DUFFIE, C.

This action was brought by Harrah to redeem the property known as the "Brownell Block," in the city of Lincoln, from an alleged mortgage held thereon by the defendant Smith. The district court, after a lengthy trial, entered a decree dismissing the plaintiff's bill, and the plaintiff has appealed to this court.

The facts surrounding the transaction are contained in a bill of exceptions covering about 1,200 pages, and, while the circumstances attending the numerous transactions are somewhat complicated, the material facts which must govern in determining the case are neither numerous nor difficult of understanding. During the transactions which we shall now proceed to examine,

Smith, the defendant, had charge of the business of the New York Life Insurance Company in the state of Nebraska, his official title being "agency director." One H. O. Jackson was a successful insurance solicitor, and some time in 1901 Smith procured his services for the company which he represented. It is not in controversy that Jackson was successful in his business of life insurance, earning in commissions from $500 to $1,000 a month, and during his employment with the New York Life Insurance Company, covering a period of about three years, numerous transactions of a financial character took place between him and the defendant. He owned a ranch of 2,000 acres in Holt county, Nebraska, and his business as a ranchman was not apparently as successful as in that of soliciting life insurance. At any rate, he became indebted to Smith in a sum aggregating $19,000 or $20,000, for which Smith held mortgages on the ranch and stock. There were other liens amounting to about $8,000 held by other parties on the ranch property, and in 1901 Jackson was negotiating with the plaintiff, who lived in Iowa, for the purchase of $15,000 worth of graded cattle. He approached Smith, suggesting a loan of the cash payment to be made upon the cattle, which Smith refused, telling him at the same time that he could not make a success in breeding fine cattle, and that it would lead him into further financial difficulties. Notwithstanding this, he made the purchase, and the evidence tends to show that this greatly increased the financial difficulties under which he was laboring. Some time after this, and in the summer of 1902, desiring to get rid of his ranch, Jackson entered into negotiations with Hardin & Disney looking to a trade of his ranch property in exchange for the Brownell Block in Lincoln, of which they were the owners. Hardin & Disney would not trade for the ranch unless all liens existing against it were paid and discharged, and an agreement was finally made, by the terms of which Jackson agreed to discharge the liens against his ranch and to transfer it to Hardin & Disney

for the Brownell Block, which was also to be clear of all liens. Thereupon Jackson commenced negotiations with different parties to raise money to discharge the liens existing on his ranch. He applied to Smith to release his liens on the ranch property and take a mortgage for the amount upon the Brownell Block. This Smith refused to do or to advance him more money, but insisted that a portion of the amount then due him should be paid. Finally an arrangement was entered into between Jackson and the defendant by which Smith was to advance money enough to discharge the liens held by third parties on the ranch and to take a deed in his own name for the Brownell Block, one object of this arrangement apparently being to allow Smith to obtain a loan upon the block, Jackson's application for a loan having been refused by those to whom he had made application. The evidence of both these parties is to the effect that Smith considered the block worth not to exceed $28,000, while Jackson regarded it as of much greater value. The trade was completed October 16, 1902; the deed for the Brownell Block, at Jackson's request, being made to Smith, and on that or a later date Smith made and delivered to Jackson what the parties have denominated an "agency agreement," which is in the following words: "Omaha, Neb., October 16, 1902. Mr. H. O. Jackson, City. Dear Sir: You are hereby authorized and commissioned, as my sole agent, to sell for me, any time within twelve months from this date, lots C and D and the south two feet of lot B, of Cropsey's subdivision of lots 16, 17 and 18 of block fifty-five, city of Lincoln, Nebraska, commonly known as the 'Brownell block'; provided, however, that the net proceeds to me of the sale shall amount to $28,000, and interest thereon at the rate of eight per cent. per annum from October 16, 1902, and, in addition thereto, such sum or sums of money as you may be owing to me at the date of such sale. If said block is not sold within sixty days, I will endeavor to get a loan on it, to the best advantage possible, and whatever I am able to save in interest below

eight per cent., after deducting all costs and expenses incurred in procuring the loan, shall be allowed to you as additional commissions when you consummate the cash sale, in accordance with provisions above. If the net income from rent of said block, after deducting all costs and expenses for taxes, repairs, improvements, insurance or any other expenditures incurred in managing or caring for said property, exceeds the interest on the purchase price of said building, viz., $28,000, I agree to allow you such excess, as a bonus commission, when you become entitled to other commissions by reason of making the sale. If a cash sale is consummated by you, in compliance with the provisions above, I agree to furnish a good, special warranty deed, running to such party or parties as you may designate. (Signed) Edgar C. Smith. Accepted. H. O. Jackson."

On June 27, 1903, Jackson surrendered his agency agreement, writing across the face thereof the following: "My agency for sale of this block, Brownell block, is hereby canceled and terminated," and on the same date he executed and delivered to Smith the following: "Dear Sir: In consideration of your canceling and surrendering to me two promissory notes given to you for money loaned me, one for $1,000, dated January 4, 1901, bearing 8 per cent. and secured by a chattel mortgage on furniture; and one for $2,000, dated October 18, 1902, bearing 8 per cent., and the receipt from you in full for the book account you have against me of $1,044.14 for cash advanced and policies delivered, I hereby relinquish all interest or claim of every nature I hold or ever had in the Brownell Block by reason of the agency you gave me to sell said building, or otherwise, the said agency being hereby canceled and forever terminated from this date. H. O. Jackson. Witness: W. D. Reily."

Another transaction will now have to be explained in order to show the facts relating to the plaintiff's claim to an interest in the Brownell Block. At the time the trade for said block was consummated, Jackson was still

owing the plaintiff $9,000, with interest, on the purchase of the cattle made in 1901, and he procured Jackson to be indicted in the district court for Jasper county, Iowa, on the charge of obtaining property under false pretenses, claiming that Jackson, in order to obtain credit on his purchase of the cattle, represented to him that he was a man of means, while in truth and fact he was wholly insolvent. Jackson was arrested and taken to Iowa, and, on the solicitation of Mrs. Jackson, Smith deposited with the clerk of the court where the indictment was pending $2,500 in cash as bail for Jackson. On the trial Jackson was acquitted of the charge, but in the meantime Harrah had commenced an action against Jackson in the district court for Douglas county, Nebraska, and attached the Brownell Block, and this action was pending at the time of the trial of the criminal case in Iowa. Harrah had also attached or garnisheed the $2,500 bail money deposited in Iowa, claiming that it belonged to Jackson. After Jackson's acquittal on the criminal charge, he had some information leading him to believe that Harrah had endeavored to use unfair means to procure his conviction and he filed a counterclaim in the suit brought against him by Harrah in Douglas county, asking judgment for $25,000 for malicious prosecution, and a large sum for misrepresenting the condition of the cattle purchased. Sometime thereafter this case was settled, Harrah surrendering to Jackson all evidences of indebtedness held against him, and Jackson dismissing his counterclaim for malicious prosecution and other damages claimed. As a part of that settlement Jackson and wife quitclaimed to Harrah any interest held by them in the Brownell Block, Jackson having theretofore made a written statement to the effect that at the time the Brownell Block was conveyed to Smith it was agreed between them that Smith should hold the block as security for the amount owing him by Jackson, and that whenever he could pay him $28,000 he would deed the block to Jackson or to any person that he might designate. The quitclaim deed from

Jackson and wife to Harrah bears date March 14, 1904, and Harrah now claims, and this action is based upon the theory, that Smith took title to the property as security only for $28,000 due him from Jackson and for such other sums as have since been advanced, and that Jackson's quitclaim deed vests in Harrah the right to redeem from that mortgage. There are two letters written by Smith to Jackson during the life of the "agency agreement," which plaintiff insists have a bearing on the case, and which tend to show that Smith held the block, not by absolute title, but by way of security only. One, under date of March 9, 1903, contains the following: "Write me what you have said to Holm. Of course, I want my money out of it, and you want your commission in cash for selling it. Did you intimate to him that there would be any deed given, and what is the least price you think he better take it for? Write the least you would recommend it being sold for." Another, under date of March 11, 1903, contains the following: "This afternoon I received $20,000 on account of loan, and sent $10,000 to Waterbury National Bank that I borrowed of Uncle Mark, and the other I used at bank here. They charged interest from March 2, the date they sent it from Milwaukee, but Ambler had held it waiting to get answers to telegrams from different states, from Hardin & Parsons, and from Des Moines, as to whether any bankruptcy proceedings had been commenced against them or me, and it has taken time; but Ambler says they charge interest from the time the drafts leave their office, so I suppose we will have to stand it. There will be ten days lost interest." This paragraph of the letter refers to a loan made by Smith on the Brownell Block from the Northwestern Life Insurance Company.

These are the principal features in the case, and, together with the oral testimony which will be considered as we proceed, sufficient for understanding our views of the controversy without reciting many immaterial facts and circumstances that have no real bearing on the rights

of the parties. It is insisted by the plaintiff that the documentary evidence is alone sufficient, not only to justify, but to require from the court a holding that Smith's interest in the Brownell Block is that of a mortgagee, and that an account should be taken, and the amount due him from Jackson ascertained, and the plaintiff allowed to redeem. The evidence shows without conflict that at the time Smith took title to the property Jackson was owing him $27,000 or $28,000. Smith's evidence that he valued the block at $28,000, and no more, is not disputed. It is also shown that Jackson placed a much higher value on the property. That Smith desired to realize part, at least, of the amount that Jackson was owing him is evident, and he thought that he might, as he afterwards did, secure a loan upon the property by which he could realize $20,000 or more. Under these circumstances, it is not unreasonable that Smith should insist upon taking absolute title to himself in order that he might effect a loan, or that Jackson should insist that he should have an opportunity to realize from the property something more than the $28,000 which Smith had invested. The reasonable way to accomplish these objects was the one adopted by the parties, giving Jackson a reasonable time in which to make a sale of the property or to repurchase it by paying to Smith the amount he had invested therein, together with interest and any additional sums due from Jackson at the time. Jackson was paying 8 per cent. interest on his loans from Smith, and the agency agreement very fairly provided that, if no sale of the property was made within 60 days, then Smith would endeavor to get a loan on it at the lowest rate of interest possible, and allow Jackson the benefit of any reduced interest on the amount of the loan in case of a sale. The agreement further provided, in the interest of Jackson, that, if the net income from the rent of the block exceeded the interest on the purchase price, Jackson should be allowed the benefit of such excess. If, as contended by Smith, this agreement was purely an agreement for commissions

for the sale of the property, or a conditional sale thereof, it was in all matters as fair to a party occupying the position of Jackson as could be drawn. Realizing to the full extent that, where a transaction of this character leaves it doubtful whether it should be construed as a security or as an absolutely unconditional sale, the debtor should have the benefit of such doubt, there is one circumstance which relieves the transaction of any doubt whatever. When Smith took title to this property, he surrendered to Jackson $28,000 of the indebtedness due him. There is one principle which is axiomatic in the law of mortgages, which is, that the relation of mortgagor and mortgagee cannot exist in the absence of a debt. In *Riley v. Starr*, 48 Neb. 243, it was said: "The true test in determining whether a conveyance absolute in form should be treated as a sale or as a mortgage is whether the relation of the parties toward each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as a security only." In this case the indebtedness did not continue. The evidence without dispute shows that Smith surrendered his entire indebtedness from Jackson on taking this deed. Jackson himself testified that "he surrendered everything to me; Yes, sir, I can't remember the different notes, Mr. Smyth, I can't remember that, but I know it was evidence of indebtedness to the amount of $28,000. He canceled that entire debt against me." He further testified that it was understood between them that, so far as the $28,000 was concerned, he ceased to owe Smith a penny of it and that he had been fully paid.

How it can be claimed that property taken in full payment of a debt should still stand as security for that debt has not been explained to our satisfaction. The letters of Smith above referred to were written while the agency agreement was still in force, and while Jackson had such interest in the property as the agency agreement allowed him. Aside from this, when the agency agreement was made, Mr. Baird, a reputable attorney of Omaha, was

called upon to determine whether Jackson's rights would be fully protected by its terms. He examined it in the presence of the parties, and, after full explanation of their agreement, suggested that the word "sole" be inserted before the word "agent," making Jackson the sole agent to sell the property for one year. His testimony is undisputed that the conversation between the parties at the time was to the effect that Smith was taking title absolute to the property, and that the only interest Jackson had therein was the right to sell within a year under the terms and conditions provided in the agreement. His testimony is corroborated by other witnesses, and is undisputed, except by such inferences as may be drawn from the documents above set out. It is true that in a written statement made prior to his quitclaim deed to Harrah, Jackson had given a different version of the transaction, but his deposition was taken by the plaintiff, and he testified that all of his indebtedness to Smith was surrendered, that he fully understood the transaction, and this is conclusive that he could thereafter have no interest in the property as mortgagor. This disposes of the principal question in the case, and eliminates many of the collateral questions raised in the briefs of the parties.

It being, as we think, fully established by the testimony offered by the plaintiff himself that Jackson had no interest in the property except such as he acquired by what is known as the agency agreement, it follows that, when in June, 1903, he surrendered for a valuable consideration all rights under that agreement, he ceased to have any interest whatever, and the plaintiff's rights, if any he has, depend wholly upon the question of estoppel raised by his pleadings. Relating to this question, it may be said that plaintiff claims that at the time he took his quitclaim deed from Jackson he was led to believe from statements made by the defendant that Jackson was a mortgagor having the right to redeem the property upon payment of whatever might be due to Smith from Jackson. The evidence to support this claim arises principally from the fol-

lowing facts: Some time in May, 1903, the attorneys of Jackson and Harrah met in Omaha to effect a settlement of the litigation there pending between them. They called upon Smith, and wanted to know if he would transfer the block to Mr. Harrah, provided they could fix up a settlement with him regarding Harrah's claim against Jackson. He told them that he would under the agency agreement giving him the right to sell the property. They wanted to know how much approximately there was that Jackson owed outside of the purchase price of the building, and Smith figured up the amount due at the time, but no further proceedings were had in relation to the matter, and Smith that evening went to Colorado. This was on the day that the block took fire, and shortly after his arrival in Colorado Smith received a telegram to the effect that the parties would have nothing further to do with the building. It will be borne in mind that this conversation, which Smith himself relates, was during the life of the agency agreement, and that by the terms of that agreement Smith was legally bound to convey to anyone whom Jackson might designate when the terms thereof were complied with. Some other conversations are referred to in which Smith manifested a willingness to convey the block upon payment of the amount invested therein and the further sums due from Jackson, but these were all during the life of the agency agreement, and his offers were nothing more nor less than an expressed willingness to comply therewith. Smith was a witness for the state in the criminal action brought against Jackson in Iowa. On cross examination he was asked the following question: "Mr. Smith, it was the understanding between you and Mr. Jackson, wasn't it, at the time the title of this building or the building itself was transferred to you, that you took it to secure your indebtedness, and that you were willing to give him the difference between what your indebtedness was and whatever sum he might sell the building for?" He answered: "Yes, sir." It will be observed that the question embraces other elements than that of his holding

title to the building as security for Jackson's debt, and, while his answer might very well be construed to mean that he took title absolute to secure himself from loss against Jackson's indebtedness, still, if it be construed that he held as mortgagee only, his direct examination was plain and explicit to the effect that he held by absolute title and claimed to be absolute owner. Harrah himself testified as follows: "Q. So that your final interview with him in your brother's office with respect to this matter satisfied you that he was the absolute and unqualified owner of this property? A. Yes, sir. Q. That Jackson had no interest in it at all? A. None whatever. Q. And you believed that fully and unqualifiedly at that time, didn't you? A. Yes, sir; I did." We have searched the record in vain for any fact or circumstance which would justify Mr. Harrah in changing the opinion which he says he had regarding the ownership of the block at the time he had the conversation with Smith referred to in the questions quoted, and we are unable to find anything in the record upon which an estoppel to Smith's present claim of ownership can be predicated. In conclusion, we might say that it is only the zeal and ability of the plaintiff's counsel in the presentation of the case that would cast even a doubt upon Smith's absolute title and his entire fairness in all the transactions concerning this case.

To our minds the facts are so strongly in favor of the decree of the district court that we have no hesitation whatever in recommending its affirmance.

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

AFFIRMED.

O. C. TARPENNING, APPELLANT, V. J. W. KNAPP, APPELLEE.

FILED MAY 10, 1907. No. 14,804.

1. **Appeal: INSTRUCTIONS: REVIEW.** Errors alleged in instructions to the jury must be called to the attention of the trial court in the motion for a new trial before they will be considered by this court.

2. ———: **EVIDENCE: REVIEW.** This court will not consider an assignment that the trial court erred in receiving evidence over the objection of the party. Our attention must be called to the specific evidence against which the objection is urged.

APPEAL from the district court for Saunders county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

O. C. Tarpenning, pro se.

Simpson & Good, contra.

DUFFIE, C.

Tarpenning brought this action against Knapp to recover $250 commission on a sale of lands. The answer set up two defenses: First, that the contract of agency was not signed by Tarpenning until after January 1, 1906; and, second, that defendant himself made the sale in December, 1905. The jury returned a verdict for the defendant, upon which judgment was entered, and, the motion for a new trial being overruled, the plaintiff has appealed.

There is plenty of evidence in the record to show that Tarpenning did not sign his contract of agency until about the time of commencing his action, and a month or more after the defendant had himself sold his farm. The court instructed the jury to the effect that, under our statute, the plaintiff would not be entitled to recover unless they found that such contract was signed by both the parties prior to the time that the sale was made by the defendant, and, also, that to entitle him to recover they must find that the sale was brought about by his efforts. In

the motion for a new trial no exceptions were taken to any of the instructions, and errors therein, if any there be, cannot be considered.

Error is also predicated on the action of the court in allowing the purchaser to testify that the efforts of the agent had no influence in inducing him to purchase the farm. The assignment of errors in this court is general and to the effect that the court erred in receiving evidence offered by the defendant over plaintiff's objection. This is not sufficient. Our uniform holding has been that the assignment must point out and specify the particular evidence of which complaint is made before we will consider it.

The judgment being fully supported by the evidence we recommend an affirmance thereof.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

EDGAR JONES, APPELLANT, V. JAMES G. JONES, APPELLEE.

FILED MAY 10, 1907. No. 14,814.

Evidence examined, and *held* not sufficient to sustain a verdict of no cause of action.

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

W. P. McCreary, for appellant.

R. A. Batty, contra.

ALBERT, C.

The plaintiff filed a petition stating two causes of action. The first is for a remainder of $100 of certain money collected by the defendant on a note for the plain-

tiff. The second is for a remainder of $450 alleged to be due the plaintiff for services rendered by him as attorney for the defendant. The answer impliedly admits that the defendant collected $250 on the note for the plaintiff, and also admits that the plaintiff had rendered certain services as attorney for the defendant, but alleges that such services were rendered upon an express contract, whereby the compensation was fixed at $100. The defendant also pleads payment in full, and sets forth the amounts paid and certain items of account against the plaintiff, amounting to $359.10, leaving a remainder due the defendant of $9.10, for which he asks judgment against the plaintiff. The reply is a general denial. The jury found no cause of action, and judgment went accordingly. The plaintiff appeals.

The plaintiff contends that the verdict is not sustained by sufficient evidence. On the trial of the cause one item of credit, amounting to $13.50, charged against the plaintiff in defendant's answer, was voluntarily stricken out by the defendant. As he had only claimed a remainder of $9.10 due him from the plaintiff, it is quite clear that, with the $13.50 item stricken, the pleadings show a remainder due the plaintiff of $4.40, and the evidence adduced bearing on the issues show that the plaintiff was entitled to recover at least that amount. It follows, therefore, that the verdict is not sustained by the pleadings or the evidence. We have not overlooked certain evidence tending to show a settlement, which in a proper case might support a verdict of no cause of action. But no settlement was pleaded, and such evidence, therefore, cannot be held to warrant a verdict against the plaintiff, in the face of the defendant's solemn admission of the record that he is indebted to him in a certain amount.

The amount involved is small, and for that reason it is with reluctance that we recommend a reversal of the judgment of the district court.

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.

MATT SCHULENBERG V. STATE OF NEBRASKA.

FILED MAY 10, 1907. No. 14,720.

Criminal Law: TRIAL. In a prosecution for unlawfully keeping intoxicating liquor for sale without a license, it is not error for the jury to taste of the liquors seized and produced in evidence at the trial, for the purpose of aiding in the determination of the question whether or not the liquor is intoxicating.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Reavis & Reavis, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

JACKSON, C.

The defendant was found guilty of unlawfully keeping intoxicating liquors for the purpose of sale without license. He presents the case in this court for review by petition in error.

The principal and important question arises out of the assumption of counsel on either side that the jury were required to taste of certain liquors produced in evidence on behalf of the state. The record in that respect presents this condition: A state's witness was being examined by the prosecution. A portion of the contents of a bottle in evidence was poured into a glass, and the witness was required to taste it, and this question was asked: "Q. Is that beer? A. I couldn't say whether that is beer or not.

By counsel for the prosecution: Let the jury sample it. (The bottle and contents and glass and contents are handed to the jury.) Objected to as irrelevant, incompetent, and immaterial, and not a proper way to prove intoxicating liquors. Overruled. Exception." It will thus be seen that it does not affirmatively appear that any of the jurors tasted of the liquor. If it is a reasonable inference from the record that they did so, we are of the opinion that it was not error.

The authorities are somewhat in conflict as to the propriety of permitting jurors to taste of liquor in prosecutions of this character, and the question has never before been in this court for determination. The appellate court of Kansas, in *State v. Lindgrove,* 1 Kan. App. 51, 41 Pac. 689, held that it was error to permit jurors to taste of liquor produced in evidence. The reasoning seems to be that the jurors thus obtained private grounds of belief, and that after tasting of the liquor they were properly witnesses in the case and disqualified as jurors. We are unable to concur in that reasoning. If a belief founded on the evidence during the progress of a trial can be held to be a private ground of information, then it may be so held because of a belief founded on any class of evidence. In *Commonwealth v. Brelsford,* 161 Mass. 61, it is said: "There are grave reasons against giving to a jury liquor to drink for the purpose of determining whether it is or is not intoxicating." We entirely agree with the sentiment there expressed where such course is taken by direction of the court, express or implied. The tasting should not be compulsory. A case in point is that of *People v. Kinney,* 124 Mich. 486, where it was held not to be error to permit the jury to taste of liquor where the question was whether it was intoxicating. No reason is given to sustain the rule, but we think it is supported both by reason and common sense. In the determination of a disputed question of fact, there is called in requisition perhaps all the senses of jurors, which they are permitted to freely use, and where, in prosecutions of this

character, liquor is produced in evidence, the jury should be permitted to determine in their own way, and by the exercise of such of their senses as they choose to employ, whether it is intoxicating or not.

Another question discussed relates to the admission in evidence of the affidavit upon which the search warrant was issued at the inception of the prosecution, the affidavit having been admitted over the objection of the defendant. If the court erred in that respect, we are not at liberty to consider it, for the reason that the error is not assigned in the petition.

The only other question discussed is the claim of error in the giving of the following instruction: "The jury are further instructed that whiskey and beer are intoxicating liquors within the meaning of the statute, and if you find from the evidence, beyond a reasonable doubt, that the defendant was on or about the 2d day of September, 1905, in Richardson county, Nebraska, keeping in his possession in the building described in the information in this case either beer or whiskey, with the intention of disposing of the same without a license, either for himself or jointly with others, known as a commercial club, then, and in that case, you will find the defendant guilty as charged in the information." The objection urged against the instruction lies in the use of the words "disposing of the same without a license." It is said that one may be in possession of intoxicating liquors with the purpose of disposing of them without in any manner violating the provisions of the statute, although he has no license to sell. That is doubtless true, but there is abundant evidence in the record to sustain the conviction on the charge of keeping intoxicating liquors for sale without license, and there was no evidence of any purpose to dispose of the liquors in any lawful manner. Under such circumstances it was not error to instruct the jury in the language used in the statute, and the error in the instruction, if any, was without prejudice.

We find no reversible error, and recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

ROBERT C. GLENN, APPELLANT, V. ARVILLA A. GLENN ET AL., APPELLANTS; STATE BANK OF DU BOIS ET AL., APPELLEES.

FILED MAY 10, 1907. NO. 14,741.

1. **Judgment: LIENS: PRIORITY.** A judgment creditor who fails to have execution issued and levied before the expiration of five years next after the rendition of the judgment loses the priority of his lien as against other *bona fide* judgment creditors or purchasers.
2. **———: PURCHASER.** A mortgagee of real estate is a purchaser within the meaning of the provisions of section 509 of the code.

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

Reavis & Reavis, for appellants.

A. J. Weaver, E. Falloon, John Gagnon and *F. Martin, contra.*

JACKSON, C.

The action involves the priority of liens on real estate. The plaintiff claims under four mortgages, one recorded January 25, 1896, a second March 9, 1899, a third October 23, 1901, and a fourth on September 12, 1902. One defendant, the State Bank of Du Bois, claims under a judgment obtained in the county court, a transcript of which was filed in the district court on October 23, 1894. The defendants Ratekin and Musselman claim under a judgment rendered in justice court, a transcript of which was filed in the district court December 5, 1899; the de-

fendant Lore claims under a judgment rendered in the county court and transcript filed in the district court February 6, 1895. Execution was issued on the judgment in favor of the State Bank of Du Bois on September 29, 1899, and in February, May, and June, 1901, all of which were returned unsatisfied. On December 3, 1901, the bank caused an execution to issue on its judgment, and had the same levied on a portion of the real estate involved. Thereupon the plaintiff instituted an action in the district court for the purpose of enjoining the sale under the execution issued by the bank. The petition in that action, after reciting the plaintiff's interest in the property, the rendition of the judgment in favor of the bank, and the filing of transcript in the district court, charged that the judgment had become dormant because no execution was issued and levied for more than five years from the date of the judgment, and that the sale under the execution would cloud the title covered by the plaintiff's mortgage. A temporary injunction was obtained restraining the sale. The bank answered in that action, admitting the recovery of the judgment and the filing of the transcript; further admitting the issuance of the execution of December 3, 1901, and the levy thereunder; and alleged affirmatively the issuance of executions as of the dates already stated, and the return thereof unsatisfied. On May 11, 1904, a decree was entered therein dissolving the restraining order issued at the commencement of the action, and finding that the judgment was not dormant, but was a lien on the real estate prior to that of the plaintiff's mortgage. There was involved in that proceeding at least two of the mortgages under which the plaintiff now claims. The decree in the injunction proceeding became absolute by reason of a failure to appeal. Executions were issued on the judgment under which the defendants Ratekin and Musselman claim on May 20, 1901, and May 3, 1905, and returned without levy, wholly unsatisfied. Executions were also issued and returned without levy on the judgment under

which the defendant Lore claims, in February, 1895, April, 1899, and December, 1901. The judgment debtor, who was the mortgagor as well, died prior to the commencement of this action. His widow and daughter, an only child, survive. This action was instituted April 14, 1905. The plaintiff now takes the same ground with reference to all of the judgments as that taken in the injunction proceeding against the bank, that is, that the judgments are dormant, or have at least lost their priority over the mortgage liens, by reason of the failure to cause executions to be issued and levied within five years from the date of the judgments. The widow, who claims a homestead right and dower interest in the real estate, and the daughter, who claims title by descent, take the same ground. The decree of the district court sustained the contention of the judgment creditors and revived the judgments as against the representatives of the deceased, the priority of all liens involved being determined and established from the dates of the several filings of the mortgages and judgment liens, the judgment liens being deferred to the homestead and dower rights of the widow. The plaintiff and the widow and daughter appeal.

The claim of appellants is that, in order to preserve the priority of a judgment lien over another *bona fide* judgment creditor or purchaser, the issuance of an execution must be accompanied by an actual levy. Two sections of the code are involved in the inquiry. In section 482 it is provided: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." That portion of section 509 involved reads as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been

taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other *bona fide* judgment creditor (or purchaser)." In *Dorr v. Meyer,* 51 Neb. 94, it was held that a subsequent mortgagee of real estate is a subsequent purchaser thereof within the meaning of section 16, ch. 73, Comp. St. 1903, one of the provisions of the recording act. Under the rule there announced it would appear that a mortgagee should be held to be a purchaser within the meaning of the provisions of section 509 of the code. Unaided by any previous construction of sections 482 and 509, and giving to the language employed its ordinary meaning, it would seem that as against the judgment debtor, the issuance and return of an execution without levy is sufficient to prevent the judgment from becoming dormant, but, in order to preserve the priority of the judgment lien, it is necessary that an actual levy should be made. Section 509, as it is found in the Revised Statutes of 1866, provided: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall have been taken out and levied, before the expiration of one year next after its rendition, shall operate as a lien upon the estate of any debtor to the prejudice of any other *bona fide* judgment creditor." Construing this provision in *Miller v. Finn,* 1 Neb. 254, 294, it was held: "This section of the code is explicit in itself, and, as regards a judgment on which execution has not been taken out and levied within one year next after its rendition, it is conclusive upon the creditor that his judgment shall not operate as a lien on the estate of the debtor to the prejudice of any other *bona fide* judgment creditor. The lien is effectually dead and gone, so far as respects the rights and interests of such other *bona fide* judgment creditor, and a levy and sale of the debtor's lands upon the judgment of such other *bona fide* judgment creditor passes the lands absolved and wholly discharged from the first lien." In the code of 1873 this provision is found amended to extend the limitation to five years, and the

word "preference" is contained in the section in lieu of the word "prejudice," as it formerly existed. In 1891 this section was further amended to include purchasers. In *Godman v. Boggs,* 12 Neb. 13, it was determined that an execution issued by a clerk of the district court upon a transcript of a judgment of a justice of the peace or county judge and delivered to the sheriff, and by him levied upon real estate, and afterwards, before the sale, returned unsatisfied by order of the creditor in execution, would prevent the judgment becoming dormant, and that in such case the execution had been sued out within the meaning of section 482 and the lien of the judgment continued. To the same effect is *Reynolds v. Cobb,* 15 Neb. 378.

The force of what appears to be the plain meaning of section 509 is somewhat weakened by what is said in *Barker v. Potter,* 55 Neb. 25. From the statement of facts in that case it appears that Kate Bird Curtis became the assignee of certain judgments rendered in the district court for Douglas county in 1888; that she had not suffered the judgments to become dormant (presumably because executions were issued and returned, although it is not so stated); that no actual levy was made until February 1, 1894, when she caused executions to issue and a levy to be made upon certain real estate, which was sold under the levy and bid in by her. On May 4, 1889, George A. Hoagland recovered judgment against the same debtor in the district court, and on May 3, 1894, execution issued on this judgment and was levied on the property claimed by Kate Bird Curtis by virtue of her purchase at sheriff's sale. It will be observed that the levy of the execution on the judgments held by Kate Bird Curtis was not made within five years from the rendition of the judgments. The learned commissioner who wrote the opinion in that case, in sustaining the title of Kate Bird Curtis and disposing of the claim of Hoagland made under the provisions of section 509 of the code, said: "Originally this statute contained the word 'prejudice' where now occurs the

word 'preference,' and it may have been by inadvertence that the substitution of the one word for the other was brought about, but we find the word 'preference' in the statute, and cannot ignore it. We cannot endow the word 'preference' with the meaning which inheres in the word 'prejudice,' merely that such forced construction may restrict the operation of the provisions of section 477. The conclusion which we reach on this branch of the case is that the judgments held by Kate Bird Curtiss, and the execution sales thereunder, entitle her to a priority over George A. Hoagland." This opinion is entitled to respectful consideration, but I find myself unable to agree with the conclusion there reached. Preference implies precedence or priority. A judgment lien is created by statute, and is destroyed by statute if its provisions requiring the taking out of an execution are not complied with. *Halmes v. Dovey,* 64 Neb. 122.

Section 477 of the code provides: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered." But the lien is not made perpetual, and is subject to the limitations contained in the code. The legislature, having provided by law when and how a judgment may become a lien upon real estate, might well provide how the priority of such liens could be continued, and offer some inducement to diligent creditors. This appears to have been accomplished by the provisions of section 509 of the code; and, giving effect to that section, we hold that the priority of a judgment lien may be continued as against other *bona fide* judgment creditors and purchasers only by the issuance of an execution and an actual levy within the time limited by statute. The judgment creditors in this case, however, do not all stand upon the same footing in that respect. The priority of the lien held by the State Bank of Du Bois over two of the mortgages in suit was determined by the decree of May 11, 1904, and has become *res judicata.* The judgment liens

in suit should be held to be subordinate to the liens of the plaintiff's mortgages, except as above indicated, but effective as against the title of the daughter of the decedent.

It is recommended that the decree of the district court be reversed and the cause remanded, with instructions to enter a decree in conformity with the conclusion here reached.

DUFFIE and ALBERT, 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 instructions to enter a decree in conformity with the conclusion here reached.

REVERSED.

CITY OF LINCOLN, APPELLANT, V. EDWARD T. MCLAUGHLIN ET AL., APPELLEES.

FILED MAY 10, 1908. No. 14,799.

1. **Cities: STREETS: LIMITATIONS.** The general statute of limitations has no application to an action brought by a city, town or village for the recovery of the title or possession of a public road, street, alley, or other public ground.
2. **Estoppel.** In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged.

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

E. C. Strode and *Dennis J. Flaherty,* for appellant.

T. J. Doyle, contra.

JACKSON, C.

In 1888 Chase platted an addition to the city of Lincoln, known as "Chase's Second Subdivision." The plat covered an extension of Washington street. J. C. Williams purchased lots 7 and 8 in block 1 of this subdivision in 1892, and in 1893 erected a dwelling house thereon, which by mistake was partially extended into the street. A mortgage given by Williams and his wife was foreclosed on these lots, and a sheriff's deed issued to Francis M. Metcalf and Betsy M. Doubleday on August 9, 1899. Edward T. McLaughlin acquired title through the grantees at the sheriff's sale on May 25, 1903. This action was instituted by the city of Lincoln in January, 1905, to recover the possession of that portion of the street covered by the dwelling house erected by Williams. The answer denies that any part of the dwelling is in a street of the city; alleges that the house was erected by Williams where it now stands, with the consent and by the direction of the city of Lincoln; and contains a plea of adverse possession. The defendants had judgment, and the city appeals.

The principal contention of the defendants is that the city is equitably estopped from now enforcing its right to possession. The doctrine of estoppel, however, has no application under the facts presented by the record. There is an entire lack of evidence that the city authorities knew that the house was being erected, or any part of the street occupied by Williams for private purposes, until after the dwelling was completed. In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were not only unknown to the party urging it, but that they were known to the party against whom the estoppel is urged. *Nash v. Baker,* 40 Neb. 294. The general statute of limitations does not run against the right of a city, town, or village to maintain an action for the recovery of the title or possession to a public road, street, alley, or other public grounds. Code, sec. 6.

The judgment finds no support in the record, and we recommend that it 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 judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

PETER G. COX, APPELLANT, V. PETER ANDERSON, SHERIFF, ET AL., APPELLEES.

FILED MAY 10, 1907. No. 14,802.

Injunction: JUDGMENT. Injunction will not lie to restrain the enforcement of a judgment obtained in an action at law, where there is no claim of want of jurisdiction or of fraud or mistake, and where the situation of the parties remains unchanged.

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

A. H. Tingle and *D. A. Harrington,* for appellant.

N. D. Burch and *M. F. Harrington, contra.*

JACKSON, C.

On June 13, 1902, the land involved was covered by the homestead entry of Peter G. Cox, and on that date Levi P. Wells instituted before the register and receiver of the local land office at O'Neill, Nebraska, a contest against this entry. Proceedings were had resulting in the cancelation of the entry, and a homestead entry by the successful contestant. Thereafter, in an action for the forcible detention of the premises, Wells had judgment in the district court for possession. A writ of restitution

was issued, but before service of the writ Cox obtained, in this action, a temporary injunction restraining the sheriff from proceeding under the writ. On the final hearing in the district court the temporary order of injunction was dissolved, and the action dismissed. The plaintiff appeals.

The ground upon which the injunction was asked, and upon which it is now sought to sustain it, is that, after Wells secured the cancelation of the homestead entry made by Cox and filed on the land in his own behalf, Cox in turn contested the Wells entry, and that the latter contest was pending at the time the judgment of restitution was rendered in the state court, and is still pending. It is alleged in the petition that the contest was put upon the ground that Wells was not qualified to make a homestead entry, and that the department of the interior had so held, but the proof does not sustain these allegations. It seems that the last contest was denied because the allegations in the affidavit of contest were insufficient in law. Upon appeal to the department of the interior, the affidavit was held sufficient, and the judgment of dismissal reversed. The contest was again dismissed by the register and receiver of the local land office for want of prosecution, and, if pending at all, it is on appeal from the last order of dismissal.

But, independently of these considerations, the judgment of the district court was right. This is a collateral attack on the judgment of restitution. There is no charge in the petition of a lack of jurisdiction in the forcible detention action. There are no allegations of fraud, accident, surprise, or mistake. The grounds upon which it is now sought to maintain an injunction, if available at all, were known to the appellant when the detention action was commenced, and should have been pleaded as a defense in that action. A party to an action cannot be permitted to so assail a judgment rendered therein. *Bryant v. Estabrook*, 16 Neb. 217; *Hilton v. Bachman*, 24 Neb. 490; *Cizek v. Cizek*, 69 Neb. 797; *City of Ft. Pierre v. Hall*, 19 S. Dak. 663, 104 N. W. 470.

The order of dismissal should 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.

STATE, EX REL. JAMES P. ELLIS ET AL., RELATORS, V. LEONARD D. SWITZER ET AL., RESPONDENTS.

FILED MAY 10, 1907. No. 14,944.

1. **Mandamus**: COUNTIES: BRIDGE REPAIRS: EVIDENCE: PRESUMPTIONS. Where a mandamus is sought to compel the commissioners of a county to repair a bridge, and it becomes necessary for the court to ascertain the amount in the treasury and available for such purpose, and it appears that the county has, without advertising for bids and letting contracts to the lowest bidder, incurred liabilities amounting to $4,000 for sundry repairs, the items of which are not disclosed by the evidence, the court will not assume, in the absence of evidence to that effect, that any one contract was for more than $100 and therefore in violation of section 83, ch. 78, Comp. St. 1903.

2. ———: BRIDGE REPAIRS: DISCRETION OF COUNTY COMMISSIONERS. In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion.

ORIGINAL application for a writ of mandamus to compel respondents, as county commissioners, to repair a bridge. *Writ denied and action dismissed.*

G. W. Wertz, for relators.

C. A. Rawls, Byron Clark and *E. R. Ringo, contra.*

CALKINS, C.

This was an original application by the relators, who are citizens and taxpayers of Cass county, for a mandamus to

compel the respondents, who are the county commissioners of Cass and Sarpy counties, to repair a bridge across the Platte river near Lousiville, in Cass county, where the Platte river forms the boundary between the two counties named. An alternative writ was issued November 7, 1906, returnable January 7, 1907; and, the respondents having answered, the cause is now submitted upon the pleadings, an agreed statement of facts, and the depositions of the respondents, commissioners of Sarpy county.

The bridge in question consists of 132 spans of 22 feet each. It was built in 1890, at a cost of $10,000, defrayed by bonds voted by Louisville precinct in Cass county; and has since been kept in repair, when in use, by the county of Cass, and citizens of Louisville precinct. It was extensively repaired in 1900, and was partially destroyed in 1903, and again in March, 1905, at which time some 30 spans were carried away. Since that time it has been out of use. On August 15, 1905, the relators Richey and Panokin appeared before the commissioners of Cass county, and represented that the repairs of said bridge could be made for not to exceed $5,000; and said commissioners thereupon resolved that an emergency existed for the repair of said bridge, and invited the commissioners of Sarpy county to join them in the repair of the same, notifying them that if they failed to do so the county of Cass would proceed to make such repairs and collect from Sarpy county its just proportion of the cost thereof. The commissioners of Sarpy county did not reply to this notice until June 18, 1906, at which time they refused to join in making such repairs. At about this time the relators Richey and Panokin examined the plans and specifications for the repairs of said bridge, which they approved, and which were then adopted by the commissioners of Cass county, who immediately ordered the clerk to advertise for bids for the construction thereof. In response to such advertisements three bids were received, and opened July 19, 1906, the lowest one aggregating $14,000. Thereupon the commissioners rejected all bids on the

ground that they did not feel justified in expending that amount of money at that time. On November 5, and after they had received notice that the alternative writ issued herein would be applied for, they adopted a resolution reciting that the resolution above referred to had been passed under the belief that there would be sufficient funds in the treasury of Cass county which might be lawfully used for that purpose; that since the passage of said resolution it had been ascertained that the cost of such repairs would far exceed the estimate made at the time of passing said resolution; that owing to rains and washouts throughout the county there were many bridges needing repairs, which were of greater public utility than the Louisville bridge; that after paying for bridges already contracted for and those needing repairs there would not be sufficient funds to repair the Louisville bridge; and resolving that the action theretofore taken be rescinded and annulled.

It appears from the stipulation of facts that on January 1, 1907, there was in the Cass county bridge fund from the taxes of 1905 the sum of $466. The total levy for 1906 was $18,245.16, of which $1,416.15 was railroad tax enjoined, leaving 85 per cent. of the remainder, or the sum of $14,304.86. But it is agreed that there were orders out for the construction of bridges amounting to the sum of $4,000; and if we deduct the latter sum it leaves for the construction and repair of bridges until the next levy shall become available only the sum of $10,304.86, which added to the $466 on hand, makes a total of $10,770.86. In Sarpy county the total uncollected levy for the bridge fund for 1906 on January 7 was $10,072.06; but, after deducting 15 per cent. and the amount of railroad tax enjoined, there remains but $6,836.63, to which must be added the amount of cash on hand at that date, $1,187.30, making a total of $8,023.93. Against this there were claims allowed $1,056.42, registered warrants $1,975.19, and taxes paid under protest $334.64, or a total of $3,366.25, which, deducted from the sum otherwise available,

leaves a balance of $4,657.68. On October 11, 1906, the commissioners had advertised for bids for a steel bridge, and let the contract therefor November 17 at the price of $2,500, and if we deduct this latter sum it leaves but $2,157.68 available.

It is stipulated that Charles A. Richey, a financially responsible citizen of Cass county, states under oath that he is ready to enter into a contract, with sufficient bonds to repair the bridge according to the original plans for $7,600; but that "in the judgment of the respondents" the bridge as originally constructed is not a practical bridge, and that it would be a waste of public money to reconstruct it according to the original plans; that it should be made stronger in several respects, and as good as required by the plans and specifications under which the bids of July 19, 1906, were made at a necessary cost of $14,000. It is further stipulated that there are nearly 1,600 bridges in Cass county, more than 700 of which are 16 feet or more in length; that there never had been less than 40 bridges in need of repair and reconstruction each and every year, and that in years of heavy rainfall this number is greatly increased; that the county has never had sufficient funds to do all the work necessary in repairing and rebuilding bridges in any one year; that at the date of the hearing there were, in the "judgment" and according to the "conclusions" of the commissioners of Cass county, 8 bridges in need of immediate repair, which would cost $7,300, all of which bridges were of greater utility and accommodated more travel than the Louisville bridge, and should, in the opinion of the commissioners, be repaired in preference thereto.

The evidence of the commissioners of Sarpy county shows that there are other bridges in said county needing repairs, but it is so indefinite as to the extent and costs of such repairs that it is of little value.

1. The agreed statement of facts gives the state of the bridge funds in the respective counties in October and

November, 1906, but is lacking in the amount of liabilities incurred at those dates, and we have taken their status at the date of the return of the writ. There does not seem to have been any unusual expenditure made or incurred between the application and the return of the writ, unless it be the contract for the steel bridge by Sarpy county. We do not think the issuance of an alternative writ should prevent the ordinary and usual transaction of the business of the county board; and it appears that only $838.55 was contracted by Cass county between the date of the notice of the application for the writ and the date of the return, which cannot materially affect their ability to comply with any judgment we might make.

It is contended by the relator that the liabilities incurred by the county of Cass, amounting to the sum of $4,000, which the respondents seek to deduct from the amount otherwise available, was incurred in violation of section 83, ch. 78, Comp. St. 1905, and should not be considered. This statute provides for the letting to the lowest bidder of all contracts in excess of $100, but the stipulation fails to disclose the amount of any of the items making up the sum of $4,000, and we cannot presume that any one of them was in excess of $100. Even if this were not so, it was held in *Cass County v. Sarpy County,* 66 Neb. 476, that one who furnishes labor and materials for the creation of a public work in good faith, but in the absence of a contract such as is required by the statute, is entitled to recover their reasonable value, and we cannot disregard this liability in estimating the funds available in the bridge fund of Cass county.

2. The duty of Cass and Sarpy counties to maintain this bridge is enjoined by sections 87, 88, 89 and 90, ch. 78, Comp. St. 1905, and has been judicially determined in the cases which have been before this court. In *Dutton v. State,* 42 Neb. 804, it was held that the bridge is the property of the public and a part of the public highways of the state, and that it is the duty of the commissioners of Cass county to keep the south half thereof in repair. In

State v. Commissioners, 58 Neb. 244, this court affirmed a judgment of the district court for Cass county denying a mandamus to compel the commissioners of Cass county to repair the north half thereof. In *Cass County v. Sarpy County,* 63 Neb. 813, and 66 Neb. 473, 476, the liability of Sarpy county to Cass county for repairs was determined; while in *Iske v. State,* 72 Neb. 78, it was held that mandamus would lie to compel Sarpy county, when notified so to do by Cass county, to either join in a contract to make repairs, or to unequivocally refuse so to do. From these cases, and the sections of the statute above referred to, it seems there is no doubt that it is the duty of the respondents to keep this bridge in repair, if they have funds at their disposal reasonably available for that purpose. The duty to repair involves the duty to determine and specify the character of the repairs within the limits of their reasonable discretion. It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. Dillon, Municipal Corporations (4th ed.), sec. 836. Such was the rule adopted in *State v. Kearney County,* 12 Neb. 6, and it was there applied in a case where the commissioners had not sufficient funds to make all the repairs demanded. Such, it seems to us, must be the rule.

The county board is forbidden by statutory provisions highly penal from incurring liabilities beyond its legal levy and lawful appropriation, and it must often happen that that body is forced to choose between objects of expenditure both of which are necessary. When they build or repair a bridge, the commissioners must necessarily decide upon the material to be used and the character and design of the structure. If from their experience they are convinced that the original design of a structure is faulty, and that it would be a waste of public money to reconstruct it according to the original plan, it is their duty to

make such changes as in their best judgment are necessary under all the circumstances. In this case it appears that the commissioners of Cass county had on hand on January 7, 1907, between $10,000 and $11,000 in the bridge fund, to be used in making such repairs as were then necessary, and as would likely develop in the six months to elapse before the next levy should become available. The commissioners, being residents of Cass county, would have a personal knowledge of local conditions, the character and amount of travel upon the different highways, and the relative importance of the different bridges. Having in charge nearly 1,600 bridges, they should acquire by experience the capacity to judge of the merits of different plans and methods. With these opportunities, they have decided: First, that it would be a waste of public money to rebuild this bridge according to the original plan, and that the least price for which it can be properly constructed is $14,000; second, that there are 8 other bridges in need of immediate repair, which will cost $7,300; and, third, that the bridges last above mentioned are of greater utility to the taxpayers of the county of Cass than the bridge in question, and that the travel over them is greater than over the Louisville bridge.

The form of the stipulation of facts precludes the relators from asserting that these were not the honest conclusions of the commissioners. Paragraph 14 of the statement stipulates that in the judgment of the respondents the bridge as heretofore constructed was not a practical bridge, while paragraph 25 of the statement stipulates that paragraph 8 of the answer states the judgment and conclusions of the commissioners, and paragraph 8 of the answer covers the second and third conclusions above stated. The word "judgment" is here used as synonymous with "opinion" and "belief." When the stipulation agrees that it is their opinion, it necessarily follows that it must be their real opinion, and therefore their honest conviction. But there is nothing in the record to impeach the soundness of their conclusions. There is no evidence

offered from which we would be justified in arriving at a different conclusion. If it is our duty to determine whether the bridge should be repaired according to the original plans or according to the specifications approved by the commissioners of Cass county for that purpose, we are without any data upon which to base our decision. If it is our duty to decide whether the other bridges are in need of immediate repair, there is nothing before us to enable us to form a correct opinion. Or, again, if it is our duty to decide whether the 8 bridges are of greater utility than the Louisville bridge, the facts are not before us.

The decision of the county commissioners of Cass county above referred to being made within the limits of their discretion, and not impeached for bad faith nor any error shown therein, it follows that they would not have enough money left, after repairing the 8 bridges, to repair one-half of the Louisville bridge according to the plans adopted by them and approved by the relator Richey at the time, and scarcely enough to repair one-half of the same according to the original plan and as proposed by Mr. Richey. For us to say that the commissioners must repair the bridge according to the latter plan would be for us to decide if such a course was a wise expenditure of the public funds, or whether ordinary prudence and economy demanded that the work be done according to the plans adopted by the commissioners. This we do not conceive it our duty to do; and, if it were, we are without any evidence upon which to determine the question.

So far as Sarpy county is concerned, its commissioners have shown a determination to avoid, if possible, any expenditure upon this bridge. They evidently have not the funds available to pay one-half of $14,000 for the repair of the bridge; and whether they have sufficient to pay one-half of $7,600 depends upon whether the liabilities for the steel bridge advertised for October 11 and contracted for November 17, 1907, should be deducted. In view of the conclusion at which we have arrived concerning the decis-

ion of the commissioners of Cass county, it is unnecessary for us to pass upon this question.

It follows that the peremptory writ must be denied.

By the Court: For the foregoing reasons, the writ is denied and the case dismissed.

WRIT DENIED.

JAMES J. BUCKLEY V. STATE OF NEBRASKA.

FILED MAY 24, 1907. No. 14,870.

1. Criminal Law: EVIDENCE. The positive testimony of one apparently credible witness identifying the defendant as the perpetrator of the crime may be sufficient to support a conviction, when the defendant is shown by other witnesses to have been in the vicinity of the commission of the crime at the time it was committed, and there is no explanation of his presence there, and the *corpus delicti* is clearly proved.

2. Robbery: PENALTY. The statute defining the crime of robbery gives the court a large discretion in fixing the punishment. This discretion is to be exercised according to the aggravation of the crime committed. It was not contemplated by the legislature that the extreme penalty allowed by the statute should be imposed for the first offense, when any mitigating circumstances are shown in the evidence.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed as modified.*

John W. Cooper and *A. G. Wolfenbarger,* for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin and *A. G. Murdock, contra.*

SEDGWICK, C. J.

The defendant in the district court for Douglas county was convicted of the crime of robbery as defined in section 13 of the criminal code. He complains of two principal matters in which he contends that the judgment of the trial

court was erroneous. First: That the verdict against him is not supported by the evidence; and, second, that his punishment is excessive.

1. The first contention is based mainly upon the lack of evidence, as he thinks, to identify him as the person who committed the crime. On the evening of November 9, 1905, Mr. Healey was alone in his saloon in South Omaha, when two men entered. One of them presented a revolver and commanded Mr. Healey to hold up his hands. Mr. Healey was overawed and at once complied, and, while he was so under the control of the man with the revolver, the other stranger took the money from the register, amounting to about $9, and, after warning Mr. Healey that if he gave alarm within ten minutes he would be killed, they left with the money they had secured. Mr. Healey identified the defendant as the man who threatened him with the revolver. He is very positive in this testimony, and appears, so far as the evidence contained in the record shows, to have been a fair and intelligent witness. He is to some extent supported in this identification by several witnesses, one of whom testifies that he left Mr. Healey's saloon a few minutes before the time that Mr. Healey testifies that the robbers entered. This witness testifies that, as he went out of the door of the saloon, he passed two men whom he describes substantially as the two men are described by Mr. Healey, and he positively identified this defendant as one of these two men. There was an electric street light in front of the saloon door, from 50 to 75 feet distant, and the witness obtained a fair view of the personal appearance and the countenance of the man who he is certain was this defendant. The record discloses no reason for rejecting the testimony of these witnesses, nor for concluding that the jury ought not to have believed them, and, if this evidence is believed, it was sufficient, supported as it was by that of several other witnesses, to justify the conviction. We are satisfied that this verdict ought not to be set aside for want of evidence to support it.

2. The conviction, as before stated, was under section 13 of the criminal code. The punishment prescribed for the crime there defined is "imprisonment in the penitentiary not more than fifteen nor less than three years." This defendant was given the extreme penalty allowed by law. The legislature has left a wide margin for the exercise of discretion by the trial court. The defendant is a man nearly 50 years of age. So far as the evidence discloses this is his first serious offense. The record shows that he had been in jail shortly before this crime was committed, but for what offense, if any, is not shown. The statute defines this crime in these words: "If any person shall forcibly, and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, with the intent to rob or steal." The statute contemplates various degrees of guilt in the crime of robbery, calling for punishment varying from three years in the penitentiary to five times that length of time. Was the offense committed by this defendant of the most aggravated nature possible? If so, the punishment imposed was contemplated by the legislature when the statute was enacted. The crime committed was by no means of so trifling a nature as appears to be contended in the brief of defendant's counsel. The conduct of the defendant, as described by the complaining witness, indicates a dangerous man. If he was without prior experience in crimes of this character, he evidently had thoroughly considered his course of procedure in executing it. There was no hesitation or delay on his part, and, when they had secured the money, they cursed Mr. Healey because the amount was so small, and debated between themselves the propriety of killing him then and there. The crime of robbery has always been considered a serious and aggravated offense. To trespass upon the property of another, to interfere with his personal liberty, to threaten his life under circumstances that make it seem probable that the threat will be executed, to steal his property, and to gain possession of his money for that purpose

by a combination of these crimes, constitutes this crime of robbery, which society has always considered to call for severe punishment. But the crime was not of the most aggravated form of robbery possible. The amount stolen was small. The crime was committed in a business place, and not in a dwelling house, and no actual injury was done either to the person or property of the complaining witness except the taking of the small amount of money. To a man of nearly 50 years of age, imprisonment in the penitentiary for 15 years is a terrible punishment indeed. It is virtually imprisonment for life. Such severe sentences, more than anything else, tend in after years to arouse public sympathy for the criminal, which sometimes leads to the unreasonable exercise of the pardoning power. Nothwithstanding the confidence we have in the discretion of the trial judge who heard the evidence in this case, we believe that this sentence ought to be reduced. There have undobutedly been convictions of the crime of robbery calling for less punishment than this, but there have been many in which the crime was much more serious, as the records of this court will show.

The sentence is reduced to imprisonment in the penitentiary for ten years, and the judgment so modified is affirmed.

JUDGMENT ACCORDINGLY.

FRED BECKMAN, APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY, APPELLANT.

FILED MAY 24, 1907. No. 14,987.

1. **Eminent Domain:** EXERCISE OF RIGHT. A railroad company cannot exercise the right of eminent domain, except to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its own road, and it has no authority to take land for the use of another company in the construction of the road of the latter.

2. ———: ———. A railroad company which has leased its lines may, if the lease so provide, extend its lines for the benefit of its lessee, and for this purpose may maintain condemnation proceedings in its own name.

3. ———: INJUNCTION: EVIDENCE. Where a plaintiff, in an action to restrain a railroad company from entering upon his land and constructing a railroad, pleads that the defendant company has instituted condemnation proceedings and deposited the damages as required by law, and that the road is being constructed across his land pursuant to such proceedings, and that the proceedings are void because the road is in fact being constructed by and for another company, the burden is upon him to prove the latter allegation.

4. Evidence examined, and *held* insufficient to establish the plaintiff's allegation that the road is not in fact being constructed by and for the corporation which is seeking to obtain the right of way by condemnation proceedings.

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

J. W. Deweese and *F. E. Bishop,* for appellant.

Field, Ricketts & Ricketts, contra.

SEDGWICK, C. J.

This action is brought to restrain the Lincoln & Northwestern Railroad Company, a corporation, from entering upon the plaintiff's land and constructing, or permitting the Chicago, Burlington & Quincy Railway Company to construct, a railroad thereon, claiming the right by virtue of certain condemnation proceedings. The defendant, the Lincoln & Northwestern Railroad Company, was incorporated under the laws of this state in 1879 to construct a line of railroad from the city of Lincoln, Nebraska, to Columbus, Nebraska, and thence to the north boundary of the state. The road has been constructed as far as to Columbus. In the following year it leased its right of way and all of its property and franchises to the Burlington & Missouri River Railway Company in Nebraska (a corporation also organized under the laws of this state) for

the period of 999 years. Afterwards the Chicago, Burlington & Quincy Railroad Company purchased the road and property of the Burlington & Missouri River Railway Company, including the lease from the defendant company. In May, 1906, the defendant company began proceedings in the county court of Lancaster county to condemn a right of way across the plaintiff's land for the construction of a railroad. On its application, appraisers were appointed and the plaintiff's damages appraised, and the amount so found was deposited by the defendant company with the county court, and afterwards appeals were taken by both parties to the district court. Those appeals are still pending. While the application was pending in the county court, and before the damages had been assessed, the plaintiff sought to question in that court the right and authority of the defendant to exercise the right of eminent domain, but was not permitted to do so by reason of lack of jurisdiction to determine such a question. The plaintiff then began this action in the district court for Lancaster county. Upon the trial of the action in the district court, judgment was entered enjoining the defendant as prayed, and from that judgment the defendant has appealed to this court.

1. The defendant objects that the plaintiff is not entitled to relief by injunction, and that the relief which the plaintiff seeks could only be obtained in an action of *quo warranto* to determine the rights and powers of the defendant corporation. We do not see any merit in this objection. The matters complained of in the petition are not that the defendant is seeking to exercise powers not given it by its articles of incorporation under the law. It is not claimed that the defendant is without the general power to exercise the right of eminent domain, but that its attempted exercise of that right in this particular case is unlawful. There can be no doubt that a court of equity may enjoin a corporation from exercising its corporate powers in an unlawful manner to the injury of an individual, when the ordinary course of the law affords no

adequate remedy. Under the law of this state, as it has been construed, the landowner, when his property is taken by a railroad corporation in condemnation proceedings by virtue of the right of eminent domain, has no adequate remedy in those proceedings against the wrongful taking of the property for other purposes than for the necessary uses of the corporation seeking to condemn the land. In *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681, it is determined that the county court has no jurisdiction to afford such relief. An appeal to the district court does not vacate or supersede the proceedings in the county court so as to prevent the railroad company from proceeding with the construction of its road upon the land, which may be completed and the road in operation before the matter is finally heard in the district court. Any relief that the district court might then afford cannot be said to be adequate. On the other hand, it is equally clear that the corporate existence of the defendant cannot be attacked, nor its right to exist and exercise its corporate franchises challenged by a private individual in this form of action.

2. The contention of the plaintiff is, in substance, that the defendant is not engaged in the construction of the line which crosses his land, but that the same is being constructed by the Chicago, Burlington & Quincy Railroad Company for its own use and benefit; that the nearest point on defendant's line of railroad is more than two miles from his premises, and that the condemnation proceedings are not prosecuted in good faith for the proper use of the defendant, and are in fraud of plaintiff's rights. The contention of the plaintiff that "a railroad company cannot use its powers of eminent domain to acquire a right of way for another company's road" is manifestly right. "Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road." Ann. St., sec. 9967.

It clearly has no authority to take land for the use of another company in the construction of the road of the latter. No one would contend that this defendant company could go into a distant county of the state and condemn land for the construction of a road in which it would have no interest when constructed, a road that would be the property of another company and used exclusively by that other company. The Lincoln & Northwestern Railroad Company may condemn land necessary for the construction of its road, but it cannot condemn land for the construction of a road by and for the Chicago, Burlington & Quincy Railroad Company, or any other company, and the principal question in this case is whether this land is being taken for the construction of the road of the defendant in this action, or whether it is in fact being taken for the construction of the road of the Chicago, Burlington & Quincy Railroad Company. It appears from the record that the latter company, which is sometimes spoken of as the "Burlington" operates a line of road from Chicago, through Omaha and Lincoln, to Denver, and that the road of the defendant company, as before stated, extends from Lincoln to Columbus. The two roads are thus connected for interchange of traffic at Lincoln. They use the Lincoln "yards" in common and have done so for many years. The improvements now being made involve a reconstruction of the lines of both roads west and northwest of Lincoln, and also of the railroad yards used in common. The particular part of the road in question is to extend from a point near Denton, which is a few miles west of Lincoln on the Burlington line, into these common yards, and together with other improvements and lines will afford a new route of connection between the two lines.

It is argued in the brief that this new line in question, extending as it does from the Burlington line to the yards used in common, is intended principally, if not entirely, for the use of the Burlington company, and must for that reason be held to be an extension of the Burlington line,

and not a branch of the defendant's line. We do not think that this distinction is meritorious. The statute provides that railroad companies may "construct branches from the main line to other towns and places within the limits of this state." Ann. St., sec. 9953. *Trester v. Missouri P. R. Co.*, 33 Neb. 171. If the yards used in common are the yards of the Burlington company, and the defendant company's road runs into those yards, it might extend its line through those yards to another road, and so make connections therewith. In such case the state would not be interested in the question as to which company was in fact building the connecting line. The statute quoted will not admit of a construction that would prohibit the defendant company from building such connection, and as that part of the line which is in question here connects with both roads, and will or may be used by both roads in the interchange of traffic, it is clear that either road might build the line, and the road that was so building the line in good faith might exercise the right of eminent domain to secure the necessary right of way for that purpose. When the defendant leased its right of way and property and franchises to the Burlington & Missouri River Railway Company for 999 years, as before stated, that company took over the property and began operating the same in connection with its other lines of road, until it was consolidated with its successor, the Chicago, Burlington & Quincy Railroad Company, which latter company has since been and still is operating the same in the same manner.

The effect of this lease and the rights of the parties thereto in regard to condemnation proceedings were considered and determined in *Deitricks v. Lincoln & N. W. R. Co.*, 13 Neb. 361, and *Gottschalk v. Lincoln & N. W. R. Co.*, 14 Neb. 389, and it was held that the fact that this defendant had executed a lease of all of its property for so long a term, with the conditions and provisions set forth in the opinions referred to, did not prevent the defendant company from extending its lines for the benefit of the lessee, and that in doing so this defendant might maintain con-

demnation proceedings in its own name. We consider these cases as settling the law upon these questions in this state, and they are well supported by authorities in other jurisdictions. *Mayor and Aldermen of Worcester v. Norwich & W. R. Co.,* 109 Mass. 103; *Chicago & W. I. R. Co. v. Illinois C. R. Co.,* 113 Ill. 156; *Lower v. Chicago, B. & Q. R. Co.,* 59 Ia. 563; *Chicago & A. R. Co. v. People,* 152 Ill. 230, 38 N. E. 1075; *State v. Superior Court,* 31 Wash. 445, 72 Pac. 89. The railroad company seeking to condemn land can only do so when the land is necessary for the construction of its road; but, on the other hand, a railroad company which has leased its road and franchises and property for a term of years may still make extensions and build branch lines, and the fact that the same are to be used by another company, its lessee, and that other company is to have the exclusive beneficial interest in the use of the property, will not prevent the prosecution of condemnation proceedings in the name of the company that is actually building the same. If it is the road of the defendant that is being constructed, the condemnation proceedings should be in the name of the defendant, but, if it is the road of some other company that is being constructed, then the condemnation proceedings could not be maintained by this defendant.

The question at issue is one of fact, and not of law, and requires an examination of the record. The trial is one *de novo* in this court, under section 681*a* of the code, and must be determined here in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. The first point necessary to determine is upon whom is the burden of proof.

In every case, all allegations necessary to the plaintiff to make out his case and entitle him to the relief he asks must be proved by him. If an allegation material to the plaintiff's case is essentially negative in its character the rule remains the same. "Whenever under the rules of substantive law applicable to the rights or liabilities in

dispute between the parties, an affirmative case requires proof of a material negative allegation, the party, whether plaintiff or defendant, has the burden of proving it." 16 Cyc. 927, and cases cited. This proposition is discussed at large in *Goodwin v. Smith,* 72 Ind. 113, and in a note to the same case in 37 Am. Rep. 148. The court in its opinion, quoting from a prior case in the same court, said: "Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms." In *Stokes v. Stokes,* 155 N. Y. 581, it was said in the syllabus (50 N. E. 342) that the defendant, "was bound to establish his defense or counterclaim, although it required the proof of a negative, and that he did not sustain this burden of proof by testifying that he deposited the bonds as security for the notes, without stating that they were deposited for no other purpose," and the court, quoting from the case of *Lamb v. Camden & A. R. & T. Co.,* 46 N. Y. 271, said: "It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which, uncontradicted, proves the fact alleged by him. It has, in such cases, frequently been said that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this; and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury affirmatively of the truth of the fact alleged by him, or he is not entitled to a verdict,"—citing several other cases. In *Brown v. King,* 46 Mass. 173, the court said: "Where a party grounds his title on an allegation, whether affirmative or negative, he must prove it. Presumptive evidence of title, although sufficient to make out a good *prima facie* case, does not necessarily change the burden of proof." In *Royal Ins. Co. v. Schwing,* 87 Ky. 410, 9 S. W. 242, the court, after

stating that averments that were necessary in the petition must be proved by the plaintiff, although they were of a negative character, said: "The defendant, however, if the petition was defective, cured the defect by pleading the fact that the fire resulted from the fall of the building; still this did not place the burden on the company, if the plaintiff was required to aver and prove the nonexistence of a state of facts that would exonerate the company from liability when developed." In *Cook v. Guirkin & Co.*, 119 N. C. 13, 25 S. E. 715, the court quoted with approval from 1 Wharton, Evidence (3d ed.), sec. 354, as follows: "When ever, whether in plea, or replication, or rejoinder, or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." In *Gillson & Barber v. Price,* 18 Nev. 109, the court said: "Where a party grounds his right of action upon a negative allegation he must prove it. It is then material, and a denial raises a material issue." See, also, a full discussion of the proposition and of the meaning and application of the rule in 2 Ency. Evi. 802, where the rule is thus stated: "It is now well settled that if a negative allegation is essential in asserting a right, whether on the part of the plaintiff or defendant, the one asserting the right has the burden of proving the negative although he may have failed to make such allegation."

There has been much discussion by various courts on the subject of burden of proof, and whether the burden of proof does or can in any case shift during the progress of the trial. It is clearly pointed out in the authority last cited that upon the substantive issues between the parties the burden of proof never shifts; that the words "burden of proof" are sometimes used in a secondary sense; and in many cases the party having the burden of proof is assisted by presumptions. In some cases the presumptions are so strong that his adversary is required

first to introduce some proof. To say, under such circumstances, that his adversary has the burden of proof means only that he has the burden to introduce a certain quantum of proof, and, when he has done so, the issue is tried and the evidence weighed as upon any other issue, the party making the allegation having the burden of proof upon that issue. This is the logical use of the words "burden of proof." The party making the allegation of fact, whether it be an affirmative or a negative, must, when the evidence is all in, have furnished more proof upon that fact than his adversary has, or he fails to establish his case. It is in this sense that the authorities above cited hold that, when the allegation of a negative fact is necessary to the statement of the plaintiff's case, the burden of proof is upon him who alleges it to establish his case.

The plaintiff in this case assumed this burden upon the trial. He alleged in his petition that the defendant had begun condemnation proceedings in the county court to obtain a right of way across his land; that the amount of his damages occasioned by the taking of the land had been ascertained and allowed by the proceedings in the county court; that the amount had been deposited by the company pursuant to the statute; that he had taken appeal from the allowance of these damages to the district court, where the same is now pending; and that in pursuance of those proceedings a railroad was being built across his land. His petition shows that the road was being built for actual use as a public railroad, and that it will be an important part of a public system of railroads, so that the allegations of his petition show that it is a plain case of right to condemn this right of way, except for one controlling fact which he alleges to exist, viz., that this road across his land is being built by and for another corporation as owner thereof, and not by and for the company instituting the condemnation proceedings, so that his cause of action that he has pleaded and presented to the court depends entirely upon this allegation. If the road is being built

by and for another company, his action can be maintained. If it is being built by and for the company which instituted the condemnation proceedings, he has no cause of action. "The party who would be defeated if no evidence were given on either side must first produce his evidence." Code, sec. 283. We must take the issues as they are. The plaintiff has presented a case which depends upon the allegations of the ownership of the road which is being built, and plainly upon this issue, so presented, he has the burden of proof. To maintain this issue on his part he called Mr. Westervelt as a witness. This witness was employed as a right of way man to procure the right of way for this road. He asked this witness for whom he was acting in procuring this right of way, and the witness testified that he was acting for this defendant. This was direct testimony that this defendant was building this road as owner thereof, and it is not weakened by the fact that the witness testified that he was the agent for the defendant. Agency may not be established by proof of unsworn declarations of the supposed agent, but the testimony of the agent himself is direct evidence of the fact of his employment, and is not weakened by the fact that he is in a position to know for whom he is acting. The plaintiff also proved by this witness that he also acted as right of way agent for the Chicago, Burlington & Quincy Railroad Company, and that this company operates a line of road from Chicago to Denver, which line is owned by several distinct corporations, and that all of the lines of these corporations were either owned or leased by the Chicago, Burlington & Quincy Railroad Company, and that the line of road now being operated runs through Mr. Beckman's land. The plaintiff also proved by the witness that the checks which he drew in payment for right of way for the construction of this new line of road in question were drawn upon the Chicago, Burlington & Quincy Railroad Company; that he receives his salary as right of way man from the Chicago, Burlington &

Quincy Railroad Company, but each month he makes an apportionment of his salary among the different subsidiary companies, which is sent to the auditor and charged to the different railroads. It appears from his evidence that the money used to pay for the right of way for this new line is furnished by the Chicago, Burlington & Quincy Railroad Company. It also appears from the evidence of this witness that the vouchers given for the checks drawn upon the Chicago, Burlington & Quincy Railroad Company for money used in the building of this line, and in paying for the right of way, and in paying the damages for injuries to the crop of the tenant upon the land in question, were marked with the letters "A. F. E. L. & N. W."; that these letters stand for the words "Authorized for Expenditure Lincoln & Northwestern"; and that they are so identified for the purpose of enabling the auditor of accounts to charge the expense of procuring this right of way and building this line to the defendant, the Lincoln & Northwestern Railroad Company. The plaintiff admits that so far as his damages are concerned it is immaterial whether this railroad is to be built by the one or by the other corporation, he stands upon his strict legal rights, and alleges that the fact is that the railroad is not being built by the corporation in whose name the right of way is being condemned as the owner of the road, and he insists that the evidence which he has produced is sufficient to establish that fact. It seems clear that he has not established that fact by a preponderance of the evidence.

The defendant offered in evidence a paper purporting to be a copy of the minutes of a meeting of the board of directors of the defendant company authorizing the construction of the line in question. This document was excluded by the district court as secondary evidence. This ruling of the district court was probably correct.

The plaintiff has failed in the proof necessary to estab-

lish his cause of action, and the judgment of the district court is therefore reversed and the case dismissed.

REVERSED.

STATE, EX REL. WILLIAM P. COLLINS, RELATOR, V. O. W. GARDNER, TREASURER, ET AL., RESPONDENTS.

FILED MAY 24, 1907. No. 14,545.

1. **Schools and School Districts:** WARRANTS: PAYMENT. There is no restriction in the school law upon the power of school district officers to issue warrants in payment of teachers' wages and current expenses payable out of the general fund, and warrants issued for a liability of this nature incurred during previous years may be paid out of funds derived from taxes levied and collected during the current year.

2. ———: ———: ———. The general fund of a school district is a continuing fund upon which warrants may be issued, and if not paid for want of funds they may be registered under the provisions of the warrant act, sections 10850, 10851, Ann. St., and paid in the order of their registration, upon the accumulation of money in the fund upon which they are drawn.

3. ———: ———: ———: MANDAMUS. Mandamus will not compel school district officers to appropriate and set apart the entire revenue of the district for general purposes to the payment of registered warrants, if the effect will be to close the schools and deprive the children of the district of a common school education, but will require such officers to set apart so much of said fund as is necessary to maintain a common school for the shortest time provided by law and at the least possible expense, and use the remainder of the fund in payment of such warrants in the order of their registration.

ORIGINAL application for a writ of mandamus to compel respondents, as school district officers, to apply certain moneys in payment of school warrants. *Writ to issue if a showing of certain facts is made within a reasonable time, otherwise the writ to be denied.*

A. G. Greenlee, C. H. Eubank and *A. J. Sawyer,* for relator.

Gardner & White, A. F. Moore and *Hainer & Smith, contra.*

BARNES, J.

This is an original application for a writ of mandamus. The respondents are respectively the treasurer, director and moderator of school district No. 16 of Scott's Bluff county. It appears that the relator holds by purchase and assignment a large number of school district warrants of the said district, issued at intervals between December 1, 1902, and January 31, 1905. About $2,700 worth of said warrants were issued for the payment of teachers' wages, and the remainder of them, amounting to about $300, are for incidental expenses. Soon after the issuance of these warrants, the payees presented them to the treasurer for payment. They were not paid for want of funds, and the treasurer thereupon registered them, giving each a number in the order of its presentation. It is alleged in the petition that the treasurer of said school district is receiving, and is about to receive, in each of said funds, large sums of money from the levy of taxes for the year 1905 from the state apportionment fund, and from other sources; that the respondents, as officers of said school district, have directed its treasurer to apply said moneys to the payment of the current expenses of said school district during the school year, commencing the first Monday of July, 1905, to the exclusion of the payment of the relator's warrants; that the treasurer of said district refuses to apply the said moneys, or any part of them, so coming or about to come into his hands, to the payment of the relator's warrants; that said treasurer threatens to and will apply any and all moneys realized from said sources during the school year, commencing on the first Monday in July, 1905, to the payment of the

expenses incurred during said school year, and warrants drawn in payment therefor; and refuses to apply any of the moneys so realized to the payment of the warrants owned by the relator. It is further alleged that the taxes still outstanding for years previous to the school year of 1905, and the moneys accruing to said district from other sources for such years, are entirely insufficient to pay the warrants owned by this relator, and if the defendants are permitted to expend all of said fund received for the year 1905 for the current expenses incurred by them in conducting the school in said district for that year, to the exclusion of the payment of any part of the relator's warrants, he will be without remedy, will have no means of collecting the moneys due him on said warrants, and his claim against the district thereon will be defeated and wholly lost.

In response to the alternative writ, respondents have answered, admitting the issuance and registration of the warrants in question and the relator's ownership thereof. They also admit that they intend to apply the revenue collected from the levy of 1905 and the state apportionment fund to the payment of the current expenses of the school year, beginning in July, 1905, and also that the revenue available from other sources consists of small amounts derived from tuition received from nonresident pupils, which has been turned into the teachers' fund for the said school year, to be paid out on teachers' warrants drawn for that year. The answer also contains the following: "Respondents, further answering, allege that at the annual meeting of the legal voters of school district No. 16, held on the last Monday in June, 1905, the trustees of said district presented an estimate showing the amount of money required for the maintenance of schools in said district during the coming year; that the legal voters at said meeting thereupon determined the amount of money required for said school maintenance, and voted the same to the amount of $1,600, which was divided as follows: Teachers' fund, eighteen mills; incidental fund,

seven mills. That all of the money so voted and levied, together with the state apportionment and accruing money for tuition, is necessary to pay the expenses of maintaining its school for the said school year." And the foregoing is assigned by the respondents as a justification for their refusal to pay the relator's warrants in the order of their registration. No evidence was taken, and the case has been presented to us upon the pleadings, oral arguments and briefs.

It is the contention of the relator that he is entitled to a peremptory writ commanding the respondents to apply all of the moneys coming into the fund in question to the payment of his warrants in the order of their registration. Sections 10850-10852, Ann. St., provide, in substance, that all warrants upon the state treasury, the treasury of any county, city or school district, or other municipal corporation, shall be paid in the order of their presentation; that each treasurer shall keep a warrant register, which shall show the number, date and amount of each warrant presented and registered, the particular fund upon which the same is drawn, and the date of presentation. And section 10853 of said statutes reads as follows: "It shall be the duty of every such treasurer to put aside in a separate and sealed package, the money for the payment of each registered warrant, in the order of its registration, as soon as money sufficient for the payment of such warrant is received to the credit of the particular fund upon which the same is drawn." The relator insists that these sections, together with section 11039 of said statutes, require us to grant him the relief for which he prays. It is provided by the last numbered section that the legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes, except for the payment of bonded indebtedness, which number shall be sufficient to maintain a school in the manner and for the time provided in section 14 of the school law (Ann. St. sec. 11042), but not exceeding 25 mills in any one year;

provided, that in districts having four children or less of school age the levy shall not exceed the sum of $400 in any year, and in districts having more than four and less than sixteen children of school age the levy shall not exceed the sum of $50 a child, in addition to the above; that the tax so voted shall be reported by the district board to the county clerk, and shall be levied by the county board and collected as other taxes. The fund thus created has been commonly known and designated as the general school district fund. This is the fund out of which the current expenses of the district are paid, and warrants may be drawn against it, whether there is money in the school district treasury to its credit or not.

Discussing the nature of this fund, in the case of *Zimmerman v. State*, 60 Neb. 633, it was said: "But a different purpose is disclosed with respect to ordinary current expenses. They are to be paid out of the taxes levied for the year in which they are incurred. The school year commences on the second Monday of July. * * * At the annual school meeting held on the last Monday in June * * * the qualified voters are authorized to determine 'the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of the same.' * * * This language admits of only one construction. It means that the general expenses of each school year shall be paid out of the taxes levied at the annual meeting held just prior to the commencement of such year. The taxes so levied constitute a fund against which warrants may be drawn; and such warrants, when presented to the district treasurer, are, in default of cash, required to be registered and paid in the order of their registration. * * * They bear interest from the time they are presented to the treasurer, * * * and, under the act of 1895, the sinking funds of the district may be invested in them." The nature of this fund was again under consideration in *School District v. Fiske*, 61 Neb. 3, where it was said: "It is contended, however, that, although it may be held

that the indebtedness incurred by the district for these services is payable out of the general fund, that at the time the contract was made and the indebtedness created there was no money in this fund with which to pay for them, and that for that reason the contract of the board was void. There is no express limitation of the kind suggested by statute placed upon school boards, and in the absence thereof this court would be very reluctant to declare such a rule. To do so would cripple many school districts, for out of this fund most of the money which goes toward maintaining public schools must come, and it is not always possible to have money in this fund at all times during the school year to maintain them and keep them open to pupils. The taxes had been levied to create the general fund and the amount of such levy had not been exhausted. This was sufficient to constitute a fund against which warrants may be drawn."

Again, this is an original action in this court, and we may take judicial notice of the fact that the last biennial report of the state superintendent of public instruction shows that at the close of the school year ending July 13, 1903, the indebtedness of the school districts in this state, not secured by bonds, amounted to $646,182.18. This fact seems to bear out the contention of the relator that the law has uniformly been construed by school district officers, since its first enactment, to mean that the fund for school maintenance is a continuing fund upon which warrants may be drawn for current expenses, without regard to the amount of taxes levied each year, and that such warrants, if not paid for want of funds, may be registered and paid in the order of their registration, as soon as the funds are available for that purpose.

It is contended by the respondents, however, that by amendment the legislature of 1905 changed the provisions of section 11039, *supra,* so as to limit the power of the board to expend the money raised for school maintenance to expenses to be incurred during the current year only; but an examination of the whole course of legislation

upon this point convinces us that this was not the purpose of the amendment. The only substantial change in the law made by the amendment was to require the school trustees to submit a statement of the necessary expenses to carry on the business of the district to the voters at their annual meeting, for the purpose of assisting them in making a final estimate of the amount of money required to properly conduct the schools for the ensuing year. The power to finally determine the requisite amount was still left with the voters, which, however, is limited to 25 mills on the dollar valuation. It seems clear that the voters still have the power to vote a tax to the full amount of such limitation; and the words "school support" or "amount necessary to be expended during the ensuing year for school purposes," or "amount required for support of schools during the fiscal year, next ensuing," are only used to designate and distinguish the fund created thereby from other funds, such as the bond or building fund, and the like.

The warrants which the relator holds evidence a proper liability of the district incurred for a lawful and proper purpose. The district officers had power to issue them as an evidence of its liability. They are payable out of the teachers' fund and incidental fund of the district, which are a part of the general fund, and this general fund is a continuing one upon which warrants may be issued, and, if not paid for want of funds, may be registered under the provisions of the registration act. It is apparent, however, that school district No. 16 has been extravagant in its expenditures, and for the present benefit has sacrificed its future good. It finds itself in an unfortunate situation, due alone, however, to its own extravagance, and it must be content to do as any honest individual does when his indebtedness exceeds his present ability to pay. It must curtail its expenditures so that its income may provide a fund with which to pay its debts. The law provides that upon a proper showing the district may still draw its proportionate share of the state school funds,

although unable to maintain a school for the whole period required by the school law; and if it were not for the fact that the children of school age residing in said district are entitled, under the constitution and laws of this state, to the benefits of a common school education, we would be disposed to grant the relator the full relief prayed for by his petition, and require the respondents to apply all of the money coming into the general fund of the district to the payment of the relator's warrants in the order of their registration. However, by section 6, art. VIII of the constitution, it is provided: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." It is further provided by section 7 of said article: "Provision shall be made by general law for an equitable distribution of the income of the fund set apart for the support of the common schools, among the several school districts of the state, and no appropriation shall be made from said fund to any district for the year in which school is not maintained at least three months." These provisions have been properly supplemented by statute, and it is the legislative policy of this state to see to it that the persons thus entitled to a common school education shall not be deprived of its benefits.

So we are constrained to hold that the respondents, in this case, should be required to make a division of the funds in question, and set apart so much thereof as may be necessary to maintain a common school for the least time which would enable the district to receive its proper share of the state apportionment fund, at the least possible expense, and apply the balance of the general fund to the payment of the relator's warrants in the order of their registration. That this is a proper solution of the question involved in this controversy seems to be settled by the opinion in *Wessel v. Weir,* 33 Neb. 35. In that case a writ of mandamus was applied for to compel the county board to include in the estimate of expenses for the current year an amount for the payment of certain

warrants held by the relator against the county. The defense there made was the same, in substance, as the one interposed in this case, to wit, that the actual necessary expenses of running the county for the current year would amount to a sum equal to the entire revenue of the county; that there would be nothing left to pay the indebtedness of the county incurred in previous years, and therefore the county commissioners were justified in refusing to provide for the payment of the relator's claims. The court said: "If it be true that the respondents may lawfully exhaust all the revenues of the county for current expenses without making any provision for the payment of the just indebtedness of the county already incurred, then the only alternative left the relator is a vote of the people of the county authorizing the levying of a tax for the payment of his claims. And should such a question be submitted to a vote of the people, it might fail to carry. We do not think the relator is compelled to submit to such an alternative. His claims are just, and the indebtedness was incurred in carrying on the county government. If the indebtedness was so large that its payment would absorb so much of the revenues of the county as to leave the county board practically without means to meet the current expenses of the county government, we might be called upon to require only a portion of the plaintiff's claims to be paid in one year and the balance out of future tax levies. So far as is disclosed by this record the relator's claims constitute the entire indebtedness of the county which has not been provided for. It is not believed that the payment of these claims out of the next tax levies will seriously embarrass the county." The writ, therefore, was allowed.

School districts in this state are limited in the amount of taxes which they may levy and collect to 25 mills on the dollar of their assessed valuation for all purposes, except for the payment of bonds and the purchase and lease of school houses. It was held in *Dawson County v. Clark*, 58 Neb. 756: "A tax to pay a judgment against

a school district cannot be levied and collected where the maximum amount of taxes authorized by statute for all purposes has already been levied." It appears in this case that the school district in question has, at all times, levied the full amount of taxes authorized by law. Hence, a judgment on his warrants would afford the relator no relief. So it seems clear that, unless he obtains some relief in this proceedng, he is without any remedy whatever. To deny him the writ and permit the respondents to pursue the course outlined by their defense would authorize them to repudiate the just indebtedness of the school district. Such a course should not be tolerated by the courts.

So we are of opinion that relator is entitled to substantial relief in this case, and he will be permitted to make a further showing as to the number of children of school age residing in the school district, the necessary expense required to afford them the benefits of a common school education, as hereinbefore indicated, the amount of funds which can be raised for that purpose and the payment of the warrants in question herein; and, upon the completion of such showing, the respondents will be required to set apart so much of said funds as shall be found necessary to conduct a common district school in the aforesaid manner, and directed to pay the remainder thereof on the relator's warrants in the order of their registration, and to continue to do this until said warrants are fully paid.

When this showing is made, the writ will be issued accordingly, and, unless the same is made within a reasonable time, the writ will be denied.

JUDGMENT ACCORDINGLY.

STATE, EX REL. JOHN J. LEDWITH, RELATOR, V. E. M. SEARLE, JR., AUDITOR, RESPONDENT.

FILED MAY 24, 1907. No. 15,183.

1. **Colleges and Universities:** UNIVERSITY FUND: STATUTES: REPEAL. That part of section 19, ch. 87, Comp. St. 1905, which provides that in the year 1899, and annually thereafter, a tax of one mill on the dollar shall be levied on all of the taxable property in the state, the proceeds to constitute a fund for the maintenance of the university, was not repealed by implication by the revenue law of 1903.

2. **States:** APPROPRIATIONS. The act of the legislature passed and approved April 4, 1907, appropriating the proceeds of said tax for the years 1907 and 1908, and so much of the proceeds of the one mill tax for the years 1905 and 1906, not heretofore appropriated, to the use of the state university for the biennium ending March 31, 1909, amounts to a specific appropriation within the meaning of section 22, art. III of the constitution.

3. ———: ALLOWED CLAIMS: PAYMENT. When the auditor of public accounts has duly audited and allowed a claim payable out of the said fund, and there is an unexpended balance therein of a sufficient amount, it is his duty to draw a warrant therefor in favor of the claimant, although there may be no money actually in the treasury belonging to said fund.

ORIGINAL application for a writ of mandamus to compel respondent to issue a warrant in payment of a claim payable out of the temporary university fund. *Writ allowed.*

Clark & Allen, for relator.

W. T. Thompson, Attorney General, and *W. B. Rose, contra.*

BARNES, J.

This is an original application for a writ of mandamus. The facts stated in the petition of the relator are substantially as follows: The respondent is the duly elected and qualified auditor of public accounts of the state of Nebraska. By section 19, ch. 87, Comp. St. 1905, it is

provided that in the year 1899, and annually thereafter, a tax of one mill upon the dollar shall be levied on all taxable property in the state, the proceeds to constitute a fund to be expended under the directions of the regents of the university of Nebraska, for the maintenance of said university, and for buildings and improvements. That, pursuant to this statute, the board of equalization has each year levied a tax of one mill on the dollar upon the grand assessment roll of the state for said purpose. To make the proceeds of said one mill tax available, the legislature on the 4th day of April, 1907, duly passed an act appropriating the proceeds thereof for the purposes specified in section 19, ch. 87, *supra,* which act was duly approved by the governor on April 9, 1907, and section 1 of said appropriation act reads as follows: "The proceeds of the one mill university tax for the years 1907 and 1908 and so much of the proceeds of the one mill tax for the years 1905 and 1906 as was not appropriated at the last session of the legislature are hereby appropriated for the biennium ending March 31, 1909 to the use of the state university for current expenses, buildings and permanent improvements, as directed in section 19, chapter 87, Compiled Statutes of Nebraska of the year 1905." (Here follows an estimate of the principal items of expenditure.) "The foregoing are estimates for the information of the legislature. The enumeration shall not preclude the regents from using more for one item and less for another if in their judgment it becomes necessary." Laws 1907, ch. 151, sec. 1. On April 26, 1907, the relator presented to the respondent a certificate of the board of university regents, executed by its president and secretary, as required by law, which certificate recited that the relator was entitled to $25 for services rendered for the university as instructor in the biennium, beginning April 1, 1907, and payable from the temporary university fund; that the respondent examined and allowed the claim, but refused to issue a warrant to the relator therefor, on the sole ground that a sufficient amount of taxes had not been paid

into the state treasury with which to pay said claim. Relator further alleges that the assessed value of real estate fixed by the state board of equalization in the year 1904, and in force until the year 1908, is $185,790,126, and the one mill tax aforesaid will therefore produce in the biennium $371,580.26, against which no warrant has been drawn; that the assessment of personal property for the year 1907 has not yet been made, and the relator is unable to state at this time what the entire assessment roll will be, but the assessed valuation of taxable property in 1905 was $304,470,961, and in 1906 was $313,060,301; that the legislature of 1905 appropriated from the one mill levy for that year the sum of $558,000 for the use of the university as aforesaid, leaving a balance of $28,000 in said fund unappropriated; that under the provisions of sections 1-3, ch. 93, Comp. St. 1905, it is the duty of the state treasurer to register state warrants in the order of presentation when the funds in the treasury are insufficient to pay the same; that by reason of this provision it is the duty of the auditor to issue warrants against the appropriation, whether or not the taxes are actually collected at the time the warrant is applied for; that the relator is therefore entitled to a warrant for his said claim, regardless of the fact that the proceeds of the one mill tax above mentioned has not been collected and paid into the state treasury.

To this petition the respondent has filed a general demurrer, thereby admitting the facts above recited, and upon the issue of law thus raised the question involved in this controversy is to be determined.

The respondent contended upon the hearing that there is no fund provided by law against which the warrant sought to be obtained by the relator can be drawn; that there is no law in force requiring the one mill levy, which is mentioned in the relator's petition to be made, because that part of section 19, ch. 87, Comp. St., which provides for such a levy was repealed by implication by section 134,

art. I, ch. 77 of the general revenue law, 1903, as it now appears in the Compiled Statutes. It is a universal rule that repeals by implication are not favored, and it is only when two statutes relating to the same subject are so repugnant to each other that both cannot be enforced that the last enactment will be held to supersede the former and repeal it by implication. *Beha v. State,* 67 Neb. 27. Again, all statutes should be so construed, if possible, as to give effect to every provision thereof, and an act should not be placed in antagonism with another act unless such was the manifest purpose and object of the legislature.

Having in mind these well-established rules, we come now to consider the two provisions of our statutes which bear upon the subject under consideration. Section 19, ch. 87, Comp. St. 1905, provides, among other things, as follows: "The temporary university fund shall consist of the proceeds of investments of the permanent fund; * * * and a tax of one mill upon the dollar of valuation of the grand assessment roll of the state, which tax shall be levied in the year 1899 and annually thereafter. All moneys accruing to this fund are hereby appropriated for the maintenance of the university including buildings and permanent improvements and the same may be applied by the board of regents to any and all university needs." And the board of equalization since the year 1899 has each year levied the one mill tax above specified according to the provisions of the statute just quoted, and each legislature since that year has appropriated the proceeds of that tax to the use of the university. Section 134, art. I, ch. 77, of the general revenue law, 1903, reads as follows: "The state board shall determine the amount of all taxes required for state purposes, and the rate of taxation upon all property in the state necessary to raise the same, and make the levy of such taxes throughout the state. The rate of the general state tax shall be sufficient to realize the amount necessary to meet appropriations made by the legislature for the year in which the tax is levied, and an

additional sum not exceeding twenty per cent. of the amount of any existing state indebtedness, and not exceeding in all five mills on the dollar valuation. The rate of the state school tax shall not be less than one-half mill nor more than one and one-half mills on the dollar valuation." There does not appear to be any repugnancy between the statutes quoted. One contains a provision allowing the state board to levy a five mill tax, if necessary, for the state general fund, and one and one-half mills for the common school fund, while the other specifically directs the board to make a levy of one mill for the support of the state university. Both statutes can be enforced, therefore one of them does not repeal the other by implication. Again, a special statute relating to a particular subject will not ordinarily be held inconsistent with a general enactment that, but for the special statute, would have included the subject matter of the latter. In such a case the general act operates according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act, and this is so whether the general and special provisions are contained in the same statute or in independent acts adopted at the same or different times. *Kountze v. Omaha,* 63 Neb. 52. Applying the foregoing rules to the facts in the case at bar, there seems to be no escape from the conclusion that the statute providing for the special one mill levy for the temporary university fund is in force, notwithstanding the section of the general revenue law above quoted.

It is contended, however, that there may be no fund provided for the payment of the claim in question because the state board of equalization may not levy the university tax. This contention hardly merits our consideration. The law presumes that officers will perform their duties, and it is not to be believed that the state board will refuse or neglect to make the levy in question; and, if they should do so, they may be coerced by the courts to perform that duty.

It is contended, however, that the appropriation in question is not a specific appropriation, and therefore is in conflict with that part of section 22, art. III, of the constitution which provides: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." As we understand the respondent's contention on this point, it rests on the proposition that the amount of the one mill levy is indefinite and uncertain because the amount of the grand assessment roll for the years 1907 and 1908 is still undetermined. A like question was before us in the case of *State v. Babcock*, 24 Neb. 787. It appeared in that case that the legislature of 1887 passed an act providing for the sale of lots and lands belonging to the state in the city of Lincoln; and it was further provided in said act: "The amount derived from the sale of said lots and lands is hereby appropriated out of the capitol building fund to aid in the completion and furnishing of said capitol building." Laws 1887, ch. 85, sec. 5. The lands and lots were sold, and the amount of the sale was $78,878, part in cash and the remainder in notes due in one and two years. In holding the act to be the appropriation of said entire sum, the court said: "The evident design of the legislature was that this fund should be available as soon as a sale of the lands and lots mentioned took place. The fact that a short credit was to be given each purchaser if he so desired, does not nullify the appropriation. The amount of the sales, being $78,870, was appropriated and made available for the purposes for which it was intended. If the whole amount is not in the treasury the statute has provided that the holder of a warrant shall be entitled to interest thereon when it is presented to the treasurer and not paid for want of funds. This being an absolute appropriation of the amount of the sales of the lots and lands referred to, and a large part of this being still unexpended, it follows that the relator is entitled to the writ." In commenting on that decision in a later opinion in which the subject of appropriations was ex-

haustively considered, it was said: "An appropriation may be specific, according to any of the definintions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue." *State v. Moore,* 50 Neb. 98.

In the case at bar the amount of the grand assessment roll determines the amount of the appropriation because the rate of taxation is fixed by the statute at one mill on the dollar valuation. What the grand assessment roll will be is not now ascertained, but it will be determined before the money is expended; and this much is certain—the fund will be many times greater than the amount of the relator's claim. Again, the value of the real estate in this state fixed by the state board of equalization in 1904, operative until 1908, is $185,790,000. This will produce for the current year a fund amounting to $185,790. So it is unnecessary to determine now how much will be added to the grand assessment roll by the valuation of personal property. The same question was before the supreme court of Illinois in *People v. Miner,* 46 Ill. 384. The Illinois legislature, under a constitutional provision similar to our own, appropriated the proceeds of a certain tax for a specific purpose. The act was vigorously attacked on the ground that the appropriation was not specific within the meaning of the constitution. The court said: "There is no force in the objection that the appropriation is for no certain amount. * * * It is not essential or vital to an appropriation that it should be of an amount certainly ascertained prior to the appropriation." To our minds the case at bar is one which calls for the application of the maxim: "That is certain which may be rendered certain." See *Weston v. Herdman,* 64 Neb. 24. In this case the appropriation is certain because it can be made certain. No matter what the valuation of the grand assessment roll may be, the rate of taxation is fixed, and it is merely a question of computation to determine what the tax will yield; and the only concern of the respondent should be to see to it that warrants are not

drawn against the fund thus appropriated in excess of the actual amount thereof now known or to be hereafter ascertained.

Lastly, it is contended that no warrant can be drawn on the fund in question because there is no money in the treasury with which to pay the same. It was well understood by the legislature, and is a matter of common knowledge, that it may often happen that there are no funds actually in the treasury belonging to a specific appropriiton, against which warrants can be drawn. And so it was provided by sections 1-3, ch. 93, Comp. St. 1905, that it is the duty of the state treasurer to register warrants in the order of their presentation, when there is no fund in the treasury with which to pay them; and, when a fund is provided for a certain purpose, warrants may be drawn against that fund, whether it is actually in the treasury or not, so long as the warrants drawn do not exceed the amount of the appropriation. If this could not be done the business of the several departments of the state would often be seriously interfered with, and in many instances would have to cease altogether.

So we are of opinion that it is the duty of the respondent to issue a warrant to the relator in payment of the claim in question in this case, and the writ will be issued accordingly.

WRIT ALLOWED.

JOHN H. STRATTON V. STATE OF NEBRASKA.

FILED MAY 24, 1907. No. 14,864.

Statutes: PASSAGE: EVIDENCE. An enrolled bill found on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage, and cannot be overthrown by the legislative journals, where they are silent on that matter. *Stetter v. State*, 77 Neb. 777.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. M. Morrissey, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

The defendant was charged in the district court for Cherry county with the keeping of gaming devices unlawfully, in violation of section 215 of the criminal code. He demurred to the information on the ground of the unconstitutionality of the law. The demurrer being overruled, he then entered a plea of guilty and filed a motion for arrest of judgment on substantially the same grounds. This motion was also overruled and sentence imposed, and from the judgment of the district court he prosecutes error.

His argument is, in substance, that sections 214 and 215 of the criminal code as they now stand are invalid, for the reason that they were not passed in accordance with the constitutional requirements. The same point was urged in *Stetter v. State,* 77 Neb. 777, and was decided adversely to his contention. The facts upon which he relies to substantiate his claim of the improper passage of the act are that the references to senate file No. 98 which are made in the legislative journals are not identical in all respects when referring to the title of the act, and that therefore the same act was not finally passed that was introduced. In some portions of the journal the act is denominated: "Senate File No. 98. A bill for an act to amend sections 214 and 215 of the criminal code." In another portion the title appears as "Senate File No. 98. A bill for an act to amend sections 214 and 215 of the criminal code, and to provide for the recovery of money or other property lost in gambling." And in still another place it appears as "Senate File No. 98. A bill for an act

to amend sections 214 and 215 of the criminal code, and to provide for the recovery of money or other property lost in gambling, and to repeal said original sections," which is the full and proper title as appears in the enrolled act.

The enrolled bill, if in all respects in proper form, is *prima facie* evidence of its proper passage; but, if the legislative journals unequivocally contradict the evidence furnished by the enrolled bill, we have held that the evidence furnished by the journals will control. *Webster v. City of Hastings,* 59 Neb. 563. But, where the legislative journals are silent, this will not be taken as evidence that the constitutional requirements were not observed. *State v. Frank,* 60 Neb. 327. The references to senate file No. 98, made in the journals, were only made for the purpose of identification, and do not show affirmatively that the full title of the act as it now stands was not the same during the whole of its progress through the legislature. *Stetter v. State, supra.*

The rulings of the district court upon the motions were correct, and the judgment of the district court is

AFFIRMED.

JOHN T. HANSBERRY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 24, 1907. No. 14,746.

Railroads: KILLING CATTLE: LIABILITY. Where cattle are being driven over a private crossing and are allowed to wander along the right of way of a railroad company, and one of them attempts to cross the track a short distance ahead of an approaching train, the railroad company is not liable for running down and killing such animal, unless it failed to use ordinary care to avoid the accident after discovering the animal on the track.

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

J. W. Deweese, F. E. Bishop and *F. M. Deweese*, for appellant.

A. H. Byrum, contra.

DUFFIE, C.

Hansberry is the owner of a tract of pasture land in Franklin county. Defendant's railroad traverses this tract from east to west. For the purpose of affording the plaintiff free access to his land on either side of the track, the railway company, in compliance with the statute of the state, has established and provided a crossing, and maintains gates on each side thereof. July 19, 1906, plaintiff directed his son, a minor 11 years of age, to drive the cattle on the north side of the track to the south side. The boy opened the gates, drove the cattle through the north gate and across the graded roadbed, and then returned to close the north gate. On account of some claimed defect or want of repair in the gate, the boy testifies that it took him about 15 minutes to close and fasten the same. In the meantime the cattle, instead of passing through the south gate, had meandered along the defendant's right of way. About this time one of defendant's passenger trains approached from the west at a high rate of speed, being from one to two hours behind its schedule time. The train struck and killed one of the plaintiff's cows which was crossing its track at the time, and this action was brought to recover its value. From a judgment in favor of the plaintiff, the defendant has appealed.

The negligence charged against the defendant is "that its employees saw said animal on said track in ample and sufficient time to have avoided, and could have avoided, the killing of said animal, but that, notwithstanding this fact, the said defendant, its agents and employees, knowingly, negligently, wilfully, and on purpose, ran its locomotive and cars upon and over said animal, kill-

ing the same, to the plaintiff's damage in the sum of $30." The only witnesses having personal knowledge of the circumstances of the killing were plaintiff's son and the engineer in charge of the train. The engineer relates the circumstances as follows: "Well, sir, it is about two miles east of Naponee, and a curve is about a mile east of Naponee, and after we got around that curve I noticed a boy on a horse. I seen his back was to me, and I whistled the crossing whistle, and the boy looked around and saw me, and turned his horse around and whipped to the south. The south gate was open, and there was a cow standing on the south side of the track about two rails east of the crossing, and I didn't see these other cattle until I got up. There was four, five, six, or maybe a dozen on the north side, probably two rails east of the crossing, and the north gate was shut. This boy put the spur to the horse, or whip, and went south. The road-master was on the left side, and, when I got up close to the cow, probably 150 or 200 yards, she turned her head, and I thought she was inside the fence, but saw she wasn't, and just then she turned and started to cross the track ahead of the train, and I applied the emergency air, and the train slowed down to about 15 miles an hour, and struck the cow, and I released the air and went on." He further stated that there was nothing else that could be done except to apply the emergency air, and that by all his skill as an engineer he could not have prevented striking the animal. The boy in charge of the animals testified that the cow went on the track "when they got pretty near to her." He further testified that the train slowed up, and, when asked how much, he answered: "Oh! pretty slow."

In *Union P. R. Co. v. Mertes,* 39 Neb. 448, we said: "The Union Pacific company's employees having sounded the whistle, rung the bell, and shut off steam, so as to decrease speed, as soon as they discovered that Mr. Mertes, apparently intoxicated, was walking along the

side of the track upon which they were running their engine, and afterwards, when he actually stepped upon this track, having, as we have seen, used every available means to stop the engine as quickly as that result could be accomplished, nothing more could be required at their hands." In *Chicago, B. & Q. R. Co. v. Lilley,* 4 Neb. (Unof.) 286, we said: "Ordinarily an engineer has a right to presume that persons walking along the track are in possession of their senses and will appreciate the danger and act with discretion; and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril." That the rule of these opinions is right and just is not a matter for dispute, and with much more force should it be applied in case of an animal grazing along the right of way of a railroad company, but not actually upon the track when first seen. In *Yazoo & M. V. R. Co. v. Wright,* 78 Miss. 125, it was said: "An engineer need not stop his train or check his speed because animals appear on the side of the track, and under such circumstances, to blow his whistle will often cause the very disaster sought to be avoided." In *Cuming v. Great Northern R. Co.,* 108 N. W. (N. Dak.) 798, the supreme court of North Dakota, under circumstances very similar to those in the case at bar, reversed a judgment in favor of the plaintiff and ordered the case dismissed. If we accept as true the undisputed evidence offered in this case, it conclusively appears that the cow for which damage is claimed attempted to cross defendant's track ahead of the approaching train and at so short a distance that it was impossible to avoid striking her. The whistle was blown, the bell was rung, the emergency air was applied, and every means adopted to avoid the injury. The plaintiff's own evidence tends strongly to prove that the defendant and its employees were wholly without fault. The district court should have directed a verdict for the defendant.

We recommend a reversal of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

REVERSED.

WALTER MOISE & COMPANY, APPELLANT, V. ROCK SPRINGS DISTILLING COMPANY, APPELLEE.

FILED MAY 24, 1907. No. 14,768.

1. **Contract**: OPTION. April 2, 1901, the defendant gave the plaintiff a written agreement to sell certain goods at a certain cash price, and to carry the goods until February 1, 1902, by adding interest at the rate of 6 per cent. per annum until that date, with the privilege to the plaintiff of countermanding all or part of the order before that time. *Held*, That the agreement was an option extended to the plaintiff to make purchase at the price named within the time limited.
2. ———: CONSTRUCTION. The agreement to pay interest from date of the writing to the time of delivery of the goods was a part of the price to be paid therefor, and not a consideration for the option.
3. ———: OPTION: WITHDRAWAL. An option to purchase goods extended to a party and for which no consideration was paid may be withdrawn at any time before the offer is accepted.
4. **Petition** examined, and *held* not to state a cause of action.

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

I. J. Dunn, for appellant.

B. N. Robertson, contra.

DUFFIE, C.

The plaintiff's cause of action is based upon a written agreement, together with subsequent letters which passed between the parties, which we will hereafter notice. The written agreement is as follows: "We agree to sell to

Messrs. Walter Moise & Company 150 bbls. S. I. Monarch whiskey, as follows: 100 bbls. S. I. Monarch Spr. 1899 at 42½c. in bond; 50 bbls. S. I. Monarch Spr. 1900 at 37½c. in bond, on the following terms: The above prices are to be on a cash basis. We agree to carry the above 150 bbls. until February 1, 1902, by adding interest at the rate of 6 per cent. per annum until February, 1902, with the privilege of countermanding all or part of the above order before February 1, 1902. The Rock Springs Distilling Co., Per. A. Hoeber." Appellant contends that the writing above set out constitutes a complete contract, while appellee asserts that it was a mere offer or option given to Moise & Company to purchase the goods, and that, unless said option was exercised before February 1, 1902, and before the option or offer was withdrawn, it is not binding on the defendant. The trial court accepted appellee's view and sustained a demurrer to the petition.

In our view the writing constitutes an option only. Moise & Company did not agree to purchase and pay for the goods. By the express terms of the agreement they reserved the right to countermand all or part of the order before February 1, 1902. They did not in any manner bind themselves to make the purchase. It is not alleged in the petition that any consideration was paid for this option, although it is contended in argument that the agreement to pay six per cent. interest constitutes a consideration. We do not so regard it. The price fixed upon the goods was a cash price, and if Moise & Company accepted the option they were, in addition to the cash price, to pay six per cent. interest thereon from the date of the agreement up to the time of the delivery of the goods. The provision for the payment of interest was a simple method of fixing the price of the goods at the time of delivery. It is alleged in the petition that on April 27, 1901, and again on March 11, 1902, appellant demanded that appellee fulfil its contract, and appellee then refused and still refuses to make delivery. These

letters are referred to as "Exhibits C and D," and made a part of the petition. "Exhibit C," the letter of April 27, after referring to some other orders, concludes as follows: "Now, so you will thoroughly understand our order, the only order you are to fill for us at present is the 100 bbls. of S. I. Monarch Spr. 1901 at 25c. The balance, 100 bbls. Spr. '99 at 42½c. and 50 bbls. S. I. Monarch Spr. 1900 at 37½c., to be filled later, unless we countermand before Feb. 1, 1902. If you have any other orders outside of those mentioned, we countermand them. We remain, Yours truly, Walter Moise & Co."

This certainly does not constitute an acceptance of the option, as the letter contains a plain assertion of appellant's right to countermand the order at any time up to February 1, 1902. The letter of March 11, 1902, need not be considered, as it was written two months after the option had expired. Plaintiff's petition also refers to and sets out a copy of a letter written by defendant to the appellant under date of May 29, 1901. This letter is quite lengthy, and need not be fully set forth. After stating that the orders from Moise & Company were considerably mixed up, the letter continues: "You gave our Mr. Hoeber on January 28 an order for 100 bbls. of May, 1901. This was a cash sale, and the goods were to have been branded 'Walter Moise & Co., Distillers,' and this brand we have had made for you. Before we could fill this order we received your letter of the 27th April saying, cancel all orders except the order given on April 3 for 100 bbls. of May, 1901, which was in addition to the order we already had booked for you. We had information from Mr. Hoeber to the effect that you had the right to countermand the order for 100 bbls. 1901 and 50 bbls. 1900 if the goods were not satisfactory. In our letter of April 5, acknowledging receipt of this order for 250 bbls., we stated that we would guarantee the quality of the goods to be of our highest standard. * * * We do not authorize any salesman to give options on anything, and we accept nothing but *bona fide* sales, and any

whiskey that we sell that is not strictly merchantable we will agree to take back, paying the purchase price with interest on the investment, storage, state and county taxes, and transportation charges, and we think a guarantee of this kind should be sufficient. We hope you will fully understand our position in this matter, and that the same will have your favorable consideration." Other correspondence undoubtedly passed between the parties that is not contained in the record, but we think defendant's letter of May 29, 1901, was a complete withdrawal of any option to purchase whiskey given to the plaintiff by its agent, if the agent had authority to enter into such option contracts.

It is not claimed by appellant that any consideration further than the agreement to pay interest was given for this option agreement, and, as we have already seen, the provision for interest was not a consideration for the privilege of the option, but a method fixed by the parties for arriving at the price of the goods, if the option should be accepted before withdrawal. There are authorities to the effect that one having an option must not only signify his intention to accept within the time limited, but must also pay or tender the price. *Weaver v. Burr*, 31 W. Va. 736, 3 L. R. A. 94. This rule has particular application to the case we are considering. The goods mentioned in the agreement were in bond, and it was the duty of the appellant to pay the internal revenue tax due the general government before the goods could be released. No duty rested upon the defendant to advance the internal revenue tax and make delivery of the goods prior to payment therefor, and the petition is entirely silent regarding any offer or tender of payment of the purchase price or the tax necessary to release the goods from the bonded warehouse.

The demurrer was properly sustained, and 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 appealed from is

AFFIRMED.

WALTER W. HACKNEY, APPELLEE, V. MITCHEL S. MCININCH ET AL., APPELLANTS.*

FILED MAY 24, 1907. No. 14,801.

1. **Injunction**: REPEATED TRESPASS. Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it.

2. **Landlord and Tenant**: ESTOPPEL. Estoppel of the tenant to deny the title of his landlord extends to every one in privity with him, and it inures to the benefit of any person to whom the landlord's title may pass, and continues until possession is actually surrendered. Gear, Landlord and Tenant, sec. 165.

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

M. S. McIninch and *H. A. Lambert*, for appellants.

Stull & Hawxby, contra.

DUFFIE, C.

Previous to November 10, 1903, one Theodore Bedford claimed title to the west half of the west half of the southeast quarter of section 25, township 5, range 15, in Nemaha county, Nebraska. Mrs. Gilbert had rented the land from Bedford for a series of years, and sublet the premises to the defendant David Jones, who had been in possession as her tenant for two or three years previous to the commencement of this action. Her lease expired March 1, 1904. In the fall previous to the expiration of her lease she assigned the unexpired term to the defendant McIninch. November 10, 1903, Hackney, the

* Rehearing denied. See opinion, 80 Neb. 49.

plaintiff and appellee, acquired the title of Theodore Bedford's heirs, he having deceased previous to that date. After securing his deed from the Bedford heirs, Hackney notified Jones that he was the owner of the premises, and that rent should thereafter be paid to him. Jones continued in possession during the year 1904, but delivered the rental share of the crop to McIninch in the fall of that year. In March, 1905, Hackney rented the land to one Charles Andrews, and early in March of that year took Andrews to the place and put him in possession. Jones occupied an adjoining tract of land belonging to Hackney, and, after putting Andrews in possession of this particular forty, Hackney and Andrews visited Jones on the adjoining tract, where he was living, and at that time appellee told Jones whose cattle were feeding on the stalks on the land in controversy, that he had put Andrews in possession, and that he would have to get Andrews' consent to his cattle feeding on the stalks. Jones at that time did not object to Andrews taking possession of the land, and replied that he and Andrews would have no trouble over the stalks. Andrews did some work upon the land, cutting the stalks and listing it, and also cut and removed some wood from the premises, but he and his son were on several occasions thereafter driven off from the land by McIninch and Jones, McIninch claiming that Hackney had no title, and Jones asserting that he had rented the land from McIninch for the year 1905. Not being able to remain in peaceable possession of the land through his tenant Andrews, Hackney brought this action in the district court, asking that the defendants be restrained and enjoined from going upon the premises, or in any manner interfering with appellee and his said tenant in the peaceable possession and occupancy thereof. A temporary injunction was issued, and a motion to dissolve the same overruled by the court. By agreement of counsel the case was submitted on final hearing upon the evidence taken on the motion to dis-

solve the temporary injunction, and on such hearing the court entered a decree making the injunction perpetual, from which decree defendants have appealed.

It is insisted by appellants that the petition does not state a cause of action for equitable relief. The petition alleges ownership of the land in Hackney; that Jones was in possession as subtenant of the former owner at the time plaintiff acquired title; that he remained in possession during the year 1904 under an implied agreement to pay rent therefor; that he fraudulently attorned to his codefendant McInnch; that thereafter, and in March, 1905, plaintiff rented the premises to Andrews and put him in possession; that the defendants were repeatedly trespassing upon the premises and threatening to assault the plaintiff and his tenant; that they on several occasions drove the tenant and his son from the premises under threats of bodily injury. In our opinion the allegations of the petition are amply sufficient to warrant the court in granting a temporary injunction. Not only did it charge a continuing trespass of which equity will take jurisdiction (*Shaffer v. Stull,* 32 Neb. 94), but it clearly appears from the petition and the proof offered in support thereof that Jones fraudulently attorned to his codefendant McInnch. In the fall of 1903 Hackney obtained title to the land from the landlord of Mrs. Gilbert and her subtenant, Jones. The law is well settled that the tenant's estoppel to deny his landlord's title inures to the benefit of any person to whom the landlord's title may pass. *Jackson v. Collins,* 3 Cow. (N. Y.) 89; *Dunshee v. Grundy,* 81 Mass. 314; *Tilghman & West v. Little,* 13 Ill. 239; *Brenner v. Bigelow,* 8 Kan. 496; Gear, Landlord and Tenant, sec. 165. Jones, being in possession as subtenant of Bedford, was estopped to deny the title of Hackney, who had acquired title from the Bedford heirs. It results, then, that Hackney was in possession through his tenant Jones, and the proof satisfies us that, while no direct or express contract of lease was made from Hackney to Jones for the year 1904, it

was well understood between them that Jones remained in possession as Hackney's tenant. Without disclaiming such implied lease or notifying the plaintiff of any agreement or understanding which he had with McIninch, Jones paid the rent to the latter and thus perpetrated a wrong upon his landlord. In the spring of 1905, when Hackney put Andrews in possession as his tenant, Jones acquiesced therein. From that time forward he had no right of possession and his entry upon the land was trespass. The continued trespass of Jones and McIninch, their driving Andrews from possession by threats of violence, the apparent combination between them by which rent was to be paid to McIninch, instead of to Hackney, the landlord, were all circumstances calling for the interposition of the equitable arm of the court to preserve the plaintiff and his tenant in peaceable possession of the property, and to end the wrongful conduct of the parties in the disposition of the rent to which the plaintiff was entitled. It is now well setled that injunction is a proper remedy, particularly when, as in this case, the injury is of a continuous nature and committed under a claim which indicates a continuance or frequent and constant repetition of it. Courts of equity take cognizance of these cases to prevent the vexation and harassment of continued disturbances, prevent a multiplicity of suits, and to preserve the right by restraining the commission and repetition of threatened injury. *Pohlman v. Trinity Church,* 60 Neb. 364; *Carroll v. Campbell,* 108 Mo. 550. A claim is made that Hackney got no title by his deed from the Bedford heirs; that the real title rests in the heirs of one Whitney. The question of the legal title to the premises is wholly immaterial, and is not to be considered in determining the rights of the parties. Not only was Jones a subtenant of the party from whom Hackney acquired title, but McIninch himself became a tenant by taking over the unexpired term of Mrs. Gilbert. Both of these parties by well-established rules of law are estopped from questioning Hackney's title. They are tenants on

this land, their rights as such being derived from Hackney's grantors. Until they have surrendered their possession, they stand in no attitude to question the title under which they entered.

In our opinion the decree of the district court is clearly right and should be affirmed. We so recommend.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

FRED PETERSON ET AL. V. STATE OF NEBRASKA.

FILED MAY 24, 1907. No. 14,834.

1. **Criminal Law**: JURISDICTION. The judgment of a court having no jurisdiction of the subject matter does not constitute a bar to a second prosecution based upon the same charge as that upon which the first judgment was pronounced.

2. **Interstate Commerce**: RAILROADS: SPEED ORDINANCE. An ordinance limiting the speed of trains on an interstate railway which carries United States mail to ten miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail.

3. **Cities**: ORDINANCES: PRESUMPTION. The determination of the question whether an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities, and, when they have acted and passed an ordinance, it is presumptively valid, and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence.

4. ———: ———: VIOLATION: EVIDENCE. A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal prosecution, is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been com-

mitted is sufficient to sustain a conviction. Proof beyond a reasonable doubt is not required.

5. **Fines:** IMPRISONMENT FOR DEBT. Fines or penalties arising from a violation of the penal laws of the state, or city or village ordinances, are not debts within the meaning of our constitutional provision prohibiting imprisonment for debt. *Kennedy v. People*, 122 Ill. 649.

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

Edson Rich and *Phelps & Peterson*, for plaintiffs in error.

W. T. Thompson, Attorney General, Grant G. Martin, T. F. A. Williams, W. I. Allen, I. H. Hatfield, C. M. Johnson and *F. B. Churchill, contra.*

DUFFIE, C.

Schuyler is a city of the second class having more than 1,500 and less than 5,000 inhabitants. An ordinance of the city, approved August 16, 1904, designed to regulate the speed of railroad trains passing through the city, provided that it should be unlawful for any person, or railroad company, or any employee managing, operating or controlling any locomotive engine, car, or train of cars, to run or permit to be run or propelled or operated any locomotive engine, car, or train of cars within the limits of the city at a rate of speed greater than ten miles an hour, provided that the rate of speed of any such engine, car, or train of cars, shall not be restricted on any railroad in said city where competent watchmen for the purpose of signaling the approach of any engine, car, or train of cars, are stationed at all public crossings of such railroad, which are thoroughfares, which watchmen shall so signal the approach of every such engine, car or train of cars, nor on any railroad in said city which has or shall have erected or placed at all public street crossings of said railroad, which are thoroughfares,

gates or bars, so constructed as to be quickly lowered and raised across any such street so crossing such railroad, and to remain closed during the entire time of the arrival and departure of any train running at a higher rate of speed than ten miles an hour, and which gates or bars shall be so situated as to cut off traffic across such railway at such street crossings while said gates or bars are closed. A penalty of not less than $25 nor more than $100 was provided for a violation of the ordinance. Section 8733, Ann. St., authorizes cities of the second class to regulate the running of railway trains and to govern the speed thereon within the limits of the city.

December 6, 1905, plaintiffs in error were arrested under a warrant issued upon the complaint of the city attorney charging them with the violation of the ordinance. The defendants, prior to this proceeding, and on November 4, 1905, had been arrested upon the same charge. They were tried and convicted before one V. W. Sutherland, a justice of the peace, claiming to act as a specially appointed police judge for the city of Schuyler. The district court released them on habeas corpus, on the ground that "in said alleged proceedings said Sutherland was without jurisdiction and said proceedings and judgment were and are void." It is elementary that the judgment of a court having no jurisdiction of the subject matter is absolutely void, and constitutes no bar to further proceedings on the same charge. *Thompson v. State,* 6 Neb. 102; *Arnold v. State,* 38 Neb. 752. The defendants, after having procured their discharge on the ground that the court before which they were tried had no jurisdiction of the offense charged against them, and that the judgment under which they were held was absolutely void, cannot now interpose that judgment as a bar to another trial before a court having jurisdiction of the offense with which they stand charged. This is conclusive of the first point raised by the defendants that they were twice placed in jeopardy.

It is next insisted that a municipal corporation, in the

exercise of its police power, cannot impose such restriction as will interfere with the governmental agency of the United States to unreasonably impede interstate commerce and retard and delay the speedy transportation of the United States mail. It is urged that the Union Pacific Railroad Company sustains relations to the federal government different from that of any other railroad in the state, because of the conditions under which it was built and the obligations imposed by the charter of the company. It is said that those roads which the government did not aid in building perform a voluntary service in carrying the United States mails, while those aided by the government rest under an obligation by the terms of their charter to do so, and that their service in that respect is obligatory. It is further urged that commerce between the states has been confided exclusively to congress by the constitution, and is not within the jurisdiction of the police power of the state, and that, while the state may make reasonable regulations to secure the safety of passengers and of the people of the state, it can do nothing which will directly burden or impede the traffic of railway companies engaged in interstate commerce, or which will impair the usefulness and facilities of such traffic. On these grounds it is argued that the ordinance under which the defendants were convicted on their second trial is unreasonable and void.

This question in various forms has been before the supreme court of the United States on several occasions. In *Illinois C. R. Co. v. State,* 163 U. S. 142, the court had before it a statute of the state of Illinois which provided that "every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers

with safety." It appears from a statement of the facts that the line of railroad communication crossing the Ohio river at Cairo, of which the Illinois Central Railroad Company forms part, has been established by congress as a national highway for the accommodation of interstate commerce and of the mails of the United States; that the station of the Illinois Central Railroad Company at the southern terminus of its road in the city of Cairo was at a point three and a half miles distant from so much of its main track as formed part of the through communication by railroad from the state of Illinois across the Ohio river into the state of Kentucky and other states on the through connecting lines, and it was the contention of the railroad company that the particular train in question, a fast mail train, was not compelled to leave the direct and through route of travel and switch down to the depot in Cairo three and a half miles from the through line, the people of that city being sufficiently accommodated by other trains operated by the company. The court held that a fast mail train carrying interstate passengers and the United States mail from Chicago to places south of the Ohio river, over an interstate highway established by authority of congress, need not turn aside from the direct interstate route and run to the station in Cairo three and a half miles away from that route and back again, in order to receive and dispatch passengers at that station for the interstate travel to and from which the railroad company furnished other and ample accommodations, and that the statute, in so far as it required this to be done, was an unconstitutional obstruction of interstate commerce and of the passage of the United States mails. In the same case it was said, however, "that the arrangements made by the company with the post office department of the United States cannot have the effect of abrogating a reasonable police regulation of the state."

In *Cleveland, C., C. & St. L. R. Co. v. State,* 177 U. S. 514, that part of the Illinois statute above quoted, which required all passenger trains to stop at county seats,

was before the court on petition of the state's attorney to require the defendant company to stop a train known as the "Knickerbocker Special" at the city of Hillsboro, the county seat of Montgomery county. In that case it was shown that the "Knickerbocker Special" was a train especially devoted to carrying interstate transportation between the city of St. Louis and the city of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train which connected with other similar trains on the Lake Shore and New York Central roads, and that it was necessary to put on this train, because the trains theretofore run (none of which had been taken off) could not, by reason of stopping at Hillsboro and other smaller stations, make the time necessary for eastern connections or carry passengers from St. Louis to New York within the time which the demands of business and interstate traffic required; that the train was not a regular passenger train for carrying passengers from one point to another in the state of Illinois, such traffic being amply provided for by four other trains, and that the "Knickerbocker Special" was used exclusively for interstate traffic from and to points without the state of Illinois. In that case it was held that the requirement that all regular passenger trains must stop at county seats, which is made by the Illinois act of March 21, 1874, constitutes a direct burden upon interstate commerce in violation of the United States constitution, so far, at least, as that statute requires through interstate passenger trains to stop at such stations when adequate through service has been provided for local traffic. In that case it was said: "Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of congress to regulate such commerce, is evident from the large number of cases in which we

have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." The court further said: "The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

In *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, it was held that, in case of a railroad whose construction had been aided by congress so as to establish a route of travel through several states, a state had the power to make all needful regulations of a police character for the government of the company operating the road within the jurisdiction of the state. It was there said: "By the settled rule of decisions in this court * * * it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to post its tariffs and time tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

In *Crutcher v. Kentucky*, 141 U. S. 47, Mr. Justice Bradley, speaking for the court, said: "It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in

the neighborhood of cities and towns, with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

Here is a distinct recognition of the rights of the state to enact all reasonable police regulations necessary to protect the people of the state in the enjoyment of their property and to guard them from injury by the operation of trains through thickly populated communities. It will be observed that in the two cases first above referred to, no question of the protection of life or of the person from bodily injury was drawn in question. The only feature presented by the cases was the right of the state to require, in one case, a fast mail train to depart from its usual route for the accommodation of the citizens of a city for whose benefit other ample accommodations had been provided, and, in the other case, to require a train specially devoted to interstate commerce to stop at a county seat for the accommodation of its citizens who were amply provided with accommodations by four other daily trains. The difference between those cases and the one we are considering is manifest. The ordinance in question is designed, not for the mere accommodation of the residents of Schuyler in the use of the trains of the company, but it is to protect them against loss of life or bodily injury from the operation of trains running through its limits. In such case, unless the ordinance is wholly unreasonable, it ought to receive the support of the courts. In *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L. R. A. 391, it was held that an ordinance limiting the speed to ten miles an hour within the corporate limits is not unreasonable, where the road lies for a mile and a

quarter within such limits, and crosses four streets, two of which are main thoroughfares, and buildings located near the road obstruct to a considerable extent a view of the tracks and approaching trains, although the principal part of the buildings of the municipality are located on one side of the road; and it was further said that an ordinance limiting the speed of trains on an interstate railway which carries the United States mail to ten miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail.

It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities thereof by the legislature. When they have acted and passed an ordinance, it is presumptively valid, and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred by acting in an arbitrary manner. *Knobloch v. Chicago, M. & St. P. R. Co.*, 31 Minn. 402; *Erison v. Chicago, St. P., M. & O. R. Co.*, 45 Minn. 370, 11 L. R. A. 434. So far as we have observed there is nothing in the record showing that the ordinance in question is unreasonable or unnecessary. That the municipal authorities had in view the rights of the company, as well as the protection of its own citizens, is manifest from the proviso allowing unlimited speed of trains where watchmen are provided or where gates or bars are erected to guard the tracks. That this might impose some additional burden upon the company cannot, we think, be urged as an objection to the ordinance.

The district court instructed the jury that the burden of proof was upon the state to establish each and all of the material facts charged in the complaint by clear and satisfactory evidence; that the prosecution, while criminal in form, was in fact civil; that it was not necessary for the state to establish the facts charged beyond a reasonable doubt; that the material facts should, however, be clearly and satisfactorily established by a preponderance of the evidence before finding the defendants guilty. Exceptions to the instructions were taken by the defendants, and are now assigned as error, it being insisted that the proceeding was criminal in its nature, and that evidence beyond a reasonable doubt was necessary to convict. At common law, and independent of statutory enactments, punishments for the violation of municipal ordinances were treated in the light of civil actions; imprisonment for noncompliance with the order of the court imposing the payment of a fine being looked upon, not in the light of punishment, but as a means of compelling a compliance with the orders of the court and enforcing payment. The general doctrine appears to be that, where an act is not criminal under the laws of the state, a municipal ordinance will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action. *City of Huron v. Carter,* 5 S. Dak. 4, 57 N. W. 947. McQuillan, Municipal Ordinances, sec. 190, asserts that the weight of judicial authority holds that the prosecution for the violation of a municipal ordinance is in the nature of a civil action for the recovery of a debt. Sometimes the action is regarded as criminal where the offense constitutes a misdemeanor under the laws of the state; but ordinances of the character of the one in question, forbidding the doing of an act that is not *per se* criminal or immoral, that is not made a crime or misdemeanor by any law of the state, is a mere rule or regulation for the government of the community within the municipal limits,

and does not come within the category of acts considered criminal under our constitution or statutes. In *Sutton v. McConnell,* 46 Wis. 269, 50 N. W. 414, the supreme court of Wisconsin, in answer to the argument that a prosecution for the violation of a city ordinance was a criminal prosecution, said: "We think it is not. No law in force when that prosecution was instituted made it a criminal offense to use wanton or obscene language within the corporate limits of the city of Columbus. The use of such language there gave the city a right of action against the offender to recover a prescribed penalty therefor. Under the charter of the city an action to recover such a penalty may be commenced either by summons or warrant. But whether commenced by the one process or the other, the pleadings and judgment are the same. In either case it is nothing more than a civil action to recover a penalty. Hence, it was competent for the magistrate, as in other civil actions, to act upon the stipulation of the parties, and to determine the action and render final judgment therein."

Section 8751, Ann. St., found in the chapter relating to cities and villages, is in the following language: "Fines may in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state. And in any such suit or action where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation." From this it will be seen that the legislature contemplated a civil action for the recovery of a fine imposed for the violation of an ordinance, and in such case clear and satisfactory proof of the violation would certainly be sufficient to warrant a recovery. In *Toledo, P. & W. R. Co. v. Foster,* 43 Ill. 480, brought to recover a penalty of $50 imposed upon railways for a failure to sound a whistle or ring a

bell for 80 rods before arriving at a crossing, the court said: "While the law does not require the same completeness of proof in cases of this character that is required in criminal prosecutions where life or liberty is in jeopardy, yet the evidence must be of such a character as to bring home to the jury a reasonable and well-founded belief of the guilt of the defendant. Neither a railway company nor a private individual should be subjected to a fine, whereby their property is to be divested, merely because there is a little more evidence that they did not perform some required act than there is that they did." The instruction here under consideration required something more than a preponderance of the evidence. It required that the charge against the defendant should be established by clear and satisfactory evidence, and this is in full accord with the Illinois rule.

It is further urged that if the action is civil in its nature the fine imposed is in the nature of a debt due from the defendants, and that to imprison them for its nonpayment, as required by the ordinance, would violate our constitutional provision prohibiting imprisonment for debt. It is well settled that a direction in a sentence imposing a fine that defendant shall stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court. 19 Cyc. 553, and authorities cited. A fine is not a debt within the meaning of the constitutional provision referred to. *In re Beall,* 26 Ohio St. 195.

After a careful examination of the record and the questions presented we are unable to discover any reversible error, and recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

DAVID BRADLEY & COMPANY, APPELLANT, V. KINGMAN IMPLEMENT COMPANY ET AL., APPELLEES.

FILED MAY 24, 1907. No. 14,838.

1. **Conditional Sales.** Section 26, ch. 32, Comp. St. 1905, requiring conditional sales of personal property to be in writing, signed by the vendee, and a copy filed with the county clerk, applies to a contract of sale made in Iowa of property to be delivered to and held by the purchaser within this state.

2. **Sales: CONSIDERATION.** A pre-existing debt is a good consideration to support a sale of personal property.

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

C. L. Richards, for appellant.

M. H. Weiss and *O. H. Scott, contra.*

DUFFIE, C.

John Meinen, an implement dealer at Belvidere, entered into a contract with David Bradley & Company to handle their implements. The contract recites that Meinen is appointed agent for the Bradley company to sell its implements, but there are other terms and conditions which make it evident that Meinen was something more than an agent, and it is conceded by the David Bradley company that his interest in all implements received by him under the contract was that of a vendee in a conditional sale. It also appears that Meinen was handling the goods of the Kingman Implement Company, and became indebted to them in a sum exceeding $2,000. A short time prior to the commencement of this action Meinen and the Kingman company had a settlement, the Kingman company receiving back such of its goods as Meinen had on hand, and in addition thereto a surrey which Meinen had received from the David Bradley company. Other goods were turned over to the Kingman company to the full

amount of its claim, and the indebtedness of Meinen to said company thus satisfied and discharged. This action was commenced by the David Bradley company to recover the surrey turned over by Meinen to the Kingman company on that settlement. The court directed the jury to return a verdict for the defendant, and the plaintiff has appealed.

The contract between Meinen and the David Bradley company was made in Council Bluffs, Iowa. No copy thereof was filed in the office of the clerk of Thayer county, where Meinen resided and carried on his business. It is insisted by appellant that the contract, being an Iowa contract, was not required to be filed in Thayer county in order to protect the David Bradley company as against a purchaser or judgment creditor of Meinen; that a conditional sale of property made in Iowa, although to a resident of Nebraska, the property to be taken and used in Nebraska, does not come within the provisions of our statute requiring a conditional sale to be in writing, and signed by the vendee, and a copy thereof filed with the clerk of the county. We do not think that this position can be sustained. While it is true that the contract of conditional sale was made in Iowa, both parties thereto contemplated that it was to be performed in Nebraska. The goods were to be taken to Nebraska and there sold, and absolute title passed to the purchasers from Meinen. Meinen was to remain in possession until a sale was made. The manifest purpose of our statute is to render ineffectual the condition in a sale of goods held in this state, where a copy of the contract of sale is not filed with the clerk of the county. The object of the statute is to get rid of secret and latent liens. Public policy, as asserted in the extension of our registry laws, requires that the public record shall show the ownership of personal property, and a construction which is favorable to that end should be given to the act. *Knowles Loom Works v. Vacher,* 57 N. J. Law, 490, 33 L. R. A. 305.

It is further urged that the Kingman Implement Company is not a purchaser within the meaning of the statute. It clearly appears from the evidence that the Kingman Implement Company gave credit to Meinen for $90 on the amount due from him in consideration of this surrey. It also appears that it had no notice of any claim to the property by the David Bradley company. It is a well-recognized principle of law in this state that a pre-existing debt is a good consideration for a conveyance of property, and, if taken in good faith and without any fraudulent purpose, the sale will be upheld, even though the consideration therefor was an antecedent debt. *Ward v. Parlin,* 30 Neb. 376; *Steen v. Stretch,* 50 Neb. 572; *Rachman v. Clapp,* 50 Neb. 648.

The action of the district court in directing a verdict and entering judgment thereon in favor of the defendant was clearly right, and we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

KATE CONNELLY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 24, 1907. No. 14,578.

1. **Justice of the Peace:** JURISDICTION. It is a well-established rule in this state that a mere claim of title will not oust a justice of the peace of jurisdiction in a forcible entry and detainer case, but the justice may proceed until it is shown by competent evidence that the defendant is claiming possession under a *bona fide* claim of title.

2. **Judgment:** RES JUDICATA. A fact within the jurisdiction of the court, litigated and determined in a forcible entry and detainer suit, cannot again be brought in question between the same parties.

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

David Van Etten, for appellant.

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

EPPERSON, C.

In November, 1900, in a forcible entry and detainer action the defendant herein obtained judgment against the plaintiff for the restitution of the real estate here in controversy. Plaintiff brings this action, alleging that she is the owner of the property, and asks that defendant be restrained from enforcing its judgment for restitution. She also asks that the title be confirmed in her as against any claim or demand of defendant. No fraud or irregularity was alleged or proved to impeach the judgment for restitution. In *Shufeldt v. Gandy,* 34 Neb. 32, it was held: "The jurisdiction of courts of equity to set aside judgments at law will be exercised only when it appears that the judgment complained of is unconscionable, and when the party applying had no opportunity to make defense, or was prevented from so doing by accident or the fraud of the opposing party." In the opinion by Judge POST it is further said: "The rule is well settled that the party seeking relief in equity from a judgment at law must show clearly that the judgment complained of is the result of fraud, accident, or mistake, and not of his own negligence." In *City of Broken Bow v. Broken Bow Water Works Co.,* 57 Neb. 548, it was held: "To justify an injunction to restrain the enforcement of a judgment it is not sufficient to show that the judgment debtor had a valid defense. It must be shown that he was prevented from interposing it by fraud, mistake, or accident, and without fault on his part." We know of no reason why the same rule should not apply to judgments for the restitution of real estate.

In the forcible entry and detainer case the defendant

herein alleged a lease then existing between the parties under which the plaintiff herein was in possession of the property. Plaintiff, as defendant in that action, set up fraud in the obtaining of the lease. On this issue the forcible entry and detainer action was tried and resolved against the plaintiff herein. It is a well-established rule in this state that a mere claim of title will not oust a justice of the peace of jurisdiction in a forcible entry and detainer case, but that the justice may proceed until it is shown by the evidence that defendant is claiming possession under a *bona fide* claim of title. *Green v. Morse,* 57 Neb. 391; *Lipp v. Hunt,* 25 Neb. 91; *Smith v. Kaiser,* 17 Neb. 184; *Pettit v. Black,* 13 Neb. 142; *Leach v. Sutphen,* 11 Neb. 527; *Clark v. Tukey Land Co.,* 75 Neb. 326. In the forcible entry and detainer case the claim of title by adverse possession was also interposed by the plaintiff herein, but the justice court considered, in the face of the lease, that the evidence did not support the defense, and that the claim of title by adverse possession was not made in good faith. Ordinarily a judgment of ouster in a forcible entry and detainer case is not a bar to an action in relation to the title, since one person may own the title and another may hold the right of possession for a term. In *Dale v. Doddridge,* 9 Neb. 138, it was held: "The judgment of a justice of the peace, or of the district court, in proceedings in forcible entry and detainer, is conclusive in that proceeding on the matter in issue at the time of its rendition, unless such judgment is reversed or modified by proceedings in error. But the judgment is no bar to another action in relation to the title of the premises." The above rule, however, is not broad enough to permit an action to restrain the enforcement of restitution. As stated in the rule quoted, such judgment is conclusive on the matter in issue at the time of its rendition. The specific issue of fact, which the justice of the peace had jurisdiction to try, was litigated, and we are bound by the adjudication that plaintiff was in possession under a lease with defendant; and, in the absence of fatal irregularity

in the former proceeding, the judgment for restitution should not be enjoined.

Plaintiff's contention that she is entitled to a decree quieting title as against any claim or demand of the defendant is based on the theory that the judgment for restitution is a cloud upon her title. To grant her such a decree would be in fact an annulment of the judgment, or an injunction against its enforcement, which, as above shown, cannot be done in this case.

Many errors are assigned in the admission and exclusion of evidence, but as the assigned errors do not pertain to the regularity of the former judgment the court's rulings were without prejudice, and further discussion is not necessary.

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

AMES, C., concurs.

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

AFFIRMED.

GRANT DYE, APPELLEE, V. WESLEY RASER ET AL., APPELLANTS.

FILED MAY 24, 1907. No. 14,769.

1. **Liquor License:** APPLICATION. Under the liquor laws of this state (Ann. St. ch. 32), a petition for a liquor license must be signed by *bona fide* freeholders.
2. ———: ———: FREEHOLDER. One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law.
3. ———: ———: ———. Lapse of time alone will not qualify a bad faith freeholder to sign a petition for a liquor license.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

Martin & Ayres and *Thomas Darnall,* for appellants.

Patterson & Patterson, contra.

EPPERSON, C.

In May, 1906, upon the petition of 33 citizens, the trustees of the village of Chapman issued a liquor license to appellee, overruling the remonstrance of appellants. The district court affirmed the action of the village board, and remonstrators appeal to this court.

Twelve of the petitioners claim to be freeholders by reason of each owning a certain lot or part of a lot in McCormick's addition to said village. McCormick's addition consists of one block of land divided into 12 lots, 25x140 feet. It is 40 rods from the original town. The intervening land is not platted. There are no improvements upon these lots. They are low and flat, and have been put to no use whatever by the owners. The tract was platted in 1902, since which time the owners of the different lots have been persistent petitioners for liquor licenses. Petitioner Hartman holds a deed to an undivided one-half interest in one of the lots, for which he gave $10 March 2, 1906. He says he bought it for speculation and for a garden. He did not know the condition of the lot, nor could he explain how it appeared of value for speculation. Petitioner Trimann bought an entire lot for $10 March 24, 1906, and says that he made the purchase as an investment. D. W. Abbott, who signed the petition, claimed to own one-half of a lot purchased in December, 1905. Another petitioner, Platt Abbott, claimed to own all of this lot under a deed given in April, 1904. Both deeds were executed by the same grantor. The evidence does not show that D. W. Abbott is the owner. Each of the above named, except Platt Abbott, signed the petition here in controversy soon after obtaining their deeds. Petitioners Gallogly, Worlard, Hanna, Platt Abbott, Westphal, Valkman, Mrs. Valkman, Crandall and Flora Abbott each acquired title to one of the McCor-

mick lots, or an interest in one, prior to the spring of 1906, but each conveyance was at a time when a petition for a liquor license was in circulation. The purchase prices varied from $8 to $25. Many of the grantees did not know the dimensions of their lots. Several testified that they bought their property for speculation or for a garden spot, but none was ever used for gardening. The lots in McCormick's addition were not desirable property, and the only inference deducible from the evidence is that the petitioners above named bought and held their several tracts of land for the sole purpose of becoming eligible to petition for liquor licenses. Under these circumstances are they *bona fide* freeholders within the meaning of the liquor law?

The statute contemplates that 30 *bona fide* resident freeholders shall sign the petition; and it has been said that "a deed for lands to many persons for a single consideration, and with the purpose of qualifying them to sign recommendations for inn and tavern licenses, is fraudulent, and will not constitute them reputable freeholders within the statute." *Austin v. Atlantic City,* 48 N. J. Law, 118; *Smith v. Elizabeth,* 46 N. J. Law, 312; *Bennett v. Otto,* 68 Neb. 652; *Colglazier v. McClary & Martin,* 5 Neb. (Unof.) 332. In *Bennett v. Otto, supra,* the petitioners, whose qualifications were in dispute, with 28 others, purchased a tract of three acres to be used as a park, taking title by deed, in which all were named as grantees. Each paid $5, claiming that the land was taken as an investment. Remonstrators contended that they were not *bona fide* freeholders, and this court so held, saying: "The circumstances under which the deed to the park was made, the fact that so many of the grantees are young men with no property or other interests in the town of Waco to be benefited by the purchase of this ground for park purposes, and the fact that they pretend that a five dollar interest in this land was taken as an 'investment,' are all inconsistent with the *bona fides* of the transaction. We can understand why property owners, permanent resi-

dents of Waco, would contribute something toward a park for the town, and why the young men of the village should desire a ball ground to which they might resort for ball play and other sports, and that this might induce them to contribute or donate from their means toward the purchase of such grounds; but when they assert that such investment of their money was for profit, and that that was the inducement which led them to put five dollars in such an enterprise, we are led to look for some other cause for their action; and the signing of Otto's petition the same evening that the deed was made, or at latest the next day, indicates quite conclusively that a desire to qualify themselves as such signers was the principal inducing cause." In *Colglazier v. McClary*, 5 Neb. (Unof.) 332, it appears that several freeholders signed the petition soon after obtaining deeds. Many of them obtained title from the same grantor, acting through his attorney in fact, who had circulated the petition in behalf of another. In some instances a small cash payment was made by the purchaser and notes given for the remainder. The conveyances had not been placed on record. It was held that they were made freeholders for the purpose of enabling them to sign the petition.

Appellee attempts to distinguish *Bennett v. Otto* and *Colglazier v. McClary, supra*, on the ground that the applicants therein had assisted in making the petitioners freeholders. The conclusion of this court was not based on any direct evidence of that nature, but the unusual manner of becoming freeholders, as shown by the evidence in each case, was sufficient to disclose that the petitioners were not *bona fide* freeholders. The facts are different, but no stronger in establishing that conclusion in the cases cited than in the case at bar. There is no difference in principle between the bad faith of the conveyances condemned by this court in *Bennett v. Otto* and *Colglazier v. McClary* and the bad faith in the conveyance of the small worthless tracts of land in the case at bar. In the case in hand it is true that many of the conveyances were made to assist

former applicants to obtain licenses, and the title now relied on to qualify some of the petitioners had been held for some time. As above shown, however, these titles were not *bona fide* when acquired. They never became such by lapse of time. The evidence is sufficient not only to justify, but to require, the conclusion that McCormick's addition is held in the interests of the liquor traffic, not as a place for conducting business, but for the purpose of annually furnishing freeholders, so claimed, to sign petitions for liquor licenses. We cannot place judicial approval upon this method of obtaining a liquor license. The 12 signers above named were not *bona fide* freeholders within the meaning of the liquor laws, Ann. St., ch. 32.

The judgment of the district court was wrong and should be reversed, and we so recommend.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the license canceled.

REVERSED.

WILLIAM T. WHITE, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MAY 24, 1907. No. 14,795.

1. **Taxation: ASSESSMENT: EVIDENCE.** Evidence examined, and *held* to show appellant a resident of the city of Lincoln, and liable to assessment as such.
2. ———: ———. Appellant had $12,000 on April 1, 1905, which he soon afterwards applied on the purchase price of real estate for which he had previously contracted, and by his contract with his grantor assumed the payment of the 1905 taxes assessed against the real estate. *Held*, That an assessment to him of the $12,000 was not a double taxation of his property.
3. ———: ———: **DEPOSITS.** Money deposited in a bank and evidenced by a certificate of deposit payable on demand is liable to assessment as money, and not as a credit, under the revenue laws of 1903, Comp. St. ch. 77.

4. ———: ———: PROPERTY OMITTED. Under the provisions of section 7777, Ann. St., the board of equalization of the city of Lincoln has power, upon notice to the person liable, to assess property which has been omitted by the assessor from the tax list.

5. ———: ———: ———: EVIDENCE. In the assessment of omitted property, the board of equalization of the city of Lincoln may reach their conclusions as to property to be placed on the tax list from evidence given upon an investigation in the nature of a judicial proceeding.

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

S. J. Tuttle, for appellant.

E. C. Strode and *D. J. Flaherty, contra.*

EPPERSON, C.

The board of equalization of the city of Lincoln placed on the assessment roll for 1905 an assessment of $12,000 against one William T. White, who thereupon prosecuted error proceedings to the district court, and has appealed from a judgment affirming the order of the board.

1. Appellant's first contention is that he was not a resident of the city of Lincoln on April 1, 1905, and could not be legally taxed for that year. This insistence presents a question of fact which the board of equalization, as well as the district court, has determined adversely to appellant. A review of the record constrains us to adopt their finding as the only reasonable inference to be drawn from the evidence. Appelllant's testimony discloses that he was a resident of the city of Lincoln on January 1, 1905, and that he never removed from Lincoln, though absent therefrom with his family from the latter part of March until June 1, 1905—a part of the time visiting in Butler county and a part of the time boarding with relatives in University Place, a city conveniently near Lincoln. On June 1, 1905, he returned to Lincoln.

2. It appears that on March 25, 1905, appellant entered into a contract with Dr. H. J. Winnett for the purchase

of certain real estate in Lincoln for the agreed consideration of $18,000, $1,000 of which was paid in cash, and the remainder to be paid between the 3d and 20th of April following. Nothing was said in the contract as to the payment of the taxes, but in the deed of April 18 appellant assumed the taxes assessed against the property for the year 1905. On the first of April appellant possessed $12,000 and the contract for the purchase of $18,000 of real estate, and he now argues that, if the assessment of the $12,000 is allowed to stand, the result will be that appellant will suffer double taxation; that is, he must not only pay taxes on the assessed value of the real estate, but also upon the $12,000 which he intended to apply on the purchase price. This contention is devoid of merit. The evidence discloses, and the board was justified in finding, that appellant, as part of the consideration, orally agreed to pay the taxes on the purchase money and also on the property, and that Dr. Winnett was to be relieved from the payment of the same. Appellant cannot now complain because he was compelled to perform his part of the agreement. The money and the real estate were both in existence and subject to taxation. The authorities did not assess the real estate to appellant. By his agreement he gave as a part of the consideration for his purchase $18,000, plus the amount of the 1905 taxes assessed against the property, and for which, were it not for the contract, his grantor would be liable.

3. The $12,000 was deposited in a bank and evidenced by certificates of deposit payable on demand. Appellant now insists that he is entitled to offset against the $12,000 the deferred payments of $17,000 provided for in the contract. We doubt that the $17,000 was an indebtedness which could be offset to reduce appellant's liability for taxation on any credits he may have had. It is unnecessary to discuss that question. As we view it, the money in the bank was liable to assessment without reduction by reason of White's indebtedness. In *Lancaster County v. McDonald,* 73 Neb. 453, it was held: "The statute distin-

guishes between items of property to be scheduled for taxation. The other items named in the schedule are not to be considered as credits, so as to allow indebtedness to be deducted therefrom. Notes and mortgages which represent moneys loaned or invested are not subject to such deduction." In the revenue law we find the following: "The word 'money' includes all kinds of coin, all kinds of paper issued by or under authority of the United States circulating as money whether in possession or deposited in bank or elsewhere." Ann. St., sec. 10403. It is apparent that the legislature intended citizens of the state to pay taxes alike upon cash in hand and money deposited in bank. Had it been intended that money on deposit should be considered as a credit, against which indebtedness may be offset, no occasion would have existed for section 10403, *supra*. And the fact that the bank has issued a demand certificate of deposit does not change the character of the depositor's property interests therein. In *Critchfield v. Nance County*, 77 Neb. 807, it was held: "The expression 'money deposited in bank' as used in section 4 of the revenue act of 1903 (sec. 10403 *supra*) is intended to include money on general deposit in bank." There is no substantial difference between a general deposit and one evidenced by a certificate payable on demand. Each is a fund belonging to and within the control of the depositor. It is money, and not a credit, and as such is liable to assessment.

4. The next proposition advanced is that the board of equalization had no jurisdiction of the subject matter, because the county of Lancaster had made no assessment of the appellant. Section 7777, Ann. St., in part provides: "The city council sitting as a board of equalization * * * shall have power, first, to assess all property real and personal not assessed and which is not exempt. * * * The board shall not increase the assessments of any person * * * until such person * * *shall have been notified by the board to appear before the board and show cause, if any, why the assessment should not be

increased." Appellant argues that the two provisions must be construed together, that they do not provide for a notice to one who has not been assessed by the assessor, and therefore the board is without jurisdiction. We cannot accept this view. By the first provision quoted, power is undoubtedly given to assess one liable who was not previously assessed. Appellant herein had notice and was within the jurisdiction of the city board of equalization.

5. Appellant finally contends, if we understand him correctly, that as the board did the assessing they should perform the duties of an assessor, and, "upon actual view, list, value, assess, and return all property subject to taxation." This contention also is without merit. Section 7777, *supra,* gives the board jurisdiction to assess omitted property. Section 7822, Ann. St., gives them power to compel the attendance of witnesses for the investigation of matters pending before them. Thus, upon an inquiry in the nature of judicial proceedings, the board is required to ascertain facts and make assessments accordingly. The law prescribing the duties of assessors does not apply to other revenue officers.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN CHRISTNER, APPELLANT, V. HAYES COUNTY, APPELLEE.

FILED MAY 24, 1907. No. 14,817.

1. **County officers** have by implication such powers as are necessary to enable them to perform the duties expressly enjoined upon them.

2. **County Attorneys: POWERS: EXPENSES.** A county attorney, who is

required by law and by the order of the county board to institute actions for the benefit of the county, may bind the county to pay the reasonable and necessary expense incident thereto.

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

W. S. Morlan, for appellant.

C. A. Ready and *Starr & Reeder, contra.*

EPPERSON, C.

In 1899 the commissioners of Hayes county directed the county attorney to institute proceedings to collect delinquent taxes. In order to ascertain the proper parties defendant in suits brought for that purpose, the county attorney requested plaintiff to prepare statements or abstracts showing the names of all persons having an interest in the land in question. Plaintiff furnished the statements or abstracts requested, and filed his claim therefor with the county board, where it was disallowed. On appeal to the district court, judgment was entered for the county, and plaintiff now presents the case to this court for review.

An agreed statement of facts discloses that the public records had been destroyed, and that plaintiff possessed the only books showing the complete title to the various tracts of land in that county. The county attorney agreed that the plaintiff should be paid $3 for each statement, which, it is admitted, was a reasonable charge. The county board had power to require the county attorney to bring actions for the foreclosure of the alleged liens. Acting officially the county attorney incurred the indebtedness. This he had the power to do. Appellee contends that the case is ruled by *Card v. Dawes County,* 71 Neb. 788, where it was held: "A county is not bound to pay for legal services rendered at the instance of the county attorney without the previous authorization or subsequent official ratification of the county board." We do

not doubt the soundness of that decision. The services there claimed were professional and such as the county attorney was required to perform. It included, it is true, an investigation of the title to the land there in controversy, but the public records were in existence and the county attorney had access to them. In the case at bar the public records had been destroyed. Plaintiff alone could furnish the necessary information. This he did for a reasonable compensation. His services were not professional. This expense was as necessary to a successful prosecution of the actions as the services of the court officers in filing paper and serving process. Had there been records to which the county attorney had access, our conclusion would be different, for no doubt it is the duty of the county attorney to procure, if possible, without expense to the county, information necessary to the institutions of actions in which the county is interested. But, where it is impossible, the power to make expense therefor is incidental to the power conferred by law, and the order of the board directing the institution of such suits. In *People v. Supervisors,* 45 N. Y. 196, it was held that an attorney could recover for the time and traveling expenses incidental in finding and subpœnaing witnesses. "Public officers have not only the powers expressly conferred upon them by law, but they also possess by necessary implication such powers as are requisite to enable them to discharge the official duties devolved upon them." 23 Am. & Eng. Ency. Law (2d ed.), 364. This court has repeatedly recognized the rule that county officers have such powers as are incidentally necessary to carry into effect those which are granted. *Lancaster County v. Green,* 54 Neb. 98, and cases cited.

Appellee contends that plaintiff's petition fails to state a cause of action, because no contract is alleged to have been made by the county commissioners for the performance of the services. The petition alleges that the defendant (the county) requested the plaintiff to furnish the statements, and agreed to pay therefor, and that in pur-

suance of said agreement plaintiff furnished the statements. This was a sufficient allegation to charge the county.

Appellee further contends that a new cause of action was presented in the district court, wherein plaintiff claims compensation for statements of title, instead of abstracts of title, as designated in his claim filed with the county board. The agreed statement of facts shows that plaintiff furnished the statements set forth in the petition. The identical issue presented to the board was tried in the court on appeal, notwithstanding the erroneous use of the word "abstracts" in his original claim.

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

REVERSED.

GEORGE A. GILBERT, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED MAY 24, 1907. No. 14,842.

1. **Vendor and Purchaser:** CONTRACT: FORFEITURE. Where a contract for the sale of real estate provides that time and punctuality are material and essential ingredients in the contract, and that nonpayment of an instalment of the purchase price shall forfeit the purchaser's rights therein, and that the vendor shall thereupon have the right to take possession of the property, such default of itself operates as a forfeiture, and the vendor is not required to give notice to the purchaser.

2. ———: ———: ———: DAMAGES. Damages cannot be recovered for the cancelation of a contract for the sale of real estate, and a resale of the property, against the vendor by a purchaser who could not have maintained an action for the specific performance of his contract had the resale not have been made.

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

Greene & Breckenridge, for appellant.

Edson Rich and *Charles E. Clapp, contra.*

EPPERSON, C.

Plaintiff's amended and supplemental petitions set forth, among others, the following facts: April 1, 1884, the Union Pacific Railway Company executed four land contracts, and therein agreed to sell to one Charles H. Payne 640 acres of land in Deuel county, Nebraska. August 12, 1898, plaintiff herein by mesne assignments acquired the purchaser's interests in said contracts. Each provided for the payment of $480 and interest annually, the last payment maturing in 1894. The purchaser agreed to make these payments when due, together with all taxes and assessments levied against the land. Each contract further provided: "It is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract, and in case the second party shall fail to make the payments aforesaid, and each of them punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created, or then existing in favor of or derived from the second party, shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted, with all the improvements and appurtenances, shall revert to, and revest in, said first party, without any declaration of forfeiture or act of reentry, or any other act by said first party to be performed, and without any right of second

party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made." All the stipulated payments were made except those due in 1893 and 1894. On July 23, 1898, defendant, who succeeds the Union Pacific Railway Company in interest, notified one W. C. Van Gilder, of Chicago, that the amount necessary for a deed for said land would be $812.47, and August 11, 1898, sent a telegram to one Trenton, of Chicago, as follows: "Contracts all stand in name William Atkinson by assignment from John Flanagan March 26, 1894. Will issue deed upon approved assignments from Atkinson and wife when contracts are paid in full." Plaintiff relied upon defendant's statement and telegram in making the purchase of the contracts. It is further alleged in the petition, as to the earlier payments, that the defendant accepted money to apply on said contracts after the same were due, intending to waive and thereby waiving the defaults in the payments. On July 30, 1900, without legal proceedings and without notice to plaintiff, defendant canceled said contracts, and subsequently resold the lands to some person unknown to plaintiff. Plaintiff prayed that defendant be required to answer, disclosing the amount received for the land and the remainder due from defendant to plaintiff upon the contracts, and for a judgment for the difference. Defendant filed a general demurrer to the petition, which was sustained by the court, and plaintiff appeals.

It is contended that the railway company had no right to declare a forfeiture without notice to plaintiff. It will be observed that time was the essence of the contract; that the company reserved the right upon default to immediately repossess the property without notice. In *Morgan v. Bergen*, 3 Neb. 209, it is held: "Parties may make *time* the essence of the contract, so that if there be a default at the day, without any excuse and without any waiver afterwards, the court will not interfere to help the party in default." This rule has been continuously

adhered to by this court. See *Bradley & Co. v. Union P. R. Co.*, 76 Neb. 172, and cases cited. From the decisions it is apparent that a grantor who by the terms of his contract is entitled to avail himself of a forfeiture may do so and maintain ejectment against his grantee in possession, and that the purchaser cannot maintain an action for the specific performance of his contract which has been forfeited. Upon forfeiture all rights under the contract cease. It is inoperative, and the purchaser can no more maintain an action for damages for the sale of the property to a third party than he could previous to such sale have enforced specific performance or resisted ejectment. We are satisfied that under the contract the company had the legal right to forfeiture without notice to plaintiff.

But plaintiff contends that such right of forfeiture was waived by defendant by making the statement and sending the telegram above referred to, and upon which plaintiff relied in the purchase of the contracts. On the date of the telegram plaintiff's grantor had been in default five years. How this message or statement was prompted, or what connection plaintiff sustained toward Trenton and Van Gilder, is not alleged. Had plaintiff within a reasonable time after August 12, 1898, made payments upon the contract, or negotiated for and received an extension of time for the payment of defaulted amounts, it would then appear that the company had waived their right to a forfeiture, not by reason of the messages, but by the acceptance of partial payments or the granting of an extension. Plaintiff's assignment had not been approved by the defendant as the contract provided. Plaintiff from August 12, 1898, to July, 1902, remained silent, entirely indifferent to the rights of the defendant and his obligation to pay the remainder of the purchase price. The telegram of August 11, 1898, did not amount to a waiver of the forfeiture. The contracts were not such as required an election to be made by the company to create a forfeiture. The nonpayment alone created the forfeiture. For some reason unexplained a telegram was sent to Trenton. From

the telegram itself it would seem that the company was still willing to give the holder of the contract the privilege of paying out. The telegram was not a waiver which an assignee of the contract, with no intervening circumstances which would appeal to a court of equity, could plead four years later as a ground of relief. It was mere grace, and to avail himself thereof the plaintiff should have acted within a reasonable time after receiving knowledge of the same. The company, not having received payment, had the right at the expiration of two years to sell the land which had reverted to it under the contract.

The facts pleaded are similar to those proved in *Bradley & Co. v. Union P. R. Co., supra.* Long after default the railway company, in the case cited, informed the plaintiff, the assignee of the purchaser, that deeds would be issued upon the payment of the remainder of the purchase price. Plaintiff delayed for three years, when the land was sold to a third party. It was there held: "Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties." We see no difference in principle in an action for specific performance and one for an accounting, where such is based on an alleged illegal forfeiture. Plaintiff is now no more entitled to recover damages than he would be entitled to specific performance of the contract were it possible for him to procure the same. OLDHAM, C., speaking for the court in *Bradley & Co. v. Union P. R. Co., supra,* said: "While it is true, as contended by counsel for appellee, that forfeitures are never favored, either in equity or at law, and while it is also true that very slight proof will be held sufficient to show a waiver as to the date of payment on a contract of purchase of real estate, because of the disfavor in which forfeitures are regarded in courts of equity, yet this rule is always made to depend on a showing of diligence in fact by the vendee

in making the payments and the further showing of a reasonable excuse for the failure of a strict compliance with the letter of the contract."

Not having alleged diligence on his part, and the facts showing plaintiff guilty of laches, we are of opinion that the petition did not state facts sufficient to constitute a cause of action, and, under the rule announced in the case cited, the judgment of the district court should be affirmed, and we so recommend.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN E. VANDERPOOL, APPELLANT, V. CHARLES W. PARTRIDGE, APPELLEE.

FILED MAY 24, 1907. No. 14,846.

1. **Master and Servant:** APPLIANCES. The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants.
2. ———: ———. But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant.
3. ———: ASSUMPTION OF RISK. When the servant, having knowledge that a tool furnished by the master is unsafe and dangerous, continues to use the same without objection or protest, he assumes the risk of injury incident to its use.

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

Weaver & Giller and *W. S. Lewis,* for appellant.

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

GOOD, C.

This action was instituted in the district court for Douglas county by the appellant to recover damages for an injury which resulted in the loss of his left eye. At the close of the plaintiff's testimony the trial court directed a verdict for the defendant, and plaintiff brings the case to this court on appeal.

Appellant alleged in his petition that, while he was employed by the appellee in cutting holes for the support of a joist in a brick wall of a building, and while using a two pound steel hammer and a chisel made from an old rasp, a chip or sliver from the end of the rasp flew off and struck him in the left eye, and so injured it that it had to be removed. Appellant alleged that the appellee carelessly and negligently ordered and directed him to perform work outside of his usual and customary employment; that appellee failed and neglected to give appellant proper instructions for the performance of the work; that appellee negligently furnished an old rasp made into a chisel on which there was no wooden handle or top to prevent the same from chipping off. Appellee in his answer admitted the injury resulting in the loss of the eye, and the employment of the appellant, denied all the other allegations of the petition, and pleaded negligence and assumption of risk by the appellant. At the close of appellant's evidence the trial court, upon motion of the appellee, directed a verdict in his favor upon the ground that, under the pleadings and the evidence, appellant was not entitled to recover.

The statement of the facts found in appellee's brief is so clear and nearly in accord with the record that, with slight variation, we adopt it in this opinion. The appellant was 25 years of age, apparently a man of at least average intelligence and knowledge, and received his injury in October, 1904, while cutting holes for joists in a brick wall of what is known as the "Allen Brothers' Building," which was being reconstructed by the appellee in the city of Omaha. Appellant, prior to his injury, had

worked on this building about a month off and on. His first work was tearing down an old brick wall, which was done with a crowbar and pick. He next dug holes in the bottom for the foundation. He had been using a hammer and a chisel for about ten days prior to the injury. Part of this time he was tearing down and shaping up a corner of the brick wall, where another wall was to be joined to it. In this work he used a hammer and cold chisel, and was instructed by the appellee and his foreman how to perform the work. While appellant was performing this work with a cold chisel, appellee told him the chisel was too thick, and sent him to Nelson, the foreman, to procure another chisel. The foreman gave him the old rasp, which was afterwards made into the chisel which appellant was using when he received the injury complained of. Appellee told appellant to take the rasp to the blacksmith shop and have it made into a chisel. Appellant took the rasp to the blacksmith shop and watched the blacksmith make it into a chisel, and, when it was finished, returned and showed it to the appellee, and asked him if it would do, and the appellee said: "Yes." Shortly after this the appellant was directed to cut the holes in the wall for the joists. It does not appear that he was given any specific directions as to what tools to use in performing that work. Nelson, the foreman, showed him where to cut the holes, and marked out the places with a line and chalk and showed him how to perform the work, making holes about 10 inches by 12 inches in size and 8 inches deep. In the performance of the work appellant stood on a ladder, holding the chisel in front of him and pounding upon it with the hammer, striking light blows. At the time he was injured he had cut about 20 to 25 holes, and the end of the chisel upon which he hammered had become considerably battered. Prior to his injury appellant had been in the employ of the appellee for about 18 months as a roustabout or carpenter's helper, and had worked for the appellee in remodeling the Barker hotel and several other buildings, where he had been employed in tearing down

partitions, repairing and putting in new floors, and tearing down brick walls, and assisting the carpenters in whatever they desired him to do. Sometime prior to his employment by the appellee he had worked in Omaha in the roundhouse of the Missouri Pacific Railway Company, and for the Chicago & Northwestern and the Missouri Pacific railway companies as a section laborer, and later in a roundhouse, firing engines. It also appears from the appellant's own testimony that three or four days prior to his injury, in talking with one of the carpenters engaged in work upon the building, he had stated to the carpenter that he believed the chisel was an unsafe tool to work with, to which the carpenter replied that it was too hard, it was not made for a chisel. The appellant further states that at the time of the injury he thought the chisel was too hard, and admits that he told the carpenter that the tool was too hard or dangerous prior to the injury, and that he at no time made any complaint or protest to the foreman or to the appellee concerning the unsafe or dangerous condition of the tool.

The rule of law is well recognized that it is the duty of the master to use ordinary care in furnishing reasonably safe tools and appliances for his servants. In *Central Granaries Co. v. Ault,* 75 Neb. 255, it was said: "The rule undoubtedly is that the master is not liable for furnishing dangerous machinery and appliances for the use of his servant, for all machinery is more or less dangerous. Employers are not insurers. They are liable for consequences not of danger, but of negligence." In *Lincoln Street R. Co. v. Cox,* 48 Neb. 807, it is held that "a master does not insure his servants against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice unless the exercise of ordinary care under all the circumstances would have resulted in notice." In *Chicago, B. &*

Q. R. Co. v. Oyster, 58 Neb. 1, it is held that "a railroad company is only required to exercise reasonable and ordinary care and diligence in furnishing its employees reasonably safe roadbed, machinery and appliances for the operation of its road. The law does not impose the absolute duty of providing a reasonably safe roadway, but makes the company liable for negligence in that regard."

The foregoing cases fairly reflect the rule of law generally applicable to the duty of a master in furnishing tools and appliances for his servants, but, where the tools or appliances furnished are of a simple nature, easily understood and comprehended, and defects in which can be readily observed by persons of ordinary intelligence, the foregoing rule has but little application. "It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which the employer owes a duty to the employee of looking out for his saftey." *Lynn v. Glucose Sugar Refining Co.,* 128 Ia. 501, 104 N. W. 577. In the case just cited the injury was caused by a chip slivered off from a steel hammer made from a piece of soft shafting and provided for the use of the defendant's workmen. It was contended in that case that, if the defendant had furnished hammers made of tool steel properly tempered, there would have been less danger that particles would sliver off to the peril of the workmen. In that case the court, in summing up the case, used the following language: "This case, so far as the evidence for plaintiff shows, may well be considered as close to the boundary line between accident and negligence; but we are satisfied that the cause of the injury was not anything which it was the duty of the defendant to anticipate and prevent, if it might have been prevented in the exercise of reasonable care, but was one of those uncertain happenings as to which every one must take his chances." In the case of *Martin v. Highland Park Mfg. Co.,* 38 S. E. 876, 128 N. Car. 264, it was held that "plaintiff, a weaver, was injured while assisting in the repair of a loom which he operated,

by a sliver of steel flying from a hammer and striking him in the eye. There was no evidence that the hammer was apparently defective, or was being negligently used. *Held*, That the plaintiff was properly nonsuited, since the injury was caused by a latent defect in the hammer, for which the defendant was not liable." In the body of the opinion in that case we find the following: "There is no complication about a hammer. It is not a piece of machinery which requires any attention whatsoever to keep in order. It cannot get 'out of fix,' unless the handle breaks. It requires neither art, science nor skill in its use. Brawn and muscle do the work. And it is known to be one of the most harmless of all tools to the person using it. Should a flaw or other patent defect exist, it would more certainly appear to the person undertaking to work with it, whose duty it would be to make it known to his employer. Should a latent defect exist, it could not be known by the closest inspection either to employer or employee; and for injury on that account legal responsibility would rest upon no one, and would be the misfortune of the sufferer. Whether properly tempered can only be ascertained by its use, and not by inspection. * * * Surely, it cannot be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace-chains, lap-links, bridle-bits, etc., the imperfections of which could not be known till used; or for defective whiffletrees, ax-helves, hoe-helves, handspikes, plow-lines, and such like, the defects of which would be first discovered by the party using them; unless the employer is shown to have had knowledge of such defects. If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe-helve or handspike, defective bridle-bit, whiffletree, or plow-line, *et id simile*, may at any time occur, and sweep from him his farm and belongings in compensation of the damage done. To the same experience would the contractor expect to be subjected, should a defective nail, while being

driven by one of his carpenters, break and do injury. To such doctrine we cannot subscribe. Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore not expected, must be borne by the unfortunate sufferer, which seems to us to be the condition of the plaintiff in this case. For an injury caused by an inevitable or unavoidable accident while engaged in a lawful business there is no legal liability." 128 N. Car. 264. In *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275, 76 N. W. 497, where a chip from a snap hammer struck plaintiff and injured him, it is held that the duty of inspection by the master of appliances used by servants does not extend to small and common tools in every day use; of the fitness for such use the servants using them may reasonably be supposed to be better judges than the master. From these cases and the many citations therein contained, it is apparent that the master is not liable for injuries resulting from latent defects in simple tools or appliances, such as a hammer, saw, chisel, and the like. The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master, and the underlying reason in all the cases for holding the master accountable for injuries resulting from imperfect or defective tools and appliances is that the servant is ordinarily presumed to have no knowledge of the dangers incident to their use. But, as we have seen, the rule has no application to the simpler tools and appliances. Nor would the rule have any general application at all where it was shown that the servant had knowledge of the defective and dangerous condition of the tools he was using.

In the case at bar it is clearly shown from the record that appellant, prior to his injury, had actual knowledge that the chisel was unsafe and dangerous. His continued use of the tool after knowledge that it was dangerous and unsafe, without objection or protest, or without notice to the master, under the authorities just cited and quoted

from, would give him no right of recovery against the master for the injuries received. By his continued use of the chisel after knowledge of its unsafe and dangerous condition, he must be held to have assumed all risk of injury that might result from its use, and, having assumed this risk, he is in no position to ask compensation from his master.

In view of the conclusion at which we have arrived, it is unnecessary to discuss the other assignments of error. The action of the trial court in directing a verdict for the appellee was proper and should be sustained. We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

MARSHALL WEBB, APPELLANT, V. ROSINA WHEELER, APPELLEE.

FILED MAY 24, 1907. No. 14,618.

Attachment: RESIDENCE. It is the actual residence of the debtor, and not his domicile, which determines the status of the parties in attachment proceedings.

APPEAL from the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Neal & Quackenbush, for appellant.

Stull & Hawxby and *H. A. Lambert, contra.*

JACKSON, C.

The plaintiff appealed from an order dissolving an attachment issued on the ground that the defendant was a nonresident of the state.

The principal contention is that the judgment is contrary to the evidence. We think the claim of the plaintiff in that respect is well founded. The defendant is a widow, and formerly lived by herself at Nemaha City, in a home which she owned in her own right. A married daughter resided in the same city, and another in Illinois. A son lived at Auburn. The daughter at Nemaha City removed to St. Paul, Minnesota, and was accompanied by the defendant, who, prior to her departure sold her home and such household furniture and effects as she did not take with her, excepting a few keepsakes which were packed in a box and sent to the home of her son at Auburn. She had been gone from the state something over a year before the commencement of the action in which the attachment proceedings were had. At the hearing of the application to dissolve the attachment the defendant was a witness in her own behalf, and testified as to her intentions when she left the state, in effect, that she did not know what she would do; she had no settled purpose as to whether she would remain in St. Paul with her daughter or not. Her purpose to go to St. Paul was formed at the time she learned that the daughter intended to remove to that city. This daughter had lived near her in Nemaha City, and she went to St. Paul so that they might still be near together. She, however, rented a room and kept house by herself, except during the winter months, when she went to Illinois and visited with her daughter in that state. The facts upon which she seeks to justify the conclusion of the trial court are that shortly after she went to St. Paul she sent to her son at Auburn the proceeds of the sale of her property at Nemaha City, with instructions to buy a lot and build a small residence there. This was done, but the property was leased and occupied by a tenant until some months after the commencement of this action, and was offered for sale before the action was instituted. The further fact that in May, 1904, she sustained an injury which has resulted in her since being bedridden is urged as a reason why she did not sooner return. Several wit-

nesses testified that immediately prior to her departure from Nemaha City, and while she was disposing of her effects there, she stated that she was going to St. Paul with the purpose of making that city her future home.

Resting the case upon her own evidence, construed in the light most favorable to herself, we are forced to believe that she was not a resident of the state within the meaning of the statute under which the attachment proceedings were had. In *Lawson v. Adlard,* 46 Minn. 243, 48 N. W. 1019, this question was under consideration, and it was said: "When construing statutes relating to attachment proceedings against nonresidents, a clear distinction has been recognized between an actual and a legal residence, the latter having been, generally, deemed the domicile, and not the residence contemplated. It is the actual residence of the debtor, and not his domicile, which determines the *status* of the parties in such proceeding." Considering the prolonged absence of the defendant from the state, coupled with the fact that at the time of her departure she had no purpose to return, and that during her absence she had no dwelling place within the state where summons could be served in compliance with the provisions of the code, we think it would practically amount to a denial of justice to hold that a creditor, under such circumstances, could not proceed by attachment. As bearing upon this question, see *Pech Mfg. Co. v. Groves,* 6 S. Dak. 504, 62 N. W. 109.

It is recommended that the order appealed from be reversed.

AMES, C., concurs.

CALKINS, 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.

REVERSED.

LOUIS N. WENTE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.*

FILED MAY 24, 1907. No. 14,650.

Carriers: LIABILITY. When facts are disclosed from which it appears that an animal has not suffered through the neglect of a carrier intrusted with its transportation, the rule that proof of the receipt of animals by a carrier in good order and delivery at destination in bad order makes a *prima facie* case of liability against the carrier has no weight as against such facts.

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

J. W. Deweese and *Frank E. Bishop,* for appellant.

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

JACKSON, C.

The plaintiff had judgment for the value of a stallion, which it is charged died through the neglect of the defendant in transportation. The substance of the complaint is that the plaintiff delivered the stallion to the defendant in the city of Lincoln to be transported to Mexico City, Missouri, on a fast train due to leave Lincoln at 6 o'clock P. M. on December 14, 1904; that by direction of the defendant the stallion was loaded into the car at 5 o'clock P. M. of that date, but through defendant's neglect the car was not attached to the train leaving Lincoln at 6 o'clock P. M., but was detained in the yards until 10:45 o'clock P. M. of that date, when it was attached to another train, and was delayed in transportation so that it did not reach Kansas City, Missouri, until about 5 o'clock A. M. of December 16, that the defendant negligently and unlawfully failed and refused to unload the horse to be rested, fed and cared for during the entire journey from Lincoln to Kansas City, and kept the horse

* Rehearing allowed. See opinion, p. 179, *post.*

confined in the car on board the train for 49 hours and 10 minutes; that by reason of this neglect the horse took cold and became sick; that the weather was warm when the horse was loaded at Lincoln, but became cold on the 15th, and along the route to Kansas City continued to grow colder, with cold wind accompanied by rain and snow; that about noon of December 16 the plaintiff, through his employee, notified the defendant at its freight office in Kansas City that the stallion was sick, and requested that the horse be unloaded that it could be given medical attention; that the defendant was advised that the animal was a valuable stallion and was contracting pneumonia, that it needed immediate medical attention which could not be properly given while the animal was detained in the car, but that the defendant negligently and carelessly kept and detained the animal on board the car in its yards in the increasing cold and storm until 7:10 P. M. of the 16th, although frequently requested to place the car so that the animal could be unloaded; that, if the defendant had delivered the car to a platform to permit the horse to be unloaded within a reasonable time after being requested so to do, its life could have been saved by proper medical treatment. The appeal involves the sufficiency of the evidence to sustain the judgment.

J. R. Jones, an employee of the plaintiff, accompanied the animal as a caretaker, and it is disclosed from his testimony that the horse was shipped in a box car suitable for the purpose. He provided bedding, hay and grain for the journey, and personally attended to furnishing the horse with water. There is no dispute that a horse might be confined in a car during a journey of from a week to ten days without danger on account of confinement alone, if otherwise well cared for. There was no request that the horse should be unloaded en route, and no evidence that his condition required it. When facts are disclosed from which it appears than an animal has not suffered through the neglect of a carrier intrusted with its transportation, the rule that such carrier is an insurer of

animals transported over its line, and that proof of the receipt of animals by a carrier in good order and delivery at destination in bad order makes a *prima facie* case of liability against the carrier, has no weight as against such facts. The claim of liability on account of delay in shipment and en route should therefore properly be eliminated from the inquiry.

Several elements enter into the consideration of the charge of delay at Kansas City. The shipping contract was for the transportation of the animal from Lincoln, Nebraska, to Mexico City, Missouri, by way of Kansas City. From the latter point the route was over the Alton. There is little substantial conflict in the evidence as to what occurred in Kansas City, where Jones arrived with the horse at 5 o'clock in the morning of December 16. The train on which the shipment was to be made over the Alton was due to leave at 1 o'clock P. M. It appears to have been incumbent on the defendant to transfer the car from its own yards to those of the Alton. This was done at about 12 o'clock M. In the meantime Jones discovered that the horse was chilled. He called a veterinary surgeon, and it was determined to have the animal unloaded and placed in a veterinary hospital for treatment. He went to the Alton freight office to arrange for that course, and says he was there shortly after 12 M., when the way bill came into that office from the hands of the defendant's agent. After some parley at the Alton office Jones secured a release of the animal from that company, and went from there to the freight office of the defendant, according to his testimony, at 1:20 o'clock P. M., where he paid the freight to Kansas City, and requested that the car be placed so that the animal might be unloaded. The car, however, was not returned by the Alton to the defendant's yards until about 4:30 P. M., and, according to the plaintiff's evidence, was not placed by the defendant so that the animal could be unloaded until 7:10 P. M. The delivery of the animal to the Alton by the defendant was

without notice to the defendant's agent of a desire to unload, or that the horse was not in good condition. The shipping contract relieved the defendant from liability for loss or damage after delivery to the connecting line, so that the question resolves itself into an inquiry of whether the delay in placing the car so that it might be unloaded after its return to the defendant's yards can be said to be the cause of the animal's death, and if so, whether the defendant is liable therefor. In that connection the condition of the horse after arrival at Kansas City seems important. When Jones went to water and feed the horse in the morning he seemed to be chilled. He untied him and led him back and forth in the car, and he coughed some, as Jones says, indicating that he had taken a little cold. He watered and fed him and went to get his own breakfast. When he came back to the car at about 11 o'clock A. M., the horse showed distress and would not eat. At this time he called the veterinary, who testified that the case was not serious, and was one where recovery was usually secured by proper treatment. When the horse was finally taken out of the car, Jones says that he acted fairly well, and did not show anything near the distress that he did later. He was led behind a carriage for a distance of two miles through a severe sleet and snow storm to a veterinary hospital. After being led from six to ten blocks he appeared exhausted, and when he reached the hospital was bleeding at the nostrils, and his condition was practically hopeless. He died the following day. On behalf of the defendant the testimony discloses that when the car was returned from the Alton yards there was a congestion of cars in its own yards, crews were busy making up trains for departure, and that the car was set at the platform for unloading the horse as soon as it could reasonably be done. It is also shown that there were livery stables near at hand where the animal might have been taken, and avoided the necessity of the two mile trip through the storm, resulting in the exposure incident to that trip.

As we view the case, the cause of the death of the ani-

mal is a mere matter of conjecture. From the single fact that an animal is sick no presumption of neglect can arise, any more than such presumption would be justified from a similar condition of a human being. In this case it is pleaded and proven that, if the horse had been subjected to suitable treatment when its sickness was discovered at Kansas City, it would probably have recovered. When it was determined that treatment was necessary, the animal had passed beyond the control of the defendant and was under the control of the Alton, for whose acts the defendant was in no sense responsible. The care and responsibility imposed upon the defendant had terminated by contract of the parties. No request was made of the Alton to place the car where it might be unloaded, and during the four hours or more that the car was in the Alton yards no negligence could be imputed to the defendant, whose responsibility had ceased. It was not bound to receive the animal back from the Alton for the purpose of unloading. Its acts in that respect were a mere gratuity. It was not even a bailee for hire.

We do not think it a reasonable inference from the evidence that the loss of the animal was due to any neglect on the part of the defendant, and recommend that the judgment of the district court be reversed and the cause remanded.

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed March 19, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Carriers:** RIGHTS OF CONSIGNOR. The consignor of a horse shipped from one point to another, which will necessitate shipment over two connecting lines of railroad, on the arrival of the horse at

the connecting point of said roads, may, if he so desires, decline to ship farther, and upon payment of the charges of the first carrier demand a redelivery of such horse.

2. ———: DUTIES. In such case it is the duty of the carrier to redeliver said horse without unreasonable delay.

3. ———: NEGLIGENCE. Where, in the month of December, a railroad company agrees with an intending shipper of a horse to ship such horse on a particular fast freight train, and the horse is delivered to said company within the time prior to the time of departure of such train designated by the agent of said company, and said company fails to ship such horse on said fast train, but ships it on another and slower train, which does not reach the connecting point of such shipment until about 24 hours later than said horse would have reached such point if shipped on said fast train, and during said last named 24 hours the weather changes and becomes cold and stormy, by reason of which said horse contracts a cold, and after the arrival of such horse at said connecting point the consignor notifies the agent of the carrier at said connecting point that such horse is a valuable horse, that it is sick and in need of immediate medical attention, that he does not intend to ship the horse farther, but wants the car containing the horse switched to some chute or platform so that it can be unloaded for treatment, and pays the carrier's charges for shipment to such point, and the agent of the carrier fails and neglects, for the space of five or six hours thereafter, to place said car in a position where said horse can be unloaded, and about three hours after the payment of the charges and demand for the unloading of the horse a storm of snow and sleet sets in which continues down to and after the time such horse is finally unloaded, which necessitates the unloading of the horse in said storm, and after being unloaded the horse is led through said storm to a veterinary hospital, and as a result of such delay and exposure the illness of the horse is increased to pneumonia, of which it dies; *held*, sufficient to sustain a finding that such delay on the part of the carrier was negligence which was the proximate cause of the death of said horse.

4. ———: ———: QUESTION FOR JURY. Where the owner of such horse, after it is unloaded, acting under the supervision of a competent veterinary surgeon whom he has employed, leads said horse, in the storm which has arisen, through the streets of the city for a distance of two miles to the veterinary hospital; *held*, a question of fact for the jury whether a reasonably prudent man under like circumstances would have so done.

5. Instructions examined, and *held* to have properly submitted the questions at issue to the jury.

6. **Evidence examined, and *held* sufficient to sustain the findings of the jury.**

FAWCETT, C.

This case is before us on rehearing. Appellee had judgment in the court below for the value of a thoroughbred stallion, which, it is charged, died through the neglect of appellant in transportation. The former opinion, *ante,* p. 175, clearly states the allegations contained in plaintiff's petition. For answer the defendant alleged that the destination of the horse so shipped over its line of railroad was Mexico City, Missouri, on the Chicago & Alton Railroad, with which its line connected at Kansas City, Missouri; denied plaintiff's ownership of the horse, and called for proof thereof; alleged that it was part of the contract of shipment that plaintiff was to furnish a caretaker of said horse, who should go along with the same and look after and care for it and give it proper and necessary care and attention, and that said agent of plaintiff did accompany and give attention concerning the handling and care of said horse; that plaintiff did not deliver the horse to defendant in time to be carried any faster, or to be delivered to the connecting carrier at Kansas City any quicker than the same was carried and delivered; that the shipment was made without any unusual and unnecessary delay, and was promptly delivered on time, in the regular course of business, to the connecting carrier, the Chicago & Alton Railroad at Kansas City, without any fault or negligence on the part of defendant, its agents or servants; that, if said horse in said shipment referred to sustained any injury, such injury was not caused by any fault or negligence on the part of defendant, nor while the horse was in its possession, but, if any injury was sustained by it in any way, the same was the result of the plaintiff's own negligence and that of his agent in charge of said horse, and without fault of the defendant; adding a general denial. The plaintiff's reply was a general denial.

The main questions discussed at the bar are: (1) Was appellant guilty of negligence in failing to ship the horse on a fast train which left Lincoln at 6 o'clock on the evening of shipment, and in shipping it on a later and slower train which did not leave that city until 10:55 on the evening of shipment? (2) Was appellant guilty of negligence, after the arrival of the horse in Kansas City, on the second day after its shipment, in failing to place the car in a position so that the horse could be unloaded, for an unreasonable length of time after it was notified by appellee's agent that the horse was sick and needing attention, and that he had decided not to ship the horse farther, but desired to remove it from the car for treatment? (3) Was appellee guilty of contributory negligence after the horse was unloaded in leading it a distance of two miles through the streets of Kansas City in a storm of snow and sleet to a veterinary hospital?

As to points 1 and 2, the evidence is decidedly conflicting. As to the third point, there is no conflict in the evidence. The caretaker of the horse, who went with it and took care of it on the trip, was one J. R. Jones, who, it appears from the evidence, was an entirely competent person for such a charge. The evidence shows that at the time of the shipment, December 14, 1904, appellant had two freight trains leaving Lincoln for Kansas City; one, No. 120, a fast through freight, which also carried passengers and express, being scheduled to leave Lincoln at 6 P. M., and the other, No. 110, a slower freight, scheduled to leave at 7 P. M. No. 120 left Lincoln that evening on time. No. 110 left 3 hours and 55 minutes late; viz., at 10:55 P. M. Appellee testifies that, when he made arrangements with the agent of appellant for shipping the horse, it was with the understanding and agreement that the horse should go on No. 120. This part of his testimony is corroborated by appellant's employee with whom he had the transaction. Appellee also testifies that he was advised by appellant's employee that if the horse was loaded by 5 o'clock it would be in time for that train. This is

denied by appellant's employee, who says he told appellee that the horse must be loaded by 4:30 o'clock. Appellee and his caretaker, Jones, both testified that the horse was loaded before 5 o'clock. In their testimony on rebuttal they both placed it as early as 4:30 o'clock, but in their examination on the case in chief they placed it as being before 5 o'clock. Appellee, as an explanation of why he was so sure that it was before 5 o'clock, said that the sun was still shining when they got the horse loaded. If this is true, then the horse was loaded before 5 o'clock, as it is a matter of common knowledge that on that day of the year the sun sets before that hour. This testimony on the part of appellee and the witness Jones is contradicted by two employees of appellant, one of whom says he was present when the horse was loaded, the other basing his testimony upon what had been told him.

Train No. 120 left Lincoln that evening on time at 6 P. M., but the car in which the horse had been loaded was not attached to that train. The car was attached to train No. 110, which, as before stated, did not leave Lincoln until 10:55 P. M. Train No. 120 arrived in Kansas City early in the forenoon of the next day, December 15, while train No. 110 did not reach Kansas City until 4:50 o'clock of the second morning after shipment, December 16. Train No. 110 was delayed en route for nearly two hours at Table Rock, and did not arrive at St. Joseph until about noon on the 15th. The car was then placed on a side track, and remained there until a few minutes after 11 o'clock that night—a delay of about 11 hours. It reached Kansas City, as stated, at 4:50 o'clock the next morning. On arrival there, Jones, the caretaker, went to the Alton freight house to ascertain what time they could get away from there. He was advised by some man there that he would have to come back after the day man came on, which would not be very long. He then went back to the car and fed and watered the horse. He says the car was then standing between the Burlington and Alton freight depots. After feeding the horse he went and got

his breakfast. On his return he located the car farther down in the yard—"quite a long way down." He says when he went to water and feed the horse in the morning he noticed that he seemed to be a little chilly, and untied him and led him back and forth, exercising him in the car; that he exercised him quite well in the car; that, after getting his breakfast, he returned to the car about 11 o'clock, when he discovered that the horse was showing a good deal of distress; that he was "taking sick pretty fast"; that he "went straight and called a veterinary"; that before he called the veterinary he went to the Alton freight depot and notified them that the horse was sick, and that he would not ship any farther. The veterinary whom he called was Dr. R. C. Moore, a graduate of the Chicago Veterinary College in 1887, and president of the Kansas City Veterinary College, a man well up in his profession, as appears from the record, and owning a hospital for the treatment of sick horses. Dr. Moore arrived, and went into the car to see the horse about 12:30. While Dr. Moore was in the car examining the horse, Jones went to the Burlington office, and told them the horse was sick, and that he wanted to unload him immediately. While he was talking, Dr. Moore came in, and also told the representative of appellant that the horse was sick and should be unloaded at once. Dr. Moore and Jones both testify that the agent promised to have the car set up to a chute or platform immediately, so that the horse could be unloaded, but, before doing so, demanded that the contract be surrendered and the freight to Kansas City paid. Dr. Moore and Jones both testify that Jones paid the freight as demanded at 1:20 o'clock. The agent testifies that this was done at 3:50 P. M. After this interview Dr. Moore returned home. Jones testifies that between 12 and 1 o'clock there was sent to the agent of the Burlington this message from the agent of the Alton: "I understand this horse is sick and in need of attention. Must therefore refuse shipment." Jones further testifies that during the afternoon he made repeated visits to the agent of appel-

lant and also to the day yardman, urging them to set up the car so that he could unload the horse; that he told the agent that it was a valuable horse and was sick and needed attention; that the car never was moved from the place where he found it on his return to it after breakfast, at 11 o'clock in the forenoon, until they coupled on to it to run it up to the platform for unloading at 7 o'clock that evening. He says that, after the night yardman came on duty at 6:30 that evening, he went to him and told him his troubles; that the night man told him that he would attend to it. He seems to have been expeditious, for at 7:10 P. M. the horse was unloaded. Appellant's agent at Kansas City testifies that, when the car arrived in the morning, it was delivered to the yards of the Chicago & Alton, and was not returned to their yards until 4:15 that afternoon; that during all of that time it was beyond their control. The agent who gave this testimony is so squarely contradicted by Dr. Moore and Mr. Jones as to the time of the payment of the freight that the jury evidently discredited him, and the conviction is forced upon us that, if the message from the agent of the Alton, above recited, was sent to him between 12 and 1 o'clock, he must have been negligent indeed in failing to have that car returned to his custody earlier than 4:15 in the afternoon.

Defendant's witnesses testified that the car was delivered to the Alton at 12:15 and left on the Alton tracks. Jones says it was never moved after 11 A. M. until after the night man came on duty in the evening. Defendant's general yardmaster, who was examined as to the transfer of cars from the Chicago & Alton tracks, testified that such transfers could only be made between the hours of 11 A. M. and 4 P. M. He said: "On account of us having to go through the Union depot, and over the Union depot property, they will not allow us to deliver transfers only during those hours." Yet the chief yard clerk testified that the car was received back from the Alton at 4:15. If they were not allowed to deliver transfers after 4 o'clock, the jury may well have discredited the testimony

that the car was not returned to defendant's yards until 4:15, and have accepted the testimony of Jones that the car was never moved from the place where he found it after breakfast, about 11 o'clock A. M., until it was switched up to the platform for unloading in the evening. Jones unquestionably knew where the car was every hour of that day. He was using every effort to have it run up to some platform so that he could unload. If his testimony is true, and of that the jury were the judges, the car was not delivered to the Alton at 12:15 and returned by the Alton at 4:15, but, on the contrary, was never actually out of appellant's yards and control.

The evidence further shows that during the night prior to the arrival of the horse in Kansas City the weather changed and began to grow colder. During the forenoon some snow fell, but Dr. Moore testifies that the snow had dried off. He says: "When I was down at the car, it was a fairly cold day, a little cloudy. It had been snowing in the forenoon and had dried off. The streets were comparatively dried off when I was at the depot, and remained dry until probably about 4 o'clock in the evening." Jones also testifies that the weather was good that day until about 4 o'clock in the evening. About 4 o'clock it began to snow and sleet, and from that time on until after the arrival of the horse at the hospital the storm seems to have been more or less continuous. Jones testified that, when the horse came off the car, he acted fairly well; did not show anything near the distress that he did farther on on the trip. They led the horse behind a buggy to the hospital, a distance of about two miles, during the storm above referred to. When they reached the hospital the horse was bleeding at the nose, and showing great distress and exhaustion. Dr. Moore says that at that time his case was hopeless. The next day the horse died. On cross-examination Dr. Moore was interrogated by counsel for appellant as to whether or not there were stables near the depot to which the horse might have been taken: "Q. There are good barns? A. Fairly good barns; but they are

tie stalls, and not very well protected from breeze, cold air. They are not very good barns for sick horses. Q. I am not asking you that, I simply asked you if the barns were good shelter? A. I suppose, yes; plenty of stables— Q. Well fit for taking care of horses? A. Of well horses; yes, sir. Q. You go there I presume to those barns, some of the places, to treat horses, do you not? A. Yes, sir; and take them from these places to the hospital frequently." It further appears from the evidence that, in taking the horse from the car to the hospital under the circumstances under which he was taken, Jones was acting under the direction of the veterinary. In answer to a question as to whether or not he was present when the horse was unloaded, Dr. Moore said: "I sent my assistant, Dr. Merker; had him come with the horse to the hospital, * * * I had my assistant remain with Mr. Jones until the car was set out to unload him." From this it would appear that Jones was acting under the guidance of the veterinary whom he had employed in the emergency which confronted him.

Appellant insists that the taking of the horse through the streets of Kansas City for a distance of two miles to the hospital in the storm was such negligence as precludes a recovery in this case. Appellee insists that it was not negligence; and, to our minds, this is the really important question in this case. This point, it seems to us, must be determined by the rule of what a reasonably prudent man would have done in Mr. Jones' situation, under the surrounding circumstances and conditions. We think that was a question for the jury. It was for the jury to say whether or not a reasonably prudent man, under those circumstances, would have followed the guidance of the veterinary surgeon, whom he had employed, and have taken the horse to the hospital, as Jones did, or whether a reasonably prudent man, under those circumstances, would have refused to take the horse, and have sought shelter for him in some of the other stables in that neighborhood. On a careful reading of the entire record, and a

careful consideration of all the facts and circumstances disclosed, we think that the questions: (1) Did the appellant agree to ship the horse on train No. 120? (2) Was the appellant guilty of negligence in not doing so, and holding it for shipment on the later and slower train? (3) Was it negligent in delaying the shipment of the horse from Lincoln from the time it was loaded in the afternoon until 10:55 that night? (4) Was it negligent in delaying the shipment of the horse for 11 hours at St. Joseph? (5) Was it negligent in failing to switch the car up to some chute or platform, where the horse could be unloaded, during the entire afternoon of the day the horse arrived in Kansas City, in the face of the repeated requests of Jones that it do so? (6) The question as to whether or not appellee was negligent in permitting the horse to be taken from the car to the hospital during the storm referred to—were all questions of fact for the determination of the jury. We have examined the instructions of the court, and, in our opinion, these questions were all properly submitted. The jury have decided these questions in favor of appellee, and there is ample testimony in the record to sustain their verdict. We do not think the statement by the agent of appellant that the great number of cars in the yards at Kansas City, and the large amount of their business, was such that they could not place the car where it could be unloaded any sooner than was done, is either a sufficient or truthful excuse for their long delay. They were advised, both by Jones and the doctor, that this horse was sick; that he was a valuable horse, and that it was necessary for his treatment that he should be unloaded at once, and yet no steps whatever were taken until the night man came on duty at 6:30 that evening. We regard the conduct of appellant's agents at Kansas City as entirely inexcusable, and think that defendant should be held responsible for their negligence. If the horse had been shipped on train No. 120, it would not only have reached Kansas City, but would have reached its destination at Mexico City, Mis-

souri, long before the storm referred to, and appellee would undoubtedly have suffered no injury. The negligence of appellant in not keeping its agreement with appellee, in delaying the shipment of the horse, and in not promptly furnishing facilities for unloading it, under the circumstances shown, were clearly the proximate cause of the injury; and we cannot say, as a matter of law, that the jury were wrong in finding that the act of appellee in taking the horse from the car to the hospital, under the circumstances under which he was taken, was such action as any reasonably prudent man would have taken under the same circumstances.

We recommend that the former judgment of this court be vacated and set aside, and that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated and set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

OTTO T. BANNARD, APPELLEE, V. MARY E. DUNCAN ET AL., APPELLANTS.

FILED MAY 24, 1907. No. 14,792.

1. **Vendor and Purchaser: PRIORITIES.** A *bona fide* purchaser of real estate who takes title by quitclaim should be protected as against the holder of an unrecorded deed, of which the purchaser had no notice.

2. **Deed: INTEREST CONVEYED.** The word "quitclaim" in what purports to be a deed of conveyance to real estate is sufficient to convey the interest of the grantor therein.

3. **Evidence: FOREIGN STATUTES: PRESUMPTIONS.** In the absence of evidence to the contrary, the laws of a sister state with reference

to the creation of a corporation will be presumed to be the same as those of this state.

4. **Lis Pendens**: JUDICIAL SALE: PURCHASER PENDENTE LITE. A took a real estate mortgage from B, and pending an action to foreclose the same C commenced an action in ejectment against B, and had judgment for possession of the land. *Held*, That the purchaser at the foreclosure sale was not bound or affected by the judgment entered in the action between B and C.

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

W. E. Gantt, for appellants.

Milchrist & Scott and *William P. Warner*, *contra*.

JACKSON, C.

The plaintiff had a decree quieting his title in certain real estate. The defendants appeal.

The plaintiff's chain of title is based on a patent issued August 20, 1869, to David Brendlinger, a quitclaim deed from David Brendlinger to J. M. Morse and John Comstock, dated August 12, 1885, recorded August 15, 1885, for a consideration of $40, a tax deed issued by the county treasurer June 26, 1880, to Thomas L. Griffey, a quitclaim deed from Thomas L. Griffey to John Comstock under date of October 1, 1885, for the consideration of $269, recorded October 9, 1885, and a warranty deed from John Comstock and wife and James M. Morse and wife, dated December 5, 1891, to Stephen Cain, recorded December 14, 1891, for the consideration of $1,200. The latter deed appears to have been made pursuant to a contract of sale between the parties in 1888. Cain borrowed the money to make the payment from the Fidelity Loan & Trust Company, and gave a mortgage for $1,200 to that company under date of December 2, 1891, recorded December 12, 1891. This mortgage, by a series of assignments, came into the possession of the Fidelity Securities Company, and, default having been made in the perform-

ance of the conditions of the mortgage, the latter company instituted foreclosure proceedings and had a decree of foreclosure in June, 1897. The property was sold in December, 1898, to the plaintiff herein, the sale confirmed, deed issued, and recorded January 13, 1899. The defendants claim under a warranty deed from David Brendlinger executed September 24, 1870, recorded January 11, 1898.

The first contention of the appellants is that the plaintiff's petition fails to state a cause of action, for the reason that it is not charged that the plaintiff is a *bona fide* purchaser of the land in controversy. The plaintiff's petition recites the several conveyances upon which the title is based, and alleges that Stephen Cain, for a consideration of $1,200, purchased the land from John Comstock and James M. Morse, and received a conveyance with covenants of warranty, which he caused to be recorded; that the transaction was in good faith, without knowledge, either actual or constructive, of any adverse claim by the defendants or any other person or persons; relying upon the deed and the title as it appeared of record, that Cain immediately went into possession, and that such possession continued for more than ten years; that the Fidelity Loan & Trust Company took its mortgage from Cain and wife in good faith and without notice of any adverse conveyance or claim of equity existing in favor of the defendants, relying upon the title of Cain. The petition does not charge in express terms that the plaintiff purchased the property at the sheriff's sale in good faith, nor do we think it important that it should do so. The purchaser of real estate at judicial sale under the foreclosure of a mortgage buys at his peril, but he acquires all of the interest of the mortgagor and the mortgagee in the mortgaged premises. He acquires that interest as effectually as he would have done by deed from the parties, and he may protect himself under their rights. *Snowden v. Tyler*, 21 Neb. 199; *Byron Reed Co. v. Klabunde*, 76 Neb. 801. The *bona fides* of the interest in the property acquired

by Cain and the trust company appears from the petition, and the pleading is sufficient to meet that contention.

The next complaint is that the evidence is insufficient to sustain the decree. One feature of this contention arises out of the quitclaim deed from Brendlinger to Morse and Comstock, and the contention that such a conveyance is subject to all existing equities against the grantor. That rule, however, does not go to the extent claimed for it by the appellant. We have never gone to the extent of holding that a good faith purchaser might not acquire title to real estate by quitclaim as against an unrecorded, outstanding conveyance, of which the purchaser had no knowledge. In *Snowden v. Tyler, supra,* it is said that a quitclaim deed, while affording cause of suspicion, where it appears in a chain of title in the proper records of the county, is sufficient to justify a *bona fide* purchaser for a valuable consideration in relying upon it as a valid defense. It is the *bona fide* purchaser who is protected. To the same effect is *Schott v. Dosh,* 49 Neb. 187. It appears from the testimony of Cain that before he purchased the property from Morse and Comstock he procured an abstract of the title to be made by the county clerk of the county where the land is situate, found no conveyance of record affecting the title of his grantors, and that he bought the property (so far as the record discloses) for a full consideration, relying upon the record title. The outstanding tax lien at the time of the purchase by Morse and Comstock would furnish a sufficient reason why Brendlinger would not care to give a warranty deed. It is also disclosed that, before advancing the money upon the loan made to Cain, the Fidelity Loan & Trust Company procured the title to be examined by an attorney, who, finding no conveyances of record affecting Cain's title, advised that company that their mortgage constituted a first lien on the premises. This evidence is not disputed, and is sufficient to justify the trial court in concluding that Cain was a *bona fide* purchaser, and that the rights of the

mortgagee could not be affected by the unrecorded conveyance under which the defendants claim title.

The conveyance from Brendlinger to Morse and Comstock is in the following form: "Know all men by these presents, that I, David Brendlinger (single man), of the county of Indiana, and state of Pennsylvania, for the consideration of $40, hereby quitclaim to James M. Morse and John Comstock," etc. This, it is urged, is not a conveyance; that the word "quitclaim" is not sufficient to convey title. It is said in the brief on behalf of appellant that the operative words of a conveyance in a quitclaim deed are "remise, release and quitclaim." "Quitclaim" is defined by Webster as meaning in law "to release a claim to by deed, without covenants of warranty against adverse and paramount titles." Remise is defined by the same authority, "to release a claim to, remise or surrender by deed." It would appear that remise, release and quitclaim are interchangeable, and that the words of the instrument are sufficient to constitute a conveyance.

The petition charges an assignment of the mortgage to the Fidelity Loan & Trust Company, a corporation, to the Metropolitan Trust Company, a corporation organized and existing under and by virtue of the laws of New York, and an assignment by the latter company to the Fidelity Securities Company, a corporation organized and existing under and by virtue of the laws of the state of Iowa. The corporate capacity of all of these societies is denied by answer. To meet this issue the plaintiff put in evidence copies of the articles of incorporation of the Fidelity Loan & Trust Company and the Fidelity Securities Company, certified by the secretary of state of the state of Iowa, under the seal of his office. It is said that this is not sufficient, in the absence of proof of the laws of the state of Iowa under which these corporations came into existence. It is a sufficient answer to this claim that, in the absence of proof to the contrary, the laws of Iowa on this subject will be presumed to be the same as those in Nebraska, and

that the companies were incorporated under a general statute similar to our own. Our statute provides that "duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed." Code, sec. 408. Furthermore, there is some evidence in the record of the exercise of corporate functions by these organizations. The court, therefore, violated no rule of evidence in the admission of these documents.

A stipulation in the record in effect admits the corporate capacity of the Fidelity Loan & Trust Company, the language of the stipulation being: "It is hereby stipulated and agreed between the plaintiff and the defendants in this case that on or about December 9, 1891, the Fidelity Loan & Trust Company, a corporation, loaned to Stephen Cain $1,200, and that said Cain executed and delivered to the Fidelity Loan & Trust Company his mortgage on the premises in controversy in this suit." The introduction of this stipulation in evidence was sufficient to avoid the necessity of further proof of the corporate capacity of that company. As to the Metropolitan Trust Company, proof of its corporate capacity and of an assignment from that company was immaterial. The production of the papers in court by the Fidelity Securities Company in the proceeding to foreclose its mortgage was *prima facie* evidence of ownership. *Michigan M. L. Ins. Co. v. Klatt,* 2 Neb. (Unof.) 870; *First Nat. Bank v. Sprout,* 78 Neb. 187.

Complaint is made of the introduction of the written opinion procured by the Fidelity Loan & Trust Company at the time they accepted the mortgage. If the court erred in that respect, it was without prejudice, because the written stipulation referred to contained an admission that the company did not in fact examine the records, but did inspect and examine an abstract of the records and submitted the abstract to their attorney at Sioux City, Iowa, and procured his opinion upon the state of the title. The

purpose of introducing the certificate was to show good faith on the part of the company, and it was made entirely unnecessary by the stipulation of facts.

This brings us to some of the features of the defense which it seems necessary to notice before final disposition of the case. At the time the defendants filed the deed for record, under which their claim of title is made, the foreclosure of the mortgage given by Cain to the Fidelity Loan & Trust Company was pending. Cain was in possession of the premises. The defendants herein instituted an ejectment proceeding against Cain for the recovery of the possession of the property. The plaintiff herein bought the property at judicial sale while that action was pending. In the ejectment proceeding the plaintiffs ultimately had judgment by default against Cain under an agreement to protect him in the possession of the premises for another year. It is urged that the purchaser at the judicial sale then took the title with constructive knowledge of the defendant's claim to the land; that, having bought pending the ejectment proceedings, he is bound by the doctrine of *res judicata.* The doctrine of *res judicata,* however, does not operate against the mortgagee whose rights were acquired long prior to the institution of the ejectment proceedings and who was not a party to that action, and the purchaser at the judicial sale would be protected to the same extent as the mortgagee, notwithstanding the pendency of the possessory action.

A further contention of the defendants is that they were in possession of the premises at the time of the commencement of this action, and that the plaintiff, being out of possession, cannot maintain an action to quiet his title. The right to maintain an action to quiet title to real estate in this state by the person claiming title thereto, whether in or out of possession, is no longer an open question. *Foree v. Stubbs,* 41 Neb. 271.

The plaintiff, in our judgment, has made a case sufficient to support the decree in his favor, and there is no

equity in the case presented by the defendants, who for almost 28 years neglected to assert title under an unrecorded deed. Courts of equity will apply the doctrine of laches against inexcusable delay in the enforcement of stale claims. *Hawley v. Von Lanken,* 75 Neb. 597.

From a consideration of the whole case, 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.

WILLEY H. MILLER, APPELLANT, V. JOHN PAUSTIAN, APPELLEE.

FILED MAY 24, 1907. No. 14,835.

Homestead: CONVEYANCE. Where a homestead has been selected by husband and wife from the separate property of the wife, the wife cannot by a conveyance of the property deprive the husband of his homestead right therein while the marriage relation exists.

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

George W. Prather, for appellant.

J. L. McPheely, contra.

JACKSON, C.

John and Mary Paustian are husband and wife. They were married in December, 1900. They bought the property involved in this action, consisting of two lots in the village of Hildreth, and in March, 1901, commenced the erection of a small dwelling-house thereon. The house was completed and occupied as a family home during the following month. Their possession continued jointly for

about one and one-half years, when they were separated, and the wife has since lived apart from her husband; the husband continuing to occupy the home and is still in possession. To purchase the property and build the home the wife contributed $100 and the husband $300. The property is incumbered by a mortgage of $250. The title to the real estate was taken in the wife's name. On March 31, 1905, the wife conveyed this property by deed to the plaintiff, who testified that he paid her $50 in cash and assumed the payment of the mortgage, although the deed is quitclaim in form and no reference is had to the incumbrance. The plaintiff instituted this action in ejectment against John Paustian for the possession of the premises. The judgment was for the defendant, and the plaintiff appeals.

He claims the property was the separate property of Mary Paustian, and that her deed conveyed an absolute title, free from any claim of the husband. The judgment of the district court was the only one that could be rendered under the facts. While the title to the real estate was taken in the name of the wife, yet a large portion of its value is due to the contribution of the husband. There can be no doubt that this contribution was with the express purpose and intention that the property should be occupied as a homestead. While the consent of the wife is necessary to the selection of a homestead from her separate property, it does not follow that such consent must be in express terms. It may be inferred from facts and circumstances from which a reasonable inference of consent may be deduced, or facts and circumstances may be shown which would estop the wife from asserting that consent was not given. The case of *Klamp v. Klamp*, 58 Neb. 748, is cited by the plaintiff as authority for his contention. The real question involved in that case was whether, after decree of divorce, the husband was entitled to possession of the separate property of the wife, occupied as a homestead while the marriage relation subsisted, and that case should not be taken as au-

thority beyond the determination of the question involved. It is true that a married woman in this state may convey her separate property in the same manner as if she were single, but property which comes to the wife by the gift of the husband, with the purpose that it shall be held for their joint use and benefit, is not the separate property of the wife within the meaning of the law.

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

AMES, C., concurs.

CALKINS, C., not sitting.

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

AFFIRMED.

STELLA DICKINSON ET AL., APPELLANTS, V. ELVIRA M. ALDRICH ET AL., APPELLEES.

FILED MAY 24, 1907. NOS. 14,636, 14,832.

1. **New Trial.** A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result.

2. **Appeal: NEW TRIAL: RECORD.** A decision of a district court granting an application for a new trial on the ground of newly discovered evidence will not be reviewed by this court in the absence of a bill of exceptions containing both the evidence used on the trial and that alleged to have been newly discovered.

3. **New Trial: TRANSCRIPT: WAIVER.** Inability of a party, without his fault or negligence, to procure a transcript of oral testimony taken on a trial in time to prepare and settle a bill of exceptions within the period limited by statute is not a ground for a new trial when the adverse party offers to waive his advantage and permit the bill to be subsequently prepared and settled.

4. **Wills: PROBATE: TRIAL.** It is error for a court to submit questions

of law to a jury, as for instance, whether the facts and circumstances given in evidence upon the trial of a contestant of the probate of a will are sufficient to operate as a revocation of the instrument by implication of law.

APPEAL from the district court for Douglas county: WILLIS G. SEARS and ALEXANDER C. TROUP, JUDGES. *Judgment granting new trial affirmed: Judgment denying probate of will reversed.*

W. A. Saunders, J. L. Kaley and *L. D. Holmes,* for appellants.

McGilton & Gaines, E. E. Thomas and *Thomas J. Nolan, contra.*

AMES, C.

The plaintiffs began in the county court of Douglas county a proceeding for the probate of an alleged lost will of one Seth F. Winch, deceased. Probate was resisted by the defendants, who are heirs at law of the deceased, and was denied, and from the order of denial an appeal was taken to the district court, where, as the result of a trial, a like decision was reached, and the plaintiffs appealed to this court, such appeal being one of the matters now under consideration.

A purported copy of the alleged will accompanied the application for its probate, to which there were four distinct grounds of objection made by the contestants: First, it was denied that the alleged will was properly made, executed, acknowledged, attested or witnessed; second, it was averred that at the time of the alleged execution of the supposed will the deceased was, and that he continued to be until the time of his death, of insufficient mental capacity to make a will; and, third, that during all said time the deceased was and had been subject to the undue influence and control exerted over him by his wife, who is the principal beneficiary in the instrument offered for probate; and, fourth, that between

the date of the alleged execution of the instrument and the death of Winch his pecuniary affairs had undergone such a change as to render the disposition of the alleged will inapplicable to them, or at least such as to render its provisions inconsistent with his situation and necessarily presumable intent at the time of his death, and to amount to an implied revocation of it. In connection with the application for probate there was presented what purported to be a typewritten copy of the will, with the names attached thereto, as subscribing witnesses, of William F. Wappich and W. S. Shoemaker, both of whom were produced as witnesses at the trial. Wappich testified that he had witnessed a will corresponding with the copy, together with Shoemaker, on the day of its purported date, November 30, 1891, in the presence of Winch, in a certain building in Omaha, and that the instrument was typewritten. Shoemaker testified that he had witnessed such a will in the presence of Wappich and Winch in the summer or fall of 1891, in another building in Omaha, but that the instrument was in "longhand" or manuscript. He then and afterwards testified that he had no recollection of ever having witnessed a typewritten instrument. It was a theory and contention of the contestants upon the trial, which there was some evidence to support, that Winch had a habit of making wills as his fancy struck him, and that he had prepared or had caused to be prepared at least four such instruments. Counsel now say that this evidence and contention were offered for the purpose, not of showing that the instrument, a copy of which was in evidence, was not executed by the deceased, but as bearing solely upon his mental sanity and testamentary capacity, and that the court instructed the jury that the disagreement of the witnesses as to whether the instrument was in writing or manuscript is immaterial. We are unable to find such an instruction in the record, but the proposition is doubtless true, and would have been apprehended by the jury of their own minds, provided they were satisfied that the instrument

in suit was in fact executed and was the only one to which either witness had reference. Counsel for contestants therefore contend that the first formal issue raised by the pleading was not a real one, and that it is apparent upon the face of the whole record that the fact of execution, if not admitted, was established without substantial contradiction. The significance of this contention will appear presently. The jury returned a verdict generally for the defendants, and that the alleged will had not been established and should not be admitted to probate, and the court entered judgment accordingly. Some months afterwards an original instrument, of which the document used on the trial is an exact copy, was discovered, and the plaintiffs began a suit in equity and obtained a judgment for a new trial on the ground of newly discovered evidence. From this latter judgment the contestants appealed to this court, where the two proceedings have been consolidated to be disposed of by a single decision.

Counsel for contestants invoke the rule, well settled in this court and elsewhere, and no doubt correctly so, that a new trial will not be granted on the ground of newly discovered evidence unless it is shown that such evidence would probably have changed the result had it been offered and admitted on the trial. *Ogden v. State,* 13 Neb. 436; *Lillie v. State,* 72 Neb. 228. And in that connection they rely also upon the previous decisions of this court that, in order to render the application of that rule efficacious in this court, the record upon the proceedings for a new trial must contain not only all the evidence received therein, but also all that was taken on the former trial, so that this court may be enabled to pass upon the vital question of probability. *Western Gravel Co. v. Gauer,* 48 Neb. 246; *Williams v. Miles,* 73 Neb. 193.

They contend, therefore, first, that the original will could have had no practical force or effect upon the trial, in view of the fact that, as they insist, its execution was not substantially in dispute; and they contend, secondly,

because the evidence taken upon the former trial upon any of the three other issues was not presented upon the trial of the suit to obtain a new trial, and has not been preserved or presented to this court in the form of a bill of exceptions, although the record shows that the issues of mental incapacity, undue influence and implied revocation were all submitted by the court to the jury by appropriate instructions upon conflicting evidence in the former trial, that the presumption is therefore at least as forceful that the verdict was responsive to one or all of those issues as to that of nonexecution. We are unable to find a way not in conflict with the above cited decisions to escape from this latter situation. If the only issue tried had been that of execution, we should not hesitate to hold that the presence of the original instrument in formal and substantial compliance in all respects with the requirements of law would have been conclusive of its due execution in the face of such evidence as was presented upon that issue, but, on the other hand, we are very much inclined to think that in the absence of the original and in view of the discrepancies of the testimony of the witnesses, not only as to whether the will was typewritten or in manuscript, but as to the place of its execution, and without distinct agreement as to time, taken in connection with the evidence that the alleged testator had made at least four wills, would probably have been sufficient to induce the jury to reject the instrument before them. We may, perhaps, go a step farther and conjecture that this issue was principally or alone considered by the jury, because it was, or may have been, regarded by them as the simplest and as vexed with the fewest complications, and therefore to be the most easily disposed of. But how can we say in what manner it is probable that the jury would have decided any or all the other issues in the case if this one had been set at rest by the presence of the original will? For aught that we know, the evidence of mental incapacity was as overwhelming and conclusive as would have been that of the formal execution of the instrument

had the original been present, and, if it was so, we, of course, cannot say that such presence would not have probably changed the result. The same may also be said of the other issues of undue influence and implied revocation, and, if the entire record was before us and disclosed sufficient evidence to support the verdict, the court could not reverse the judgment because of a mere conjecture that the jury had been misled or had committed a mistake upon one issue only.

After the issues had been joined in the action to obtain a new trial, the plaintiffs by leave of the court filed a supplemental petition, in which they averred, as an additional ground for the relief prayed, that, owing to the delinquency of the official stenographer of the court, they had without their own fault or negligence been unable to procure a transcript in longhand, to be incorporated in a bill of exceptions, of the oral testimony adduced on the trial of the contest in that court, and that it was then physically impossible so to do until after the time fixed by the statute for the preparation and settlement of a bill of exceptions would have expired. But the defendants offered in open court to waive the time of such preparation and settlement, and to treat a bill afterwards perfected as one having been made within the statutory period. There is some criticism upon the phraseology of the offer, but it appears to have been made in good faith and to have been intended to be complete and comprehensive, and this court would without doubt have construed it liberally for the purpose of effectuating its evident object and protecting the plaintiffs from any undue advantage by reason of their acceptance of it. We think it unnecessary to set the offer forth at large in this opinion, and that it suffices to say that in our judgment it was sufficient to defeat the plaintiffs of their claim for a new trial for the cause set forth in their supplemental petition.

In the trial of the suit contesting the will the court of its own motion gave the following instruction, which was

excepted to by the proponents, and which is assigned here for error: "As previously stated to you, it is the law of this state that a will may be revoked by implication of law from subsequent changes in the condition or circumstances of testator. Therefore you are instructed that subsequent to the execution of the will (in case you may find it to have been legally executed) it may have been revoked by implication of law by reason of changes in the condition or circumstances of the one who executed the same. Such changes, however, must have been with reference to the condition of the testator or his circumstances, and have been so material that, by reason of their existence as a matter of good faith toward the testator and toward his intent, and such good faith toward the several objects of his bounty, the courts, in viewing the estate and the several bequests in the light of those changed conditions and circumstances, will say in fairness to all concerned that the terms of the will either cannot or should not be enforced. You are instructed in this connection that a change of mental condition alone from soundness of mind at the time of a will's execution to unsoundness of mind at a later period would not work to revoke a will; neither would the disposal by the testator of specific items of property bequeathed in such will. But you must view the condition and circumstances of the testator as a whole, and conclude whether, from all the evidence in the case bearing upon such points, such will was or was not revoked by reason of such changes. The condition and circumstances of the testator have been given to you in evidence from the time of the execution of the will (in case you find that the same was legally executed on or about the 30th day of November, 1891), until his death in 1899. Should you find that said will has been revoked by implication of law as herein stated to you, you will find against the admission of said will to probate. (Given.)"

It is objected to this instruction, and we think justly so, that it submits to the jury, not questions of fact which were within their province, but an important and vital question

of law with which the court alone was competent, and with which it was his duty exclusively, to deal. The instruction, in effect, says to the jury that they should take into consideration all the facts and circumstances given in evidence on the issue of revocation, and, if in their opinion they were sufficient as a matter of law to accomplish that result, they should find against the admission of the instrument to probate. It seems quite clear to us that such instruction is erroneous. The court should, instead, have told the jury what facts were alleged and proved, or attempted so to be, or in dispute upon the issue of revocation, and which or how many of them were relevant to that issue, and, if established by the evidence, would suffice as a matter of law, to work a revocation of the will, provided that they should find that the instrument in suit was duly executed by the deceased not unduly influenced, and with sufficient mental capacity.

We therefore recommend that the judgment of the district court in the action to obtain a new trial on the ground of newly discovered evidence be affirmed, but that the judgment excluding the alleged will from probate 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 in the action to obtain a new trial on the ground of newly discovered evidence is affirmed, and the judgment excluding the alleged will from probate is reversed and remanded.

JUDGMENT ACCORDINGLY.

MUNSEY HACKLER, APPELLANT, V. HOWARD MILLER ET AL., APPELLEES.*

FILED MAY 24, 1907. No. 14,793.

False Imprisonment: LIMITATIONS. When a peace officer arrests and imprisons a person without process, and thereupon takes him before a magistrate before whom he files a written complaint against the prisoner, describing no offense against the law, and after a hearing the person is set at liberty, an action for a malicious prosecution does not lie; but the party so mistreated has an immediate and complete cause of action for a false imprisonment, against which the statute of limitations begins to run when he is released from custody.

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

Allen & Reed and *T. S. Allen*, for appellant.

Robertson & Robertson and *M. F. Harrington, contra.*

AMES, C.

On June 3, 1903, the defendant Reavis, who then held the offices of marshal and street commissioner of the village of Battle Creek in this state, with the assistance or encouragement, as it is alleged, of the defendants Miller and Kilbourn, and without warrant or process, seized the person of the plaintiff and cast him into the village jail, detaining him there for the space of two hours. At the end of that time Reavis hauled the plaintiff and another before a justice of the peace of the county, before whom he filed a written complaint of which the following is a copy: "The State of Nebraska, Madison County, ss.: The complaint of W. F. Reavis, village marshal of said county, made before me, E. G. Dennis, a justice of the peace in and for said county, who, being duly sworn, deposes and says that on the 3d day of June, 1903, in the county of Madison state of Nebraska, Church Boyer and Munsey Hackley

* Rehearing allowed. See opinion, p. 209, *post.*

comite a missdemeanor for interfearing and obstructin the public highway by filling up a ditch on said highway. Affiant further states that Church Boyer and Munsey Hackley committed the offense. W. F. Reavis. Subscribed in my presence and sworn to before me this 3 day of June, 1903. E. G. Dennis Justice of the Peace." A hearing of the complaint was postponed until the 5th of the month, until which time the prisoners were permitted to go at large, as the justice's docket recites, on their own recognizance. On the 5th the docket recites that the parties appeared, and the matter was further continued until the 8th, until which time the prisoners seem to have been at liberty without recognizance, the same not appearing to have been continued or renewed, and no document or acknowledgment in the form of a recognizance was filed with the justice or entered upon his docket at any time during the pendency of the proceeding before him. On the 8th a written motion to dismiss was filed by the defendants in that matter, and thereafter appears the following docket entry: "The motion of the defendants was overruled by the court and the cause was submitted, and upon the evidence before me I find that Church Boyer and Munsey Hakley was gilty of the charge maid in the complaint and I fixt their fine at $2 each and costs fixt $11.95." On the same day the plaintiff herein and Boyer entered into a recognizance with sureties in the sum of $200 for their appearance at the next term of the district court of the county, and remained at liberty. At a subsequent term of the last named court, to wit, on the 14th day of March, 1905, the proceeding was dismissed. This suit, which was begun May 25, 1905, is described by counsel for plaintiff in his brief as "an action to recover damages for malicious prosecution, false imprisonment and assault and battery." The answer is a general denial and a plea of the statute of limitations. There was a verdict and judgment for the defendants, from which the plaintiff appealed.

The arrest was without process, and in his motion be-

fore the justice of peace to dismiss the proceeding the plaintiff correctly contended that the written complaint described no offense against the statutes of the state, or, so far as the record discloses, against the ordinances of the village. The whole transaction was therefore *coram non judice,* and in violation of law. With respect to that proceeding the marshal was not a police officer, and the justice was not a magistrate. There was no malicious prosecution, nor any prosecution at all. There was simply a false imprisonment. The plaintiff's cause of action arose on the instant of his arrest, and the statute of limitations, which is of one year (code sec. 13), began to run the moment he was set at liberty. If he had been subsequently arrested, a new cause would have arisen. There is a clear distinction between an action for a false imprisonment and one for a malicious prosecution. "The distinction is that false imprisonment is some interference with the personal liberty of the plaintiff which is without authority. Malicious prosecution is in procuring the arrest or prosecution under lawful process on the forms of law, but from malicious motives and without probable cause." *Herzog v. Graham,* 9 Lea (Tenn.), 152. "An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceedings, before some judicial officer or tribunal. If the proceedings complained of are extra-judicial, the remedy is trespass, and not an action on the case for a malicious prosecution." *Turpin v. Remy,* 3 Blackf. (Ind.) 210; *Colter v. Lower,* 35 Ind. 285, 9 Am. Rep. 735; *McConnell v. Kennedy,* 29 S. Car. 180; *Cunningham v. East River E. L. Co.,* 60 N. Y., Super. Ct. 282. Where the magistrate has no jurisdiction of the offense of which the plaintiff was accused, the proceedings before him are of no legal force or validity, and they therefore afford no sufficient basis to sustain an action for malicious prosecution. *Bixby v. Brundige,* 2 Gray (Mass.), 129. The authorities seem to be nearly or quite all to the same effect.

In addition to the foregoing, it does not seem that the

justice pronounced any judgment against the plaintiff. He found him "gilty," and "fixt" his fine at $2 and costs, but he did not adjudge that the state have or recover any sum, or that the plaintiff be committed or imprisoned. *Preuit v. People*, 5 Neb. 377; *Miller v. Burlington & M. R. R. Co.*, 7 Neb. 227.

This action was begun nearly two years after the happening of the assault and battery and false imprisonment complained of, and is therefore barred. We therefore recommend that the judgment of the district court be affirmed.

JACKSON, C., concurs.

CALKINS, C., not sitting.

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 December 18, 1907. *Former judgment of affirmance as modified adhered to:*

1. **Appeal:** OBJECTIONS: WAIVER. Where an objection to the introduction of the plaintiff's evidence is sustained on the ground of a defect in his petition, and he afterwards obviates the objection by filing an amended petition, he will be held to have waived his exception, if any, to the order sustaining such objection.

2. **Pleading:** ORDER: REVIEW. Where a plaintiff asks leave to amend his petition, "either by interlineation or by filing such other pleading as the court may order," and complies without objection or exception with an order requiring him to file an amended petition, he cannot afterwards complain of such order.

3. **Malicious Prosecution:** DEFENSES. If a person maliciously, and without probable cause, procures or instigates a criminal prosecution against another, he cannot defeat an action for malicious prosecution by setting up the invalidity of his complaint, or a defect in the judgment or proceedings.

4. ———: LIMITATIONS. The statute of limitations in such a case does

not begin to run until the criminal case is dismissed, or the prosecution otherwise finally terminated.

5. ———: ANSWER. An answer in the nature of a general denial in an action for malicious prosecution puts in issue the plaintiff's allegations of malice and want of probable cause. Under such an answer the defendant may introduce any evidence which tends to disprove malice or establish the existence of probable cause.

6. Instructions examined, and found to coincide with the plaintiff's view of the law of the case, and to furnish no ground for a reversal of the judgment of the trial court.

7. Appeal: HARMLESS ERROR. If the evidence in a case is of such a character that a verdict for the defendants is the only one which can be upheld, the plaintiff cannot predicate error on the instructions, because, if erroneous, they constitute error without prejudice.

BARNES, J.

This case is before us on a rehearing. By our former opinion, *ante,* p. 206, the judgment of the district court in favor of the defendants was affirmed, for the reason that the plaintiff's action was one for damages for trespass in the nature of assault and battery committed by false imprisonment, and was barred by the statute of limitations when it was commenced. We think the rule of law announced in the opinion is sound, but an examination of the record convinces us that it does not correctly dispose of one of the questions presented thereby. The plaintiff's amended petition contained two causes of action; one for malicious prosecution, and the other for a trespass in the nature of an assault and battery committed by false imprisonment. The record discloses that it was made to appear that plaintiff was designated in his petition, and his action was brought in the name of, "Munsey Hackley," instead of "Munsey Hackler," which is his true name. The defendant therefore objected to the plaintiff's evidence, and the objection was sustained, to which an exception was noted. Plaintiff thereupon made the following request: "The plaintiff, Munsey Hackler, asks leave of court to change the words 'Munsey Hackley' to the

words 'Munsey Hackler' by amendment, either by interlineation or by filing such other pleading as the court may order. To which the defendants, Miller and Reavis, objected, because the same is incompetent, improper, and because it changes the name of the plaintiff in this case, and because the statute of limitations under the name of Munsey Hackley has already run. By the court: I will allow the amendment, but not by interlineation, and I am not passing on the question of the statute of limitations raised by the objection. To which ruling the defendants except." Thereupon the following agreement was made in open court: "Now, it is agreed between the parties that the evidence taken up to this time may stand as applicable to the amendment filed." So it appears beyond question that the plaintiff asked and obtained the ruling of which he now complains, and to which he entered no objection. This sufficiently disposes of his assignment "that the court erred in requiring him to amend his petition," and which he alleges resulted in the interposition of the plea of the statute of limitations." After the proceedings above mentioned were had, the defendants filed their answers, which contained both a general denial and a plea of the statute of limitations. Plaintiff replied instanter, and the trial proceeded. By filing his amended petition he acquiesced in the ruling of the court, and waived his exception thereto.

The plaintiff introduced a record of the proceedings in the justice court, which were the basis of the action for malicious prosecution, to which defendants objected for the reason that it appeared that the plaintiff's cause of action was barred by the statute of limitations. The court overruled the objection, and properly so in our opinion, because the first cause of action set forth in the plaintiff's petition was one for malicious prosecution; and, although the complaint filed before the justice of the peace failed to state facts sufficient to charge the plaintiff with the commission of a crime, and no judgment which could have been enforced was ever pronounced against him, yet, in

order to terminate the prosecution or avoid the effects of the record in the justice court, he deemed it necessary to appeal to the district court, and so the cause was pending and undisposed of until it was dismissed by the county attorney. The action having been commenced within one year after such dismissal, his cause of action for malicious prosecution was not barred by the statute of limitations. Not so, however, as to the cause of action for assault and battery committed by the alleged false imprisonment. The court should have sustained the defendants' objection to the introduction of any testimony in support of the plaintiff's second cause of action, but of this the plaintiff is not in a position to complain. The court having overruled the objection predicated upon the statute of limitations, that matter was practically eliminated from the case, and the defendants were, in effect, deprived of that defense. It is true it remained in the answers because it was not attacked by the plaintiff, and, neither party having requested the court to instruct the jury on that point, no instruction was given in relation to it. So it would seem that the jury could not have considered it in arriving at their verdict.

After the ruling above mentioned the trial proceeded on the plaintiff's theory of the case. The jury were instructed upon that theory, and yet they returned a verdict for the defendants. A careful reading of the bill of exceptions convinces us that the evidence fully sustains the verdict.

Plaintiff contends that the judgment should be reversed for the reason that defendants could not justify their actions without interposing a plea of that nature. Strictly speaking there is no such thing as a plea of justification in an action for malicious prosecution. It is true the defendant may justify in an action for false imprisonment, but that cause of action was barred by the statute of limitations when the suit was commenced. So it appears that no justification was attempted by the defendants in the sense in which that term is ordinarily used. The plaintiff

introduced the record of the prosecution before the justice of the peace, and attempted to show that the defendants were actuated by malice, and that the prosecution was without probable cause. His testimony showed that at the time the proceeding in the justice court was commenced against him the defendant Reavis was the village marshal of the village of Battle Creek; that he, together with several other persons who were assisting him, was engaged in opening a ditch on what was claimed to be one of the streets of said village; that the plaintiff obstructed him in that work by filling up the ditch as fast as it was opened by the defendant; that thereupon defendant told the plaintiff, and the others who were with him, that they should consider themselves under arrest; that after taking them up the street a little distance the defendant released them upon a promise not to further interfere with him in the performance of his duty; that after he returned to his work the plaintiff and one Church Boyer, contrary to their promise, again commenced to fill up the ditch; that defendant thereupon arrested them without a warrant, confined them in the village jail, and commenced the proceeding complained of in the justice court. The evidence of the defendant Reavis was submitted on the theory that he acted in the matter in good faith, without malice, and not without probable cause, and it is apparent that the jury took this view of the matter, and their verdict should not be disturbed. His denial put in issue the questions of malice and want of probable cause, and it was competent for him to introduce any evidence which tended to show the absence of malice on his part, and the existence of probable cause for the attempted prosecution. As to the defendant Miller, his defense was that he had nothing to do with the prosecution whatever; that he took no part in the transaction, and the jury must have so found. The verdict is not only fully sustained by the evidence, but it is difficult to see how they could have arrived at any other conclusion.

Complaint is made of instructions 10 and 11, given by

the court on his own motion. Instruction No. 10 seems to be a correct statement of the law relating to malicious prosecution, and by instruction No. 11 the jury were told that "in law the want of probable cause does not of itself show malice, but the jury are at liberty to infer malice therefrom as a conclusion of fact, if from all the evidence in the case they deem such an inference justifiable."

It is contended that the court erred in giving paragraph No. 12 of his instructions, because it conflicts with the instructions given at the plaintiff's request. The instruction reads as follows: "Malice in law means an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another. It is enough if defendant be actuated by improper or sinister motives." This instruction seems to support the plaintiff's theory of the case, and the conflict, if any, between it and those given at the request of the plaintiff is so slight that the jury could not have been confused or misled thereby. Again, by instruction No. 13 the jury were informed that, if the purpose of the arrest was anything else than to vindicate the law and punish crime, then they might infer that the defendant had a malicious motive in causing the same. In short, the instructions seem to substantially coincide with the plaintiff's view of the law of the case.

Counsel complains of instructions numbered 1 to 3, inclusive, given at the request of the defendants. As we have heretofore stated, it seems clear that the case was not decided by the jury on the theory of justification. In fact the record of the prosecution was not sufficient to constitute a justification, and the only thing left for the jury to determine was whether or not the prosecution was malicious and without probable cause. This being the case, the judgment should not be reversed because of the instructions complained of. In our view of the case, no other verdict could have been sustained than the one returned by the jury, and therefore the giving of these instructions, if error, was without prejudice.

The plaintiff groups the remainder of his 37 assignments, and argues them upon what we assume to be the theory that the evidence does not sustain the verdict. As we have before stated, the plaintiff tried his case to a jury upon his own theory, but failed to establish the fact that the prosecution complained of was malicious and without probable cause. The statute of limitations barred his right to recover for the trespass, assault and battery or false imprisonment, set forth in his second cause of action, and the verdict of the jury was therefore right and should not be disturbed.

For the foregoing reasons, our former judgment, as explained and modified herein, is adhered to.

AFFIRMED.

CARL J. HALLNER ET AL., APPELLEES, V. UNION TRANSFER COMPANY, APPELLANT.

FILED MAY 24, 1907. No. 14,818.

Pleading. New matter in a reply must be responsive and defensive to new matter pleaded in the answer. If it is a departure therefrom it should upon motion or objection be stricken out or disregarded.

APPEAL from the district court for Saunders county: ARTHUR J. EVANS, JUDGE. *Reversed.*

Harl & Tinley and *H. Gilkeson,* for appellant.

J. L. Sundean and *Wilson & Brown, contra.*

AMES, C.

The petition alleges, in substance, that the plaintiffs delivered to the defendant for sale, for the plaintiff's use, a steam engine, separator and stacker belonging to the latter, and that afterwards the defendant sold the engine to S. F. Negley and O. M. Anderson, for $1,100,

and, with the consent of the plaintiffs, took therefor to the defendant's own use the note of the purchasers for said sum, and by that means became indebted to the plaintiffs in that amount, and that afterwards the defendant, with the consent of the plaintiffs, sold or appropriated to its own use the separator and stacker, which were of the reasonable value of $450, and became by that means indebted to the plaintiffs in the further sum of $450, making a total indebtedness of $1,550. And the plaintiffs aver that of said sum the defendant has paid to them or to their use the sum of $450 only, in principal amount, leaving an unpaid residue of $1,100, for which and interest they pray judgment. For answer, the defendant admits the receipt by it of the three articles for sale, for the use of the plaintiffs, the proceeds to be applied upon a certain debt of the latter, but denies having made sale of any of them, and denies having, by consent or otherwise, become indebted to the plaintiffs on account of the transaction in any sum or amount, but the defendant avers that the plaintiff sold the engine to Negley and Anderson, receiving in payment therefor three notes of the purchasers for unnamed amounts and a 10 horse power engine, and that this latter mentioned engine was delivered to the defendant to be sold for the use of the plaintiffs, but has not been sold. And the defendant specifically alleges that the engine, separator and stacker still remain in its possession, subject to an agreement between the parties that the same shall be sold and the proceeds of the sale of the separator and stacker applied to the payment of certain indebtedness by the plaintiffs to the defendant, and the 10 horse power engine or the proceeds of its sale subject to the order of the plaintiffs. For a reply, the plaintiffs admit that the first mentioned engine and separator and stacker were delivered to the defendant to be sold and the proceeds applied toward the payment of a debt of the plaintiffs, but deny that they ever received the purchase-price notes of Negley and Anderson, amounting to $700 or the 10 horse power engine, which they aver was of the value of $400,

but they aver that the defendant has converted both the notes and the engine to its own use, and deny "each and every allegation of the answer inconsistent with the petition and this reply." The plaintiffs recovered a verdict and judgment for $600, from which the defendant appealed.

Concerning the new matter pleaded in the reply, we think it must be said that, if it was intended as a charge or tortious conversion, it is inconsistent with the petition, and ought upon motion or objection to have been stricken out or disregarded, and that, if it is treated as consistent therewith, it is immaterial. According to the petition, all articles involved in the suit became, by the agreement or consent of the parties, the property of the defendant, for the amount or value of which it became unconditionally liable to the plaintiffs, and the relation of bailor and bailee theretofore existing between the parties wholly ceased. Now, a person cannot be charged with tortious conversion of property of which he is absolute owner and of which he is at liberty to make such disposition as he sees fit, and in every system of enlightened jurisprudence a person, when sued, either civilly or criminally, has a right to be informed by a formal pleading of the precise nature of the wrong of which he is accused, and to be called upon during the progress of that litigation to respond to no other charge. Section 109 of the code provides that, when the answer contains new matter, the reply may also contain new matter constituting a defense to that contained in the answer. In this instance the new matter pleaded in the answer amounts to no more than that the defendant denies that it has, by consent or agreement of the parties, become the owner of and absolutely liable for the price or value of the articles mentioned in the petition, and avers that it has received them as bailee, and continues liable for such of them as it has not already accounted for, in that capacity, and no other. It is extremely difficult to make out either from the pleadings or from the bill of exceptions what issue it was supposed by counsel for either party was being tried, and the instructions given and refused by the

court are not as illuminating as could have been desired, but the new matter in the reply, if it has any force at all, impliedly admits the version of the transaction set out in the answer, and seeks to recover for a breach of the contract of bailment, such a breach consisting of a tortious conversion of the property, and upon the trial the plaintiffs were permitted to introduce evidence of a like conversion of the remainder thereof without pleading. This was obviously a very wide departure from the case made in the petition, and ought not to have been permitted. The court, over the objection and exception of the defendant, submitted the question of conversion to the jury, and refused an instruction asked by it withdrawing that question from their consideration.

We think that the judgment ought to be reversed and a new trial ordered, in the hope that the issues will be reformed and the cause resubmitted in a more intelligible manner.

JACKSON, C., concurs.

CALKINS, C., not sitting.

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.

WALTER P. PROPECK, APPELLANT, V. SADIE PROPECK, APPELLEE.

FILED MAY 24, 1907. No. 14,823.

Appeal. A transcript upon an appeal to this court which does not contain a final order or judgment presents nothing for review.

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

Meier & Meier, for appellant.

AMES, C.

This is an action for a divorce begun in the district court for Otoe county. The defendant has not appeared either in that court or in this; why, we do not know. The district court found specially that there had been due service of notice of the pendency of the action by publication in a newspaper, and upon an examination we do not find that he erred in so doing.

The petition states two grounds for action, viz., extreme cruelty and total abandonment, without cause, for a term exceeding two years next before the beginning of the action. Both causes appear to be abundantly supported by the evidence, which is preserved in a bill of exceptions. After the cause had been submitted on the petition and proofs, the court made and entered the following order: "And the court, being well advised in the premises, finds the issues herein against the plaintiff, and a decree of divorce as prayed in his petition is refused the said plaintiff. To which plaintiff excepts, and 40 days are given from the rising of the court in which to prepare and serve a bill of exceptions." This is a finding of facts, but not a judgment. On the contrary, it is an explicit refusal by the court to render a judgment for the plaintiff, and none is rendered against him. There is consequently nothing before this court for review. The plaintiff appealed.

We recommend that the appeal be dismissed with costs.

JACKSON, C., concurs.

CALKINS, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the appeal be dismissed, with costs.

DISMISSED.

SHERIDAN COUNTY, APPELLEE, V. ALEXANDER MCKINNEY ET AL., APPELLEES; CORNELIUS C. CUYLER ET AL., APPELLANTS.*

FILED MAY 24, 1907. No. 14,833.

Acknowledgment: CERTIFICATE. A certificate of a notary public not authenticated by a statement either engraved upon his seal or written under his official signature of the date of the expiration of his commission or term of office is void.

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

W. W. Wood and *Flansburg & Williams,* for appellants.

C. Patterson, J. E. Gilmore and *A. G. Fisher, contra.*

AMES, C.

In January, 1900, Sheridan county began an action against Alexander McKinney and Lucilla, his wife, to foreclose tax liens delinquent for a series of years upon a tract of land lying in the county, the title to which was in the former named defendant. Cuyler and Graham, two other defendants, were alleged to be owners by assignment of a mortgage lien upon the land, and they appeared and pleaded their instrument by cross-petition, to which Alexander McKinney answered by a general denial. The action proceeded to trial and a decree adjudging the taxes as first lien, and the alleged mortgage debt as second lien, and directing a sale of the premises, as is usual in such cases. Service was attempted to be made upon Lucilla by publication, on the ground of nonresidence, but she afterward appeared, and upon motion and proof of residence procured the decree to be vacated and the cause to be again set down for trial. She also answered the cross-petition by a general denial, and further answered specifically that the premises were a homestead occupied by her husband and herself

* Rehearing allowed. See opinion, p. 223, *post.*

and their minor children as such, and that the alleged mortgage was a cloud upon her title, and praying that it be so adjudged. The suit proceeded to trial and a decree, in which the court found generally against the cross-petitioners and in favor of the defendants McKinney upon the issue as to the alleged mortgage, and dismissed the action with respect thereto. But it was found that the cross-petitioners were the owners by purchase and assignment of the tax liens set forth in the petition of the plaintiff, and decreed a foreclosure of the same. This latter finding and decree is without the support of a pleading or of sufficient competent proof, but it was not assailed by motion in the district court, nor did either the county or the defendants McKinney or either of them appeal, so that the error cannot be availed of here. Cuyler and Graham alone appeal.

We shall not discuss the evidence upon the issue whether the premises were a homestead. Counsel for appellants seem to concede in their brief that it is sufficient to support the finding of the trial court, if the defendants McKinney are credible witnesses and their testimony is worthy of belief. There was no attempt at a direct impeachment of them, and the trial court was more competent to weigh their testimony than we are. We think that an accusation of vagueness on this issue, or of apparent reluctance and perhaps insincerity upon another, is not sufficient to overcome his judgment or to wholly discredit the witnesses. Their testimony with respect to the homestead character of the premises is not in itself incredible, and, if true, is sufficient to establish their contention.

At the second trial the notes and mortgages pleaded in the cross-petition had been lost, and appellants were therefore compelled to rely solely upon the county record, and hence arises the important question in the case. The premises were a homestead. Not only is the existence of a mortgage put in issue by both defendants by general denial, but the wife expressly denies ever having acknowledged any such instrument. On the witness

stand she not only repeats such denial, but also denies any present recollection or knowledge that she signed the alleged instrument in suit. No one testifies to having seen her sign it, or to having seen her purported signature to it, or to any positive knowledge that it is hers, so that the fact must be established, if at all, by the public record, and the verity of the record depends upon the sufficiency of the notary's certificate of acknowledgment there shown. Comp. St. 1905, ch. 73, sec. 14. Section 5, ch. 61, Comp. St. 1905, in so far as it pertains to the present controversy, is as follows: "Each notary public, before performing any duties of his office, shall provide himself with an official seal, on which shall be engraved the words 'Notarial Seal,' the name of the county for which he was appointed and commissioned, and the word 'Nebraska,' and in addition, at his option, his name and the date of expiration of his commission, or the initial letters of his name, with which seal by impression all his official acts as notary public shall be authenticated, and under his official signature on all certificates of authentication made by him, such notary public shall write the date at which his term of office, as such notary public will expire; provided, such date of expiration is not engraved on the seal."

The certificate in question is concededly in due form, except that there is neither engraved upon the notary's seal, nor appended in writing to his signature, a statement of the date of the expiration of his commission or term of office. Is this defect fatal? Under sections 13, 14, ch. 73, Comp. St. 1905, only instruments "duly recorded" can be read in evidence in the absence of the original. Is the mortgage in suit duly recorded? If the statute had peremptorily required the date to be engraved on the seal its omission would without doubt have been fatal. *Oelbermann v. Ide,* 93 Wis. 669; *Welton v. Atkinson,* 55 Neb. 674; *Byrd v. Cochran,* 39 Neb. 109. Such an omission under such a statute would have destroyed the official character of his seal. But section 5 of the statute, *supra,* requires

that all the notary's official acts shall be authenticated, not only by his official seal, but by his official signature, so that his name without the added words "Notary Public" would clearly be insufficient, and so we think that the date engraved upon his seal is required as an addition to, or rather as a part or amplification of, his "official signature." It is not worth while to speculate as to what was the object or purpose of the legislature in making this requirement. It is enough to say that the requirement itself is as peremptory as any other contained in the statute, and, if it may be disobeyed, any or all the rest may be treated in like manner without impairing the authenticity of the instrument or of its record. We think there is not sufficient proof in the record that the wife either signed or acknowledged the mortgage in suit, and that it is void as to her, and that, the premises being a homestead, it is also void as to her husband.

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

JACKSON, C., concurs.

CALKINS, C., not sitting.

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 February 20, 1908. *Former judgment of affirmance vacated and decree entered:*

1. **Notaries: CERTIFICATE: SEAL.** The seal of a notary which contains the words "Notarial Seal," the name of the county for which the notary was appointed, and the word "Nebraska," is sufficient for the authentication of his official acts; and his failure to write under his official signature the date when his commission will expire does not render his certificate void.

2. **Acknowledgment: IMPEACHMENT.** A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by

clear, convincing, and satisfactory proof that the certificate is false and fraudulent; and whilst the making of a false certificate is a fraud upon the party against whom it is perpetrated, yet the mere evidence of a party purporting to have made the acknowledgment usually cannot overcome the officer's certificate, nor will such evidence, slightly corroborated, overcome it.

BARNES, C. J.

By our former judgment in this case it was held that a certificate of a notary public, not authenticated by a statement either engraved upon his seal, or written under his official signature, of the date of the expiration of his commission or term of office, is void. *Ante*, p. 220. This was so vigorously assailed by the appellants that a rehearing was granted, the case has been reargued to the court, and is again before us for consideration.

The certificate of the notary public attached to the mortgage which the appellants sought to foreclose in this action is in due form. It appears, however, that the date of the expiration of his commission was not engraved upon his seal, or written by him under his official signature, and the effect of such omission is presented for our determination. By section 5, ch. 61, Comp. St. 1891, as it existed prior to the legislative session of 1893, it was provided: "Each notary public, before performing any duties of his office, shall provide himself with an official seal, on which shall be engraved the words 'Notarial Seal,' the name of the county for which he was appointed and commissioned, and the word 'Nebraska'; and in addition at his option, his name or the initial letters of his name, with which seal by impression all his official acts as notary public shall be authenticated." While the foregoing section was in force, the question here presented was before this court in *Weeping Water v. Reed*, 21 Neb. 261, and it was there held that the seal of a notary public, which contains the words "Notarial Seal," the name of the county for which he was appointed, and the word "Nebraska," is sufficient for the authentication of his official acts; and that the provision of the section concerning the name or

initials of the name of the notary is permissive only. It was said in the opinion: "The proper construction of the section, as we think, is that the seal shall contain the words 'Notarial Seal,' the name of the county for which the notary was appointed, and 'Nebraska'; and that, if the notary so desire, at his option, he may add his name or the initials thereof. This has been the construction placed upon this section by the bar of the state, and, so far as we know, by the officers of the state, and of the counties throughout the state, and it would require a strong case indeed to justify a court at this late day in adopting the construction contended for and thus destroying the evidence of the title to real estate throughout the state upon which reliance has been placed since the date of the enactment of the law." It appears, however, that the legislature at its session of 1893 amended the section above quoted by adding the words, "And under his official signature on all certificates of authentication made by him, such notary public shall write the date at which his term of office, as such notary public, will expire; provided such date of expiration is not engraved on the seal." Comp. St. 1893, ch. 61, sec. 5. So, in the case at bar, we are required to determine the effect of the words added to the original statute by the amendment above mentioned.

It is contended by defendant Lucilla McKinney that the failure of the notary public to write under his official signature to his certificate of authentication the date of the expiration of his commission renders the acknowledgment void; and, as the matter of the acknowledgment of the mortgage in question is in issue in this case, neither the mortgage itself nor the record of it is admissible in evidence, and for that reason the judgment of the district court must be affirmed. It appears that the mortgage was delivered to the clerk of the district court after the original decree of foreclosure was rendered, and has been lost or abstracted from the files, and after making due proof of that fact the record of it was offered in evidence and was

received by the trial court. We are unable to determine whether the judgment of that court was entered for the defendants McKinney because of the omission above mentioned, or for some other reason, for there was a general finding in favor of the defendant Lucilla McKinney, whose defense to the foreclosure of the mortgage was that she had never acknowledged it, and who produced some evidence tending to establish that defense. Our former decision necessarily affirmed the judgment of the district court. Upon a careful review of the record, and we think the weight of authority, we are convinced that our judgment was wrong.

The certificate of the notary to the acknowledgment of the mortgage in question reads as follows: "The State of Nebraska, Sheridan County, ss.: Be it remembered that on this 8th day of January, A. D. 1894, personally appeared Alexander McKinney and Lucilla McKinney, his wife, known to me to be the identical persons who are described in, and who executed the within mortgage, and acknowledged the same to be their voluntary act and deed. In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year above written. D. T. Taylor, Notary Public." It was authenticated by the impression of his official seal on which was engraved the words: "D. T. Taylor—Notarial Seal—Sheridan County, Nebraska." This fully complied with the mandatory provisions of the statute as it stood prior to the amendment of 1893, and is, according to the rule announced in *Weeping Water v. Reed, supra,* a valid authentication. It must be observed that the amendment requiring the notary to write under his official signature the date of the expiration of his commission applies to, and is contained in, the optional or permissive part of the statute, and therefore a failure to literally comply with it should not render the authentication of the instrument void. Indeed, we think it may be presumed that if the legislature had so intended it would have been so expressed by the amendment. Where an acknowledgment is actually taken

by an officer, having power to act, who certifies the fact in due form and authenticates his act in the manner provided by law, it would be unreasonable to hold, in the absence of a statute requiring it, that his failure to state that his commission had not expired renders the acknowlergment void. If the commission of a notary has in fact expired, and he has no power to take an acknowledgment, his statement that it is still in force cannot serve to change the existing fact or validate his action. On the other hand if he is still such officer, and has the power to perform the official act, his action is valid, without regard to his statement or declaration concerning that fact. And so the courts have established a liberal and reasonable rule, as we shall presently see, governing such matters. In *Lake Erie & W. R. Co. v. Whitham,* 155 Ill. 514, it was said: "As he professes, in the body of his certificate, to be a notary public, and to be acting officially, we are of the opinion that the omission of the words 'Notary Public' after his signature cannot have the effect of rendering his certificate invalid." Indeed, the general rule is that, where the official character of the acknowledging officer appears in the body of the certificate, it need not appear in the subscription. In *Goree v. Wadsworth,* 91 Ala. 416, the court held that a certificate made by a notary public and attested by his official seal was self-proving. And it has been held that even the body of the instrument may be looked to in order to ascertain the character of the acknowledging officer, and if discoverable there it is sufficient. In *Owen v. Baker,* 101 Mo. 407, a deed was held good where the acknowledging officer, who was county clerk and recorder, signed the acknowledgment as recorder, a recorder having no authority under the statute to take acknowledgments, while the county clerk had; thus holding, in effect, that the official designation of the character of the acknowledging officer was immaterial if the person in law had authority to take the acknowledgment. This case collects the authorities from other jurisdictions holding to the same effect. It follows that the acknowledgment in the case

at bar, being at most only irregular, should be upheld. Again, it is provided by section 10213, Ann. St., that "every deed acknowledged or proved, and certified by any of the officers before named * * * may be read in evidence without further proof, and shall be entitled to be recorded." It is also provided by section 10220 of said statutes: "It shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment or proof thereof if, when the acknowledgment or proof purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment or proof that the same is made under his hand and seal of office, and such statement shall be presumptive evidence that the affixed seal was attached to the original certificate." For the foregoing reasons we are of opinion that the record of the mortgage was properly received in evidence.

Having reversed our former judgment on this point, we are now required to try the case *de novo,* and determine for ourselves the issues raised by the pleadings. The defense interposed by defendant Lucilla McKinney is a general denial, accompanied by an allegation that she was the wife of Alexander McKinney; that the land described in the purported mortgage was their family homestead; that D. T. Taylor, the notary public, who claims to have taken her acknowledgment to the purported mortgage, was the agent of the original mortgagee; and the execution and acknowledgment of the mortgage is thus put in issue by her. The record of the mortgage having been properly received in evidence, it carries with it all of the presumptions, and is entitled to the same evidential weight which would accompany the original instrument if it had been produced at the trial. The rule is that a certificate of acknowledgment of a deed or mortgage in proper form can be impeached only by clear, convincing and satisfactory proof that the certificate is false and fraudulent. *Phillips v. Bishop,* 35 Neb. 487; *Pereau v. Frederick,* 17 Neb. 117; *Insurance Co. v. Nelson,* 103 U. S. 544; *Crane v. Crane,* 81

Ill. 165; *Heeter v. Glasgow*, 79 Pa. St. 79; *Gabbey v. Forgeus, Adm'r*, 38 Kan. 62; *Bailey, Wood & Co. v. Landingham*, 53 Ia. 722; *Smith v. Allis*, 52 Wis. 337; *Johnson v. Van Velsor*, 43 Mich. 208. In *Russell v. The Baptist Theological Union*, 73 Ill. 337, it was said: "It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and in such case the evidence must be clear and convincing beyond a reasonable doubt; and whilst the making of a false certificate is a fraud upon the party against whom it is perpetrated, yet the mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate, nor will such evidence, slightly corroborated, overcome it." While we think it is hardly correct to say that the evidence must exclude all reasonable doubt, yet it must, in such cases, be clear, convincing and satisfactory in its nature, and the uncorroborated evidence of the party purporting to have made the acknowledgment of the deed or mortgage has never been held sufficient to overcome the officer's certificate of that fact.

With the foregoing rule in view, we come now to consider the evidence contained in the record. In the deposition of the defendant Lucilla McKinney, touching the question of the execution of the acknowledgment of the mortgage, we find the following: "Q. In March, 1894, do you remember of making a mortgage upon this land to any person? A. I do not. Q. Do you remember going down to the store at that time and signing this paper under which the defendants Cuyler and Graham—Did you do so? A. I did not. If you signed such paper, and recollect of doing it, will you state if you signed it in the presence of D. T. Taylor and P. N. Serbousek, and acknowledged it to Mr. Taylor as a mortgage upon your home? A. No, sir; I did not. Q. Did you know at any time that you were signing a first mortgage on your homestead, and did you ever intend to do this, and to acknowledge it as an incumbrance or conveyance of your homestead? A. Not to my knowledge; I never did it." On cross-examination she

further testified as follows: "Q. You stated in your direct examination that you did not remember of making a mortgage on the tract of land in controversy in this case, which has already been described in a former question. You could have executed a mortgage on said tract of land and not remember about it, could you not? A. If I should have ever done so I know I would have remembered it. Q. Do you mean to say now, Mrs. McKinney, with certainty, that you never signed a mortgage to the Globe Investment Company on the tract of land in controversy in this case? A. Not to my knowledge. Q. Do you think it possible you may be mistaken about the matter, and that you may possibly have signed a mortgage on this land. A. I do not think I am mistaken." It appears that there was introduced in evidence a second or commission mortgage on the land in question, made at the same time the mortgage in controversy herein was executed, together with the note accompanying it. The witness was shown her signature attached to those papers, and she was asked whether or not she signed such papers. Her answer was: "I could not swear to it." She was then asked: "Is not that your signature?" And she answered: "I could not say." The next question was: "Do you have any recollection of signing that paper?" And her answer was: "I have not." It also appears that she denied her genuine signature to other papers in the case.

Her husband, Alexander McKinney, attempted to corroborate her evidence, and testified positively upon direct examination that she never signed or acknowledged the mortgage in question. He testified, however, on cross-examination that he had no recollection about the mortgage at all. He was then asked: "Do you say that Mrs. McKinney never signed or executed this mortgage?" And his answer was: "She states she never did." He further testified as follows: "Q. What do you say about it? I am not asking what she states about it. A. I do not know. Q. You don't know whether she did or not? A. No; I don't. Q. You don't know whether she signed it or ac-

knowledged it or not, do you? A. What do you mean by acknowledge it? * * * Q. And do you now say that Mrs. McKinney never acknowledged that paper before a notary public? A. I do; yes, sir. Q. You do? A. Yes, sir; absolutely. Q. Do you know she did not—were you present when the paper was presented to her? A. I do not know whether I was or not. I took her several papers there. Q. Were you present when this paper was presented to her? A. No, sir; I do not recollect of ever taking that paper to Mrs. McKinney to be signed at any time. Q. Somebody else may have taken it to her to sign and you not know it? A. It would be very doubtful about their getting her to sign it if they did. Q. Were you present in D. T. Taylor's office on the 8th day of January, 1894, all day? A. Well, now, I couldn't say as to that. I was there from 1886 to 1893. Of course I could not tell whether I was there that day absolutely or not. Q. Then you don't know whether Mrs. McKinney was there on that day? A. She says she wasn't. * * * Q. Do you know she did not leave home all day of the 8th of January, 1894? A. That's my recollection, all right; yes, sir." The witness further testified that he did not sign and acknowledge the mortgage in question before D. T. Taylor on the 8th of January, 1894. He also refused to acknowledge his signature to other papers in the case which were shown conclusively to have been signed by him. He was finally asked: "Q. Did you, together with Mrs. McKinney, acknowledge any mortgage on this land on the 8th day of January, 1894, to the Globe Investment Company?" His answer was: "Not to my recollection." He was then asked: "Did you sign any mortgage on that day?" And he answered: "Not that I know of."

After a careful consideration of the testimony of McKinney and his wife, we cannot say that we are impressed with its reliability or truthfulness to any considerable degree, and we are of opinion that it is not of such a positive, clear, convincing and satisfactory character as is required to overthrow the certificate of acknowledgment.

We therefore find on the issues joined for the defendants, Cuyler and Graham, for the amount now due on the mortgage set forth in their answer and cross-petition; and said mortgage is found to be a second lien on lots 3 and 4, and the south half of the northwest quarter of section 2, township 31, west of the 6th P. M., in Sheridan county, Nebraska; and, as to that part of the decree of the district court foreclosing the plaintiff's tax lien, the same is affirmed; but that part of said judgment denying any relief to the cross-petitioners, Cuyler and Graham, is reversed. A decree will be entered in this court foreclosing their said mortgage, and our former judgment herein is reversed.

JUDGMENT ACCORDINGLY.

THOMAS J. SHEIBLEY, APPELLEE, V. WILLIAM W. COOPER ET AL., APPELLANTS.*

FILED MAY 24, 1907. No. 14,810.

1. **Officers: ILLEGAL FEES: ACTION ON BOND.** An action will not lie on an official bond to recover the statutory penalty for taking, charging or demanding illegal or excessive fees.

2. ———: ———. In order to subject one to such penalty, it must appear that he was an officer at the time of taking, charging or demanding such fees.

3. ———: ———. One whose term of office had expired when such fees were taken, charged or demanded, is not liable for the statutory penalty.

4. **Limitation of Actions: STATUTORY PENALTY.** An action for the recovery of the statutory penalty is barred if not brought within one year from the date of its accrual.

5. **Voluntary Payment: RECOVERY.** When such fees are claimed as a matter of right, and are paid to a party after his term of office has expired, voluntarily and with full knowledge of the facts, they cannot be recovered.

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* Rehearing denied. See opinion, p. 236, *post.*

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

John V. Pearson, for appellants.

W. E. Gantt, contra.

ALBERT, C.

William W. Cooper, one of the defendants in the court below, was clerk of the district court for Dixon county for a term of four years ending in January, 1900. His codefendants were sureties on his official bond. During Cooper's incumbency Thomas J. Sheibley, plaintiff, was a party to some litigation in that court, the costs of which were taxed against him by Cooper. Among the items of costs are the following: For complete record, $10; for transcript on appeal to the supreme court, $10; for entering judgment on the journal, after the first 100 words, $1; for entering the return of five subpœnas, $1; for approving bond on appeal to the supreme court, 25 cents. All of these items were paid after Cooper's term of office had expired, and, with the exception of the fee for the complete record, more than one year before the commencement of this suit. On the 17th day of August, 1903, the plaintiff brought an action on Cooper's official bond, alleging in his petition that the charge of 25 cents for approving the bond on appeal to the supreme court was unauthorized and illegal; that the charge of $1 for entering the return of five subpœnas was for services that had not been performed, and that the other items were excessive. The prayer was for judgment for the amount of the alleged illegal and excessive fees paid, and for the statutory penalty. The defendants answered, alleging, among other things, that the alleged illegal and excessive fees were paid after Cooper's term of office had expired, voluntarily and with full knowledge of the facts, and that the action for the statutory penalty was barred by the statute of limitations. A jury was

waived, and the court found that all of the items were barred by the statute of limitations, except the alleged excessive charge for the complete record. With respect to that charge, the court found it was excessive to the extent of $2.37, and gave judgment in favor of the plaintiff and against the defendants for the amount of the excess, and the statutory penalty of $50. Both parties appeal.

We do not deem it necessary to discuss separately the questions raised by the two appeals, because an examination of the assignment that the finding and judgment are not sustained by sufficient evidence will dispose of both, we think. In the first place, the plaintiff seeks to recover not only the illegal and excessive fees, but the penalty prescribed by section 34, ch. 28, Comp. St. 1905, which is as follows: "If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand, and take any of the fees hereinbefore ascertained and limited, where the business for which such fees are chargeable shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law." The penalty prescribed by that section is not recoverable in an action on the bond. *Eccles v. Walker,* 75 Neb. 722. It is quite clear, however, that, while an action on the bond will not lie, a petition properly framed on that theory would support a judgment against the offending officer for the penalty. As the defendants have all joined in the assignments of error, the judgment might be sustained, notwithstanding the fact that the suit was erroneously brought and prosecuted on the theory that the penalty might be recovered in an action on the bond, provided the record were sufficient in other respects to sustain it. But, without going into an examination of the petition, it is quite clear to us that the evidence is insufficient to sustain a judgment in favor of the plaintiff for the statutory penalty. The statute must be

strictly construed, and must not be extended by construction or implication beyond the clear import of its language. *Phœnix Ins. Co. v. Bohman,* 28 Neb. 251; *Shelbley v. Hurley,* 74 Neb. 31; *Eccles v. Walker, supra; Gallagher v. Neal,* 3 Pen. & W. (Pa.) 183. In the last case, under a statute similar to ours, the court held that taking fees by a person out of office, for services rendered while in office, was not within the act, and did not subject the party to the statutory penalty. The statute contemplates two classes of cases: (1) Where greater fees than those fixed by law are taken; (2) where the fees fixed by law are charged or demanded for services not actually performed. In either case, the act denounced must be done by an officer, and the cause of action arises the instant it is done. None of the items were paid to Cooper until after his term of office had expired and his successor had been elected and qualified. The payments therefore were not made to an officer, but to a private person. The case, then, does not fall within the first class contemplated by the statute. Granting that the case at bar falls within the second class —a point we do not decide—it would still be essential that the charge or demand was made during Cooper's term of office. His term, as we have seen, expired in January, 1900, more than two years before this suit was commenced. The cause of action therefore must have accrued more than one year before this suit was brought. An action to recover a statutory penalty is barred by the statute of limitations, unless brought within one year from the date of its accrual. Code, sec. 13. It necessarily follows that the plaintiff was not entitled to judgment for the statutory penalty.

This brings us to another question: Was the plaintiff entitled to recover any of the alleged illegal or excessive fees paid by him to the defendant Cooper? As we have seen, the payments of which complaint is made were all made after Cooper's term of office had expired, and when he and the plaintiff stood on equal footing. Cooper claimed the fees as his right, but no process had issued for

their collection, nor does it seem that there was any threat of process for that purpose. They were paid by the plaintiff voluntarily and with full knowledge of the facts. It is not a case of official extortion or oppression, but an ordinary transaction between two men dealing on equal terms. It is well settled that money voluntarily paid, under a claim of right, and with knowledge of the facts on the part of the person making the payment or affected by it, cannot be recovered back on the ground that the asserted claim was invalid and unenforceable. *Wessel v. Johnston Land & Mortgage Co.*, 3 N. Dak. 160, 44 Am. St. Rep. 259; *New Orleans & N. E. R. Co. v. Louisiana C. & I. Co.*, 109 La. 13, 94 Am. St. Rep. 395, and extended note. In *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660, it was held that, where there is a want of any power in the officer to enforce payment, if refused, and payment is made voluntarily, with full knowledge of the facts, and at most only under a mistake of law, the fees paid cannot be recovered, there being no extortion. If fees paid to an officer under such circumstances cannot be recovered, *a fortiori* they cannot be recovered when paid, under such circumstances, to one not an officer. It would follow therefore that the court not only erred in giving judgment in favor of the plaintiff for the statutory penalty, but in giving judgment in his favor for any amount.

It is therefore 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.

The following opinion on motion for rehearing was filed October 16, 1907. *Rehearing denied:*

DUFFIE, C.

In a motion for rehearing our attention is called to the fact that Mr. Commissioner ALBERT erroneously stated, and his opinion is based on the assumption, that all the fees claimed to have been illegally exacted were paid to the defendant Cooper after the expiration of his term of office. A reexamination of the record makes it apparent that there was an overcharge for the transcript amounting to $2.37, and that this was paid during the defendant's term of office, and does not come within the rule of a voluntary payment. The answer of the defendant alleged that after the fees had been taxed the plaintiff made a motion to retax the costs in the case, and upon a hearing the court fixed the fee for the transcript at the sum of $10, which was the amount actually paid, although, as now shown, it was $2.37 in excess of the legal fee. The evidence fully sustains this defense. While this matter was not noticed in the opinion, we think it decisive of the case. A party who thinks that the fees taxed against him are exorbitant has a right, and it is a proper proceeding, to move for a retaxation of the costs. If his motion is sustained, and the court enters upon an examination of the question and makes an order retaxing the costs, we think that, as between the moving party and the officer in whose favor costs were taxed, the question becomes *res judicata*. Such was the holding of Judge Brewer in the case of *Commissioners v. McIntosh*, 30 Kan. 234, where the identical question was examined and determined. The plaintiff in this action having called upon the court to adjudicate upon the question of the amount of costs which should be paid, and having taken no exception to or appeal from the ruling of the court upon the order of retaxation made, is, we think, conclusively bound by that order.

By the Court: The motion for a rehearing is

OVERRULED.

FRANCES K. HOLDREGE, APPELLANT, V. WILLIAM B. LIVINGSTON ET AL., APPELLEES.

FILED MAY 24, 1907. No. 14,824.

1. **Adverse Possession: TACKING.** Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription.

2. **Death: PRESUMPTION.** A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him.

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

Byron Clark, for appellant.

C. S. Polk, contra.

CALKINS, C.

On September 17, 1904, the plaintiff filed her bill seeking to quiet title to a tract of land, the record title to which was in Elijah Noyes, and other property. Constructive service was had upon Elijah Noyes, and on December 6, 1904, a decree was rendered in favor of the plaintiff, quieting title in her to all of said property. Subsequently, and on February 13, 1905, an amended petition was filed, seeking to quiet title as against Mrs. Elijah Noyes, wife of Elijah Noyes. To this amended petition the three sons of Elijah Noyes, Elmer, Charles and Rolland, filed answer, denying the allegations of the plaintiff, and alleging the death of their father prior to the decree of December 6, 1904. The decree of the district court found that Elijah Noyes was presumed to be dead on December 6, 1904, when the decree quieting title against him was entered, and adjudged that, be-

cause of his death at said time, said decree was a nullity. The plaintiff's claim as against Noyes was founded upon adverse possession, and the court found that the property in dispute had not been in the adverse possession of the plaintiff as against the answering defendants Noyes, and dismissed the petition as to them. From this decree the plaintiff appeals.

1. To show adverse possession for the requisite period of time, it is necessary for the plaintiff to tack her possession under a tenant who took possession in 1898 or 1899 to that of one Siever, a prior tenant of the plaintiff's adjoining land. The testimony of Siever is that he fenced the land in 1893; that he pastured cattle for one of the Noyes sons in payment of rent in 1893; and that in 1894 or 1895 (the witness is uncertain which) he refused to further pasture cattle on the ground that he did not "think they had any better right to it than he had." At the time he left, he sold his fence to Mr. Holdrege, the plaintiff's husband. There is no evidence that he transferred or attempted to transfer any right of possession or claim to the land to the plaintiff or to Mr. Holdrege. It is essential that each occupant show a derivative title from his predecessor in order to link his possession with that under the original entry. *Zwcibel v. Myers,* 69 Neb. 294; *Montague v. Marunda,* 71 Neb. 805. In the case at bar, the plaintiff could not claim anything under the possession of Siever without showing a transfer of his claim in the land. There is wanting this essential element; and the trial judge could not well have found otherwise than he did upon the evidence.

2. The plaintiff, however, claims that the decree of December 6, 1904, was conclusive, and that the finding that the presumption of the death of Elijah Noyes existed at the date thereof is unsupported by the evidence and contrary to law. There is nothing in the record to show the terms and conditions of the order allowing the plaintiff to file an amended petition making the wife of Elijah Noyes a party, and seeking to quiet title to the land as

against her after the entry of the original decree. It is unusual to permit the filing of amended pleadings requiring new parties and new proofs after judgment, without opening or vacating so much of the judgment as is involved by the amendment. In this case, Mrs. Noyes' claim was in the right of her husband, and the plaintiff's claim against her required the same proofs as did the plaintiff's claim against Elijah Noyes; in other words, the subject of the claim against Elijah Noyes and his wife is identical. If we say that, with a decree against the husband still in force, his wife may be brought in by an amended petition, and the same matter litigated as to her, it follows that it is possible to have two contrary findings upon the same issues in the same case. To avoid this, we should perhaps regard the order permitting the filing of an amended petition after judgment as operating to vacate so much of the decree as was involved in the subject matter of the amended petition; but this question was not argued, and, in view of the conclusion at which we have arrived upon the evidence, need not be decided. The trial judge found, as we have seen, that the evidence showed that a presumption of the death of Elijah Noyes existed at the date of the rendition of the first decree. The plaintiff's argument against this finding is based upon the assumption that Elijah Noyes established a new abode after he left his old home in Nebraska. The rule is settled that the presumption of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time they were last known to be living, after which the burden of proof is devolved on the party asserting the life of the individual in question. 2 Greenleaf, Evidence (16th ed.), sec. 278*f*. It is true that proof of a change of his residence from one state to another, and that he has not been heard of in the former state for a period of seven years, does not create the presumption; and some of the cases go so far as to hold that, where a party leaves his domicile with the avowed intention of establishing some specific

new abode, the inquiry must follow him to such new domicile, but there is nothing here to bring this case within either exception to the rule. There is a total lack of any evidence that Elijah Noyes proposed, or intended to, or did in fact establish any new residence or place of abode. The record fails to point out any other place than his old Nebraska home where inquiry might be made concerning his whereabouts. In view of this fact, the finding of the trial judge should be affirmed upon this point also.

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

AMES and JACKSON, CC., concur.

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

AFFIRMED.

SIM BURK V. STATE OF NEBRASKA.

FILED JUNE 7, 1907. No. 14,837.

1. **Criminal Law:** ACCUSED AS WITNESS: INSTRUCTIONS. Where a person on trial for a crime testifies in his own behalf, he becomes as any other witness, and his credibility should be subjected to the same tests as are legally applied to other witnesses; and it is error for the court to give undue prominence to the fact of defendant's interest in the result of the prosecution by repeatedly calling the attention of the jury thereto, and informing them that they must consider that fact in determining the weight and credibility of his evidence.

2. **Rape:** EVIDENCE. In order to sustain a conviction for the crime of statutory rape, the record must contain some evidence corroborating the testimony of the prosecutrix as to the principal fact of sexual intercourse with the defendant; and, where the prosecutrix is over 16 years of age at the time of the alleged commission of the crime, the evidence should show, beyond a reasonable doubt, that she was not previously unchaste.

ERROR to the district court for Richardson county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

C. F. Reavis, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

Sim Burk, hereafter called the defendant, was convicted of the crime of statutory rape on the person of one Flora McMahon, and was sentenced by the district court for Richardson county to imprisonment in the state penitentiary for a period of three years. To reverse that judgment he has brought the case here by a petition in error.

The information on which he was tried contained three counts. The trial court, however, withdrew the second and third counts from the consideration of the jury, and he was convicted on the first count of the information, which charged him with having carnal knowledge of the prosecutrix, with her consent, on the 29th day of April, 1904, she being a female child of the age of 16 years, not previously unchaste, and he being a male person over 18 years of age.

The first question argued in the defendant's brief is the contention of his counsel that the evidence is not sufficient to sustain the verdict, for the reason, among other things, that the evidence of the prosecutrix as to the principal fact is wholly uncorroborated. This question will not be considered in the order in which it is presented, but will be referred to hereafter.

It is next urged as one of the grounds for a reversal of the judgment that the trial court erred in instructing the jury as follows: "First.—The jury are instructed that, when the defendant testifies in this case, he becomes as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any

other witness, and in determining the degree of credibility that shall be accorded to his testimony the jury have the right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor upon the stand, and the fact that he has been contradicted by other witnesses, if the jury believe from the evidence that he has been so contradicted, but the degree of credit given to each and all of the witnesses is a question for the jury alone, and not for the court." A defendant in a criminal case may, under the laws of this state, be a witness on his own behalf or not, as he may see fit, and, when he goes upon the witness stand, he is to be treated precisely the same as any other witness in the case. He cannot be compelled to be a witness, and in that particular only does his position differ from any other person who is actually called as a witness. The difference extends no further and has no greater significance. The first part of the instruction above quoted, in which the jury were told that, when the defendant testifies in this case, he becomes as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness, and in determining the credibility which shall be accorded to his testimony the jury have the right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor on the stand, is a correct statement of the law, and in no manner objectionable. But the vice of the instruction lies in that part of it by which the jury were told that if the defendant had been contradicted by other witnesses, if they should believe from the evidence that he had been so contradicted, that fact should be considered in determining the degree of credit to be given to his testimony. That part of the instruction seems to be an invasion of the legal rights of the defendant. It is applying a test to his evidence, to determine its weight and credibility, that is not applied to any other witness in the case, namely that his credibility may be affected by the fact that some other witness has contra-

dicted him. As this instruction was given to the jury, it stated in effect that the mere fact of contradiction alone, no matter whether the contradicting witness was worthy of belief or not, or whether or not he was a credible person, the sole fact of the contradiction should be considered in determining the weight of the defendant's evidence. We have some doubt, however, whether the giving of the instruction complained of as to the credibility of the accused as a witness would of itself require a reversal of the judgment. In *People v. O'Brien,* 96 Cal. 171, 31 Pac. 45, the supreme court of California said: "The court also gave an instruction, which has been several times approved here, with some hesitancy and criticism, however, directing the attention of the jury to the fact that the defendant had offered himself as a witness on his own behalf, and saying to them that in considering the weight and effect to be given to his evidence, in addition to noticing his manner and the probability of his statements, they could consider his relation to the case, and the circumstances under which he gave his testimony, the consequences to him resulting from the verdict in the case, and all the inducements and temptations which would ordinarily influence a person in his situation. * * * The construction which was placed upon it by those decisions has become a part of the provision itself, and we are not at liberty to depart from it. As a slight change in the phraseology of the instruction, however, is liable to be construed as going beyond the limits of what has been approved, it would be a safer course, and one which would work no injustice to the people, if it were entirely omitted from the instructions asked and given on behalf of the prosecution." We think this language is peculiarly applicable to this case. There seems to be no necessity for a special instruction in regard to the credibility of the accused when he offers himself as a witness, in addition to the general statement that the same tests are to be applied to his evidence as those applied to the evidence of any other witness. If, in addition to such an

instruction, the general instruction is given that the jury are to be the judges of the credibility of all witnesses, and that they may take into consideration the interest, if any, which the witness appears to have in the result of the litigation the bias or prejudice of the witness, if any such appears from the evidence, the reasonableness of his testimony when considered in connection with all of the other evidence in the case, his conduct and demeanor while testifying, his opportunity for knowing the facts in regard to which he testifies, the degree of intelligence which he manifests, and all of the facts and circumstances in evidence tending to corroborate or contradict his testimony, it would seem to be sufficient. There is danger of prejudice against one charged with a crime of this nature. If an innocent man is so charged and is confronted by a false witness, it is dangerous to the interests of justice to call the attention of the jury to the fact that he has the highest possible interest to give such testimony as will shield him from an unjust conviction, and so much of the opinion in *Philamalee v. State,* 58 Neb. 320, as seems to sanction an instruction like the one in question is disapproved.

It is also contended by the defendant that the court erred in too often directing the attention of the jury to the fact that his interest in the result of the prosecution should be taken into consideration by them in determining the weight and credibility of his evidence. It will be observed that this statement was made a prominent feature of the instruction above quoted. This fact seems to have been also referred to in paragraph No. 3 of the instructions, and it was again referred to in paragraph No. 4. Now the jury knew, as well as the counsel and the court, that the defendant had a great and peculiar interest in the result of the prosecution, and that fact was unduly emphasized and was kept prominently before them by the instructions complained of. In the case of *Clark v. State,* 32 Neb. 246, it was said: "Where a person on trial for a crime testifies in his own behalf, the court may

instruct the jury that in weighing his testimony they may consider his interest in the result of the suit. The court, however, cannot, by repeating its statement in that regard, give it undue weight or say aught calculated to disparage the testimony of the accused." It was further said in that case: "While it is true that the jury may consider the interest of the witness in the result of the suit in determining his credibility, yet it does not follow that his interest will prevent him from telling the truth. His testimony, notwithstanding his interest, may be entirely truthful and reliable. He may be an honest man falsely accused, whose testimony not only is true, but will bear the closest analysis. Neither the court nor the jury should assume that the testimony of a witness is false, nor so decide without cause. The facts in a case are to be determined from a patient, careful examination of the testimony of the several witnesses. From the necessity of the case the credibility of the witnesses must be determined by the jury, but there should be adequate cause for rejecting the testimony of any witness." In view of the foregoing, it would seem quite probable that, by frequently telling the jury that, in determining the credibility of the evidence of the defendant they should take into consideration his interest in the result of the trial, they were led to consider it their duty to give his evidence little or no weight in determining the question of his guilt. That this was prejudicial error there can be no doubt.

Having concluded, for the foregoing reasons, to reverse the judgment in this case, it is not absolutely necessary for us to consider the sufficiency of the evidence. We do not think, however, it would be out of place for us to briefly state our view concerning that matter. The prosecutrix testified as to the principal fact, in substance: That she went to the defendant's store, which is situated in the village of Rulo, in the daytime, during business hours, on the 29th day of April, 1904, to buy a pair of shoes; that the defendant, who was alone in the store at the time, told her that he would like to have sexual intercourse with

her; that she hesitated because she thought it was wrong, but finally consented, and he thereupon pulled down the curtains to the front windows, locked the glass door, which had no curtain at all, took her to the back end of the store, and had intercourse with her; that he then went to the front end of the store with her, put up the curtains, unlocked the door, and let her out upon the street or sidewalk; that there were numerous persons on the walk and street at the time, and she says this was repeated in the same manner later on at three different times; she could not remember, however, whether it was at noon or toward evening that the transaction occurred; in fact she could not fix the time of day when any of the acts of intercourse took place. We have examined the record with great care, and are unable to find therein any evidence of any other witness or witnesses which corroborates the evidence of the prosecutrix as to the act of sexual intercourse on which the prosecution herein is predicated. No witness testifies that she was ever seen in Burk's company, that he ever paid the slightest attention to her, or that she was ever seen to go into or come out of his store under the circumstances detailed by her, or in fact at all, or at any time.

It further appears that there had been a fire in the same block in which the defendant's store was situated on the morning of April 29, and there were many people congregated on the street and in front of the store looking at the burning embers and talking over the matter of the fire, and yet no witness is produced who saw the prosecutrix enter or leave the store on that occasion. It is contended by the state, however, that she was corroborated by the evidence of her father and mother, which is, in substance, that the defendant came to their house sometime in April, 1905, and said to the prosecuting witness: "What is that I hear about your charging me with being responsible for your condition. You know it is not so, and you cannot look me in the face and say I am the cause of your condition." That she looked him in the face and

said: "It is so." And defendant then said: "It cannot be so, for the first time was too long ago, and the second time it would be impossible." It would seem that this was no evidence of any fact or circumstance corroborating the evidence of the prosecutrix as to the principal fact, but was an attempt on the part of the state to prove an alleged confession of the defendant, and as such it might tend to establish his guilt, but, where such alleged confession or admission is of doubtful import and is positively denied by the defendant, it may reasonably be given but little weight by the jury. Again, the evidence shows without contradiction that the father of the prosecutrix had before that time been to one Jacob Sweinfurth, the father of a young man who had been keeping company with the prosecutrix for more than a year, and was in fact her sweetheart, and had attempted to extort money from him on account of the condition of his daughter. It further appears that the prosecutrix had been to the office of the county attorney of Richardson county and had attempted to induce that officer to file a complaint against young Sweinfurth, charging him with the crime of statutory rape, and that the county attorney had asked her whether or not she had ever had sexual intercourse before that time with any other men, to which she answered, "Yes." And he thereupon refused to prosecute Sweinfurth, who, it appears, on ascertaining her condition, had fled the county. It also appears from the evidence of the accused that, after the refusal of the county attorney to prosecute Sweinfurth, the father of the prosecutrix called upon the defendant, and, while protesting that he did not believe that the defendant was to blame for the condition of his daughter, still he proposed to settle the matter with him, and hush it up, if the defendant would give him money enough to pay the doctor's bill, to pay his wife for nursing and taking care of the prosecutrix during confinement, and a little spending money for himself; that the defendant denied any complicity in the matter, and declared he was innocent of the cause of the girl's down-

fall, and he would not give him "one five cent piece." He said: "I am not the father of that child and not to blame for her condition, and therefore I will not pay for anything of the kind." So it may be said the corroborating evidence, if any, was at least of doubtful character.

There is another feature of this case which should properly receive our consideration. In order to establish the defendant's guilt, it was as necessary for the state to prove beyond a reasonable doubt that the prosecutrix was not previously unchaste, as it was to establish the principal fact beyond such doubt. There is no evidence of her previous chastity except her own declaration, and this is discredited by her statement to the county attorney when she applied to him to prefer charges against young Sweinfurth, instead of the defendant, that she had previously had sexual intercourse with other men." Again, the record discloses that about nine months before she was delivered of her illegitimate child she ran away with Sweinfurth to Hiawatha, Kansas, and remained there over night with him; that her father telephoned to the sheriff at that place and had him bring the couple back to Rulo. It was also shown by the testimony of Mrs. Amanda Johnson that some three years before the trial took place, and before she claimed to have had sexual intercourse with the defendant, the prosecutrix was working for her; that she was keeping boarders, and that a young man by the name of Emmet Asher, who boarded with her, was keeping company with the prosecutrix; that on one occasion in the evening the prosecutrix and Asher locked themselves up in a room in her house and turned out the light; that, when she noticed that fact, she went round to the outside door and rapped, and demanded that the door be opened; that it was thereafter unlocked, and, when she went in, she found them in a compromising situtation; that she compelled them to open the door between the room where they were and her sitting room; that later on she again found that door closed and locked, and on its being opened she found Asher and the prosecuting witness

in the same compromising position she had found them before. So it would seem that the evidence was sufficient to at least cast grave doubt upon the previous character of the prosecutrix for chastity.

Again, the prosecutrix testified in this case that she went to the county attorney for the purpose of filing a complaint against young Sweinfurth, charging him with the same crime for which the defendant herein was prosecuted; that, when asked why she did this, she testified that the defendant had offered her $150 if she would place the blame on Sweinfurth; that she was willing and intended for that sum to go into court and testify that young Sweinfurth was the author of her misfortune; that she was willing to commit perjury for that sum of money, and endeavor to procure the conviction of one who she now says was an innocent man.

We think we have sufficiently reviewed the evidence, and it seems to us that the prosecuting witness not only lacks satisfactory corroboration, but there is grave doubt of her previous chastity, and of the defendant's guilt. If this case is to be tried again, it would seem necessary for the state to produce at least some evidence corroborating the evidence of the prosecuting witness as to the principal fact on which this prosecution is based, and of the previous chastity of the prosecutrix.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

EVERETT EDWARDS V. STATE OF NEBRASKA.

FILED JUNE 7, 1907. No. 14,988.

1. Abortion: WORDS DEFINED. The words, "at any stage of utero-gestation" as used in section 6 of the criminal code, defined, and *held* to mean "at any stage of pregnancy."
2. ———: EVIDENCE: DYING DECLARATIONS. In a prosecution for homicide in procuring an abortion under section 6 of the criminal code, dying declarations of the deceased may be admitted in evidence, under the same conditions and limitations as in prosecutions for murder or manslaughter.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

C. A. Robinson and *Harrison & Prince,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

The defendant was convicted in the district court for Buffalo county of homicide by the use of instruments used in attempting to procure an abortion. He seeks a reversal of the judgment of conviction upon two grounds: First, that the information was fatally defective in that it does not charge that the abortion was committed during the period of utero-gestation; and second, because the court erred in admitting in evidence the dying declarations of the deceased. The first contention is based upon the fact that the language of section 6 of the criminal code under which the charge is made is as follows: "Any physician or other person who shall administer, or advise to be administered to any pregnant woman with a vitalized embryo, or fœtus, at any state of utero-gestation, any medicine," etc. It is urged that the term "utero-gestation" is not synonymous with "pregnancy," that there may be gestation in the fallopian tube and hence that the allega-

tion is essential. We think, however, that the use of the words "at any stage of utero-gestation," in the statute, means at any stage of pregnancy. At common law it was thought that a person could not be guilty of abortion unless the pregnant woman was quick with child. The clause here considered was evidently inserted in the statute to avoid the perplexing and doubtful questions which might be raised as to the time of "quickening" under this view of the law. One of the definitions of the word utero-gestation given by the Standard dictionary, by the Century dictionary, and by Webster, is "pregnancy," and this is the sense in which it is used in this connection. We think therefore that the indictment was not defective for the lack of such allegation.

The second point made by the defendant is that the court erred in admitting the dying declarations of Anna Gosch, as related by her attending physician, Dr. Cameron. It is said that this evidence is inadmissible for two reasons: Because it is not competent under the charge in this case, and because no sufficient foundation was laid for its introduction.

For convenience, we will consider the second of these objections first. It is said that Miss Gosch was under the influence of opiates when she made the statements; that the declarations were made on Monday; that she died on Tuesday at 6:10 P. M., and that she is not shown to have given up hope or to have been in fear of immediate death. It appears from the evidence that the attending physician was called upon Thursday, the 15th day of March; that he visited her that day and twice a day thereafter until Monday; that on Monday afternoon, about 2 or 3 o'clock, after an examination and consultation with another physician who had been called for the purpose, he told her that she was going to die. The witness was asked by the court: "Q. What did she say when you told her she was going to die, with reference to her dying? A. I think she cried some, and asked me if there was anything more that could be done, if I remember right. Q. What did you

say? A. I told her no; that anything I could do would make her worse." The witness testifies that her mind was clear at the time he had this talk with her, and that she answered questions rationally. The patient had been suffering severely for several days. A consultation of physicians had been had, and the result of the consultation had just been told her. She showed a realization of the solemn fact that had just been communicated, and, upon asking if anything more could be done, was again told her case was hopeless. It seems clear that the statements which were immediately thereafter made to the doctor were made with the knowledge and realization of impending death, and that the fact that she survived until the next evening is of no importance. The doctor continues: "A. I asked her what had been done to make her sick, and she said there had been a man had passed an instrument into her with a wire in it, rubber with a wire in it. I asked her when that had been done, and she said Monday; she thought it was Monday night. Q. What further was said? A. I told her then if she had told me that on the start that I might have done something for her, but anything I would do at this time would only help to make her worse. Q. Did she say who the man was that did this? A. She said he was a man who traveled for rubber goods or instruments of some kind, said he was a traveling man. Q. What further did she say about it, if anything? A. I asked her if she was willing to have that done. She said no; that he made her do it. That is about all that was said then. I left the room then." It is urged that these statements condemn by suggestion and inference. That no person was named, and that they might have been made to protect her own name and excuse herself by throwing the blame on some unknown person. It is true that no person was named, but an individual was described, and the time and manner of the unlawful act was narrated. The jury were entitled to consider the declarations in connection with the other evidence in determining the identity of the guilty individual, and the cause of death.

The defendant's second contention is that the dying declarations were not competent evidence, for the reason that this is a prosecution for procuring an abortion, and the death of the deceased is not the subject of the charge; that the death of the woman in such a case as this is only incidentally involved and is not the gravamen of the offense. Some text-writers, but not all, lay down this rule, and there seems to be a substantial conflict in the decisions of the courts with reference to whether or not dying declarations are admissible in cases of this nature. The conflict, however, seems to be more apparent than real, depending largely upon the particular language used in the different statutes relating to the offense of procuring an abortion or of causing death while in the commission of an abortion. The earlier cases seem to adhere to the rule stated, and the later to take the opposite view. The fundamental distinction between the cases, or at least between those which are best considered, is that under one class of statutes the offense is punishable whether death occurs or not, and in the other class the crime defined is not committed unless death ensues as a result of the operation. The section under which the conviction was had in this case appears as section 6, ch. 2, of the criminal code. The act establishing a criminal code was enacted as a whole, with the various subjects of which it treats classified and subdivided into chapters at the time of its enactment. Chapter 2 is entitled "Homicide and Fœticide," and consists of four sections; sections 3, 4, 5 and 6, defining, respectively, the crimes of murder in the first degree, murder in the second degree, manslaughter, and fœticide and homicide in committing the same. Chapter 6 of the criminal code is entitled, "Attempts and Inducements to Poisoning and Abortion," and under this chapter is found section 39, which provides in substance for the punishment of any person who shall attempt unlawfully to procure an abortion by the use of drugs or instruments.

So far as the intention of the legislature may be gathered

from the manner of classification and the context of these sections of the statute, the administering of drugs or other substance, or the using of instruments with the intent to procure an unlawful miscarriage, falls under one class of offenses, while causing death by the use of such methods falls under another. Under section 39 the unlawful use of instrumentalities to procure a miscarriage is the gist of the offense and the subject of the charge, while under section 6 no punishment is provided unless in case of the death, either of the vitalized embryo, or fœtus, or mother, so that death is the subject matter with which this section is concerned, and causing death is the crime denounced thereby. If the legislature had provided that in case of the death of the vitalized embryo or fœtus, or mother, the guilty person should be deemed guilty of manslaughter and imprisoned in the penitentiary, this would not make death any more the subject of the inquiry than it is as the section now stands. This is what was actually done in the case of section 93 of the criminal code, where a punishment is provided for interfering with railroad tracks or bridges, or placing obstructions upon the rails, and it is provided that, if any person dies from the result of such acts, the guilty person shall be deemed guilty of murder in the first degree or second degree, or manslaughter, according to the nature of the offense. In the case of train wrecking, as in the case of using instruments or drugs to procure an abortion, there is a special statute concerned with the manner of procuring death or the instruments by which it is caused, and a punishment provided in the event that death ensues from the wrongful act. Causing the death in both instances is the subject matter of the sections which provide for punishment in the case of death, and in charges brought under such provisions death is clearly the subject of the charge. *Davis v. State,* 51 Neb. 301; *People v. Commonwealth,* 87 Ky. 487. The defendant insists that our statute is copied almost verbatim from the laws of Ohio, and that that state has decided that dying declarations are not admissible in proceedings

brought under this section. In that state, at the time of the decision cited, there was a separate act covering the crime of abortion, the second section of which is almost identical with the section under consideration. In *State v. Barker,* 28 Ohio St. 583, the defendant was indicted for manslaughter while in the commission of an unlawful act by using certain means with the intent to procure an abortion. The court held that, if the cause had proceeded to trial and the evidence shown that the death of the woman was occasioned by using instruments to produce an abortion, there could have been no conviction for manslaughter, because the evidence showed that another crime had been committed for which there was a separate and specific punishment, but held, further, that the indictment did not show all the elements of the crime under the abortion act, and therefore the indictment was good. In a later Ohio case, *State v. Harper,* 35 Ohio St. 78, the defendant was indicted under the abortion act, the first count charging the unlawful use of an instrument with intent to produce an abortion and the consequent destruction of the vitalized embryo, and the second count charging that by the use of an instrument with the same intent the death of the mother was caused. On the trial the state attempted to prove the dying declarations of the mother, which were excluded by the court. In the opinion of the supreme court it is said: "This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide. * * * The death of R. G. was not the subject of the charge and the death was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation." This is all that was said upon the question. The question under investigation is therefore decided, but not discussed, in this opinion. It may be said further, that, since this consideration of the statute was made by the supreme court of Ohio several years after the adoption of our criminal code, the rule that, where we adopt a statute from another state, we also adopt

the construction placed upon the statute by the courts of that state, does not apply. Moreover, as we have seen, when the section was adopted in substance in this state, the crime was classified as a species of homicide. In our opinion, there seems to be no sound reason for the rule in such a case as this under a statute such as ours.

While the statutes in the following states are not identical in language with that of this state, nor with those of each other, their highest courts have held such declarations admissible in cases of prosecution for death caused by the use of means to procure unlawful abortion, and we prefer to adopt such rule. The states whose courts take this view are Indiana, Wisconsin, Minnesota, Michigan, Iowa, Kentucky and New Jersey. *State v. Pearce,* 56 Minn. 226; *Montgomery v. State,* 80 Ind. 338; *State v. Baldwin,* 79 Ia. 714; *State v. Leeper,* 70 Ia. 748; *State v. Dickinson,* 41 Wis. 299; *People v. Commonwealth,* 87 Ky. 487; *People v. Lonsdale,* 122 Mich. 388; 1 Elliott, Evidence, sec. 353. In a New Jersey case, *State v. Meyer,* 64 N. J. Law, 382, it was held that dying declarations in a case where the defendant was charged with using an instrument upon the person of a pregnant woman with the intent to cause a miscarriage were inadmissible, but the reason given by the court for this conclusion was that, as the statute then stood—it having recently been changed—death was no longer an essential element of the crime, and therefore the dying declarations of the deceased were inadmissible.

A consideration of the reason for the rule admitting dying declarations shows that there is no logical ground for the distinction which has been attempted to be drawn with reference to their admissibility. The two reasons upon which the rule rests are: On account of necessity, since in many cases the first clue to the person guilty of the homicide is procured by the dying declaration of the wounded person, and often, but for this evidence, justice would miscarry and guilt go unpunished; and, second,

because in the near approach of death and in the thought of dissolution, all temptations to falsify or motives to tell other than the truth are removed from the mind, and the solemnity of the occasion supplies a sanction equal to that of an oath. These being the grounds upon which the rule of admissibility rests, the necessity is just as urgent and the solemnity of the occasion just as great in a case where a woman is dying from the result of an unlawful operation, as if she were in the same condition as the result of the commission of any other unlawful act, such as from an assault made by a burglar while committing burglary, or by a robber in the act of robbery.

Aside from the dying declarations, it would seem as if there was sufficient evidence to convict the defendant. The evidence is uncontradicted that he admitted to the sheriff and to the county attorney that he had become acquainted with the deceased, had kept company with her to some extent, and had upon several occasions shortly before the act of abortion had sexual intercourse with her; that she had called him by telephone while he was at a neighboring town, and informed him that her menstrual period had passed and that she was worried about it; that he then went to Kearney, procured a room in a hotel, and took her there with the intention of procuring an abortion by the insertion of instruments; that while in the room for this purpose they were disturbed by a bell boy sent by the proprietor of the hotel, who objected to the defendant taking a woman to his room; that the next day he went to her home, and took with him a speculum and some catheters for the purpose of performing the operation; that he attempted to insert a catheter for some time, but failed, and that afterwards the deceased went up stairs, and returned with a small catheter with a wire in it, and that he used it, and afterwards bent the wire and threw it away. Upon cross-examination, however, this witness stated that the defendant at the time he made these admissions denied having accomplished the abortion himself, but stated that the deceased woman,

when she came down stairs, said that "she thought she had done it." The evidence also shows that a speculum and three catheters were found in his valise when he was arrested, and that he had these articles in his possession at about the time of the unlawful act. The only question upon which there seems to be any doubt is whether the actual insertion of the catheter into the womb was performed by the defendant himself or by the deceased under his suggestion, advice, and procurement, and following his unsuccessful efforts to obtain the same result. Taking these admissions in connection with the other evidence in the case, it would seem that the verdict had sufficient evidence to support it, even if the dying declarations had been excluded.

The judgment of the district court is

AFFIRMED.

SAMUEL E. FOSTER V. STATE OF NEBRASKA.

FILED JUNE 7, 1907. No. 15,097.

1. **Criminal Law:** CONTINUANCE. The defendant made an application for a continuance, setting forth fully what he believed the absent witnesses would swear to if present. The state offered to admit that the witnesses, if present, would testify as stated in the affidavit. *Held*, Under the circumstances of the case, that there was no abuse of discretion on the part of the court in overruling the motion for continuance. *Catron v. State*, 52 Neb. 389.

2. ———: VENUE. Evidence examined on the question of venue, and *held* to be sufficient to sustain the verdict of the jury that the crime was committed in Keya Paha county.

ERROR to the district court for Keya Paha county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

J. A. Douglas, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

Samuel E. Foster was convicted in the district court for Keya Paha county of stealing six horses, the property of Stillman O. Lewis, and was sentenced to imprisonment in the pentitentiary. Foster was a dealer and trader in horses who lived in Rock county. Lewis, the owner of the horses, lives in Keya Paha county, a short distance from the South Dakota line, his pasture fence extending to the boundary line. Just north of his place a township is fenced in as a pasture, and is known as the "Laird pasture." Lewis testifies that the last time he saw his horses was in his own pasture on the 30th of March, and upon the first of April, which was Sunday, he testifies he fed them hay. Before this time the Laird pasture fence had been broken down and the horses had been ranging in that pasture, but had been brought back from there about the 19th of March. This testimony is corroborated as to time by Mrs. Lewis, who says she saw the horses in their pasture on the 27th day of March. She fixes this date as being the day when Mr. Lewis took her to Bassett to take the train to Iowa, she having received a message that her mother was seriously ill. Lewis is also corroborated by the testimony of John Lewis, a young man who worked for him in March and April, who said he saw the horses on Friday, the last week in March; that he left the place on Saturday, and came back on Monday, and helped feed them that evening. Lewis apparently did not miss the horses until about the 10th of April, and did not succeed in finding them until early in June, when he found that several of them had been driven to Ord, in Valley county, by Foster and sold there by him. Foster, in accounting for his possession of the horses, testified that about the first of April he, with one Rupert, went to South Dakota to look for some horses belonging to one Smith which were missing; that he stayed all night at a place known as the "Connora ranch"; that while there he met a man called Sloeagle, who asked him and Rupert to drive these

horses, with three others, down to Rock county for him; that he did so, and that afterwards Sloeagle came to Foster's place in Rock county, and that he bought the horses from Sloeagle at that time and took a bill of sale for them, but it is shown that he afterwards made false statements as to how he came into possession of them, and otherwise acted in a manner inconsistent with innocence. It seems that Rupert, the man who was with Foster, afterwards pleaded guilty to stealing these horses in Keya Paha county, but his deposition was taken in this case, and he testifies that the horses were taken from the Laird pasture in South Dakota, and not from the farm of Lewis in Keya Paha county, Nebraska.

The first point made is that the court erred in refusing the application of the defendant for a continuance. The defendant was arrested in July and confined in jail until November, when he procured bail and was released. On December 3 district court convened, and an information was filed, which was quashed upon motion. A new complaint was filed the next day, a preliminary hearing had and an information filed. An application for continuance was then made by the defendant, which set forth specifically the names of certain witnesses and the facts to which they would testify if present in court, together with a showing of diligence upon his part in attempting to procure the evidence. The evidence set forth in the affidavit, if believed, would tend to corroborate the defendant's testimony. It was alleged that the witnesses named would testify that the defendant bought the horses from Sloeagle after having been employed by him to drive the horses from Tripp county, South Dakota, to Rock county, Nebraska; that he was seen by one of the witnesses to pay Sloeagle for the horses; that he had been employed by one Sidney Smith to go into South Dakota and search for certain horses owned by Smith, and that these horses were later found southwest of Springview, in Keya Paha county; and, further, that one Reynolds would testify that in the summer of 1906 Mr. Lewis, the owner of the horses,

told him that his horses were running in the Laird pasture in South Dakota; that he did not miss them until about the 10th of April, and that he supposed the horses were in that pasture until he missed them. Upon this motion being filed, the state admitted that the persons would testify as set forth in the showing, and thereupon the application was denied. The statements of what the witnesses would testify to if present were read in evidence. It does not appear that there was an abuse of discretion on the part of the trial court in this ruling. In the main, the testimony offered was merely corroborative of that of Foster and of Rupert, and was probably considered by the jury of as much weight as if it had been given by deposition. Under our former holdings the ruling was not erroneous. *Catron v. State,* 52 Neb. 389.

The principal contention made by the defendant is that the evidence is not sufficient to show that the horses were stolen in Nebraska. After an examination of the evidence it seems impossible to doubt that the defendant was concerned in the stealing of the horses. If the testimony of the defendant and his witnesses is to be believed, the horses were taken in South Dakota, and he was not guilty of the crime charged, in this state, but the jury were entitled to give more credit to the testimony of Mr. and Mrs. Lewis and John Lewis that the horses were in the Lewis pasture about the 1st of April, than to the story of the defendant's witnesses, even though it is not entirely clear but that it might have been possible for the horses to have strayed into the Laird pasture about that time. It was for the jury to determine which of these witnesses were most worthy of credit, and there is sufficient evidence to sustain the verdict upon the question of venue.

It is contended there was error in admitting the record of the conviction of Rupert for stealing these with other horses. This was done, however, to rebut the statements in his deposition that he had taken them in South Dakota, by showing that he had pleaded guilty to taking them in Nebraska. It may also be said that the sheriff, Cottrel,

when called for the state, was allowed to testify without objection that he took Rupert to the Lincoln pentitentiary, and that Rupert had pleaded guilty to stealing the Raymus horses, and upon cross-examination defendant's counsel drew out the fact that Rupert pleaded guilty to stealing not only the three Raymus horses, but the six Lewis horses, which were included in the information in this case, so that the same fact was already before the jury without objection.

Complaint is made because the court refused certain instructions relating to venue. It is apparent, however, that one of the main issues that was litigated at the trial was whether the horses were taken in Nebraska or South Dakota, and the jury were instructed at defendant's request that one who steals property in another state and brings the same into this state cannot be found guilty of larceny in Nebraska, as well as being instructed by the court upon its own motion that one of the material allegations that the state must prove was that the horses were taken at the time and place alleged in the information. We think the question as to venue was fully understood by the jury.

We find no prejudicial error in the record, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. LUCIUS E. MANN ET AL., APPELLANTS, V. WILLIAM A. CLARK, APPELLEE.

FILED JUNE 7, 1907. No. 14,860.

1. **County Warrants: PAYMENT.** A county warrant issued against the general fund of a certain year is not payable out of the general fund of a subsequent year, unless included in the estimate of the latter year, or unless, after deducting the items included in such estimate, sufficient remains to pay such warrant.

2. **Counties:** GENERAL FUND. The amount received by the county treasurer as interest from depository banks should be credited to the general fund of the county immediately on its receipt, and can be disbursed only as other moneys belonging to that fund.

APPEAL from the district court for Loup county: JAMES R. HANNA, JUDGE. *Affirmed.*

A. S. Moon, for appellants.

C. I. Bragg and *A. M. Robbins, contra.*

DUFFIE, C.

Plaintiffs and appellants constitute the board of county commissioners of Loup county. Clark, the appellee, is treasurer of the county and has occupied the office since January, 1904. Following the custom of his predecessors, the treasurer had prorated the interest received from the several banks where the funds of the county were deposited, and credited the same to the several funds from which the interest was derived. Section 10871, Ann. St., provides that "all interest on such moneys be credited by the county treasurer directly to the account of the general fund of the county." At a meeting of the board of county commissioners held on August 21, 1905, the board adopted a resolution requiring the treasurer to credit the general fund of the county for 1905 with all interest theretofore credited to the several funds from which such interest had been derived, but Clark, instead of complying literally with the order of the commissioners, after crediting the interest in question to the general fund of the county, used it to pay outstanding warrants issued in 1903 and 1904, instead of the warrants of 1905, to the payment of which the commissioners insist the interest should be applied.

In answer to an alternative writ of mandamus issued by the district court on the application of the commissioners, Clark, among other matters, states that at the time the plaintiffs made the order above referred to there were filed against the general fund of 1903 unallowed claims

amounting to $368.58, and against the general fund of 1904, $442.48; that the levy for said years had been entirely exhausted, and no provision made in any manner by which the unallowed claims could be paid, and that said unallowed claims were all proper charges against said fund; that warrants had also been drawn against said funds which were outsanding and unpaid at the time of the order, and that he had credited the interest in question to the general fund of those years, and had paid out the sums ordered to be transferred on warrants drawn against the levy for the general fund of 1903-1904. The district court refused to award a peremptory mandamus and dismissed the plaintiffs' petition, and from this order and judgment the plaintiffs have appealed.

From the above statement it will be seen that the question to be determined is whether depository interest received by a county treasurer during the years 1903 and 1904 should be applied to the payment of oustanding warrants issued against the general fund of the county during those years, or whether the county board may of right direct it to be applied to the payment of warrants issued against the general fund of the county in the year 1905, it not being shown that the outstanding warrants of 1903 and 1904 had been included in the annual estimate of the expenses of the county for the year 1905. Subdivision VI, sec. 4443, Ann. St., defining the duties of county boards, is as follows: "At their regular meeting in January of each year to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness, as evidenced by bonds, coupons, or warrants legally issued; and such estimate, containing the items constituting the amounts, shall be entered at large upon their records and published four successive weeks before the levy for that year in some newspaper published and of general circulation in the county, or if none is published, then in some

newspaper of general circulation therein; and no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published, but any item or amount may be stricken from such estimate, or reduced, at the time the levy is made." In *State v. Harvey*, 12 Neb. 31, this section was considered by this court. Hitchcock applied to the court for a mandamus to compel Harvey, the treasurer of Furnas county, to pay a registered warrant of that county for the year 1879, without preferring the warrants of 1880 to the warrants of 1879, previously registered, in disbursing the revenue of the year 1880 collected by it. Judge LAKE, who wrote the opinion, after quoting the provisions of the statute above set out, said: "In these provisions we see that the commissioners are required to distinctly specify the very purposes for which they levy taxes for each current year. And one of the purposes which they are authorized to consider and levy for is the outstanding indebtedness of the county, evidenced by its warrants legally issued in former years. The warrant in question was issued July 8, 1879, and against the levy for that year, *but it is not shown that the indebtedness it evidenced entered into the estimate for the levy of 1880, out of which the relator seeks to have it paid.* Nor does it even appear that there was any reason why it should have been a part of that estimate, ample provision already having been made by the levy of 1879, the year in which it was drawn, as shown by the unexpended balance indorsed on the warrant itself. Now, the law requiring an itemized estimate to be made of the requisite amounts to be raised by taxation for county purposes, is it not a reasonable inference, from this fact alone, that the legislative intent was that the funds realized from the levy should be devoted to those purposes? It certainly could not have been intended that objects thus provided for should be postponed to such as were not included in the yearly estimate." The conclusion arrived at by the court was that, where the estimate does not include outstanding warrants of preceding years, the fund arising from the

levy of the present year cannot be legally used to pay warrants of preceding years, not, at least, until all the expenditures contemplated by the yearly estimate for the present year have been made. There is nothing in the record showing that the warrants drawn and still unpaid by Loup county against the levy of 1903-1904 had been included in the estimate made by the county board for the year 1905, and, this being so, the treasurer, under the holding in *State v. Harvey, supra,* was not authorized to use funds derived from the levy of 1905 in payment of warrants issued in 1903 and 1904. If he was not authorized to use the general fund of the county levied for the years 1903 and 1904 to pay warrants issued against the levy of 1905, could he use any money properly belonging to these funds for that purpose? We think not. If the interest received from the depository banks during the years 1903 and 1904 had been properly credited, it would have become a part of the general county fund of these years, as much so as the money derived from the tax levy then made, and could be used only for the payment of the items included in the estimate made for these years, and not for the payment of any of the items included in the estimate of 1905.

This, to us, seems decisive of the case and requires an affirmance of the judgment appealed from, and we so recommend.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

EDWARD YOUNG, APPELLEE, V. CHI PSI CATTLE COMPANY, APPELLANT.

FILED JUNE 7, 1907. NO. 14,868.

Principal and Agent: LIABILITY FOR ACTS OF EMPLOYEE. A person or corporation cannot be held for goods sold and delivered to an employee in the absence of a showing that he was authorized to make the purchase and to bind the employer therefor.

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

O. C. Tredway, Walcott & Morrissey and *W. E. Gantt,* for appellant.

Clarke & Easley, contra.

DUFFIE, C.

The plaintiff and appellee, a merchant at Wood Lake, Nebraska, brought this action against the defendant corporation to recover an amount claimed to be due for goods sold and delivered. An itemized bill of the account is attached to the petition. Judgment went in favor of the plaintiff for $110.97, and defendant has appealed.

We think that the judgment must be reversed as being wholly unsupported by the evidence. One Ed Lewis was an employee upon the ranch of the defendant company, and the goods sold were purchased by him or by some employee upon the ranch on his direction. It is true the plaintiff testified that Lewis informed him the goods were purchased for and on account of the cattle company, but nowhere does it appear that he was empowered to act for the cattle company or to purchase these goods on its account. Some time prior to the commencement of this action plaintiff rendered a bill to Lewis for these same goods, and on November 26, 1904, O. C. Tredway, secretary and treasurer of the company, paid on said bill $120, which

amount was receipted on the bill in the following words: "Received of Ed Lewis by the hand of O. C. Tredway the sum of $120 on above bill, Nov. 26th, 1904. (Signed) Ed Young." Plaintiff and his wife both testify that at the time of paying this money Tredway stated that the remainder of the bill would be paid by the 1st of January next ensuing, and it was perhaps upon this evidence that the district court based its judgment. It is not shown or claimed that Tredway at the time admitted that the company was responsible for the goods, or that they were purchased for or on account of the company, and he denies in express terms that Lewis had authority to act for the company in the purchase of goods or to pledge the credit of the company for any purchase. That the bill was originally made out to Lewis is a strong circumstance tending to show that the goods were sold to him and on his own account. The character of the goods sold corroborates this view of the case, being mostly family supplies, including shirts, hose, cloaking, buttons, handkerchiefs, ribbons and other articles of wearing apparel, and supplies for the table. Again, it might be said that if Tredway, at the time of the payment of $120, had acknowledged liability of the company, the suit would have been brought on an account stated, and not for goods sold and delivered. If the goods were sold to Lewis on his own personal account, the promise of Tredway to pay the remainder due would be void under our statute of frauds and no liability would attach to such a promise.

We recommend a reversal of the judgment.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

STATE, EX REL. WILLIAM A. CLARK, APPELLEE, V. WILLIAM VINNEDGE ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 14,888.

1. **County Treasurer**: ACCOUNTING: COSTS. While a county treasurer should be required to account for the full amount of interest due on taxes collected by him, the county commissioners should call to his attention his failure to do so if their refusal to settle with him is based on that ground, or pay the cost of legal proceedings brought to compel an approval of his bond if such objection is not disclosed before action brought to require acceptance and approval of his official bond for a second term of the office to which he has been elected.

2. ———: BOND: APPROVAL. The bond of a county treasurer who has been elected to serve a second term should be approved by the board of county commissioners when he has accounted, or stands ready to account, for all funds collected by him during his first term, and mere irregularities in disbursing the funds in his hands during his first term is not a valid objection to his proposed settlement or to the approval of his bond for a second term, where such irregularities occur on the advice of the county attorney and do not in fact cause any loss to the county, or to any one interested in the disbursement of the funds, and where the treasurer has acted in good faith in the discharge of the duties of his office; and especially is this true when it is apparent that the action of the board is based on the refusal of the treasurer to comply with an order of the board relating to the disposition of funds in his hands which contemplates an illegal disbursement thereof.

APPEAL from the district court for Loup county: JAMES R. HANNA, JUDGE. *Affirmed as modified.*

A. S. Moon, for appellants.

A. M. Robbins and *C. I. Bragg, contra.*

DUFFIE, C.

William A. Clark, the relator, brought this action against William Vinnedge, Charles W. Wright and H. E. Carter, composing the board of county commissioners of Loup county, to require them to approve his official bond

as treasurer of said county for the term commencing January, 1906. The record shows that Clark had served one term as treasurer and was reelected to the office at the fall election of 1905. During the January session of the board of county commissioners he filed with them a statement of the doings of his office covering the period from June 30, 1905, the date of his last settlement, to December 31, 1905, but no settlement with him was then entered upon by the county commissioners, the same being postponed from time to time at their request. It does not appear from the record that any full settlement has yet been made and entered of record by the county commissioners, and they have refused to approve his official bond, not on account of any defect in the form thereof or of want of qualification in the sureties thereon, but on account of a matter which we will now proceed to explain:

From the record in another case heretofore submitted to this court, in which the board of county commissioners sought a mandamus against Clark, it appears that he had made a *pro rata* division among the several funds in his charge of the interest received from depository banks, and that at a meeting of the commissioners held on August 21, 1905, the board adopted a resolution requiring him to credit the general fund of the county for 1905 with all the interest theretofore credited to the several funds from which it was derived. Instead of complying literally with this resolution, Clark credited the interest to the general fund of the county for the years in which it was collected, and used it to pay outstanding warrants drawn against the levy of such years. His action in this respect was approved by the district court, and on appeal taken by the commissioners the judgment of the district court was affirmed by this court. *State v. Clark, ante,* p. 263. After the board of commissioners had examined the statement filed by the relator, a motion was made to accept and approve the same and to approve his official bond for the ensuing term. Relating to the proceedings thereon H. E. Carter, one of the commissioners, testified as follows: "Q.

Now, Mr. Carter, please tell the court what the board did in regard to the settlement. A. I think we compared the duplicate receipts with the cash book. We even went so far as to consume some time in comparing the tax book with the receipts that had been issued, or the stubs or duplicates, for the purpose of determining whether the receipts had been issued for the correct amount as shown by the tax book itself. We examined all of the vouchers of the disbursement, the bank books for the purpose of determining the amount of money deposited, the other two members counted the cash—I believe I didn't take any part in that—we tried to examine all of the records that was necessary for the purpose of determining whether his recapitulation was correct or erroneous. Q. What did the board find, whether his account was correct or not? A. Found it correct. Q. Well, now, you may state why it was not approved? A. The reasons? Q. Yes, sir. A. After the examination was closed and the question was what, if anything, would be done with the bond, I made a motion that the board accept of the settlement and approve it, and accept and approve the official bond, Clark's official bond as county treasurer, and the other members of the board said there was a mandamus suit pending in court, and told me the nature and purport of it, and that, if this settlement was accepted and this bond approved, it would virtually result in their defeat in that suit, and practically admit that they had no cause of action in that suit. The other members of the board held that Clark had no right to take his fees out of the money as he collected it. I think these were the only two reasons that were presented to me why the bonds should not be approved. Q. Now, I will ask you whether there was any reason given by any member of the board why his settlement was not accepted and his bond approved that there was any shortage of his accounts that you had found in the examination? A. No, sir." The following question and answer also appear in his evidence: "Q. You may state what the members of the board said as to the nature

of the cause of action? A. The old board, some time in 1905, had made an order that the county treasurer should transfer certain moneys on hand that had been derived from interest on county deposits to the county general fund of 1905, or the special general fund, that they had drawn warrants to the full amount of that transfer, that Mr. Clark had failed or refused to make the transfer in compliance with their order, and the board had commenced proceedings in mandamus to compel him to comply with the terms of their order, and the other members of the board claimed that, if they accepted his settlement and approved of his official bond, it would be admitted that everything was correct, and that they would be defeated in that suit. I tried to explain my opinion to them, that it was simply a legal question to be presented to the court, but they took a different view, and consequently we didn't agree." The following appears from the evidence of the county clerk: "Q. Did you hear the reason given for disapproving the bond and the settlement? A. Yes, sir. Q. You may state what was said about that? A. I heard Vinnedge say that they would not accept the settlement for the reason that, if they done that, they would have to step down and out of court on the mandamus suit." Mrs. W. A. Clark, who was employed in the treasurer's office, testified as follows: "Vinnedge came in there and stood at the table right in front of me, and he says, 'Mrs. Clark, we can't accept Bill's settlement unless he transfers that money,' and he says, 'If we do, we might just as well step down and out of court, and if he does make that transfer then his settlement will be all right.'" To the same effect is the evidence of George Evans and of L. E. Mann.

In their answer to the alternative writ, some technical objections are made to the settlement proposed by the county treasurer. It is said, and the evidence shows, that in the collection of taxes, through oversight or mistake, Clark, in several cases, neglected to charge the full

amount of interest due, while in other cases the interest exceeded the amount which should be collected. It is also shown that that portion of the road tax paid in cash, as required by section 6073, Ann. St., was paid directly to the county commissioners, and the individual receipt of the commissioner receiving the tax taken, instead of requiring a regular order or warrant to issue in favor of the commissioner to whom such tax was paid. It is not claimed that the treasurer diverted or appropriated to his own use any of this road fund, but the objection is made that the manner of disbursing it was irregular. This may be, and probably is, true, as it is not a safe proceeding for the county treasurer to disburse the fund in his office except upon orders or warrants regularly issued. But it can be said in explanation and excuse of the method adopted by Clark that it was done on the advice of the county attorney given to the board of county commissioners in the presence of Clark, and that he was in good faith acting on that advice and in supposed compliance with all legal requirements. The relator has been duly elected to the office of treasurer. He has tendered a good and sufficient bond. He has made what he claims to be a full report of the doings of his office since the date of his last settlement, and claims to have accounted for all funds in his hands. If these facts are established, he is entitled to an approval of his report and of the official bond tendered. This, while not decided, is clearly implied in *Woodward v. State,* 58 Neb. 598. In no other way can he retain the office to which he was reelected, or receive the benefits and emoluments pertaining thereto. It is the duty of the board, made so by statute, to effect a settlement with him and to approve his bond, if, on a settlement, all funds in his hands have been accounted for. If there are objections to his report, if a claim is made that any funds are not properly accounted for, he is entitled to know it and to know the precise objection which the commissioners have to offer to the report which he has made. If, as is now claimed, he failed to collect the proper amount of interest,

that fact should have been disclosed to him in order that he might make good any shortage on that account. In no other matter, so far as we can see, can any objection be urged to the report made and to the settlement proposed by him. A careful examination of the record satisfies us that Clark has neither defaulted nor misapplied any of the funds coming to his hands; that some irregularities in his manner of disbursing the funds is the most that can be charged against him. No loss to the county, except for interest, is shown and no wilful misconduct in office is claimed. It is quite apparent that the refusal of the county board to approve his settlement and the bond tendered is not based on any substantial claim that Clark has failed in his duties as treasurer, or misappropriated any of the funds coming to his hands, and we are quite satisfied that, were it not for the mandamus action then pending in this court, a full and complete settlement would have been effected without dispute or difficulty, and his bond, to which no legal objection has been raised, promptly approved. Were it not that the record shows that Clark failed to collect the full amount of interest due upon some of the taxes for which receipts were issued, we would recommend an affirmance of the judgment. The county is entitled to all interest due upon delinquent taxes, and we do not feel justified in making any order that might be construed as barring the county from requiring Clark to account for all interest which should have been collected.

We therefore recommend that the judgment of the district court be so modified as to require the appellants to make a full and complete settlement with Clark, requiring him to account for all interest due upon the taxes collected, and which, through oversight or mistake, he failed to collect, and that when this is done his official bond may be approved. In view of the fact that no objection was made of a failure on the part of the relator to collect the full amount of interest until the trial of the case, we further recommend that all costs of the case be taxed to the appellants.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is so modified as to require the appellants to make a full and complete settlement with Clark, requiring him to account for all interest due upon the taxes collected, and which, through oversight or mistake, he failed to collect, and that when this is done his official bond may be approved; and that all costs of the case be taxed to the appellants, and as modified the judgment is affirmed.

JUDGMENT ACCORDINGLY.

CHARLES M. SMITH, APPELLANT, V. PETER G. HOFELDT ET AL., APPELLEES.*

FILED JUNE 7, 1907. No. 14,762.

1. **Villages: SIDEWALKS: GRADING.** Power given to villages by statute prior to the 1903 amendment to require the construction of sidewalks did not include the power to require the lot owner to reduce the sidewalk space to the established grade.

2. ———: ———: ———. Prior to 1903, before a village could, by notice, require a lot owner to construct a sidewalk to grade upon an improved street, it must perform its duty by reducing the sidewalk space to the established grade.

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

H. W. Pennock, for appellant.

H. P. Leavitt and *W. W. Slabaugh, contra.*

EPPERSON, C.

In the lower court, plaintiff sought to enjoin the levy and collection of a special assessment to pay the cost of constructing artificial stone sidewalks in front of his

* Rehearing pending.

property in the village of Dundee, and the cost of reducing the sidewalk space to the established street grade. Subdivision IV, sec. 69, art. I, ch. 14, Comp. St. 1901, which was in force at the time the improvements in controversy were made, delegates to villages the power "to construct sidewalks, to curb, pave, gravel, macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley, to pay the expenses of such improvement." Subdivision III empowers the village to provide for the grading of streets, and said village shall defray the expense thereof out of the general fund of such village. The streets upon which plaintiff's property abutted had been reduced to the established grade between curb lines only. The sidewalk space had not been reduced until after the sidewalk had been ordered. To construct the walk at grade, the authorities reduced the sidewalk space, and included the expense thereof in the amount they attempt to assess against the plaintiff's property. The district court granted an injunction as respects the cost of reducing the sidewalk space to grade, but denied it with respect to the cost of constructing the walk. Both parties appeal.

By reason of the statutory provision that the expense of grading a street shall be paid out of the general fund, the question is suggested: "Is the sidewalk space a part of the street?" We think it is. Indeed, we have no doubt of it. The very language of subdivision IV, *supra*, indicates that the sidewalks contemplated by the legislature should be constructed in the street, and not upon the abutting lots. "The term street in ordinary legal signification includes all parts of the way, the roadway, the gutters and the sidewalks." Elliott, Roads and Streets (2d ed.), sec. 20, and cases cited in note 2; 2 Dillon, Municipal Corporations (3d ed.), sec. 1008. There are cases in which the word "street" is intended to mean only a part of the highway, but the necessity for drawing a distinction does not exist here.

Defendants contend that the grading is incident to the construction of the sidewalk, and therefore the expense is properly chargeable to the property. With confidence they cite *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, where it is held in the fifteenth paragraph of the syllabus: "Where a city engages in the work of paving its streets, and, as a part of the general improvement, grading is done in order to accomplish the main object, *held*, that the cost of grading, being a part of the general improvement, is properly charged as being incidental to, and a part of, the work of paving, and that special assessments against a street railway company for the cost of paving its right of way may properly include the cost of grading also, the grading being incidental and necessary to accomplish the main object of grading the street." We do not doubt the rule there announced, nor do we doubt that the grading in the case at bar was necessary to place the proposed walk upon the street level. But was the grading an incident to the improvement which the village was empowered to require of the plaintiff? In the proper construction of artificial stone walks upon the surface of the ground, or upon the street after it is reduced to grade, a certain amount of excavating is necessary to form a foundation for the structure. Such excavating or grading is incident to the sidewalk itself. A removal of earth is necessary for the construction of a surface walk, and such grading the abutting owner may be required to do or be subject to taxation therefor. Grading of this character only is contemplated in *Lincoln Street R. Co. v. City of Lincoln, supra.* In the opinion therein we find the following: "In a case where the improvement consists only of bringing the street to an established grade, some doubt would probably arise as to authority to require a street railway company to pay the cost of such grading as to its right of way under the provisions of the statute authorizing the levy of costs and expenses of paving, as in the case at bar. * * * We understand the general rule to be that where there is a requirement to pay the cost of paving, as mentioned in the

statute, by such requirement there is included and contemplated all incidental work necessary and required to accomplish the main object, and that the cost of grading, when done as a part of the general paving improvement, is properly assessed as a part of the cost of such paving in contemplation of the statute." It was sought to charge the street railway company only with the grading necessary to pave a part of the street. The question of reducing the street to an established grade was foreign to the case. In *Little Rock v. Fitzgerald,* 28 L. R. A. 496 (59 Ark. 494), wherein the facts were very similar to the facts herein, arising under similar statutes and ordinances, it was held: "The power to require grading for sidewalks is not included in the statutory power to require lot owners to build and maintain sidewalks." See, also, note 28 L. R. A. 496. We are satisfied that our legislature, prior to amendments made in 1903, never intended that the expense of reducing streets to grade should be assessed to the property owners. Quite the opposite intention appears in subdivision III, *supra.*

The legality of the levy to pay the expense of constructing the sidewalk is also questioned. In conformity with the statutes, the village of Dundee had passed an ordinance authorizing the village board to cause artificial stone sidewalks to be constructed along permanently improved streets, but none other. On September 16, 1902, a notice was served upon the plaintiff to require him to construct the proposed walk, which the ordinance provided should rise one inch in three feet from the curb; in other words requiring the walk substantially on the street level. At that time the village authorities had not reduced the sidewalk space to the established grade, nor had they done so within the time fixed in the notice to plaintiff. The plaintiff failing to comply with the notice, the village authorities graded for and constructed the walk. Had plaintiff attempted to comply with the notice, he could not have done so without going to great expense in the grading of the sidewalk space, which as above shown was not required

of him, and which cost the village $212. He was entitled to a notice after the village had done its part in improving the street.

The district court was in error in refusing the plaintiff all the relief he asked, and we recommend that the judgment be reversed and the cause remanded, with directions to grant the injunction.

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 grant the injunction as prayed.

REVERSED.

M. E. GANDY, APPELLANT, V. JEROME C. WILTSE, APPELLEE.

FILED JUNE 7, 1907. No. 14,822.

1. **Evidence:** COMPETENCY. Evidence of a verbal agreement by a landlord with his tenant to construct a drain for the protection of a part of the land leased made without consideration, and evidence of damage by reason of the failure to construct such drain, is incompetent in an action for an accounting, the agreement being omitted from a written lease between the parties.

2. **Jury, Right to Trial by.** "Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and in case of ambiguity by resort to the prayer." *Yager v. Exchange Nat. Bank*, 52 Neb. 321.

3. **Compromise and Settlement:** PLEADING. The giving of a note by one party to another in settlement of the differences between them is a good defense in an action by the maker against the payee to recover prior existing claims, in the absence of fraud or mistake, but such defense must be pleaded.

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

R. S. Moloney and *Reavis & Reavis*, for appellant.

E. Falloon, John Wiltse and *I. E. Smith, contra.*

EPPERSON, C.

From 1901 to 1904 defendant occupied several tracts of land as plaintiff's tenant under written leases, and was also the agent or employee of plaintiff in many transactions pertaining to the leased premises and other matters. Plaintiff brought this suit, alleging numerous items, aggregating $6,388, on account of waste and for the conversion of property and money, and prayed "for an accounting and for a decree for the several sums of money particularly mentioned, and such other and further relief in the premises as equity and good conscience may require." The defendant denied the plaintiff's allegations, and set forth numerous items of indebtedness against plaintiff, aggregating $3,116.12, for labor performed upon the premises at plaintiff's request, damages for the withholding of certain land described in the lease, material purchased for plaintiff, and other items not necessary to mention. Trial was had to a jury, and defendant obtained a verdict and judgment for $1,000. Plaintiff appeals.

One item claimed by defendant was $500 damages occasioned by plaintiff's failure to comply with an alleged verbal agreement to construct certain drains, whereby defendant's crops were damaged. Defendant testified that the agreement was made in the latter part of 1902 or early in 1903. At the time there was existing, or soon thereafter was made, a written lease, which was silent as to the proposed drainage. It is not shown that any consideration was given for the agreement. The only evidence of this agreement was the testimony of defendant as follows: "The agreement was he would make a ditch from the Ritter place, through Kuhlman's, to the river to drain the Ritter tract, and also a ditch from the Goodsell tract, across Mr. Ludwig's, to the river. These two ditches would have completed the drainage for the tract of land we had." Defendant was permitted to testify over objection that the damage was, "I would judge, $500 anyway."

No other evidence of damage was given. It seems that the so-called agreement, which defendant assumed was a binding contract, was but a statement made in a conversation, and never reached the dignity of a contract. Nor does the evidence show what was the value of the land without the drain. The defendant should be held to have taken the land as it existed on the date of his written lease made in March, 1903, which contained no provision for the drainage. We are satisfied that the admission of the above evidence was reversible error, and that the $500 item should not have been considered by the jury.

Defendant contends, however, that the action was brought for equitable relief, that a jury should not have been called, that the verdict of the jury was advisory only, that for these reasons error in the admission of incompetent evidence was without prejudice, and that the case should be disposed of as though no jury trial had been had. If the case was for equitable relief only, the verdict of the jury would be advisory, and we would indulge the presumption that the court considered only competent evidence. If, however, our constitution and statutes require a jury trial, then the legality of evidence admitted must be determined. An examination of the petition and the answer discloses numerous items of indebtedness, each of which constituted a distinct cause of action at law. The only relief that could be obtained was a money judgment in favor of the successful party. The only feature of the pleadings indicating that equitable relief was sought was the prayer of the petition above quoted. But, in the absence of ambiguity in the body of the pleading, it is unnecessary to consider the prayer in determining the nature of the action. *Harral v. Gray*, 10 Neb. 186.

Article I, sec. 6 of the constitution, provides that "the right of trial by jury shall remain inviolate." Section 280 of the code provides: "Issues of fact arising in actions for the recovery of money, * * * shall be tried by a jury, unless a jury trial is waived." Under the law as it

existed at the time our constitution was adopted, there is no doubt that the right to a trial by jury existed in favor of one pleading causes of action against his adversary, such as are claimed by each party herein. Every issue presented is one involving the right of the parties to recover a money judgment. No purely equitable rights are claimed by either party, and we entertain no doubt that the matters in question were for the determination of a jury. In *Yager v. Exchange Nat. Bank, supra,* it is said: "It is contended, and we think correctly, that the nature of the action cannot be determined alone from the prayer of the petition. * * * One must see what sort of a case the plaintiff makes by his averments, and from that ascertain what would be the nature of the case and the relief required under the former procedure."

Plaintiff contends that, as the several claims of defendant arose prior to the giving of a note by defendant to plaintiff in January, 1905, for the rental of the land in controversy, defendant cannot recover, as the note settled all their differences to that date. The evidence does not show that the note was intended as a settlement; but when it was given defendant claimed that he was entitled to a reduction for money due from plaintiff to him, which plaintiff agreed to adjust later. Nor is plaintiff in a position to now insist on this contention. He does not allege that the note was given in settlement of the various items claimed by defendant. The giving of a note by one party to another in full settlement of all differences existing between them is a good defense to an action subsequently alleged by the maker of the note against the payee, but, like any other defense, it must be pleaded. A general denial is insufficient to permit proof of settlement.

There are other assignments, but we are unable to detect error, other than above indicated. It is earnestly contended by defendant that the evidence required a verdict in his favor for a much larger sum. This may be true, but it also appears that it would have sustained a verdict for a sum less than that returned by the jury. The items

were so numerous and the evidence of such a nature that reasonable men might differ as to the rights of the parties.

We recommend that the judgment of the district court be reversed and the cause remanded for a new trial, unless the defendant shall within 30 days file a remittitur of $500, and, if he elects so to do, the judgment, thus reduced, be affirmed.

DUFFIE and GOOD, 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, unless the defendant shall within 30 days file a remittitur of $500, and, if he elects so to do, the judgment, thus reduced, will be affirmed.

JUDGMENT ACCORDINGLY.

S. D. MERCER COMPANY ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED JUNE 7, 1907. No. 14,867.

1. Cities: REPAVING: PETITION. In determining whether or not the owners of a majority of the foot frontage of an improvement district in the city of Omaha have signed a petition for repaving, it is necessary to consider the foot frontage created by the vacation of an abutting street.
2. ———: ———: ———. One who held the title to city lots, and who had full power and authority to improve them, was competent to petition for the repavement of a street upon which such lots abutted, under the Omaha charter (Ann. St., sec. 7562), as it existed prior to 1903, providing that such petition shall be signed by the owners of the abutting property.

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

W. A. Saunders, for appellants.

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

EPPERSON, C.

Plaintiffs seek to set aside special taxes levied upon their property to pay the cost of repaving a part of Cuming street in the city of Omaha. The principal objection to the levy is that the petition for repaving was not signed by the owners of a majority of the foot frontage of the improvement district. The frontage of the district is 6,302.69 feet. Of this, 885 feet is the frontage of Bemis Park, which is not subject to taxation. *Herman v. City of Omaha,* 75 Neb. 489. The petition purports to be signed by the owners of 2,744 125-200 feet, which is a majority of the foot frontage of the taxable property. The respective owners of lot 2, in block 8, and lot 1, in block 9, of Lowe's second addition, signed the petition, claiming a frontage of 436 feet. As originally platted these lots had a frontage on Cuming street of 193 7-8 feet each. They were divided by Summit street, 66 feet wide. In 1881 the county commissioners declared this part of Summit street vacated, and in 1887 the county clerk attempted to convey it to the owner of the abutting lots. There seems to have been no power in the county board to vacate the street, nor in the county clerk to convey the title; but the petitioners and their grantors had been in possession of the street property for more than ten years prior to the filing of the petition for repaving. It was therefore vacated by nonuser and the petitioners were the owners thereof. It became a part of the lots above named, and should be considered in determining the sufficiency of the petition.

Richard Scannell, claiming to own property having a foot frontage of 299 7-8 feet, signed the petition. The deed conveying this property to him designated him as "Right Rev. Richard Scannell, Bishop of Nebraska." Evidence was introduced showing that the property in fact belonged to the Catholic church. It was proved, however, that the grantee under the canon law had full power and authority to control the property, and for all intents

and purposes, so far as improvements were concerned, he had full jurisdiction and power over it. He was the legal owner, and the church the equitable owner or beneficiary. The church could act only through the bishop, and under the city charter as it then existed, requiring a petition signed by the owners of a majority of the property, we consider him a competent petitioner.

The district court rendered judgment of dismissal which should be affirmed, and we so recommend.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN F. COFFEY, ADMINISTRATOR, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 7, 1907. No. 14,816.

1. **Street Railways:** INJURIES: NEGLIGENCE: QUESTION FOR JURY. It is a question of fact for the jury whether or not a passenger, who is riding on the lower step of the platform of a crowded street car, and who is thrown therefrom and injured by reason of the negligent operation of the car, is, by voluntarily riding in such place, guilty of such contributory negligence as will defeat a recovery.

2. **Evidence** as to the negligence of the defendant in the operation of the car examined, and *held* sufficient to require its submission to the jury.

3. **Witnesses:** COMPETENCY. A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving. *Omaha Street R. Co. v. Larson*, 70 Neb. 591, followed and approved.

4. **Rulings** of the trial court on the admission and exclusion of testimony examined, and *held* not to be prejudicially erroneous.

5. **Appeal:** INSTRUCTIONS. It is not error to refuse instructions re-

quested, where the substance of the instructions requested has been embodied in the court's charge to the jury.

6. Instructions given examined, and *held* to have been properly given.

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

John L. Webster and *W. J. Connell,* for appellant.

Weaver & Giller, contra.

GOOD, C.

John F. Coffey, in his representative capacity as administrator of the estate of John Nelson, deceased, brought this action to recover damages for the death of said Nelson, and alleged that Nelson on the 11th day of October, 1903, was a passenger on one of defendant's street cars, and, while riding on the rear platform of the car, was thrown off and killed; that the employees and servants of the defendant in charge of said car negligently permitted the same to become crowded, and ran the same at a high rate of speed around a curve in the defendant's railway track, thereby causing the said car to give a sudden and violent lurch, which caused Nelson to be violently thrown from the car to the pavement, thereby causing his death. Defendant in its answer denied all negligence on its part, and alleged contributory negligence on the part of Nelson, and alleged that he was intoxicated at the time of his injury. There was a trial to a jury in the court below, resulting in a verdict for $1,500 in favor of the plaintiff. The court overruled defendant's motion for a new trial and entered judgment on the verdict, from which defendant appeals to this court.

Defendant not only complains of the rulings of the trial court in the admission and exclusion of evidence and in the giving and refusing of instructions, but contends that the trial court should have directed a verdict for the defendant because Nelson came to his death solely from his own

negligence. From the evidence it appears that Nelson boarded the car of the defendant at the intersection of Sixteenth and Dorcas streets to go north on Sixteenth street in the city of Omaha; that the car was somewhat crowded, the seats all being taken, perhaps some passengers standing in the aisle, and a number of passengers standing on the back platform; that Nelson took a position on the lower step of the rear platform and remained there until the accident; that two or three times the conductor of the car requested Nelson to step up and go inside, but did not warn him of any danger, the request to step inside being given apparently to clear the way for passengers to get off and on the car. The car continued northward until it reached a point between Williams street and Pierce street, where Sixteenth street widens, the added width being all on the east side of the street, and the car tracks made a double curve in order to keep the tracks in the middle of the widened street. It is contended that the effect of running the car at a rapid rate over these curves is to sway the passengers to the west on entering the first curve, and then to the east as the car leaves the second curve to take the straight track again going north. It was at or near this point that Nelson fell or was thrown from the car. Plaintiff's testimony tended to show that the car was going at a rate of about 20 miles an hour, and defendant's testimony that the speed was only about 8 or 10 miles an hour. There was a conflict in the testimony as to whether or not Nelson was under the influence of liquor at the time of the accident. The evidence also disclosed that immediately before the accident Nelson was standing on the lower step with his back to the east and his right hand holding the rail or handhold on the car; that he held to this rail after his feet were off the step; and that, when he fell or was thrown from the car, he landed a considerable distance from the track, striking on the back of his head, and receiving injuries from which he became unconscious and soon died. It also appears that at the scene of the accident the track

inclines north toward the viaduct, so that the car was running on a down grade at the time Nelson fell, and that the car ran about 250 feet before it stopped after the accident.

Defendant contends that, since Nelson chose to stand on the lower outside step of the platform after he was requested by the conductor to come up from the step and go inside, he was guilty of such contributory negligence as a matter of law as forbids any recovery for damages. Our attention has been called to a number of cases that apparently hold that a party who elects to stand on the platform of a car is required to exercise the increased care that the increased danger entails, and that, if a passenger persists in standing on the step of the car after being warned of the danger and told to go inside, he cannot recover damages for injuries he may receive by being thrown from the car. *Nieboer v. Detroit E. R. Co.*, 128 Mich. 486; *Pike v. Boston E. R. Co.*, 192 Mass. 426; *Gaffney v. Union Traction Co.*, 211 Pa. St. 91. In the first of the above cited cases, however, it appears that the person injured had climbed upon the deadwood, or "bumper," at the rear of the car, outside of the platform. The cars were running in close proximity to each other, and the conductor suddenly stopped the car upon which plaintiff was riding, and plaintiff was caught and injured by the car following, which bumped into the rear of the car where plaintiff was standing on the deadwood. The "bumper" was not a place to be used under any circumstances by a passenger. The position the plaintiff took was an extremely dangerous and perilous one, and the dangers of riding in such a position were apparent to any person of ordinary intelligence. The facts in that case are so different from those in the case at bar we do not think that it can be of any real value in determining the question of contributory negligence in this case. In *Pike v. Boston E. R. Co., supra,* it appears that the plaintff's intestate was injured, while riding upon the front platform of one of defendant's cars, in a collision between the car and

a repair wagon in the early hours of a dark and foggy morning. It appeared that the street car company had signs posted up on its cars giving notice that passengers riding on the front platform did so at their own risk, and that plaintiff's intestate knew and had read the notice. Morton, J., in writing the opinion, says: "In the present case the notice did not forbid passengers to ride on the front platform, but stated the terms on which, if they rode there, they would be carried, namely, at their own risk. * * * In the present case the defendant furnished a safe place for the plaintiff's intestate to ride in, and instead of riding there he rode on the front platform knowing that he thereby took the risk." Under the circumstances, he was held to have assumed the risk, and plaintiff was not entitled to recover. In *Gaffney v. Union Traction Co., supra,* it was unequivocally held that a passenger riding upon the back platform of a street car, who goes onto the step while the car is in motion and is thrown off by a sudden jerk, is guilty of such contributory negligence as will bar a recovery. But in this state the rule seems to be otherwise. In *Pray v. Omaha Street R. Co.,* 44 Neb. 167, it was held that it was not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will prevent a recovery for injuries received on account of the negligence of persons in charge thereof. The rule in this case was followed and reaffirmed in the case of *East Omaha Street R. Co. v. Godola,* 50 Neb. 906. It would seem that a street railway company, which permits the use of its platforms and steps for the carrying of passengers and collects fares from the passengers riding in such places, is bound as a common carrier to use proper precaution for the protection of the passengers riding in such positions; and, in the absence of any warning to the passenger that such position is dangerous, and in the absence of any rule of the street railway company brought to the knowledge of the passenger that it will not be liable for injuries received by passengers riding upon the platform or step, we think it can-

not be said to be negligence *per se* for a passenger to ride in such position. A passenger riding in such position does not assume the risk of injury arising from the negligent operation of the car. In this case we think it was properly a question of fact whether or not plaintiff's intestate was guilty of such contributory negligence as would bar a recovery.

The defendant further contends that there was no competent evidence in the record of any negligence on the part of the defendant that would justify the submission of the case to the jury. The negligence complained of was the overcrowding of the car and the high rate of speed. The record is replete with evidence showing beyond cavil that the car was full, that passengers were standing in the aisle, and that the rear platform was quite well filled with passengers. Three witnesses testify that the car was moving at the rate of 20 miles an hour, and there were the other circumstances that at least one passenger standing in the aisle was jostled from his feet, that passengers standing inside the car were jerked first one way and then the other by the lurching of the car, that the car ran about 250 feet after the accident before it came to a stop, and that Nelson, when he went from the car, slid 10 to 15 feet, notwithstanding the fact that when his feet struck the pavement he was still holding to the car. So, if this evidence was properly admitted, there was ample evidence to sustain the contention of the plaintiff that the car was moving at a high rate of speed, and, under the circumstances of the crowded condition of the car with passengers standing on the platform and steps, it was proper for the jury to determine whether or not the defendant was guilty of negligence which caused Nelson's death.

In this connection defendant urges that the testimony of the witnesses Johnston, Albert Elsasser and Henning Elsasser, to the effect that the car was moving at the rate of 20 miles an hour, was improperly admitted, for the reason that there was no showing that these witnesses were competent to give an opinion as to the rate of speed

at which the car was going. This question has been before this court on other occasions. In *Omaha Street R. Co. v. Larson,* 70 Neb. 591, this language is used: "We think that a witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate at which the car is moving." This rule was sustained by numerous authorities cited in the opinion, and is approved in the case of *Lindgren v. Omaha Street R. Co.,* 73 Neb. 628. In the instant case it appears that the witness Johnston had been a locomotive engineer for two years, and that he was riding on the front platform of a car following close behind the one on which Nelson was riding. It also appears that both the Elsassers had been residents of the city of Omaha many years, that they lived at the time of the accident by the side of the track in question and immediately adjoining to the place where the accident occurred, that they both had been in the habit of observing street cars. All of these testified that they were able to state approximately the speed of street cars, and from their observation of the car in question knew and were able to state its rate of speed. Under the rule laid down in the foregoing cases, we think these witnesses were competent to give an opinion as to the rate of speed at which the car was moving.

The defendant also contends that there was error in permitting the witnesses Mary Blair and Anna Nelson to impeach the defendant's witness Mead. Mead, who was the motorman in charge of the car, on his cross-examination was asked whether or not he had stated at the coroner's inquest that he was about 10 minutes behind time, and that he was hurrying to make up time, to which he answered that he had not so testified. The witnesses Blair and Nelson testified that he had made such a statement at the coroner's inquest. The point of the objection is that no time and place were stated in the question propounded to the motorman Mead. But he was asked whether or not he had testified before the coroner's inquest, and he answered that he remembered of testifying before the in-

quest. The object of the rule requiring time and place to be fixed is to apprise the witness of when and where and under what circumstances he was supposed to have made the statement to which his attention is called. In this case it appears that he recalled the fact of testifying before the coroner's inquest, and it would have been an idle form to have the statement of the exact time and place of the holding of the inquest. The witness was as fully apprised of the time and place as if it had been named in the question, and we can see no prejudicial error in not fixing the time and place in the question, especially in view of the fact that no objection was made to the form of the question when it was propounded to the motorman Mead.

The defendant complains because the court refused to strike out a portion of one of the answers of the witness Johnston. The question, answer and motion are as follows: "Q. How close were the two cars together? A. Well, we was between Williams and that first curve at the time he was thrown off the car he was on. Mr. Webster: I move to strike out that part of the statement, that he was thrown off, as not being responsive to the question." The answer does not appear to be responsive to the question, and the court should, perhaps, have sustained the motion to strike. But, while it was error on the part of the court, in view of the whole of the testimony of the witness Johnston, which showed that he was an eye-witness to the accident and saw Nelson thrown from the car and fully detailed the manner in which the accident occurred, we fail to see how this error of the court could have prejudiced the rights of the defendant. At the most, it was only a voluntary statement of the witness in which he in effect repeated evidence that had been properly admitted.

Defendant complains of the court's refusal to give instructions No. 2 and No. 4, asked by the defendant. From an inspection of the instructions given, we find that defendant's instruction No. 2 was embodied substantially in

instruction No. 8, given by the court, and that instruction No. 4, asked by the defendant, was fully covered in the sixth paragraph of the court's charge to the jury. As to defendant's instruction No. 2, the same ground was covered in almost the identical language, and in instruction No. 6 the court covered and properly instructed the jury on the same subject matter as was contained in instruction No. 4, asked by the defendant. Under the circumstances no error appears from the refusal to give these instructions.

Defendant complains of the giving of instruction No. 10 by the court, not from any misstatement of the law, but for the reason that it is claimed that it finds no support in the evidence. Defendant contends that there was no evidence of any unusualy swaying or jerk of the car. This contention is not borne out by the record. There was ample evidence in the record tending to show that there was a violent lurching of the car at the time of the accident, and so the instruction was peculiarly applicable to the evidence.

Defendant complains of instruction No. 7, in the following language: "Before plaintiff can recover, he must go further and satisfy you by a preponderance of the evidence that the defendant was guilty of some act of negligence alleged in the petition." The complaint as to this instruction is that it was vague and indefinite, in that it does not tell the jury the precise act of negligence alleged in the petition. But, in instruction No. 5, given by the court, we find that the jury were told that their inquiry should be confined to the single proposition whether or not the car was being operated at a negligent rate of speed just prior to and at the time of the accident. There was no misstatement of the law in instruction No. 7, and, taken in connection with No. 5, the jury were properly instructed on this question. It is not necessary that the court should cover every point in a single instruction. It is sufficient if the instructions taken alto-

gether cover the issues to be submitted to the jury for its consideration.

Instruction No. 8 is complained of for the reason that the same is said to be vague, indefinite, uncertain, confusing, and misleading. No misstatement of the law is pointed out, and we have carefully examined the instruction. While it is lengthy and complex, it contains no misstatement of legal rules so far as we can ascertain. Under the circumstances the giving of the instruction is not reversible error.

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

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

LULU TAYLOR V. C. LAWRENCE STULL, APPELLEE; BYRON CLARK, APPELLANT.

FILED JUNE 7, 1907. No. 14,825.

1. **Attorney's Lien**: BASTARDY PROCEEDINGS. Under section 3607, Ann. St., providing for attorneys' liens, the judgment in favor of the prosecutrix in a bastardy proceeding is subject to the lien of her attorneys for professional services in obtaining such judgment.
2. ———: ASSIGNMENT OF JUDGMENT. An assignment of such judgment after the filing of the attorney's lien does not affect such lien, and the assignee takes the judgment subject to the attorney's lien.

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

Byron Clark, pro se.

A. N. Sullivan, contra.

GOOD, C.

In this action Lulu Taylor recovered a judgment against C. Lawrence Stull in the district court for Cass county, in a bastardy proceeding, for $1,800, to be paid in equal quarterly instalments of $45 for a period of 10 years. One thousand dollars was paid upon this judgment, leaving $800 still due. Byron Clark represented the plaintiff in all of the proceedings as her attorney, and about the time of the payment of the $1,000 filed an attorney's lien in the sum of $485, in which the plaintiff acquiesced, and joined with the attorney in giving notice of the lien to the defendant. Shortly afterwards she assigned the judgment to her brother, Elmer Taylor, making the assignment specifically subject to the lien. Byron Clark made application in the original action to be permitted to enforce his attorney's lien against the defendant out of the unpaid portion of the judgment. The defendant Stull answered, and a trial was had to the court. The court found all of the issues of fact upon Clark's application in his favor, but held as a matter of law that a judgment in a bastardy proceeding was not subject to the lien of an attorney. From this judgment of the district court Clark appeals.

The only question requiring determination is whether or not, under our statute providing for an attorney's lien, a judgment in a bastardy proceeding is subject to such lien. Section 3607, Ann. St., is as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Under the last clause of this section, which provides for the lien upon money belonging to his client in the hands of the adverse party, such lien will ordinarily attach to a judgment in favor of the

attorney's client in a proceeding in which the attorney was employed, and the lien will attach in this case to the judgment, unless a judgment in a bastardy proceeding is not subject to the lien of the attorney who represented the plaintiff in the proceeding.

It is earnestly contended on behalf of the appellee that a lien will not attach to such judgment, for the reason that the money does not belong to the plaintiff in the action; that, while the judgment is nominally in her favor, she is in fact a trustee and receives and holds the money in trust for the support of the bastard child. With this contention we cannot wholly agree. It is doubtless true that in a measure she acts in a trust capacity, and the judgment awarded in such case is largely for the benefit of and for the support of the bastard child. But the mother in such proceeding has a beneficial interest in the judgment. She is liable for the support of her child, and to the extent that she recovers from the father her burdens are lessened. She is also vested with the authority to bring the action in her own name. She is the one to whom the money is paid. She is the one who receives the money and discharges the judgment when paid. She is the one who has the right to use and disburse the money for the support of the child. So, she does not act wholly in a trust capacity in the institution and recovery of a judgment in such proceeding. But, even if it should be held that she acts entirely in a trust capacity, still we do not think that would deprive an attorney of his right to a lien on a judgment in such proceeding.

It has been frequently held that judgments in favor of administrators, executors, and guardians, recovered in their trust capacity, were subject to the lien of their attorneys in such actions, and that the trust fund recovered in such actions was liable for the attorney's liens. It was recently held in the case of *Burleigh v. Palmer,* 74 Neb. 122, that an attorney has a lien as compensation for his services and disbursements and for moneys received by him in his client's behalf in the course of his employment,

and that this right of a lien is not affected by the fact that the client is an executor or trustee, when the services were rendered, or money received, on behalf of the estate.

We can see no real distinction between the liability of a judgment in favor of an administrator or executor and that in favor of a plaintiff in a bastardy proceeding to the lien of the attorney in such action for his professional services.

Appellee urges in the case at bar that the client of the intervener was the mother, and that the fund in the hands of the adverse party belongs to the child. But, if it should be conceded that the mother in instituting the action acted in a trust capacity, then the employment of the attorney was in her behalf as trustee, and the services were rendered to her in her trust capacity, and the judgment would, nevertheless, be liable for the attorney's lien. We are therefore forced to the conclusion that the judgment in a bastardy proceeding is subject to the lien of the attorney representing the mother in procuring the judgment.

The plaintiff in this action assigned the judgment to Elmer Taylor, but in the assignment it was made subject to the attorney's lien. Appellee contends that the assignment of the judgment destroyed the lien, if any existed. To this contention we cannot assent, for the reason that the assignment was expressly made subject to the lien, and whatever rights Elmer Taylor received under the assignment were accepted subject to the lien of the attorney, and, as the amount of the lien was specified and certain, and plaintiff had consented thereto, we cannot see that either Elmer Taylor or the attorney could be prejudiced by such assignment, and we therefore hold that such assignment did not affect the right of the attorney to a lien on the unpaid remainder of the judgment.

There are other questions urged in the brief of the appellee, but they do not appear to have been presented to the trial court, and were, in fact, waived by the pleadings, and it is not necessary to consider them.

For the reasons given, we recommend that the judgment

of the district court be reversed and the cause remanded for further proceedings.

DUFFIE 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.

LINCOLN TOWNSHIP, APPELLANT, V. KEARNEY COUNTY, APPELLEE.

FILED JUNE 7, 1907. No. 14,854.

1. County Commissioners: DISALLOWANCE OF CLAIMS. Action of the board of county supervisors in disallowing a claim against the county is final, unless appealed from.

2. ———: ———: NOTICE. The action of the board of county supervisors in disallowing a claim of a township is not affected by the fact that the notice of such disallowance was mailed to a person who was an officer of the township at the time of the filing of the claim, but who had resigned his office, when the written notice was delivered by such ex-official to his successor in office within five days from the order of disallowance.

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

Joel Hull, for appellant.

L. C. Paulson and *C. P. Anderbery, contra.*

GOOD, C.

In October, 1904, Earl Watkins became ill with typhoid fever in Lincoln township, Kearney county, Nebraska. For about five months previous thereto he had worked as a farm hand and in other capacities in different parts of Kearney county. He was a minor about 18 years of

age, and had neither parents nor relatives in Nebraska so far as known. At the time he became ill he had no property or means of support. L. R. Brown, justice of the peace, *ex officio* overseer of the poor and chairman of the town board of Lincoln township, upon being notified of Watkins' illness and his need of care and attention, caused Watkins to be taken to a boarding house, and procured medical services and nursing until Watkins recovered. The bills for the boarding, nursing and medical attendance were presented to and allowed by the town board of Lincoln township, amounting to about $78. The town board directed its chairman and overseer of the poor, L. R. Brown, to file a claim against the county to reimburse the township for the expenditures so incurred. On the 3d day of January, 1905, Brown verified the claim in favor of Lincoln township against Kearney county and filed the same with the county clerk of said county, and on the same day, being about to remove his residence from Lincoln township, also filed his resignation as justice of the peace and *ex officio* overseer of the poor and member of the town board with said board, which resignation was then and there accepted. One Larson was appointed as his successor in office, took the oath and filed his bond with the county clerk of Kearney county on the 12th day of January, 1905, which bond was approved by the board of supervisors on the 21st day of February following. On the 21st day of February, 1905, the board of supervisors of Kearney county passed upon the claim of Lincoln township and rejected the same. On the day following the county clerk mailed a notice, addressed to L. R. Brown, giving notice that the claim of Lincoln township was rejected by the county board at its meeting held on the 21st day of February, 1905. It should be borne in mind that at this time Brown had ceased to be an officer of Lincoln township. The evidence shows that, within two or three days after the notice was mailed, Brown received the same through the post office. His successor in office, Larson, being at the time in the post office, Brown

turned the notice over to him. Lincoln township did not appeal from the judgment of the board of supervisors disallowing its claim, but some months later filed another claim, covering the same items of expenditure, and differing from the first claim only in the fact that it made the items more explicit and set them out in greater detail. In due time this claim was brought to the attention of the board of supervisors and was disallowed, for the reason that it represented the same items of expenditure which had been previously passed upon and rejected. From the order disallowing this claim Lincoln township appealed to the district court for Kearney county. The plaintiff filed its petition in the district court, setting up all the facts in great detail. The defendant county answered, admitting the corporate existence of each of the parties, pleaded the former adjudication of the county board, and denied all the other allegations of the petition. A jury was waived and trial had to the court, with findings and judgment for the defendant. Plaintiff brings the case to this court on appeal to review this judgment.

This court has held repeatedly that the county board in passing upon such claims against the county acts judicially, and its findings have the same force and effect as a judgment, and are final unless appealed from. *Taylor v. Davey,* 55 Neb. 153; *Dixon County v. Barnes,* 13 Neb. 294; *Sioux County v. Jameson,* 43 Neb. 265; *State v. Merrell,* 43 Neb. 575; *Cuming County v. Thiele,* 48 Neb. 888. Appellant contends, however, that the action of the county board in rejecting its claim on the 21st day of February, 1905, was nugatory and not binding upon appellant, for the reason that appellant was not notified of the order of the board in rejecting its claim. We should be very glad if we could conscientiously adopt this view, for the reason that it appears from the record that the claim of Lincoln township against Kearney county was just and meritorious, and we regret that there is a stumbling block that prevents the township from being reimbursed for its expenditures incurred in its commendable

and praiseworthy efforts to care for and help the needy within its jurisdiction. But, however much we should like to see plaintiff recover upon its just claim, courts are bound to interpret and follow the law as they find it. By section 4455, Ann. St., it is provided that "upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing, of the fact, within five days after such disallowance. Notice mailed within said time shall be deemed sufficient." By this section the claimant is allowed twenty days from the order of disallowance in which to appeal. The object of the law in providing for notice to the claimant is that he may be informed of such disallowance, so that he may, if he feel aggrieved, appeal to the district court within the statutory time. In this case the notice was originally sent to L. R. Brown, who was an officer at the time of the filing of the claim; and, while he had ceased to be such officer at the time of the notice, yet the fact that the notice was delivered to the officer who succeeded Brown within the five days after the disallowance of the claim informed the plaintiff of the action of the county board. It then had knowledge of the disallowance of its claim, and had the opportunity to appeal from the order of disallowance; but, instead of exercising that statutory right, it neglected to do so until it had lost its right of appeal and the order of disallowance had become final. Plaintiff's right having been determined and adjudicated, it could not thereafter gain any rights by refiling its claim.

From what has been said, it follows that the judgment of the district court is right and should be affirmed, which we accordingly recommend.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

MARGARET SULLIVAN ET AL., APPELLANTS, V. FRANK P. CONRAD ET AL., APPELLEES.

FILED JUNE 7, 1907. No. 14,863.

1. **Appeal:** EVIDENCE. Rulings of the trial court in excluding certain evidence offered examined, and *held* prejudicial error.
2. **———:** INSTRUCTIONS. Instructions that withdraw from the consideration of the jury any material issue in the case, properly pleaded and supported by competent testimony, are erroneous. Instructions No. 6 and No. 8 examined, and *held* to withdraw a material issue from the consideration of the jury.
3. **Intoxicating Liquors:** DAMAGES: EVIDENCE. Under the civil damages section of our liquor law (Ann. St., sec. 7165), under ordinary circumstances a saloon-keeper is not liable for damages resulting from the use of intoxicating liquors, where the liquors were sold by the saloon-keeper to a third person, who thereafter furnished the liquor to the person who became intoxicated and caused the injury complained of, if it appears that the saloon-keeper had no knowledge or reason to believe that the liquors sold to the third person were to be furnished to the person who became intoxicated.

APPEAL from the district court for Jefferson county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

W. J. Moss, for appellants.

Heasty & Barnes, contra.

GOOD, C.

Margaret Sullivan, on behalf of herself and five minor children, brought suit in the district court for Jefferson county against Frank P. Conrad and Fred F. Borland, two licensed saloon-keepers in the city of Fairbury, and joined with them their respective sureties on their liquor license bonds, to recover for damages to their means of support which, she alleged, was caused by the two principal defendants selling intoxicating liquors to John Sullivan, the husband and father of the plaintiffs. In her petition she alleged that both of said saloon-keepers sold and furnished to said John Sullivan intoxicating liquors

from the 3d day of May, 1904, until the 23d day of February, 1905; that, by reason of the use of the intoxicating liquors so sold and furnished, John Sullivan became a drunkard and was incapacitated to support the plaintiffs; that on the 23d day of February, 1905, while intoxicated from liquors furnished by the principal defendants, he resisted arrest by the city marshal of the city of Fairbury, and, while resisting said officer, was struck by him, and, by reason of the blow and of his intoxication, he fell upon the pavement and received injuries from which he died a few hours later. The jury returned a verdict in favor of the plaintiffs as against defendant Frank P. Conrad and his bondsmen in the sum of $450, but found in favor of defendant Borland and his bondsmen. Plaintiffs moved for a new trial, which was denied, and now bring the action to this court for review.

Complaint is made of certain rulings of the trial court in the exclusion of evidence, and in the giving and refusing of instructions. Plaintiffs offered direct evidence tending to show that the defendant Borland, during the period complained of, had sold and furnished liquors to John Sullivan. Among other things, Margaret Sullivan testified that her husband frequently brought home bottles or flasks of whiskey, which he drank, and one particular bottle, bearing the label, "Whiskey. Sold by Fred F. Borland, Fairbury, Neb.," was offered in evidence when she testified that she had seen her husband bring this particular bottle home and drink the liquor therefrom. The court excluded this offer from the consideration of the jury. The defendant Borland and his bartenders testified, denying that they sold any liquors to John Sullivan during the time complained of. In view of the conflict between the testimony of the plaintiffs and the defendants as to whether defendant Borland had sold any liquors to John Sullivan during the period named, we think that any fact or circumstance which would have a tendency to corroborate the testimony of either side was properly admissible. While there was no testimony that anyone saw

Sullivan buy or procure this particular bottle of liquor from Borland, yet the fact that Sullivan brought home a bottle of liquor which bore the printed label of defendant Borland was a circumstance which tended in some degree to support and corroborate the evidence offered by plaintiffs, and, while it was not conclusive that the liquor in the bottle was furnished by Borland to Sullivan, it was a circumstance which was proper to go to the jury for its consideration in determining the question as to whether or not Borland had furnished any of the liquors which contributed to the cause of the alleged loss of support. We are of opinion that this ruling of the court was error, and, as the jury found entirely in favor of Borland and his sureties, the ruling was prejudicial to the plaintiffs.

Two instructions of the court are particularly complained of. The first one is as follows: "No. 6. In order to return a verdict in favor of plaintiffs for loss of support caused by the death of Sullivan, you must be satisfied by a preponderance of the evidence, not only that Sullivan was intoxicated and that liquors furnished by Conrad and Borland contributed to produce such intoxication, but, further, that his intoxication was a contributing cause to his death. Unless you are convinced that Sullivan's intoxication contributed to produce the injury which resulted in his death, there can be no recovery in this suit." By the latter part of this instruction the court excluded from the consideration of the jury any loss or injury sustained by the plaintiffs to their means of support prior to the death of Sullivan. It must be borne in mind that the plaintiffs sue to recover for damages to their means of support from the 3d day of May, 1904, thenceforward, and that they complain of the injury to their means of support prior to, as well as after, the death of the husband and father. The means of support might be only partially impaired prior to his death and wholly lost thereafter, but the fact that the means of support was wholly cut off did not preclude the plaintiffs from

recovery for any injury sustained prior thereto which the evidence would show them to have sustained. The defendants contend that there is no evidence in the record that would warrant any finding of any loss of support prior to the death of Sullivan. It becomes necessary, therefore, to determine whether or not there is sufficient evidence offered to entitle this question to be submitted to the jury. We have examined the evidence with considerable care, and, while the evidence is neither clear nor satisfactory as to any loss of support prior to the death of Sullivan, yet there was evidence that Sullivan spent part of his earnings in the saloons, that he drank to excess and on a few occasions was drunk, and that he did not attend to his work and duties as well as he did before he became addicted to the excessive use of intoxicants. We are of opinion, on the whole, that the evidence was sufficient to warrant the court in submitting to the jury for its determination the question of the injury to plaintiffs' means of support occurring previous to the death of Sullivan. By the instruction referred to the court withdrew this question from the consideration of the jury. We think, under the circumstances, this instruction should not have been given, and that it was prejudicial to the plaintiffs.

That part of instruction No. 8 complained of is in the following language: "If Conrad or Borland did not furnish to Sullivan any of the liquor which contributed to produce the intoxication that resulted in his death, then you cannot return a verdict against them or their bondsmen, and you must be satisfied by a preponderance of the evidence that either Conrad or Borland furnished to Sullivan liquors which contributed to such intoxication, or you must find for the defendants, and your verdict can in no event be against either one of the principal defendants and their respective bondsmen, unless you are convinced by a preponderance of the evidence that he sold or furnished Sullivan intoxicating liquors which contributed to the intoxication which in whole or in part caused his death." This instruction contains the same vice as in-

struction No. 6, except that it enlarges and amplifies the same view, which was improperly given the jury in No. 6. The same observations that apply to No. 6 apply also to No. 8.

Complaint is also made of instruction No. 5, which is in the following language: "You are instructed that the fact that the witness Joe Burke purchased a pint of whiskey at defendant Conrad's place of business on the day of the accident, which he subsequently gave to Sullivan, can have no bearing upon Conrad's liability in this suit, except on the issue of Sullivan's intoxication at the time of his death, for the reason that Mr. Conrad had no notice or knowledge that Burke intended that Sullivan was to have any part of such liquor. Evidence that Burke did give the liquor purchased to Sullivan was admitted for your consideration only for the reason that it tended to show Sullivan's intoxication at the time he was killed." The evidence discloses that on the afternoon preceding the death of Sullivan he drank a single glass of whiskey at the bar of defendant Conrad. It further shows that the witness Joe Burke the same afternoon purchased a pint of whiskey from defendant Conrad, and that Burke gave a part of this whiskey to Sullivan, which Sullivan drank, and that the whiskey so furnished Sullivan by Burke contributed to his intoxication which caused his death. The court permitted the evidence to go to the jury for the purpose of showing Sullivan's intoxication at the time he received the injury that caused his death, and, by the instruction, informed the jury that this could have no bearing upon Conrad's liability in the suit, in the absence of any evidence that Conrad had notice or knowledge that the liquor bought by Burke was intended for Sullivan. This presents a phase of our liquor law that, so far as we are aware, has not been determined by this court; that is, whether or not a saloonkeeper is liable to one who uses intoxicating liquors and by reason of such intoxication is injured, when the injured person did not obtain the intoxicating liquors from

the saloon-keeper, but from a person to whom the saloon-keeper had sold or furnished intoxicating liquors, without notice or knowledge that such liquors were to be given or furnished to the person who received the injury. Whether he is liable in such a case depends upon whether the injury can be said, under the circumstances, to grow out of the saloon-keeper's traffic in intoxicating liquors. In such case there is no traffic in intoxicating liquors between the saloon-keeper and the person who received the injury. The traffic in such case is limited to the person who purchased the liquor. To hold the saloon-keeper liable under such circumstances would deprive him of any benefit from the exercise of the most careful judgment in the sale of liquors. If he may be held liable where the sale or furnishing of the liquor is removed one step from the person who becomes intoxicated and injured, either in time or person, then we are at a loss to know where the line might be drawn. If he may be held liable in such case, we see no reason why he should not be held liable if he should sell to A, who might a month or a year thereafter give the liquor to B, who from its use might become intoxicated and injured. Or, to go further, he might exercise the utmost caution and good judgment in selling to A, who might thereafter give the liquor to B, and B furnish it to C, and so on through a half a dozen persons, until the liquor originally sold to A, might a year thereafter be given by some third or fourth person to an habitual drunkard, who would become intoxicated and suffer an injury, which would impair the means of support of the wife and family of the habitual drunkard, to whom the saloon-keeper under no circumstances would have sold or furnished any liquor. We do not think such a construction of our liquor law is warranted, nor do we think that injuries under such circumstances were contemplated by the framers of the civil damage section of our liquor statute. We have not been cited to any authorities in point by counsel for either side, but we find support given to this view in Black, Intoxicating Liquors,

sec. 294, from which we quote the following: "As a rule, the liability under the civil damage laws is confined to the person who directly caused the intoxication complained of, by furnishing liquor to the inebriate. If the same liquor has passed through several hands, this does not establish a joint or successive liability on the part of all those who have sold it. Thus, if A sells liquor to B, and B sells it to C, and C thereby becomes intoxicated and injures D, the latter has a right of action against B, but not against A." The rule might be different, however, if the first vendor knew, or had good reason to believe, when he sold the liquor, that the purchaser intended to furnish it to a third person, if such third person thereafter became intoxicated and thereby caused damage to himself or another.

There are other errors complained of; but, since this cause must be reversed for the reasons heretofore given, and the other errors complained of do not appear likely to arise upon a new trial, we refrain from considering them.

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

DUFFIE 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.

HARRY FORD V. STATE OF NEBRASKA.

FILED JUNE 7, 1907. No. 14,695.

1. **Statutes: CONSTRUCTION.** In construing a statute it will not be presumed that the legislature intended any provision of an act to be without meaning.

2. **Intoxicating Liquors, Keeper of.** A person who is found in possession of intoxicating liquors, with the intention of disposing of same without license, is a keeper within the meaning of the provisions of section 20, ch. 50, Comp. St. 1905.

3. **Criminal Law: INFORMATION: SEVERAL COUNTS: VERDICT.** Where several counts are included in the same information, a conviction on one count may be sustained, although the jury ignore the others, and a judgment upon one of several counts, with no verdict as to the others, operates as an acquittal on the other counts. *Casey v. State*, 20 Neb. 138, overruled.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Rinaker & Bibb, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

JACKSON, C.

The plaintiff in error was prosecuted for a violation of the Slocumb law. The information contains four counts. The jury returned a verdict of guilty on the second count and ignored the other three. A motion in arrest of judgment was interposed on the ground that the count upon which the verdict of guilty was rendered does not charge an offense punishable under the laws of the state. The motion was overruled, and a judgment of conviction rendered on the verdict. The count upon which the conviction rests is as follows: "Said S. D. Killen, county attorney aforesaid, further upon his oath gives this court to understand that on or about the 9th day of July, 1905, on the second floor of the two-story brick building at the southeast corner of Third and Court streets in the city of Beatrice, Gage county, Nebraska, Harry Ford then and there did unlawfully keep and have for sale certain intoxicating liquors, to wit, whiskey, without having first obtained a license or druggist's permit therefor; that said intoxicating liquor above described was intended to be and was then and there by said Harry Ford being kept

for sale unlawfully without license or druggist's permit therefor, nor was said whiskey kept for sacramental or mechanical purposes, nor for home consumption, but said whiskey was kept for sale by said Harry Ford unlawfully and contrary to the form of the statute in such case provided, and against the peace and dignity of the state of Nebraska."

The complaint is made under the provisions of section 20, ch. 50, Comp. St., 1905, the portion of which involved in the inquiry is as follows: "Hereafter it shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license in violation of this chapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined or imprisoned as provided in section eleven of this chapter." The objection urged against the information is that it does not charge that the defendant was found in possession of the liquors unlawfully kept for sale, that the gravamen of the offense lies in the fact of being found in possession, and that the complaint omitting the words "found in possession," therefore, states no offense under the statute. We do not assent to that construction. The statute should be construed with reference to its object, the connection with which the provisions are used, the evident intention of the legislature, and so as to give it a practical operation, so far as possible. The word "keep" denotes possession, and the statute makes the fact of being found in possession evidence that the person so found is keeping intoxicating liquors within the meaning of the statute, and, if it is further shown that the possession is coupled with an "intention of disposing of the same without license in violation" of the law, the crime is complete. The complaint is not very artistically drawn. It will be noticed that it does not charge in the language of the statute that the liquors were kept with the intention

of disposing of them without license. The allegation is that the liquor "was intended to be and was then and there by said Harry Ford being kept for sale unlawfully without license." It is sufficient to charge a statutory misdemeanor in the language of the statute, but a complaint is not necessarily fatal because it fails to use the precise words of the statute. If plain language of a precisely equivalent meaning is used, it is generally held to be sufficient. The construction contended for would apparently make the first clause of the section meaningless. We think that the complaint was sufficient against an attack coming for the first time after conviction.

Complaint is also made that the verdict does not respond to all the counts of the information, and that the verdict is therefore contrary to law under our holdings in *Williams v. State,* 6 Neb. 334, and *Casey v. State,* 20 Neb. 138. In the case of *Williams v. State* the identical question was not involved, and that case is not to be taken as authority on the question now being discussed. The holding in *Casey v. State* was put upon the ground that, having adopted the Ohio code, we were bound to follow the courts of that state in the construction accepted by them. The supreme court of Ohio, however, no longer follows the rule contended for. *Jackson v. State,* 39 Ohio St. 37. The general rule is that a verdict of guilty on one count, without responding to other counts in the same information, is equivalent to a verdict of not guilty as to such other counts. Wharton, Criminal Pleading, sec. 740. In fact, so far as the writer has investigated the question, this court stands alone in holding to a contrary doctrine. The case of *Casey v. State, supra,* was reviewed and criticised by the supreme court of the United States in *Selvester v. United States,* 170 U. S. 262, where the principle is discussed and the general rule announced as being contrary to our decision. A well-considered case on the subject is that of *State v. McNaught,* 36 Kan. 624, where the authorities are reviewed. The reason which induced the decision in *Casey v. State, supra,* no longer prevails, and

there remains no reason why our decision in this case should not rest upon correct principles of law and be in harmony with the weight of authority.

It is said that the second count of the information is insufficient for the further reason that it is not charged that the offense was committed in the state of Nebraska. It will be observed that the charge is that the offense was committed "in the city of Beatrice, Gage county, Nebraska." We do not regard the omission of the word "state" as being at all important to the validity of the complaint.

The only remaining assignment of error relates to the sufficiency of the evidence to sustain the verdict. There is direct evidence to justify the jury in finding that the defendant rented the rooms in which the liquor was found, that he assisted in taking the liquor to the rooms, and directed one Fisher with reference to the sales and the prices to be charged, and that he received the proceeds of the sales in cash.

We find no reversible error in the record, and recommend that the judgment be affirmed.

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

AFFIRMED.

BAZELMAN LUMBER COMPANY, APPELLEE, V. JAMES W. HINTON ET AL., APPELLEES: PEARL JOHNSON ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 14,798.

1. **Vendor and Purchaser:** CHATTEL MORTGAGE, LIEN OF. A *bona fide* purchaser of real estate, without notice of an existing chattel mortgage given by his vendor on a dwelling house situate thereon, takes the title free from the lien of such chattel mortgage.

2. **Mortgage Foreclosure:** EVIDENCE. It is not incumbent on the plain-

tiff in an action to foreclose a real estate mortgage to prove title to the real estate in the mortgagor as against such mortgagor and his privies.

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

D. A. Harrington and *W. T. Wills,* for appellants.

M. F. Harrington, contra.

JACKSON, C.

The evidence in this case is somewhat conflicting, but we think the following facts may fairly be said to have been established: On July 2, 1902, J. W. Hinton purchased of the Pioneer Townsite Company lots 4, 5 and 6, in block 1, in the town of Bristow, Boyd county, for an agreed consideration of $325, of which sum $81.25 was paid in cash. The townsite company gave him a written contract for the conveyance of the premises by warranty deed upon completion of deferred payments. Hinton erected on these premises a small dwelling house and a livery barn. On November 7 of that year Hinton gave the plaintiff a chattel mortgage on these buildings to secure an indebtedness of $915.35. This mortgage was filed and entered on the chattel mortgage index of Boyd county on the 14th of the same month, but not recorded. The mortgage was taken by the plaintiff with the knowledge of Hinton's equitable interest in the real estate. Hinton was indebted to the defendant Pearl Johnson in about the sum of $550, and on January 23, 1903, he, joining with his wife, assigned the contract from the Pioneer Townsite Company to Pearl Johnson in satisfaction of his indebtedness to her. Mrs. Johnson paid Hinton $80 additional in cash, and assumed the remainder due on the contract, which she paid out, and received from the Pioneer Townsite Company on August 31, 1903, a warranty deed to the real estate. The contract with the Pioneer Townsite Company and assignment to Mrs. Johnson were recorded

and entered in the numerical index in the office of the county clerk of Boyd county January 31, 1903, and the deed from the Pioneer Townsite Company to Mrs. Johnson was recorded and entered in the index on September 25, 1903. The transactions between Hinton, Mrs. Johnson and the Pioneer Townsite Company were all without knowledge, on the part of Mrs. Johnson, of the chattel mortgage to the plaintiff. On the 16th day of August, 1904, Pearl Johnson and her husband mortgaged said real estate to the intervener, M. P. Meholin, to secure a loan of $700, payable January 1, 1905. This mortgage was recorded on the date of its execution. On October 13, 1904, plaintiff instituted this action in the district court for Boyd county for the purpose of foreclosing its chattel mortgage. Pearl Johnson and her husband answered, claiming title free from the chattel mortgage lien. Meholin intervened, claiming a first lien on the premises by reason of his mortgage and praying a foreclosure thereof. In the trial court, the decree was for the plaintiff, establishing its mortgage as a first lien on the buildings. Meholin had a decree foreclosing his real estate mortgage and establishing his lien subject to the plaintiff's lien on the buildings. The Johnsons and the intervener appeal.

The case of *Holt County Bank v. Tootle, Livingston & Co.*, 25 Neb. 408, is cited by the appellees to sustain the decree. From the statement of that case it appears that Bridget Gorman bought a lot in the village of O'Neill under contract, by the terms of which she paid $25 in cash, and was to pay $50 later. She erected a building on this lot, and to secure an indebtedness to Tootle, Livingston & Company gave that firm a chattel mortgage on the building, the mortgagee not being aware of the fact that Gorman had any interest in the real estate. Prior to the execution of the chattel mortgage a lumber firm filed a lien for material furnished in the erection of the building. Gorman was also indebted to the Holt county Bank, and later secured that indebtedness by a real estate

mortgage covering the lot. The bank assumed the payment of the mechanic's lien, and took an assignment of the contract of purchase and a quitclaim deed from Gorman. This latter transaction was with knowledge of the chattel mortgage to Tootle, Livingston & Company. The bank paid off the remainder due on the contract for the purchase of the lot, and took a deed from the owner of the legal title. Tootle, Livingston & Company foreclosed their chattel mortgage, and bid the building in at the sale. They then brought suit against the bank for the value of the building, which had not been removed from the premises, and it was held that, while the bank was entitled to be subrogated to the rights of the mechanic's lien holder, it was liable to the purchaser at the chattel mortgage sale for the value of the building, diminished by the amount of the mechanic's lien. The reasoning in the case is that, had the bank proceeded to foreclose its real estate mortgage, it would have been entitled to a lien on the premises superior to that of the chattel mortgage, but, having taken a quitclaim deed from the mortgagor, with knowledge of the chattel mortgage lien, it acquired thereby the interest of the mortgagor only, subject to the incumbrance of the chattel mortgage. We do not regard the holding in that case as controlling under the facts in this case. It is authority to the extent that it is there said that a chattel mortgage, given on buildings by the owner of real estate, is valid as between the parties, but the litigation here is between one claiming under a chattel mortgage and a subsequent purchaser and lien holder in good faith. The features which control the case of *Holt County Bank v. Tootle, Livingston & Co., supra,* are entirely lacking in the case at bar.

Another contention of the appellee is that, because the title to the real estate was not proved to have been in the Pioneer Townsite Company at the time they gave the contract and deed, the defendants must fail, and our attention is called to the case of *Gilman v. Crossman*, 75 Neb. 696. An examination of that case discloses that

Gilman sought to foreclose a mortgage, and in the action instituted for that purpose Crossman was made defendant, it being charged in the petition that he claimed title under a sheriff's deed issued in tax foreclosure proceedings against the premises. Crossman filed a general denial, and alleged that he was the owner in fee simple of the premises and in possession thereof under claim of title. He was permitted at the trial to testify, without objection, that he was the owner of the premises and in possession under claim of title. The source of his title was not traced, and it was held that, while it was not necessary for the mortgagee to prove title to the mortgaged premises in the mortgagor as against the mortgagor and his privies, because they are each estopped by the execution of the mortgage from denying the mortgagor's title, yet, as against a defendant who claims title adversely to a mortgagor, this rule does not apply. Here again the case differs from the case at bar. While the plaintiff in this action claims no interest in the real estate, yet his interest in the subject matter is traced to the same source as that from which the defendants derive their claim of right.

Our conclusion is that the judgment of the district court was erroneous. We have reached that conclusion reluctantly, because the consideration for the plaintiff's chattel mortgage was lumber and material furnished by the plaintiff for the erection of the buildings on the real estate involved; but we cannot ignore legal principles for the purpose of aiding the plaintiff in its dilemma. The defendant Pearl Johnson took title to the real estate free from the lien of the plaintiff's chattel mortgage, and the intervener Meholin should be decreed to have a first lien thereon under his real estate mortgage.

It is recommended that the decree of the district court be reversed and the cause remanded, with directions to enter a decree in conformity with this opinion.

AMES and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in conformity with this opinion.

REVERSED.

MARY G. RUSSELL, APPELLEE, V. ESTATE OF JOHN A. CLOSE ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 14,836.

Witnesses: COMPETENCY. In an action against the representative of a deceased person, founded on an alleged contract between the plaintiff and the deceased, where the execution and delivery of a contract is denied, the plaintiff is an incompetent witness to prove the fact of delivery.

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

George L. Loomis and *H. C. Maynard,* for appellants.

J. C. Cook and *Stinson & Martin, contra.*

JACKSON, C.

The plaintiff had judgment in an action against the representative of a deceased person. One cause of action was founded on a written promise of the deceased to pay the plaintiff $1,000, or leave that sum to be paid to her at his death for services rendered as housekeeper, companion and nurse. The execution and delivery of this instrument were put in issue by objections to the allowance of the claim. The trial was to a jury. The foundation for the introduction of the instrument in evidence was through the testimony of the plaintiff, who was permitted, over the objection of the defendant, to testify that the signature was that of the deceased person and that the document

had been in her possession since its execution. The admission of this evidence is assigned as error.

It is provided by section 329 of the code: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the party having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Construing this provision of the code, it was held in *Kroh v. Heins,* 48 Neb. 691, that the word "transactions" as there employed embraces every variety of affairs which form the subject of negotiations or actions between the parties. It is possible that the testimony of the plaintiff that the contract was in the handwriting of the deceased might be held to be evidence of an independent fact, which any one acquainted with the handwriting could testify to, but the rule could not be extended to permit the plaintiff to prove delivery by her own evidence, and the objection to her testimony for the purpose of proving delivery should have been sustained.

For the error of the trial court in admitting the testimony of the plaintiff to prove the delivery of the contract by the deceased, we recommend that the judgment be reversed and the cause remanded.

AMES, C., concurs.

CALKINS, 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.

REVERSED.

GUSTAV D. W. KOHLER, APPELLEE, V. GEORGE B. HUGHBANKS, APPELLANT.

FILED JUNE 7, 1907. No. 14,852.

Appeal: HARMLESS ERROR. The action of a trial court in withdrawing a cause of action from the consideration of the jury will not be held erroneous on account of the reason given therefor by the court, if the withdrawal is proper for any reason.

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

J. H. Linderman and *George C. Gillan,* for appellant.

E. A. Cook, contra.

JACKSON, C.

The plaintiff, as landlord, sued the defendant for rentals and had judgment, from which the defendant appeals.

The items involved were $15 for the use of alfalfa land, $23.50 for rent of a small pasture, and $50 for use of a larger pasture. The item of $15 for alfalfa was admitted. That of $23.50, rental of small pasture, was eliminated by the trial court, and the amount of recovery on the last item was dependent upon the number of head of stock kept in the larger pasture. The judgment was for $59, and is assailed as being contrary to the evidence.

Both parties agree that the use of the larger pasture was worth 40 cents a month per head of stock pastured, and the evidence on behalf of the plaintiff tends to prove that the defendant had 26 head of cattle in the pasture for 5½ months, besides as many as 11 head of horses at a time when they were counted by one of the plaintiff's witnesses.

The stock thus accounted for was in addition to 10 head which the defendant was entitled to have pastured free. The defendant testified that he had only 20 cattle in the pasture in all, and those for 5 months, besides 8 horses for 3 or 4 days. Judgment for a less amount would have been more in accord with our own ideas of a just determination of the litigation, but the weight to be given to the evidence involves a question exclusively within the province of the jury, and we are not at liberty to disturb their findings, where there is a substantial conflict in the evidence.

The answer contained a counterclaim, all items of which were put in issue by denial, and, with one exception, submitted to the jury upon conflicting evidence. The findings of the jury as to the defendant's cause of action are conclusive within the rule already stated.

The exclusion of one item of the defendant's counterclaim is challenged as erroneous. It appears that a single well supplied the water for the two pastures referred to, and that the lease of the farm upon which these pastures were situate provided that the defendant should keep the pump and windmill in repair, the plaintiff to furnish the material for that purpose. The item of defendant's counterclaim excluded was $30 for pumping water by hand during a time when it was claimed the mill was out of repair and incapable of pumping sufficient water to supply the needs of all the cattle kept in the pasture. The trial court held that the cost of pumping water by hand was not a proper measure of damages. We think the item was properly excluded for another reason. The obligation to repair the mill rested upon the defendant by the express terms of his contract, and the evidence does not disclose that he ever requested the plaintiff to furnish material for that purpose. There was some talk about a new mill, which was ultimately provided, so that under no theory of the case was the defendant entitled to have his claim for pumping water considered by the jury.

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

AMES and CALKINS, CC., concur.

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

AFFIRMED.

MARY E. WIRSIG, GUARDIAN, APPELLEE, V. GEORGE F. SCOTT ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 14,859.

1. Domicile: PRESUMPTIONS. The domicile of the parents is presumably the residence of their minor children, but that presumption may be overcome by facts and circumstances showing a different condition.

2. Guardians: APPOINTMENT: COLLATERAL ATTACK. Where minor children over the age of 14 years apply for and, with the consent of their parents, procure the appointment of a guardian of their persons and property, the proceeding is not open to collateral attack on the ground that the parents are the natural guardians of their children.

APPEAL from the district court for Loup county: JAMES R. HANNA, JUDGE. *Affirmed.*

A. S. Moon, for appellants.

Guy Laverty and *A. M. Robbins, contra.*

JACKSON, C.

Alfred Wirsig resides in school district No. 23, Loup county. He purchased a valuable farm in school district No. 5 of that county. He is the father of two children, Otway Wirsig, aged 17, and Alpha Wirsig, aged 15. In July, 1905, these children went to live on the farm in school district No. 5, under an agreement with their father that they should take charge of the farm, use so much of it

as they choose, and pay a crop rent therefor. They kept house by themselves, the furniture having been given them for that purpose. They owned three head of horses and ten head of cattle, which, with stock belonging to the father, they kept on this farm. At their request and with the consent of their parents, Mary E. Wirsig, an aunt, was by the county judge of Loup county appointed guardian of their persons and estate. The guardian resided in school district No. 5. On September 11, 1905, they attempted to attend the public school in district No. 5, where they then resided. The teacher, by direction of the board, refused to receive them into the school. This action was instituted by the guardian, on behalf of her wards, to enjoin the board and teacher from interfering with their attendance at the school. A temporary injunction was allowed, which on final hearing was made perpetual. The defendants appeal.

The refusal of the officers of the district to allow these children to attend the school in district No. 5, was put upon the ground that they were nonresidents of the district, and prior to the commencement of this action, on the advice of counsel, who informed them that it might save litigation, they tendered fees as nonresident pupils, the tender of fees was refused, and the denial of their right to attend the school was absolute.

The first question presented by the appeal is that the proceedings resulting in the appointment of the guardian were void, and that the action was improperly brought in the name of Mary E. Wirsig, guardian. This contention is put upon the ground that the parents are the natural guardians, and that, while living, a guardian cannot be appointed unless the unsuitableness of the parents is adjudicated, and numerous authorities are cited in support of that contention. That rule is applicable where the appointment of a guardian is resisted by the parents, but we know of no rule of law which will prevent the parents from voluntarily surrendering the custody and control of their children to a suitable guardian, if they choose to do

so, and, having taken that course and the proceedings being regular on their face, the appointment cannot be collaterally attacked, and the guardian, standing in *loco parentis* to the children, may maintain the action. *Mizner v. School District,* 2 Neb. (Unof.), 238. Nor does the fact that the children are not members of the same household with their guardian militate against this rule.

It is urged, further, that the legal domicile of the minor children is necessarily with their parents. That is a mere presumption, and is overcome by the facts showing a different condition. *McNish v. State,* 74 Neb. 261. The evidence is positive, direct, and without conflict, that the children did not move into school district No. 5 for the purpose of obtaining school privileges, and is sustained by the facts and circumstances shown to surround their removal. The case is governed in principle by the rule in *State v. Selleck,* 76 Neb. 747, where it was said: "If a family, or the person or persons having the legal custody and control of children of school age, remove to and live in a school district other than the district of their legal residence, and such removal is not for the purpose of obtaining school privileges, but is principally from other motives, such children are entitled to free school privileges while so living in the district." It is the policy of the state, declared in our fundamental law and followed by legislative enactment, to provide free public school privileges for children of school age, and that privilege must not be unreasonably denied. There is no equity in the position taken by the defendants. The children are residents of the school district within the meaning of the law. They are taxpayers and contribute to the support of the school which they sought the privilege of attending. The judgment of the district court has ample support in the facts, and is abundantly sustained by principle and authority.

We recommend, therefore, that it be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

FRED F. BORLAND, APPELLEE, V. A. D. HEGES ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 14,862.

Appeal: TRANSCRIPT. A transcript of the proceedings before a license board upon an application for a license for the sale of liquors, which does not contain a certified copy of the final order of such board, presents no question for review on appeal.

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

W. J. Moss, for appellants.

Heasty & Barnes, contra.

JACKSON, C.

This is an appeal from a judgment of the district court for Jefferson county in a case coming into that court by appeal from the city council of Fairbury in the matter of an application for a license for the sale of liquor.

The appellee insists that the record is insufficient to justify a review of the proceedings. The record consists of the judgment of the district court, to which is appended the following certificate: "State of Nebraska, Jefferson County, ss.: I, O. N. Garnsey clerk of the district court for Jefferson county, Nebraska, do hereby certify that the foregoing is a true and perfect transcript of the record in the above entitled cause as the same is on file and of record in my office. O. N. Garnsey, Clerk of the District Court." Following this, and attached, is a bound volume assumed by appellant to contain a transcript of the proceedings had before the city council. The appellee con-

tends that the certificate of the clerk of the district court is not sufficient to cover the proceedings of the city council, which follows instead of preceding the certificate; that is, the word "foregoing," as used in the certificate, must be given that meaning which is ordinarily understood from its use. That question we do not determine, because, independent of this contention, we think the judgment of the district court should be affirmed.

Attached to what purports to be the proceedings of the council are two certificates, one by the mayor as follows: "I, W. G. Uhley, mayor of the city of Fairbury, Jefferson county, Nebraska, do hereby certify that the foregoing transcript contains all of the evidence, as offered in the foregoing entitled cause, all of the objections thereto, the rulings of the council thereon, and the exceptions of the applicant and remonstrators, respectively, to said rulings, made and taken at the time. Wherefore, I, the said mayor, do hereby allow and sign this transcript of the evidence, and do hereby order that it be made a part of the record in said cause. Done at Fairbury, Nebraska, this 5th day of June, 1906. W. G. Uhley, Mayor of the City of Fairbury, Nebraska." The other certificate is by the city clerk, of which the following is a copy:—"I, F. L. Rain, city clerk of the city of Fairbury, Nebraska, do hereby certify that this is the original transcript of the evidence in the foregoing entitled cause, filed in the office of the said city clerk. In testimony whereof, I have hereunto set my hand and affixed the official seal of said city this 5th day of June, 1906. (Seal.) F. L. Rain, City Clerk of Fairbury, Nebraska."

No other certificates are to be found in the record. It thus appears that the final action of the city council in the matter involved was never authenticated or certified to the district court. Until that is done, it cannot be made to appear that the remonstrators are in a position to complain, and we recommend that the judgment be affirmed.

CALKINS, C., concurs.

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

AFFIRMED.

ROSALIE PLANT ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLEE.

FILED JUNE 7, 1907. No. 14,850.

Directing Verdict: REVIEW. The record discloses conflicting evidence upon disputed questions of fact, and the court therefore erred in peremptorily instructing a verdict.

APPEAL from the district court for Richardson county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Reavis & Reavis, for appellants.

J. W. Deweese, F. M. Deweese and *F. E. Bishop, contra.*

AMES, C.

There is but one issue made by the pleadings with which the court is at present required to deal. The petition alleges that the line of the defendant's railroad traverses the plaintiff's land in an easterly and westerly direction, and that immediately to the eastward of the land is a considerable elevation of ground constituting one of the bluffs of the Missouri river, through which bluff the defendant company, when it constructed its road, excavated a deep cut for the purpose of establishing its grade, which it has since maintained, and that the natural surface of the elevation and of the neighboring country is or was such that before the building of the road surface water falling thereon did not flow to the plaintiff's land, but so much thereof as fell to the northward of where the cut now is flowed eastwardly away from the land and toward and finally into the river, and

so much thereof as fell southward of where the cut now is flowed northward until it met and mingled with the above mentioned eastward flow. But it is alleged that since the building of the road the defendant has dug and maintained a ditch, which arrests this northward flow of the water and prevents it from pouring upon the roadbed as it would otherwise do, and collects it and conducts it westward for a distance of about a quarter of a mile, and discharges it upon the land of the plaintiff lying south of the right of way, causing injuries to it and to his growing crops, for which a recovery is prayed. The answer, so far as the issue thus tendered is concerned, amounts in effect to a general denial. There was a judgment for the defendant upon an instructed verdict, from which the plaintiff appealed.

All the foregoing allegations of the petition are supported by the testimony of the plaintiff as a witness, and are controverted by the testimony of surveying engineers and by a topographical map made by the latter tending to show that the natural inclination of the surface of the bluff south of the cut is such that the same quantity of water flowed upon or over the plaintiff's land before the digging of the ditch that has done so since, and that the ditch has therefore done him no wrong. If the map was a scientific document, the accuracy of which was admitted or indisputably established, it might suffice to determine the controversy, but it is not such. It is not for the court to weigh the credibility of the testimony of the plaintiff, or that of the surveyors or draughtsmen, or to decide upon the skill of the latter or the accuracy of the map. In other words, the record discloses an ordinary instance of conflicting testimony with reference to a disputed question of fact, which should have been submitted to the jury for decision, and, for that reason, we recommend that the judgment of the district court be reversed and a new trial granted.

JACKSON and CALKINS, 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.

J. WILLIAMS BRIDENBAUGH, APPELLANT, V. CHARLES BRYANT, APPELLEE.

FILED JUNE 7, 1907. No. 14,819.

1. **Evidence**, examined, and *held* to support finding of trial judge.
2. **Boundaries**: EVIDENCE. The fact that the boundary lines of fields and highways, as established by the early settlers, are in harmony with disputed monuments is relevant as tending to show that such monuments are true corners.
3. **Ejectment**: ESSENTIAL ELEMENTS. The essential elements of the action of ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by defendant; and the plaintiff cannot recover where the latter element is lacking.

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

Hubbard & Burgess and *R. E. Evans,* for appellant.

William P. Warner, contra.

CALKINS, C.

Township 28 of range 8 east, in Dixon county, was subdivided in 1858. Its settlement began in 1855, but, the center of the township being low and marshy, the north and south parts thereof were first occupied. In 1890 a highway, known as the "Swamp road," was established on the half section line east and west through section 16. The plaintiff became the owner of the north-east quarter of the southwest quarter of this section, and the defendant owned the southeast quarter of the northwest quarter thereof. The Swamp road was for some years treated as

the boundary line between these two proprietors. In 1893, there being a dispute as to the proper location of some portions of the Swamp road, the county surveyor, Dixon, undertook to survey it. He began at the southeast corner of section 28, at a stone which is conceded to mark the site of the corner established by the original government survey, and ran north to the seventh standard parallel, a distance of five miles. On the line so run there were monuments at or near the southeast corner of 16, the quarter corner on the east line of 16, the northeast quarter of section 9, and the quarter corner on the east line of section 4; but these the surveyor did not consider authentic, and disregarded. He thereupon proceeded to place new monuments according to the regular method of reestablishing lost corners. He also retraced the government survey north from the southwest corner of section 28 to the seventh standard parallel. Upon this line there were monuments at the southwest corner and at the quarter line of section 4, which he also disregarded. This survey resulted in locating all the parallel boundary lines in the north part of the township from 1½ to 3 chains north of the monuments disregarded by Dixon, the surveyor, and north of the fences, roads and lines according to which the country had been settled and improved, including the Swamp road, running between the land of the plaintiff and the defendant. It left some 7 acres of the land, theretofore claimed and in the possession of the defendant, south of the half section line, and to recover possession of this tract the plaintiff brought this action. There was a survey made by a surveyor named Smith, which recognized as government corners the monuments we have mentioned as having been disregarded by Dixon. The Smith survey resulted in locating the half section line at the center of the Swamp road on the east line of section 16, and slightly further north on the west line, so as to leave a triangular tract of land seven links wide at the west end, and vanishing to a point 290 feet east thereof, north of the Swamp road and south of the half section line. A jury

being waived, there was a trial to the court, who found the Smith survey correct, and gave the plaintiff judgment for restitution of the triangular tract of land above mentioned. From this judgment the plaintiff appeals.

1. If Dixon was justified in disregarding the monuments on the line run by him from the southeast and the southwest corners of section 28 to the seventh standard parallel, then his survey was correct. If the evidence establishes the fact that these monuments marked the site of the original government corners, then the Dixon survey is wrong, and the Smith survey correctly fixes the boundary between the plaintiff's and defendant's land. The rule that fixed monuments and known corners govern both courses and distances is well established. *Johnson v. Preston,* 9 Neb. 474; *Minkler v. State,* 14 Neb. 181; *Thompson v. Harris,* 40 Neb. 230; *Clark v. Thornburg,* 66 Neb. 717. If, therefore, the evidence establishes the fact that the monuments recognized by Smith in making his survey mark the true location of the original government monuments, it follows that the survey of Dixon was wrong, and should be disregarded. The district court found that the Smith survey was correct, and this, we think, involves the finding that the monuments recognized by Smith marked the true site of the original monuments. It is, however, claimed by the plaintiff that the special findings of the trial judge are inconsistent with his general conclusion, in that he did not in his special finding determine that the post at the southwest corner of section 4 was a government monument; and that he did not find that the southeast corners of 4 and 16 were true government corners. If this be true, the special did not go as far as the general findings; but they are not inconsistent therewith. The trial judge did find that the east quarter corner recognized by Smith is a true corner, and his failure to find that the other corners on that line are true corners is immaterial. We have, however, examined the evidence, and are satisfied that it would have justified a finding that all the corners recognized in

the Smith survey marked the site of the original corners. There was a large number of witnesses called, and the evidence is voluminous. To recapitulate the testimony would extend this opinion beyond reasonable bounds. It is sufficient to say that the identity of some of these corners was established by a witness who had settled upon lands in the neighborhood prior to the original survey, and all of them by witnesses who became acquainted with their location at a comparatively early date; that, in a locality where there was no natural stone, most of them were marked by stones of the same character as that marking the one corner at the southeast corner of 28, which all agree was an original corner; and that the locality from the south line of section 16 to the north boundary of the township had been settled, lands cultivated, and roads and fences built according to the boundaries indicated by these corners. The only evidence to offset the probative effect of these facts is the circumstance that these monuments would need to be moved from 1½ to 3 chains north in order to check with the distances given in the field notes of the government survey. It is to be observed that the survey of Dixon discovers no trace of any original monuments at any of the places in which it established corners. The only hypothesis suggested by the plaintiff to account for the fact that the parallel lines from the south line of section 16 to the north line of the township would have to be materially moved to coincide with the Dixon survey is that there has been a general moving of these monuments from the north toward the south. If the monuments bounding a single tract of land were out of harmony with the field notes and with neighboring boundaries, such a suggestion would be plausible; but that all the monuments in a locality, owned by many different proprietors, on a half dozen parallel lines, should be moved in one direction, when the proprietors upon only one of those parallel lines would be benefited thereby, is incredible.

2. The plaintiff complains of the admission of evidence that the boundary lines of fields, fences and roads, as fixed

by the early settlers of the north part of the township, coincide with the monuments in question, and argues that such recognition of these monuments cannot estop the plaintiff, nor can the plaintiff be held to acquiesce in acts to which he was not a party. The only boundary in which plaintiff seems to have acquiesced is that of the Swamp road, and this, under the doctrine announced in *Coy v. Miller,* 31 Neb. 348, raised a presumption in favor of such line being the true one, though, having continued for less than 10 years, it should not be held conclusive. The fact of the recognition of these monuments north of the Swamp road is not admissible to show acquiescence by or estoppel of the plaintiff, for it does neither. It is admissible as a fact tending to show that the monuments in dispute are the true corners as originally marked upon the ground. The early settlers, locating their lands at a time when the survey was comparatively recent, and the monuments comparatively new, would naturally and probably fix their boundaries accordingly. And the fact that such boundaries, so fixed, coincide with old, defaced and uncertain monuments tends to prove their genuine character. *Thoen v. Roche,* 57 Minn. 135; *Arneson v. Spawn,* 2 S. Dak. 269; *Tarpenning v. Cannon,* 28 Kan. 665. In the last above cited case, Horton, C. J., in writing the opinion, quotes with approval the words of Judge Cooley: "In legal controversy, the law, as well as common sense, must declare that a supposed boundary line, long acquiesced in, is better evidence of where the real line should be than any survey made after the original monuments have disappeared." We therefore think that such facts are not only relevant, but, when fully established, are entitled to great weight.

3. The plaintiff further contends that the court erred in not including in its decree that portion of the northeast quarter of the southwest quarter of section 16 which lies south of the quarter line as established by the Smith survey and within the boundaries of the Swamp road. To maintain ejectment, the plaintiff must, first, have a legal

estate in the property sought to be recovered; second, be entitled to the possession thereof; and, third, the defendant must unlawfully keep him out of the possession thereof. Code, sec. 626. The plaintiff's case as to the land within the boundaries of the highway lacks the second and third of these essential elements. Ejectment is a possessory action, and the plaintiff must have not only the legal estate, but a present right of possession. *Wells v. Steckelberg,* 52 Neb. 597. It must also appear that the defendant was in possession at the commencement of the action. See 17 Cent. Dig., col. 2054, sec. 65. There is nothing to show that the defendant ever interfered with the plaintiff's possession of the land within the boundaries of the highway, and the plaintiff could not, therefore, maintain an action against the defendant in respect thereto.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.

ROY Y. HOBSON ET AL., APPELLEES, V. ADA E. HUXTABLE ET AL., APPELLANTS.*

FILED JUNE 7, 1907. No. 14,845.

1. **Homestead:** SELECTION: PRESUMPTION. The actual use of a dwelling as a family home is a sufficient selection under the provisions of the homestead law.

2. ———: ———. Where the homestead is selected from the property of the wife, it must be with her consent; but such consent may, until the contrary is shown, be presumed from the use and occupancy of the property as a family home.

* Rehearing allowed. See opinion, p. 340, *post.*

3. **Remainders: QUIETING TITLE: LIMITATIONS.** Under the provisions of sections 57, 59, ch. 73, Comp. St. 1905, a remainderman may bring an action to quiet title during the life of the life tenant, and the running of the statute of limitations is not in such case postponed until the death of the life tenant.

4. ———: ———: ———. Where a defendant in an action to quiet title claims as a cotenant with the plaintiff, and the action proceeds to a decree quieting title in the cotenants, plaintiff and defendant, and against the other defendants, the action will be deemed an action to quiet title, and if the statute of limitations would run against such action by any defendant such defendant will be barred.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Judgment in favor of Roy Y. Hobson and John T. Hobson affirmed: Judgment in favor of Ida Belle Busby and George W. Hobson reversed.*

W. R. Burton and *R. A. Batty,* for appellants.

H. S. Dungan and *John C. Stevens, contra.*

CALKINS, C.

Anna E. Hobson died on the 17th day of August, 1888, intestate, leaving her surviving husband, John H. Hobson, and her children, John T., aged 1 year, Roy Y., aged 7 years, Ida Belle, aged 14 years, and George W., aged 18 years. At the time of her death she was seized of a quarter section of land upon which she had resided with her husband and family for several years preceding her death. The land did not exceed in value, over and above incumbrances, the sum of $2,000, so that the same constituted the family homestead, if the mere fact of occupying it as a family residence was a sufficient selection under the homestead law. On the 27th day of October, 1888, one Palmer was appointed administrator of the estate of said deceased, and he in May filed his petition under the statute for license to sell said lands to pay debts. Such license was granted by the district court, and such proceedings were had thereunder that the premises were on

the 24th day of October, 1890, sold by the said administrator to the defendant Charles A. Huxtable, and, the said sale having been confirmed, the administrator conveyed the premises to said purchaser, who went into possession under said deed, and who has, with his wife, the defendant Ada E., remained in actual possession ever since. It appears that no record of the oath required to be taken by the administrator can be found in the district court, but that the proceedings were otherwise regular. On the 15th day of June, 1904, the plaintiffs Roy Y. Hobson and John T. Hobson commenced this action, setting forth the foregoing facts and praying for a decree declaring the administrator's deed void. John H. Hobson, the surviving husband of Anna E., died pending this action, on the 18th day of June, 1905. On the 18th day of July, 1905, the defendants Ida Belle Hobson, now Busby, and George W. Hobson filed an answer in this action, admitting the allegations of the plaintiff's petition, alleging the death of John H. Hobson, asserting title in themselves, and asking that their rights in the property be investigated, and that the defendants Huxtable be ejected from the premises. There was a plea of the statute of limitations against these defendants by the defendants Huxtable. The district court rendered a decree quieting the title in the four Hobsons, subject to the amount of a mortgage which had been paid off by or with the money received from the purchaser at the administrator's sale. From this decree the defendants Huxtable appeal.

1. The appellants contend that the fact of the use of the property as a family home for herself, husband and children for some years before, and up to the time of her death, was insufficient to show that the homestead was selected with the consent of the wife, and, as to the defendants Ida Belle and George W., that more than ten years have elapsed since they became of age, and that they are accordingly barred by the statute of limitations. It is admitted by the appellants that, where the husband is the owner of the fee, the mere fact of residence is suffi-

cient selection; but they insist that, where the wife is the owner, there must be some further evidence of her consent. The statute provides that "if the claimant be married, the homestead may, be selected from the separate from her separate property." The counsel for appellants property of the husband, *or with the consent of the wife,* lays stress upon the words in italics, and argues that to give them effect there must be some further evidence of the consent of the owner of the fee where the property is in the name of the wife than where it is owned by the husband. The cases cited from California and Idaho do not assist us, for in each of these states the statute requires the selection of a homestead to be made by an instrument in writing executed and recorded in the same manner as a conveyance. Our own court has in several cases assumed that the fact of residence was sufficient evidence of selection in a case where the property belonged to the wife. *Larson v. Butts,* 22 Neb. 370; *France v. Bell,* 52 Neb. 57; *First Nat. Bank v. Reese,* 64 Neb. 292, and, *Brichacek v. Brichacek,* 75 Neb. 417, were all cases where the property was in the name of the wife, and the homestead character was sustained without proof of any formal consent of the wife. It is, however, but fair to say that in none of these cases was the fact that the statute requires the selection to be made in such cases with the consent of the wife discussed. *Klamp v. Klamp,* 58 Neb. 748, is the only case brought to our attention in which the effect of these words has been considered, and it was there held that a husband could not acquire the homestead in the separate property of the wife except with her consent. The question in issue was whether or not the husband had a right to compel the wife to account to him for the proceeds of the homestead which was the separate property of the wife and the court held that he had not that right. We do not think that this case established the doctrine contended for by the appellants that the wife must declare her formal consent to the selection of a homestead from her

property. We think her consent will be presumed from the actual use of the property as a homestead, which presumption can only be overcome by proof that she did not in fact consent. The property being the homestead of the deceased descended to the husband during his life, and, upon his death, in fee to the children. This being the case, the license to the administrator was void, even though the proceedings were regular. *Tindall v. Peterson*, 71 Neb. 166; *Brandon v. Jensen*, 74 Neb. 569.

2. Section 57, ch. 73, Comp. St. 1905, provides "that an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in 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"; while section 59 contains the further provision that "any person or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of this act." It is clear that under this statute a remainderman may maintain an action to quiet title during the life of the life tenant; and it follows that the disability of the defendants Ida Belle and George W. ceased, and their right to bring an action to quiet this title accrued, more than 10 years prior to the filing of their answer in this case. It is contended by the attorney for the defendants Ida Belle and George W. that the claim set up in their answer is to be considered an action in the nature of ejectment, and that such an action could not accrue to them during the life of John H. Hobson, the life tenant. This again is met by the defendants Huxtable with the contention that, since the Huxtables did not claim under John H. Hobson, and could not claim to be the owners of his interest for life, an action by the heirs to obtain possession could have been as well maintained before as after his death.

We are, however, unable to regard this suit as an action in the nature of ejectment. The plaintiffs' suit was to

quiet title, and, if we admit this claim of the defendants Ida Belle and George W., we are committed to the anomalous proposition that two tenants in common can join in an action which shall be on the part of one an action to quiet title, and on the part of the other an action in ejectment. The two actions are incompatible. They require different methods of trial and a different judgment at the end. If we accept the view of the attorneys for Ida Belle and George W. that the action of ejectment could not accrue during the life of John H. Hobson, they had no right to bring ejectment at the time of the commencement of this action. If the action against the Huxtables was ejectment, they were entitled to a trial by jury, which they did not demand, and, under the statute in force at that time, to a new trial as a matter of right, which they did demand and which was denied them. If it was an action to quiet title, it was not only within the power but it was the duty of the court to require the heirs of Anna E. Hobson, as a condition of granting them any relief, to do equity by reimbursing the Huxtables for the money advanced by them to discharge mortgage liens upon the land. *Henry v. Henry,* 73 Neb. 752. It is a practical as well as a legal impossibility to join two such diverse actions. The court below regarded this as an action to quiet title. The decree quiets title in the heirs, subject to the mortgage which was paid out of the proceeds of the sale by the administrator, orders the defendants Huxtable to execute deeds, and enjoins them from claiming title. Such a decree is suitable in an action to quiet title, but could not be rendered in an action in ejectment. The defendants Ida Belle and George W. do not object to this decree, and we are constrained to hold that their action is in the nature of an action to quiet title, and that it was barred by the statute of limitations.

We therefore recommend that the judgment of the district court be affirmed as to the plaintiffs Roy Y. Hobson and John T. Hobson, and that the same, as to the defend-

ants Ida Belle Busby and George W. Hobson, be reversed and their action dismissed.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the court below in favor of the plaintiffs Roy Y. Hobson and John T. Hobson is affirmed, and the judgment in favor of the defendants Ida Belle Busby and George W. Hobson is reversed and their action dismissed, and the costs of this court are divided equally between appellants Huxtable and appellees Ida Belle Busby and George W. Hobson.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed April 23, 1908. *Former judgment vacated and decree entered:*

1. **Stipulations:** CONSTRUCTION. When litigants stipulate that certain facts exist, and the language employed is at all equivocal, the evident definition given by both litigants to the words in the stipulation will control, and upon appeal they will be bound thereby.

2. **Homestead:** ESTATES OF HEIRS. If a homestead be selected from the separate property of a married woman in her lifetime, upon her death intestate, a life estate vests in the surviving spouse, and remainder in the heirs of the deceased.

3. **Remainders:** QUIETING TITLE. The heirs aforesaid may, during the life estate, maintain an action under sections 57-59, ch. 73, Comp. St. 1907, for the purpose of quieting their title or removing a cloud therefrom.

4. ———: ———: LIMITATIONS. If a remainderman, not being under any legal disability, fails for ten years after his cause of action accrues to commence his suit, he is barred by the statute of limitations from maintaining his action to quiet title, and the fact that a remainderman owning an undivided interest in real estate may be under a legal disability will not toll the statute as to the other remaindermen not within the exception.

5. ———: ———: ———. If the remainderman be under a legal disability when the aforesaid cause of action accrues, the statute will not commence to run against him until the disability is removed.

6. ———: EJECTMENT: LIMITATIONS. The remainderman's estate in the homestead will not support an action in ejectment during the lifetime of the life tenant, and the statute of limitations will not commence to run against that possessory action until the demise of the surviving spouse.

7. **Equity**: RIGHT OF POSSESSION. In an equitable action to set aside a deed, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession, if all parties in interest are before the court, and put the parties entitled thereto into possession.

8. ———: SUBROGATION: LIMITATIONS. In case a defendant as a matter of equity is entitled to be subrogated to the lien of a mortgage upon real estate, it is within the power of a court of equity, as a condition precedent to granting equitable relief to the owner of the real estate, to compel the payment of that mortgage, even though by its terms said lien be barred by the statute of limitations.

9. **Remainders**: VALUE OF USE AND OCCUPATION: EVIDENCE. Evidence examined, and *held* insufficient to justify a finding concerning the value of the use and occupation of the real estate involved for that part of the crop season of 1905 subsequent to June 18.

ROOT, C.

In our former opinion, *ante*, p. 334, may be found a statement of the facts in this case. A rehearing has been granted and the entire record presented for our consideration.

1. The defendants Huxtable insist that the record does not disclose that Anna E. Hobson owned the real estate in litigation in fee simple; that they stipulated only that she died seized of the real estate; that seizin may be for life or for years, and fall far short of an estate in fee simple; that, as they had interposed the defense of title by adverse possession, the heirs of Anna E. Hobson must trace their title back to the United States. We do not think it necessary to decide the legal definition of the word "seizin," because it was used in this case evidently as a synonym for title in fee simple. The testimony of the witness Tomkins further establishes that Mrs. Hobson purchased the farm some ten years before her death, and

resided thereon with her family from the time she acquired the land until she died.

2. It is claimed that the children of Anna E. Hobson did not take a vested estate in remainder upon the death of their mother. We cannot agree with counsel. The writers refer to the estates included within the homestead as a life estate for the surviving spouse, and either a remainder or reversion in the heirs. "A remainder is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it." 4 Kent, Commentaries (13th ed.), *197. "A reversion is the return of land to the grantor and his heirs, after the grant is over." 4 Kent, Commentaries (13th ed.), *353. In *Caldwell v. Pollak,* 91 Ala. 353, the estates are thus referred to: "A homestead exemption, actually and rightfully interposed, has the effect in law of dividing the freehold into two *quasi* ownerships, the one for life, and the other in remainder." The title in the succession of a homestead is not evidenced by written grant, but arises from seizin, the family relation and residence; and those facts take the place of the written instrument that usually evidences the prior estate and the one in remainder. The nature of the estate devolving upon the heirs at the death of the fee-holding spouse is settled as squarely as the decision of this court can establish any principle of law, and is not open to question. In *Schuyler v. Hanna,* 31 Neb. 307, we held, "under section 17 of the homestead law of 1879, that the heirs of the person whose property had been selected for a homestead took a vested remainder therein, subject to the life estate of the surviving husband or wife." In *Fort v. Cook,* 3 Neb. (Unof.) 12, Mr. Commissioner HASTINGS reviews the case of *Schuyler v. Hanna,* and clearly demonstrates that the estate of the heir vests upon the death of the parent. *Durland v. Seiler,* 27 Neb. 33; *Cooley v. Jansen,* 54 Neb. 33.

3. It is asserted that an action to quiet title cannot be

maintained by the heirs during the lifetime of the surviving spouse. Our statutes plainly give the right. Comp. St. 1905, ch. 73, secs. 57-59. Section 59 is surplusage, unless it extends that right to the remainderman: "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." Upon the termination of the prior estate, those who were remaindermen or reversioners cease to hold the title by that description, and would fall within the class referred to in section 57, *supra*. We have held the action could be maintained before the surviving spouse departs this life. *Holmes v. Mason*, 80 Neb. 448. We also held in said case that the statute of limitations bars that right unless exercised within ten years of the time the cause of action accrues, the heirs being adults. It is said that the action may still be maintained by all the heirs of Anna E. Hobson because commenced within ten years of the date the youngest child attained his majority; that the cause of action is an entirety and cannot be severed, and, hence, good as to one is good as to all. *Thompson v. Wiggenhorn*, 34 Neb. 723, is cited to sustain this proposition. In that case an infant had the right to rebuild a burned mill, whereas, if he had been an adult at the time his ancestor died, he would have forfeited that privilege. The other heirs of the deceased were adults when the father died, and it was held the forfeiture could not apply to one joint owner, and not to the others, because the two buildings could not at the one time occupy the same space, and, if the statute worked a forfeiture as to the adults, and not as to the infant, the impossible condition of two persons or sets of persons each having the exclusive right to construct a building within the same space at the same time would exist. The rule does not apply in the instant case, because each one of two or more tenants in common may maintain a separate action for the protection or recovery of his estate, and he may not litigate as to other than his own interests in the land. *Johnson v. Hardy*, 43 Neb. 368. We are also

cited to authorities holding that the statute does not commence to run against the remainderman or reversioner until he has a right of entry, and this we do not deny as to actions for the possession of real estate. *Allen v. De Groodt,* 98 Mo. 159, 14 Am. St. Rep. 626, and monographic note commencing on page 628; *Smith v. McWhorter,* 123 Ga. 287, 107 Am. St. Rep. 85; *Hanson v. Ingwaldson,* 77 Minn. 533, 77 Am. St. Rep. 692; *McCorry v. King's Heirs,* 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

The administrator's deed and the record thereof created a cloud on the remaindermen's title, and gave plaintiffs a cause of action in equity against defendants Huxtable. Preceding the father's death no relief other than an adjudication that the farm was a homestead, that the deed was void, and quieting title in plaintiffs as against the Huxtables, could be given by the court. With the added allegation and proof of the father's death, the court could place plaintiffs in possession of the real estate. It was held in *Albin v. Parmele,* 70 Neb. 746, that in an equitable action to set aside a deed, where the right of possession was in issue and dependent upon the principles of equity that must necessarily be determined by the court, it was the duty of the court to determine the right of possession, and, if all parties in interest were before the court, to put the party who is entitled thereto into possession. The court therefore had power to and, upon proper terms, should quiet in each plaintiff his title to an undivided one-fourth part of said land, and to award them possession thereof. More than ten years intervened between the majority of defendants Ida Belle Busby and George W. Hobson, on the one hand, and the commencement of this action, on the other, so, therefore, the statute of limitations barred said defendants' action to quiet their title to the real estate involved herein. *First Nat. Bank v. Pilger,* 78 Neb. 168; *Holmes v. Mason,* 80 Neb. 448. The court therefore erred in quieting their title to said real estate. However, they were before the

court demanding possession of their part of the land, the only relief they were entitled to, and the court had the right to award that possession, but only upon equitable terms. *Albin v. Parmele, supra.* Counsel argue that the allegations in the answer and cross-petition of the defendants George W. Hobson and Ida Belle Busby are insufficient to state a cause of action against the Huxtables. A litigant may assert, on rehearing, or at any preceding stage of the litigation, that the petition will not warrant equitable relief, or that it does not state facts sufficient to constitute a cause of action in favor of the petitioner. *Vila v. Grand Island E. L. I. & C. S. Co.,* 68 Neb. 233. All the allegations in the petition are admitted in the answer and cross-petition. The interests of said defendants in said real estate are alleged in an indefinite manner. The claim is made that the cross-petitioners are entitled to the immediate possession of the real estate and are kept out of that possession by their codefendants Huxtable, and judgment is asked ejecting the Huxtables and their privies from said land. Considering the allegations of the petition and cross-petition, defendants Huxtable were advised of the nature and extent of the claim made by the Hobson heirs, plaintiffs and defendants; that plaintiffs prayed for equitable relief and possession of the real estate, and the defendant heirs the possession only. The court will read the petition and cross-petition together, and the allegations in the first pleading may aid the lack thereof in the other. *Neal v. Foster,* 34 Fed. 496; *Railway O. & E. A. Ass'n v. Drummond,* 56 Neb. 235. The court subrogated Huxtables to the rights of the mortgagors, McKinley-Lanning Loan & Trust Company and Carnahan, but we think it should have gone further and made the right to a writ of ouster in favor of the Hobson heirs, or any of them, conditioned upon the payment to the Huxtables of the $2,400 of Huxtables' money that was used to pay off those mortgages, with 7 per cent. interest added from June 18, 1905, the date John H. Hobson, the surviving spouse, departed this life. To merely subro-

gate the Huxtables to the rights of the mortgagors, whose liens had matured more than ten years past, would be a snare and a delusion. 3 Pomeroy, Equity Jurisprudence (3d ed.), secs. 1219-1221; *Henry v. Henry,* 73 Neb. 752. Huxtables' counsel argue that interest should be computed on the mortgages from the date they were paid. This we do not consider equitable. Huxtables will not be charged with rent prior to the death of the life tenant, and we do not think they should recover interest during that period.

4. The trial judge rendered judgment against defendants Huxtable for the rental value of the farm for the year 1905. This was error. The Huxtables either succeeded to the rights of John H. Hobson, the surviving spouse, in said farm, or by adverse possession extinguished those rights, and during his lifetime had the right to the rents and profits thereof. John H. Hobson died on the 18th day of June, 1905. In 1905 Huxtable raised 50 acres of wheat, 15 acres of oats, 50 acres of corn, and 15 acres of timothy and clover on said farm; the remainder of the land being used for pasturage and other purposes. The record is silent as to the date said annuals were planted, but we are safe in assuming the crops had not only been planted before but were growing at the date referred to. Defendants Hobsons' answer and cross-petition was not filed till July 19, and the supplemental petition September 6, 1905. In any event, Huxtable had the right to mature, harvest and remove his crops. *Edghill v. Mankey,* p. 347, *post.* Whether, upon a proper issue tendered and definite proof in support thereof, the Hobson heirs could have recovered for the use and occupation of the land for that part of 1905 subsequent to their father's death, we do not determine, but certainly the burden was not upon Huxtables to furnish any evidence upon this issue. The Hobson heirs tried the case upon the theory they were entitled to rents for the entire year, and all their evidence referred to the value of the use and occupation and of the rents and profits of said

land for the year 1905, and it is impossible to ascertain from the record the value of the use and occupation of the farm for said fraction of a year. While we might remand the case for that inquiry, we are not inclined to do so, but rather to enter a decree in this court and thereby determine this litigation, saving to Huxtables their rights and remedies under the occupying claimant's law.

It is therefore recommended that the former opinion of this court and the decree of the district court be vacated; that a decree be rendered in this court in conformity with this opinion; that the Huxtables pay the costs in the district court and the Hobson heirs pay the costs in this court, and that a special mandate issue to the district court for Adams county to carry this judgment into execution.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former opinion of this court and the decree of the district court are vacated, and a decree will be rendered in this court in conformity with this opinion; that the Huxtables pay the costs in the district court, and the Hobson heirs pay the costs of this court, and that a special mandate issue to the district court for Adams county to carry this decree into execution.

JUDGMENT ACCORDINGLY.

ALICE EDGHILL, APPELLANT, V. HERMAN MANKEY, APPELLEE.

FILED JUNE 7, 1907. No. 14,855.

1. **Life Tenant, Death of.** The death of a life tenant terminates the right of possession of his lessee.

2. ———: RIGHTS OF LESSEE. Where the lessee of a life tenant plants crops before the death of the life tenant and consequent termina-

tion of his lease, he is entitled to reenter to cultivate, harvest and remove such crops; but this right of entry is not inconsistent with the right of possession of the reversioner.

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

Dorsey & McGrew, for appellant.

H. W. Short, contra.

CALKINS, C.

John Dopke was seized of a life estate in a quarter section farm in Franklin county, which the defendant occupied as his tenant under a lease expiring March 1, 1905. In August, 1904, Dopke made an oral agreement to let the land to the defendant for a term of one year, to begin March 1, 1905; and, following this agreement, the defendant sowed a portion of the land to wheat, and prepared some additional ground for spring planting. In December, 1904, Dopke died. In March, 1905, the plaintiff, who was seized of the fee in the land in question, brought proceedings under the forcible entry and detainer statute to recover the possession thereof. The defendant claimed that by virtue of the oral agreement made in August, 1904, and by the fact of his sowing the wheat, he was at the time of the commencement of this action entitled to the possession of the premises. The plaintiff requested the court to direct a verdict in his favor, which request was denied and the case submitted to the jury, who returned a verdict for the defendant; and from the judgment rendered upon such verdict the plaintiff appeals.

1. It is clear that the lessee of a tenant for life is charged with notice of the extent of his landlord's title, and that on the termination of the life estate, his estate also ends. *Guthmann v. Vallery,* 51 Neb. 824.

2. It is equally clear that, if the sublessee of a life tenant plants a crop before the death of his landlord, he is

entitled, under the doctrine of emblements, to reap the same. To avail himself of this right, it is obvious that the sublessee must have some right of entry upon the land itself; and, if the tenancy is determined by death soon after the planting of a crop, this right may of necessity be continued for some months. The extent of this right is said to be that the lessee may enter upon the land, cultivate the crop if a growing one, cut and harvest it when fit, and, if interfered with in the reasonable exercise of these privileges by the reversioner, or, if the crop be injured by him, he may have an action for such injury. This does not give him a right to the possession of the land, but merely the right of ingress and egress for the purpose above mentioned; for all other purposes the owner of the reversion has the right to the exclusive possession. 1 Washburn, Real Property (6th ed.), sec. 267; *Collins v. Crownover,* 57 S. W. (Tenn. Ch. App.) 357. It follows that the right to emblements does not extend the term of the sublessee of the life tenant. Upon the death of his landlord he has no longer an estate in the land, and is not entitled to the possession of the same. His right to enter for the particular purposes specified is not inconsistent with the right of possession of the reversioner.

It does not appear from the evidence whether there was a house, barn or other buildings upon the premises, nor how much land was sown to wheat; but it is sufficiently disclosed that there was other land than that sown to wheat, which the defendant purposed to plant to spring crops. The action of forcible entry and detainer being under our statute a purely possessory one, in which no other question than the right of possession could be determined, it must necessarily follow that, if in this case the plaintiff had the right of possession, she was entitled to recover. The only reason urged by the defendant in his brief against the plaintiff's right to possession is the planting of the crop during the life of John Dopke; and this, he argues, operated to extend the lease. We have

already seen that this position is not tenable. The surrender of the possession of the premises generally would not have affected his right to reenter for the purpose of cultivating and harvesting the crops which he had sown; and this was all he was entitled to. The right of a tenant to reenter after the expiration of his term to remove straw by him raised and left upon the premises was expressly recognized in the case of *Smith v. Boyle*, 66 Neb. 823. It is there held that a tenant has a reasonable time after the termination of his lease to reenter and remove personal property by him left upon the premises. The right of a tenant to cultivate and remove emblements rests upon the same principle, and is no greater than the right to enter and remove other personal property. The fact that the property is a growing crop would be considered in determining what constituted a reasonable time for the removal thereof; but otherwise there is no distinction in the two cases. It is clear that such right of reentry is in neither case inconsistent with the right of general possession of the reversioner or owner.

The trial judge should have granted the plaintiff's motion to direct a verdict, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

JACKSON and AMES, CC., concur.

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

REVERSED.

CALVIN L. MINTON, APPELLANT, V. ERNEST M. PALMER ET AL., APPELLEES.

FILED JUNE 7, 1907. No. 14,866.

1. **Petition**: SUFFICIENCY. A petition to enjoin the execution of an erroneous judgment of a justice of the peace, which fails to show that the plaintiff has exhausted his legal remedy by appeal or error, does not state a cause of action.
2. **Appeal**: PLEADING: AMENDMENT. Where objections are sustained to the introduction of any testimony, on the ground that the petition does not state facts sufficient to constitute a cause of action, the plaintiff is not entitled as a matter of right to time in which to amend his petition; and, where the record does not show the character of the amendment proposed to be made, this court will not review the action of the trial judge in refusing leave to amend.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed.*

R. D. Druliner and *E. B. Perry,* for appellant.

C. W. Meeker and *D. G. Hines, contra.*

CALKINS, C.

This was a suit to enjoin the enforcement of a judgment of a justice of the peace in replevin. The plaintiff in the first and second paragraphs of his petition states that the defendant Welch was a justice of the peace; and that on or about the 12th day of December, 1904, in an action pending before said justice, in which the defendant Palmer was plaintiff and the plaintiff Minton was defendant, Minton obtained a judgment for the return of a calf, and costs of action. The third paragraph of said petition is as follows: "That notwithstanding said adjudication of the rights of the said parties as to this property, the said defendant Welch afterwards, on said 12th day of December, 1904, said judgment still being in force and effect, upon the said Ernest M. Palmer filing a new and second affidavit in replevin in a second action,

wherein said Ernest M. Palmer was again plaintiff and said Calvin L. Minton was again defendant, did issue a new and second order of replevin for the same and identical property, and did deliver the same to a special constable to be served, and upon the service and return of the same did set said cause down and hold the same for hearing on the 19th day of December, 1904, over the objection of the plaintiff herein, and proceeded to a hearing of said cause over the objection of the plaintiff herein; that during the hearing the plaintiff herein made objections to said proceedings, which said justice erroneously overruled; made objections to evidence offered, which said justice erroneously overruled; offered evidence, which the justice erroneously refused to admit, to which said defendant Welch, corruptly conniving and conspiring with the defendant Palmer herein, did fail and refuse to give plaintiff herein his exceptions, or to make a correct copy of the record of the proceedings had in said cause, and that said defendant Welch, still conniving and conspiring with defendant Palmer, on the said 19th day of December, 1904, rendered a pretended judgment in favor of defendant Palmer herein and against the plaintiff herein for the return of said light red heifer calf, for $1 damages, and for costs accruing in the two separate actions, amounting to $108.75, which judgment was void and of no effect; that said defendant Welch, still conniving and conspiring with said defendant Palmer herein, has corruptly refused and still corruptly refuses to prepare or furnish a correct transcript of the record of said cause, although the amount of fees have been tendered therefor, and by reason of such corrupt and unlawful refusal and such malfeasance in office the plaintiff herein is unable to perfect proceedings in error or by appeal from the justice court of said defendant Welch to the district court for said Dundy county, Nebraska, and plaintiff is unable to obtain a review of said pretended judgment by error proceedings, upon appeal, or by any other manner in an action at law." This was followed by allegations that the property in

question was really the property of the plaintiff Minton; that the judgment of December 12, 1904, was in full force and effect; that the defendants threatened to and were about to enforce the judgment of December 19, and file a transcript of the same in the district court; and that the defendants were insolvent; and plaintiff prayed that the defendants be enjoined from asserting any right or claim under said judgment. A temporary injunction was granted by the county judge, and after issues being joined in the district court, and upon the trial of the cause, the defendants demurred to the plaintiff's petition and objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action, which objection was sustained. The court, refusing the application of the plaintiff for 30 days in which to amend his petition, rendered judgment dismissing the action, from which judgment the plaintiff appeals.

1. The plaintiff appeared in the action which resulted in the second judgment, that of December 19, and made his defense. For errors committed upon that trial or in the rendition of that judgment, he had the remedy by appeal or error to the district court, and, unless he was deprived of these remedies without his own neglect or fault, he is not entitled to the remedy by injunction. *Proctor v. Pettitt,* 25 Neb. 96; *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Mayer v. Nelson,* 54 Neb. 434; *Nebraska Loan & Trust Co. v. Crook,* 73 Neb. 485. He alleges "that the said defendant Welch, still conniving and conspiring with the defendant Palmer herein, has corruptly refused and still corruptly refuses to prepare or furnish a correct transcript of the record of said cause, although the amount of fees have been tendered therefor." There is no allegation that the plaintiff gave or offered to give the usual bond required upon appeal from a justice court, nor any excuse set forth for his failure so to do. The allegation that the justice refused to prepare a cor-

rect transcript does not amount to an allegation that the justice refused to make a sufficient transcript to enable the plaintiff to perfect an appeal to the district court or to bring proceedings in error. A refusal of the justice to perform this duty could have been enforced by mandamus. It was suggested on the argument that, owing to the time of holding the courts in Dundy county, the remedy by mandamus was not adequate; but no such facts are alleged in the petition.

2. Complaint is made of the refusal of the district court to give the plaintiff 30 days to amend his petition. It does not appear that any amendment was tendered, nor does the record show that the plaintiff indicated to the district court the character of the amendment which he desired to make. Section 144 of the code provides that "the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." This language vests in the district court a discretion in permitting or refusing amendments. *Mills v. Miller,* 3 Neb. 87; *Hedges v. Roach,* 16 Neb. 673; *Commercial Nat. Bank v. Gibson,* 37 Neb. 750. This is a judicial discretion, the abuse of which is subject to review. But, when the character of the amendment is not disclosed by the record, it is impossible for us to say whether it should have been allowed or denied.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.

JOHN F. ANTHES, APPELLEE, V. JOHN SCHROEDER ET AL., APPELLANTS.

FILED JUNE 7, 1907. No. 15,019.

1. **Appeal:** RECORD: MOTION TO STRIKE. Where, upon the final hearing of a case, the trial judge makes an order permitting the defendant to offer the testimony taken at a former trial, and afterwards includes the evidence so taken in the bill of exceptions, the same will not be stricken from the record in this court.
2. **Marshalling Assets:** RIGHTS OF MORTGAGEES. The right of a junior mortgagee having security upon a single tract of land to require a senior mortgagee having security upon several tracts to take payment out of those to which he can resort exclusively, so that both may be paid, cannot be defeated by a secret oral agreement between the senior mortgagee and the debtor that the former shall first resort to the security upon which the junior mortgagee has a lien.

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

John C. Hartigan and *John Heasty,* for appellants.

William M. Clark, George H. Hastings and *W. G. Hastings, contra.*

CALKINS, C.

In 1896 the plaintiff was the owner of 400 acres of land in Clay county, which he sold to the defendant John Schroeder. Schroeder obtained a loan from one Thompson for a considerable portion of the purchase price, securing the same by mortgage on the land purchased, and also by a mortgage upon a half section of land in Jefferson county. For the remainder of the purchase price, the

plaintiff accepted a second mortgage executed by Schroeder and wife on the Clay county land alone. Default having been made in the payment of this mortgage, the plaintiff instituted an action in the district court for Clay county to foreclose this mortgage, making Thompson, who held the first mortgage, a party. In an amended petition in this action, the plaintiff alleged that the Clay county land was of insufficient value to pay both the senior and junior incumbrances thereon, and prayed an injunction restraining the senior incumbrancer from proceeding further in that action until he had first exhausted his security on the Jefferson county land. Or, if the court would not grant him that relief, that upon payment of the senior incumbrance from the proceeds of the Clay county security the plaintiff be subrogated to the rights of Thompson under his mortgage on the land in Jefferson county to the extent necessary to satisfy the remainder due the plaintiff under his mortgage on the land in Clay county. The court denied the plaintiff any relief in this action, but gave a judgment of foreclosure upon the prayer of Thompson, who had appeared in the action, resisting the plaintiff's claim and demanding a foreclosure of his own mortgage. From this decree the plaintiff appealed to the supreme court, which held that the plaintiff was entitled to a decree subrogating him to the rights of Thompson (*Anthes v. Schroeder,* 68 Neb. 371), reversed the case and remanded it to the district court. The opinion in this case was filed April 9, 1903, and the mandate was received by the clerk of the district court on June 24, 1903.

At the inception of the above proceedings the title was in John Schroeder; but afterwards such conveyances were had that the record title passed to the defendant Elizabeth Schroeder, who died intestate February 16, 1903. On March 24, 1903, John Schroeder was appointed administrator, and appeared in the action, filing an answer to the plaintiff's petition, as such administrator. On the 25th day of January, 1904, the district court for Clay

county rendered its decree finding in favor of the plaintiff, subrogating him to the rights of the said Thompson by virtue of his mortgage on the Jefferson county land; finding the amount due upon the plaintiff's mortgage; authorizing and empowering him to proceed to foreclose the mortgage in Jefferson county for the satisfaction of his mortgage; and restraining Thompson from releasing or discharging upon the record the mortgage made to him. An appeal was taken from this decree to the supreme court, and the same was affirmed by an opinion filed June 8, 1905. *Anthes v. Schroeder,* 74 Neb. 172. Upon the affirmance of this judgment, the plaintiff brought this action in Jefferson county to enforce the mortgage to which he had been subrogated by the decree rendered in Clay county. This resulted in a decree in favor of the plaintiff, from which this appeal was taken by the defendant.

1. With this case there was submitted a motion to strike from the bill of exceptions the first 45 pages. It appears that the trial of the action was begun, and the testimony included in that portion attacked by this motion was taken, and the case submitted at the February, 1906, term of the Jefferson county district court, which adjourned *sine die* on June 8, 1906; that during that term, on May 24, the submission was vacated, and an amended petition filed, 15 days given for answer, and the case continued until the June term of the court, when the case was tried, and a decree entered June 20. At the latter hearing, we find that the court made an order permitting the defendant to offer all the testimony on the former trial, which we understand to mean the first 45 pages of the bill of exceptions. There was no exception nor objection to this order, and we think the motion should be overruled.

2. The plaintiff claimed the right to be subrogated to the lien of the mortgage made by the Schroeders to Thompson upon the Jefferson county land under the rule that, where there are several creditors having a common

debtor who has several funds, all of which can be reached by one creditor, and only a part of the funds by the others, the former shall take payment out of the funds to which he can resort exclusively, so that all may receive payment; and from the further rule, deduced from the foregoing, that in equity, if a prior creditor having security on two funds satisfies his demand out of the security or fund which alone is pledged to a junior creditor, and thereby exhausts that fund or security, equity will subrogate the latter creditor to the former lien upon that fund or security which is not exhausted. This contention of the plaintiff was fully sustained by this court in *Anthes v. Schroeder,* 68 Neb. 371, where, in the opinion by HOLCOMB, J., there is a full discussion of the question.

When this case was again before the district court, the defendant interposed the defense that prior to the execution of the mortgage upon the Jefferson county land to Thompson there was an oral agreement between Schroeder and Thompson that this mortgage was not given as security for the debt generally, but only for so much thereof as should remain unpaid and unsatisfied after exhausting the security in the Clay county land. This question was determined adversely to the defendants in the district court, and again upon appeal to this court in *Anthes v. Schroeder,* 74 Neb. 172, and would certainly be *res judicata* but for the fact that the defendant Elizabeth Schroeder, who held the fee in the land, died pending the appeal, and the defendant John Schroeder, who had been appointed administrator, was substituted for her in the district court. It appears that Elizabeth Schroeder died intestate, leaving heirs who are defendants in this action, but were not made defendants in the action above referred to. It is contended by these heirs that they are not bound by the decree in the Clay county case, but that the question must be considered as to these defendants upon the merits in this action. It is the settled doctrine of this court that a judgment rendered against a person after his death is reversible if the fact and time of

death appear on the record; or in error *coram nobis* if the fact must be shown *aliunde*. It is voidable, and not void, and cannot be impeached collaterally. *Jennings v. Simpson*, 12 Neb. 558; *McCormick v. Paddock*, 20 Neb. 486. But we have examined the evidence, and, in view of the conclusion we have reached as to the merits, it is not necessary to determine whether the heirs of Elizabeth Schroeder are in any degree concluded by the judgment of the Clay county case. The evidence does not establish the oral agreement alleged in the pleadings. The testimony of the witness Hutchins was in substance that he was afraid the Clay county land was not sufficient security for the loan of $7,000, and proposed that, if Mr. Schroeder would give a mortgage on the Jefferson county land in addition, and for the purpose of "backing up the loan" on the Clay county land, he would make it, and that Mr. Schroeder consented to this. Schroeder himself says: "We made the agreement then, if the Clay county land did not pay out, then he should have the right on this"; but he is discredited by his denial of the execution of the Jefferson county mortgage. On cross-examination, he denies its execution in the form produced in evidence, and insists that "it was a little piece of paper." This was far short of proving the agreement alleged, and the finding of the trial court should be sustained. But, if the oral agreement were clearly established against Thompson, we do not think it would affect the plaintiff's right to have the lien upon the Jefferson county land kept alive and enforced for his benefit after the satisfaction of the debt of Thompson from the Clay county land.

It is insisted that the Jefferson county mortgage was executed after the plaintiff's mortgage. We have carefully examined the evidence, and are satisfied that these mortgages took effect simultaneously. While the negotiations for the loan from Thompson were pending, the plaintiff held the title to the Clay county land, Schroeder having merely a contract with him for its purchase. It appears that, to enable Schroeder to make the loan from

Thompson, the plaintiff was to convey the fee to him and take back a second mortgage for the remainder of the purchase price, and that Schroeder was to use the money secured from Thompson to pay the remainder of the purchase price. These several conditions were interdependent, and no one could be carried out without the other, each instrument taking effect at the same time. Cases like the one at bar must be distinguished from those where a junior creditor pays off a prior incumbrance upon the same property, or where a surety discharges the debt of his principal. In the latter class of cases, the substitute acquires a right in the debt secured by the act of payment. In the former, the substitute is not required to pay the debt, and need acquire no interest therein. His right is to have the entire security held for his benefit, and it arises as one of the legal incidents of the transaction when he acquires his junior lien. From the principle that the law enters into and becomes a part of every contract, and that each contracting party is presumed to know the law, it follows that the defendant John Schroeder executed, and the plaintiff accepted, the second mortgage, with the full understanding that the plaintiff would be entitled to require Thompson to first resort to the Jefferson county land; or, in the event of Thompson's satisfying his claim out of the Clay county land, then that the mortgage on the Jefferson county land should stand as security for plaintiff's claim.

In our judgment, the decree of the district court should be affirmed, and it is so recommended.

JACKSON and AMES, 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. FRANK BARKER, APPELLEE.

FILED JUNE 12, 1907. No. 15,257.

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

W. T. Thompson, Attorney General, for appellant.

Francis G. Hamer, contra.

PER CURIAM.

The record shows that upon evidence before the judge of the district court he found that the defendant appears to be insane, and thereupon ordered that the question of his sanity be submitted to a jury pursuant to sections 454, 551 and succeeding sections of the criminal code. Under these statutes the inquiry as to the sanity of the convict is committed largely to the discretion of the judge of the district court of the county in which the penitentiary is located and to whom the application is made. In his discretion he has power to stay the execution of the sentence, when the proper investigation as to the sanity of the convict makes such stay absolutely necessary, and must by proper order at the hearing, if the convict is found to be sane, fix the precise limits of such stay of execution.

The order of the district court complained of is therefore

AFFIRMED.

The following opinion was filed July 12, 1907:

1. **Criminal Law:** STAY OF EXECUTION: SANITY OF CONVICT. Upon the hearing of an application under section 551 of the criminal code, the judge may stay execution of sentence, when such stay is absolutely necessary in order that the investigation required by statute shall be had. The necessity for such stay is to be deter-

mined by the judge before whom the application is pending, in the exercise of a sound legal discretion.

2. ———: SENTENCE, SUSPENSION OF. The sentence is not vacated by such stay. The execution thereof is suspended until the day named in the order of stay.

SEDGWICK, C. J.

The defendant Barker is confined in the penitentiary under sentence of death for a capital offense. The reprieve granted by the governor being about to expire, the defendant's attorney applied to one of the judges of the district court for Lancaster county for an investigation as to defendant's sanity. The judge ordered an investigation, and that a jury be called for that purpose, and therefore on the application of defendant's attorney continued the hearing to a day beyond the day fixed for execution, and ordered the execution to be stayed until further order. Upon the hearing in this court the jurisdiction and power of the judge to stay the execution was the principal question discussed, and the action of the judge in that regard was sustained. We will confine this discussion to a statement of the ground of this holding, without considering the method by which the proceedings were brought to this court, or other questions of practice which may be supposed to be presented by this record.

In a former appeal to this court by the defendant (*Barker v. State*, 75 Neb. 289), it was said that "the judge should, upon proper information of that fact, and a *prima facie* showing that the convict is insane, investigate the matter for himself so far as to determine whether the convict appears to be insane, and, if he finds that he does so appear, then it would be his duty to impanel a jury to try the question of insanity." The rule of the common law was quoted as stated by Mr. Chitty. This rule has been substantially enacted in section 454 of our criminal code, which was cited in *Walker v. State*, 46 Neb. 25. In that case it was pointed out that these proceedings are not applicable when "the alleged insanity or lunacy is claimed to have been in existence before trial upon information is

begun." Upon the former appeal herein it was said that, when the application is made without the concurrence of the warden of the penitentiary, the judge to whom the application is made is not required to order a jury for the investigation of the matter, unless he finds that there are sufficient appearances of insanity to warrant him in so doing. The matter is left to the discretion of the judge to whom the application is made. If the application is manifestly made for purposes of delay, it should not be allowed to have that result. If the judge is satisfied that the convict appears to be insane, he should order an investigation by a jury. It was insisted by the attorney general on the argument that in this case the judge unnecessarily continued the hearing, and that his order staying the execution was erroneous. We did not consider that we had power to interfere upon these grounds. From the nature of the case, the matter must be committed to the discretion of the judge to whom the application is made. Nothing should be allowed to delay the proceedings, so as to require a stay of execution, unless absolutely unavoidable. But the power of the judge to stay the execution, when the investigation cannot be had without such stay, is not doubted. Section 454, *supra,* contains these words: "In case the punishment be capital, the execution thereof shall be stayed," and the power of the judge before whom the application is pending to stay the execution is necessarily implied from his power to make an investigation, which would be prevented without such stay. It was argued that no method is provided by the statute for resentence, and so justice would be thwarted if execution were stayed. But the sentence is not vacated; its execution is suspended to a time to be fixed in the order of the court by which it is stayed, and at the time so fixed it will be executed, as it would have been at the expiration of the governor's reprieve if no stay had been ordered by the judge.

For these reasons, we declined to interfere with the proceedings before the judge of the district court.

WILLIAM M. CAMPION, RELATOR, v. JOHN A. GILLAN, RESPONDENT.

FILED JUNE 22, 1907. No. 15,028.

1. **Pardon:** LIMITATIONS ON POWER. The governor of the state has no authority to order a sheriff to release a prisoner committed to his custody by judgment of a court.
2. ———: ———. The governor has no power to pardon a prisoner found guilty of bastardy and adjudged to be the reputed father of an illegitimate child.
3. ———: ———. The word "offenses" as used in section 13, art. V of the constitution, is equivalent to "crimes." The governor cannot pardon an offense until after conviction by the judgment of a court.

ORIGINAL application for a writ of habeas corpus. *Writ denied.*

Burr & Marlay, for relator.

J. J. Thomas, M. D. Carey and *C. E. Holland, contra.*

SEDGWICK, C. J.

The relator, William M. Campion, was tried in the district court for Seward county upon a charge of bastardy preferred against him by one Nellie M. Lattimer. The jury returned a verdict of guilty, and thereupon on the 6th day of December, 1902, the court adjudged him to be the reputed father of the complainant's bastard child, and ordered that he stand charged with the maintenance of the child in the sum of $1,000, and adjudged the costs of the prosecution against him. It was adjudged that the said sum of $1,000 should be paid in instalments, $200 in the following January, and $100 on the first day of January each year thereafter, with interest at 7 per cent. on deferred payments after maturity; and it was further ordered that the defendant give security for payment in accordance with the decree, and that, in default of pay-

ment and of giving security, he "stand committed to the jail of Seward county according to law." The defendant failed to comply with the decree, and an order of commitment was duly issued committing him to the jail of Seward county in accordance with the decree. On the 24th day of October, 1906, the governor made an order in these words: "In the Matter of the Application for Pardon of William M. Campion, confined in the jail of Seward county, Nebraska: To John Gillan, Sheriff of Seward county, Nebraska, Seward, Nebraska. Sir: Upon receipt of this order you will release from confinement William M. Campion, now serving an indefinite sentence in your county jail, and this order is your authority for such release. (Seal.) (Signed.) John H. Mickey, Governor." This document having been delivered to the sheriff of Seward county, he thereupon discharged the relator from jail, and afterwards upon complaint being made to the district court of that county, an order was made directing the sheriff to retake the relator and again commit him to jail. Pursuant to this order the relator was again committed to jail. In November, 1906, the defendant having been charged in the district court for Seward county with the crime of abandoning his infant child under section 212*a* of the criminal code, he was placed upon trial in that court before a jury, and on the 29th day of that month the jury returned a verdict of guilty against him. Thereupon a motion for new trial was filed in the case, and, while the same was pending, the governor issued a pardon in the following words: "The State of Nebraska, ss.: Executive Office, Lincoln. In the name and by the authority of the state of Nebraska, John H. Mickey, governor of said state, in the matter of the application of William M. Campion, for a pardon, to all to whom these presents shall come, sends greeting: Whereas, in the month of December, A. D. 1902, in an action pending in the district court for Seward county, Nebraska, wherein one Nellie M. Lattimer was the complaining witness and said William M. Campion was defendant, said Campion

was convicted in a trial to the jury of the crime and offense of bastardy, and whereas on October 24th, '06, in the manner provided by law on application for pardon, said William M. Campion was pardoned by the governor of this state for said offense and of said conviction, and the sheriff of said county duly released and discharged said Campion on account of and because of said pardon; whereas, on the 28th day of November, 1906, notwithstanding said pardon, by an order of the judge of said district court for Seward county, said William M. Campion was again arrested of said offense and again confined in the county jail of Seward county; whereas, on the 28th day of November, 1906, in an action pending in said district court for Seward county, Nebraska, wherein the state of Nebraska was plaintiff and said William M. Campion was defendant, he was convicted of the crime of abandonment and refusal and neglect to support without good cause the said child named in said proceedings as the reputed father of said illegitimate child and is now confined in the county jail of Seward county: Therefore, (1) know ye, that in consideration of the premises I hereby pardon the said William M. Campion, and he is hereby fully pardoned of each one of said offenses and convictions and orders of court, and the sheriff of Seward county is hereby ordered to release from confinement said William M. Campion. (2) All fines and forfeitures in connection therewith are hereby remitted. Given under my hand and the seal of the state of Nebraska this 22d day of December, A. D. 1906. (Seal.) John H. Mickey, Governor of the State of Nebraska. By the Governor: A. Galusha, Secretary of State." This document being presented to the sheriff of Seward county, he refused to recognize it, and thereupon this application was made to this court for a writ of habeas corpus.

1. It is contended in the brief that, after the relator had been discharged from confinement in the jail under the governor's order of October 24, above set forth, the district court had no jurisdiction in an *ex parte* proceeding

to order the sheriff to recommit the relator to jail. Our constitution and laws do not authorize the governor to order the sheriffs of the respective counties to discharge prisoners in their custody, and the sheriff should have entirely disregarded this order. After having without authority discharged the relator from jail, it was the duty of the sheriff on his own motion to have retaken the relator under the original order of commitment, and no formal proceedings in the district court were necessary for that purpose. The legality of the detention of the relator by the sheriff depends, then, entirely upon the force and effect of the governor's pardon issued on the 22d day of December, 1906.

2. Did the governor's pardon authorize the release of the relator from imprisonment under the commitment in the bastardy proceedings? The source of the pardoning power reposed in the governor is to be found in section 13, art. V of the constitution, which is as follows: "The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the legislature, at every regular session, each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation or pardon." Was the relator convicted of an offense in these bastardy proceedings within the meaning of this constitutional provision? It is strenuously contended in his behalf that in determining this question great consideration

must be given to the nature and character of the imprisonment. It is said that the law requires that he be imprisoned until he complies with the order of the court, and that cases will frequently arise in which, through financial inability to comply with the order of the court, the imprisonment must be perpetual; that such a remedy must be in the nature of punishment, and if he is imprisoned as a punishment it must be upon conviction of an offense, and so the conclusion is derived that these conditions rendered applicable the constitutional provisions clothing the governor with the pardoning power. It is not entirely clear to our minds that this premise is sound, or that, if it is, the conclusion must necessarily follow. Great reliance is placed upon the opinion of this court in *Ex parte Donahoe,* 24 Neb. 66, as establishing the law to be that there is no remedy for a defendant in bastardy proceedings upon conviction and being ordered to make payment to the complaining witness, except to comply with the order of the court, and that, in case of inability to comply with the order of the court, no alternative remains but to remain perpetually in jail. In the opinion in that case the language of the statute *"there to remain until he shall comply with the requirements of the court"* is printed with emphasis, and the opinion also contains this language: "This proceeding, under the statute, does not offer any remedy for imprisonment under it but that of security to comply with the order of the court, nor any alternative but that of payment of the amount to the complaining witness, the mother of the child." And again: "Nor is there any remedy, other than acquiescence and compliance with the law, for his discharge." That was an application for a writ of habeas corpus, and, although other points were made, the one apparently argued in the brief was that the obligation to pay under the decree is a debt, and that imprisonment for debt is forbidden by the constitution. Of course, such obligation is not a debt within the meaning of the provision of the constitution relied upon. From the quotations in the brief printed in

the report it appears to have been stated that "the legislature had no constitutional power to authorize imprisonment without making provision for the discharge of the prisoner at some time and in some manner." But this proposition does not appear to have been argued or insisted upon, except for the purpose of showing what the true construction of the statute is, it being insisted that the statute intended that the prisoner might be discharged under the insolvent debtor's oath. At all events, it does not appear that any showing was made in the trial court of the prisoner's inability to pay. The regular and proper way to test the question would be to make such showing, and, if overruled by the trial court, an appeal (under our present statute) taken to this court would present the question. It is doubtful whether the question could be presented at all upon application for habeas corpus, and, even if it could, it would require a very strong showing, amounting substantially to absolute proof, so that the court would be without jurisdiction to continue the imprisonment.

In *Ex parte Cottrell,* 13 Neb. 193, the act providing for such imprisonment is held not to be unconstitutional. Although neither of these cases is a very strong authority for the proposition announced in the language above quoted from the opinion of Judge COBB, in *Ex parte Donahoe, supra,* this has probably been taken to be the rule by the profession generally ever since the publication of the opinion in that case. Many states have statutes expressly providing for the discharge of the prisoner when absolutely unable to pay. It may be doubted whether any state in the Union, or any civilized country, unless it be Nebraska, has ever held that there was absolutely no remedy under such circumstances. It is frequently said that habeas corpus is not an effective remedy. 5 Cyc. 671; *In re Wheeler,* 34 Kan. 96; *In re Walker,* 61 Neb. 803. There is a note to *State v. Brewer,* 37 Am. St. Rep. 752, 764 (38 S. Car. 263), in which the author says that in

some cases the statutes provide expressly for discharge, and then says: "Even without such a provision it would seem, on general principles, that, as the inability to pay negatives the existence of that contumacy which is a necessary element of a contempt of court, no one can be detained after he establishes the fact of his inability, and so it has been held in *Ryan v. Kingsbery,* 89 Ga. 228. In other cases it is said that the prisoner's proper remedy is to take advantage of the insolvent laws. *Rogers v. State,* 5 Yerg. (Tenn.) 368; *Wood v. Wood,* Phil. Law. (N. Car.), 538. The principal case shows that this remedy has in South Carolina been converted into a statutory one. But whether the inability of a defendant to discharge a pecuniary liability imposed upon him is ascertained by regular insolvency proceedings, or simply by producing the necessary evidence in the court from which the order for his commitment was issued, it is possible that no legislation would be valid which would undertake to deprive one so situated of the privilege of procuring his release in one or other of these ways." A prosecution in bastardy is a civil action. We have no statute making bastardy a crime, and there are no common law crimes punishable in this state. The fact that he may be brought before the court by warrant to answer to the complaint does not determine the character of the proceedings. The legislature may authorize any civil action for the recovery of a penalty or forfeiture, or for fraud or trespass, to be so begun. Unless the action is for the recovery of debt upon contract the legislature may provide this remedy, and in all such actions the legislature may provide for the enforcement of the judgment by imprisonment. Imprisonment as a punishment in such cases is not authorized. It is solely for the purpose of coercing the defendant to perform the duty which the judgment of the court requires of him. When a court of competent jurisdiction in proper proceedings for that purpose adjudges a party to perform some specific act, and obedience is refused, he is committed until he complies with the order of the court. If this were

not so, such judgments would be idle. Mandamus and kindred remedies would be abandoned. But imprisonment under such order is never continued after it is made to appear that it is impossible for him to perform the thing required of him. Do these principles apply to judgments in bastardy proceedings under our statute? We do not regard the above cited cases, entitled *Ex parte Donahoe* and *Ex parte Cottrell,* as decisive of this question, and, even if they should be so held, they do not furnish a complete guide in determining the question now before us. Bastardy is not a crime under our statute. Imprisonment therefor as a punishment is not allowed. Can a governor remit a civil obligation? Can he relieve the reputed father from his obligation to support his illegitimate child? If such a proposition had been made without the prestige of the action of the governor of the state to support it, and not enforced by the argument of able and respected lawyers, we would have supposed that the mere statement of the question would have been sufficient answer. The constitution gives the governor power to pardon "offenses," and it is suggested that bastardy is an offense, although we have no statute defining and punishing it as a crime, and so the governor may pardon the wrongdoer and relieve him from all consequences of his act. The provision of our constitution is too plain to lead to such absurd conclusions. The word "offense" in a public statute is generally though not always used as synonymous with "crime." In *State v. West,* 42 Minn. 147, it is said that the terms, "crime," "offense" and "criminal offense" are all synonymous, and are ordinarily used interchangeably. At all events the words are so used in the section of the constitution under consideration. There can be no doubt that "crime" in the latter part of the section is used as an exact equivalent of the word "offense" in the first part, and that the words "convict" and "sentence" are used with reference to both. Unless there has been a crime and conviction the governor cannot interfere with a pardon. "A pardon is an act of grace, proceeding from the power

intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *United States v. Wilson,* 32 U. S. *150. A pardon affects only the public interest in the conviction. Private obligations cannot be discharged by it. *Ex parte Mann,* 39 Tex. Cr. Rep. 491, 73 Am. St. Rep. 961; *In re Nevitt,* 117 Fed. 448; *Estep v. Lacy,* 35 Ia. 419, 14 Am. Rep. 498; *In re Boyd,* 34 Kan. 570. The obligation of the relator to contribute to the support of his illegitimate child, as fixed by the judgment of the court, could not be released by the governor.

3. The governor can pardon only after conviction. The verdict of a jury is not a conviction within the meaning of the constitutional provision. The term is no doubt sometimes applied to finding a person guilty by a verdict of a jury. In ordinary speech it may be used in a still more general sense. It sometimes means the judgment of conviction pronounced by a court of competent jurisdiction. In statutes providing that conviction of crime may be shown to affect the credibility of a witness it has that meaning. *Commonwealth v. Gorham,* 99 Mass. 420; *Marion v. State,* 16 Neb. 349. Can it be supposed that the intention of the constitution makers was to forbid the governor to pardon the offense before proceedings had been begun in the courts, and to sanction his interference with the orderly course of those proceedings. In this case no final verdict had been rendered. The defendant had asked the court to set aside the verdict because of intervening errors, as he claimed, rendering it ineffectual. Nothing but the plainest language excluding any other meaning could justify the construction of the constitution contended for. But the language employed in the constitution precludes such a construction. The governor is required to communicate to the legislature each case of pardon granted, "stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation, or pardon."

This he could not do if there had been no judgment and sentence.

For these reasons, the relator is remanded to the custody of the sheriff of Seward county.

WRIT DENIED.

P. H. SALTER ET AL., APPELLEES, V. NEBRASKA TELEPHONE COMPANY, APPELLANT.

FILED JUNE 22, 1907. No. 14,674.

1. **Corporations: INJURY TO EMPLOYEE: OFFICERS, AUTHORITY OF.** When a serious injury requiring immediate medical or surgical services is incurred by the employee of a company engaged in a business dangerous to its employees, and the injury is received at a place distant from the home of the injured party, any general officer of the company then present may engage such medical or surgical treatment and care as the case requires, and bind the company for the reasonable value thereof, without any proof on the part of the party furnishing such treatment and care that such general officer of the company had special authority to make such contract or that such action on his part came within the general scope of his power and duties.
2. ———: ———: ———. In case of serious injury to an employee under the circumstances above set out, if no general officer of the company is present, the highest officer or person highest in authority then present may bind the company for such services as the emergency may demand.
3. ———: ———: ———. While not attempting to formulate any general rule to determine what constitutes emergency treatment for which a company will be liable under employment made by an officer or agent of known limited authority, it ought generally to extend for a time sufficient for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.

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

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

Mapes & Hazen and *John R. Hays, contra.*

DUFFIE, C.

January 1, 1904, Burt Crumb, an employee of the Nebraska Telephone Company, fell from the top of a telephone pole to the frozen earth, fracturing his arm at the elbow to such an extent that the ends of the broken bones protruded through his coat into the earth. He was taken to Hubbard, some 4½ miles distant, and the next morning put on the train and taken to Norfolk, where he was placed in a hospital operated by the plaintiffs. One O. E. Dugan, foreman in charge of the working gang of which Crumb was a member, was in Norfolk at the time, and made arrangements with the plaintiffs for the reception and treatment of Crumb. The evidence discloses that Crumb had received a compound fracture of the elbow joint; that in drawing back the protruding bones previous to his reception by the plaintiffs, some 19 hours after the accident, dirt and other foreign matter, which had been taken into the wound caused by the protruding bones, infected the arm, and this infection spread over the entire system, necessitating a number of operations, among others the removal of the elbow joint, which operation was performed by the plaintiffs on January 16. It further appears that Crumb's condition was such as to require the constant attendance of a nurse and the services of both the plaintiffs to dress his arm, which was necessary from two to three times a day for some time after his reception. There is evidence tending to show that at no time previous to his leaving could Crumb have been moved from the hospital without great danger to his life. Crumb was received by the plaintiffs on January 2, 1904, and discharged on July 28, 1904, This action was commenced against the defendant and appellant to recover the value of the professional services rendered and for board and hospital services, the amount claimed being $918.

The answer admits that Crumb was an employee of the defendant corporation, and was injured so as to become in

need of immediate medical and surgical treatment; avers that Dugan employed the plaintiffs to render such services on January 2, 1904, but that he then informed plaintiffs that defendant would not be responsible or pay plaintiffs for more than the first surgical treatment, and that neither he (Dugan) nor any other employee of defendant had authority to employ plaintiffs and to obligate the defendant for more than the first treatment given Crumb. The answer further offered to let plaintiffs take judgment for the value of the first treatment of said Crumb as specified in the petition, to wit, setting arm $25, with the costs to date of filing the answer.

On the trial the defendant interposed numerous objections to evidence offered by the plaintiffs, which objections were overruled and exceptions duly entered. The defendant offered evidence to show that Dugan had no authority to make any contract on behalf of the company for services rendered to any employee of the company, except for the first treatment given such injured employee; also, that Dugan informed one of the plaintiffs on January 3, 1904, that the defendant would not be responsible for any services other than the first treatment of Burt Crumb; that at a later date another employee of the company informed one of the plaintiffs, when interrogated about payment for services rendered Crumb, that it was a matter to be decided later by the company; and that on another occasion the district manager of the defendant company at Norfolk informed one of the plaintiffs that by the rules of the defendant company it would not hold itself responsible for surgical and medical attendance received by one of its injured employees, except only for the first treatment. An objection to these offers made by the plaintiffs was sustained by the court and defendant's exceptions duly entered. At the conclusion of the testimony the defendant moved the court to direct a verdict for the defendant as to the entire claim of the plaintiffs, except $25 for the first treatment, interest and costs, and the plaintiffs moved for a directed verdict for the entire amount of

plaintiff's demand, with interest and costs. The court sustained the plaintiffs' motion, and in accordance therewith directed a verdict for the plaintiffs for the sum of $971.70. From a judgment entered upon this verdict the defendant has appealed to this court.

It will be unnecessary, as we view the case, to pass upon all the errors assigned by the appellant. While the rule is not uniform there are many cases holding that, where a company is engaged in a business dangerous to its employees, in case of an accident of such serious character that the injured employee stands in need of immediate medical or surgical attendance, the conductor of a train, or the highest officer of the company present at the time, has, from the necessities of the case, authority to represent the company and to bind it by the employment of a surgeon for such immediate medical or surgical services and care as are required. In support of this rule the court, in *Terre Haute & I. R. Co. v. McMurray,* 98 Ind. 358, 49 Am. Rep. 752, said: "An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling

aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

In *Marquette & O. R. Co. v. Taft,* 28 Mich. 289, the yardmaster of the defendant company employed a physician to amputate a leg and bind up the wounds and bruises of an employee injured in the service of the company. The employment by the yardmaster was afterwards ratified by the general superintendent. The company defended upon the ground that it was not shown that either the yardmaster or the general superintendent acted within the scope of their authority in employing the surgeon. Judgment went in favor of the plaintiff in the trial court, and this judgment was affirmed by the supreme court, Justices Groves and Campbell voting for a reversal, Cooley and Christiancy voting for an affirmance. Judges Cooley and Christiancy appeared to have based their decision more upon the ground of the ratification of the employment by the general superintendent, than upon the authority of the yardmaster to make a contract binding the company in the first instance.

In *Toledo, St. L. & K. C. R. Co. v. Mylott,* 6 Ind. App. 438, a brakeman on the appellant's road met with an accident by which his skull was crushed. The conductor requested the appellee to board and care for the injured man in every way necessary, stating that the company would pay for the same. The conductor was the highest officer of the company then present. After discussing the right of a general officer to bind the company by such employment, the court proceeded to discuss the right of the conductor to do so. We quote from the opinion: "It being established that the general officers of the company would have the power under such circumstances to bind the company for the necessary board, care, and attention furnished an employee injured while in the performance of his duty, it follows, under the authorities, that the

conductor also has such authority under certain circumstances. That the conductor has no such general authority in ordinary cases is conceded, but it is clear that he has such authority in the case of an emergency where an accident occurs remote from the general offices, when he is the highest officer of the company present, and when immediate action is required in order to preserve and protect the life of the injured man. In the face of this emergency, requiring immediate action to preserve human life, the duty devolves upon the company to act, and the conductor stands in the place of the company, clothed with such powers as may be necessary to meet the exigencies of the occasion." The supreme court of Indiana, so far as our examination of the authorities has extended, has gone further than any other in adopting the rule that a subordinate officer has authority to bind the company by the employment of physicians and surgeons in case of an emergency, and where no higher officer of the company is present at the time, and these decisions are all to the effect that such employment binds the company only for the first or emergency service. There are numerous cases from other states holding that, where such services are obtained, and where there is direct or inferential evidence of a ratification by some general officer, then the company is bound for all services so rendered.

In *Toledo, W. & W. R. Co. v. Rodrigues,* 47 Ill. 188, the station agent of the company employed the appellant to nurse and take care of one Johnson, an injured employee of the company. He wrote to the general superintendent, making a full statement of all that had been done. The fourth paragraph of the syllabus is in the following words: "Where an employee of a railroad company has received injury, while in the discharge of his duty, and the station agent, in his capacity as such, assumes certain liabilities in his behalf, for nurse and medical attendance, and writes a letter to the general superintendent stating the facts, it is presumed that the general superintendent received such notice, and, in the absence of any instructions

to the contrary, consented, on the part of the railroad company, to assume the liabilities of the station agent for all reasonable charges in this behalf." *Toledo, W. & W. R. Co. v. Prince,* 50 Ill. 26; *Indianapolis & St. L. R. Co. v. Morris,* 67 Ill. 295, and *Cairo & St. L. R. Co. v. Mahoney,* 82 Ill. 73, are to the same effect, but, as will be seen, these are based on the ratification by a general officer of the company of employment made by one without general authority to do so. On the whole, we are inclined to adopt the rule that a general officer of the company has power to make such a contract as is here sued on without showing that he had special authority to do so, and, if an emergency demanding immediate action exists, then the highest officer then present, whether he be conductor of a train, the station agent of the company or the foreman in charge of a gang of workmen, may bind the company for such medical and surgical attendance as the exigencies of the case may immediately demand. We recognize that this rule is one required by an emergency, rather than one based on any general legal principle, and that the authority of the officer with limited powers can extend no further than the emergency demands. As said in *Holmes v. McAllister,* 123 Mich. 493: "Authority to act is implied from the necessity of the case. * * * Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him."

It is urged by appellee that the emergency in this case continued during the time that Crumb was in the hospital, and this was probably the theory upon which the district court directed a verdict for the plaintiffs for the full amount of their claim. *Toledo, St. L. & K. C. R. Co. v. Mylott, supra,* and *Williams v. Griffin Wheel Co.,* 84 Minn. 279, are cited in support of this position. A careful reading of the opinion in the *Mylott* case will disclose that

the only question considered by the court was the right of the plaintiff to recover at all, and that the question of the amount of the recovery was not involved. In the concurring opinion of Davis, J., it is said: "No question is raised as to the extent or amount of the recovery. The only question presented for our consideration is whether appellee was entitled to recover anything. The court does not hold that appellee was entitled to recover for board of others, or for the continued care and nursing of the brakeman beyond the emergency then existing." We do not attempt to define what are primary or emergency services, and *Williams v. Griffin Wheel Co., supra,* does not assist us in attempting to determine the question, as the facts of that case are dissimilar from this case, so far as disclosed in the opinion, and apparently are not fully stated. We believe, however, that emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the company, and, if it declines to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.

For the reason that the law will not impose upon the defendant company the duty of caring for one of their injured employees except for emergency treatment, and for the reason that the court refused evidence going to show that the company expressly disclaimed liability for further treatment, we recommend a reversal of the judgment.

ALBERT, C., concurs.

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

REVERSED.

JOHN BOESEN, APPELLANT, V. OMAHA STREET RAILWAY COMPANY, APPELLEE.

FILED JUNE 22, 1907. No. 15,073.

1. **Carriers: INJURY: CONTRIBUTORY NEGLIGENCE.** A party cannot be charged with contributory negligence on account of taking a place on a crowded street car designated by the conductor of the car.

2. **Instructions.** An instruction not based upon the evidence, although correct as a legal proposition, is ground for the reversal of a judgment if it has a tendency to mislead the jury. *Esterly Harvesting M. Co. v. Frolkey*, 34 Neb. 110.

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

T. W. Blackburn and *Richard S. Horton,* for appellant.

W. J. Connell and *J. L. Webster, contra.*

DUFFIE, C.

On a former appeal taken by the Omaha Street Railway Company the judgment was reversed and the cause remanded on account of misdirection of the court. 74 Neb. 764. A retrial of the case resulted in a judgment for the defendant, and the plaintiff has appealed, alleging error in the instructions given by the court and in refusing instructions asked by the plaintiff. A statement of the case will be found in the opinion of Mr. Commissioner ALBERT on the former appeal, and the facts need not again be repeated here. It is conceded that the accident took place at what is known as the "blind switch," just north of O street, in the city of South Omaha. The evidence is undisputed that the plaintiff was standing on the running board of the rear or trailer car, and his claim is that, on reaching the blind switch, the car was derailed, throwing him to the pavement and causing the injuries for which he brings suit. The plaintiff testified that both the motor and trailer car were crowded at the time he boarded

the trailer; that the conductor in charge of the car directed him to stand upon the running board. This evidence is undisputed, and plaintiff is corroborated by other witnesses that he stood on the running board because both the motor and trailer were crowded with passengers. It was claimed by the defendant that plaintiff was guilty of contributory negligence in riding upon the running board of the car, and this was brought to the attention of the jury by the third instruction of the court, who further said to them: "If you find from the evidence in this case that in so riding he was guilty of negligence which contributed to his injury, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant." The plaintiff requested the following instruction upon that phase of the case: "You are instructed that, if the plaintiff was standing on the running board of the car at the invitation of the defendant, his standing on said running board would not of itself constitute negligence on his part." We have no doubt that the plaintiff was prejudiced by the instruction given by the court, and by his refusal to give the instruction asked by the plaintiff. If a passenger, at the direction of those in charge, takes a designated place on the car of the company, he cannot be charged with negligence solely from the fact that he rode in such position. He cannot be charged with contributory negligence because of the position which he occupies at the direction and request of the company. The negligence, if any, in standing where he is directed, is the negligence of the company.

In *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570, it is held: Assuming that deceased had a right to be safely carried by appellant to the stockyards, he had a right to suppose that he would not be assigned to a place of extra hazard or peril, and that, to whatever place assigned, reasonable care would be exercised to protect him from injury. In *City R. Co. v. Lee*, 50 N. J. Law, 435, the court said: "It certainly cannot be contributory negligence that he, at the invitation of the defendant,

exposed himself to risk of danger created by the defendant, and which he did not know and of which no warning was given. The position of this outside platform undoubtedly was attended with some risks and exposure. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing. And had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him."

If the plaintiff in this case had been injured by a passing vehicle, it is possible, although we have some doubt on the proposition, that he might be charged with contributory negligence, but he certainly cannot be so charged when he occupied the place by the direction of the conductor in charge of the car, if the accident occurred from the operation of the train or from defects in the car or the tracks. The ninth instruction of the court is in the following language: "You are instructed that, if you believe from the evidence that plaintiff attempted to get off the car while it was in motion and fell with his knee upon the pavement, he cannot recover in this action, and your verdict must be for the defendant." The plaintiff testified that he was thrown from the foot board by the car being derailed at the blind switch near O street. The witnesses Oldman, Jodeit and Mrs. Tobin each testify that the trailer jumped the track at that point. We have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion. The instruction assumes that there was evidence to go to the jury, and submits to them a fact of which no evidence exists, and this, under the repeated holdings of this court, was error. The rule is so familiar that a citation of authorities is unnecessary. Other alleged errors need not be discussed, as the case will have to be reversed and remanded on account of those already noticed.

We recommend a reversal of the judgment and remanding of the cause for another trial.

EPPERSON and GOOD, 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.

EDWARD CUSHING, APPELLANT, V. OTTO LICKERT ET AL., APPELLEES.

FILED JUNE 22, 1907. No. 14,777.

1. **Officers: ACTION ON BOND.** Section 643 of the code, providing for actions upon official bonds by any person damaged through the misconduct of an officer, refers only to bonds given under statutory authority.

2. **Cities: POLICEMEN: ACTION ON BOND.** A citizen could not, prior to 1905, maintain an action upon the bond of a patrolman of the city of Omaha, there being no privity between the plaintiff and the surety, and neither the state laws nor the city ordinances giving him the right to recover.

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

T. W. Blackburn, for appellant.

C. L. Dundy, E. M. Martin and *E. M. Bartlett, contra.*

EPPERSON, C.

Plaintiff sued two patrolmen of the city of Omaha and the surety on their bonds to recover damages for the unlawful shooting, arresting and imprisoning of the plaintiff in August, 1903. A demurrer *ore tenus* to the petition by the surety company was sustained and the case dismissed as to that defendant. Plaintiff appeals.

The bond, which is set forth in the petition, provides that each patrolman shall faithfully and impartially perform all his duties, and shall deliver over to the city all property in his possession belonging to the city, and shall hold the city harmless from any loss or liability from his appointment. Plaintiff contends that he is entitled to sue upon the bond, for damages sustained by him at the hands of the patrolman, under the provisions of section 643 of the code. We cannot adopt this view. The section cited is as follows: "When an officer, executor, or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is by law entitled to the benefit of the security may bring an action thereon, in his own name, against the officer, executor, or administrator, and his sureties, to recover the amount to which he may be entitled by reason of the delinquency." The official bonds there referred to are the bonds required by and given under the provisions of the statute. Our legislature, prior to 1905, had not provided that patrolmen in cities shall give bonds for the faithful discharge of their duties. The bond in question was presumably required by city ordinance. The city is named as the obligee. The bond itself does not give individuals the right to sue for damages sustained at the hands of the patrolmen, nor is it shown that the ordinance was intended to give such protection.

This court has frequently held that one not a party to a bond may maintain an action thereon, but only when such bond was given for his benefit. *Barker v. Wheeler*, 71 Neb. 740, and cases there cited. But, in the absence of a contract made for his benefit, a citizen cannot maintain an action against the surety on an official bond, except by legislative authority. In *Alexander v. Ison*, 107 Ga. 745, 33 S. E. 657, a case similar to the case at bar and arising in a state having similar laws as to official bonds, it is said: "We cannot think it was for a moment contemplated

that any individual could have redress for wrongs committed by the chief of police, by bringing an action against him and his sureties upon his officical bond. It was argued here that this case fell within the provisions of section 12 of the political code, which declares that 'all bonds taken from public officers shall be kept in the places specified by law, and copies thereof shall be furnished to any person desiring them. Suits thereon may be brought by any person aggrieved by the official misconduct of the officer, in his own name, in any court having jurisdiction thereof, without an order for that purpose.' Obviously, however, the provisions embraced in this section were intended to be applicable only to the public officers of this state who are required by general law to give bonds for the faithful performance of duties they owe to the public at large. This section is not, therefore, to be regarded as having any application whatever to a bonded officer of a municipality who is required by special legislation, relating to that municipality alone, to give such a bond as the mayor and council may deem necessary to the proper protection of the city itself."

Section 643, *supra*, does not refer to bonds given otherwise than by legislative authority. The judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

LAURA W. GRIMM, ADMINISTRATRIX, APPELLEE, V. OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT.*

FILED JUNE 22, 1907. No. 14,856.

1. **Electricity: NEGLIGENCE.** An electric light company placed its wires through the branches of trees so that high potential wires charged with 2,300 volts of electricity were within 26 inches of low potential wires. It was undisputed that proper construction required such wires to be at least five feet apart, and, even when so placed, should not be permitted to pass through the branches of trees, thereby endangering contact. *Held*, That the company was guilty of negligence as a matter of law, and that errors in submitting the question to the jury were without prejudice.

2. **Master and Servant: INJURY: NEGLIGENCE.** *Held*, That plaintiff's intestate was killed while in the performance of duties within the scope of his employment.

3. ———: ASSUMPTION OF RISK: NEGLIGENCE OF MASTER. A servant by his contract assumes the ordinary risks and dangers incident thereto, but does not assume the risk of dangers due to his master's negligence.

4. ———: ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Plaintiff's intestate, a lineman, was sent by his superior to ascertain and remove the cause of an electrical disturbance at the residence of one of the company's patrons. It was undisputed that deceased knew that the patron's son had received a shock from one of the electric lights in the dwelling, and that the wires in the yard were causing trees to which they were attached to smoke: Deceased assisted in removing the wires in the yard, and then went into the residence, and later asked to be shown the light from which the son had received the shock. Upon it being pointed out to him, he took hold of it with his hand, and was instantly killed. *Held*, That whether deceased assumed the risk and was guilty of contributory negligence were properly left to the determination of the jury.

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

Greene, Breckenridge & Kinsler, for appellant.

James M. Macfarland and *Weaver & Giller, contra.*

* Rehearing allowed. See opinion, p. 395, *post.*

EPPERSON, C.

Dundee is a village situate immediately west of the city of Omaha. Forty-Ninth street runs north and south through the village, intersecting Davenport street at right angles. The wires of the Omaha Electric Light & Power Company extend along the east side of Forty-Ninth street. There were two wires, a primary or high potential wire carrying 2,300 volts of electricity, and a secondary or low potential wire carrying 106 volts. The high potential wires were on four-pin arms near the top of the poles, and the low potential wires on two-pin arms about 26 inches lower down. The poles were placed so that wires passed through the crown of trees along Forty-Ninth street. At Forty-Ninth and Davenport streets the power company constructed a transformer, and strung a secondary wire from the transformer east along Davenport street to the residence of W. L. Selby. In this manner the company supplied Selby with electricity. Selby's yard, as well as his residence, had been wired and was provided with electric lights. These lights were connected with those in the house and controlled by switches in the dwelling. August 29, 1904, about 7:30 A. M., Selby observed a disturbance among the wires in his yard, and noticed that the trees to which the wires were attached were smoking and sparks were flying from the fixtures. He requested his son, Frank Selby, to go to the switch in the cellar and cut the current. Frank proceeded to the cellar, but could not see the switch. Thereupon he attempted to turn on an incandescent light. The instant he took hold of the button he received a severe electric shock. After Mr. Selby learned of the accident to his son, he telephoned Wesley Morrison, an independent electrician who had wired the yard, and also called up the company, and notified it that the trees were burning in the yard, and that his son had sustained a shock. Upon receiving this report, George Keebler, as foreman of the power company, directed James C. Grimm, one of the defendant

company's employees, to immediately proceed to Dundee, and investigate and remove the trouble complained of, stating to Grimm that the information had been received from Selby's at 4808 Davenport; that in all probability there was a cross between the primary and secondary wires on Forty-Ninth street; that he should look carefully along Forty-Ninth street as the trees were pretty thick there; and that the trouble in all probability would be found at that point. Morrison reached the premises first. When he observed the trees smoking, it occurred to him that there was a "ground," and he went into the house and cut the current from the yard lights. Upon his return, he began cutting down the wires in the yard. While thus engaged, Grimm came up and began to assist in removing the wires. After this work was completed, Mrs. Selby called to them to investigate the wiring in the house. The two men went in, and Morrison began working on a switch, while Grimm stood by watching him. Frank Selby was in the room, and Grimm asked him to show him the light in the cellar where he had received the shock. Frank testified: "When we got down cellar, I walked right around the switch to the west, and pointed at it with my finger, and said, 'That's the one,' and he (Grimm) walked right around to the south, and said, 'Is this the one?' and then he grabbed it," and was instantly killed. An investigation disclosed that the company's wires had "become tangled together" in the trees along Forty-Ninth street, and that the high potential wires and the low potential wires were in contact, thus causing 2,300 volts of electricity to be carried along the secondary wire to the Selby residence.

The plaintiff, Laura W. Grimm, as administratrix, sued the power company and recovered $5,000 damages for the death of her husband, James C. Grimm. The negligence relied upon is that the power company negligently and carelessly constructed the electric wiring leading to the residence of W. L. Selby so that the high potential wires and the low potential wires ran along so close together that they became at times crossed, and negligently ran

said wires through the limbs of trees so that the high currents were carried upon the low current wires, and in that way conducted into the residences; and that said defendant negligently and carelessly maintained, and continued to maintain, said faulty construction and arrangement of said wires up to and including the time said James C. Grimm was killed. The power company alleged as a defense, and now urges as grounds for reversal, (1) that the company was not negligent; (2) that plaintiff's intestate was working outside of his employment at the time of the fatal shock; (3) that the accident was one of the assumed risks incident to his employment; and (4) that deceased was guilty of contributory negligence. Of these contentions in their order.

1. We think the company was negligent in placing its wires through the branches of trees along Forty-Ninth street so that high potential wires were within 26 inches of low potential wires. The evidence shows without contradiction that proper construction requires such wires to be at least five feet apart, and, even when so placed, should not be permitted to pass through the branches of trees, thereby endangering contact. The negligence of the company was clearly established by undisputed evidence, and the court should have instructed the jury to that effect. Hence, assigned errors in submitting the question to the jury will not be considered.

2. It cannot be said as a matter of law that plaintiff's intestate was working outside of his employment at the time of the fatal shock. Grimm, under the directions of Keebler, his line foreman, performed what is called "outside work," while the "inside work" was in charge of another foreman and different employees. Selby notified the company that the trees in his yard were smoking, and that his son had received a shock. The jury were justified in finding that the company knew that there was "inside" as well as "outside" trouble. Grimm was told by his foreman that the information had been received from 4808 Davenport street—Selby's residence. Grimm was sent

alone to remedy the defects. If the company's division of labor was such that there were men for "outside work" and men for "inside work," then certainly an "inside man" should have been sent with Grimm. But such was not the case; Grimm was sent alone. He was justified in proceeding to the Selby residence and removing the trouble reported from that point, no matter what it was. The company had entrusted him with the job. He was at the Selby residence for that purpose, and, when Mrs. Selby invited him into the house to ascertain whether normal conditions had returned, all that he was doing was on behalf of the company and for its benefit. He was not doing this work out of "idle curiosity," as contended by counsel, but was doing it because it was the duty of the company to attend to such things, and he had been sent alone for that purpose. "The question whether the injured person was acting in the course of his employment is for the jury, * * * where a difference of opinion may reasonably be entertained with regard to the proper inference to be drawn from the testimony." 2 Labatt, Master and Servant, p. 1867; Wood, Law of Master and Servant, sec. 388.

3. Defendant's third contention is that the accident resulting in Grimm's death was one of the ordinary risks incident to his employment. A servant by his contract of employment assumes the ordinary risks and dangers incident thereto. *Missouri P. R. Co. v. Baxter,* 42 Neb. 793; *Dehning v. Detroit Bridge & Iron Works,* 46 Neb. 556. He assumes risks arising from defective appliances used, when such risks are known to him or are apparent and obvious to persons of his experience and understanding. *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138. A servant, however, does not assume the risk arising from his master's negligence. *Chicago, R. I. & P. R. Co. v. McCarty,* 49 Neb. 475.

Did the fatal accident fall within the ordinary and usual hazards of the business in which Grimm was engaged? Whether it did, we think, is a question for the

jury. Whatever may be the rule in other jurisdictions, we think the decision of this court in *New Omaha T.-H. E. L. Co. v. Dent*, 68 Neb. 674, required the submission of the question of assumed risk to the jury. In that case it was held: "An employee assumes only the risks arising from the appliances and materials to be used by him or from the manner in which the business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding." HOLCOMB, C. J., said in the opinion: "Taking the knowledge and experience of the deceased, as disclosed by the evidence, can it be said that the dangers from the defective or decayed insulation were so apparent that the deceased was negligent in respect of the manner in which he handled the wires he was working with, or assumed these extraordinary risks incident thereto." In that case an experienced lineman was injured because of defective insulation, while working among wires highly charged with electricity. The defective insulation could have been observed more readily than the dangerous character of the electric light in the case at bar. An employee and the public have the right to assume that the company will not charge an incandescent lamp with 2,300 volts of electricity. If it negligently does so, it cannot successfully contend that its employee assumed the danger arising from its gross negligence. The authorities are that an employee does not assume the risk due to his master's negligence. We think the learned trial court properly left the question of assumed risk to the determination of the jury. The burden of proof was on defendant to establish this defense. *Nadau v. White River Lumber Co.*, 76 Wis. 120. Defendant did not prove that Grimm failed to look for the cross between the wires along Forty-Ninth street, or that he could have ascertained the fact that the wires were in contact from a prudent examination of the wires among the branches of the trees. See *Bernier v. St. Paul Gaslight Co.*, 92 Minn.

214; *Blom v. Yellowstone Park Ass'n*, 86 Minn. 237; *New Omaha T.-H. E. L. Co. v. Rombold*, 68 Neb. 54.

4. It cannot be said that plaintiff's intestate was guilty of contributory negligence as a matter of law. It is true, he took hold of the light without insulating himself, and with knowledge that young Selby had sustained a shock; but he could not presume that the company had negligently charged the fixture with 2,300 volts of electricity. The city electrician testified that one would conclude that young Selby would have been instantly killed had the fixture been charged with the dangerous current. This, together with the fact, as shown by the record, that it is not unusual for boys and women with soft hands to receive severe shocks from the ordinary current in incandescent lamps, might have led Grimm, or any other prudent man, for that matter, to presume that no serious harm would result from contact with a fixture which is ordinarily free from dangerous currents.

Where a young man 21 years of age, and an electrician, had seen the proprietor of a cafe attempt to turn out the electric lights on a chandelier, and, after seeing him draw back on account of a shock received, attempted to turn out the lights, and received a shock from which he died, it was held, in *Predmore v. Consumers L. & P. Co.*, 99 App. Div. (N. Y.) 551, that the question of his contributory negligence was for the jury. The court said that it was true he had seen the proprietor draw back on account of the shock received, but that, on the other hand, it was to be observed that he must have noticed that this shock had not produced any serious effects, and it could not be held, as a matter of law, that he was at fault for supposing that he could turn out the light himself without risk of fatal injury.

In an action for death caused by an electric current from wires used in lighting a house, where the usual voltage was less than enough to be dangerous to life, whether the deceased was guilty of contributory negligence in handling the wire was a question for the jury.

Witmer v. Buffalo & N. F. E. L. & P. Co., 112 App. Div. (N. Y.) 698. In the *Dent* case it was held that the deceased's contributory negligence was not so conclusively proved that there was no reasonable chance of different minds reaching different conclusions, and to have been properly submitted to the jury.

Under the rule announced in the foregoing authorities, we think the question of contributory negligence of the deceased was for the jury. It is argued, however, by counsel for the power company that deceased was instructed by his foreman that the dangerous condition in Selby's residence was probably due to contact of primary and secondary wires in the trees on Forty-Ninth street, and hence he was guilty of negligence in taking hold of the light with knowledge of this fact. The conversation with deceased before he started for Dundee, as testified to by the foreman of the company, was admitted over plaintiff's objection. The competency of this testimony is challenged. However, if properly admitted, the record is still silent on one point. It does not disclose what examination Grimm made of the wires along Forty-Ninth street to discover a cross before proceeding to the residence of W. L. Selby. The city electrician, a man of considerable experience, testified that the trees were so thick along Forty-Ninth street that he could barely see the crossed wires. For all that this record discloses Grimm had made a careful examination along Forty-Ninth street, and failed to discover the wires which could barely be seen among the branches of the trees. The burden was on the company to prove that he did not make such examination before appearing at the Selby residence. This it failed to do, and the jury were justified in finding that Grimm had no knowledge of the deadly current in the residence.

We do not think the learned trial court was in error in submitting this case to the jury, and therefore recommend an affirmance of the judgment.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed January 23, 1908. *Former judgment of affirmance adhered to:*

1. Master and Servant: INJURY: PRESUMPTIONS. The instinct of self-preservation and the disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care.
2. ———: ASSUMPTION OF RISK: BURDEN OF PROOF. In an action against a master for negligence, the burden of establishing an assumption of risk is on the master.
3. ———: NEGLIGENCE: QUESTIONS FOR JURY. In an action for the death of an employee, *held* that whether he was guilty of contributory negligence in taking hold of an incandescent lamp charged with a deadly current of electricity, or assumed the risk of injury, was for the jury.

EPPERSON, C.

A rehearing has been granted, and the case reargued, and again submitted. The first and second divisions of our former opinion, *ante,* p. 387, are not assailed. We have considered further the questions of assumed risk and contributory negligence in the light of additional adjudications called to our attention by appellant's able counsel. Did the fatal accident fall within the usual hazards of the business in which Grimm was engaged? We confess that the case is not free from difficulty, and that the question involved is a close one. On first impression, one is inclined to think that deceased assumed the risk and that his administratrix cannot recover; but, upon mature reflection, the view taken by the learned trial court seems more just and reasonable, and leads one to conclude, whatever may be his views if acting as a trier of fact, that there is a reasonable probability of different minds reaching different conclusions on the question of assumed risk, and hence its determination should be left, where the district court placed it, with the jury. At any

rate, we must presume that the lower court's ruling was correct, until the contrary is established.

There is another presumption which must be given weight. The record is silent as to the conduct of the deceased from the time he left the defendant's place of business until he arrived at Selby's residence, where the accident occurred. "The instinct of self-preservation and the disposition of men to avoid personal harm reinforce an inference that a person killed or injured was in the exercise of ordinary care." 16 Cyc. 1057, note 49; *Baltimore & P. R. Co. v. Landrigan,* 191 U. S. 461; *Kansas City-Leavenworth R. Co. v. Gallagher,* 68 Kan. 424, 64 L. R. A. 344; *Hendrickson v. Great Northern R. Co.,* 49 Minn. 245; *Northern P. R. Co. v. Spike,* 121 Fed. 44. In the case last cited, Caldwell, Circuit Judge, said: "The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery, in the absence of countervailing testimony. * * * Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases, and may be strong enough to overcome the testimony of an eye-witness. * * * This principle has been repeatedly affirmed and applied by the supreme court of the United States."

Another inquiry is: Upon whom is the burden of proving that Grimm assumed the risk of the accident which resulted in his death? We think the weight of authority is that the burden of sustaining this defense is upon the defendant. *Dowd v. New York, O. & W. R. Co.,* 170 N. Y. 459; *Calloway v. Agar Packing Co.,* 129 Ia. 1; *Arenschield v. Chicago, R. I. & P. R. Co.,* 128 Ia. 677; *Mace v. Boedker & Co.,* 127 Ia. 721; *Nadau v. White River Lumber Co.,* 76 Wis. 120; *Norfolk & W. R. Co. v. Ward,* 90 Va. 687, 19 S. E. 849; *Missouri, K. & T. R. Co. v. Jones,* 35 Tex. Civ. App. 584, 80 S. W. 852; *McDonald v. Champion Iron & Steel Co.,* 140 Mich. 401; *Judd v. Chesapeake & O. R. Co.,* 18 Ky. Law Rep. 747, 37 S. W. 842; *Jackson Lumber Co. v. Cunningham,* 141 Ala. 206, 37 So. 445.

In view of the rules above stated and the general principles announced in the former opinion, can it be said that deceased must be held as a matter of law to have assumed the risk of the injury which caused his death? Grimm was "a first-class lineman," who had been in defendant's employ for a year and a half. Defendant, however, contends that he was "a trouble finder," that his employment required the performance of dangerous duties, and that the risks which he assumed were commensurate with his extra-hazardous employment. In defendant's brief it is said: "James C. Grimm, a lineman and troubleman of large experience, familiar with the work and the dangers of his employment, was selected for this particular service of inspecting and repairing the defective and dangerous conditions referred to." The only evidence in support of this contention is the testimony of defendant's foreman, who said that Grimm was a lineman receiving $2.85 a day; that $2.85 was the standard wage (for lineman, we suppose); that he usually earned a little more salary than others working in the same capacity, because he worked a great deal over time. "He was a man whom I would take for over-time work, taking care of trouble or anything that might come up after the ordinary hours, and in that way used. We usually have trouble after a storm. * * * Q. What sort of trouble? A. From various causes. The wires become deranged after a wind, and, so, many things have a great deal to do with causing trouble. Wires come in contact with poles and wood, and so on, that might cause any burning of high potential wires. Q. State whether you have cases where wires of different potentiality come in contact? A. That occurs at times; yes, sir. Q. So all of these conditions occur from time to time? A. They do. Q. In the life of an electric light man, you say? A. Yes, sir. Q. State what the fitness or competency of Mr. Grimm was with respect to that class of work. A. I considered him a first-class man." If the above evidence is sufficient to establish, to such a degree of certainty that all reasonable minds are con-

vinced, that Grimm was employed for the purpose of finding and repairing dangerous defects of an extra-hazardous nature, and that his experience or knowledge was such that he knew or should have known the probable results of his conduct at the time of his death, then the defendant was justified in sending him out upon this hazardous service, and Grimm assumed the risk incident thereto. Defects, such as caused Grimm's death, it appears from the evidence quoted, occur from time to time during the life of an electric light man. From this it would seem improbable that the deceased, a man 23 years of age, had by experience acquired a great deal of knowledge regarding defects of the kind testified to. It does not appear that he received extra wages for extra-hazardous service, nor does it appear that he had been engaged in extra-hazardous work. At most, he was used for over-time work taking care of trouble. The nature of the trouble referred to by the witness is not known, but a reasonable inference, in the absence of an explanation, and in view of the fact that Grimm was receiving a lineman's wages, is that it referred to common-place troubles, and not such as are extra-hazardous and dangerous to human life. The administratrix testified that her husband (Grimm) was "a lineman." The jury, under all the circumstances of the case, were not compelled to find that deceased was an inspector or trouble finder.

However, if plaintiff's decedent knew that the wires on Forty-Ninth street were in contact, and with this knowledge attempted to turn on the light in Selby's residence, we can see how it could be held that he assumed the risk. The question of the assumption of risk generally turns upon the actual or constructive knowledge of the deceased of the dangers at the time of the injury. "The doctrine of the assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should, know, the risks to which he is exposed, he will, as a rule, be held to

have assumed them; but where he either does not know, or, knowing, does not appreciate, such risks, and his ignorance or nonappreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries." 26 Cyc. 1196-1199, and many cases there cited.

Now, the burden of proving that Grimm had knowledge, or should have known, of the risks to which he was exposed, rested upon the defendant company. There is no proof, and the record is silent, as to the conduct of the deceased immediately prior to his appearance at the Selby residence on the morning in question. If we take as true the foreman's version of the conversation that he informed deceased that the disturbance was due to crossed wires on Forty-Ninth street, still the record does not disclose what examination Grimm made of the wires along Forty-Ninth street to discover a cross before proceeding to Selby's residence. The city electrician, a man of considerable experience, made an examination of the wires along Forty-Ninth street after Grimm was killed, and testified that he could barely see the crossed wires among the branches of the trees. For all that the evidence discloses, Grimm may have made an examination of the wires on Forty-Ninth street, and failed, in the exercise of due care, to discover the crossed wires, which could barely be seen among the branches of the trees. If Grimm had been informed of the contact of the wires, he certainly had the highest motives for making such an examination, for his life depended upon such caution being taken. The company did not prove that he failed to make such an examination, or was aware of the crossed wires, or did not use ordinary care to discover them. In view of the natural instinct of self-preservation and the disposition of men to avoid personal harm, the jury were justified in presuming that plaintiff's intestate was in the exercise of ordinary care, and had made a prudent examination of the wires on Forty-Ninth street, and failed to discover the wires in contact among the branches of the trees. If this

is true, then deceased did not know that Selby's incandescent lamp was charged with the deadly current of 2,300 volts of electricity. "In the absence of evidence conclusively establishing assumption by a servant of the risk of his employment, the fact that the servant did not establish affirmatively that he had no knowledge of the risk, and therefore did not waive it, will not prevent a finding that he was not chargeable with knowledge." *Dowd v. New York, O. & W. R. Co.*, 63 N. E. 541 (170 N. Y. 459).

Another view of the evidence, one very unfavorable to defendant, may be reasonably taken. Defendant's foreman testified, as stated in our former opinion, that he told Grimm "that in all probability there was a cross between the primary and secondary wires on Forty-Ninth street, that he should look carefully along Forty-Ninth street as the trees were pretty thick there, and that the trouble in all probability would be found at that point." No living person can either corroborate or refute the foreman's testimony as to this conversation. If, as this witness testified, he knew that the high and low potential wires were in contact, ordinary prudence would dictate that he should have informed not only Grimm, but, further, that he should have warned the Selby family, or immediately cut off the death dealing current, not necessarily for the protection of Grimm, but for the protection of the company's patrons and the public generally. It would not be an unreasonable inference for the jury to draw from the evidence that defendant's foreman never instructed Grimm as he said he did, but sent him forth on his fatal mission without warning, and to deal with dangers he never assumed. Morrison, an electrician with greater experience than Grimm, was fully conversant with all the facts communicated to defendant by the Selbys, and not until Grimm's death did he think that the disturbance was caused by contact of the high and low potential wires. We also have the testimony of Mr. Michaelson, a fair witness, and an experienced electrician, to the effect that knowledge of the shock to the Selby boy would not indi-

cate to an electrician that the lamp where the shock was received was extra dangerous, but quite the contrary, as the boy survived. How the facts known and communicated by Mr. Selby would indicate to the defendant's foreman that there was contact of high and low potential wires, and thereby give him occasion to communicate such facts to Grimm, was undoubtedly not explained to the satisfaction of the jury, and has not been explained to our satisfaction. In our former opinion, we erred in reciting this conversation as an established fact in the case, but this was not prejudicial to the defendant.

Our attention is called to cases which, it is claimed, are in conflict with the conclusion we have reached. The principal authority cited is *Bell Telephone Co. v. Dethard-ing,* 148 Fed. 371, wherein it was held: "Plaintiff's intestate was employed by defendant telephone company as a 'trouble finder,' and was sent by his superior, in the line of his duty, to ascertain the cause of the failure of a telephone to work properly, which was unknown. In climbing a cable pole his hand came in contact with a guy wire, from which he received an electric shock, which caused him to fall, and he was killed. From the effects of a storm on the previous night, or from some other cause not shown, the telephone wires leading from the pole had sagged across electric light wires, and had become heavily charged with electricity, and also charged the guy wire. *Held,* That the risk from such danger was one known to and assumed by plaintiff's intestate as one necessarily incidental to his employment, and that there could be no recovery from the defendant for his death." This case, at first thought, would seem decisive of the one in hand; but, when we bear in mind that in the case cited there was, as expressly stated by the court, no "lack of diligence on the part of the defendant below shown," and apply the rule established in this state that "a servant generally does not assume the risk of dangers due to his master's negligence" (*Chicago, R. I. & P. R. Co. v. McCarty,* 49 Neb.

475), we are constrained to hold that plaintiff's intestate did not, as a matter of law, assume the risk due to defendant's negligent construction of its electric wires. See *Belvidere G. & E. Co. v. Boyer,* 122 Ill. App. 116; *Chicago, S. W. & L. Co. v. Hyslop,* 227 Ill. 308.

We now come to the other question presented for further discussion. It is unnecessary here to repeat what was said in the fourth division of our former opinion. Additional authorities have been cited, and examined, and are found not to require the overruling of our former pronouncement on the question of contributory negligence. This case is clearly distinguishable from cases like *Citizens Telephone Co. v. Westcott,* 99 S. W. (Ky.) 1153, and *Johnston v. New Omaha T.-H. E. L. Co.,* 78 Neb. 27, and must be classed with those like *Predmore v. Consumers L. & P. Co.,* 99 App. Div. (N. Y.), 551, and *Belvidere G. & E. Co. v. Boyer, supra.* In the first class the courts held, for obvious reasons, that the injured party knew of, and deliberately placed himself in, a position to receive an electric shock, and hence could not recover. In the latter class experienced electricians knew that others had received shocks from electric fixtures not resulting fatally, and after knowing the effect of contact therewith attempted to adjust the difficulty, and were killed. Such circumstances do not so clearly establish contributory negligence as to remove the question into the realm of undebatable fact and require a peremptory instruction to the jury. See authorities cited in former opinion.

In *Belvidere G. & E. Co. v. Boyer, supra,* the company was engaged in running an electric plant in the city of Belvidere. Deceased, a man of considerable experience with electric machinery, was its engineer and had charge of the building and the machinery and the men employed therein, and, when repairs were to be made in the room, he made them or saw that they were made. Another employee, one Tynan, received a shock from a wire on which a light was suspended. The shock rendered him unconscious for a time. Deceased said he would take the wire

down so no one else would get hurt. He was warned by the employee who had received the shock, but went into the room where the light was, and the only eye-witness to the accident says he saw him attempt to take down the extension, and it seemed to draw him right up. He was reaching for the plug—he knew enough not to take hold of the wire—but he was killed. The wire was intended for and usually carried but 110 volts. Unknown to deceased the wire had come in contact outside of the building with another wire carrying 1,100 volts. In the opinion the court said: "While the proof shows men had received shocks from the wire that caused Boyer's death two or three days before his death occurred, and that Boyer knew of this, it further shows the shocks were not of a serious nature before the one received by Tynan, and, further, that the conditions which caused these shocks to the men were not known to any one whose employment was inside the building until after Boyer's death. The fact that persons handling the wire received slight shocks might indicate that the insulation on the wires was worn and defective without apprising one of the fact that they had come in contact with a wire outside, which was carrying a powerful current." The court left the determination of the question of contributory negligence to the jury, and said in the syllabus: "In determining whether one who has lost his life by an accident has been guilty of contributory negligence, it is only proper to consider his acts in connection with conditions as they appeared and were known at the time of the accident, and conditions not known to exist until after his death should be rejected." See, also, *Chicago, S. W. & L. Co. v. Hyslop, supra.*

While the questions presented by the record before us are not free from difficulty, we think the facts are such that reasonable men would differ as to the proper inference to be drawn. This being true, the district court was not in error in submitting the case to the jury.

We therefore recommend that our former judgment of affirmance be adhered to.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of affirmance heretofore entered is adhered to.

AFFIRMED.

STURGIS, CORNISH & BURN COMPANY, APPELLEE, V. MARTIN B. MILLER ET AL., APPELLANTS.

FILED JUNE 22, 1907. No. 14,873.

1. Judgment: JOINT DEBTORS. In this state a judgment is not considered an entirety unless the interests of the judgment debtors are inseparable.
2. ———: VACATION. The vacation of a judgment against one judgment debtor whose interests are inseparable *ipso facto* vacates it as to other judgment debtors.
3. ———: ———: PRINCIPAL AND SURETY. A judgment rendered against one defendant as principal and others as sureties was set aside as to the principal on his motion. *Held*, That the interests of the judgment debtors were inseparable, and that the vacating of the judgment as to the principal vacated it *ipso facto* as to all parties.

APPEAL from the district court for Seward county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Smyth & Smith, O'Neill & Gilbert, M. D. Carey and *Landis & Schick,* for appellants.

Norval Bros. and *Jefferis & Howell, contra.*

EPPERSON, C.

On May 11, 1900, Frank Sturgis obtained a judgment in the district court for Douglas county against Martin B. Miller, the Hinman Improved Can Company, and the Helm Building & Supply Company upon a bill of exchange. In conformity with the findings of the court, the judgment was entered against the Hinman company as principal and the Helm company and Miller as sureties. Ten days

later, and during the same term of court, the Hinman company filed a motion to set aside the judgment as to it because of the absence of its attorney at the time of trial. On consideration of this motion, the court ordered "that the judgment heretofore entered in this cause on the 11th day of May, 1900, against this defendant, the Hinman Improved Can Company, be, and the same is hereby, set aside, vacated and held for naught, and the execution heretofore issued be recalled and vacated, and the said cause be set down for trial at the present term of court." The record discloses that the trial was entered into in May, 1900, and that on December 7, 1900, the court made a finding in favor of the plaintiff as against the Helm company, but against the plaintiff as to the Hinman company. Upon these findings, the action as to the Hinman company was dismissed and a judgment rendered against the Helm company for the amount of the debt.

Plaintiff herein, as assignee of the judgment creditor, brought this action in the district court for Seward county against the defendants, who constitute the Helm company, a partnership firm, to subject their property to the Douglas county judgment of December 7, 1900. The validity of that judgment is assailed on the ground that the judgment of May 11, 1900, was not set aside as to the Helm company, and the court had no jurisdiction over it in the proceeding of its codefendant for a new trial. The language of the order of the court vacating the judgment against the Hinman company, above set out, did not expressly vacate the judgment against the Helm company. The question at issue is: Did such order *ipso facto* set aside the judgment as to all the debtors, or was the moving defendant alone released? If the judgment of May 11, 1900, remained in full force against the Helm company, the judgment subsequently rendered is void, and the plaintiff's present action must fail.

In this state a judgment obtained against a principal and a surety is considered a joint judgment. See *Farney*

v. Hamilton County, 54 Neb. 797, and cases cited. But this does not mean that such judgment is an entirety. There are jurisdictions holding that a judgment obtained against two or more parties is an entirety, and therefore if void as to one is also void as to all. Hence, in those jurisdictions, the setting aside of a judgment as to one of the parties *ipso facto* worked the same relief as to the others. 1 Freeman, Judgments (4th ed.), sec. 136; 1 Black, Judgments (2d ed.), sec. 211. "At common law a judgment was regarded as an *entire thing,* and being an entirety it has been held repeatedly that it could not be affirmed as to one or more defendants, and reversed as to others. It must either be affirmed as a whole or reversed as a whole." *Hanley & Welch v. Donoghue,* 59 Md. 239. Relief may be obtained against one or more of several parties sued jointly and the action dismissed as to the others. A judgment may be sustained as to one party and reversed as to another. One judgment debtor may appeal, and, unless his interests are inseparably connected with another judgment debtor, the relief granted on his suit to reverse will not affect the original judgment as against his codebtors. Section 429 of the code provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." Section 594 of the code provides in part: "When a judgment or final order shall be reversed either in whole or in part in the supreme

court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment." In *Polk v. Covell,* 43 Neb. 884, it was held that "one of several defendants having separate and distinct defenses may prosecute an appeal from the county court to the district court, without joining his codefendants." In the case cited two defendants were sued, one as principal and the other as surety. Separate answers were filed, and upon trial judgment was rendered against both. The alleged surety alone appealed, and his right to thus prosecute an appeal was challenged. In the opinion this court quotes from *McHugh v. Smiley,* 17 Neb. 626, as follows: "The rule as to appeals appears to be this, that when the action is against several defendants who have distinct and separate defenses the judgment as to one defendant in a proper case may be appealed; in which case it will only be necessary to take up so much of the record as pertains to his case. Where, however, the interests of the parties are inseparably connected, an appeal will take up the case as to all." In *Western Cornice & Mfg. Works v. Leavenworth,* 52 Neb. 418, it was held: "In an appeal, that the final adjudication may affirm the decree of the trial court in some particular or particulars, as to the rights of one appellant, does not necessitate the affirmance of the decree as an entirety and against all appellants." This rule was applied in a case where all defendants jointly prosecuted an appeal. In *Stahnka v. Kreitle,* 66 Neb. 829, the judgment of the lower court was reversed as to some of the defendants and affirmed as to others in an action for damages caused by the liquor traffic. In *Morrissey v. Schindler,* 18 Neb. 672, it is said: "A plaintiff having sued several defendants in an action *ex contractu*, must in general have recovered against them all or be nonsuited upon the trial. See Chitty's Pleadings, vol. 1, 51. But all of this is changed by the code, and it may be said that the necessity for a reform in the system of practice which resulted in the

new system of pleading and practice in New York and other states, including our own, was more sharply illustrated in the provisions of the common law above stated than in any other." HASTINGS, C., speaking for the court, in *Sutherland v. Holliday,* 65 Neb. 9, says: "'At common law, where several defendants are sued jointly in an action *ex contractu,* the plaintiff must have judgment against all of the defendants who are before the court * * * or he can have judgment against none.' 11 Ency. Pl. & Pr. 847. *Long v. Clapp,* 15 Neb. 417, is an action on an alleged joint warranty of certain sheep. There was evidence of the contract only against one defendant. Verdict and judgment were against both, and a joint petition in error was held bad because under section 429 of the code of civil procedure, judgment against part of the defendants was authorized, and it could not be set aside as to both. In *Roggenkamp v. Hargreaves,* 39 Neb. 540, it was held that a judgment might properly be rendered against one of two defendants sued on an account as partners. In Ohio, whence Nebraska took this section 429, it has been held to authorize a judgment against part of the defendants sued jointly on a joint contract. *Lampkin v. Chisom,* 10 Ohio St. 450; *Roby v. Rainsberger,* 27 Ohio St. 674, 676; *Humphries v. Huffman,* 33 Ohio St. 395. In New York, under a quite similar and only slightly broader statute, it has been uniformly held that the rule in suits upon contracts is precisely the same as in torts—that all or any of the defendants may be found liable. *Brumskill v. James,* 11 N. Y. 294; *McIntosh v. Ensign,* 28 N. Y. 169; *Barker v. Cocks,* 50 N. Y. 689." In *Cooper v. Speiser,* 34 Neb. 500, where the interests of the parties were separate and distinct, it was held that an appeal by one did not bring up the cause as to both.

A different rule obtained under our former statute in a proceeding to review the judgment of the lower court by petition in error. Such proceeding was in the nature of an independent action. All parties must be brought into

the appellate court. See *Farney v. Hamilton County,* 54 Neb. 798, and cases cited.

The foregoing authorities and statutes cited have established in this state the rule that a judgment is not considered an entirety unless the interests of the judgment debtors are inseparable. If the interest of the defendants against whom the judgment of May 11 was rendered was not inseparable, then they were permitted each to prosecute his own defense and present his own theory independently of the other, and procure a new trial of the issues in which he is interested without affecting the liability of his codefendant. He would have the same right alone to move in the court rendering the judgment as he would have under like issues to appeal from an inferior court to the district court. But with inseparable interests, proceedings to vacate by one would carry the entire case with it.

It will be observed that the judgment of May 11, 1900, fixes the liability of the Hinman company as principal and the Helm company as surety. Plaintiff cites authorities to the effect that the liability of a surety is dependent upon and inseparable from the interest or liability of the principal, and that, when joined in an action and judgment rendered against them, the judgment became an entirety. In *Van Renselaer v. Whiting,* 12 Mich. 449, it appears that Van Renselaer recovered a judgment against John L. Whiting and J. Tallman Whiting. The latter moved that the judgment be vacated as to him, and the court entered the following order: "A motion to set aside the judgment in this cause having been argued by counsel, and submitted, and the court having duly considered the same, it is ordered that said motion be, and the same is hereby, granted and that the judgment heretofore entered in this cause, be and the same is hereby, set aside and vacated, as to the defendant J. Tallman Whiting." In reviewing the case the supreme court of Michigan said: "The effect of vacating the judgment as to J. Tallman Whiting was to vacate it as to the other defendant also;

and there is now no judgment in the case. The parties have, therefore, now all the rights in the circuit court which they would have in any case of the vacation of a judgment." In *Wilcox v. Raben,* 24 Neb. 368, it is held: "Where, in an action in the county court against the principal and sureties on a promissory note, as joint makers thereof, judgment was rendered in favor of the plaintiff against all, and the principal defendant removed the cause to the district court by appeal, it was held that, as the interests of the defendants were inseparably connected, the appeal brought the entire case to the district court, and that court, upon a trial resulting in favor of the plaintiff, had jurisdiction to render judgment against all the defendants." In the opinion it was further said: "I think it sufficiently settled, in this state at least, that, where the interests of the parties are inseparably connected in an action, an appeal by one will remove the cause to the appellate court for all. *Lepin v. Paine & Co.,* 18 Neb. 629, and cases there cited. Durias Wilcox was the principal debtor upon the note; any defense mady by him inured to the benefit of his sureties, and therefore the appeal, even if taken by him alone, and without express authority from the other defendants, removed the cause into the district court as to all."

From this it seems that the interest of a surety was so dependent upon and inseparable from the interests of his principal that a proceeding on appeal carried with it the judgment as an entirety, giving the court jurisdiction over the sureties who did not appeal. This case was cited with approval in *Polk v. Covell,* 43 Neb. 884, above cited, where it was held that an appeal by an alleged surety did not remove the judgment as to the principal. The reason for the different application of the rule seems to be that a surety may have a defense which cannot avail his principal, such as a denial of the suretyship, which must be determined independently of the principal's liability. In *Polk v. Covell, supra,* it is said: "It is evident, therefore, that the result of the appeal cannot affect the liability of

the principal, and no sufficient reason has been suggested for holding that he must be joined as a party in order to confer jurisdiction upon the district court."

It is true that by the judgment of December 7, the alleged principal was released and the Helm company held as principal and not as surety, thereby establishing that the relationship of principal and surety never in fact existed; and, moreover, making it now appear that the interests of the judgment debtors were separable. But their relative interests cannot be determined in this suit. Here the only question for determination is the effect of the order of the district court vacating the judgment of May 11. The status of the parties as then existing controls. They were adjudged jointly liable to the plaintiff in the judgment decreeing the Helm company a surety, thereby binding its interests inseparably to those of its codefendant. This being their status, the vacating of the judgment against the Hinman company *ipso facto* vacated it as to all, and the court retained jurisdiction over all the defendants.

We think the learned trial court reached the right conclusion in this case, and recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

SHELTON IMPLEMENT COMPANY, APPELLANT, V. PARLOR FURNITURE & MATTRESS COMPANY ET AL., APPELLEES.

FILED JUNE 22, 1907. No. 14,883.

Trover: REVIEW. The rulings of the trial court upon instructions tendered and upon the admission and rejection of evidence examined, and *held* without error.

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

E. C. Calkins, for appellant.

J. F. Walker, Hamer & Hamer and *C. A. Robinson, contra.*

EPPERSON, C.

The defendant Parlor Furniture & Mattress Company held a judgment against Washburn & Company, and on January 11, 1904, issued an execution thereon, under which the defendant Oliver, a constable, seized a stock of goods as the property of the judgment debtor. On January 28 the judgment was vacated on motion of the debtor and the execution recalled. The creditor secured a writ of attachment, which, on the same day, was levied upon the same property by the constable. The plaintiff sued the Parlor Furniture & Mattress Company, the constable, and his bondsmen for conversion of the goods, claiming that it bought the goods from the debtor on January 11, 1904, in consideration of rent payable to plaintiff under a lease expiring December 31, 1904. Defendants prevailed in the lower court, and plaintiff appeals.

The court refused the third instruction requested by plaintiff, which was in substance that it was the duty of the officer to return the property to the debtor or his assigns upon a recall of the execution, and, if the transfer to plaintiff was found to be valid, then their verdict should be for plaintiff. This instruction is not objectionable, but it was unnecessary, as the court instructed the jury that, if they found the plaintiff was the owner of the goods when the writ of attachment was levied, their verdict should be for the plaintiff.

Plaintiff alleges error in the admission in evidence of the writ of attachment and the affidavit for attachment. As the pleadings admitted the levy of the attachment, this error was without prejudice.

On cross-examination Washburn, manager of the debtor company, was questioned as to the company's indebtedness to several creditors. This we consider not improper, as the witness had previously testified as to the transfer to plaintiff and as to the value of the stock. The cross-examination brought out circumstances tending to show the good faith of the transfer.

Plaintiff's manager was asked on cross-examination if he rented the property described in the debtor's lease to another in September, 1904. This also was proper. Plaintiff contends that for the rental of 1904 he received a conveyance of the goods in controversy. The objectionable evidence tended to prove plaintiff's possession of the leased premises, and thereby to disprove the exchange.

Plaintiff objected to the introduction of all evidence by the defendants, contending that the answers did not state a defense. The answers contained a general denial of plaintiff's cause of action, and alleged the facts relative to the Parlor Furniture & Mattress Company's debt, the execution, attachment, and seizure and sale of the goods, and further alleged that plaintiff's pretended purchase was for the purpose of and with the intent to hinder, delay and defraud the furniture company. The general denial was sufficient to permit the introduction of the greater portion of defendants' evidence, and it mostly went to the fact of a sale to plaintiff of the goods in controversy. The answer as a whole is not subject to plaintiff's objection.

Plaintiff also contends that there was no evidence to support a finding that the transfer to it was not valid and subject to the lien of the execution, and that, having been dissolved, plaintiff's title became absolute. The evidence does not support plaintiff's contention that he bought subject to the execution. On the contrary, if he purchased at all, it was an absolute purchase on January 11, 1904, the date the execution was levied. The evidence was all directed to this transaction. That of the defendants was in part to the effect that plaintiff was present immediately

after the levy and made no claim to the property in controversy, but did claim a few goods in the same room, and made the statement that he did not have any claim upon the goods in controversy. There was ample evidence to support a finding that there was not a valid contract of purchase made by the plaintiff. The questions involved were properly submitted to the jury.

Other assignments are called to our attention, but cannot be considered for the reason that no exceptions were taken, or the alleged errors were not called to the attention of the trial court in the motion for new trial.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

WILLIAM B. PAYNE, APPELLANT, V. E. J. RYAN, APPELLEE.

FILED JUNE 22, 1907. No. 14,879.

1. **Municipal Corporations**: ORDINANCES. The provisions of section 8755, Ann. St., which provides that, "on the passage or adoption of every by-law or ordinance * * * by the council or board of trustees, the yeas and nays shall be called and recorded," are mandatory, and it is necessary that the yeas and nays should be called and recorded to pass or adopt an ordinance.
2. **Intoxicating Liquors**: LICENSES. No valid license for the sale of intoxicating liquors can be granted by a village board until it has adopted a valid ordinance authorizing the issuance of a license.

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

R. M. Proudfit, for appellant.

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

GOOD, C.

E. J. Ryan, the appellee, applied to the village board of Exeter for a license to sell intoxicating liquors in said village. The appellant, William B. Payne, filed a remonstrance. Hearing was had before the board of trustees upon the petition and remonstrance, which resulted in the overruling of the remonstrance and the granting of the license. Payne thereupon appealed from the order of the village board to the district court for Fillmore county, where upon trial judgment was entered sustaining the action of the village board in granting the license. From this judgment of the district court Payne prosecutes his appeal to this court.

Among other grounds of remonstrance, it was set forth that there was no sufficient ordinance in Exeter to authorize the issuance of the license. On the hearing before the village board, the record of the proceedings of the village board in attempting to pass the ordinance, under which the liquor license was granted, was offered in evidence. The following is all the record relating to the passing of the ordinance in question: "Ordinance No. 70 was then called up for its first reading, and on motion carried to its second reading. Costello, Ragan, Nye, Robinson and Bickel voting 'yes.' Ordinance No. 70 was then read a second time, and on motion carried was ordered to pass to third reading. Ordinance No. 70 was then read the third time, and passed and approved by the chairman of the board."

Section 8755, Ann. St., provides: "On the passage or adoption of every by-law or ordinance * * * by the council or board of trustees, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, * * * a concurrence of a majority of the whole number of members elected to the council or trustees shall be required." The language of this statute is clear and explicit, and leaves no doubt in the mind that it is mandatory, and that the provisions of the statute relat-

ing to the calling and recording of the yeas and nays on the passing of an ordinance must be strictly complied with. The object of the statute is to require that a record shall be made and kept of all proceedings by which an ordinance is passed and becomes valid. The provisions of the statute requiring the calling of the yeas and nays were made that there might be no doubt that the requisite number had voted for the passage of the ordinance, and the provisions requiring the recording of the yeas and nays were intended to require an indisputable record of the necessary action in passing an ordinance, and that the public might have the opportunity to know how their councilmen had voted upon the passage of any given ordinance. It was intended to avoid any reliance, after the passage of years, upon the frailties of human memory to sustain the action of the council or the board of trustees in its action in adopting or passing an ordinance. In the case of *Pickton v. City of Fargo,* 10 N. Dak. 469, in considering a statute very similar to the one above referred to, it is said: "The purpose of this requirement is to fix individual responsibility upon members of the council, and to do so, it is essential that the journal entries shall show not only the number of votes cast, and the fact that the yeas and nays were called, but likewise the names of the members voting upon the passage of the ordinance, and how each voted—whether yea or nay." The same rule is announced in *Brophy v. Hyatt,* 10 Colo. 223, 15 Pac. 399; *Town of Olin v. Myers,* 55 Ia. 209, and *O'Neil v. Tyler,* 3 N. Dak. 47. In the present case the record discloses that the yeas and nays were not recorded upon the passage of the ordinance, and does not show that the yeas and nays were called. Without this necessary foundation the ordinance was never legally passed and adopted, and, consequently, was without legal force and effect. In *State v. Andrews,* 11 Neb. 523, it was held that "the traffic in liquors within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof. Until this is done, no application can be made

and no other step taken toward the procurement of a license to sell liquors within the limits of such corporations." It follows that the board of trustees was without legal authority to grant the license.

Appellee undertook to avoid the force of the record of the board of trustees relating to the attempted passage of the ordinance in question. Several days after the hearing before the village board, and after it had ordered the license to issue, a special meeting of the village board was called, and it proceeded to enter a *nunc pro tunc* order, whereby it caused a record to be made supplying the omissions in the record relative to the passage of the ordinance in question, notwithstanding that 15 years had elapsed since the attempted passage of the ordinance. It may well be doubted whether or not the village board had such power. But, granting that it had such power, still we do not think that it could affect the decision in the present case, for the reason that this record, as amended, was not and could not have been offered in evidence upon the hearing of appellee's petition for a license. It was not and could not have been incorporated into the transcript of the proceedings of the board upon such hearing. It was, in fact, brought to the attention of the district court by a motion suggesting a diminution of the record, and the district court, over the appellant's objections, permitted the appellee to file a supplemental transcript showing the entry of the *nunc pro tunc* order made by the board of trustees. Although the trial court permitted this additional transcript to be incorporated into the original transcript, it did not, in fact, constitute any part of the hearing upon the application to grant the license.

Under the provisions of section 7153, Ann. St., it is required upon an appeal to the district court from the action of the village board in granting a license that the testimony taken upon such hearing shall be transmitted to the court, and such appeal shall be decided by the court on such evidence alone. Under this section of the statute

the court had no authority to consider any evidence except that which was adduced upon the hearing. Under the evidence offered and adduced upon the hearing, it appears that the village of Exeter, at the time of the granting of the license, did not have any village ordinance authorizing the issuance of a license, and that the village board was therefore without power to issue the license. It follows that the judgment of the district court should be reversed.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE 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.

EMIL WALLBER, APPELLANT, V. MARY JANE CALDWELL ET AL., APPELLEES.

FILED JUNE 22, 1907. No. 14,882.

1. **Limitation of Actions: DEBT, ACKNOWLEDGMENT OF.** An acknowledgment of an indebtedness sufficient to toll the statute of limitations should be to the creditor or to some one authorized to represent him.

2. ———: ———. A conveyance of real estate subject to a mortgage indebtedness, where it does not appear that the grantee assumed the debt or retained any part of the consideration on account of such indebtedness, does not operate to stay the running of the statute of limitations.

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

W. W. Wood and *G. W. Shields,* for appellant.

C. Patterson, contra.

JACKSON, C.

The action is one to foreclose a real estate mortgage. The trial court sustained a general demurrer to the petition, and the plaintiff appeals.

The essential facts as pleaded are that on October 1, 1887, August Janson gave a mortgage on the land involved to secure an indebtedness of $525, payable October 1, 1892. The note secured by the mortgage provided for interest payable semiannually. Interest was paid until April 1, 1891, since that time no payment of either principal or interest is claimed. On September 7, 1900, August Janson conveyed the real estate to Mary Jane Caldwell. One recital of the deed is: "Subject to a mortgage of $525 made to the Farmers Trust Company." On November 14, 1904, Mary Jane Caldwell conveyed the premises to the defendant Oscar F. Farnam. The deed recited "Subject to mortgage." This action was commenced June 6, 1905, more than ten years after the maturity of the note secured by the mortgage and the payment of any part of the indebtedness secured thereby, so that the action to foreclose the mortgage was barred by the statute of limitations, unless there is something in the transactions between Janson, Mary Jane Caldwell and Farnam that would operate to toll the statute.

It is provided by section 22 of the code: "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." It is the contention of the appellant that the recital in the deed from Janson to Caldwell amounts to an acknowledgment of the debt and operates to stay the running of the statute. The question has never been adjudicated by this court, and must be determined from the statute and legal principles involved. There is some con-

flict in the authorities as to what constitutes a sufficient acknowledgment of an indebtedness in order to take an action out of the statute of limitations, but the rule announced by Mr. Justice Brewer in *Sibert v. Wilder*, 16 Kan. 176, in construing a statute similar to our own, appeals strongly to our sense of justice. It was there held that an acknowledgment of a debt, to take the case out of the statute of limitations, must not be made to a mere stranger, but to the creditor or some one acting for or representing him. This rule was followed by the supreme court of the United States in *Fort Scott v. Hickman*, 112 U. S. 150. In the latter case it was held, further, that an acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation. In *Nelson v. Becker*, 32 Neb. 99, this court quoted with approval from *Hanson v. Towle*, 19 Kan. 273, as follows: "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an acknowledgment as is contemplated by the statute. There must be an unqualified and direct admission of a present subsisting debt on which the party is liable." We are of the opinion that the allegation in the petition, under the authorities, is not sufficient to prevent the running of the statute.

Another contention of appellant is that the defendants acquired title subject to the mortgage and are now estopped from denying its validity. There are many circumstances under which this rule might be applied. Where one purchases real estate subject to a mortgage, and as a part of the consideration assumes and agrees to pay the mortgage debt, or where the amount of the incumbrance is shown to have been deducted from the purchase price, either in a personal transaction between private parties or in the course of a judicial sale where the pur-

chaser gets the benefit of the amount of an incumbrance deducted from the appraised value of the land, such purchasers are estopped from denying the validity of the lien; and it is doubtless true that, had the plaintiff instituted this action after the purchase of the premises by Mary Jane Caldwell, prior to the time the action was barred by the statute of limitations, she might have been estopped from asserting an invalidity of the mortgage, but that is not the question in the case. The plaintiff had a valid and subsisting right of action when Caldwell acquired the title. Can the defendants avail themselves of a defense subsequently accruing by reason of the statute of limitations? There seems to be no reason why they should not be permitted to do so. The allegations of the petition do not show that the purchaser of the real estate incumbered by the mortgage deducted the amount of the mortgage indebtedness from the purchase price, or that she assumed and agreed to pay it.

We conclude that the judgment of the district court was right and recommend that it be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

WILLIAM T. YOUNG, APPELLEE, V. LAMBERT C. KINNEY, APPELLANT.

FILED JUNE 22, 1907. No. 14,891.

1. Evidence: DECLARATIONS AGAINST INTEREST. The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination.

2. Trial: ARGUMENT OF COUNSEL. Unwarranted and unreasonable assault upon the character and integrity of witnesses by counsel in the argument of a case, which tends to inflame the minds of the jurors and prevent a calm and dispassionate consideration of the case, constitutes prejudicial error.

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

Wilcox & Halligan, for appellant.

J. J. Kinney and *Wright & Wright, contra.*

JACKSON, C.

This is an action in replevin, and involves the ownership and right to possession of a horse. The plaintiff had judgment, from which the defendant appeals.

This action was tried originally in the county court, and from the judgment of that court an appeal had been taken to the district court. In the district court the plaintiff, as a witness in his own behalf, testified that he had known the animal in dispute from the time it was a sucking colt. On cross-examination he was asked if he had not testified at the trial in the county court that the first time he saw the animal to remember him was when he was two years old, coming three. He answered, in effect, that he did not remember. On behalf of the defendant, the county judge was called as a witness, and by this witness the defendant offered to prove that at the trial in the county court the plaintiff testified that the first time he saw the animal in dispute, that he remembered of, was when the animal was coming two or three years old. It was objected that there was no sufficient foundation, and it did not tend to impeach the plaintiff. This objection was sustained, and a proper exception taken. In sustaining the objection to the introduction of this evidence, the trial court erred. The admissions and declarations of a party to an action against his own interest, in a material

matter, may be proved as original evidence, and it is unnecessary to lay any foundation in the cross-examination of such party, where he has testified in his own behalf. *Lowe v. Vaughan,* 48 Neb. 651; *Churchill v. White,* 58 Neb. 22. The identity of the horse was the principal matter in controversy, and the opportunity of the plaintiff to acquire a knowledge of the animal was important as tending to weaken or strengthen his testimony by means of which he undertook to positively identify the animal as his own.

Another assignment of error relates to the misconduct of counsel for the plaintiff in the argument before the jury. It is unnecessary to set out the remarks of counsel at length.

We will content ourselves by saying that they were of such character that the jury could draw no inference, except the one that the defendant was a thief and was keeping a fence for a pack of organized thieves; that certain witnesses on behalf of the defendant were perjured witnesses and testified falsely at the instance of the defendant. Frequent objections were interposed by counsel for the defendant to the line of argument pursued, and counsel for plaintiff was frequently cautioned by the court to confine his argument to a legitimate discussion of the issues. The record discloses no facts sufficient to justify this unwarranted assault on the defendant and his witnesses. In an argument before the jury, counsel, of course, are permitted to draw such reasonable inferences from the facts as the evidence will justify; but unwarranted and unreasonable assaults upon witnesses and parties are reprehensible, and, to the extent that they tend to prejudice a jury and procure a verdict under the influence of passion and prejudice, they are erroneous and will not be countenanced by the courts. *Cleveland Paper Co., v. Banks,* 15 Neb. 20; *Ashland Land & Live Stock Co. v. May,* 51 Neb. 474; *Case Threshing Machine Co. v. Meyers,* 78 Neb. 685.

On account of these errors, it is recommended that the

judgment of the district court be reversed and the cause remanded.

AMES and CALKINS, CC., concur.

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

REVERSED.

HOLT COUNTY, APPELLANT, V. DANIEL J. CRONIN ET AL., APPELLEES.

FILED JUNE 22, 1907. No. 14,894.

County Treasurer: DEPOSIT OF FUNDS. In the absence of bad faith, a county treasurer is not liable for depositing county funds in a legal depository in excess of the depository bank's *pro rata* share of such funds, as provided by section 18, ch. 18, art. III, Comp. St. 1905, unless the amount of such deposit exceeds the sum which might lawfully be deposited under the provisions of section 20 of the same chapter.

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

Arthur F. Mullen, for appellant.

J. A. Donohoe, contra.

JACKSON, C.

The defendant Daniel J. Cronin was treasurer of the plaintiff county, and the defendant United States Fidelity & Guaranty Company surety on his official bond. The case is in this court on an appeal from the judgment of the district court sustaining a demurrer to plaintiff's petition and dismissing the action.

It appears from the petition that certain banks in Holt county had been properly designated as depositories of

the funds in the hands of the defendant treasurer and were qualified as such depositories. Among the banks so designated was the Elkhorn Valley Bank, with a paid up capital of $15,000. This bank failed, and at the time of the failure was the depository of $4,619.56. It is charged in the petition that the bank was insolvent, and would not pay to exceed 60 per cent. of its indebtedness. The theory upon which the petition was framed, and upon which the plaintiff seeks to recover against the treasurer and his bond, is that at the time the doors of the bank were closed the defendant treasurer had on deposit in that bank a sum in excess of the *pro rata* share of the funds of the county to which it was entitled, when its capital stock was considered in comparison with the capital stock of other banks which were legal depositories of the county funds. County depositories are created under the provisions of section 18, ch. 18, art. III, Comp. St. 1905. By this statute it is provided: "The county treasurer of each and every county of the state of Nebraska shall deposit, and at all times keep on deposit for safe keeping, in the state, national or private banks doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer. Any such bank located in the county may apply for the privilege of keeping such moneys upon the following conditions: All such deposits shall be subject to payment when demanded by the county treasurer on his check, and by all banks receiving and holding such deposits, interest shall be paid amounting to not less than two (2) per cent. per annum upon the amount so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law, and the rules adopted by the county treasurer for holding and receiving such deposits. It shall be the duty of the county board to act on such application or applications of any and all banks, state, national or private, as may ask for the privilege of becoming the depository of such moneys, as well as to approve the bonds of those selected incident

to such relation, and the county treasurer shall not deposit such money or any part thereof, in any bank or banks, other than such as may have been so selected by the county board for such purposes if any such bank or banks have been so selected by the county board, and on all deposits he may make in any bank whatsoever, interest shall be paid at a rate not less than two (2) per cent. per annum; and where more than one bank may have been so selected by the county board for such purpose, he shall not give a preference, to any one or more of them, in the money he may so deposit, but shall keep deposited with each of said banks, such a part of said moneys, as the capital stock of such bank is a part of the amount of all the capital stock of all the banks so selected, so that such moneys may at all times be deposited with said banks *pro rata,* as to their capital stock." It is also provided by section 20 of the same chapter that for the security of the funds so deposited the county treasurer shall require all depositories to give bonds for the safe-keeping and payment of such deposits and the accretions thereof, and that the treasurer shall not have on deposit in any bank at any one time more than one-half of its said bond, and the amount so on deposit at any one time with any such bank shall not exceed 50 per cent. of the paid up capital stock of such bank. The bond of the Elkhorn Valley Bank was for $15,000, and, except as controlled by the provisions of section 18 of the act in question, the treasurer might lawfully have deposited in that bank the sum of $7,500, a sum which it will be observed is in excess of the amount actually on deposit at the time the bank failed. The sum on deposit in the failed bank was $1,134.74 in excess of the *pro rata* share to which it was entitled under the provisions of section 18, so that the question is whether the defendant treasurer and the surety on his bond are liable, under the allegations of the petition, to the county for that excess.

The allegations of the petition with reference to this deposit are as follows: "That the defendant Daniel J.

Cronin unlawfully, and in violation of the depository laws of the state of Nebraska, and in violation of the conditions of his official bond as county treasurer of the county of Holt, had on deposit in said bank and as a deposit in said bank on the 23d day of November, 1904, the sum of $1,134.74 of the public moneys of the county of Holt, that being the difference between the amount of money on deposit in said bank on said day and the amount to which the said Elkhorn Valley Bank was entitled to have on deposit as the *pro rata* share of the public moneys of the county of Holt therein deposited in the various depositories of the county of Holt; that the depositing of any sum of money by Daniel J. Cronin as county treasurer of the county of Holt in any depository of the county of Holt to exceed the *pro rata* share of said bank was and is illegal and unlawful, and that the depositing of the sum of $1,134.74 in said Elkhorn Valley Bank, which amount was in excess of the legal *pro rata* share of said Elkhorn Valley Bank of the public moneys of the county of Holt then on deposit, was and is illegal and unlawful; that the having on deposit of said sum in the Elkhorn Valley Bank on the 23d day of November, 1904, was and is a breach of trust on the part of said defendant Daniel J. Cronin, and a violation of his duties as county treasurer of the county of Holt, and in violation of the conditions of his bond, and that the said Daniel J. Cronin and the defendant, The United States Fidelity & Guarantee Company, are liable for the said sum of $1,134.74; that the county of Holt will sustain a loss by reason of said illegal and unlawful act of said Daniel J. Cronin as county treasurer of the county of Holt in the sum of $1,134.74." We do not wish to be understood as holding that a county treasurer and the surety on his official bond might not, under some circumstances, be held liable for a violation of the provisions of section 18 of the statute under consideration with reference to the *pro rata* deposit of the county funds in his hands according to the capital stock of the depository banks, but we do not think that the

allegations of the petition in this case are sufficient to show such liability. It appears from the petition that the Elkhorn Valley Bank was located at O'Neill, and we will take judicial notice of the fact that that city is the county seat of Holt county. The aggregate of the funds on deposit in the several depositories of the county at the time that bank failed was $47,277.57. The disbursement of the funds by a county treasurer must usually necessarily be by checks drawn on county depositories, and for the convenience of the public such checks are ordinarily drawn on banks located at the county seat. The reasons for that course of business are obvious. The custom of banks in one town of charging exchange for cashing checks drawn on the banks of neighboring towns involves an expense to the holders of such checks which the county treasurer should avoid imposing upon the payees of the warrants on the funds in his hands, where it can be done by the ordinary and usual method of transacting business, nor would he be justified in drawing checks payable with exchange on banks located at other points than the county seat. This method of transacting the daily affairs of the office involves a larger volume of business with some banks than with others, and makes it impracticable to have on deposit in the county depositories over the county the exact amount to which each bank would be entitled as its *pro rata* share under the provisions of section 18.

In view of the large amount of funds in the hands of the defendant treasurer, and of the ordinary and usual method of transacting the business of the office, we do not think that the single fact of his having $1.134.74 on deposit in a depository at the county seat in excess of the *pro rata* share to which the bank was entitled is of itself sufficient to render him liable on his official bond. There is no charge of bad faith. The circumstance is one which might easily occur, and probably does arise, in the conduct of the affairs of the office of the county treasurer of every county in the state. To avoid an infraction of the letter of the provisions of section 18 would require the

issuance of a check for a fractional part of each warrant paid by county treasurers on each depository bank in the county, and a corresponding system of deposits, with a system of bookkeeping too elaborate and expensive to justify the interference of the courts in bringing it about. The law does not contemplate that the county treasurer should pursue that course.

The judgment of the district court was right, and we recommend that it be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

PHILETUS F. WALDRON ET AL., APPELLEES, V. JOHN D. MCBRIDE, APPELLANT.

FILED JUNE 22, 1907. No. 14,871.

Pleading: CONSTRUCTION. The court will, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which does not affect the rights of the adverse party and appears not to have misled him to his prejudice.

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

Samuel M. Chapman, Jefferis & Howell and *Matthew Gering,* for appellant.

R. D. Stearns, W. W. Towle and *A. L. Tidd, contra.*

AMES, C.

McBride, as sheriff, levied an execution upon certain chattel property in possession of the judgment debtor Waldron. The latter began this action in replevin to recover possession of the property, alleged to be of the

value of $1,200. The sheriff answered, admitting the taking of the property and its alleged value, but justifying under the execution and judgment. Reiter intervened, alleging that he was the absolute owner of an undivided one-third of the chattels taken, and that he had a special property in the remaining undivided two-thirds by reason of a chattel mortgage, a copy of which was annexed to and made a part of his petition, and that the same was given to secure a *bona fide* indebtedness of $733, which at the beginning of the action was wholly due and unpaid, and praying a judgment protecting his interest. No answer or reply to the petition in intervention was filed by either of the original parties to the suit. There was a trial before the court and a jury, resulting in a verdict and judgment awarding all the property to the intervener, from which the sheriff appealed.

Upon the appeal it is expressly admitted by counsel, as we understand their brief and argument, that the intervener was proven to be the absolute owner of an undivided one-third of the chattels as he had alleged, and it is not denied that he was also proven to have been the owner at the time of the trial of a valid and subsisting mortgage lien upon the remaining two-thirds thereof for the sum of $754.44, which exceeded their value; but it is complained that the court erred in instructing a verdict for the intervener, as it did, and that the verdict is erroneous as respects the mortgage lien, because the petition of intervention alleges that the intervener was by virtue of his instrument an owner of a special property in, and entitled to the immediate possession of, an undivided two-thirds of the chattels in controversy at and before the time of the beginning of the action, and omits to allege specifically he remained so at the time of the filing of the petition. The objection was not specifically made in the court below, although there was a general demurrer *ore tenus,* and it seems to us to be somewhat too technical to be at present upheld. The flaw in the pleading, if it be one, seems to have been due to inadvertence or a slip of the pen, and to

have been treated by the trial court and jury, as well as by counsel, as a sufficient allegation of a present subsisting interest or lien; and, there being nothing lacking or complained of in the evidence, we think the case falls within the provisions of section 145 of the code, which requires the court, in every stage of an action, to disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party. The variance does not, in the language of section 138 of the code, appear to "have actually misled the adverse party to his prejudice," and ought not to be permitted to be availed of to prolong for no useful purpose a litigation that has already reached a correct result.

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

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

GEORGE F. VANDERVEER, APPELLEE, V. FRANK MORAN, APPELLANT.

FILED JUNE 22, 1907. No. 14,841.

1. **Pleading.** The plaintiff cannot, by a motion to make specific, be required to disclose in his petition facts which are properly matters of defense.
2. **Negligence: STATUTORY DUTY.** The failure to perform a statutory duty imposed for the protection of the public is negligence; and, in the absence of contributory negligence, a recovery may be had for the injury thereby occasioned.
3. **Evidence** examined, and found sufficient to support verdict.
4. **Instructions** must be taken together and their true meaning determined by considering all that is stated on each particular branch of the case.

5. Parent and Child: INJURY: LOSS OF SERVICES: EVIDENCE. Where a father sues for a loss of services of a minor child resulting from an injury caused by the negligence of the defendant, and proves the fair value of such services, it is not necessary for him to go further and prove how or where or in what manner the child would probably have been employed.

APPEAL from the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

T. P. Lanigan, J. R. Swain and *T. J. Doyle,* for appellant.

T. T. Bell, contra.

CALKINS, C.

This was an action to recover damages for injuries suffered by the plaintiff's minor son by riding into a barbed-wire fence which the defendant had constructed across a traveled way upon his own land, without first putting up sufficient guards to prevent such accidents. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which the defendant appeals.

1. The defendant moved to require the plaintiff to set out in his petition "whether or not there was a new road and plainly traveled track at the place where the road had been changed to after the fence was built." The overruling of this motion is assigned as error. This was a matter of defense, and the ruling of the district court was clearly right.

2. At the beginning of the trial the defendant objected to the introduction of any testimony in the case on the ground that the plaintiff's petition did not state a cause of action. The petition alleges, in substance, that the defendant was the owner of certain land upon which there was a plain traveled wagon road that was used by the public generally, and that on about the 1st day of November he erected a barbed-wire fence across said road, thereby obstructing the road and preventing travel along it, and wrongfully, carelessly and negligently failed to

put any guard to prevent persons passing along said road from running into said wire fence where the same crossed said way, and that the plaintiff's minor son, while passing along said road, without any fault or negligence on his part, ran into said wire fence and was injured. Section 1, ch. 77, laws 1885, provides: "From and after the passage of this act it shall be unlawful for any person to build a barbed-wire fence across or in any plain traveled road or track in common use either public or private in this state, without first putting up sufficient guards to prevent either man or beast from running into said fence." And section 2 of the same act provides: "Any person violating the provisions of the foregoing section shall be guilty of a misdemeanor and fined not less than five ($5) nor more than twenty-five ($25) dollars, and shall be liable for all damages that may accrue to the party damaged by reason of said barbed-wire fence." (Ann. St., secs. 6104, 6105.) The failure to perform a statutory duty specifically imposed for the protection of the public is negligence, and, in the absence of contributory negligence, a recovery may be had for the injury thereby occasioned. *Platte & Denver C. & M. Co. v. Dowell*, 17 Colo. 376; *Giles v. Diamond State Iron Co.*, 7 Houst. (Del.) 453. We think the allegation of a breach of the statutory duty is a sufficient charge of negligence, and that the petition stated a cause of action.

3. At the close of the plaintiff's testimony the defendant asked the court to direct a verdict in his favor, and its refusal to do so is assigned as error. We have carefully read the testimony in the case, and are satisfied that there is testimony which would warrant the jury in finding against the defendant, and that this request was properly denied.

4. The remaining assignments of error are directed to certain paragraphs of the instructions of the court. In instruction No. 5 the provisions of the above quoted sections were given to the jury as being the law of this state,

while in instruction No. 15 the jury were told that if the defendant constructed such a fence across such a road the law required that the defendant should put up such guard and maintain it for such time as should be reasonably necessary, under the facts and circumstances as they are disclosed in this case, to prevent such injuries. The defendant objected to instruction No. 5 on the ground that it did not contain a statement of the duties imposed by law upon the injured person, and to instruction No. 15 on the same ground, and upon the further ground that it was a repetition and gave undue prominence to the matters contained in instruction No. 5. In at least five other paragraphs of the instructions of the court contributory negligence was properly defined, and the jury were plainly told that, if the plaintiff's son was guilty of a want of ordinary care on his part, the plaintiff could not recover. Instructions must be considered together. *Philamalee v. State,* 58 Neb. 320. Their true meaning and effect must be determined by considering all that is stated on each particular subject or branch of the case. *St. Louis v. State,* 8 Neb. 405. The same reasoning applies to the defendant's objections to instruction No. 7, of which it is complained that it fails to tell the jury that, if the act of the defendant was not the proximate cause of the injury, he would not be liable. If this instruction was deficient in that respect, it was amply cured by instruction No. 3 given at the request of the defendant, in which the jury were plainly told that, if the evidence did not show that the fence was the immediate and proximate cause of the accident, but that some other cause over which the defendant had no control was responsible, they must in such case find for the defendant. The same reasoning applies to the exception to instruction No. 21 given by the court at the request of the plaintiff, in which the jury were told that, although it should find that the dogs caused the horse carrying the plaintiff's son to leave the traveled track and run into the fence outside the traveled road or track, still, if by the negligence of defendant no

guards were erected sufficient to prevent man or beast from running into the barbed-wire fence across the track, and the boy was injured without negligence on his part by the wires within and across the track, the plaintiff would be entitled to recover. It is urged that the question whether the defendant's failure to erect and maintain a suitable guard was the proximate cause of the injury was omitted from this instruction. What we have said above with reference to instruction No. 7 is applicable to this instruction.

5. The only remaining errors urged are the exceptions of the defendant to the instructions concerning the measure of damages in which he claims that the jury should have been told that it was incumbent upon the plaintiff to show, not only the reasonable value of the services of the son, but to prove that he could have earned the same. There is no merit in this contention. When the fair value of services has been shown, it is not necessary to prove that he had contracted for or could have actually secured employment.

There is no error in the record, and we recommend that the judgment of the court below be affirmed.

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

AFFIRMED.

CLAUS DANKER ET AL., APPELLEES, V. PETER B. JACOBS ET AL., APPELLANTS.

FILED JUNE 22, 1907. No. 14,876.

1. **Attachment: INTERVENTION.** A third party claiming an interest in or lien on property upon which an attachment has been levied cannot intervene in the attachment suit to question the grounds for the issuance of the writ.

2. **———: CLAIM NOT DUE: SURETY.** Where the payee of a promissory note before the maturity thereof indorses the same to a

person who is surety thereon, such surety takes all the rights of such payee; and, in cases where the payee could have obtained an attachment under the provisions of section 237 of the code authorizing such process upon claims before due, the surety is entitled to the same remedy.

3. Evidence examined, and found to support decision of trial court refusing to dissolve the attachment.

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

Byron G. Burbank, Charles Battelle and *J. J. Hess,* for appellants.

W. H. Thompson, contra.

CALKINS, C.

On March 8, 1905, the defendant Jacobs made to a bank in Iowa his promissory note for $1,300, due in one year, which the plaintiffs Danker signed as surety. In October following the plaintiffs paid the principal of the note and interest earned up to that date to the bank, which thereupon indorsed and delivered the note to the plaintiffs. They, in December, 1905, began this action, procuring an order from the county judge of Sarpy county allowing an attachment under the provisions of section 237 of the code, permitting that remedy to creditors on claims before due in certain cases, and caused the same to be levied upon lands standing in the name of Jacobs in Sarpy county. Jacobs had purchased the land of one Rihner, who before this date had brought a suit in equity to cancel the conveyance on the ground that the same was obtained from him by fraud. This suit was pending at the date of the attachment, and was afterwards determined in favor of the plaintiff, in a decree which provided that, if the attachment in this suit should be sustained, it should in such case be deemed a lien upon said land. Rihner intervened in this action and moved to discharge the attachment, but his petition of intervention was denied

and his motion stricken from the records. Jacobs appeared in the action by Mr. Burbank, his attorney, and moved to discharge the attachment, which motion, after a hearing upon the law and facts, was denied. The plaintiffs questioned the authority of Mr. Burbank to appear for Mr. Jacobs, and an order was made requiring him to show his authority for said appearance, which upon a hearing was discharged. The defendant Jacobs appeals from the order denying the motion to discharge the attachment; the intervener Rihner appeals from the order striking his petition of intervention and motion to dissolve the attachment from the files, and the plaintiffs prosecute a cross-appeal from the rule discharging the order for Mr. Burbank to show his authority to appear for the defendant Jacobs.

1. It is settled that a claim of ownership in, or a lien upon, the property attached gives the claimant no right to intervene and move for a dissolution of the attachment. *Kimbro v. Clark,* 17 Neb. 403; *Meyer v. Keefer,* 58 Neb. 220. The intervener cites the case of *Deere, Wells & Co. v. Eagle Mfg. Co.,* 49 Neb. 385. The doctrine of that case is expressly limited to cases where writs of attachment have been levied in different actions on the same property, and the plaintiff in the later case seeks to intervene in the earlier case on a proper showing, not to defend the principal action nor to move to discharge the attachment, but to have the relative priority of the levies adjudicated. He also argues that the act of 1887 (sec. 50*a* of the code) gives him the right, as a party claiming an interest in the matter in litigation, to intervene. This depends upon the proper definition of the matter in litigation. We understand the matter in litigation in this case to be, not the real estate attached, nor the ownership thereof, but the debt owing by Jacobs to the plaintiffs, and the existence of the facts alleged in their petition for attachment. The interest that entitles a person to intervene must be of such a nature that he will gain or lose by the direct legal operation of the judgment. *Smith v. Gale,* 144 U. S. 509.

A judgment for the plaintiffs in this case, and the sustaining of the attachment herein, in no way prevents the intervener from disputing Jacobs' ownership of the property attached in any other proceeding. Therefore his rights are not affected by the direct legal operation of the judgment, and it follows that the judgment of the district court was correct in this respect.

2. The defendant contends that the action cannot be maintained for the reason that the plaintiffs cannot be said to be creditors of the defendant, and in support of this contention invokes the doctrine that, where one of two joint promissors, who is liable directly upon the note for its whole amount, buys such note, the note is necessarily extinguished, and the original contract at an end. This was the rule of the English law before the statute of 19 and 20 Victoria, quoted by the defendant, which provides that, in all cases where the surety pays the debt of another, he shall be entitled to assignment, and to stand in the place of the creditor in any action or other proceeding at law or in equity. But the general American doctrine is more liberal in favor of sureties than the English law before the enactment of that statute. The courts have, in a majority of the American states, accomplished the same result by judicial decisions, which has been reached in England by act of parliament. In the case of *Nelson v. Webster,* 72 Neb. 332, in an opinion very fully discussing this question, our own court has adopted the rule of the civil law that the surety is entitled, where he pays the whole debt, not only to the collateral securities taken by the creditor, but he is also entitled to be substituted as to the very debt itself to the creditor by way of cession or assignment. If the bank had not parted with the ownership of the note, it would have been entitled to an attachment before the same became due, in the cases prescribed in section 237 of the code; and it follows under the doctrine above announced that the surety paying the debt before due and taking an indorsement of the note was entitled to the same remedy.

3. The defendant's counsel insists that there is not sufficient evidence to support the charge that the defendant sold, conveyed and otherwise disposed of his property with intent to defraud his creditors, and to hinder and delay them in the collection of their debts. Before the commencement of this suit the defendant had been indicted and had absconded. He left property standing in his name or hitherto claimed by him, the farm attached herein, personal property thereon, and, it is alleged, a farm in Lincoln county, barley grown upon the Sarpy county farm, and a valuable horse, said to have cost $500 and to have been sold for $170. There was $500 received from a settlement of the litigation affecting the Sarpy county farm, which was paid to defendant's attorney and by him retained as fees. $900 surplus was realized by defendant's attorney from the sale of the personal property on the farm, one-half of which was retained by him as fees, and the remainder paid to Mrs. Buchanan, wife of the defendant's business associate, who also claimed and sold the horse in question. The barley was shipped and sold by Mr. Buchanan, while the evidence fails to show just what became of the proceeds of the Lincoln farm. All the property owned or claimed by Jacobs before his departure was soon thereafter converted into money, and the net proceeds thereof, after satisfying attorney's fees seems to have gone to the Buchanans. It is claimed by the defendant that some of this property belonged to the Northwestern Trust Company, a corporation of which Jacobs was president and Buchanan secretary. There is no evidence of the facts showing such ownership, though it is testified to as a conclusion of law; neither is there any evidence as to how the Buchanans became the owners of the horse and the barley. We do not propose to discuss the testimony at large, but, for an illustration, take the single question of the disposal of the horse. The proof offered on the part of the plaintiff is the statement of Jacobs that he owned this horse and paid $500 for it. This is met by the testimony of the defendant's attorney that

shortly after Jacobs left the state the horse was in the possession of Mrs. Buchanan, who "admitted the ownership of the horse as her property for and on behalf of her husband." The disposal of this item of property being challenged by the plaintiffs, it was incumbent upon the defendant to account for the same, and there is a total lack of any testimony showing how the title passed to Mrs. Buchanan or her husband, if it ever did so pass.

In the defendant's brief it is admitted that Jacobs' absconding might be evidence of his fraudulent disposition of the property, if it had not been for his indictment; but it is argued that his motive in leaving the state was not to defraud a creditor, but to avoid criminal process. The intent to escape the criminal prosecution and the intent to defraud creditors are not inconsistent. On the contrary, the former is likely in many cases to be the cause of the latter. On the whole, we are satisfied that there was sufficient evidence to support the finding of the trial judge, and that it should not therefore be disturbed.

Since the attachment must be sustained, it becomes unnecessary to consider the errors assigned by the plaintiffs upon their cross-appeal.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.