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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1904.

VOLUME LXXII.

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.

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Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck.. James G. Reeder.....	Fremont. Columbus.
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TABLE OF CASES REPORTED.

PAGE

Aachen & Munich Fire Ins. Co. v. City of Omaha.....112, 518
Abbott, Martin v..... 89
Acom, Dodge County v..... 71
Agnew v. Montgomery..... 9
Allen v. Rushfort..... 907
Allen, Smith v..... 170
Allen, Thull v..... 760
American Bonding & Trust Co., American Radiator Co. v..... 100
American Bonding & Trust Co., Nelson Mfg. Co. v..... 100
American Loan & Trust Co., Hamilton Nat. Bank v..... 81
American Radiator Co. v. American Bonding & Trust Co..... 100
Anderson, Chicago, B. & Q. R. Co. v..... 856
Anderson v. Kannow..... 32
Anthes, Schwingel v.....643, 649

Babb, Felsch v..... 736
Back, State v..... 402
Beatrice, City of, v. Wright..... 689
Beemer, Michaelson v..... 761
Bellevue Improvement Co., O'Neal v..... 899
Bentley v. Estate of Bentley..... 803
Berger, Halverstadt v..... 462
Bissell, Estate of, Gandy v..... 356
Bixby v. Jewell..... 755
Blair v. State.....368, 501
Bouck, Farrell v..... 875
Boyer, Kelley v..... 41
Brown v. Cowles..... 896
Brown v. Reed..... 167
Butterfield v. Commercial Cattle Co..... 605

Caldwell, Zweibel v.....47, 53
Campbell, Link v.....307, 310
Campbell v. Noyes, Norman & Co..... 201
Campbell v. Tracy..... 548
Carlson, State v..... 837
Cass County, Chicago, B. & Q. R. Co. v..... 489

PAGE
Cass County v. Sarpy County 93
Cassidy v. Collier 376
Chaloupka, Flint v 34
Chamberlain Banking House, Wheatley v 570
Chamberlain, National Bank of Commerce v 469
Chicago, B. & Q. R. Co. v. Anderson 856
Chicago, B. & Q. R. Co. v. Cass County 489
Chicago, B. & Q. R. Co., Fielding v 854
Chicago, B. & Q. R. Co. v. Richardson County 482
Chicago, B. & Q. R. Co. v. Roberts 539
Chicago, B. & Q. R. Co. v. Russell 114
Chicago, B. & Q. R. Co. v. Sevcek 793, 799
Chicago, R. I. & P. R. Co. v. O'Donnell 900
Chicago, R. I. & P. R. Co. v. Sporer 372
Christian, Dennison v 703
City of Beatrice v. Wright 689
City of Fremont, Nebraska Telephone Co. v 25
City of Minden v. Vedene 657
City of Omaha, Aachen & Munich Fire Ins. Co. v 112, 518
City of Omaha, Eddy v 550, 559, 561
City of Omaha v. Houlihan 326
City of Omaha, McCaffery v 583
City of Omaha, Provident Savings Life Assurance Society v ... 113, 553
City of Omaha, Shannon v 281
City of South Omaha, Lonergan v 317
City of South Omaha v. McGavock 382
City of South Omaha v. Sutliffe 746
Clark v. Interstate Independent Telephone Co 883
Clarke v. Woodruff 286
Cline v. Dexter 619
Colburn v. McDonald 431
Colby v. Foxworthy 378
Collier, Cassidy v 376
Collier, Levy v 377
Collyer v. Davis 887
Commercial Cattle Co., Butterfield v 605
Commercial Union Assurance Co., Shoemaker v 650
Connolly, Frontier Steam Laundry Co. v 767
Corrigan, Smith v 686
Cowles, Brown v 896
Crandall, State v 542
Cronin, State v 636, 642
Cuthbertson v. State 727

Dallugge, Goken v 16, 22, 23
Daughetee, Williams v 270
Davis, Collyer v 887

PAGE

Dawes, Foss v. 608, 611
Dennison v. Christian 703
Dexter, Cline v. 619
Dodge County v. Acom 71
Donner v. State 263

Eccles v. United States Fidelity & Guaranty Co. 439, 734
Eddy v. City of Omaha 550, 559, 561
Ellsworth, State v. 277
Esch v. Graue 719
Estate of Bentley, Bentley v. 803
Estate of Bissell, Gandy v. 356

Farmers Canal Co. v. Frank 136
Farmers & Merchants Ins. Co. v. Mickel 122
Farrell v. Bouck 875
Faulkner v. Powell 474
Felsch v. Babb 736
Ferguson v. State 350
Fickenscher, Union P. R. Co. v. 187
Fidelity & Deposit Co. v. Libby 850
Fielding v. Chicago, B. & Q. R. Co 854
Figg, Young v. 271
Fitch, Lodge v. 652
Flint v. Chaloupka 34
Foss v. Dawes 608, 611
Foxworthy, Colby v. 378
Frank, Farmers Canal Co. v. 136
Fremont, City of, Nebraska Telephone Co. v. 25
Fremont Brewing Co. v. Schulz 631
Fremont, E. & M. V. R. Co. v. Hagblad 773, 790
Fremont Telephone Co. v. Keeler 613
Frontier Steam Laundry Co. v. Connolly 767
Fullenwider, Naudain v. 221

Gadsden v. Thrush 1
Gage County, Maurer v. 441
Gandy v. Estate of Bissell 356
Gillman v. Topinka 96
Goken v. Dallugge 16, 22, 23
Gombert v. Lyon 319
Graue, Esch v. 719
Greaser, In re 612

Hacker v. Howe 385
Hagblad, Fremont, E. & M. V. R. Co. v. 773, 790
Halverstadt v. Berger 462
Hamilton Nat. Bank v. American Loan & Trust Co 81

PAGE

Hans v. State 288
Hardinger v. Modern Brotherhood of America 860, 869
Haskins, Richards v 195
Hawke v. Kerr 848
Heller, Lincoln Traction Co. v 127, 134
Henry v. State 252
Herrick, Humphrey Hardware Co. v 878, 881
Hodges, Western Fly Guard Co. v 313
Holmes v. Seaman 300, 304
Horner v. Hughbanks 467
Hotovy, Ruzicka v 589
Houlihan, City of Omaha v 326
Howe, Hacker v 385
Hubbard v. State 62
Huffman v. Rhodes 57
Hughbanks, Horner v 467
Humphrey Hardware Co. v. Herrick 878, 881
Hunter, McNeal v 579

In re Application of Krug 576
In re Estate of Parker 601
In re Greaser 612
Interstate Independent Telephone Co., Clark v 883
Iske v. State 278

Johnson v. Owen 477
Johnson-McLean Co., Maloney v 340
Jewell, Bixby v 755

Kannow, Anderson v 32
Keeler, Fremont Telephone Co. v 613
Kelley v. Boyer 41
Kelsey, Simmons v 534
Kerr, Hawke v 848
Kleutsch v. Security Mutual Life Ins. Co 75
Krug, In re Application of 576
Krug, Moise & Co. v 43

Lamb v. Rooney 322
Levy v. Collier 377
Libby, Fidelity & Deposit Co. v 850
Lillie v. State 228
Lincoln Safe Deposit & Trust Co. v. Weston 536
Lincoln Traction Co. v. Heller 127, 134
Link v. Campbell 307, 310
Lobeck v. State 595
Locke, Skow v 681
Lodge v. Fitch 652

PAGE
Lonergan v. City of South Omaha 317
Luebben, Stock v. 254
Lyon, Gombert v. 319

McCaffrey v. City of Omaha 583
McDonald, Colburn v. 431
McDonald, Parrott v. 97
McGavock, City of South Omaha v. 382
McGinley v. Wirthele 602
McLean v. Omaha & Council Bluffs Railway & Bridge Co. 447, 450
McNeal v. Hunter 579
Maloney v. Johnson-McLean Co. 340
Martin v. Abbott 89
Maurer v. Gage County 441
Mays v. State 723
Meixel, Westinghouse Co. v. 623
Michaelson v. Beemer 761
Michaelson v. Village of Tilden 744
Mickel, Farmers & Merchants Ins. Co. v. 122
Miller v. Walker 660
Minden, City of, v. Vedene 657
Missouri P. R. Co., Parkins v. 831
Modern Brotherhood of America, Hardinger v. 860, 869
Moise & Co. v. Krug 43
Moline v. State 361
Montgomery, Agnew v. 9
Moores, State v. 5
Morris v. Washington County 174

National Bank of Commerce v. Chamberlain 469
Naudain v. Fullenwider 221
Neal v. Vansickle 105
Nebraska Telephone Co. v. City of Fremont 25
Nelson v. Webster 332
Nelson Mfg. Co. v. American Bonding & Trust Co. 100
Nemaha County, Stocker v. 255
Northwestern Trust Co., State v. 497
Noyes, Norman & Co., Campbell v. 201

O'Donnell, Chicago, R. I. & P. R. Co. v. 900
Omaha, City of, Aachen & Munich Fire Ins. Co. v. 112, 518
Omaha, City of, Eddy v. 550, 559, 561
Omaha, City of, v. Houlihan 326
Omaha, City of, McCaffrey v. 583
Omaha, City of, Provident Savings Life Assurance Society v. 113, 533
Omaha, City of, Shannon v. 281
Omaha & Council Bluffs Railway & Bridge Co., McLean v. 447, 450

PAGE
O'Neal v. Bellevue Improvement Co..... 899
Owen, Johnson v..... 477

Parker, In re Estate of..... 601
Parkins v. Missouri P. R. Co..... 831
Parrott v. McDonald..... 97
Patrick v. Patrick..... 454
Penn v. Trompen..... 273
Pine v. Pine..... 463
Powell, Faulkner v..... 474
Provident Savings Life Assurance Society v. City of Omaha....113, 533

Reed, Brown v..... 167
Rhodes, Huffman v..... 57
Richards v. Haskins..... 195
Richardson County, Chicago, B. & Q. R. Co. v..... 482
Roberts, Chicago, B. & Q. R. Co. v..... 539
Rooney, Lamb v..... 322
Rue, Snell v..... 571
Rushfort, Allen v..... 907
Russell, Chicago, B. & Q. R. Co. v..... 114
Ruzicka v. Hotovy..... 589

Sarpy County, Cass County v..... 93
Scace v. Wayne County..... 162
Schulz, Fremont Brewing Co. v..... 631
Schwingel v. Anthes.....643, 649
Seaman, Holmes v.....300, 304
Security Mutual Life Ins. Co., Kleutsch v..... 75
Setzer, Trayer v..... 845
Sevcek, Chicago, B. & Q. R. Co. v.....793, 799
Shannon v. City of Omaha..... 281
Shoemaker v. Commercial Union Assurance Co..... 650
Simmons v. Kelsey..... 534
Skow v. Locke..... 681
Smith v. Allen..... 170
Smith v. Corrigan..... 686
Smith v. State..... 345
Snell v. Rue..... 571
Sornborger, State v..... 615
South Omaha, City of, Lonergan v..... 317
South Omaha, City of, v. McGavock..... 382
South Omaha, City of, v. Sutliffe..... 746
Sporer, Chicago, R. I. & P. R. Co. v..... 372
State, Blair v.....368, 501
State v. Carlson..... 837
State, Cuthbertson v..... 727

PAGE
State, Donner v. 263
State, Ferguson v. 350
State, Hans v. 288
State, Henry v. 252
State, Hubbard v. 62
State, Lillie v. 228
State, Lobeck v. 595
State, Mays v. 723
State, Moline v. 361
State, Smith v. 345
State, Woodruff v. 815
State, Zobel v. 427
State, ex. rel. Crandall, v. Chicago, B. & Q. R. Co. 542
State, ex rel. Dunn, v. Moores. 5
State, ex rel. First Nat. Bank of Atkinson, v. Cronin. 636
State, ex rel. First Nat. Bank of O'Neill, v. Cronin. 642
State, ex rel. Holm, v. Ellsworth. 277
State, ex rel. Morton, v. Back. 402
State, ex rel. Pankonin, Iske v. 278
State, ex rel. Pritschau, v. Sornborger. 615
State, ex rel. Prout, v. Northwestern Trust Co. 497
Stock v. Luebben. 254
Stocker v. Nemaha County. 255
Supreme Court of Honor v. Tracy. 742
Sutliffe, City of South Omaha v. 746

Thrush, Gadsden v. 1
Thull v. Allen. 760
Todd v. York County. 207
Tomson, Western Travelers Accident Ass'n v. 661, 674, 680
Topinka, Gillman v. 96
Tracy, Campbell v. 548
Tracy, Supreme Court of Honor v. 742
Trayer v. Setzer. 845
Trompen, Penn v. 273

Ulysses Township, Wilson v. 807
Union P. R. Co. v. Fickenscher. 187
Union P. R. Co. v. Westlund. 733, 734
United States Fidelity & Guaranty Co., Eccles v. 439, 734

Vansickle, Neal v. 105
Vedene, City of Minden v. 657
Village of Tilden, Michaelson v. 744

Walker, Miller v. 660
Washington County, Morris v. 174
Wayne County, Scace v. 162

PAGE
Webster, Nelson v. 332
Western Fly Guard Co. v. Hodges 313
Western Travelers Accident Ass'n v. Tomson 661, 674, 680
Westinghouse Co. v. Meixel 623
Westlund, Union P. R. Co. v. 733, 734
Weston, Lincoln Safe Deposit & Trust Co. v. 536
Wheatley v. Chamberlain Banking House 570
Williams v. Daughetee 270
Wilson v. Ulysses Township 807
Wirthele, McGinley v. 602
Woodruff, Clarke v. 286
Woodruff v. State 815
Wright, City of Beatrice v. 689

York County, Todd v. 207
Young v. Figg 271

Zobel v. State 427
Zweibel v. Caldwell 47, 53

CASES CITED BY THE COURT.

CASES MARKED † ARE DISTINGUISHED IN THIS VOLUME.

PAGE

Achilles v. Achilles, 137 Ill. 589 806
Adams v. Thompson, 28 Neb. 53 591
Adams County v. Kansas City & O. R. Co., 71 Neb. 549 416
Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 486
Aetna Ins. Co. v. Bank of Wilcox, 48 Neb. 544 15
Allen v. Bennet, 3 Taunt. (Eng.) 169 894
Altschuler v. Coburn, 38 Neb. 881 309
American Savings Bank v. Estate of Harrington, 34 Neb. 597 623
Ames v. People, 26 Colo. 83 ..... 419, 423
Anderson v. Henderson, 124 Ill. 164 219
Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897 216
Anselme v. American Savings & Loan Ass'n, 63 Neb. 525 286
Anselme v. American Savings & Loan Ass'n, 66 Neb. 520 287
Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286 553
Armstrong v. Middlestadt, 22 Neb. 711 560
Arnold v. Bright, 41 Mich. 207 840
Arnold v. State, 38 Neb. 752 764
Ashley v. Williams, 17 Ore. 441 610
Atchison, T. & S. F. R. Co. v. Cross, 58 Kan. 424 120
Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491 751
Atkins v. Atkins, 13 Neb. 271 464
Atkins v. Seeley, 54 Neb. 688 267
Atkinson v. State, 34 Tex. Cr. App. 424 348
Attorney General v. Cleaver, 18 Ves., Jr. (Eng.) 211 66
Attorney General v. Rice, 64 Mich. 385 640
Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) *371 65
Austin v. Vaughn, 14 La. Ann. 43 610

Bailey v. State, 4 Ohio St. 440 504
Bailey v. State, 57 Neb. 706 ..... 505, 827
Ballard v. State, 19 Neb. 609 371
Ballou v. Sherwood, 32 Neb. 666 591
Bank of Montpelier v. Dixon, 4 Vt. 587 338
Bank of Orange v. Brown, 3 Wend. (N. Y.) 158 778
Bardrick v. Dillon, 7 Okla. 535 398
Barkley v. Missouri P. R. Co., 96 Mo. 367 119

PAGE

Barnes v. District of Columbia, 91 U. S. 540..... 813
Barney v. State, 49 Neb. 515.....229, 245, 726
Bartley v. State, 53 Neb. 310..... 347
Battelle v. McIntosh, 62 Neb. 647..... 553
Battle Creek Valley Bank v. Collins, 3 Neb. (Unof.) 38..... 13
Beall v. McMenemy, 63 Neb. 70..... 574
Beems v. Chicago, R. I. & P. R. Co., 67 Ia. 435..... 751
Bennett v. Otto, 68 Neb. 652..... 576
Berdolt v. Berdolt, 56 Neb. 792..... 464
Berneker v. State, 40 Neb. 810..... 826
Biggs v. Board of Commissioners, 7 Ind. App. 142..... 394
Blair v. State, 72 Neb. 501..... 824
Bliss v. State, 117 Wis. 596..... 231
Block v. Milwaukee Street R. Co., 89 Wis. 371..... 754
Blodgett v. McMurtry, 39 Neb. 210..... 669
Bobel v. People, 173 Ill. 19..... 365
Boice v. Palmer, 55 Neb. 389..... 311
Bollman v. Pasewalk, 22 Neb. 761..... 104
Bond v. Dolby, 17 Neb. 491..... 553
Bound v. Wisconsin C. R. Co., 45 Wis. 543..... 438
Bradshaw v. Jones, 103 Tenn. 331..... 828
Bradshaw v. State, 17 Neb. 147..... 514
Bradshaw v. State, 19 Neb. 644..... 65
Brandon v. State, 16 Ind. 197.....364, 375
Brass v. Vandecar, 70 Neb. 35..... 304
Brown v. Baron, 162 Mass. 56..... 460
Brown v. City of Denver, 7 Colo. 305..... 693
Bruce v. Rayner, 124 Fed. 481..... 713
Burger v. Missouri P. R. Co., 112 Mo. 238..... 119
Burgess & Co. v. Blake, 128 Ala. 105..... 882
Burke v. Chicago & N. W. R. Co., 108 Ill. App. 565..... 782
Burnett v. Lyford, 93 Cal. 114..... 460
Bush v. Johnson County, 48 Neb. 1..... 446

Cain v. City of Omaha, 42 Neb. 120..... 110
Calvert v. State, 34 Neb. 616..... 839
Campbell v. McClure, 45 Neb. 608..... 305
Campbell v. Noyes, Norman & Co., 72 Neb. 201..... 548
Cancemi v. People, 18 N. Y. 128..... 764
Carey v. Rawson, 8 Mass. 159..... 893
Carleton v. State, 43 Neb. 373.....231, 268
Carrall v. State, 53 Neb. 431..... 347
Cass County v. Chicago, B. & Q. R. Co., 25 Neb. 384..... 490
Cass County v. Sarpy County, 63 Neb. 813, 66 Neb. 473..... 280
Castle Rock Irrigation Canal & Water Power Co. v. Jurisch, 67 Neb. 377..... 152

PAGE
Chapman v. State, 61 Neb. 888 822
Charter v. Stevens, 3 Den. (N. Y.) 33 684
Cheney v. Straube, 35 Neb. 521 301
Chicago, B. & Q. R. Co. v. County of Otoe, 16 Wall. (U. S.) 667 ... 436
Chicago, B. & Q. R. Co. v. Dundy County, 3 Neb. (Unof.) 391 437
Chicago, B. & Q. R. Co. v. Goracke, 32 Neb. 90 512
Chicago, B. & Q. R. Co. v. Hogan, 27 Neb. 801 795
†Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258 ..... 807, 814
Chicago, B. & Q. R. Co. v. Landauer, 39 Neb. 803 792
Chicago, B. & Q. R. Co. v. Richardson County, 61 Neb. 519
403, 417, 482, 490, 495
Chicago, B. & Q. R. Co. v. Richardson County, 72 Neb. 482 426
Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364 165
†Chicago, R. I. & P. R. Co. v. McDowell, 66 Neb. 170 746
Chicago, R. I. & P. R. Co. v. O'Neill, 58 Neb. 239 166
Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636 ..... 782, 791
Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689 792
Chickering v. Lovejoy, 13 Mass. 51 893
Chouteau v. Hannibal & St. J. R. Co., 28 Mo. App. 556 800
Churchill v. Beethe, 48 Neb. 87 219
Cincinnati v. Hafer, 49 Ohio St. 60 38
Citizens Bank v. Clossen, 29 Ohio St. 78 669
Citizens Street R. Co. v. Willoeby, 134 Ind. 563 741
City and County of Sacramento v. Crocker, 16 Cal. 119 528
City and County of San Francisco v. Liverpool and London and
Globe Ins. Co., 74 Cal. 113 532
City of Beatrice v. Leary, 45 Neb. 149 216
City of Chattanooga v. Nashville, C. & St. L. R. Co., 7 Lea
(Tenn.) 561 417
City of Dubuque v. Northwestern Life Ins. Co., 29 Ia. 9 527
City of Harvard v. Crouch, 47 Neb. 133 166
City of Omaha v. Gsantner, 4 Neb. (Unof.) 52 558
City of Omaha v. Olmstead, 5 Neb. 446 808
City of Ord v. Nash, 50 Neb. 335 240
Clapp v. Maxwell, 13 Neb. 542 342
Clark v. Charles, 55 Neb. 202 91
Clark v. Fitch, 32 Neb. 511 61
Clark v. State, 32 Neb. 246 ..... 268, 371
Cleland v. Anderson, 66 Neb. 252 640
Clother v. Maher, 15 Neb. 1 522
Clough v. State, 7 Neb. 320 231
Clutton v. Clutton, 108 Mich. 267 465
Coe v. Caledonia & M. R. Co., 27 Minn. 197 438
Coil v. State, 62 Neb. 15 291
Cole v. Duluth, S. S. & A. R. Co., 104 Wis. 460 801
Collins Mfg. Co. v. Seeds Dry Plate Co., 55 Neb. 577 441

PAGE

Columbus S. R. Co. v. Wright, 151 U. S. 470 424
Commonwealth v Dennison, 24 How. (U. S.) 66 707
Commonwealth v. Green, 17 Mass. 417 66
Commonwealth v. Jacobs, 152 Mass. 276 504
Cook v. Johnston, 58 Mich. 437 770
Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261 119
Couch v. Woodruff, 63 Ala. 466 16
Coulson v. Galtsman, 1 Neb. (Unof.) 502 38
County of Cass v. County of Sarpy, 63 Neb. 813 375
County of Dakota v. Cheney, 22 Neb. 437 72
County of Dodge v. Acom, 61 Neb. 376 179
County of San Mateo v. Southern P. R. Co., 13 Fed. 722 693
Crawford Co. v. Hathaway, 67 Neb. 325 ..... 152, 500
Crispen v. Hannavan, 50 Mo. 536 199
Culmer v. Wilson, 13 Utah, 129 20
Cunningham v. Fuller, 35 Neb. 58 311
Curran v. Wilcox, 10 Neb. 449 52
Curry v. State, 4 Neb. 55 371
Curtis v. Osborne & Co., 63 Neb. 837 553
Cutler v. Roberts, 7 Neb. 4 104

Darst v. Griffin, 31 Neb. 668 179
Darst v. People, 62 Ill. 306 842
Davidson v. New Orleans, 96 U. S. 97 693
Davis v. Lambert, 69 Neb. 242 80
Davis v. Londgreen, 8 Neb. 43 212
Davis v. State, 31 Neb. 240 64
Davis v. State, 51 Neb. 301 ..... 239, 348
Deisen v. Chicago, St. P., M. & O. R. Co., 43 Minn. 454 751
De La Vega v. Butler, 47 Tex. 529 200
Derry v. Ross, 5 Colo. 295 155
Detroit Citizens Street R. Co. v. Common Council, 125 Mich. 673 .. 420
Dickey v. Reed, 78 Ill. 261 841
Dinsmore & Co. v. Stimbert, 12 Neb. 433 836
Dodge v. Boston & B. Steamship Co., 148 Mass. 207 781
Dodge v. People, 4 Neb. 220 66
Drum v. Drum, 133 Mass. 566 381
Ducat v. City of Chicago, 48 Ill. 172 525
Dunbar v. Briggs, 18 Neb. 94 309
Dundy v. Richardson County, 8 Neb. 508 395
Durant v. People, 13 Mich. 351 243
Dwelling House Ins. Co. v. Brewster, 43 Neb. 528 ..... 662, 670, 678
Dworak v. More, 25 Neb. 735 36

Edgerly v. Emerson, 23 N. H. 555 338
Edwards v. State, 69 Neb. 386 819
Equitable Trust Co. v. City of Omaha, 69 Neb. 342 554

PAGE
Eswin v. St. Louis, I. M. & S. R. Co., 96 Mo. 290..... 119
Ex parte Ammons, 34 Ohio St. 518..... 707
Ex parte Badgley, 7 Cow. (N. Y.) 472..... 766
Ex parte Bennett, 2 Cranch (C. C.), 612..... 766
Ex parte Holmes, 21 Neb. 324..... 64
Ex parte Romanes, 1 Utah, 23..... 707
Ex parte Sheldon, 34 Ohio St. 319..... 710
Ex parte Smith, 135 Mo. 223..... 764
Ex parte White, 49 Cal. 433..... 707

Falconer v. Buffalo & Jamestown R. Co., 69 N. Y. 491..... 438
Falls v. San Francisco & N. P. R. Co., 97 Cal. 114..... 781
Farm Investment Co. v. Carpenter, 9 Wyo. 110..... 152
Farmers Loan & Trust Co. v. Schwenk, 54 Neb. 657..... 553
Farney v. Hamilton County, 54 Neb. 797..... 441
Farrell v. Bouck, 60 Neb. 771..... 875
Farrell v. Bouck, 61 Neb. 874..... 876
Farris v. State, 46 Neb. 857..... 440
Faulkner v. Simms, 68 Neb. 299..... 257
Fenton v. Yule, 27 Neb. 758..... 375
Ferguson v. State, 52 Neb. 432..... 516
Fidelity & Deposit Co. v. Parkinson, 68 Neb. 319..... 102
Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah V. R. Co., 86 Va 1..... 365
Finch v. York County, 19 Neb. 50..... 522
Finkelstein v. Kessler, 84 N. Y. Supp. 266..... 593
First Nat. Bank v. Gibson, 60 Neb. 767..... 36
First Nat. Bank v. Lowrey, 36 Neb. 290..... 80
First Nat. Bank v. Tighe, 49 Neb. 299..... 36
Fitzgerald v. Quann, 109 N. Y. 441..... 20
Flynn v. Jordan, 17 Neb. 518..... 604
Foley v. Doyle, 1 Neb. (Unof.) 643..... 36
Franklin County v. Nashville, C. & St. L. R. Co., 12 Lea (Tenn.), 521..... 417
Fremont, E. & M. V. R. Co. v. Crum, 30 Neb. 78..... 512
Fremont, E. & M. V. R. Co. v. French, 48 Neb. 638..... 792
Fremont, E. & M. V. R. Co. v. Marley, 25 Neb. 138..... 213
Frink v. Potter, 17 Ill. 406..... 778
Fuller v. Green, 64 Wis. 159..... 381
Fusze v. Stern, 17 Ill. App. 429..... 37

Gadsden v. Thrush, 56 Neb. 565..... 2
Gadsden v. Thrush, 63 Neb. 881..... 2
Gandy v. Estate of Bissell, 3 Neb. (Unof.) 47..... 356
Gandy v. Estate of Bissell, 5 Neb. (Unof.) 184..... 357
Gandy v. State, 27 Neb. 707..... 514
Gannon v. Hargadon, 10 Allen (Mass.) 106..... 217

PAGE

Gardels v. Kloke, 36 Neb. 493 607
Garrett v. Republican Pub. Co., 61 Neb. 541 15
Gartrell v. Stafford, 12 Neb. 545 607
Gatling v. Lane, 17 Neb. 80 375
Gay v. Hults, 55 Mich. 327 306
Gaynor v. Old Colony & N. R. Co., 100 Mass. 208 781
George v. State, 61 Neb. 669 824
Gerecke v. Campbell, 24 Neb. 306 574
German-American Fire Ins. Co. v. City of Minden, 51 Neb. 870 532
German Ins. Co. v. Hyman, 34 Neb. 704 122
German Ins. Co. v. Shader, 68 Neb. 1 678
German Insurance & Savings Institution v. Kline, 44 Neb. 395 122
Gibson v. Gibson 24 Neb. 394 76
Gilbert v. Merriam, 26 Neb. 194 266
Gillespie v. Switzer, 43 Neb. 772 ..... 38, 574
Gillet v. Phelps, 12 Wis 437 80
Gillette v. Morrison, 9 Neb. 395 512
Gilmore v. Armstrong, 48 Neb. 92 219
Gleason v. White, 34 Cal. 258 609
Goos v. Goos, 57 Neb. 294 553
Gottschalk v. Chicago, B. & Q. R. Co, 14 Neb. 550 165
Gran v. Houston, 45 Neb. 813 233
Grandin v. First Nat. Bank, 70 Neb. 730 222
Grand Island Savings & Loan Ass'n v. Moore, 40 Neb. 686 173
Grand Rapids & I. R. Co v. Martin, 41 Mich. 667 781
Grant v. Bartholomew, 57 Neb. 673 696
Gravely v. State, 45 Neb. 878 235
Gray v. School District, 35 Neb. 438 104
Greeley v. St. Paul, M. & M. R. Co, 33 Minn. 136 796
Gregory v. Bush, 64 Mich. 37 213

Hall v. Clagett, 48 Md. 223 610
Hall v. Hart, 52 Neb. 4 ..... 45, 579
Hallo v. Helma, 12 Neb. 87 395
Hamilton Nat. Bank v. American Loan & Trust Co., 66 Neb. 67 83
Hanawalt v. State, 64 Wis. 84 721
Hancock & Walters v. Stout, 28 Neb. 301 311
Hanover Ins. Co. v. Bohn, 48 Neb. 743 124
Hans v. State, 50 Neb. 150 512
Hanscom v. City of Omaha, 11 Neb. 37 110
Hargreaves v. Menken, 45 Neb. 668 224
Harral v. Gray, 10 Neb. 186 222
Harris v. People, 128 Ill. 585 764
Harris v. Stevens, 31 Vt. 79 789
Hart v. Beardsley, 67 Neb. 145 554
Hart v. Smith, 159 Ind. 182 531
Hatfield v. St. Paul & D. R. Co., 33 Minn. 130 741

PAGE

Hayden v. Frederickson, 59 Neb. 141 79
Hayes v. Michigan C. R. Co., 111 U. S. 228 770
Hazelet v. Holt County, 51 Neb. 716 446
Heidel v. Benedict, 61 Minn. 170 87
Hemingway v. Preston, Walk. Ch. (Mich.) 528 840
Henry v. Ward, 49 Neb. 392 365
Henry & Coatsworth Co. v. Halter, 58 Neb. 685 338
Hesser v. Johnson, 57 Neb. 155 303
Heywood v. Maine Mutual Accident Ass'n, 85 Me. 289 670
High School District v. Lancaster County, 60 Neb. 147 410
Hill v. Beach, 12 N. J. Eq. 31 610
Hill v. City of Boston, 122 Mass. 344 810
Hill v. Helman, 33 Neb. 731 233
Hill v. State, 42 Neb. 503 231
Hodgkins v. State, 36 Neb. 160 347
Hoff's Appeal, 24 Pa. St. 200 460
Holland v. Chicago, B. & Q. R. Co., 52 Neb. 100 52
Holland v. Commercial Bank, 22 Neb. 571 266
Hollister v. Mann, 40 Neb. 572 92
Home Fire Ins. Co. v. Decker, 55 Neb. 346 668
Home Fire Ins. Co. v. Johansen, 59 Neb. 349 836
Hope v. People, 83 N. Y. 418 293
Horbach v. City of Omaha, 49 Neb. 851 254
Horbach v. City of Omaha, 54 Neb. 83 283
Hoy v. State, 69 Neb. 516 295
Hubbard v. State, 65 Neb. 805 ..... 63, 816, 824
Huck & Co. v. Gaylord, 50 Tex. 578 102
Huebner v. Sesseman, 38 Neb. 78 458
Huff v. Babbott, 14 Neb. 150 488
Hughes v. Anderson, 68 Ala. 280 219
Hughes v. City of Cairo, 92 Ill. 339 525
Hughs v. Pickering, 14 Pa. St. 297 199
Hurlbut v. Hall, 39 Neb. 889 882
Hutchinson v. State, 19 Neb. 262 721
Hyatt v. Corkran, 188 U. S. 691 704

Illinois C. R. Co. v. Laloge, 113 Ky. 896 786
Illinois C. R. Co. v. O'Keefe, 168 Ill. 115 786
Ingram v. State, 24 Neb. 33 721
In re Fanton, 55 Neb. 703 761
In re Mason, 8 Mich. 70 766
In re Newton, 39 Neb. 757 428
In re Potts, 166 U. S. 263 3
In re Ring, 28 Cal. 247 766
In re Tierney, 71 Neb. 704 576
In re Van Sciever, 42 Neb. 772 612
In re White, 33 Neb. 812 374

PAGE

Insurance Co. of North America v. Bachler, 44 Neb. 549..... 126

Jackson v. Lowe & Lyman, 1 Bing. (Eng.) 9..... 894
Jacobson v. Van Boening, 48 Neb. 80..... 216
Jarvis v. Palmer, 11 Paige Ch. (N. Y.) 650..... 15
Jenal v. Green Island Draining Co., 12 Neb. 163..... 107
John v. Connell, 71 Neb. 10..... 284
Johns v. Charlotte, C. & A. R. Co., 39 S. Car. 162..... 782
Johnson v. Hesser, 61 Neb. 631..... 836
Johnston v. Spencer, 51 Neb. 198..... 348
Jones v. Rushville National Gas. Co., 135 Ind. 595..... 394
Jones v. United States Mutual Accident Ass'n, 92 Ia. 652..... 868
Jordan v. New York, N. H. & H. R. Co., Mass. 346..... 781
Judson v. Malloy, 40 Cal. 299..... 155

Kane v. Union P. R. Co., 5 Neb. 105..... 735
Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419..... 87
Kazda v. State, 52 Neb. 499..... 429
Kelley v. Wehn, 63 Neb. 410..... 173
Kelly v. Manhattan R. Co., 112 N. Y. 443..... 781
Kelly v. Manhattan Beach R. Co., 81 N. Y. 233..... 305
Kennedy v. Commonwealth, 14 Bush (Ky.), 340..... 295
Kentucky Railroad Tax Cases, 115 U. S. 321..... 488
Kenyon v. People, 26 N. Y. 203..... 828
Kerner v. McDonald, 60 Neb. 663..... 19
Ketelman v. Chicago Brush Co., 65 Neb. 429..... 836
Kieldsen v. Wilson, 77 Mich. 45..... 102
King v. Fowler & Sexton, 4 Barn. & Ald. (Eng.) *273..... 66
Kirk v. Bowling, 20 Neb. 263..... 347
Klein v. People, 113 Ill. 596..... 725
Klink v. People, 16 Colo. 467..... 70
Kloke v. Gardels, 52 Neb. 117..... 173
Knapp v. Jones, 50 Neb. 490..... 874
Knight v. Portland S. & P. R. Co., 56 Me. 234..... 781
Knowles v. State, 44 Tex. Cr. App. 322..... 823
Koch v. Losch, 31 Neb. 625..... 553
Korth v. State, 46 Neb. 631..... 504
Krantz v. Rio Grande W. R. Co., 12 Utah, 104..... 782
Kruger v. Adams & French Harvester Co., 9 Neb. 526..... 553
Kuhl v. Pierce County, 44 Neb. 584..... 441

Lafflin v. Buffalo & S. R. Co, 106 N. Y. 136..... 781
Lamb v. State, 69 Neb. 212.....244, 323
Lanphere v. State, 114 Wis. 193.....821, 823
Larned v. Tiernan, 110 Ill. 173..... 365
Leavitt v. Bell, 55 Neb. 57..... 284
Lehigh & H. R. Co. v. Marchant, 84 Fed. 870..... 754
Leidigh v. Keever, 5 Neb. (Unof.) 207..... 34

PAGE
Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189..... 868
Lidderdale v. Robinson, 12 Wheat. (U. S.) 595..... 338
Lillie v. State, 72 Neb. 228..... 723
Lincoln Rapid Transit Co. v. Rundle, 34 Neb. 559..... 92
Lincoln Street R. Co. v. City of Lincoln, 61 Neb. 109..... 532
Lincoln Street R. Co. v. McClellan, 54 Neb. 672.....127, 132
Lincoln Traction Co. v. Webb, 73 Neb. — 134
Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526..... 216
Link v. Connell, 48 Neb. 574..... 38
Livingston v. Corey, 33 Neb. 366..... 462
Livingston v. Johnson County, 42 Neb. 277..... 180
Loewenthal v. People, 192 Ill. 222..... 395
Lothrop v. Michaelson, 44 Neb. 633..... 319
Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544..... 741
Louisville & N. R. Co. v. Reynolds, 71 S. W. (Ky.) 516..... 787
Lowe v. Prospect Hill Cemetery Ass'n, 58 Neb. 94..... 558
Lower v. Denton, 9 Wis. *268..... 609
Lydick v. Korner, 13 Neb. 10..... 488
Lynam v. Anderson, 9 Neb. 367..... 696
Lyon v. Gombert, 63 Neb. 630..... 320

McAdow v. Ross, 53 Mo. 199..... 669
McCall v. Bane, 45 Fed. 828..... 375
McCall v. Forsyth, 4 W. & S. (Pa.) 179..... 778
McClay v. Foxworthy, 18 Neb. 295..... 758
McClellan v. Hein, 56 Neb. 600..... 512
McCluskey v. Cromwell, 11 N. Y. 593..... 102
McCombs v. Merryhew, 40 Mich. 72..... 840
McConnell v. Dewey, 5 Neb. 385..... 810
McDonald v. Chicago & N. W. R. Co., 26 Ia. 124..... 781
McDuffie v. Bentley, 27 Neb. 380..... 354
McGavock v. City of Omaha, 40 Neb. 64..... 166
McHale v. Maloney, 67 Neb. 532..... 341
McNaughton v. Burke, 63 Neb. 704..... 899
McNeal v. Hunter, 72 Neb. 579..... 823

Magneau v. City of Fremont, 30 Neb. 843..... 528
Maher v. People, 10 Mich. 212..... 243
Maitland v. Gilbert Paper Co., 97 Wis. 476..... 753
Mallett v. Uncle Sam Gold & Silver Mining Co., 1 Nev. 188..... 155
Malone v. Garver, 3 Neb. (Unof.) 710..... 13
Mansfield v. Gregory, 11 Neb. 297..... 224
Martin v. Robson, 65 Ill. 129..... 19
Marx & Kempner v. Kilpatrick, 25 Neb. 107..... 309
Mason Lumber Co. v. Buchtel, 101 U. S. 638..... 494
Mason v. Pierron, 63 Wis. 239..... 338
Mathews v. Mulford, 53 Neb. 252.....53, 255
May v. May, 9 Neb. 16..... 847

PAGE

Mayor v. Pilkington, 2 Atk. (Eng.) 302 66
Mayor and Alderman of Wetumpka v. Winter, 29 Ala. 651 436
Mayor of City of New York v. Davenport, 92 N. Y. 604 390
Meibus v. Dodge, 38 Wis. 300 119
Merrill v. Suing, 66 Neb. 404 305
Middleboro Nat. Bank v. Richards, 55 Neb. 682 104
Miller v. Butterfield, 79 Cal. 62 15
Miller v. Hurford, 13 Neb. 13 375
Miller v. Snyder, 6 Ind. 1 766
Mills v. Commonwealth, 93 Va. 815 827
Missouri, K. & T. R. Co. v. Board of Commissioners, 9 Kan. App. 545 423
Missouri, K. & T. R. Co. v. Edling, 18 Tex. 171 753
Mitchell v. Clay County, 69 Neb. 779 445
Mitchell v. DeWitt, 25 Tex. Supp. 180 338
Modern Woodmen Accident Ass'n v. Shryock, 54 Neb. 250 868
Modern Woodmen of America v. Kozak, 63 Neb. 146 ..... 860, 870
Moline v. State, 67 Neb. 164 362
Morearty v. State, 46 Neb. 652 371
Moreland v. Boston & P. R. Co., 141 Mass. 31 781
Morrison v. Dailey, 6 S. W. (Tex.) 426 592
Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406 216
Morse v. City of Omaha, 67 Neb. 426 ..... 557, 563
Mound City Land & Stock Co. v. Miller, 170 Mo. 240 107
Mower v. Leicester, 9 Mass. 247 810
Mullen v. Morris, 43 Neb. 596 104
Murphy v. State, 43 Neb. 34 231
Murray v. Ballou, 1 Johns. Ch. (N. Y.) 565 92
Murray v. Burd, 65 Neb. 427 312
Myers v. State, 51 Neb. 517 354

National Bank of Commerce v. Chamberlain, 72 Neb. 469 570
Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co., 53 Neb. 246 .. 434
Nebraska Nat Bank v. Johnson, 51 Neb. 546 323
Nebraska Wesleyan University v. Craig's Estate, 54 Neb. 173 .. 456, 463
Nelson v. Brodhack, 44 Mo. 596 669
Nelson v. Haywood County, 87 Tenn. 781 436
Nelson v. Shelby Mfg. & I. Co., 96 Ala. 515 591
Nessler v. Neher, 18 Neb. 649 34
Newell v. Dart, 28 Minn. 248 38
New Haven Clock Co. v. Kochersperger, 175 Ill. 383 395
New Mercer Ditch Co. v. Armstrong, 21 Colo. 237 153
New Orleans v. Citizens Bank, 167 U. S. 371 494
Niccolls v. Esterly, 16 Kan. 32 621
Norberg v. Plummer, 58 Neb. 410 266
Norfolk & W. R. Co. v. Galliher, 89 Va. 639 781
Norris v. Corkhill, 32 Kan. 409 20

PAGE
Norval v. Zinsmaster, 57 Neb. 158 303
Nye & Schneider Co. v. Fahrenholz, 49 Neb. 276 553

O'Connor v. State, 46 Neb. 165 347
O'Donnell v. Chicago, R. I. & P. R. Co., 65 Neb. 612 901
Oglesby v. Thompson, 59 Ohio St. 60 619
Omaha v. Kramer, 25 Neb. 489 165
Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61 681
Omaha Coal, Coke & Lime Co. v. Suess, 54 Neb. 379 36
Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473 ..... 668, 679
Omaha Fire Ins. Co. v. Johansen, 59 Neb. 349 558
Omaha, N. & B. H. R. Co. v. O'Donnell, 24 Neb. 753 233
Omaha & R. V. R. Co. v. Crow, 54 Neb. 747 905
Omaha & R. V. R. Co. v. Wright, 49 Neb. 456 ..... 776, 900
Omaha Savings Bank v. City of Omaha, 4 Neb. (Unof.) 563 554
Omaha Street R. Co. v. Duvall, 40 Neb. 29 ..... 127, 769
Omaha Street R. Co. v. Larson, 70 Neb. 591 453
Omaha Street R. Co. v. Loehneisen, 40 Neb. 37 131
O'Neill v. State, 85 Ga. 383 827
Orr v. City of Omaha, 2 Neb. (Unof.) 52 553
Orr v. State Board of Equalization, 3 Idaho, 190 401
Ossenkop v. Akeson, 15 Neb. 622 278
Owen v. Thomas, 3 Myl. & K. (Eng.) 353 894

Palin v. State, 38 Neb. 862 516
†Parker v. Courtnay, 28 Neb. 605 89
Parker v. State, 55 Miss. 414 295
Parmele v. Schroeder, 61 Neb. 553 61
Parrish v. McNeal, 36 Neb. 727 623
Paulson v. State, 25 Neb. 344 65
Pavey v. Pavey, 30 Ohio St. 600 669
Peck v. Herrington, 109 Ill. 611 219
Pekin Plow Co. v. Wilson, 66 Neb. 115 322
Pence v. Uhl, 11 Neb. 320 512
Pennsylvania R. Co. v. Marion, 104 Ind. 239 781
People v. Chicago & A. R. Co., 194 Ill. 51 531
People v. Colorado C. R. Co, 42 Fed. 638 8
People v. Edwards, 73 Pac. (Cal.) 416 821
People v. Garbutt, 17 Mich. 9 242
People v. Hecker, 109 Cal. 451 298
People v. Jenness, 5 Mich. 305 243
People v. Kehoe, 123 Cal. 224 827
People v. Lothrop, 3 Colo. 428 390
People v. Nelson, 153 N. Y. 90 828
People v. Simonson, 10 Mich. 335 840
People v. State Board of Equalization, 205 Ill. 296 420
Perry v. Gross, 25 Neb. 826 365

PAGE

Perry v. Holden, 22 Pick. (Mass.) 269 893
Peterborough Savings Bank v. Pierce, 54 Neb. 712 224
Peterson v. Chicago, M. & St. P. R. Co., 38 Minn. 511 753
Philadelphia, B. & W. R. Co. v. Layer, 112 Pa. St. 414 119
Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) *468 780
Phillips v. Southern R. Co., 124 N. Car. 123 787
Phenix Ins. Co. v. Fuller, 53 Neb. 811 124
†Phœnix Ins. Co. v. City of Omaha, 23 Neb. 312 .....518, 523
Phœnix Ins. Co. v. McEvony, 52 Neb. 566 735
Phœnix Ins. Co. v. Welch, 29 Kan. 672 526
Pill v. State, 43 Neb. 23 429
Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421 488
Platte Valley Irrigation Co. v. Central Trust Co., 32 Colo. 102 153
Plumley v. Birge, 124 Mass. 57 119
Poe v. Howell, 67 Pac. (N. M.) 62 397
Poessnecker v. Entenmann, 64 Neb. 409 758
Polin v. State, 14 Neb. 540 514
Pollard v. Turner, 22 Neb. 366 267
Pollock v. Brainard, 26 Fed. 732 894
Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267 486
Port Huron & G. R. Co. v. Judge, 31 Mich. 456 840
Pott v. Nathans, 1 Watts & Serg. (Pa.) 155 338
Potvin v. Meyers, 27 Neb. 749 338
Powell v. State, 20 So. (Miss.) 4 827
Priel v. Adams, 3 Neb. (Unof.) 305 722
Prigg v. Pennsylvania, 16 Pet. (U. S.) *539 707
Prince v. State, 35 Ala. 367 348
Pursley v. Ramsey, 31 Ga. 403 16
Putnam v. Curtis, 7 Colo. App. 437 155

Queen v. Bertrand, 1 L. R. P. C. 520 66
Quirk v. Seigel-Cooper Co., 56 N. Y. Supp. 49 753

Railroad Co. v. Newbrander, 40 Ohio St. 15 801
Rath v. Zembleman, 49 Neb. 351 215
Rathbone v. Board of Commissioners of Kiowa County, 27 C. C. A. 477 437
Rema v. State, 52 Neb. 375 516
Richards v. State, 22 Neb. 145 254
Richards v. State, 65 Neb. 808 .....640, 824
Richardson v. Hall, 124 Mass. 228 460
Richardson v. McNulty, 24 Cal. 339 155
Richardson v. Opelt, 60 Neb. 180 13
Richardson v. Thompson, 59 Neb. 299 441
Riddle v. Proprietors of Locks and Canals on Merrimack River, 7 Mass. 169 813
Roberts v. Briscoe, 44 Ohio St. 596 622

PAGE

Roberts v. People, 11 Colo. 213 504
Roberts v. Reilly, 116 U. S. 80 710
Robertson v. City of Omaha, 55 Neb. 718 586
Robinson v. Cheney, 17 Neb. 673 607
Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537 126
Rosenbloom v. State, 64 Neb. 342 525
Rosenfield v. Chada, 12 Neb. 25 36
Runnells v. State, 34 Tex. Cr. App. 431 348
Runner v. Dwiggins, 147 Ind. 238 88
Russell v. Hannibal & St. J. R. Co., 26 Mo. App. 368 800
Russell v. Men of the County of Devon, 2 T. R. (Eng.) 667....810, 814

St. Louis v. State, 8 Neb. 405 235
St. Louis, I. M. & S. R. Co. v. Worthen, 52 Ark. 529 424
St. Louis, V. & T. H. R. Co. v. Surrell, 88 Ill. 535 390
Saline County v. Gage County, 66 Neb. 839 280
Salling v. Johnson, 25 Mich. 489 840
Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446 894
Sampson v. Ohleyer, 22 Cal. 200 91
Sang v. Beers, 20 Neb. 365 76
Scarborough v. Myrick, 47 Neb. 794 ..... 440, 560
Schaller v. City of Omaha, 23 Neb. 325 165
Schmelling v. State, 57 Neb. 562 819
Schmid v. Schmid, 37 Neb. 629 440
School District v. First Nat. Bank, 19 Neb. 89 437
Schroeder v. Chicago, R. I. & P. R. Co., 47 Ia. 375 741
Schultz v. Insurance Co., 40 Ohio St. 217 ..... 868, 870
Schuyler Nat. Bank v. Gadsden, 191 U. S. 451 2
Scott v. McGuire, 15 Neb. 303 843
Scott v. Twiss, 4 Neb. 133 272
Scottish Union and National Ins. Co. v. Herriott, 109 Ia. 606 527
Search v. Miller, 9 Neb. 26 309
Searing v. Berry, 58 Ia. 20 338
Semple v. Flynn, 10 Atl. (N. J.) 177 579
Sharp v. Lumley, 34 Cal. 611 91
Sheehan v. Flynn, 59 Minn. 436 220
Shiverick v. Gunning, 58 Neb. 29 874
Shoemaker v. Harvey, 43 Neb. 75 36
Sieber v. Frink, 7 Colo. 148 155
Sieber v. Weiden, 17 Neb. 582 512
Simerall v. O'Bannons, 7 B. Mon. (Ky.) 608 609
Simpson v. Hart, 14 Johns. (N. Y.) 63 87
Skinner v. Reynick, 10 Neb. 323 553
Skow v. Locke, 3 Neb. (Unof.) 176 79
Slater, Myers & Co. v. Arnett, 81 Va. 432 610
Slater v. Skirving, 51 Neb. 108 263
Slobodisky v. Phenix Ins. Co., 53 Neb. 816 124

PAGE
Smith v. City of Omaha, 49 Neb. 883 110
Smith v. Commonwealth, 109 Ky. 685 821
Smith v. Gardner, 36 Neb. 741 77
Smith v. Meyers, 52 Neb. 70 78
Smith v. Sahler, 1 Neb. 310 61
Smith v. State, 5 Neb. 181 354
Smith v. State, 21 Neb. 552 347
Smith v. State, 35 Tex. Cr. App. 9 429
Snyder v. Gross, 69 Neb. 340 735
Southern R. Co. v. Reeves, 116 Ga. 743 781
Sovereign Camp of the Woodmen of the World v. Hruby, 70 Neb. 5 ..... 860, 869, 874
Spalding v. Hill, 86 Ky. 656 395
Stanberry v. Cattell, 55 Ia. 617 610
State v. Adams, 20 Kan. 311 293
State v. Aitkin, 62 Neb. 428 406
State v. Anderson, 90 Wis. 550 425
State v. Armstrong, 19 Utah, 117 395
State v. Borchert, 68 Kan. 360 821
State v. Bowers, 14 Ind. 195 ..... 364, 375
State v. Boyle, 28 Ia. 522 290
State v. Brinkhaus, 34 Minn. 285 827
State v. Broatch, 68 Neb. 687 ..... 489, 491
State v. Butler, 47 Minn. 483 367
State v. Carman, 63 Ia. 130 764
State v. Chicago, B. & Q. R. Co., 71 Neb. 593 547
State v. Chicago, R. I. & P. R. Co., 61 Neb. 545 13
State v. Colfax County, 51 Neb. 28 72
State v. Cornell, 53 Neb. 556 68
State v. Cornell, 54 Neb. 72 68
State v. Crimmins, 31 Kan. 376 504
State v. Cronin, 72 Neb. 636 642
State v. Dickinson, 59 Neb. 753 13
State v. District Court, 90 Minn. 457 599
State v. Elder, 31 Neb. 165 52
State v. Fetterly, 33 Wash. 599 ..... 821, 823
State v. Fleming, 70 Neb. 523 ..... 408, 521
State v. Folwell, 14 Kan. 105 293
State v. Frank, 60 Neb. 327 ..... 431, 435
State v. Gaslin, 32 Neb. 291 254
State v. Gibbs, 13 Fla. 55 842
State v. Graham, 17 Neb. 43 700
State v. Higby, 60 Neb. 765 61
State v. Hill, 47 Neb. 456 835
State v. Hodges, 45 Kan. 389 504
State v. Hughes, 38 Neb. 366 347
State v. Insurance Co. of North America, 115 Ind. 257 527

PAGE
State v. Irey, 42 Neb. 186 531
State v. Karr, 64 Neb. 514 410
State v. Keith, 47 Minn. 559 507
State v. King, 114 Ia. 413 504
State v. King, 117 Ia. 484 820
State v. Lincoln Gas Co., 38 Neb. 33 8
State v. Lockwood, 43 Wis. 403 764
State v. Lydick, 11 Neb. 366 578
State v. Merrell, 38 Neb. 510 8
State v. Osborn, 60 Neb. 415 401
State v. Porter, 69 Neb. 203 735
State v. Poynter, 59 Neb. 417 410
State v. Prizer, 49 Ia. 531 828
State v. Robertson, 121 N. Car. 551 821
State v. Satchwell, 68 Mo. 39 732
State v. Savage, 64 Neb. 684 491
State v. Savage, 65 Neb. 714 ..... 393, 411, 483
State v. School District, 30 Neb. 520 574
State v. School District, 38 Neb. 237 8
State v. Schweiter, 27 Kan. 499 504
State v. State Board of Equalization, 18 Mont. 473 397
State v. Stewart, 52 Neb. 243 641
State v. Stuht, 52 Neb. 209 641
State v. Thomas, 16 Utah, 86 401
State v. Tweedy, 11 Ia. 350 290
State v. Weber, 48 Mo. App. 500 732
State v. Wheeler, 33 Neb. 563 ..... 519, 531, 532
State Bank v. Belk, 68 Neb. 517 36
State Bank of Ceresco v. Belk, 56 Neb. 710 15
State Board of Tax Commissioners v. Holliday, 150 Ind. 216 531
State Railroad Tax Cases, 92 U. S. 575 488
Sterl v. Sterl, 2 Ill. App. 223 465
Stettnische v. Lamb, 18 Neb. 619 200
Stokes v. Suffolk & C. R. Co., 107 N. Car. 178 781
Stow v. Tifft, 15 Johns. (N. Y.) *463 893
Stuart v. Palmer, 74 N. Y. 183 ..... 110, 693
Sutherland v. Harrison, 86 Ill. 363 460
Suydam v. Merrick County, 19 Neb. 155 398
Swaney v. Gage County, 64 Neb. 627 ..... 384, 815
Sykes v. State, 112 Tenn. 572 821
Sylvester v. Carpenter Paper Co., 55 Neb. 621 15

Taft v. Schwamb, 80 Ill. 289 16
Tallman v. Franklin, 14 N. Y. 584 894
Tawas & B. C. R. Co. v. Judge, 44 Mich. 479 840
Taylor v. Ainsworth, 49 Neb. 696 622
Taylor v. Lake S. & M. S. R. Co., 45 Mich. 74 770

PAGE

Templeton v. Tekamah, 32 Neb. 542 528
Thayer v. Luce, 22 Ohio St. 62 893
Thayer v. Thayer, 101 Mass. 111 820
Thomas v. Gain, 35 Mich. 155 ..... 110, 693
Thompson v. Washington Territory, 1 Wash. Ter. 547 70
Thurber v. Harlan B., M. & F. R. Co., 60 N. Y. 326 120
Tindall v. Peterson, 71 Neb. 166 ..... 648, 756
Tingley v. Dolby, 13 Neb. 371 76
Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. (U. S.) 139 494
Toledo, St. L. & K. C. R. Co. v. Cupp, 9 Ind. App. 244 801
Toledo, St. L. & K. C. R. Co. v. Franklin, 159 Ill. 99 801
Tomer v. Densmore, 8 Neb. 384 512
Town of Waltham v. Kamper, 55 Ill. 346 813
Townsend v. Whitney, 75 N. Y. 425 336
Travelers Ins. Co. v. McConkey, 127 U. S. 661 ..... 868, 870
Travelers Ins. Co. v. Nitterhouse, 11 Ind. App. 155 868
Turner v. City of Newburgh, 109 N. Y. 301 754
Turner v. State, 1 Ohio St. 421 367
Tyler's Executors v. Winslow, 15 Ohio St. 364 572

Union P. R. Co. v. Board of Commissioners of Davis County, 6 Kan. 256 437
Union P. R. Co. v. Evans, 52 Neb. 50 330
Union P. R. Co. v. Fickensher, 72 Neb. 187 733
Union P. R. Co. v. Knowlton, 43 Neb. 751 795
United States v. Preston, 4 Wash. (U. S. C. C.) 446 337
United States Fidelity & Guaranty Co. v. Ridgeley, 70 Neb. 622 104
United States Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. 480 .. 486

Van Horn v. State, 46 Neb. 62 811
Van Horn v. Van Horn, 49 N. J. Eq. 327 16
Village of Kent v. Dana, 40 C. C. A. 281 438

Waggoner v. First Nat. Bank, 43 Neb. 84 15
Wagner v. State, 43 Neb. 1 347
Wakeley v. City of Omaha, 58 Neb. 247 285
Walrath v. State, 8 Neb. 80 371
Walton v. Develing, 61 Ill. 201 842
Walton Plow Co. v. Campbell, 35 Neb. 173 381
Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119 381
Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227 781
Watkins v. Grieser, 11 Okla. 302 578
Way v. State, 5 Neb. 283 820
Webster v. Fitchburg R. Co., 161 Mass. 298 785
Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194 401
Welsh v. State, 60 Neb. 101 819
West v. State, 59 Ind. 113 295
Western Mfg. Co. v. Rogers, 54 Neb. 456 15

PAGE

Western Mattress Co. v. Ostergaard, 71 Neb. 575 311
Western & A. R. Co. v. Young, 81 Ga. 397 119
Westervelt v. Hagge, 61 Neb. 647 ..... 36, 224
Weston v. New York Elevated R. Co., 73 N. Y. 595 781
Whalen v. Kitchen, 61 Neb. 329 57
Wheelwright v. Wheelwright, 2 Mass. *447 359
White v. City of Lincoln, 5 Neb. 505 374
Whitman v. State, 17 Neb. 224 345
Whitney v. Gretna State Bank, 50 Neb. 438 15
Wier v. Batdorf, 24 Neb. 83 893
Wilcox v. Young, 66 Mich. 687 80
Williams v. Miles, 68 Neb. 479 37
Williams v. Oregon Short-Line R. Co., 18 Utah, 210 753
Williams v. State, 6 Neb. 334 371
Williams v. State, 12 Ohio St. 622 764
Williamson v. Test, 24 Ia. 138 303
Willis v. State, 43 Neb. 102 726
Wilson v. Burney, 8 Neb. 39 338
Wittenberg v. Mollyneaux, 59 Neb. 203 898
Woodmen Accident Ass'n v. Pratt, 62 Neb. 673 670
Woodrough v. Douglas County, 71 Neb. 354 698
Woods v. Colfax County, 10 Neb. 552 814
Woolworth v. Parker, 57 Neb. 417 36
Worth v. Wilmington & W. R. Co., 89 N. Car. 291 527
Wright v. Geer, 6 Vt. 151 778

Yeoman v. State, 21 Neb. 171 512
Yocum v. Smith, 63 Ill. 321 881

Zimmerman v. County of Kearney, 33 Neb. 620 180
Zimmerman v. Kearney County Bank, 57 Neb. 800 354

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

Figures in parentheses indicate corresponding sections in Cobbey's Annotated Statutes.

NEBRASKA.

CONSTITUTION.

	PAGE
Art. I, sec. 3	763
Art. I, secs. 6, 11	764
Art. I, sec. 13	52
Art. I, sec. 16	158
Art. I, sec. 21	165, 180
Art. I, sec. 24	462
Art. II, sec. 11	361
Art. III	497
Art. III, sec. 11	365, 372, 639, 692, 853
Art. III, sec. 15	157
Art. III, sec. 22	537
Art. VI, sec. 1	497
Art. VI, sec. 2	112
Art. IX, sec. 1	411, 483, 520, 529
Art. IX, secs. 1, 6, 7	518, 530
Art. IX, sec. 4	689, 701
Art. IX, sec. 6	410, 586, 814
Art. IX, sec. 7	519
Art. XI*b*, sec. 7	81

SESSION LAWS.

1863.	
P. 802, ch. 464	593
1869.	
P. 92	434
1875.	
P. 2	365
1877.	
P. 168	146
1881.	
Ch. 68, sec. 2	857

1889. PAGE
Ch. 15, subdiv. 63, sec. 68 382
Ch. 68 146

1895.
Ch. 22 850
Ch. 69 138

1899.
Ch. 8 431
Ch. 104 361

1901.
Ch. 2 537
Ch. 17, sec. 172 884
Ch. 82 374

1903.
Ch. 29 497
Ch. 73, secs. 194, 199 702
Chs. 73, 74, 75, 76 702
Ch. 76 689
Ch. 116 105

GENERAL STATUTES.
1873.
Ch. 58, sec. 214 365

COMPILED STATUTES.
1887.
Ch. 77 524

1895.
Ch. 10, sec. 9 852
Ch. 16, sec. 4 853
Ch. 93*a*, art. II, sec. 16 136
Ch. 93*a*, art. II, sec. 28 157

1897.
Ch. 12*a*, sec. 110 ..... 556, 561
Ch. 78, sec. 88 375

1899.
Ch. 77, art. I, sec. 39 415
Ch. 89, art. I 71

1901.
Ch. 4, art. I, sec. 24 537
Ch. 18, art. I, secs. 43, 44 446
Ch. 28, sec. 42 441
Ch. 77, art. I, secs. 39, 40 ..... 402, 483, 489
Ch. 77, art. I, sec. 52 484
Ch. 83, art. XIII, sec. 3*a* 636

1903.

PAGE
Ch. 9 (10727-10783) 431
Ch. 9, sec. 39 (10781) 434
Ch. 12*a* (7450-7688) 585
Ch. 12*a*, sec. 33 (7482) 595
Ch. 12*a*, secs. 93, 94, 101 (7542, 7543, 7550) 598
Ch. 12*a*, sec. 98 (7547) 405
Ch. 14, art. I, sec. 101 (8776) 744
Ch. 16, secs. 216-227 (6649-6660) 499
Ch. 18, art. I, secs. 2, 146 (4420, 4495) 273
Ch. 18, art. III, secs. 18, 20 (10870, 10872) 636
Ch. 23, sec. 31 (4931) 845
Ch. 23, sec. 37 (4937) 652
Ch. 25, secs. 8, 11 (5330, 5334) 464
Ch. 28, sec. 34 (9060) 735
Ch. 32, sec. 5 (5954) 607
Ch. 36, sec. 17 (6216) 757
Ch. 50, sec. 1 (7150) 576
Ch. 50, sec. 11 (7161) 742
Ch. 63 (10259-10269) 320
Ch. 72, art. I, sec. 1 (10020) 794
Ch. 72, art. I, sec. 3 (10039) 773, 778
Ch. 72, art. V, sec. 2 (10008) 857
Ch. 77, art. I, sec. 12 (10411) 529
Ch. 77, art. I, sec. 58 (10457) 519
Ch. 77, art. I, secs. 58-61 (10457-10460) 520
Ch. 77, art. I, secs. 85-87 (10484-10486) 415
Ch. 77, art. I, sec. 121 (10520) 391
Ch. 77, art. I, sec. 130 (10529) 385
Ch. 77, art. I, sec. 132 (10531) 392
Ch. 77, art. I, sec. 193 (10592) 689
Ch. 78, secs. 87-89 (6085-6087) 280
Ch. 78, secs. 114-118 (6132-6136) 814
Ch. 83, art. III, secs. 6, 9 (9094, 9097) 537
Ch. 89, art. I, secs. 1-28 (5500-5527) 176
Ch. 89, art. IV, secs. 1-19 (5561-5579) 105
Ch. 89, art. IV, sec. 12 (5572) 108
Ch. 89, art. IV, sec. 14 (5574) 109
Ch. 93*a*, art. II, secs. 1-27 (6755-6781) 147
Ch. 93*a*, art. II, secs. 1-64 (6755-6818) 145
Ch. 93*a*, art. II, secs. 16, 21, 22, 27 (6770, 6775, 6776, 6781) 147
Ch. 93*a*, art. II, secs. 20, 42, 43 (6774, 6796, 6797) 158
Ch. 93*a*, art. II, sec. 21 (6775) 140
Ch. 93*a*, art. II, sec. 28 (6782) 139
Ch. 93*a*, art. II, secs. 28-31, 32-64 (6782-6785, 6786-6818) 148

CODE. PAGE

Secs. 10, 16 571
Sec. 45 534
Sec. 296 764
Sec. 318 ..... 52, 63, 67
Sec. 329 619
Sec. 346 267
Sec. 403 319
Sec. 511 ..... 332, 334
Sec. 582 462
Sec. 592 ..... 372, 374
Secs. 602, 675 57
Sec. 677, subdiv. 1 340
Sec. 907 305

CRIMINAL CODE.

Sec. 4 294
Sec. 14 346
Sec. 125 361
Sec. 212*a* 727
Sec. 214 365
Sec. 324 428
Sec. 333 708
Sec. 358 766
Sec. 364 703
Sec. 388 430
Sec. 466 764
Secs. 490-492 63

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1904.

JAMES GADSDEN, APPELLEE, V. GEORGE THRUSH ET AL., APPELLEES, IMPLEADED WITH SCHUYLER NATIONAL BANK ET AL., APPELLANTS.

FILED MAY 18, 1904. No. 12,533.

1. **Appeal:** REVERSAL. It is the duty of an appellate court, upon reversing a judgment of an inferior court, to determine whether the circumstances and condition of the case require that the litigation shall be ended, or the case shall be remanded for another trial, with directions as to the further proceedings to be taken, or shall be remanded for the exercise of the discretion of the lower court.

2. **Federal Courts:** REVERSAL: AMENDMENTS. Under the practice in the federal courts, the rule seems to be that, when the merits of the case have been once decided by the supreme court upon appeal, the circuit court has no authority, without express leave of the supreme court, to permit new defenses on the merits to be introduced by amendment to the answer.

3. **State Courts:** REVERSAL. The rule of this court is that, when a case is reversed and remanded generally, the district court is to exercise its discretion in the further proceedings in the cause, unless otherwise specially directed by this court.

4. **Supreme Court of the United States:** REVERSAL: AMENDMENTS. When the merits of a case have been decided by this court pursuant to the mandate of the supreme court of the United States, amendments of the answer, by introducing new defenses independent of the issues upon which the case has been determined, will not ordinarily be permitted. It is not necessary in this case to determine whether this court has jurisdiction to permit such amendments.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

A. M. Post, F. Dolezal and *George H. Thomas, contra.*

SEDGWICK, J.

The question before us arises upon the motion of the plaintiff, the Schuyler National Bank, for an order directing the district court to vacate its last decree entered herein, and to reinstate and enforce its first decree. The first decree of that court was, upon appeal to this court, reversed, and the cause remanded to the district court. *Gadsden v. Thrush,* 56 Neb. 565. Thereupon, a decree was entered in the district court in conformity with the judgment of this court, which, upon a second appeal to this court, was affirmed. *Gadsden v. Thrush,* 63 Neb. 881. From the judgment of this court affirming the decree of the district court, the cause was taken upon error to the supreme court of the United States, and the judgment of this court was there reversed. The decision of that court was expressed in the following language: "The judgment of the supreme court of Nebraska is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." *Schuyler Nat. Bank v. Gadsden,* 191 U. S. 451. Upon the filing in this court of the mandate of the supreme court of the United States, the plaintiff in error in that court, who is the plaintiff here, filed this motion, and the defendant in error objected to the motion, and suggested to this court that she desired to obtain leave in the lower court to amend her answer, by adding allegations of payments made upon the note and mortgage in question before the commencement of the suit.

It seems that upon appeals in equity taken from the federal courts to the supreme court of the United States,

where the issues were fully made up in the lower court and the cause tried in the lower court upon its merits, the rule of the supreme court of the United States is:

"When the merits of a case have been once decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." *In re Potts,* 166 U. S. 263, 17 Sup. Ct. Rep. 520. In that case, the lower court granted a rehearing on the ground of newly discovered evidence on the question of novelty in a suit for the infringement of a patent, and in such cases it seems that the rule of practice in that court is that, when the case has been determined in the lower court upon its merits, and upon appeal to the supreme court has been remanded, no amendment will be allowed setting up new defenses on the merits, "unless the right is reserved in the decree of the appellate court, or permission be given on application to that court directly for the purpose"; and in the case last cited, the court, quoting from a former decision said:

"This appears to be the practice of the court of chancery and house of lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits."

It is the duty of an appellate court to determine whether the circumstances of the case require that the litigation shall be ended, or the case shall be remanded for another trial upon the same issues, or for the exercise of the discretion of the lower court in the further proceedings. The practice in this court has been, and is, to enter a judgment in this court if the condition of the case requires it, or to remand with directions to enter judgment disposing of the case. If the reversal is general, and the cause remanded for further proceedings, without specific instructions, it is the duty of the lower court to exercise its discretion in the matter of allowing amendments, as well as

other matters in the further disposition of the case. The language used in remanding this case to this court would, if used in remanding a cause that had been appealed from the federal circuit court, no doubt, under the authority above cited, preclude that court from allowing amendments to the pleadings, unless, upon application to the supreme court, leave to reform the issues had first been obtained from that court. It is suggested that it is the writ of error or appeal, which gives that court jurisdiction in cases removed from the federal courts. And that, when a cause has been removed by writ of error from a state supreme court to the supreme court of the United States, it is the federal question involved that gives that court jurisdiction. It must appear by the record that some one of the questions stated in the statute arose in the state court, and that it was determined therein, otherwise the federal court is wholly without jurisdiction. Upon reversal, "the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so received." For these reasons it is thought that, when, as in this case, the cause is remanded to this court generally, the practice of this court ought to govern the further proceedings.

However this may be, we have looked into the record for the purpose of determining the merits of the motion before us. We think that the motion is well taken. The action has now been in the courts for about ten years. The plaintiff's case was an ordinary one for the foreclosure of a real estate mortgage. The defense was usury, and the right was insisted upon to offset payments made as usurious interest upon the principal of the loan for which the mortgage was given.

The defendant now proposes to amend her answer by alleging that, in 1893, she conveyed to plaintiff the premises involved in this litigation, and that the plaintiff then disposed of the property, and did not account to her for all of the proceeds. As a reason for not availing herself of

this defense sooner, she shows by affidavit that her husband attended to the business for her and did not inform her, until recently, of the circumstances which entitled her to further credit.

Other matters of a similar nature are urged to explain her action in allowing the claim to be litigated during all this time without tendering this issue.

We do not think that, after trying the merits of one defense to the extreme of unusually protracted litigation, and having failed therein in a court of last resort, she is in a position to insist that the cause be remanded, with instructions to frame new issues which would be wholly independent of the issues upon which the cause has been finally determined.

The last judgment of this court and the judgment of the district court are reversed and the cause remanded, with instructions to disallow the defense of usury, and proceed to a determination thereof upon the issues as now presented, in accordance with the opinion of the supreme court of the United States.

REVERSED.

STATE OF NEBRASKA, EX REL. IGNATIUS J. DUNN, RELATOR, V. FRANK E. MOORES, MAYOR, ET AL., RESPONDENTS.

FILED MAY 18, 1904. No. 13,552.

1. Mandamus: DISCRETION. It is in the discretion of this court to issue or refuse a writ of mandamus, even when a *prima facie* right thereto is shown.
2. ———: PEREMPTORY WRIT. A peremptory writ of mandamus will not be issued, except with a view to enforce its mandates if necessary.
3. ———: CONCURRENT JURISDICTION. The district court has concurrent jurisdiction, and, considering the nature of the supposed duties sought to be enforced, application should be made to that court. It is not the duty of this court to undertake to compel the performance of the things contemplated by the allegations of the alternative writ.

ORIGINAL application for a writ of mandamus to compel the mayor, chief of police and board of fire and police commissioners of the city of Omaha to enforce the provisions of the liquor law. *Dismissed.*

Ignatius J. Dunn, for relator.

C. C. Wright, Charles Ogden and *W. J. Connell, contra.*

SEDGWICK, J.

This is an original application to this court for a writ of mandamus against the mayor, the board of fire and police commissioners and its members, and the chief of police of the city of Omaha. Separate general demurrers are filed by the board and its members, by the mayor, and by the chief of police. The nature of the action is disclosed by the command of the alternative writ which is as follows:

"Now, therefore, we being willing that full and speedy justice be done in the premises do command you, the said John J. Donahue, chief of police of the city of Omaha, that you do forthwith arrest, or cause to be arrested, by the members of the police force of said city of Omaha, all persons engaged in, or found violating, the laws of the state of Nebraska or the ordinances of the city of Omaha, as herein referred to, by selling or giving away malt, spirituous or vinous liquors on the first day of the week, commonly called Sunday, or in keeping their places of business, commonly called saloons, where intoxicating liquors are kept for sale, open between the hours of 12 o'clock P. M. and 4 o'clock A. M., and that you take immediately such action as may be necessary and proper in the management, control and direction of said police force of the city of Omaha, to detect, or cause to be detected, any and all persons so engaged in the violation of, or so found violating, the laws of the state of Nebraska, or ordinances of the city of Omaha, within the limits of said

city of Omaha, as above specified; and that you Frank E. Moores, as mayor of the city of Omaha, forthwith instruct and require the chief of police of the city of Omaha, and through him the police officers of said city, to arrest, or cause to be arrested, any and all persons engaged in or found violating the laws of the state of Nebraska or the ordinances of the city of Omaha, within said city of Omaha, by selling or giving away on the first day of the week, commonly called Sunday, any malt, spirituous or vinous liquors, or in keeping open a saloon where intoxicating liquors are kept for sale, between the hours of 12 o'clock P. M. and 4 o'clock A. M.; and that you, the said Frank E. Moores, ex officio chairman of the board of fire and police commissioners of the city of Omaha, William D. McHugh, William J. Broatch, Lee W. Spratlen and Joseph Thomas, members of the board of fire and police commissioners of the city of Omaha, constituting the said board of fire and police commissioners of said city of Omaha, are directed to instruct and require the chief of police of the city of Omaha, and through him the members of the police force of the city of Omaha, to arrest and take into custody, or cause to be arrested and taken into custody, all persons engaged in, or who engage in or are found, violating the laws of the state of Nebraska or the ordinances of the city of Omaha, by selling or giving away on the first day of the week, commonly called Sunday, any malt, spirituous or vinous liquors, or who keeps any saloon open between the hours of 12 o'clock P. M. and 4 o'clock A. M., where malt, spirituous and vinous liquors are kept for sale; and that you require the chief of police, and through him the members of the police force of said city of Omaha, to be vigilant in the performance of their several duties with reference to the enforcement of the laws regarding the violations thereof herein stated, and to taks all steps necessary to detect any persons so engaged in the violation of said laws of the state of Nebraska and the ordinances of the said city of Omaha within said city, with reference to the selling and giving away of intoxicating

liquors on Sunday, and the keeping of such saloons open between the hours of 12 o'clock P. M. and 4 o'clock A. M., or that you, and each of you, appear before the supreme court for the state of Nebraska, on the 5th day of January, 1904, at the hour of 9 o'clock A. M., to show cause why you refuse so to do."

Two of the commissioners before whom the case was argued joined in a recommendation that this court proceed no further in this action. In their memorandum, which was prepared by Mr. Commissioner FAWCETT, Mr. Commissioner DUFFIE concurring, it was said:

"I do not wish to be understood as holding that this court has not original jurisdiction to hear and determine this case, for it is clear that it has such jurisdiction; but it is equally clear that the district court also has jurisdiction in this class of cases," and "if it should be adjudged that the writ issue in this case, and there should occur the numerous violations of its requirements which counsel predict, the district court could deal with such offenders with greater promptness and less expense than would be possible for this court."

It is not necessary to determine whether the facts alleged in the alternative writ are sufficient to enable the relator to maintain the action. A peremptory writ of mandamus will not be issued, except with the view to the enforcement of its mandates, if necessary, by the court from which it is issued. "It must be made to appear that the writ will be effectual as a remedy." *People v. Colorado C. R. Co.*, 42 Fed. 638. The reasons suggested by the commissioners are sufficient to show that it is not the duty of this court to undertake such a task. It is not necessary to support this conclusion by pointing out further reasons, which we think readily suggest themselves from the perusal of the alternative writ. This court has heretofore used its discretion in the matter of exercising its jurisdiction in mandamus cases. *State v. Lincoln Gas Co.*, 38 Neb. 33; *State v. School District*, 38 Neb. 237; *State v. Merrell*, 38 Neb. 510. The reason for refusing

to determine those cases upon their merits was, perhaps, sufficient, considering the burdened condition of the docket of this court then existing. The reasons for declining to undertake the enforcement of the mandates of the alternative writ in this case are more apparent and controlling.

We decline to proceed further in the matter, and the proceedings are therefore dismissed; but without prejudice to future proceedings.

DISMISSED.

FRANK A. AGNEW, RECEIVER, V. CARROLL S. MONTGOMERY ET AL.

FILED MAY 18, 1904. No. 12,892.

1. **Judgment: PARTIES.** One is not concluded by a judgment or decree in a suit to which he was not a party at the time when it was rendered.

2. **———: ESTOPPEL.** To constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded.

3. **Partnership.** An agreement between two persons, which provides that one of them shall furnish all of the property and funds necessary to carry on a business venture, and shall have the exclusive control and management thereof, and that the other shall give his time and services to the enterprise, for which he is to receive one-third of the net profits as full compensation therefor, does not create a partnership.

4. **Parol Evidence** cannot be received for the purpose of changing, modifying or explaining such a clear, plain and unambiguous written agreement.

5. **Review.** Record examined, and *held* that the evidence offered was properly received and rejected.

6. **Directing Verdict.** Where the plaintiff has the burden of proof and fails to establish all of the facts necessary to enable him to recover, it is proper for the court to direct the jury to return a verdict for the defendant.

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

Joel W. West, for plaintiff in error.

Hall & McCulloch, contra.

BARNES, J.

The plaintiff in error, Frank A. Agnew, as receiver, commenced this action in the district court for Douglas county, and in his petition alleged, in substance, the following facts: That defendants, Carroll S. Montgomery, Paul Charlton and Matthew A. Hall, were copartners, doing business as Montgomery, Charlton & Hall; that Phil Stimmel and Frank T. Emerson were copartners in a seed growing business, under the firm name and style of Phil Stimmel; that the copartnership aforesaid was the owner and in possession of certain goods, chattels, bills, notes, rights and credits, as follows: A certain lot of empty two bushel bags, of the value of $240.80; of a certain account due defendant from D. M. Ferry & Company, on account of goods, wares and merchandise sold and delivered, in the sum of $2,633.92; of a certain other account due from one Ernest Benary in the sum of $810.56, and a certain account due from D. H. Watson of Kearney, Nebraska, in the sum of $475.39; that the defendants obtained possession of said goods and chattels, and collected the accounts aforesaid, and converted the same unlawfully and wrongfully to their own use, to the damage of the partnership aforesaid in the sum of $4,160.87, which demand is still unsettled and unpaid. It was further alleged: That, in a suit pending in the district court for Douglas county wherein Frank T. Emerson for himself and all other creditors was plaintiff and Phil Stimmel was defendant, the plaintiff herein was appointed receiver of said partnership assets, and was authorized, directed and required to bring suits to recover all debts owing to

said partnership; that the plaintiff had filed his bond and duly qualified as such receiver; and the petition concluded with a prayer for judgment for the sum of $4,160.67, with interest and costs, against the defendants. To this petition the defendants filed their answer, which, in substance, denied every allegation contained therein, and concluded with the following averment: "These defendants aver that on the 6th day of January, 1894, under a judgment in their favor legally rendered by this court, they did cause execution to issue to the sheriff of Douglas county, Nebraska, against Phil Stimmel, and that under the same the property described in the plaintiff's petition was seized, subject to a prior execution, and thereafter sold; that the proceeds of said sale being insufficient to liquidate the amount of the prior judgment, no part of said proceeds were paid to these defendants; that all the acts and doings of these defendants, and the acts and doings of this court and its officers under said execution, were legal and regular." The answer concluded with a suitable prayer. Afterwards, the plaintiff filed an amended reply to said answer, setting forth matters which it was claimed constituted an estoppel against the defendants, and by which it was sought to prevent them from contesting the issues raised by said petition and answer. The substance of these matters will be mentioned and commented upon more fully and at length hereafter. On these issues the cause was tried, and, after the plaintiff had introduced his evidence, or so much thereof as the court would receive, on a motion of the defendants, the court directed the jury to return a verdict in their favor, which was accordingly done. From a judgment thereon the plaintiff prosecuted error.

It appears that on the 26th day of January, 1894, Frank T. Emerson commenced an action in the district court for Douglas county against Phil Stimmel, the Omaha National Bank and the defendants herein, by which he sought to obtain an accounting between himself and Stimmel, and enjoin the bank and the defendants from selling the prop-

erty in question on certain executions issued on judgments against Stimmel. The defendants herein answered in said suit, and on a hearing had, before the final judgment, the court dissolved and vacated the order of injunction theretofore allowed against them; and, thereupon, at their request they were dismissed from said action, and were no longer parties thereto. Afterwards, certain creditors of the parties intervened; plaintiff's petition was amended by leave of the court, at the time final judgment was rendered, so as to allege a partnership; Stimmel interposed no substantial defense, a referee was appointed who made his findings of facts, and reported them to the court, and a decree was entered declaring Emerson and Stimmel to be partners; the amounts due the several intervening creditors were determined, and the plaintiff was appointed receiver. He thereupon brought this action, and now claims that the defendants are bound by said decree, and are estopped to question the existence of a partnership between Emerson and Stimmel, or show that the property alleged to have been converted by them belonged to Stimmel individually, and was lawfully subjected to the payment of his debts.

We think the question of partnership, so far as the defendants are concerned, was an open one. On an examination of the record and decree, in the case above mentioned, it seems clear that the defendants are not bound by that judgment. The decree contains the following findings: "But in that behalf, the court further finds, that by reason of the order of the court, entered May 26, 1897, by which said defendants, the Omaha National Bank, and Montgomery, Charlton & Hall, had leave to withdraw and dismiss their petition of intervention filed May 14, 1897, and their answer and cross-petition of intervention, filed October 7, 1897, thereby the court lost jurisdiction over said defendants, the Omaha National Bank, and Montgomery, Charlton & Hall, and thereby lost jurisdiction to enter a default and a personal judgment against the said defendants, the Omaha National

Bank, and Montgomery, Charlton & Hall." So it appears that by the terms of the judgment itself, which is relied on as an estoppel, it was adjudged that defendants were not parties to the suit, and that the court had no jurisdiction over them.

It is a maxim of general jurisprudence that one is not concluded by a judgment or decree rendered in an action to which he was not a party. *State v. Chicago, R. I. & P. R. Co.*, 61 Neb. 545. The defendants were not parties to the suit at the time the decree was rendered and, of course, are not bound thereby. Going farther into the record, it also appears that the petition did not allege a partnership between Emerson and Stimmel until long after the defendants had ceased to be parties to the action; and that issue was not in the case until the petition was amended by leave of the court at the time the final judgment was rendered. It is well settled that, to constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded. *Malone v. Garver*, 3 Neb. (Unof.) 710; *Battle Creek Valley Bank v. Collins*, 3 Neb. (Unof.) 38; *Richardson v. Opelt*, 60 Neb. 180. It also appears by the records of this court, in the case of *State v. Dickinson*; 59 Neb. 753, that an application was made for a writ of mandamus to compel the trial court to enter a judgment in the action relied on as an estoppel, against the defendants herein. In denying the writ, SULLIVAN, J., speaking for the court, said:

"Emerson tendered no issue as to the conversion of partnership assets. He attempted to do so, but his effort in that direction was unsuccessful. The court denied his application for leave to file a supplemental petition, and thus excluded from the case the question which counsel now insists has been tried and resolved in relator's favor. * * * The facts stated in the finding above set out were not found on the trial of an issue between the relator and the execution creditors. There was no such issue to try in the equity cases. The court had previously

ordered that the question of conversion be tried and determined in other suits. That order had not been rescinded. * * * The court very clearly did not intend to make a finding that would have any binding force as to the bank and Montgomery, Charlton & Hall; and had judgment been rendered against them on that finding, it would, under the circumstances, be the obvious duty of this court, in a direct proceeding, to set it aside."

It is thus shown that, not only was the question of the existence of a partnership still at large as to these defendants, but they were also at liberty to litigate the question of the conversion of the alleged partnership assets, and could do so in this action.

The foregoing question having been put in issue by the pleadings in this case, and the burden of proof being on the plaintiff, it remains for us to determine whether the trial court erred in receiving and rejecting the evidence offered by him to establish these controverted facts, and in determining its effect. The plaintiff offered, and the trial court received in evidence, the entire record and decree pleaded and relied on as an estoppel, together with oral evidence identifying the written contract between Emerson and Stimmel, by which it was claimed a copartnership was created. When the instrument itself was offered, the court held that it was not sufficient to establish a partnership, and for that reason refused to allow it to be read to the jury. This ruling is assigned as error, and we are therefore required to determine the legal effect of that contract. Its provisions are, in substance, as follows: Phil Stimmel was to furnish all of the money necessary for expenses and purchases in the business of seed raising, without interest. Emerson was to devote his time and ability to the business, "under the direction and in the name of Phil Stimmel." Stimmel was to have the sole executive charge, direction and control of the whole of said business. Emerson was to get one-third of the net profits, as compensation in full for his services. Emerson was entitled to draw $150 a month for a specified part of

each year, to be charged against his proportionate share of the profits, and the agreement was to continue for two years. An agreement between two persons which provides that one of them shall furnish all of the property and funds necessary to carry on a business venture, and shall have the exclusive control and management thereof, and that the other shall give his time and services to the enterprise, for which he is to receive one-third of the net profits as full compensation, does not create a partnership. *Waggoner v. First Nat. Bank,* 43 Neb. 84, 94; *Whitney v. Gretna State Bank,* 50 Neb. 438; *Garrett v. Republican Publishing Co.,* 61 Neb. 541; *Aetna Ins. Co. v. Bank of Wilcox,* 48 Neb. 544, 551. It seems quite clear that the agreement offered did not create a partnership, and the court did not err in excluding it from the consideration of the jury.

It further appears that plaintiff thereupon offered parol evidence to show what was intended by the written agreement, and how the business was in fact conducted, in order to establish the existence of a partnership between the parties. This evidence was rejected, and the ruling is assigned as error. The terms of the written contract are clear and unambiguous, no explanation of the document was required and none was admissible. Such evidence was clearly open to the objection that it tended to modify, vary or contradict the terms of the written agreement, and was therefore inadmissible. *State Bank of Ceresco v. Belk,* 56 Neb. 710; *Western Mfg. Co. v. Rogers,* 54 Neb. 456; *Sylvester v. Carpenter Paper Co.,* 55 Neb. 621; *Jarvis v. Palmer,* 11 Paige Ch. (N. Y.) 650. This rule applies to written agreements by which it is sought to establish a partnership, as well as to other written contracts. In *Miller v. Butterfield,* 79 Cal. 62, 21 Pac. 543, the court said:

"This being the proper construction of the written contract, parol evidence was inadmissible for the purpose of enlarging, or extending, or otherwise varying it; and any subsequent contract with respect to the management or

disposal of the property to be acquired—whether in writing or by parol—was wholly immaterial."

This rule is further supported by *Taft v. Schwamb,* 80 Ill. 289; *Pursley v. Ramsey,* 31 Ga. 403; *Couch v. Woodruff,* 63 Ala. 466; *Van Horn v. Van Horn,* 49 N. J. Eq. 327, 23 Atl. 1079. It is clear, therefore, that the trial court did not err in excluding this kind of evidence.

The plaintiff having failed to establish the fact of the existence of a partnership between Emerson and Stimmel, the evidence offered of the value of the property and accounts alleged to have been converted by defendants was properly excluded. It follows that it was the duty of the court to sustain the defendants' motion, and direct the jury to return a verdict in their favor.

For the foregoing reasons, the judgment of the district court was right, and is therefore

AFFIRMED.

AHLRICH GOKEN ET AL. V. ELLA M. DALLUGGE.*

FILED MAY 18, 1904. No. 13,404.

1. **Review.** When it appears from a fair interpretation of the record that separate motions for a new trial were ruled upon by the district court, this court will not decline to consider separate petitions in error, merely because of a slight verbal inaccuracy in the order on the motions.
2. **Torts:** HUSBAND AND WIFE. The common law rule that a husband is liable jointly with his wife for torts committed by her in his presence, but which he did not instigate and in which he did not participate, but solely because of the marriage relation, does not exist in this state.
3. **Expert Testimony** must be based upon supposed facts of the existence of which there is evidence before the court.

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

* Rehearing allowed. See opinions, pp. 22, 23, *post.*

Arthur J. Evans, C. M. Skiles, C. H. Aldrich and *E. C. Strode,* for plaintiffs in error.

L. H. Hastings, Matt Miller and *A. M. Walling, contra.*

AMES, C.

This is an action in which the defendant in error, as plaintiff in the court below, recovered a judgment in an action for damages against a husband and wife for an assault committed by the latter in the presence of the former, but without his instigation or consent and in disobedience to his expressed wishes. In the view we have taken of the case, it is not necessary to state the facts in greater detail. The verdict and judgment were for the plaintiff, and there was a joint motion for a new trial, and also separate motions by each of the defendants and separate petitions in error. Afterwards, the court entered an order overruling "the motion of the defendants Ahlrich Goken and Antje Goken to set aside the verdict, and for a new trial." It is insisted that this record, because of the use of the singular number of the word "motion," does not show that the separate motions of the defendants were called to the attention of the court and ruled upon, and that therefore no error can be availed of in this court that does not affect both defendants. We think that this would be a too liberal interpretation of the record. All the motions were filed at the same time, several months before the order overruling them was made, and it seems to us more probable that the clerk should have committed the very slight mechanical oversight of omitting a final letter from one word, than that the defendants should have been at all their care and labor, without calling their motions to the attention of the court and procuring rulings upon them. It appears to us fair to infer from the record that, when the court denied the defendants a new trial, he consciously denied it to each as well as to both of them.

The first and most important question presented is, whether a husband is liable jointly with his wife for torts committed by her in his presence, but without his instigation and against his expressed wishes and protest. We think the answer should be in the negative. We are not clear, as counsel urges, and some of the authorities cited by him assert, that the husband's liability in such cases, at the common law, grew solely out of the marital rights which he enjoyed with respect to his wife's property, and her disabilities as respected a separate estate and the obligation of contracts. There is equal reason to suppose, we think, that it had its origin, in part at least, in the personal relations of the parties, in the indissolubility of the marriage, and in the idea of guardianship of the husband over his wife's person, and his right to chastise her moderately and restrain her of her liberty; from which his responsibility for her conduct, especially in his presence, would have been almost a necessary inference. But laws and customs, and prevailing sentiments, have as effectually abolished these latter mentioned incidents of the marriage, as have statutes enabling her to have and enjoy a separate estate, trade and business, and to contract concerning it, removed the former. The wife may now be "the head of the family" as respects homestead rights and exemptions, she is equally entitled with her husband to the guardianship of the offspring of the marriage, in case of separation, and she may have an absolute divorce with alimony, almost for the asking, because of "extreme cruelty," which falls far short of personal chastisement or restraint of liberty. Even if not divorced, public sentiment will not tolerate that she be compelled to abide with him, although she be destitute of provocation or excuse for doing otherwise; and his criticism of her conduct must not exceed approval by the refined manners of "polite society." We think that so nearly a complete "emancipation" of the wife must in an equal degree emancipate the husband also, and free him from obligations that were incident to a state of law and society that has van-

ished before the progress of modern ideas. As this court say in *Kerner v. McDonald,* 60 Neb. 663:

"The old common law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in the husband; she is no longer under his domination or control. On the contrary, in law, husband and wife are now considered as equals. * * * The reason for the law of entirety having ceased, with the reason, the law itself is no more. It would seem clear that, taking the modern view of the marriage relation, there is no reason for the doctrine for estates in entirety."

And so as it is said in *Martin v. Robson,* 65 Ill. 129:

"The intention of the legislature to abrogate the common law rule, to a great degree, that husband and wife were one person, and to give the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common law rule, that the husband is liable for the torts of the wife, they have made such modification of his rights and her disabilities, as wholly to remove the reason for the liability. * * * A liability which has for its consideration rights conferred, should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved. * * * So long as the husband was entitled to the property of the wife and to her industry, so long as he had power to direct and control her, and thus prevent her from commission of torts, there was reason for his liability. The reason has ceased. The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. * * * The unity of husband and wife have been severed. They are now distinct persons, and may

have separate legal estates, contracts, debts and injuries. * * * Her brains and hands and tongue are her own."

Culmer v. Wilson, 13 Utah, 129, announces the same conclusion though upon slightly different grounds:

"The common law rule, it will be remembered, which made the husband liable for the wife's torts, proceeded upon the ground that as the husband succeeded *jure mariti* to the entire estate of the wife, real and personal, and to the right of her earnings, so that she could not respond in damages for any wrong which she might commit, it was but right that he should respond for her, so long as the coverture continued. Such being the reason of the rule, if a statute intervenes giving the wife, during coverture, the sole control of all property owned by her * * * with the right to use and possess the same, thus taking away entirely the reason of the common law rule, it would seem, on principle, that the rule itself ought to cease, though the statute makes no mention of the husband's liability for the wife's torts, or her rights to her own personal services."

In *Norris v. Corkill,* 32 Kan. 409, the supreme court of that state reach the same result. In New York, *Fitzgerald v. Quann,* 109 N. Y. 441, and perhaps some other states, a contrary doctrine prevails, though, except in New York, it does not appear to have been distinctly announced, and the decisions which seem to uphold it are sufficiently justified by the active participation of the husband in the tort of his wife. In several of the states his common law liability has been abolished by statute. We are of the opinion, therefore, that there is insufficient evidence to support the verdict against the husband.

The assault, which was unaccompanied by personal contact, but consisted in pointing a gun at the plaintiff in a threatening manner, was alleged, and proved to the satisfaction of the jury, to have occasioned a fright which caused miscarriage. The plaintiff afterwards suffered, as she testified, severe pains and physical disabilities ex-

tending over a period of more than a year from the time of the assault to the date of the trial, and which she attributed to the abortion, but it was not otherwise shown that they resulted therefrom, except that she testified that she had never previously been afflicted in like manner or suffered a like mishap. Without other foundation, two competent physicians were produced as witnesses and permitted to testify over objection as follows:

Dr. F. W. Lester. Q. From your reading, practice, observation and experience, what would you say as to whether or not a female having a miscarriage after a period of nearly four months, as to whether or not it would permanently affect the general health of a woman?

A. It might do so and it might not. It most always affects them more or less, however.

Q. In what way, doctor?

A. In the way I have described as affecting their general health, producing symptoms of lassitude and weakness, pelvic pains, chronic discharges and conditions of that kind.

Dr. R. G. Rich. Q. From your experience and observation as a physician, what effect does a miscarriage have upon the health of a woman as to impairing her health or not?

A. I think that a woman who has had a miscarriage is seldom, if ever, in as good physical condition afterwards as she has been before.

We think this testimony should have been excluded. It is not based upon a knowledge by the witnesses, obtained by their own observation, or proved upon the trial, of the circumstances of the premature birth, or of the immediate physicial injury, if any, inflicted thereby upon the plaintiff, nor what had been her personal habits, or history, or treatment subsequently thereto. It left the jury to reason from effect to cause, rather than from cause to effect, and to conjecture that, because in many cases ailments such as the plaintiff complained of were caused by miscarriage, they were caused by it in her case, al-

though it was not shown that other causes might not have produced the same illnesses.

There are other alleged errors complained of, but the foregoing appear to be sufficient for the present disposition of the case, and without discussing them, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

The following opinion on rehearing was filed November 2, 1904. *Judgment modified:*

Review. A party will not be heard to complain in this court of the admission of testimony in the trial court, to which he made no objection or exception.

AMES, C.

This is a motion for leave to argue orally a motion for a rehearing from a decision in this case reported *ante*, p. 16. The error complained of is so manifest that oral argument could neither obscure it nor render it more plain, and would therefore be useless. The sole ground of the reversal as to the wife, Antje Goken, is the incompetency of the testimony of the physicians Lester and Rich, but we failed to observe at the time of preparing the opinion that this testimony was not objected or excepted to. If that fact was called to our notice on the argument, it failed to arrest our attention, and we also overlooked a brief mention of it in the brief accompanying the motion for a rehearing. The rule that a party cannot complain in this court of the admission of testimony to which he

has not objected and excepted is too well settled to require the citation of authorities in its support.

It is recommended that the former decision of this court, in so far as it reverses the judgment of the district court against the wife, the plaintiff in error Antje Goken, be vacated and set aside, and that as to her the judgment of the last named court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court, in so far as it reverses the judgment of the district court against the wife, the plaintiff in error Antje Goken, be vacated and set aside, and that as to her the judgment of the last named court be affirmed.

JUDGMENT MODIFIED.

The following opinion on rehearing was filed April 19, 1905. *Judgment of district court reversed:*

Action for Personal Injuries: INSTRUCTION. In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health were in fact sustained by the plaintiff.

LETTON, C.

This is a rehearing of this case formerly reported *ante,* pp. 16, 22. The facts are, perhaps, sufficiently related in the former opinion, but it may be well to state that, according to the plaintiff's testimony, the miscarriage did not result from fright alone, since it appears that, when the gun was pointed at her, she was apparently shocked for a moment by fright, and that she then turned and ran for some distance, until a corn crib intervened between her and the defendant. There was sufficient medical testimony to warrant the jury in finding that the plaintiff's

injuries were a direct result of the fright and violent physical exertion occurring at the same time.

After a careful examination of the record we are of the opinion that there was not sufficient evidence as to the existence of permanent injuries or lasting impairment of the plaintiff's health to justify the court in instructing the jury upon that point, or to warrant the jury in considering the same as an element of damage. The evidence upon this point is substantially set forth in the former opinion, and, tested by every criterion, is clearly insufficient.

It is insisted, however, by the plaintiff that the damages are not more than sufficient to fairly compensate the plaintiff for the injuries actually sustained and reasonably certain to be suffered by the plaintiff in the future, and therefore it was error without prejudice to submit the question of permanent injuries. The evidence shows that a physician was first called to the plaintiff on the 2d day of May, and that his last visit was upon the 8th day of May, when the plaintiff was still in bed, but recovering. That in all he made five visits. That from the time she was able to be about, until the time of the trial, the plaintiff was able to do her housework, and in addition to this that, during the fall of 1902 and the following winter, she husked corn during the corn husking season; that she helped in the farm work, and plowed, harrowed and hauled wheat, corn and hay, cut corn stalks and milked. It is no doubt true that the plaintiff suffered from the defendant's act, but the record shows she had been accustomed to help her husband in his farm work before the occurrence complained of, and was able to do outdoor work afterwards. The evidence falls far short of indicating such a condition of health as warranted a verdict for the amount given by the jury.

It is impossible to say how far the submission of the question of permanent injuries entered into the consideration of the jury in making up their verdict. The verdict is clearly excessive, unless based upon the theory that permanent injuries were sustained.

The judgment of the district court should be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

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

REVERSED.

NEBRASKA TELEPHONE COMPANY, APPELLEE, V. CITY OF FREMONT ET AL., APPELLANTS.

FILED MAY 18, 1904. No. 13,590.

1. Cities: USE OF STREETS BY PUBLIC SERVICE CORPORATIONS. When a city ordinance prescribes that permission to occupy the streets by a public service corporation shall be obtained with the consent of the mayor and council, such consent is sufficiently proved by an entry in the records of a meeting of the council presided over by the mayor, reciting that a motion granting it was offered by a member and adopted, there being nothing to indicate that the mayor dissented.

2. ———: ———: FORFEITURE. Forfeiture of the franchises and easements of a public service corporation in the streets can be declared and enforced only by a court of competent jurisdiction. The city claiming a forfeiture cannot be a judge in its own cause, or invade the privileges, or destroy the property of such a corporation, in the absence of judicial warrant for so doing.

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

Gray & Abbott, for appellants.

W. W. Morsman and *Frank Dolezal, contra.*

AMES, C.

In 1881, J. J. Dickey, L. H. Korty and W. J. Bigger united in an association, not incorporated, and named by them the Fremont Telephone Company. By that name

they applied to the mayor and council of the city of Fremont in session, on the 17th day of December, in that year, for permission to construct and maintain a system of poles, wires and apparatus constituting a telephone exchange, through and over the streets, avenues and alleys of the city. Having heard the application, the body instructed the city attorney to prepare an ordinance suitable to accomplish the desired purpose, and adjourned until the 19th of the month. At an adjourned meeting, held accordingly, an ordinance was duly enacted, and the following entry appears on the record of the proceedings: "On motion of Murray, a permit was granted to the Fremont Telephone Company to erect their poles and wires thereon, subject to ordinance number 77," the measure just adopted. Of sections one and two of the ordinance, which was unanimously adopted, the following is a copy:

"Section 1. That any person, company or corporation, is hereby authorized to erect poles and wires on the streets of the city of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs, upon obtaining the consent of the mayor and council of said city to such use of the streets; provided, that such poles and wires be so erected as to in no manner interfere with the public use of the streets and sidewalks of said city; and provided further, that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said city; and provided further, that the location and height of any pole or wire may at any time be changed by the council.

"Section 2. The consent of the mayor and council, provided for in the first section of this ordinance, may be given at any regular or special meeting of the council, and shall be entered upon the minutes, and such consent shall authorize the use of the streets of said city for the erection of telephone or telegraph lines, subject to such regulations as have been or may be provided by ordinance; provided that in all cases where any person is

desirous of moving any building or buildings through the streets of said city, any party owning or controlling said wires shall, after having twenty-four hours notice, raise up said wires enough to enable the ready and free movement of such buildings."

There is no question as to the authority of the city to grant the license or privilege, as by these proceedings it purported to do. Shortly afterwards the association accepted the grant, and constructed an exchange, occupying some of the streets and alleys for that purpose, and they maintained the system thereafter for the service of the citizens continuously until December, 1882, when they surrendered possession of it to the plaintiff, a corporation, in consideration of the receipt in exchange therefor of $3,600, in par amount of its capital stock, estimated to be of that value. At that time the number of patrons of the exchange was a few score, but the plaintiff, after obtaining possession, continued in the enjoyment of it uninterruptedly and without protest until shortly before the beginning of this action in January, 1903, or for a period of 20 years. During that time it reconstructed the entire system, extending it over additional areas and increasing the number of its patrons by nearly 400. Throughout this interval, its right so to do seems never to have been questioned, and its relations with the city authorities appear to have been friendly. In so doing, the company, with the knowledge and acquiescence of the city, expended large sums of money, so that the system is now concededly of the value of $25,000. It contracted with the plaintiff concerning the location of electric light wires, maintained by the city, so as to avoid interferences, and paid it an agreed compensation for the use of its poles for the support of wires for its fire alarm system, and continuously, from and after 1890, the city levied against and collected from it an annual occupation tax.

In December, 1902, the mayor and council adopted a resolution purporting to forbid the erection by the plaintiff of poles and wires on any part of the streets, avenues

and alleys of the city not already so in use, and to prohibit it from replacing such structures in the public ways theretofore so occupied, when by decay or usage they should become deteriorated and unfit for the transaction of the business of the exchange. Notwithstanding this prohibition, the company did erect some poles and put up some wires which the city authorities, pursuant to this resolution, caused to be cut down and destroyed, and this action was begun to restrain them from the repetition of such conduct. A temporary injunction was granted, which by final decree was made perpetual, and the city appealed to this court.

It is first contended that no valid permission was granted to the association for the construction of the system in the first instance, because the ordinance enacts that such privilege shall be granted, if at all, by the mayor and council, and the entry upon the record of the proceedings of the meeting of the council does not recite that the mayor consented thereto. But it is recited that he was present and presided at the meeting, and he presumably announced the adoption of the resolution without objection, nothing in the record indicating the contrary. The mayor and council, when in session, constitute a single collective and deliberative body, and we think that his assent to the motion is a fair inference from the entry in the minutes.

It is next contended that, even if the proceedings were sufficiently formal and complete, they amounted to a grant to the members of the association personally, and not to their successors or assigns, of a franchise having the character of an easement in, over and upon the streets, avenues and alleys of the city, and that such an easement is real property, an estate in land, which can be alienated only with the consent of the public, expressed through the legislature, and then only by means of an instrument in writing executed in conformity to the provisions of the statute relative to the conveyance of land. And it is urged that no such consent has been shown, and no such instru-

ment has been produced, and that therefore the plaintiff is a mere trespasser upon the streets, and its poles and wires unlawful obstructions and nuisances, which it is not only the right but the duty of the city authorities to remove therefrom. Granting, for the sake of discussion, the defendant's premises, we do not think that its conclusion follows therefrom. By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation. It was subject to certain conditions and regulations as to the manner of user, which are not in controversy here, and which we have not thought it necessary to set forth, and it was and is, doubtless, forfeitable for unspecified acts of abuse, abandonment and nonuser, and it may be conceded that another person or corporation cannot be legally substituted in its stead without the consent or acquiescence of the public, but if such consent had been given, the manner of the transfer would be a matter in which the public would have no interest. It is not a matter of public concern whether A conveys his land to B by deed or by livery, or whether the former permits the latter to enter and acquire the estate by adverse possession, without color of title or consent. With all that neither the public nor the grantor of A has any concern. As respects this phase of the controversy, the city stands in the attitude of A's grantor. The latter may recover possession from B if A has incurred forfeiture by breach of a valid covenant against alienation, but he cannot complain that an attempted alienation was ineffectual or void between the parties to it. Such contention, if upheld, would defeat his claim for forfeiture. For the same reasons the city cannot complain that, as between the association and the plaintiff, the attempted transfer from the former to the latter was lacking in essential formalities. Statutes and legal rules relative to the forms and instruments requisite for the creation and transfer of estates and interests in real property were made for the regulation, exclusively, of the rights and obligations of the parties to

such transactions, and of persons claiming through or under them. In this instance, the city claims adversely to both parties, the association and the plaintiff. But it is conceded by both that the plaintiff is, and for 20 years past has been, with the consent of the association, in the peaceable possession of the franchises and easements granted by the city to the latter. And that concession, we think, precludes, in this action, any necessity for an inquiry into the manner in which that possession was acquired. Let it then be assumed, but without deciding —for, in our opinion, the question is not now before the court for decision—that the transfer from the association to the plaintiff was in violation of public law, that it was an abandonment by the former, followed by nonuser of such character that it incurred thereby liability to forfeiture of its grant. Has the plaintiff, by reason of the premises, become a trespasser upon the streets of the city and its property subject to spoliation by the city authorities or by the first comer? We have been cited to no judicial decision to that effect, and are quite confident that none can be found. By hypothesis, the city made a valid grant of a valuable estate in lands and put its grantee into possession. By some means—no matter what or how—the plaintiff, to use a common law expression, became seized of that estate. The city claims that the fact and manner of its grantee's disseizin has worked a forfeiture of the estate. Can the city sit in judgment on its own cause, and execute the judgment without more ado? We think not. A city, like an individual, can recover that which it has conveyed away, only by a voluntary reconveyance or surrender, or by the judgment of a court of competent jurisdiction. The declaration and enforcement of a forfeiture are judicial acts which can be performed neither by a municipal council nor by the legislature. This is so familiar a proposition of law that little or no authority need be cited in its support, though the books are full of it. Thus says Beach on Private Corporations, vol. 1, sec. 45:

"It is conceded that a corporation may forfeit its charter or franchises for wilful misuser or nonuser thereof. For it is a tacit condition, annexed to the creation of every corporation, that it shall be subject to dissolution by forfeiture of its franchise for wilful misuser or nonuser in regard to matters which go to the essence of the contract between it and the state; and a proceeding upon an information in the nature of *quo warranto,* filed by the attorney general on behalf of the state, is the proper mode of trying the issue. The power of the courts in this respect is exclusive. The forfeiture of corporate charters is a penalty to be imposed by the judiciary alone. Under no circumstances can the legislature presume to declare a forfeiture. Such an usurpation of judicial powers would be hostile to one of the fundamental principles of the American system, by which the legislative, executive and judicial departments of government are required to be forever separate, and would be a denial of due process of law. For 'in these cases there are necessarily adverse parties; the questions that would arise are essentially judicial; and over them the court possesses jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without due consideration of the proper boundaries which mark the separation of legislative from judicial duties.' It follows, as a matter of course, that the legislature cannot strengthen an enactment of forfeiture by reciting therein facts which would constitute a ground for a judicial declaration of forfeiture." See also cases cited in notes.

The Fremont telephone system is not an unlawful structure but a public work of great utility. The plaintiff, if in unlawful possession, to the detriment of the public, may be ousted by appropriate judicial proceedings, but private rights and public interests alike forbid wanton destruction of the property.

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

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

NELS ANDERSON V. A. A. KANNOW.

FILED MAY 18, 1904. No. 13,519.

1. **Review.** Action of the trial court in the admission of evidence examined and approved.
2. **Instructions** of the trial court examined, and *held* not prejudicial.
3. **Verdict.** When the verdict of the jury is rendered on conflicting testimony, it will not be set aside, unless clearly against the weight of the evidence.

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

J. C. Robinson, for plaintiff in error.

R. J. Millard and *C. H. Whitney, contra.*

OLDHAM, C.

This case is brought here for a second review on error by the plaintiff in error, who was also plaintiff in the court below. The former opinion is found in 3 Neb (Unof.) 686. At the former hearing the issues in the case were fully stated in the opinion, and need not be reiterated, as the case was tried again on the same pleadings, and supported by practically the same testimony as that contained in the bill of exceptions examined on the former review. At the prior hearing in this court the cause was reversed for an error of the trial court in placing the burden of proof of certain issues involved in the controversy on the plaintiff. At the second trial the court followed our former opinion and corrected this error, and the defendant again prevailed in the court below.

As was said in our former opinion: "It is plain from an examination of the record that the matter in dispute between these parties arose from indefinite recollections of poorly kept accounts." And the first alleged error called to our attention in the brief for plaintiff in error is as to the admission of a book, called the "storage book," in evidence, over plaintiff's objection. This "storage book" is by no means a model book of accounts, but it was made by plaintiff himself, and contained entries of the transactions of the mill with its customers, made at the time of the transactions, and contains consecutive entries, and was delivered to the defendant by plaintiff when the mill was turned over to him, under his lease, for the purpose of enabling the defendant to settle with the customers of the mill for the wheat, flour and bran which each customer had on deposit in the mill. We think, with this foundation, the court was fully justified in the admission of this book, and our attention is not called to any incorrect or misleading entry in the book that could have operated to plaintiff's prejudice in its consideration.

Paragraph 5 of instructions given by the court is objected to because too vague, but no other instruction covering the same question was requested by plaintiff, and it is not contended that any vicious principle is announced in the instruction as given. Consequently, under a well-established rule in this court, this action was not prejudicial error.

Other technical criticisms, rather than objections, are alleged against different paragraphs of the court's instructions, but our attention is directed to nothing in the least prejudicial to plaintiff's rights in any of these instructions.

It is finally urged that there is not sufficient evidence to sustain the judgment. We have examined the testimony contained in the bill of exceptions, and, while it abounds in contradictions and omissions of recollection as to many of the items in the counterclaim, yet, we are

unable to say that the verdict of the jury was clearly wrong in this particular. This case has been twice tried to a jury in the court below, with a verdict in each instance in favor of the defendant, and as was said by BARNES, J., in the recent case of *Leidigh v. Keever,* 5 Neb. (Unof.) 207:

"It further appears that the verdict complained of is a second one rendered by a jury in this case in favor of the same party; and it should not be set aside, unless it is clearly wrong. Where different trials have resulted in verdicts for a plaintiff, the judgment of the trial court will not be reversed and set aside, unless the evidence is clearly insufficient to support it."

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

CHARLOTTE S. FLINT, ADMINISTRATRIX, APPELLANT, V. FRANK J. CHALOUPKA ET AL., APPELLEES.

FILED MAY 18, 1904. No. 13,544.

1. **Judgment: LIEN.** A judgment of the district court is not a lien upon the judgment debtor's equitable interest in real estate. *Nessler v. Neher,* 18 Neb. 649.

2. **Creditor's Suit: LIEN.** The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. It is of the nature of an equitable execution, and it is unnecessary to issue a legal execution upon the judgment during the pendency of the creditor's action, in order to prevent the judgment from becoming dormant so far as that specific property is concerned.

By the Court.

Unofficial Opinions of Commissioners. The opinions of the commis-

sioners of the supreme court, designated as "unofficial," have no value as precedent or authority in the sense in which the doctrine of *stare decisis* is applied. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves.

APPEAL from the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed.*

J. H. Grimm & Son and *A. R. Scott,* for appellant.

A. S. Sands, contra.

LETTON, C.

This was a creditor's bill brought by the appellant against the appellees in the district court for Saline county. After the note upon which the suit is based was placed in judgment, an execution was issued and returned unsatisfied, whereupon this action was begun. While this action was pending 5 years expired without the issuance of another execution, and the appellees contend that the judgment upon which it was based became dormant. The principal question discussed at the oral argument and in the briefs is whether or not this action can proceed when the judgment upon which it is based has become dormant. The appellees maintain that the lien of a judgment cannot be enforced in equity after the right to enforce the judgment at law has ceased to exist; that there is a clear distinction between a creditor's suit in aid of execution and a creditor's suit to reach property rights and interests that never were subject to and never could be taken upon execution; that, in the latter case, a lien upon the interest sought to be reached is acquired only by the bringing of the equity suit, while in the former case the judgment is a lien upon the property which the judgment debtor has fraudulently conveyed, and the creditor's suit is brought to remove an obstruction from the title, in order that the property may be levied upon and sold advantageously upon execution; that the judg-

ment is a lien upon the property fraudulently conveyed so long as the title remains in the fraudulent grantee; that any lien the appellant ever had upon the property in controversy was the lien of the judgment, and that this creditor's action creates no lien on the property, and that, consequently, when the judgment became dormant it ceased to be a lien thereon, and could no longer be enforced either by execution or by a creditor's bill. We have given the argument of the appellees at this length so that their contention may be clearly seen.

Is a judgment a lien in this state upon the equitable interest of the debtor in real estate?

In *Rosenfield v. Chada*, 12 Neb. 25, where an action in equity was brought to subject the equitable interest of a purchaser in possession of real estate to the payment of a judgment, it was held that an equitable interest in land, coupled with actual possession, may be reached by a seizure and sale under an ordinary execution.

The next case in which this general subject was considered is *Nessler v. Neher*, 18 Neb. 649. In this case it was first held (23 N. W. 345) that the lien of a judgment will extend to all the legal or equitable interests of the defendant in lands within the county, of which such defendant is in actual possession; but upon rehearing it was held that "a judgment in the district court is not a lien upon an equitable interest in the real estate of the debtor." This was followed in *Dvorak v. More*, 25 Neb. 735; *Shoemaker v. Harvey*, 43 Neb. 75; *First Nat. Bank v. Tighe*, 49 Neb. 299; *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 387; *Woolworth v. Parker*, 57 Neb. 417; and may be considered as the settled doctrine of this court.

In *Westervelt v. Hagge*, 61 Neb. 647; *Foley v. Doyle*, 1 Neb. (Unof.) 643; *First Nat. Bank v. Gibson*, 60 Neb. 767, and *State Bank v. Belk*, 68 Neb. 517, there are certain expressions used in the opinions which might be taken to imply that a judgment is a lien upon land which has been conveyed to a third person with the intent to defraud creditors, and that it is the lien of the judgment which

is enforced by the bringing of the creditor's suit. But upon a careful examination of the points that were actually decided in these cases, it will be found that, while the language of the opinions may imply that a judgment is such a lien, in no case were the former decisions overruled, and the action taken by the court in each of these cases was not inconsistent with the prior holdings.

It is not so much what a court says in the decision of a case as that which it actually does that should be considered in applying the principles of the case as a precedent. Courts often use language in an opinion responsive to an argument of counsel of which the reader of the opinion is not cognizant and thus general statements may be given undue weight. *Williams v. Miles*, 68 Neb. 479.

While it is said in *First Nat. Bank v. Gibson, supra*, "The judgment was a lien on the land, and the plaintiff had the undoubted right to make his lien effective," still this, like the language used in *State Bank v. Belk*, and *Foley v. Doyle, supra*, which approve of the doctrine of *Fusze v. Stern*, 17 Ill. App. 429, means, as is said in that case, that the judgment is an *equitable lien* and that the recovery of a judgment which would *in the absence of a fraudulent conveyance* be a legal lien, is all that is necessary to prove in order to have the right to maintain the action.

We have considered at this length our former decisions since it would appear from the position taken by appellees that a misapprehension of our meaning has occurred.

The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. The judgment is not a legal lien but the creditor's action is in the nature of an equitable execution and when begun creates a specific lien. This lien continues while the cause is pending and until final determination. Since it is of the nature of an execution it tolls the statute of dormancy so far as the particular property sought to be reached is concerned, and hence the issuance of a general execution upon the judgment during the pendency of the creditor's

action is not necessary to keep the judgment alive so far as the specific property equitably levied upon by this suit is concerned. *First Nat. Bank v. Gibson,* 60 Neb. 767; *Coulson v. Galtsman,* 1 Neb. (Unof.) 502; *Cincinnati v. Hafer,* 49 Ohio St. 60.

We are cognizant of the fact that this doctrine is at variance with the position taken by the supreme court of Minnesota in *Newell v. Dart,* 28 Minn. 248, and later cases, and also with the holdings of the courts of North Dakota and South Dakota, but the provisions of the statutes of these states upon which the rule is based by their courts are not the same as those of our statute. The holding in these cases is that at the end of 10 years the judgment is void of vital force. In this state we have taken a different view as to dormant judgments; our statutes are not so broad and emphatic as to the inability to enforce a judgment after the time limited expires. We have held that a sale of real estate upon execution issued upon a dormant judgment could not be attacked collaterally after confirmation. *Gillespie v. Switzer,* 43 Neb. 772; *Link v. Connell,* 48 Neb. 574. A writ issued upon a dormant judgment is not void but voidable. Unless the bar of the statute is raised by motion or pleading it is waived. For these reasons we conclude that the decisions mentioned are not applicable in this state, and we decline to follow them.

At the trial appellant proved the rendition of the judgment, the issuance of an execution upon the same, and its return wholly unsatisfied; that the conveyances alleged to be fraudulent were executed in 1896 and 1897. It was also proved that the promissory note upon which the judgment was rendered was in the hands of an attorney for collection in July, 1896, before any of the conveyances were made. By the pleadings the close family relationship of the parties to the conveyances was admitted, which was such as to throw the burden of proof as to good faith upon them under the familiar rule of this state. After this proof was offered and received, defendants

demurred to the evidence, which demurrer was sustained by the district court. The record itself does not show the ground upon which the demurrer was sustained by the court, but it is stated in appellant's brief, and not denied by appellees, that it was upon the ground that the judgment which it sought to enforce by the creditors' suit had become dormant, and that thereby the right to maintain the action had abated.

Among the issues raised by the answers were the bankruptcy of the principal defendants, and the filing of appellant's judgment as an unsecured claim against the bankrupt estate. Since no evidence was offered or received in the district court upon these issues, and the case was decided there upon other grounds, it is unnecessary for the questions presented by the pleadings, in relation to the effect of the bankruptcy and the filing of appellant's claim, to be considered here. The demurrer to the evidence should have been overruled.

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

HOLCOMB, C. J.

I do not think the prior decisions of the court afford any tenable ground for the contention that a judgment in a law action becomes a lien on the purely equitable interest of the judgment debtor in real estate, or that such interest can be reached by an execution on such judgment. I do not see the wisdom or necessity of explaining or distinguishing as to such opinions in rendering a decision on

the questions arising in the case at bar. Certainly, in the case of *Westervelt v. Hagge, supra*—a case involving the right of enforcing an attachment lien—the principle is distinctly recognized that a purely equitable interest in real estate can be reached only by invoking the aid of a court of equity. In *First Nat. Bank v. Gibson* and *State Bank v. Belk, supra,* the things decided were in respect of the time when, and the essential prerequisites upon which, a creditor's bill might be maintained. In neither was the question of the lien of a judgment on an equitable interest in real estate considered or decided. As to *Foley v. Doyle, supra,* this is an opinion of a class formulated by the supreme court commissioners which has been designated as "unofficial." Such opinions are of no value as authority or precedent. Whatever value they possess must be found in their intrinsic merits as being cogent in reasoning and sound in principle. The doctrine of *stare decisis* has no application to opinions of this character. The court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It approves only the conclusions. It is not required of the court that such opinions be cited with approval, if deemed sound in all respects, nor that an effort should be made to explain, distinguish, criticise or disapprove them when not followed in subsequent decisions in other cases brought here for its determination. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves. They rest on an altogether different footing from the opinions published in the official reports.

SARAH J. KELLEY, APPELLANT, V. LYMAN S. BOYER ET AL., APPELLEES.

FILED MAY 18, 1904. No. 13,573.

Evidence examined, and *held* to sustain the judgment of the district court.

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

W. P. Miles and *Hamer & Hamer,* for appellant.

Wilcox & Halligan, contra.

LETTON, C.

On the 19th day of April, 1902, one Fidella Neumann was the owner of about 160 acres of land in Cheyenne county, Nebraska. On that day she executed a lease of the same to Lyman S. Boyer for a period of 2 years; the term ending April 1, 1904; the consideration being the sum of $25 a year, to be paid April 1, 1903, and April 1, 1904. The lease also contained these further provisions: "In case Lyman S. Boyer shall construct a lateral from the Chimney Rock irrigation ditch to and through the said land, Mrs. Fidella Neumann agrees to pay half the expenses, not to exceed $50, for said lateral to Lyman S Boyer. In case Mrs. Fidella Neumann should sell the above described land before the expiration of this contract, Lyman S. Boyer agrees to give peaceable possession of this land any time to her, when the expense incurred in building lateral and loss incurred by vacating the above named land are paid. Damages shall be agreed upon by 3 disinterested parties." This lease was signed by both parties. Boyer went into possession of the premises under the lease. On April 15, 1903, Mrs. Neumann sold the land to the plaintiff and appellant, Sarah J. Kelley, who claims possession of the same under her deed from Mrs. Neumann. At the time of the sale the plaintiff

was fully advised of the lease and of its conditions, and that Boyer was in possession thereunder. The land is not cultivated but is used as hay land. Boyer cut the hay upon it in 1902, and in 1903 was again cutting the hay upon the land when the plaintiff Kelley began this action, alleging that she was the owner of the premises; that the defendants Lyman S. Boyer and George Boyer had entered upon the land without any warrant in law or color of right, and were cutting the hay crop and appropriating it to their own use; that the defendants are insolvent, and that she has no adequate remedy at law, and praying for an injunction. Lyman S. Boyer answered, setting up his lease and claiming possession under the same. George Boyer disclaimed any interest in the premises. At the trial the court found that the action was one to enjoin a mere trespass; that an injunction does not lie to restrain the same, unless the injury is irreparable, or the defendant is insolvent; and that the injury is not irreparable and the defendant is not insolvent, and dissolved the injunction and dismissed the case. In this court the appellant urges that there had been a settlement between Boyer and Mrs. Neumann under the terms of the lease, by which Boyer gave up and surrendered his right to the possession of the land for his unexpired term; that the action of Boyer in cutting and removing the only valuable crop upon the premises, and taking away the very thing on account of which the plaintiff purchased the property, was more than a mere trespass, and that under the pleadings in the case there is no denial of the allegation in regard to the insolvency of the defendant Lyman S. Boyer, and, consequently, the allegation of insolvency in the petition must be taken as true. The burden of proof was upon the plaintiff to establish the fact that Boyer was a trespasser, as she alleges in her petition, and was upon the land without any right.

From a careful examination of the testimony, we are of the opinion that it fails affirmatively to show that a settlement was ever had between Boyer and Mrs. Neu-

mann, by which Boyer's right to compensation under the terms of the lease for a surrender of his right to the possession of the premises was ever settled, or that any agreement was ever made between him and Mrs. Neumann, whereby he was to give up his rights under the lease to the plaintiff. The evidence further fails to show that Boyer ever surrendered the possession of the premises to the plaintiff, or that she had ever exercised active ownership over the same up to the time of the beginning of this action.

The uncontradicted testimony further shows that Boyer irrigated the land in June and July of 1903, and that he kept stock from straying or trespassing upon the same so as to avoid injury to the hay crop; while there was no evidence whatever to show that the plaintiff had ever taken actual possession of the land, or exercised any actual dominion over it. The proof falls far short of sustaining the allegations of the petition, and the judgment of the district court, although based upon other grounds than those set forth in this opinion, was right and should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

WALTER MOISE & COMPANY v. WILLIAM KRUG.

FILED MAY 18, 1904. No. 13,349.

Liquor License: SALE OF LIQUORS: ESTOPPEL. The holder of a saloon license, who permits other parties to conduct a business under it in his name, is not liable for liquors furnished to those other parties by one who is aware of the situation, and deals with such parties on their own credit. As against such a claim, the license holder is not estopped to deny having made the purchase.

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

Cooper & Dunn and *S. R. Rush*, for plaintiff in error.

John C. Cowin, contra.

HASTINGS, C.

There seems to be but a single question in the present case. Does public policy require that one who takes out a license as a liquor dealer at a given place, and has the business conducted in his name, not only be conclusively deemed the proprietor of the place while it continues open under his license, but held liable to the vendor for all liquors sold to any one for the purpose of resale in such business? Plaintiff brought this suit on two causes of action: (1) For a balance for liquors sold and delivered at 1024 North 16th street, Omaha, while William McAvoy was managing and operating a saloon there as defendant's agent and representative. (2) For a like balance on account of goods sold and delivered at the same place, during the year previous, while it was operated by John Goodfellow in defendant's name. The total amount of the two claims is $1,081.44. The answer is a denial of the indebtedness, and a special denial that McAvoy and Goodfellow, or either of them, were defendant's agents, and a general denial of all allegations. The reply alleged that defendant held a lease of the building; held the license under which the saloon run, and, consequently, could not permit or authorize any other person to conduct it in his name, and was estopped from denying the agency of Goodfellow and McAvoy, or his liability for the goods bought by them for sale in the saloon. At the trial the plaintiff requested three instructions to the effect that, if the saloon was with Krug's consent, licensed in his name and he permitted Goodfellow and McAvoy to conduct it, that made them his agents, and him responsible for their purchases. The court refused these instructions,

and told the jury that, if Goodfellow and McAvoy actually were Krug's agents in making the purchase, or if Krug's actions induced the plaintiff reasonably to believe they were his agents, and the goods were sold on the faith of it, the defendant would be liable; but that, if Goodfellow and McAvoy were not agents authorized to purchase the goods on defendant's behalf, and the plaintiff had no reason to believe, and did not believe, that they were authorized to purchase on defendant's behalf, plaintiff would be compelled to look to Goodfellow and McAvoy for payment.

It is not disputed that on the instructions given, the finding of the jury is supported by the evidence. As before indicated, the sole question seems to be, whether public policy requires that one who ostensibly conducts a saloon business, and has it licensed in his name, shall be conclusively held liable for purchases as well as sales. The trial court thought not, and applied to the case the ordinary doctrines of estoppel by acts and representations. The plaintiff earnestly contends that this was error, and that the defendant should no more be allowed to deny his responsibility for purchases than for sales; that the business is conclusively admitted to have been his, and that he should be held liable for all liquor that went into it for the purpose of sale in his name. The Nebraska case which seems to be most strongly relied upon is that of *Hall v. Hart,* 52 Neb. 4. The question in *Hall v. Hart,* as stated by the court, was, "Whether one purchasing the stock and business of a licensed saloon keeper, and by agreement continuing such business ostensibly in the name of, and by virtue of the license issued to, his vendor, will be heard to claim the property so purchased when taken to satisfy an execution or order of attachment against the latter for a debt existing at the date of such transfer." It was held that the purchaser who had continued to use the license of his vendor would not be permitted to allege and prove such a fraud upon the school fund of the state, in order to replevin the property which had been levied upon as

that of his vendor. This was on the ground that the agreement through which he must claim his title to the goods was a fraud upon public morals, and would not be permitted to be set up. There is little analogy to the present case. It even seems that the doctrine of *Hall v. Hart* would go rather against, than in favor of, the plaintiff's claim in this case. If the finding of the jury in the present case is correct, the sale of this liquor was to McAvoy and Goodfellow, made by the plaintiff with full knowledge that they were in fact conducting this business in defendant's name for their own benefit. If such action on their part, and on Krug's, was against public policy, it seems clear that plaintiff must be held to have been *particeps criminis*. Parties in *pari delicto* can hardly derive additional rights from its being a criminal transaction, if such it is. In fact, however, it would seem that the estoppel would go no further than to transactions in the way of selling. The law does not interfere in any way nor prescribe any restrictions as to the manner whereby liquor dealers shall obtain their stock. It is doubtless true that Krug would be estopped to deny that the sales made by Goodfellow and McAvoy were on his behalf. It does not seem to follow that defendant must be compelled to admit that purchases by them were his purchases. There seems nothing, either in law or public policy, which would prevent Krug's procuring all the liquor sold in the saloon from Goodfellow and McAvoy, and nothing which would prevent them from arranging to supply it and becoming personally responsible to any parties from whom it was procured. If they did so become personally liable to such parties, and the goods were sold to them and not to Krug, even if they were sold out under Krug's name and under his license, it would hardly seem to operate in any way to make him liable for them to the plaintiff.

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.

PHILIP H. ZWEIBEL, APPELLEE, V. VICTOR B. CALDWELL ET AL., APPELLANTS.*

FILED MAY 18, 1904. No. 13,540.

1. **Review:** TRANSCRIPT: NEW TRIAL. Where a party has, without fault or neglect on his part or his attorneys', failed to obtain a transcript for a review on error in this court, a new trial will be granted, if necessary to secure him this constitutional right.
2. ———. It is not necessary to such right that error in the judgment sought to be reviewed should be alleged or proved.
3. **Evidence** *held* to sustain trial court's finding, that the failure to obtain a transcript of the proceedings and judgment against him for filing with his petition in error in this court was without fault or neglect on plaintiff's part.

APPEAL from the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed.*

Hamilton & Maxwell, for appellants.

Baldrige & De Bord and *G. M. Mullins, contra.*

HASTINGS, C.

This is an appeal from a decree of the district court for Sarpy county entered on November 25, 1903, setting aside a judgment in ejectment of that court entered on November 2, 1901, and ordering a new trial. The findings of the trial court are that, after a trial by jury, the defendants recovered a judgment against the plaintiff here; that a motion for a new trial was filed and overruled; that Zweibel and his attorneys exercised due diligence to procure a transcript of the record in that case for the purpose

*Rehearing denied. See opinion, p. 53, *post.*

of prosecuting error to the supreme court, and were unable, through no fault of theirs, to procure it within 6 months, and the procuring of the transcript was prevented through the inability of the clerk of the court to furnish it within the time, and that Zweibel having lost his right to a review on error was therefore entitled to a new trial in the ejectment action. The defendants requested a special finding as to the employment of H. Z. Wedgwood as attorney for them in the ejectment suit, and the court found that Wedgwood, as attorney for them in the ejectment suit, was employed to assist in the trial and for no other purpose, and within 4 days after was paid for his services, which terminated his employment. There is no general finding, and, upon the record, the original ejectment judgment stands as set aside for the reason that, because of the inability of the clerk to furnish the transcript within 6 months and the inability, without fault on their part, of Zweibel or his attorneys to get it, he is entitled to a new trial, and it is allowed him.

The defendants on their appeal say, in the first place, that the petition fails to state facts sufficient to constitute a cause of action. The basis of this claim is the fact that Zweibel's petition, filed in the district court for Sarpy county, did not allege any error in the ejectment action in which the judgment was rendered; that, consequently, there was no right shown to review it, and no prejudice in the failure of the clerk to prepare a transcript. The petition shows the beginning of an action to recover certain described premises; the filing of a general denial, and a trial before Judge Baker in the Sarpy county district court; a full hearing and a verdict, it being the second trial of the case; the filing of a motion within 3 days for a new trial, which motion is alleged to have set up certain errors of the court and irregularities at the trial; "that among the errors alleged was that the verdict was contrary to law; that the verdict was not sustained by the evidence, and that the court erred in giving each of the following instructions, to wit, 1, 2, 3, 4, 5, 6, 7, 8 and 9; said in-

structions being given by the court on its own motion, and it was alleged in said motion for a new trial that the trial court erred in refusing to give each of the instructions 3, 4 and 5 asked by the defendants;" that the motion was heard and overruled, and judgment entered in November, 1901; that a bill of exceptions was ordered and prepared, signed, settled and filed within the time allowed by law; a supersedeas bond was given, and a precipe for a transcript of the petition, answer and reply, of the orders of the court and instructions requested and given, of the order refusing instructions, of the motion for new trial, of the ruling of the court on it, and of the time of the court's adjournment, filed within 3 months of the judgment; and also that the clerk had been requested a number of times, both previously and subsequently, to prepare a transcript; that the files and records were not within the control of the plaintiff, and there was no complete record; that the instructions of the court were partly typewritten and partly hand written, and could not be reproduced; that plaintiff was informed by the court's stenographer that there was no copy of the instructions in existence; that frequent demands by Zweibel and his counsel were unavailing, because the clerk could not make the transcript; that plaintiff used all possible diligence, but failed to obtain his transcript, and without fault on his part, was deprived of his appeal from said judgment to the supreme court. It is alleged that, after the time for filing the appeal had gone by, counsel for the defendants returned to the clerk the instructions of the court and some of the other files; that repeated demands had been made upon defendants' counsel for such files within the proper time, and defendants' counsel had kept the instructions and denied knowledge of their existence, and by reason of such action the clerk was unable to obtain the files, and plaintiff unable to secure his transcript.

The only allegation of any error in the ejectment proceedings is the implied one embraced in the allegation that such error was set up in the motion for a new trial. There

is no direct allegation in the petition that there was any good ground for a reversal. If the petition is to be sustained, it must be on the ground that the right to review is, in the state of Nebraska, a constitutional one, guaranteed to a party in every instance, and does not depend for its existence upon there being error in the record. A demurrer was filed to this petition and was overruled. Defendants then answered, admitting the pleadings, the trial, the verdict, the motion for a new trial and the errors assigned in it, its overruling and judgment for defendants, and the settling of a bill of exceptions. The filing of a supersedeas bond is denied for lack of information, as is also the precipe for a transcript, and the allegations as to demand upon the clerk, and as to the files and records being in the possession of defendants' counsel, and also as to whether or not there had been a request of the stenographer for copy of the instructions, and the statement made by him that they could not be obtained. The other allegations of the petition were denied. The defendants also allege that their attorneys, as plaintiff well knew, had long before the month of January, 1902, full copies of all the pleadings in the action, and instructions given by the court to the jury, and the motion for a new trial; that neither plaintiff nor his counsel ever requested that they be furnished, or took any steps for the substitution of new ones in said action. It is alleged that plaintiff could have procured a certified copy of the judgment, filed the same with his bill of exceptions in this court, thereby giving this court jurisdiction, and could have gained at least 6 months' time in which to make search for the files and instructions, and have them substituted in case the originals could not be found, and plaintiff could easily have secured a hearing in the supreme court on the merits of said ejectment case, and the failure to do so was solely owing to the neglect of plaintiff and his counsel. For a reply this answer was denied, and on trial had the findings were as above indicated.

Besides the claim that no cause of action is set out, it

is further urged that the decree is not supported by the facts found. The allegations of the petition are that the inability to make the record, and consequent failure of the plaintiff to file his petition in error, was "by reason of the conduct of the counsel for the plaintiffs therein" (that is the ejectment case). This allegation has reference only to the conduct of Wedgwood. The trial court found, as we have seen, that he was paid off and discharged immediately after defendants recovered their judgment. For his acts after that time defendants were not responsible.

It is finally urged on appellant's behalf that the decree is not sustained by sufficient evidence; that the evidence, as a whole, entirely fails to establish that due diligence on plaintiff's part would not have obtained him a full transcript; that in fact the evidence discloses nothing now missing except some refused instructions, and that due diligence on the part of plaintiff and his counsel would have produced all of the rest of the missing records, and have reproduced these lost instructions, at least in substance. It does appear, however, that the instructions tendered by the plaintiff in his behalf at the hearing of the ejectment case are lost, and it appears that his counsel are unable to "reproduce" them. It also appears that the pleadings and instructions given were returned to the clerk's office by Wedgwood after the 6 months for appeal had expired. It is tolerably clear that copies of this record could have been obtained and that it was the duty of the plaintiff to secure them, but that, as to the refused instructions, they are not to be had, and none of the instructions were at hand, until they were returned by Wedgwood after the time for filing transcript had elapsed.

The constitution in guaranteeing to every litigant a review of his case in the supreme court (constitution, art. I, section 24) would seem to indicate that equity would interfere, even to the extent of granting a new trial, to preserve such a right of review, if it had been prevented without fault of the party himself. In the present case the

trial court found, and we are not prepared to say that its findings are contrary to the weight of evidence, that the right of review had been lost, without fault on the part of the complaining party, because of the failure of the clerk to make the transcript. There is no finding as to whether this was the clerk's fault or misfortune. In any event it was his duty to find the files and make the transcript. It would seem that Zweibel and his counsel had the right to depend on him for it. The jurisdiction assumed here for the granting of a new trial cannot be claimed under any recognized head of equity jurisprudence. It must be found, if at all, under section 318 of the code, and the provision of our constitution, securing to the litigant in every case a review in the court of last resort. Section 13, article I, of the constitution, providing that the court shall be open to every person for any injury done, and that he shall have a remedy, has been held to be broader than the common law, and to entitle the courts to grant a remedy whenever a wrong has been done. *State v. Elder,* 31 Neb. 165, 185. The view of the district court, that the defendant in the ejectment suit, the plaintiff here, had lost his right of review, without fault on his part, and after making all required effort to obtain it, and was therefore entitled to a new trial, is sustainable from the evidence, and should be sustained here, if the underlying doctrine is granted, that such loss of the right of review entitles one to a new trial, without the necessity of any showing of probable error sufficient to reverse the action of the court at the ejectment trial.

The expressions of this court in *Curran v. Wilcox,* 10 Neb. 449 would indicate the recognition of an absolute right to review in all cases, though in that case there was an allegation that the judgment complained of was rendered upon issues not pleaded.

In *Holland v. Chicago, B. & Q. R. Co.,* 52 Neb. 100, a new trial was granted for simple inability to get a bill of exceptions in the former one. It does not appear that any specific error in the judgment was pleaded, and the

case is put upon the sole ground of the constitutional right to a review.

In *Mathews v. Mulford*, 53 Neb. 252, in refusing to consider a bill of exceptions allowed, without fault of the party presenting it, after the prescribed time, the opinion says: "The remedy, if any, is by application in equity for a new trial." In all of these cases the constitutional right to a review is spoken of and treated as absolute. It is true, the question as to the necessity of some showing of error in the judgment complained of is not touched upon in any of them. In the absence of such a showing the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed.

It is recommended that the action of the trial court be affiirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

The following opinion on motion for rehearing was filed January 5, 1905. *Rehearing denied:*

1. Review: NEW TRIAL: EQUITY. In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault.

2. New Trial: PLEADINGS. It should be made to appear that an issue was presented in the pleading in the law action involving the substantial rights of the parties, and that the evidence was such as to present a fair question for the determination of a jury.

3. ———: ———. If the facts are set out showing the nature of the

rulings complained of, it is not necessary that there should be a direct allegation that there was error in the trial at law.

4. ———: EVIDENCE: REVIEW. If the petition for a new trial is defective in that regard, and evidence is given showing the nature of the ruling complained of sufficiently to enable the court to determine that there was a substantial question of law upon the record of the former trial which the party complaining desired in good faith to present to the reviewing court, the party offering such evidence cannot be heard to object to such defect in the petition.

5. **New Trial:** TRANSCRIPT: EQUITY. If it is impossible to obtain a sufficient transcript to present the errors complained of to this court, it is not proper practice to file an imperfect transcript with a petition in error, with the purpose of afterwards procuring a complete transcript and amending the petition in error, where there is no reasonable certainty of being able to procure such amended transcript. To fail to do so is not negligence that will defeat an action in equity for a new trial.

6. **Finding:** EVIDENCE. The plaintiff in such equity action must be himself without fault. The former opinion herein that the evidence is sufficient to justify the finding of the trial court is adhered to.

SEDGWICK, J.

The appellants in this case complain of a decree in equity in the district court for Sarpy county setting aside a former judgment in an action at law in that court and granting a new trial therein. In the opinion of the commissioner upon the former hearing it was said that, in the absence of any showing of error upon the trial at law, "the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed." The reargument was ordered mainly for the purpose of further considering this statement of the law as applicable in this case. In the decisions of this court referred to by the commissioner and in other cases cited in the briefs, the precise question here discussed was not presented. The language used must be understood in the light of this fact. The constitutional guarantee is not for the purpose of enabling parties to

indulge a litigious disposition. It must undoubtedly be made to appear that there is a genuine cause to present, and that the object is to use this constitutional privilege to present in good faith a claim of right to the court of last resort for determination. If it appears that there is a genuine controversy, and that in the trial of that controversy questions were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault, equity should grant relief. This is clearly established by the decisions of this court above referred to.

1. That there was a genuine controversy between the parties sufficiently appears. The nature of the issue in the law action is set out in this petition. It is alleged that both parties introduced evidence upon the trial and that the issue was submitted to, and determined by, a jury. If the trial court had found that there was no conflict in the evidence and had directed a verdict in the law action, it might have been necessary for this plaintiff to set out so much of the record and evidence upon the trial at law as would show that there was a genuine controversy, in which the party complaining was seeking in good faith to assert an actual claim of right.

2. There is in this petition no direct allegation that there were prejudicial errors in the trial of the law action. If the facts were set out showing the nature of the rulings complained of, whether those rulings were or were not erroneous would be a conclusion of law. This petition is open to some criticism in this regard, but we think that, in view of the conditions that we find in the record, it is sufficient to support the decree. It is alleged that a motion for a new trial was filed in that action, and that it contained assignments of error. "That among the errors alleged was that the verdict was contrary to law; that the verdict was not sustained by the evidence, and that the court erred in giving each of the following instructions,

to wit, 1, 2, 3, 4, 5, 6, 7, 8 and 9; said instructions being given by the court on its own motion, and it was alleged in said motion for a new trial that the trial court erred in refusing to give each of the instructions 3, 4 and 5 asked by the defendants." No motion was made to make the petition more specific. There was a general demurrer to the petition which was overruled, and the defendant answered. This answer contained many affirmative allegations, and for reply a general denial was filed. The pleadings in the law action were in evidence, and the motion for a new trial was put in evidence by the defendants themselves. In this condition of the record, the matter must be considered as though the petition herein set out the assignments in full as contained in the motion for a new trial. This motion for a new trial was comprehensive, and in some instances the assignments were so made as to leave no doubt of the precise question which it was sought to present to the reviewing court. Thus the ruling complained of was fully shown to the court, from which the court could determine whether there was a substantial question upon the record which the party complaining desired in good faith to submit to the reviewing court.

3. It is urged that this record does not show that this plaintiff has been deprived of his right to bring the case to this court. It is admitted that he could not have obtained a transcript of the whole record necessary to a review of his case within the time limited for the commencement of his proceedings in this court, but it is said that he might have obtained a transcript of enough of the record so as to have given this court jurisdiction by filing such transcript with his petition in error. If that part of the record was lost which showed the proceedings complained of, and the transcript could not be made to show the alleged errors relied upon, it cannot be said to have been the duty of the plaintiff to institute proceedings in this court showing no ground for relief, in the hope that he might become able to amend his proceedings before a final hearing should be had in the action. There was no reason-

able certainty that the transcript could be completed, and without such certainty such proceeding would be unwarranted.

4. It was found by the trial court that the plaintiff himself was without fault, that this misfortune was not caused by any negligence of his own. In the opinion of the commissioner the evidence is reviewed and the conclusion of the trial court supported. For the reasons there given, we conclude that the finding of the trial court upon this point ought not to be disturbed.

The motion for rehearing is overruled.

REHEARING DENIED.

HENRY HUFFMAN, APPELLEE, V. J. R. RHODES, ADMINISTRATOR, APPELLANT.

FILED JUNE 9, 1904. No. 13,516.

1. **Final Order.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie.

2. **Interlocutory Order.** The order and rulings of the trial court in the case at bar, set out in the opinion, *held* to be interlocutory and not final.

3. ———: **Vacating.** An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court, without compliance with the provisions of section 602 *et sequitur* of the code relating to the vacation and modification of judgments and final orders at a term subsequent to that in which rendered.

4. **Review.** Section 675 of the code does not give the right to have reviewed by the supreme court on appeal the decisions made by a county court in the settlement of the estate of a person deceased, but such decision can be here reviewed by error proceedings only. *Whalen v. Kitchen*, 61 Neb. 329.

APPEAL from the district court for Custer county: HOMER M. SULLIVAN, JUDGE. *Dismissed.*

A. R. Humphrey and *J. R. Dean,* for appellant.

Homer M. Sullivan and *C. L. Gutterson, contra.*

HOLCOMB, C. J.

Appellee moves for a dismissal of this cause out of court, on the ground that the action is not appealable under the provisions of section 675 of the code authorizing appeals only in actions in equity. The questions presented by the motion call for a determination of the nature and character of the present action which has been removed to this court by appeal as distinguished from proceedings in error.

The controversy had its inception in the probate court, wherein was filed by the appellee a claim for several hundred dollars against the estate of one Hiram Curtis, deceased, which was then being administered upon in that tribunal. From an adverse decision by the county judge, the claimant, appellee here, appealed his case to the district court. At the time of the trial in the district court, upon issues raised by the pleadings filed in the county court and from which it is obvious that the action was one at law for the recovery of an alleged indebtedness owing by the intestate to the claimant, and after the impaneling of a jury and the introduction of evidence by both parties the record recites: "After testimony had been introduced by both parties and both parties had rested, the following order and stipulation was made: It was announced by the court that as a matter of law the court concludes that the theory upon which plaintiff sought to recover in the county court and the facts upon which he sought to recover in the county court, raised a question that the county court had no jurisdiction to determine, and that the appeal to this court also leaves this court without jurisdiction to determine said case, and for the reason that neither court had jurisdiction, the action as a claim

against the estate ought to be dismissed. Whereupon, by agreement of all parties in open court, the plaintiff is to file a petition in equity for an accounting, alleging the trusteeship and trust relations of the deceased with the plaintiff, and the suit shall proceed as an original action against the administrator to establish the trust claimed by plaintiff to be in his hands as such administrator, the administrator agreeing to file an answer and the case to be tried hereafter by the court as an equity action for an accounting. Whereupon, by the order of the court, the jury is discharged from the further consideration of said case. It is further agreed between the parties, that all costs up to this time in the county court, be paid by plaintiff." New pleadings were filed in which the intestate was sought to be charged as trustee having received and had control and the investment of certain moneys alleged to have come into his hands belonging to the claimant and for an accounting, and a trust was sought to be impressed upon the estate of the deceased for the satisfaction of such obligation. After joinder of issues under the new pleadings filed after entry of the above mentioned order, the record discloses that the cause came on again to be heard at a subsequent term of court, at which time the court found and concluded that, as a matter of law, the order hereinbefore referred to holding that the county court had no jurisdiction and that such cause could not be maintained against the estate as a debt was erroneous and wrong; and the court further concludes that since the parties agreed that said case might be tried to the court without a jury, that this court still has jurisdiction to try and determine said case upon the theory upon which it was begun in the county court. Findings were thereupon made to the effect that the estate was indebted to the plaintiff in a specified sum which it was adjudged the plaintiff was entitled to recover of and from the estate and which should be allowed out of such estate and which amount it was adjudged and decreed the plaintiff should have and recover from the defendants in the action; and

the proceedings and judgment were ordered to be certified back to the county court.

The appellant's position regarding the effect of the proceedings had and the rulings made and judgment finally rendered, of which we have heretofore made mention, can probably be best stated in the words of counsel. In the brief in resistance to the motion to dismiss it is said: "The appellant contends that any claim that Henry Huffman had against the estate of Hiram Curtis, deceased, was ended on October 28, 1902, when the court made its announcement of no jurisdiction and discharged the jury, and the parties made their agreement in open court on that date. The appellant contends that the court which made the findings and the judgment of June 19, 1903, was absolutely without jurisdiction so to do, and that his findings and his judgment and all that he did are null and void." Can it be successfully contended that the ruling of the district court to the effect that the claim of the appellee against the estate was equitable in character and not triable as a legal action, and that both the county and the district court were without jurisdiction to hear and determine the controversy as a law action or special statutory proceeding, was a final order or judgment disposing of the merits of the controversy and from which error could be prosecuted? We think not. The ruling is lacking in essential requisites necessary to constitute a final order or judgment. The court did not dismiss the action then pending on appeal from the probate court. It only announced that the claimant's cause of action being equitable in its nature, the law action ought to be dismissed for want of jurisdiction, whereupon the parties in anticipation of the final action which was about to be taken agreed that they would reform the pleadings, convert the legal action into a suit in equity and try it as an action in equity. The agreement as to costs referred only to costs made in the county court, thus leaving the costs made in the district court to await further orders or to abide the result of the suit. These rulings and orders can be regarded only as

interlocutory. They fall short of the requirements of a final order or judgment from which an appeal or error would lie had either party so desired. It can hardly be doubted, had the proceedings stopped at the point we are considering that the rights of neither party could have been regarded as having been finally adjudicated. Nothing would have been tried or determined. Say this court:

"In defining what is a final order, we approve and adopt the rule stated in the case of *Smith v. Sahler,* 1 Neb. 310, in which it is said that an order is final when it affects a substantial right and determines the action. An order is interlocutory which dissolves an injunction when the same is an incident of the action, and the substantial rights of the parties involved in the action remain undetermined; when no further action of the court is required to dispose of the cause pending, it is final. When the cause is retained for further action, as in this case, it is interlocutory." *Clark v. Fitch,* 32 Neb. 511. See also *State v. Higby,* 60 Neb. 765; *Parmele v. Schroeder,* 61 Neb. 553.

What was in fact done in the case at bar was to stay the proceedings in the legal action, and by the acquiescence of the parties, the entry of an order having for its object the transformation of the action into a suit in equity by reforming the pleadings and the further prosecution of the appellee's demand against the estate as an action in equity. No order of dismissal of the law action was entered. No order with reference to the costs incurred in the district court was made. There was in short no finality to the action taken wherein it was agreed to transform the law action into a suit in equity and to reform the pleading so as to accomplish that result. The rule invoked by appellant with respect to the vacation and modification of judgments and final orders at a subsequent term to that in which rendered, therefore, has no application to the proceedings later on taken in the case at bar. After pleadings had been filed and the action had been apparently changed to one in equity, the case was again taken up for consideration and further hearing and the court then found

and concluded that the order directing the action to proceed as a suit in equity was wrong and erroneous and held that the court had jurisdiction to hear and determine the action as one on appeal from the judgment of the county court disallowing the claim filed by appellee against the estate, and as being a legal action or a statutory proceeding.

It was further determined that a trial on the merits should be had to the court without the intervention of a jury since the parties had by agreement waived a jury. These later rulings were in legal contemplation a reversal and vacation of the rulings first made, and annulled all that had been done in the way of transforming the action pending on appeal into one in equity, and placed the parties in the same situation in which they were before such rulings were first made. What the court then did was to hear and determine the action as pending on appeal from the county court, and under and by virtue of the jurisdiction derived by such appeal, and, as thus tried and determined, the action was in all essential characteristics a legal action and therefore not appealable under the provisions of section 675 of the code. The right of appeal of the action in the instant case as finally tried and decided is governed by the rule anounced in *Whalen v. Kitchen,* 61 Neb. 329, and on the authority of that case appellant can have the judgment complained of reviewed only by proceedings in error. The appeal will have to be dismissed, which is accordingly done.

MOTION SUSTAINED.

MELVIN G. HUBBARD V. STATE OF NEBRASKA.

FILED JUNE 9, 1904. No. 13,624.

1. **New Trial:** CRIMINAL CASE: EQUITY. A court of equity will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly discovered evidence.

2. ———. The district court possesses no inherent or common law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term to that at which a verdict of guilty was found.

3. ———. The authority and jurisdiction of the district courts to grant new trials in criminal cases are derived from the statute, to which resort must be had in determining the extent of their powers regarding the subject.

4. ———. The provisions of sections 490-492 of the criminal code, regarding the granting of new trials in criminal cases on the ground of newly discovered evidence, are the exclusive source of power of the district court to grant such new trials.

5. ———. The provisions of section 318 of the code, authorizing the granting of new trials in civil actions at a subsequent term to that at which the judgment was rendered, on the ground of newly discovered evidence, are not applicable to the granting of new trials in criminal cases.

ERROR to the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

J. H. Broady and *W. L. Henderson,* for plaintiff in error.

W. D. Funk and *Frank N. Prout, Attorney General, contra.*

HOLCOMB, C. J.

The plaintiff, in the district court for Knox county, was duly prosecuted and convicted of the crime of rape upon a female under the age of consent and sentenced to imprisonment in the penitentiary for a period of 7 years. From the judgment of conviction error proceedings were prosecuted in this court, resulting in an affirmance of the judgment rendered in the trial court. *Hubbard v. State,* 65 Neb. 805.

In the same court, and at a subsequent term to that at which the conviction was had, the plaintiff commenced proceedings, by the filing of a petition and the issuance of summons, the object and purpose being to secure a new

trial on the ground of newly discovered evidence. In the main, the newly discovered evidence consisted of statements and declarations under oath since made by the prosecutrix and her father to the effect that the former was, at the time of the alleged offense, over the age of fifteen years, both having testified on the trial that she was under that age. There was also some new evidence offered tending to show that the prosecutrix was, previously to the time of the act charged, of unchaste character, which fact, in connection with the evidence as to her being over fifteen years of age, would, under the statute, if proven, establish a perfect defense to the crime of which the plaintiff was convicted. We refer to the character of the newly discovered evidence on which a new trial is sought only in a general way. Without determining its sufficiency, had the application for a new trial been seasonably presented, we shall for the present purposes assume its sufficiency, and address ourselves to a consideration and discussion of the authority and jurisdiction of the district court to grant a new trial under the application as made and at the time presented.

The criminal code, sections 490, 491, 492, contains provisions complete in all respects, authorizing and regulating new trials in criminal cases. Under these provisions, however, the application for a new trial on the ground of newly discovered evidence is required to be made at the same term at which the verdict of guilty is rendered, and on all other grounds upon which new trials may be granted at the same term and within three days of the rendition of the verdict, unless unavoidably prevented. *Ex parte Holmes,* 21 Neb. 324; *Davis v. State,* 31 Neb. 240. In the latter case, it is said:

"The provisions of the statute, limiting the time within which a motion for a new trial in a criminal case must be made, are mandatory. The court has no power to extend the time for filing such a motion beyond three days except for newly discovered evidence, unless the party 'was unavoidably prevented' from making the application in

time. If the court could grant an extension for one day, it could extend the period for one month or six months. * * * It has been held that under section 491 of the criminal code a motion for a new trial, to avail the party filing it, must be made at the term of court at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered unless unavoidably prevented." Citing *Bradshaw v. State,* 19 Neb. 644, and *Ex parte Holmes,* 21 Neb. 324.

Are the above mentioned sections of the criminal code exclusive? Counsel for plaintiff say they are not and that resort may be had to other sources of power for the authority which it is asked shall be exercised in the case at bar. Counsel say: "We shall contend that a court of general jurisdiction has inherent power to administer justice in such a case, and if need be, will apply section 318 of the code to such a case." We do not understand counsel as arguing that the general equity jurisdiction of the district courts can be invoked for the purpose of obtaining a new trial in a criminal case, nor is it believed that respectable authority can be cited in support of the proposition. The plaintiff seeks only a new trial. Not because he is, beyond peradventure of doubt, innocent and the victim of a miscarriage of justice, but on the ground that the new evidence which he has discovered raises a reasonable probability that a second trial may result in a verdict different from the first; that, with the additional evidence, a jury might entertain a reasonable doubt of his guilt of the crime charged, and therefore acquit. But a court of equity cannot try issues arising in the prosecution of a criminal indictment and the judgment therein would be unenforcible. "Equity can neither prevent the commission of crimes, interfere with their prosecution, nor pardon a punishment." Eaton, Equity Jurisprudence, 28. In *Paulson v. State,* 25 Neb. 344, the rule is stated to be: "The doctrine that courts of equity cannot grant relief against judgments, in criminal cases, has long been established and cannot be questioned." Citing *Attorney Gen-*

eral v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) *371; *Attorney General v. Cleaver,* 18 Ves., Jr. (Eng.) 211; *Mayor v. Pilkington,* 2 Atk. (Eng.) 302; 2 Story, Equity Jurisprudence (13th ed.), 893. It is not to be doubted that the rule as thus stated is the correct one, and it applies with the same force to the case at bar that it does to the case cited and in which enunciated.

We find no authority for saying the district court possesses the inherent or common law power to grant a new trial in a criminal case outside of statutory authority as justice may demand. The authorities point rather to the contrary. In *Dodge v. People,* 4 Neb. 220, it is declared in the head notes: "At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgments in such cases."

In the opinion it is said by Justice MAXWELL:

"At common law, the finding of the jury of the guilt of the accused, was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits, on the motion of the accused, even where the verdict was clearly against the weight of the evidence." Citing Hilliard, New Trials (2d ed.), 114; *Queen v. Bertrand,* 1 L. R. P. C. 520; *King v. Fowler & Sexton,* 4 Barn. & Ald. (Eng.) *273. And continues the author: "Therefore the utmost caution was required in capital trials, in favor of life, and if an irregularity materially affecting the trial occurred to the injury of the accused, the court usually represented such matter to the crown and a pardon was granted." Citing *Commonwealth v. Green,* 17 Mass. 417.

The authority of the district courts to grant new trials in criminal cases, and especially after the term at which a conviction is had, must, we think, if existent, be found in the statute, and, if not there, the remedy is an appeal to the executive, who is clothed with the pardoning power. As a reason for differentiating regarding relief against judgments in civil and in criminal cases, it may be observed

that the judgment in the civil case, when rendered, becomes fixed and a finality, except as the courts possess jurisdiction at law or in equity to grant relief against it in a proper case, while the judgment in a criminal case, in so far as its effectiveness is concerned, is always open to modification or annulment by an appropriate appeal to the pardoning power, against the exercise of which time does not run.

Do the provisions of section 318 of the code authorize the district court to grant a new trial in a criminal case, on the ground of newly discovered evidence, on an application made at a subsequent term, but within one year from the time of the rendition of the verdict? We are of the opinion that the answer must be in the negative, for two reasons. The provisions of the criminal code relating to the granting of new trials in such cases, being full and complete and covering every branch of the subject, must, we think, be taken as expressive of the legislative will of an exclusive method of procedure, and as empowering the courts to act only when the application is brought within the terms of that statute. Again, the provisions of the code, as indicated by its title, refer only to new trials in civil actions. They do not purport to bring within their scope and purview the granting of new trials in criminal cases, nor do they, as we read them, clothe the district court with additional power respecting its authority in criminal trials. Can it be said that the legislature intended that section 318 of the code should operate as an enlargement of the authority to grant new trials in prosecutions for crime, as conferred by the criminal code? To so hold is to ignore well recognized canons of construction. Each act relates to a particular subject, and as to such subject, is a special statute, complete in all respects. The criminal code limits the time for presenting an application for a new trial on the ground of newly discovered evidence to the term of court at which the conviction was had. The code in civil actions permits such application at a subsequent term, but only within one year after the

final judgment was rendered. The jurisdiction conferred by both acts is of the same kind and character, differing only in degree. The limitations differ, otherwise the power granted is identical in both statutes. It is a well settled rule of construction that special provisions in a law relating to a particular subject matter will prevail over general provisions in other statutes so far as there is a conflict. *State v. Cornell,* 53 Neb. 556; *State v. Cornell,* 54 Neb. 72. Even if the provisions of the code relating to the subject of new trials be regarded as of general application, which obviously they should not be, yet nevertheless, the special provisions of the criminal code would, under the rule above mentioned, control, and to that statute we must look for the authority and jurisdiction to try and determine the application of the plaintiff in the case at bar. The prior decisions of this court have, we think, practically disposed of the question now under consideration. These decisions, as we read and understand them, logically determine two points: *i. e.,* the statutes must be resorted to as the source of power for the granting of new trials in criminal cases, and the provisions of sections 490-492 of the criminal code are the source of such power and must be looked to exclusively for the authority to grant relief such as is sought to be obtained in the present proceedings. In *Davis v. State, supra,* it is held unequivocally that the application for a new trial must be made at the term of court at which the verdict was rendered, in accordance with the provisions of the sections of the criminal code mentioned above. It is held in *Bradshaw v. State,* 19 Neb. 644:

"The grounds upon which a new trial may be granted in a criminal case are prescribed by statute, and the motion therefor must be filed at the term at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered, unless unavoidably prevented."

MAXWELL, C. J., the author of the opinion, after speaking briefly of the limitation of time for taking criminal

cases on error to the supreme court, being the same and controlled in a measure by section 318 of the code, says:

"We find no similar provisions, however, in regard to new trials. The writer desires to add that the rule permitting a petition for a new trial to be filed at any time within one year from the rendition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circumstantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises, and the motion to dismiss must be sustained."

The rule was reannounced in *Ex parte Holmes,* 21 Neb. 324. After discussing the scope and effect of the provisions respecting the granting of new trials in criminal cases, and reaching the same conclusion as in *Bradshaw v. State, supra,* the writer of the opinion of the court observes:

"If we are correct in this, it must follow that upon the final adjournment of the term the right to make applications for new trial cases and the court can have no jurisdiction to entertain them. And in the case at bar the jurisdiction of the district court to make orders affecting the judgment having ceased, the order granting a new trial after execution of the sentence has been commenced must be held to be void." And in closing the opinion it is said: "It may be that injustice has been done to the prisoner and that the order of the district court seemed to be demanded by the highest considerations of justice and right, yet, in the absence of any authority to make such an order, one could not be made. As said in *Bradshaw v. State, supra,* the rule permitting the motion for a new trial to be filed at any time within one year from the rendition of the judgment should be extended to criminal cases where serious doubts are thrown upon the correctness of

the verdict. But such is not the law and the courts are without authority to act, except as provided by law."

In none of the prior utterances of this court, do we find warrant for adopting the construction contended for by counsel for plaintiff in error as to the applicability of section 318 of the code to the granting of new trials in criminal cases, but, on the contrary, all seem to logically force us to the conclusion that the section appealed to has no application to proceedings of the character under consideration. We have been cited to no authority warranting the construction contended for, nor is it believed that any such can be found. In Colorado the supreme court has been called upon to pass upon the question here being considered, and it is there held that the provisions of the code authorizing the vacation of judgments after the term at which rendered, and within five months, which is the limitation as to time in that jurisdiction, is confined to civil actions and has no application to criminal cases. *Klink v. People*, 16 Colo. 461. In Washington, under a statute containing provisions for granting new trials in civil actions almost identical with ours, it is held by the supreme court of that state that such provisions respecting new trials are not applicable to criminal cases. *Thompson v. Washington Territory*, 1 Wash. Ter. 547.

The reasons for the rule and the principles underlying these decisions are the same in all the cases cited, whether in this or other jurisdictions, and lead irresistibly to the conclusion that the district court was without power and authority to grant to the plaintiff in error a new trial as prayed for; and its judgment denying and dismissing the application should be, and accordingly is,

AFFIRMED.

DODGE COUNTY ET AL. V. THOMAS R. ACOM ET AL.

FILED JUNE 9, 1904. No. 11,707.

1. **County Board:** ASSESSMENTS: DRAINAGE DITCHES. The county board, in fixing the assessments to pay for the construction of a drainage ditch, under the provisions of article 1, chapter 89, Compiled Statutes, 1899, acts judicially.

2. **Review:** ERROR. From its judgment and orders in that behalf, error will lie to the district court, and the judgment of that court may be reviewed on such proceedings in this court.

3. **Findings.** On a petition in error from the judgment of the county board in such a proceeding, its findings and orders are entitled to the same weight as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it appears that the evidence is insufficient to sustain them and they are clearly wrong.

4. **Former opinion, 61 Neb. 376, adhered to.**

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Rehearing. Former opinion adhered to.*

Grant G. Martin, C. C. McNish, Frank Dolezal and *Robert J. Stinson,* for plaintiffs in error.

E. F. Gray and *George L. Loomis, contra.*

BARNES, J.

Our former opinion in this case appears in 61 Neb. 376. A rehearing was allowed, and the case was argued the second time before the commission. Since that time one or more opinions have been written, but we have been unable to approve of any of them; therefore the case is again considered by the court.

On a careful examination of the record, we are satisfied with our former opinion on the question of the jurisdiction of the county board to locate the ditch and levy the assessments, and decline to again consider that matter. However,

we will briefly review the questions relating to the method of procedure in such cases, and determine whether the assessments fixed by the county board in this case should be permitted to stand. It is claimed that in our former opinion the 98 objectors were all placed on the same footing, and, because the evidence showed that some of them were benefited by the construction of the ditch, therefore the objections of all were overruled. We do not so understand the opinion. It appears that all the objectors joined in one petition in error, and, strictly speaking, we might well have followed the rule, so often announced, that where the judgment is right as to one of the joint plaintiffs it must be sustained as to all of them. It seems, however, that the objections and assignments of error, although all of them are in the same terms, were specifically made on behalf of each of the plaintiffs in error, and were so considered on the former hearing. The board, in fixing the assessments in such cases, acts judicially, and therefore its decision may be reviewed by the district court on a petition in error; and, of course, error will lie from the decision of that court to this. This was the procedure adopted in *County of Dakota v. Cheney*, 22 Neb. 437, and in *State v. Colfax County*, 51 Neb. 28. Again, on principle, a party to a suit would be entitled to prosecute error where no appeal is provided for. The act in question provides for an appeal from certain of the findings and orders of the board, but not from the order fixing the assessments. One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for. In such error proceedings the orders of the county board will be given the same weight and conclusiveness as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it clearly appears that the evidence fails to sustain them. With this rule in view, we will now consider the contention of counsel that at least some of the objectors are entitled to have the assessments set aside, because

their lands receive no benefit from the construction and maintenance of the ditch.

It is strenuously urged that the lands lying west of the ditch, and at a higher level, are not benefited, because the natural drainage is toward the east and away from such lands. The original determination of this question is confided to the county board, and we can only consider it according to the rules which obtain in error proceedings. The judgment of the board thereon is final and conclusive, provided it is sustained by the evidence. It therefore only remains for us to ascertain whether there was sufficient competent evidence before the board in this case to justify its conclusions and sustain its judgment. It appears from the record that the general character of the land in question is flat and level, with a slight fall or natural drainage to the east; that this drainage is somewhat obstructed by lateral ridges and by ditches excavated in the construction and repair of the county roads running through it. The land is covered with swales and depressions, where the waters accumulate and slowly seep away or evaporate. It is a matter of common knowledge that drainage benefits such land, but the manner and extent of such benefits are best known and understood by engineers, who are experts in the matter of sanitation and land drainage. Therefore when the engineer in charge of such work has examined the lands, has made his estimates, and reported them to the county board, in the absence of fraud, such report ought to, and does, furnish *prima facie* evidence of the benefits which will accrue to each tract of land, and such evidence is sufficient to sustain the orders of the board, unless it is overcome by competent proof to the contrary. The engineer who had charge of the improvement in question, in addition to his findings and report, stated on the witness stand that all the lands included in his report would be benefited, and that he did not know of a foot of that land but what the water falling on it would get into the ditch. It does not necessarily follow that, because some of the land does not lie on or touch-

ing the ditch, such land will not be benefited by its construction and maintenance. Where bottom land, like that described by the evidence herein, is saturated and filled with water, it takes a long time, in the course of natural drainage, or by evaporation, for it to dry and become fit for cultivation. If, however, it is situated near a well constructed ditch, the land adjacent to and touching the ditch will quickly be drained of its excess of water, and this will enable the waters falling upon adjacent lands to speedily work their way into the ditch; and such lands, though not joining or touching the ditch, will surely be benefited thereby.

It is neither necessary nor profitable to multiply reasons, because we think the statements contained in our former opinion show conclusively that there was competent evidence sufficient to sustain the findings of the board and the assessments against all of the lands in question therein. We are firmly of the opinion that the evidence contained in the bill of exceptions, together with the report of the engineer, was amply sufficient to justify us in reinstating the order of the board. Although there may be some conflict in the testimony, under the rule above announced, the order of the board should not be set aside for that reason. It follows that our former opinion was right, and is therefore adhered to.

FORMER OPINION ADHERED TO.

SEDGWICK, J., took no part in the decision.

AUGUSTA O. KLEUTSCH ET AL. V. SECURITY MUTUAL LIFE INSURANCE COMPANY.
SECURITY MUTUAL LIFE INSURANCE COMPANY V. AUGUSTA O. KLEUTSCH ET AL.

FILED JUNE 9, 1904. Nos. 13,191, 13,321.

1. **New Trial:** DISCRETION. The matter of granting new trials is one of sound legal discretion, and, unless it appears that in granting a new trial the court has been guilty of an abuse of discretion, its order in that behalf will be affirmed.

2. ———: REVIEW. Where a second trial results in the same or a like verdict as the first one, error cannot be predicated on the order granting the new trial, because the party complaining cannot be said to have been injured thereby.

3. **Instructions.** It is reversible error for the court, in its charge to the jury, to give undue prominence to a portion of the testimony by special reference thereto—to state to the jury what weight shall be given it, and comment on its strength or probative force.

ERROR to the District court for Lancaster county: EDWARD P. HOLMES AND ALBERT J. CORNISH, JUDGES. *Order granting new trial affirmed. Judgment on second trial reversed.*

Talbot & Allen, for plaintiffs in error, Kleutsch et al.

Sawyer & Snell, contra.

BARNES, J.

Augusta O. Kleutsch, by her guardian and next friend, and Katherine Kleutsch Mills, commenced an action in the district court for Lancaster county, against the Security Mutual Life Insurance Company of Lincoln, Nebraska, on a policy issued by that company on the life of one George W. Kleutsch, the plaintiffs being the beneficiaries. The case was first tried before his honor, Judge Holmes, and a verdict returned in favor of the plaintiffs for the amount

named in the policy. This verdict was set aside and a new trial granted, and from that order the plaintiffs prosecute error. The case was again tried before his honor, Judge Cornish, and a verdict again returned for the plaintiffs. From an order denying a new trial and a judgment on the verdict, the defendant prosecutes error. These two cases have been argued and presented together, and will hereafter be treated as one action.

The plaintiffs contend that the district court erred in setting aside the first verdict and granting a new trial, and this assignment of error will be first disposed of.

It is true that error will lie in some cases from the order of the district court granting a new trial. In *Tingley v. Dolby*, 13 Neb. 371, it was held that, where there is no sufficient cause for granting a new trial, the granting of the same is clearly error, and is reviewable by the supreme court. See also *Sang v. Beers*, 20 Neb. 365; *Gibson v. Gibson*, 24 Neb. 394. But it is also true that, unless it finally disposes of the case, error will not lie from an order granting a new trial. It is likewise a well settled rule of law that the granting of a new trial is largely a matter of discretion with the trial court, and unless there appears to have been a clear abuse of a legal discretion, an order granting a new trial will not be disturbed by a court of review. The grounds on which the order complained of was made were newly discovered evidence, and the insufficiency of the evidence to sustain the verdict, and from an examination of the record of the first trial we are unable to say that the court abused its discretion in granting a new trial therein. Again, in the case at bar, it appears that the new trial resulted in the same or like verdict for the plaintiffs, therefore they were not injured by the order complained of. The error, if any, was without prejudice, and the ruling is therefore affirmed.

We come now to consider the assignments of error presented by the defendant company. It appears that on the second trial the court instructed the jury as follows:

"In this case the burden of proof is upon the plaintiffs to

establish by a preponderance of evidence the payment of the second premium on the policy in suit, which premium was due November 28, 1900, and on which a grace of 30 days in payment was allowed by the terms of the policy. To prove payment the plaintiffs produced the defendant's receipt for the same. A receipt is evidence of a high grade, to be overcome only by clear and convincing testimony. On the other hand it constitutes only *prima facie* evidence of what it contains, and it is entirely competent and proper for the defendant company to show that the payment in fact was not made, and that the receipt was issued by mistake."

Defendant contends that this instruction was erroneous; that it was wrong in this, that the court should not have told the jury that "a receipt is evidence of a high grade, to be overcome only by clear and convincing testimony." And it would seem that by this statement the court called the attention of the jury directly to this part of the testimony; in fact, singled it out, commented on its character and weight, and stated that it could only be overcome by clear and convincing evidence. This must have left the impression that the testimony of the defendant's witnesses, by which they attempted to explain the existence of the receipt, how it came to be issued, and in which they stated positively that the premium which it represented was never paid, was not evidence of such a high grade as the receipt itself, and the jury might therefore well conclude that the *prima facie* evidence of payment, to wit, the receipt itself, was not overcome thereby. Whatever may be the rule in other jurisdictions, we have frequently held that it was error to single out and to direct the attention of the jury to any particular part of the evidence, and comment on its weight or probative force. In *Smith v. Gardner*, 36 Neb. 741, the question involved was whether a certain promissory note had been paid. After the death of one of the defendants, the note was found among her papers. The plaintiff testified positively that the note had never been paid, but that the deceased had obtained possession of it

on the pretense of examining it, and thereafter fraudulently refused to surrender it. The trial court gave the following instruction: "You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment unless explained by the plaintiffs in the action." The court, speaking through POST, J., held this instruction error, and in commenting thereon said:

"We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof after maturity is *prima facie* evidence of payment, but what is denominated a presumption of payment in such a case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case. * * * Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment, but from which payment would ordinarily be the logical inference. It is therefore proper in such a case to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. It is therefore error to advise the jury that possession of a note by the maker raises a strong presumption of payment or is a strong circumstance to prove payment."

In *Smith v. Meyers,* 52 Neb. 70, which was an action for criminal conversation, the trial court refused to instruct the jury that, "if you find from the evidence that the plaintiff continued to live with his wife after he has heard of her alleged illicit connection with the defendant, the jury is justified in concluding that the plaintiff has condoned the offense of the wife, and this circumstance is entitled to great weight in considering the question of damages the plaintiff has sustained by the wrongful conduct of the defendant, provided the jury shall believe that the de-

fendant has, in fact, committed any wrong against the plaintiff."

This was assigned as error, and in determining that question the court said:

"This instruction was properly refused, because loss of comfort and society of the wife were not the only injuries for which compensatory damages could be awarded. Again, it was not the province of the court to tell the jury what circumstance was 'entitled to great weight.' It was for the jury alone to determine the weight to be given the testimony."

In *Hayden v. Frederickson,* 59 Neb. 141, the court said:

"The following instruction was given at the request of the plaintiff below: 'The court further instructs the jury that it is your duty to consider the opinion and expert evidence in this case the same as the evidence of other witnesses. However, the court further instructs you that such opinion and expert evidence is of the very lowest order, and is the least satisfactory, and the jury should not permit such opinion and expert evidence to overthrow positive and creditable evidence of creditable witnesses, who have testified in this case of their own personal knowledge.' This instruction was bad, and should not have been given. The defendants had the right to have the jury consider the testimony of their expert witnesses without any admonition from the court that 'expert evidence is of the very lowest order, and is the least satisfactory.' It was for the jury alone to determine the weight to be given such evidence."

In *Skow v. Locke,* 3 Neb. (Unof.) 176, it was said: "Complaint is next made that the trial court should not have instructed the jury as follows: 'The jury are instructed that where the testimony of witnesses is irreconcilably conflicting they should give great weight to the surrounding circumstances in determining which witness is entitled to credit.' This is complained of because it did not confine the attention of the jury to the surrounding circumstances proved at the trial, and also because it sought

to instruct them what weight to attach to these circumstances. Defendant in error replies that the instruction complained of was just as good for one party as the other and did not prejudice plaintiff in error; and also says that the cases cited by plaintiff in error are not in point on a general instruction, such as the one complained of. * * * We are constrained to think that the learned trial judge erred in expressing an opinion as to the degree of weight to be attached to the surrounding circumstances in determining the credibility of witnesses."

In *First Nat. Bank v. Lowrey*, 36 Neb. 290, where the issue was fraud, the jury was told that certain matters particularly mentioned by the instruction were strong evidence of a secret trust, and this was held prejudicial, because of the singling out of particular evidence on one side. The same rule is announced in *Gillet v. Phelps*, 12 Wis. 437; *Wilcox v. Young*, 66 Mich. 687. See also *Davis v. Lambert*, 69 Neb. 242.

It thus appears that we are fully committed to the rule that it is error to single out a particular part of the evidence and express an opinion as to its weight, its strength or its probative force. In the case at bar the only question in issue was, whether or not the premium on the policy in suit had been paid for the year 1900. The plaintiffs produced the receipt in question as their proof of such payment. The defendant produced the officers of the company who had charge of its business, as witnesses, and especially its secretary who, it was claimed, had executed and delivered the receipt, in order to explain its existence and overcome its effect. This witness testified positively that the receipt was made out by mistake and enclosed in a letter to the assured, which contained the policy as changed; that it was intended to evidence the payment of the full amount of the premium for the year 1899. In addition to such positive statement, the witness gave evidence of facts surrounding the issuance of the policy, which at least tended to corroborate his further statement that the premium for the year in question was never paid.

With the evidence in this condition, the jury were told that the receipt was a "high grade" of evidence "to be overcome only by clear and convincing testimony." It is true that this was followed by a fairly correct statement of the law; and yet we are unable to say that the jury were not influenced to the defendant's prejudice thereby. The instruction appears to fall within the rule announced in the cases above cited, and is not distinguishable from the instructions therein condemned. It thus clearly appears that the court erred in giving the instruction quoted.

As the case will be tried again, it is neither necessary nor proper for us to comment on the weight of the evidence, or discuss any of the other assignments of error contained in the record. For the giving of the instruction complained of, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HAMILTON NATIONAL BANK ET AL., APPELLEES, V. AMERICAN LOAN & TRUST COMPANY ET AL., APPELLANTS.

FILED JUNE 9, 1904. No. 13,411.

1. **Review**: PRIOR APPEAL. The supreme court ordinarily will not reexamine questions of law presented and determined on a prior appeal of the same cause.

2. ———: LAW OF THE CASE. Therefore our former holding in this case, that the American Loan & Trust Company was a banking institution, and that its stockholders have incurred the liability provided for by section 7, article 11*b* of the constitution, is adhered to.

3. ———: SECOND TRIAL. Where, on a new trial in the district court, the parties have introduced new evidence, together with that taken on the former trial, the supreme court, on a second appeal, will examine the record and evidence in order to determine controverted questions of fact.

4. **Res Judicata.** A judgment in a prior suit will not be a bar to a subsequent action unless it is shown by the record, or by clear and satisfactory evidence, that the same issue presented in the

subsequent action was involved in the prior suit, and that both actions are between the same parties or their privies.

5. ———: REJECTED PETITION. The overruling of a motion for leave to file a petition in the nature of intervention, by which it is sought to raise and litigate a question not theretofore in issue in the action, and a summary refusal to allow the petition exhibited and attached to the motion to be filed, is not *res judicata* of the matters contained in the petition, so as to prevent the parties from litigating the same questions again in a regular form of action.

6. ———: RULINGS. The same rule applies to the summary overruling of objections to the discharge of the receiver in a prior action.

7. ———: EVIDENCE. Evidence examined, and *held*, that the proceedings in the action in the circuit court of the United States, pleaded as an estoppel against the plaintiffs herein, are not a bar to the prosecution of this action.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Montgomery & Hall, for appellants.

James H. McIntosh, contra.

BARNES, J.

This action was commenced in the district court for Douglas county, by the Hamilton National Bank and certain other designated creditors of the American Loan & Trust Company, for themselves and all others similarly situated, against that corporation and its stockholders, to settle and determine the constitutional liability of said stockholders, and fix the amount due from each of them thereunder; to appoint a receiver to collect the sums so found due, and apply the fund thus realized to the payment of certain judgments which the plaintiffs had theretofore obtained against said corporation. A trial of the case resulted in a judgment for the defendants, and the plaintiffs appealed to this court where the judgment of the trial court was reversed, and it was held that the Ameri-

can Loan & Trust Company was a banking institution, and that the stockholders thereof had incurred the double liability provided for by section 7, article 11*b* of the constitution. It was further held that the defense of *res judicata* or estoppel by judgment, pleaded and relied on by the defendants, was not established, and the cause was remanded for further proceedings according to law. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67. In compliance with our mandate the cause was again tried in the district court where a decree was rendered in favor of the plaintiffs in accordance with the views expresed in our opinion. From that decree the defendants have appealed, and the case is now before us a second time.

On the second trial the defendants abandoned their contention that the insolvent corporation was not a banking institution, and offered no evidence or argument on that question, but relied alone upon their former defense of estoppel or *res judicata*. No attack having been made on that part of our former judgment declaring the American Loan & Trust Company a banking institution that question must be treated as finally settled, and therefore requires no further consideration. It follows that the only question left for our determination is whether the proceedings in the United States circuit court for the district of Nebraska in the case of *John A. Ordway v. The American Loan & Trust Company*, which are pleaded by the defendants by the way of an estoppel or former adjudication, constitute a defense to this action. Ordinarily our former judgment would likewise be decisive of that question, but appellants having introduced considerable new evidence in addition to that produced by them on the former trial, it is now contended by them that we must resolve that issue in their favor. In order to correctly determine this matter it is necessary for us to look to the record of the case in the federal court. It appears that on the 10th day of May, 1894, John A. Ordway and others, stockholders in the Loan & Trust Company, commenced an action in the circuit

court of the United States for the district of Nebraska, against that corporation as a sole defendant, to secure the appointment of a receiver to take charge of and distribute its assets and wind up its affairs; that such proceedings were had therein that one Philip Potter, also a stockholder in the corporation, was appointed receiver, and in due time its affairs were wound up, and the receiver was discharged. In that action the question of the constitutional liability of the stockholders sought to be established in this suit was not in issue, and was not incidentally involved therein, because the plaintiff and the receiver were all stockholders, and of course were not seeking to establish, but were rather trying to avoid, such liability. It seems clear that the receiver was disqualified, by reason of his personal interest, from attempting to establish or enforce such a liability against himself. It further appears however, that on the 30th day of September, 1897, the Rutland County National Bank, one of the plaintiffs herein, filed a motion in that suit for leave to petition for the removal of the then receiver, and for the appointment of a substituted receiver. The petition sought to be filed was attached to the motion, and set forth that Philip Potter was a stockholder in the American Loan & Trust Company; that the petitioner was advised that the stockholders of that corporation were liable under the constitution of this state in an amount equal to the par value of the stock held by them, and that the receiver, for the reason that he was a stockholder, was not a fit person to enforce such liability. It was prayed by the petition that the receiver be removed, and a disinterested person be appointed in his place, and that the court proceed to determine the liability of the stockholders of the corporation in accordance with the facts set forth therein. It appears from the evidence that the question of the liability of the stockholders, which is contended for by the plaintiffs in this action, was argued and discussed at least at some length on the hearing. The court, however, overruled the motion and denied the bank the right to file its said petition. So it may be

said that instead of allowing that matter to be made an issue in the action, the court refused to permit the same, or to allow the question to be litigated in that proceeding. So it cannot be claimed by the appellants that thus far the proceedings in the circuit court amounted to an adjudication of the question as to whether or not the American Loan & Trust Company was a banking institution. At the time of the filing of this motion none of the plaintiffs had presented or proved their claims against the trust company; they had not been made parties to the suit, and, aside from recognizing the proceedings by taking receiver's certificates for the amount of their claims, had made no appearance in the case. It further appears that when the question of the discharge of the receiver came up, the plaintiffs, or at least some of them, appeared, and by motion objected to his discharge, and assigned as one of the reasons therefor that the Loan & Trust Company was a banking institution, and that its stockholders had incurred the double liability sought to be enforced in this action, and again asked that the receivership be continued, and that a disinterested person be appointed receiver to take the proper proceedings to enforce such liability. It is true that on the hearing of this motion the question was again argued to some extent, but the result of the matter was that the motion was overruled; the plaintiffs were denied the right to file petitions of intervention, and thus raise and litigate that question, and the receiver was discharged. The court, however, did not dismiss the action, but continued it for the sole purpose of allowing the plaintiffs to prove and establish the amount of their claims against the corporation. In our former opinion it is said, regarding this contention, that the motion seems to have presented the single question of removing the receiver and appointing another who was not a stockholder in the corporation. It is true that the petition tendered with the motion, foreshadowed the desire to have proceedings to enforce the liability of the stockholders instituted in a proper manner by a substituted receiver. But it cannot be successfully contended

that the question of the liability of the stockholders was presented to the court for adjudication by this motion. The exact amounts due from the corporation to its various and numerous creditors were not judicially determined at that time; plaintiffs had not either proven their claims before the receiver, or obtained judgment thereon, and were not then in a position to ask the enforcement of the stockholders' liability. The ruling on this motion was simply on the question as to whether the then acting receiver should be discharged and one appointed who should in no way be disqualified, by reason of adverse interests, to enforce the stockholders' liability. The same may be said as to the objections to the final discharge of the receiver. The question of the stockholders' liability was not then in issue, but was one which might have been put in issue had the objections been sustained and leave given the plaintiffs to file their petition.

To show that the liability of the stockholders was in fact litigated, the appellants called the district judge, before whom the federal court proceedings were had, as a witness. His testimony shows that the matter of the constitutional liability of the stockholders was argued, and to some extent considered; that it was his opinion that the corporation was not a banking institution, and that such view of the case was one of the considerations which moved him to overrule the motion and objections, and deny the plaintiffs herein the right to file their petitions and litigate that question. It is also shown by his evidence that the case had been pending in his court for many years; that he desired to have an immediate and final disposition of it, and therefore overruled the motion and objections, and discharged the receiver. From a fair consideration of all of the evidence it seems clear that the proceedings in that case do not constitute a bar to the prosecution of this action. The rule is well settled that the determination of a motion or a summary application is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the more regular form of an action.

Heidel v. Benedict, 61 Minn. 170, 31 L. R. A. 422; *Kanne v. Minneapolis & St. L. R. Co.,* 33 Minn. 419; *Simson v. Hart,* 14 Johns. (N. Y.) 63, 75; 1 Freeman, Judgments (4th ed.), secs. 325, 326; 2 Black, Judgments (2d ed.), sec. 689.

It is also contended that the plaintiffs herein had the right to intervene in the circuit court and present for determination in that action the question of the stockholders' liability, and that having failed to do so, they are estopped to present the matter in this proceeding. As was said in our former opinion:

"We are not prepared to carry the rule to the extent sought by counsel. The receiver appointed by the circuit court for the trust company was authorized and directed to collect and convert into money the assets of the corporation. He took the place of the regularly constituted officers of the corporation and had the same right to proceed against any of the stockholders that the officers of the corporation had. He could have proceeded against any of the stockholders for the collection of any balance remaining due from them to the corporation on subscriptions for stock, and could have collected any assessments legally made against the stockholders. In short, it was his duty, under the directions of the court, to convert all the assets of the corporation into such form as would enable them to be used for the satisfaction of the debts existing against the corporation. The liability of the stockholders created by the constitution was not one existing in favor of the corporation, but in favor of the creditors."

It is clear that this provision of the constitution does not increase the capital stock or the financial resources of the corporation. Its only object is to provide an additional fund for the security of its creditors. This double liability is placed upon the stockholders solely for the benefit of the company's creditors. The officers and agents of the corporation can not dispose of or control the fund thus created; they can not collect it by assessment upon the shareholders, nor can they assign it to a trustee for the

benefit of creditors, even though the corporation be insolvent. 3 Thompson, Private Corporations, sec. 3560; 1 Cook, Stock, Stockholders and Corporation Law (3d ed.), sec. 218. In *Runner v. Driggins*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645, the court said:

"Certainly it cannot be asserted with any reasonable support, that this peculiar liability imposed by the statute upon those who became shareholders of a banking association organized under the existing law, is in any sense an asset, right or interest of the bank which it, as an insolvent debtor, can by its deed of assignment pass to its assignee, or in any manner vest the enforcement thereof in him. In the absence of some statutory provision conferring the right, neither the corporation nor its assignee, nor receiver can enforce such a liability as that in question."

It has been held, however, that notwithstanding this liability was a subject over which the receiver ordinarily had no jurisdiction, that a proceeding to enforce this liability might very properly be instituted by a receiver appointed by the court for that special purpose. Or that the action may be maintained by one creditor for himself and on behalf of all others. Without doubt the receiver appointed by the circuit court for the trust company, after the debts against the corporation had been judicially ascertained, and its property exhausted, could have proceeded to enforce the stockholders' liability in question herein if he had been directed to do so by the court. But in that event it would have been necessary to remove the then acting receiver and appoint a disinterested person in his stead. This the court refused to do. And it is sufficient to say that the plaintiffs herein are not estopped to litigate the questions involved in this action by reason of the proceedings in the case in the federal court.

For the foregoing reasons, the judgment of the district court is right, and is therefore

AFFIRMED.

ANN M. MARTIN, APPELLEE, V. C. C. ABBOTT ET AL., IMPLEADED WITH DON L. LOVE, INTERVENER, APPELLANT.

FILED JUNE 9, 1904. No. 13,421.

1. **Purchaser Pending Suit.** One who purchases real estate from a defendant in an action brought to recover dower, after a decree of the district court in favor of such defendant and while the case is duly pending in this court on appeal, with actual notice of the plaintiff's claim of dower, takes his title subject to such claim.
2. ———: APPEAL. In such a case, where no supersedeas bond is provided for by statute and none is filed, the decree appealed from will not protect a purchaser who takes the title with actual notice of its condition and of the pendency of the appeal.
3. **Decision Modified.** *Parker v. Courtnay*, 28 Neb. 605, is modified in so far as it seems to conflict with the opinion herein.

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

Ricketts & Ricketts, for appellant.

Strode & Strode, contra.

BARNES, J.

The appellee, Ann M. Martin, began an action in the district court for Lancaster county in 1896 to recover dower in certain real estate in said county. C. C. Abbott and Flora M. Abbott, his wife, who then were the owners of the land, were made defendants. Issues were made up and a trial had, and on the 1st day of April, 1897, the court rendered a judgment by which it was decreed that Mrs. Martin had no dower interest therein. She thereupon appealed to this court, where the judgment of the district court was reversed. After the cause had been remanded, and on the 7th day of February, 1902, the appellant, Don L. Love, filed a petition of intervention in the case alleging that he became the owner of the tract of land in which the plaintiff claimed a dower interest, by a conveyance from Abbott on the 18th day of September 1901. He

further alleged that at the time of his purchase, the appeal was pending in the supreme court; that no supersedeas bond had been filed by Mrs. Martin pending the appeal, and that the decree of the district court quieting title in Abbott was therefore in full force and effect; that he was a *bona fide* purchaser, and that he relied upon the decree, and prayed that his title be quieted as against said dower interest. Mrs. Martin answered this petition in intervention alleging the facts as to the bringing of the suit in the district court, the decree therein, her appeal to the supreme court and the finding and decree thereof, and alleging further that the intervener and defendant are estopped by the judgment and decree of the supreme court from questioning her right to dower in the premises. The cause was tried in the district court upon the petition in intervention, and the answer, where the findings and decree were in favor of Mrs. Martin and against the intervener, Love, and he appealed.

It appears that appellant purchased quite a large tract of land from Abbott, the defendant in the suit, of which the land in controversy is but a small portion. It also appears from the evidence that at the time he purchased the premises, he was aware that the title to the land in question was in litigation, and that an appeal had been taken to the supreme court from the decree refusing Mrs. Martin dower therein. Love insists that the judgment of the district court quieting the title in Abbott, and declaring Mrs. Martin foreclosed of all right, title, interest, dower or claim in and to the property, was a final judgment upon which he had a right to rely; that no supersedeas bond having been executed by her, any subsequent proceedings in the supreme court by which the decree might be reversed, modified or vacated, could not interfere with the rights which he had obtained by reason of his purchase while the decree was in full force. On the other hand, Mrs. Martin takes the position that no supersedeas bond was required or provided for by the statute; that it was unnecessary for her to give such a bond, and that consequently a purchaser

from Abbott with actual notice of the pendency of her appeal, was in no better position than Abbott himself, and took the title subject to all the contingencies which might befall him as to the vacation, modification or reversal of the decree.

It appears that this is not a case where the appellant obtained title to the real estate in question at a judicial sale, or under any order, judgment or decree of a court. The facts are that he purchased the land from a litigant, a party to a pending suit, in which the title was the matter in controversy; and, although there had been a decree rendered in the district court in favor of his grantor, yet he had full knowledge of all of the facts, and actual notice that an appeal had been taken to the supreme court, and that the case was there pending and undetermined.

An appeal to this court in a suit in equity brings the case here for trial upon the merits *de novo*. If this be true, as soon as Mrs. Martin perfected her appeal the case was then pending in this court, and it thus appears that the appellant acquired his title during the pendency of the suit.

Actual notice that there is an action pending affecting the title to real estate is as effective as the filing of the statutory notice of *lis pendens*. *Sampson v. Ohleyer*, 22 Cal. 200; *Sharp v. Lumley*, 34 Cal. 611. The purpose of the *lis pendens* statute is to make the filing of a paper with the proper officer take the place of actual notice, and the provisions of the statute do not render actual notice any less effective. When Love bought the premises pending the appeal he took the same with his eyes open; he obtained the title clothed with no greater rights than his grantor, and took the same subject to the contingency of an adverse decision in this court. In *Clark v. Charles*, 55 Neb. 202, it was held, that "A purchaser of real estate, during the pendency of a suit for its partition, from a party to such suit, is as much bound by the disposition made of the real estate by the decree rendered in such an action as his grantor."

One "who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases." 2 Black, Judgments (2d ed.), sec. 550; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 565; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559.

The case of *Hollister v. Mann*, 40 Neb. 572, throws some light on this question. That was a case where the title to real estate had been obtained from a purchaser at a judicial sale, which sale was afterwards vacated and a resale ordered. We held therein that the purchaser having bought without notice of any proceedings to set aside the sale, was protected. But it is said in the opinion:

"If there had been pending a motion to set aside the sale and confirmation before the purchaser thereunder had parted with his title, a question very different from that under consideration would have been presented. In such a case there would have been pending a motion upon consideration of which it might reasonably be anticipated that the sale and confirmation would be set aside." In the case at bar, when Love bought he might have reasonably anticipated that the decree in favor of his grantor might be set aside by this court. By the appeal the action was still pending; he bought *pendente lite*, and his title was affected with all the imperfections of the title of his grantor.

We have not overlooked the case of *Parker v. Courtnay*, 28 Neb. 605. In that case one of the litigants, in whose favor the district court had rendered a decree, sold the premises to a third party pending an appeal therefrom. Such third party sold and conveyed the premises to the appellant, Parker, who paid full value therefor, and took his title without any notice, actual or constructive, of the litigation in relation thereto, or the pendency of the appeal. It would seem, therefore, that the cases are fairly dintinguishable. But inasmuch as they seem to be in conflict, the opinion in that case is modified to conform to the rule announced herein.

The statute makes no provision for a supersedeas bond

in a case like the one at bar. And therefore we think the failure to file such a bond is no protection to one who purchases the property from a litigant with actual notice of the pendency of the suit in which the title thereto is in question. We are unwilling to sanction a rule which will permit a party to a pending action to convey the real estate which is the subject of the litigation to another, who takes it with full knowledge and actual notice of the pendency of the suit, and thus deprive the court of its power to administer justice between the parties.

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

AFFIRMED.

CASS COUNTY V. SARPY COUNTY.*

FILED JUNE 9, 1904. No. 12,183.

Counties: BRIDGE REPAIRS: ACTION: DEFENSE. When a county has refused, upon request, to participate with an adjoining county in repairing a bridge over a stream forming part of the boundary line between them, and the latter county has performed the work at its separate expense, it is not a defense to an action for contribution under the statute, that the plaintiff county, in procuring the repairs to be made, proceeded in an irregular or illegal manner with respect to obligating itself to pay for them, provided it did in fact become so obligated.

ERROR to the district court for Sarpy county: BENJAMIN S. BAKER, JUDGE. *Rehearing denied.*

Jesse L. Root, for plaintiff in error.

William R. Patrick and *Wright & Stout, contra.*

AMES, C.

This is an application for a third rehearing in this case, and is founded upon two assumptions: First, that the

* See former opinions, 63 Neb. 813; 66 Neb. 473, 476.

last opinion herein misinterprets the opinion of this court in *Clark v. County of Lancaster,* 69 Neb. 717. Such, however, is not the understanding of the author of the latter document, who actively participated in the last disposition of this case and who gave it his very careful consideration. Counsel for Sarpy county overlook the fact that although it was held in the *Clark* case that the contract with Sheeley was void because of the absence of prescribed statutory conditions authorizing its execution on the part of the county, yet it was not only held that equity would not enjoin the further prosecution of the work under the uncompleted agreement or the prosecution by the contractor of his claim for compensation for the work and materials actually done and furnished in the premises, but this court went a step further and not only stated an account between the parties respecting the transaction, but as a result thereof rendered an affirmative judgment for nearly $11,000 in favor of the contractor and against the county. It can be of no practical significance whether the claim thus upheld is denominated legal or equitable. In any view, it was held that the county was under an obligation for its payment which the court would and did enforce by its judgment, and the unavoidable inference is that if the suit in equity had not been begun and the contractor's suit at law had not been restrained but had been prosecuted to judgment for that amount, that judgment would not have been disturbed by the court because of the "illegality" of the claim upon which it would have been founded.

It is thus evident that the major premise of the opinion of November 5 last in this case is a legitimate interpretation of the opinion in the *Clark* case, and that Cass county was obligated to the contractor to pay the reasonable value of the repairs to the bridge in question. Whether such obligation was legal or equitable, we cannot think is a material question.

Secondly, it is argued that Cass county was authorized to make the repairs, if at all, merely as the agent of

Sarpy county, and that its agency was special and its authority limited by the statute, and that having exceeded its authority by making the repairs in the absence of funds of its own applicable to that purpose, it failed to bind its principal by so doing. We had supposed that our former opinions, especially the last of them, had made it sufficiently plain that in our opinion the relation of principal and agent is not analogous to a case of this kind. The powers of Cass county, in the premises, are derived directly from the statute. It was authorized to perform a specified public work, in conjunction with Sarpy county, if the latter would consent to participate therein, but without such participation, if consent should be refused. Counsel was requested and refused, and this fact, as we endeavored to explain in our last opinion, set Cass county free to act in all respects as though the bridge had lain wholly within her own territory. Whether her fiscal affairs were such as to justify the expense, or whether her county board were exceeding their authority to obligate her own taxpayers were matters which her own citizens had alone the right to inquire into. The fact that Sarpy county could not be bound for contribution unless she had been requested to participate in the creation of the work, did not confer upon her authorities the right to supervise the internal affairs of Cass county, or to complain that the officials of the latter county were conducting their business in an irregular or illegal manner.

It is therefore recommended that the motion for a rehearing be overruled.

OLDHAM, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion for a rehearing be overruled.

REHEARING DENIED.

W. S. GILLMAN, APPELLANT, V. FRANK TOPINKA ET AL., APPELLEES.

FILED JUNE 9, 1904. No. 13,480.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

R. C. Nolcman and *W. G. Simonson,* for appellant.

AMES, C.

This is an action to foreclose a real estate mortgage, begun by the usual petition and due service of process. The mortgagors made default; but another defendant, who claimed some interest in the premises—the record does not disclose what—appeared and moved to dismiss the action, for the alleged reason that the subject matter of it had been previously adjudicated between parties other than those to this suit. No answer or other pleading was filed. The court sustained the motion and rendered a judgment of dismissal. The plaintiff appeals. There is no appearance for the appellee or appellees in this court.

It is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to render a decree as prayed in the petition, unless a defense shall be established by pleadings and proofs.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to render a decree as prayed in the petition, unless a defense shall be established by pleadings and proofs.

REVERSED.

JEROME B. PARROTT V. JOHN W. MCDONALD ET AL.

FILED JUNE 9, 1904. No. 13,550.

Sheriff: ACTION FOR DAMAGES. A plaintiff can not recover damages from a sheriff, on account of negligence by which an attempted levy of a writ was rendered ineffectual, if he has contributed to the result by his own negligence or by that of an attorney whom he has employed to supervise the procedure.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Lysle I. Abbott and *Dan J. Riley,* for plaintiff in error.

Byron G. Burbank, contra.

AMES, C.

George W. Ames, formerly a resident of Omaha, became insolvent, and finally left the state somewhat suddenly on a Saturday night. He was indebted to the plaintiff Parrott in a considerable sum of money and was the owner of a large number of city lots of small individual value. Parrott employed an attorney, and, in company with him and a deputy sheriff, spent the greater part of Sunday afternoon and evening in the preparation of papers for the beginning of an attachment suit, and in making copies of the writ to be posted on the lots at the time of the levy. In the course of the evening the deputy told Parrott that the law required that the levy should be made in the presence of two residents of the county and the latter procured promises of the attendance of two such persons living in the neighborhood. The writ was procured to be issued shortly after midnight, and the plaintiff and deputy started out in a carriage to go to the lots and make the levy. The attorney was also in the carriage, but did not intend to go, and did not go, the entire distance. One of the witnesses was expected to be found, and was found, at the site of some of the lots, the other resided on the

side of the route of travel and was expected to be taken up on the way. At a proper place Parrott proposed to turn and drive along an intersecting street for this purpose, but the deputy told him it was unnecessary to do so and he desisted. Before arriving at the lots, the attorney left the carriage at his home, and did not rejoin the party that night. Levies were attempted to be made on all of the lots, and a copy of the writ was posted on each of them by the deputy in the presence of Parrott and one other person only. On the morning of the same day, which was the 6th of April, the party returned to the court house. Plaintiff did not go to the sheriff's office, but on the same day he saw his attorney and talked with him about the matter and the deputy made an appraisement of the lots, substituting another person in the place of the plaintiff as one of the appraisers, but at the suggestion of whom, if any one, is not known. The statute requires the appraisement to be made by persons witnessing the levy. The writ was not returned into court until the 18th, but it is impossible to infer that the plaintiff and his attorney were not at all times fully cognizant of all the circumstances and that the latter at least, and probably the former also, was fully aware of the irregularity, if not illegality of the procedure. On the 11th of the month, five days after the attempted levy, Ames incumbered the property for more than its value to third parties.

An order of the district court overruling a motion to dissolve the attachment because of the foregoing circumstances was reversed by this court and the lien of the attachment failed, or rather was held never to have existed. Ames was adjudged a bankrupt at his then residence in New York, the suit was dismissed and the claim of the plaintiff lost. This is a suit on the bond of the sheriff to recover damages on account of the negligence of his deputy. It is not alleged that there was any lack of good faith. The district court instructed a verdict for the defendant and the plaintiff prosecutes error. The defendant relies upon the foregoing facts, which are not in

dispute, and invokes the law of estoppel. But we are ignorant of any principle of estoppel applicable to the case and there is, apparently, some danger of that doctrine becoming debilitated from overwork.

There is no direct or positive evidence, nor anything from which it can be inferred, that the plaintiff said or did anything calculated to influence or which did influence the conduct of the deputy. If there were any malign influences at work between the two, they apparently operated in an opposite direction. But the action is for negligence, and it seems to us that the familiar rules of law relative to contributory negligence are not without pertinency. It is likely enough that the plaintiff, being "a layman," was justified in deferring to the supposed superior knowledge of the deputy, and in following the course which the latter chose to take with reference to the service of the process in his charge, but as much cannot be said for the attorney who was the agent of the plaintiff and who had general supervision of the proceedings in his behalf. He knew the course that was being adopted on the night of the levy, and knew or ought to have known on the following day what had been done in this regard and what was about to be done with reference to the appraisement and the return of the writ.

Five days intervened before the making of the voluntary incumbrances by Ames, during which the mistake might have been corrected and during which there was abundant opportunity for consultation between attorney and client, and enough had occurred to excite the vigilence of the plaintiff to take counsel concerning the contradictory advice of the deputy. As a matter of fact the question of law involved was not free from doubt, as is evidenced by the ruling of the learned district judge upon the motion to discharge the attachment, and the elaborate opinion by which it was found necessary to dispose of the inquiry in this court. On the whole, we conclude that the plaintiff and his attorney contributed at least equally with the deputy to the mistake by which the attempted

levy was rendered ineffectual, and to the omission to procure a new levy before the lots were placed beyond reach, and we recommend therefore that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

AMERICAN RADIATOR COMPANY V. THE AMERICAN BONDING & TRUST COMPANY.
N. O. NELSON MANUFACTURING COMPANY V. THE AMERICAN BONDING & TRUST COMPANY.

FILED JUNE 9, 1904. Nos. 13,522, 13,523.

1. **Contractor's Bond: CONSTRUCTION.** A bond given by a contractor for the erection of a public building in this state, conditioned for the payment of laborers and material men, derives no obligatory force from the statute as respects the latter subject, and, as to it, is to be treated, at most, as a common law obligation.

2. ———: VALIDITY. An instrument, which by recitals upon its face purports to be the joint obligation of one as principal and another as surety and to require execution by both, and which the former, in violation of the instructions and without the knowledge or subsequent ratification of the latter, delivers to the obligee without having signed it, is void.

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

S. L. Geisthardt and *Mockett & Polk*, for plaintiffs in error.

Strode & Strode, contra.

AMES, C.

These two cases being identical in all essential respects were consolidated for the purposes of briefs and argu-

ments, and were submitted together and will be decided by a single opinion.

In October, 1899, the board of public lands and buildings entered into a written contract with one C. F. Barras, by which the latter undertook the construction of a building for state purposes. The contract contained the following covenant:

"And the said first parties agree to give to the state of Nebraska a good and sufficient bond in the sum of $10,000, executed by an approved surety company, conditioned for the faithful performance of this contract, and also conditioned for the payment of all labor and material used in the erection of said building."

A statute in force at the time required the board in such cases to take from the contractor a bond conditioned "for the payment of all laborers and mechanics, for labor that shall be performed" pursuant to the contract, but made no provision concerning the material to be furnished thereunder, nor reference to any persons other than those above mentioned. Barras made a written application to the defendant in error, also defendant below, to execute a bond as required by the contract, and undertaking to indemnify it for loss or damages, if any, occasioned by so doing. The defendant, for a consideration, complied with the request, the instrument purporting by recitals upon its face to be the joint obligation of Barras as principal and the defendant as surety. The defendant, after executing it, delivered it to Barras with instructions to sign it and tender it to the board. He delivered it to the board without his signature, and the latter accepted and approved of it in that condition. Barras performed his contract, and, in the accomplishment of that end, sublet the heating and plumbing apparatus requisite therefor to one H. H. Gaffey. Gaffey performed his sub-contract and purchased the material used in so doing from the plaintiffs in error. The board accepted the building and settled with and satisfied Barras, and the latter did the like with Gaffey, but Gaffey has not paid the plaintiffs in

error or either of them. This suit is upon the bond to recover for the heating and plumbing materials above mentioned. Judgments of the district court for the defendants are sought to be reversed by these proceedings. That court found, in substance, correctly, as we think, that there is no evidence that the plaintiffs sold the material to Gaffey with especial intent or view to its use in the building in question, but that presumably the sales were made solely upon faith in and reliance upon his individual credit and responsibility, and that, at the times of the final payments by the board to Barras and by the latter to Gaffey, neither that body nor Barras had been notified or had any knowledge that there was any sum due or unpaid for the materials or any of them on account of which the actions were brought. The relevancy and materiality of these findings, as well as of the fact that the defendant was in like ignorance, are disputed, and may be doubted, except in so far as they have a bearing upon the question whether the materials were furnished with a view and purpose that they should be used in the construction of this building. And this question is itself unimportant, unless it shall be determined that the mechanics' lien law governs or in some way affects the rights of the parties. But in that case, the question having been answered in the negative, the point is not advantageous to the plaintiffs. We are, however, unable to see that the mechanics' lien law is applicable in any way to this transaction, and we will not pursue the subject further. Beyond this, these findings may be regarded as evidence of laches, but whether they are enough such to defeat an otherwise sufficient cause of action need not be decided.

If the instrument in suit is not invalid for lack of due execution, it derives no obligatory force from the statute in so far as it makes reference to material to be used in the erection of the building. *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319; *Huck & Co. v. Gaylord*, 50 Tex. 578; *McCluskey v. Cromwell*, 11 N. Y. 593; *Kieldsen v. Wilson*, 77 Mich. 45, 43 N. W. 1054.

So far as this subject matter is concerned, the bond can, we think, be regarded as no more than a common law obligation. The instrument named Barras, the contractor, as principal, and is conditioned "that if said principal shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on his part to be kept and performed according to its tenor, and shall pay for all labor and material used, then this obligation is to be null and void." It cannot be successfully disputed that Barras fulfilled this condition literally. It is disputed whether Barras's sub-contract with Gaffey was not in violation of his contract with the state, and if it was not therefore itself void and a forfeiture of the latter. But we cannot understand how that is a matter which concerns the plaintiffs in these actions. The state, at any rate, did not see fit to enforce a forfeiture, and Barras, by the means mentioned, became the owner of the materials used in constructing the building and paid for them in good faith and without knowledge or notice that the person from whom he acquired them had not done likewise; and this was all that the bond or his contract required of him.

The foregoing conclusion suffices to dispose of the case, but another question was strenuously litigated and ought, perhaps, to be decided. The bond was entrusted by the defendant to Barras as its agent, with instructions to affix to it his own signature and deliver it to the board and not to deliver it otherwise. He was an agent therefore for a special purpose and with limited authority. The limitation was expressed in the plainest and most unequivocal terms on the face of the instrument itself, which recites its execution by himself as principal and by the defendant as surety for him only. The obligee is conclusively presumed to have read the instrument and to have known that the delivery by Barras was in excess of his powers as agent. It does not appear that the defendant was ever made aware of that fact until the beginning of these actions. According to a long settled rule of this court the instrument, therefore, never became a contract

by the defendant. *United States Fidelity & Guaranty Co. v. Ridgley,* 70 Neb. 622, and cases there cited. See also *Cutler v. Roberts,* 7 Neb. 4; *Mullen v. Morris,* 43 Neb. 596; *Middleboro Nat. Bank v. Richards,* 55 Neb. 682, and the same rule applies to a statutory bond. *Bollman v. Pasewalk,* 22 Neb. 761; *Gray v. School District,* 35 Neb. 438.

It is contended that the reason for this rule fails in the case at bar because the principal had given the surety a separate contract of indemnity, but the argument is, we think, not good. The indemnity was for the giving of a bond upon which Barras should be bound as principal. Such a bond was never given. It is a matter of indifference whether the surety's reasons for requiring the principal to be bound upon the instrument were good or bad, or were for his advantage or not. It had a right to prescribe such conditions as it saw fit, and to become bound, if at all, only in such manner as it chose. The condition, however, was for its advantage. Had Barras signed the instrument, the defendant would have been entitled to have him made a party to any suit upon it, and, in case of recovery in such suit, to have his property first exhausted for the satisfaction of the judgment, and in case of payment by itself, to have the right of exoneration determined and the amount thereof ascertained without the expense, delay and uncertainty of a suit upon another contract. Note in 90 Am. St. Rep. (*Estate of Ramsay v. People*) at page 193.

For both the foregoing reasons, therefore, it is recommended that the judgments of the district court be affirmed.

LETTON and OLDHAM, C C., concur.

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

AFFIRMED.

JOHN F. NEAL ET AL. V. WILLIAM VANSICKLE ET AL.

FILED JUNE 9, 1904. No. 13,592.

1. **Drainage: CONSTITUTIONAL LAW.** The drainage and reclamation of large tracts of swamp and overflowed or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations.
2. **Assessments** upon private property to defray the cost of local improvements are void if in excess of the benefits conferred, or if levied without notice to persons upon whose property they are imposed, or affording them an opportunity to be heard.

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

Neal & Quackenbush, for plaintiffs in error.

Edgar Ferneau, contra.

AMES, C.

In 1903 the legislature passed an act, chapter 116 of the laws, sections 1-19, article IV, chapter 89 of the Compiled Statutes (Annotated Statutes, 5561-5579), the purpose of which is expressed in its title as follows:

"An act to provide for the formation of drainage districts; for the reclamation and protection of swamp, overflowed, or submerged lands; to provide for the acquirement of rights of way, easements and franchises, or other property necessary to carry out the purposes of this act; to prescribe the course of procedure to be followed to accomplish such object; and to prescribe a penalty for the wilful and malicious injury or interference with the rights or property of said districts."

Pursuant to this act, thirteen persons owning contiguous tracts of land in Nemaha and Otoe counties, aggregating nearly 4,000 acres, joined in the execution of articles of association for the creation of a drainage dis-

trict including said lands and also a large number of other tracts in said counties, the owners of which refused to join in such association. The articles thus adopted were filed as the act prescribes and presented to the district court for Nemaha county together with a prayer for an order or judgment establishing the association as a public corporation of the state in conformity to said act. It is not disputed that the entire procedure, including service of process upon the nonconsenting landowners, was in all respects such as is prescribed by sections 1 and 2 of the act for obtaining the judgment prayed for. Various objections were made by the persons refusing consent, but all united in one contention, namely, that the act mentioned is unconstitutional and void, and solely in consideration thereof the court dismissed the application. The moving parties bring the proceeding to this court by petition in error.

The record thus presents primarily and directly but two questions, namely, whether the drainage of large tracts, swamp and overflowed or submerged lands, is a subject of such public and general interest that the legislature may provide for it by general enactment, and, if so, whether such provision may include the creation of local political organizations to serve as agencies for the accomplishment of the desired end. If these questions are answered in the affirmative, it must, we think, be conceded that the method of creation or organization is a matter purely and exclusively of legislative discretion with which the courts have no power to intermeddle. It will not be contended that the courts have the right to dictate how road districts or school districts or townships or counties shall be created or organized, nor with what administrative powers or functions they shall be endowed, and, obviously, what is true of them in this respect is true of any other similar governmental agency that the legislature may see fit to call into being. The creation of such bodies is an act of sovereignty and the consent of the inhabitants, unless expressly re-

quired by constitutional enactment, has never been thought to be requisite. That the districts contemplated by the act are intended to be of a purely public and administrative character, is evident as well from the title as from the body of the law itself. Its officers are chosen by popular election and their powers, duties, compensation and terms of service are prescribed by the statute. The sources of its income are predetermined as are also the uses to which it may be applied, and the county treasurer is made the custodian of its funds, and his disbursement of them regulated as in case of other public moneys.

In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of watercourses, the building of levees and the drainage of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions. Authorities to this effect are numerous, and of the highest character, and are so easily accessible that their recapitulation here would serve no useful purpose. They may be found collected in the opinion of the supreme court of Missouri in *Mound City Land & Stock Co. v. Miller,* 170 Mo. 240, 60 L. R. A. 190, and in an elaborate marginal note. We know of no recent authority to the contrary. The decision of this court in *Jenal v. Green Island Draining Co.,* 12 Neb. 163, much relied upon by defendants in error, is not in conflict herewith. In that case, the body seeking to exercise the powers of eminent domain and of assessment and taxation, was a private corporation having officers and functionaries of its own choosing, governed by rules and regulations of its own devising, and enjoying the free disposition of its income. Such an organization is as unlike that now under discussion as can well be conceived of.

The foregoing conclusion, if sound, suffices for the disposition of the present proceeding, because nothing is here involved but the question of the validity of an organization created in the manner prescribed by the act of 1903, and the decision of that question does not preclude a future inquiry into the validity of the powers conferred, or sought to be conferred upon it, or the legality of the methods prescribed or that shall be adopted for their exercise. A municipal corporation would not cease to exist because its charter attempted to confer upon it powers of assessment or taxation, or of eminent domain or of police regulation in violation of the constitution, but its defects and insufficiencies in these respects would be supplied and remedied by subsequent legislation, and the same would be true, under like circumstances, of a drainage district. But, inasmuch as objection is made to the 12th and 14th sections of the act, and inasmuch as these sections prescribe the sole means by which the organization may obtain funds for the prosecution of its purposes, so that, if they were void, it would remain inanimate until vitalized by new legislation, it is important that they receive present consideration. Of these sections the following are copies:

"Sec. 12. As soon as said drainage district shall have been organized as aforesaid, and in order to defray the expenses for said topographical survey, the condemnation of any right of way, easement or franchise and constructing any ditch, drain, dyke or other works, maintain the same, and to pay such officers, servants and employees as are allowed compensation by law, the said board of supervisors may order the assessment of a tax, not exceeding fifty cents on each acre of land situate in said district to be benefited, Provided, that in apportioning the tax or assessment to be borne by each separate tract of land, due regard shall be had to the amount of benefit expected to accrue, proportionately, to such separate tract and shall be determined in the first instance by the drain commissioner and shall be equalized and approved by

the board of supervisors and not excluded by court, for each and every year, and until no further expenditure of money in that behalf shall be necessary; and whenever the said board of supervisors shall have, by resolution, ordered the assessment of a tax, the secretary of the board, under the seal of the district, shall cause a certified copy of said order describing each piece or parcel of land, right of way, road or property so benefited to be transmitted to the clerk of the county in which said drainage district shall be situated, and in case said drainage district shall be situated in two or more counties, then to the clerk of each county in which any portion of said district may be situate; and the said tax shall be extended on the tax book of the county on the real estate to be benefited, situated in said district, in the same manner that other taxes are now extended, in a column under the heading of 'drainage tax,' and shall be collected by the treasurer of the county in which the real estate is situated on which the tax is levied."

"Sec. 14. The board of supervisors of any such district may, with the consent of the owners of not less than two-thirds of the whole number of acres in said district, given at an election held for that purpose at a time and place in said district to be fixed by such board, and upon notice for the same length of time and under an organization of the meeting the same as provided in case of the election of supervisors, borrow and issue bonds therefor upon the credit of said district, any sum not exceeding six dollars per acre upon all lands in said district, to be used in paying for right of way and in constructing the drainage works authorized in this act; such bonds shall bear not exceeding six per cent. per annum, and shall not be sold for less than par. Upon negotiating any such loan, it shall be the duty of the board of supervisors to assess upon said district not exceeding fifty cents per acre in any one year, for the purpose of producing a sinking fund with which to pay the interest and principal of said bonds as it matures; and no such bonds shall be made to run for more than twenty years."

Objection is made to section 12, because it does not prescribe notice to the landowners of the making of the assessment or of the time and place of its equalization by the board of supervisors. We think that the weight of reason and authority is that an assessment on account of local improvements which is required to be levied in proportion to benefits, is void if the property owner is not notified or afforded an opportunity to be heard. *Stuart v. Palmer*, 74 N. Y. 183; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; 2 Cooley, Taxation (2d ed.), 653-655.

But it does not follow that the section in question is void. The board by whom the assessment is to be equalized and levied, is an elective deliberative body, to which is committed general supervision of the affairs of the district. It necessarily has implied power to prescribe rules and regulations for its own conduct and the transaction of business in its charge, in conformity to whatever rules and principles of law are applicable thereto, including provisions for notice of the time and place of their sittings as a board of equalization and the manner in which interested persons shall be afforded an opportunity to be heard. The fact that the assessment is to be made in anticipation of benefits to be dervied from a definitely described public work, thereafter to be constructed, is not in our opinion fatal, although the legislative wisdom of such a policy may be doubted.

There is more serious objection to section 14. It must be regarded as the settled law of this state that assessments to defray the cost of local improvements must not exceed the value of the benefits conferred upon the property affected. *Hanscom v. City of Omaha*, 11 Neb. 37; *Smith v. City of Omaha*, 49 Neb. 883; *Cain v. City of Omaha*, 42 Neb. 120.

The district has no power of general taxation and no means of acquiring revenues except from assessments of this character. This section purports to empower it to incur a debt equal to six dollars upon every acre of land

within its limits. It may well happen that none of the land will be benefited to exceed that sum or even by so much, and that the greater part or all of it may be benefited very much less. In order to meet its obligations in such a case it would be indispensable that some or all of the land should be taxed in excess of the limitation prescribed in the foregoing decisions. In view of this fact, the section evidently contemplates what counsel calls a "level assessment" of fifty cents an acre annually on all the lands in the district, without apportionment with respect to benefits, for the purpose of paying the principal and interest of the proposed bonds. Both such obligations and such a tax would be in excess of the powers which the legislature may constitutionally grant to the district and would be void, and we are of the opinion, therefore, that this section of the statute is also void. Besides this, the scheme proposed is an indirect method of farming out or selling the public revenues in anticipation of their collection, a practice that has been productive of intolerable evils whenever and wherever adopted. But section 14 is not an indispensable or essential feature of the act, and it may be stricken out without defeating its principal objects or seriously impairing the efficiency of the organization. Its elimination will, at most, delay somewhat the active prosecution of the intended improvements and the legislature may be applied to for additional powers if they shall be thought to be needed.

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

LETTON and OLDHAM, CC., concur.

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

REVERSED.

AACHEN & MUNICH FIRE INSURANCE COMPANY ET AL. V. CITY OF OMAHA ET AL.

FILED JUNE 9, 1904. No. 13,616.

ORIGINAL action to cancel municipal taxes. *Dismissed.*

Greene, Breckenridge & Kinsler, for plaintiffs.

C. C. Wright, contra.

AMES, C.

This is an original action in this court; the object and prayer of the petition in which is to procure a judgment of this court canceling and annulling certain alleged levies of taxes by the mayor and council of the city of Omaha against or upon certain insurance companies doing business in that city, on the ground that the asssessments upon which the levy was made are void. In our opinion, the subject matter is not within the jurisdiction of this court. By section 2, article VI of the constitution, this court is given original jurisdiction of only "cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus," etc. Evidently the word revenue as here used has no reference to the revenues of municipal corporations, but to those only which are required for the purposes of general state administration.

We recommend, therefore, that the action be dismissed at the costs of the plaintiffs.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the action be dismissed at the costs of the plaintiffs.

DISMISSED.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY v. CITY OF OMAHA ET AL.

FILED JUNE 9, 1904. No. 13,615.

ORIGINAL action to cancel municipal taxes. *Dismissed.*

John J. Sullivan, Montgomery & Hall and *Greene, Breckenridge & Kinsler,* for plaintiff.

C. C. Wright, contra.

AMES, C.

This case differs from that of *Aachen & Munich Fire Ins. Co. v. City of Omaha, ante,* p. 112, only in the circumstance that the plaintiff is a life insurance company instead of a fire insurance company. It is unnecessary to repeat our reasons for recommending that the action be dismissed at the costs of the plaintiff.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the action be dismissed at the costs of the plaintiff.

DISMISSED.

CHICAGO, BURLINGTON and QUINCY RAILROAD COMPANY v. LEWIS RUSSELL.

FILED JUNE 9, 1904. No. 13,520.

1. **Infants:** NEGLIGENCE: QUESTION FOR JURY. No arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railroad tracks. Ordinarily, such question is one of fact for the jury.

2. **Injury:** EVIDENCE. Where a freight train is stopped across a village street and sidewalk near the depot for the period of 20 or 30 minutes, and there is an opening of 2 feet between the hind car of the freight train and a stationary car on the side track, about 15 feet from the sidewalk, in an action for injuries sustained while passing through this opening, it is proper to show that plaintiff saw others crossing through this opening ahead of him, and that it was the custom of the railroad company, for a long time prior thereto, to make openings of a similar character through freight trains similarly situated, for the purpose of showing a license or invitation of the railroad company to the public to pass through this opening.

3. **Negligence:** QUESTION FOR JURY. Where the hind car of a freight train projects over and across a public crossing, and remains in this condition for a period of 20 or 30 minutes, and a large number of people are at the depot, and, necessarily, pass around the rear end of the car in going to and from the depot, it is for the jury to determine whether it is actionable negligence for the railroad company to start its train with a backward motion, without giving a special warning before doing so.

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

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

Francis Martin, O. J. Weaver, J. W. Deweese and *Frank E. Bishop,* for plaintiff in error.

E. Falloon, John Gagnon and *C. Gillespie, contra.*

OLDHAM, C.

Rulo, Richardson county, Nebraska, is a town of about 900 inhabitants, situated on the banks of the Missouri river, and traversed from east to west by the main line of the Chicago, Burlington & Quincy Railroad Company. The greater number of the inhabitants reside south of the tracks of such company. There are three side tracks and the main line track of this company on the north side and one side track called the "house track" on the south side of the depot. Third street runs north and south from the southern boundary of the town to the depot, and is one of the mainly traveled streets of the village. There is a sidewalk on the west side of this street leading immediately to the depot platform, and east of this sidewalk is the traveled street. At the time of the occurrence of the injury on which this cause of action is founded, there was a freight train consisting of an engine and ten or twelve cars in the yards at the station between 4 and 5 o'clock in the evening. This freight train, which was switching in the yards, left its caboose upon one of the tracks north of the depot and backed in on the south or "house track" for the purpose of allowing two passenger trains, each going east, to proceed on the main track. When the freight train backed in on the "house track," its hindmost car extended over and beyond the sidewalk on the west side of the street leading to the depot for a space of about fifteen feet, and the train then consisting of an engine and ten cars all coupled together completely blocked the passage both on the street and the sidewalk leading to the depot. About two feet west of the hindmost car of the freight train was a string of seven or eight cars which had been previously backed in on this "house track" to an elevator west of the sidewalk, so that when the train stood in the position it occupied at the time of the injury, there was a space of about two feet between the rear car of the freight train and the foremost car in the string of cars remaining stationary on the track. The freight train re-

mained in this position for some twenty or thirty minutes during the time the passenger trains were arriving and departing over the main line track on the north side of the depot.

Plaintiff, a boy twelve years of age, who brings this action by his next friend, came up the sidewalk on Third street from the south to go to the depot and from there to his home in the northwest portion of the village; and when he found the passage blocked on the sidewalk by the freight cars, according to the testimony offered on his behalf, he turned and went around the rear car attached to the freight train, and attempted to pass through the space between this car and the stationary car west of it, and while doing so, the freight train, in preparing to move forward to open the way, first slackened back, as one of the witnesses described it, for the purpose of loosening the brakes, and when it had done so, it caught the hand of plaintiff between the drawhead on the hindmost car of the freight train and the drawhead of the stationary car standing on the track, and inflicted a severe injury to plaintiff.

The material allegations of negligence relied upon by plaintiff in his petition are as follows:

"That plaintiff further alleges that on the 19th day of December, 1898, the said railroad company, through its agents and employees, had a freight train which stopped at said station on a side track for the purpose of allowing another train to pass. That the defendant railway company at that time, negligently, wrongfully and unlawfully obstructed the usual public travel on Third street across said line at said station for about thirty or forty minutes with its freight train of cars. That persons going to and from said station on Third street objected to the unlawful closing of Third street, upon which objection, the defendant railway company disconnected and separated two of the cars of said freight train about two feet apart at or near the sidewalk of said street leading to said station, for the purpose of allowing the foot travelers to cross the

railway track of the defendant. Between the opening of said train, the travel, on invitation of defendant, was resumed at or near said sidewalk between the cars. That during the time said two cars of said train were disconnected and separated and the travel was resumed on said sidetrack through the opening thus made, this minor plaintiff, a child of immature years, on said date and without fault on his part, started from the south side of said train on said line of travel to go home through said opening in said freight train, and while attempting to do so, the defendant railway company by its agents and employees, without warning, negligently and wrongfully and without stationing a guard at said opening to warn the public passing through the opening of said train of cars when the opening in the cars would be closed, negligently, wickedly and violently, by means of the engine attached to said train, closed the opening in said train of cars, catching the plaintiff between the drawheads of said detached portion of the train, severing the second finger of the right hand and violently throwing plaintiff to the ground."

Defendant's answer was, in substance, a general denial and a plea of contributory negligence. On the issues thus joined, there was a trial to a jury in the court below, a verdict for plaintiff for one thousand dollars, judgment on the verdict, and defendant railroad company brings error to this court.

When the case was submitted to the jury, special findings of fact were returned at defendant's request. These findings, we think, are all fully supported by the testimony, and are as follows:

"1. Did the freight cars stand over and across the sidewalk and wagon road when Lewis (plaintiff) came to them from the south? Answer, Yes.

"2. Were the cars continuous and connected to each other from the sidewalk east to the engine? Answer, Yes.

"3. Was there any open space left between the cars within the limits of the sidewalk? Answer, No.

"4. Was there any open space between the cars west of the sidewalk? Answer, Yes.

"5. If there was an open space between the cars west of the sidewalk, was it caused by space accidentally left between the cars backed in and other cars standing on the house track? Answer, Yes.

"6. If there was an open space, how far was it west of the sidewalk, and how wide was such space? Answer, 15 feet west from sidewalk. Opening two feet.

"7. Was Russell (plaintiff) hurt while trying to cross the track through such open space, or by attempting to cross under the train? Answer, Open space.

"8. Was Lewis Russell (plaintiff) negligent in attempting to cross the track while the cars were in his way? Answer, No."

There is no complaint concerning the sufficiency of the testimony to support any of these findings except the last. With reference to this finding it is urged that, under all the testimony touching on the occurrence of the injury, plaintiff was clearly guilty of contributory negligence in attempting to pass between these two cars. With this contention, however, we cannot agree. While, as we shall presently point out, there was much material evidence offered by plaintiff wrongfully excluded by the trial court, yet, under the evidence admitted, we think the question of plaintiff's negligence was properly one of fact for the jury. The evidence admitted tended to show, that there was an extraordinary crowd at the depot on the evening that the accident took place, because it was expected that the body of a soldier who had died in the Philippines would be returned to that place on one of the evening trains for burial, and on that account a large number of people congregated at the station. It was also in evidence that one other person had passed through the opening in which plaintiff was injured five or ten minutes before him, and it was undisputed that the crossing and street were blocked by the freight train for from twenty to thirty minutes before the injury was inflicted. Under this state of the

testimony, and in view of the fact that plaintiff was a boy of only twelve years of age and should not be charged with that high degree of caution which would be expected of an adult in guarding against possible accidents at a railroad crossing, we think that the special finding of the jury on this question was supported by sufficient evidence. The authorities are uniform on the proposition, that no arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railroad tracks. *Burger v. Missouri P. R. Co.*, 112 Mo. 238, 20 S. W. 439; *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912; *Eswin v. St. Louis, I. M. & S. R. Co.*, 96 Mo. 290; *Plumley v. Birge*, 124 Mass. 57; *Meibus v. Dodge*, 38 Wis. 300; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 33 N. W. 306.

But now conceding, as we do, that each of these special findings of fact are supported by competent evidence, was there and is there sufficient evidence in the record to sustain the allegation of plaintiff's petition as to defendant's negligence occasioning the injury? Conceding as we must, that defendant was negligent in obstructing the sidewalk and crossing for the length of time which it did, there is another essential link in the chain of casualty between this negligent act in obstructing the sidewalk and crossing and a legal liability for the injury inflicted; and this link is the duty, if any, defendant owed plaintiff and the public to give them a special warning before the train was started with a backward motion. There is no dispute as to the bell having been rung or the whistle blown before the train started; this warning, however, would not be sufficient notice to avoid liability for backing over a public crossing or closing an opening left near a public crossing through which the public had been invited by the action of defendant to pass. *Burger v. Missouri P. R. Co., supra; Barkley v. Missouri P. R. Co.*, 96 Mo. 367, 9 S. W. 763; *Philadelphia, B. & W. R. Co. v. Layer*, 112 Pa. St. 414, 3 Atl. 874.

But the difficulty here arises in determining whether the evidence admitted by the lower court, in the case at bar, is sufficient to show that the defendant owed the duty of a special warning to plaintiff or anyone else passing through the opening above referred to. When plaintiff testified in answer to a question of his counsel that he had seen others pass through this opening, his answer, on motion of counsel for defendant, was stricken out; plaintiff's counsel then offered to prove by plaintiff that he had seen others passing through this opening, and that for a long time it had been the custom of defendant to make an opening between its freight cars on this particular track, for the purpose of allowing the public to pass through to the depot when the freight train was on the "house track." This offer was denied, as were similar offers from other witnesses, so that the only evidence admitted touching on this question was that of plaintiff, that he himself attempted to pass through this opening when he was caught and injured, and by one other witness, who said that he had passed through the opening safely some eight or ten minutes before the injury occurred.

It is in evidence, and found to be true by the jury in their answer to the fifth special finding, that this opening was left accidentally and not intentionally by the railroad company, so that, to charge defendant with the duty of giving a special warning to the public at this place before starting the train, even with a backward motion, we think it was necessary that proof should have been admitted tending to show an invitation to travel at and through the opening sufficient to charge the defendant's agents with knowledge of such fact. That evidence of this nature is material in cases of this character, is established by an unbroken line of authorities, some of which have already been cited herein on other questions involved in this controversy, and in addition to these may be cited, *Atchison, T. & S. F. R. Co. v. Cross,* 58 Kan. 424, 49 Pac. 599; *Thurber v. Harlan B., M. & F. R. Co.,* 60 N. Y. 326.

The question then arises as to whether, notwithstanding the erroneous rulings of the district court on testimony offered by plaintiff, there is still sufficient evidence in the record to show that the railroad company should have given a special warning to passersby at the rear end of its train before starting with a backward motion. It is in evidence that there was a large crowd at the depot just before the accident occurred, and that most of the travel to the depot was over the sidewalk, which was obstructed by the train of cars. It is undisputed that one car stood over the sidewalk for about 20 or 30 minutes before the accident occurred. It is also in evidence that the mail carrier notified the conductor of the freight train, who was standing on the platform of the depot, to move the train from the crossing, so that the mail wagon could pass. It was testified by the defendant's witness Jackson, that he saw people passing through the opening between the cars before the plaintiff's injury; that defendant's brakeman, Dentner, while passing along the line of freight cars a few minutes before the injury, saw the opening between the cars.

After considerable hesitation we have concluded, from this testimony, that there is sufficient evidence in the record to charge plaintiff with the duty of giving a special warning at the rear end of its train before putting it in motion with a backward movement. It seems to us, in view of the special finding of the jury, that the case stands, so far as the liability of the defendant is concerned, as though there had been no cars on the sidetrack and defendant had merely backed one of its cars over the crossing for a distance of 15 feet and permitted it to remain there for 20 or 30 minutes when a large number of people were congregating at the depot, and necessarily passing backward and forward around the cars; and this, too, when the agents in charge of the train were in a position where they should and must have known of these surroundings. It seems clear, under the authorities heretofore cited, that defendant did owe a duty both to plaintiff and to the

public to give a warning before starting its train with a backward motion under such conditions.

We therefore conclude that the evidence is sufficient to sustain the judgment, and, finding no reversible error in the record, 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.

FARMERS & MERCHANTS INSURANCE COMPANY V. THOMAS E. MICKEL.

FILED JUNE 9, 1904. No. 13,541.

1. **Insurance:** INSURABLE INTEREST. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest. Following *German Ins. Co. v. Hyman*, 34 Neb. 704.

2. **Forfeiture:** WAIVER. When an insurance company issues its policy, and accepts and retains the premium, without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has, in fact, an insurable interest, the company will be conclusively presumed to have insured such interest, and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. Following *German Insurance & Savings Institution v. Kline*, 44 Neb. 395.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Henry W. Pennock and *Halleck F. Rose,* for plaintiff in error.

O'Neill & Gilbert, contra.

OLDHAM, C.

This is a suit on a policy of insurance. There is no disputed question of fact underlying the controversy. The plaintiff in the court below procured the policy of insurance from defendant's agent on his dwelling house and its contents. During the existence of the policy the house and contents were destroyed by fire. After proper notice of the fire to the defendant company, the loss of the household and kitchen furniture was adjusted and paid by the company, but all liability for loss on the building was denied, because the building was situated on leased premises. The insurance policy contained, among others, the following stipulation:

"If the interest of the insured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the insured, or, if the building stands on leased ground or ground not actually owned by insured in fee simple, it must be so expressed in the written portion of the policy; otherwise the policy shall be void."

The policy was issued on the oral application of plaintiff's brother, who was acting for him, and no representation of any kind was made touching the nature of the plaintiff's title to the land on which the building was situated. The undisputed evidence showed that the house destroyed by fire was worth considerably more than the amount for which it was insured. There was no claim of fraud or misrepresentation in procuring the insurance, the defendant company relying solely on the above stipulation as a warranty, which was broken on the delivery of the policy. On issues thus joined, there was a trial to

the court, without the intervention of a jury; judgment for plaintiff, and defendant brings error to this court.

The first question urged for our consideration, in a very able brief filed by the insurance company, is as to whether the plaintiff in the court below was possessed of an insurable interest in the house, situated, as it was conceded to have been, upon leased ground. It was alleged in defendant's answer, and admitted by plaintiff, that the house was built upon a substantial brick or stone foundation, that it had a cellar excavated beneath it, was attached to, and under ordinary circumstances would have passed with the realty. But conceding, for the sake of the argument, that the contention is true to this extent, it does not follow that the plaintiff had no insurable interest in the building, even if he could have been restrained from removing it in a suit by the owner of the fee, for as was said by this court in *German Ins. Co. v. Hyman*, 34 Neb 704:

"If the holder of an interest in property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest."

It being clearly apparent that plaintiff in the court below was the holder of an insurable interest in the dwelling house, we proceed to the consideration of the next contention of the insurance company, which is that the stipulation in the policy is a warranty which was broken on the delivery of the policy. The company frankly admits that to reach this conclusion we will be under the necessity of overruling our former adjudications in *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811; *Hanover Ins. Co. v. Bohn*, 48 Neb. 743, and *German Insurance & Savings Institution v. Kline*, 44 Neb. 395, because, as alleged in the brief, "they are at war with fundamental principles and should be overruled." The

doctrine which has long received the approval of this court, and which was followed by the learned trial judge in the determination of the instant case in the court below, was well stated by IRVINE, C., who spoke for the court in *German Insurance & Savings Institution v. Kline, supra*, when he said:

"When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making any inquiry as to the condition of the property or the state of the title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. The real contract of insurance is made before the policy is written, and the insured, by accepting the policy with such a condition as the one relied upon, cannot be deemed to have represented his title to be in fee simple, or not by leasehold."

While it is true that the principle underlying this doctrine has been questioned by some eminent text writers and a contrary rule is established by the adjudication of courts of last resort in some other states, yet we do not feel that it is so radically wrong in principle, or so far removed from the weight and current of authority as to justify a departure from it in the case at bar. The most that can be said of the rule which we have followed is, that it is a mooted question on which eminent authorities differ. The position of this court has the approval of courts of last resort in such states as Pennsylvania, Massachusetts, Michigan, Wisconsin and Washington, and it is a rule under which contracts of insurance have been entered into in this state between assured and insurer for almost a generation, and unless it is clearly and unmistakably wrong, it should not be departed from in the interpretation of any contract entered into during the time that it

was in force. There is nothing in this rule of construction that can work any hardship or injustice to either of the contracting parties for insurance. If the underwriters do not desire to insure buildings situated on leased premises they can exclude this class of risks entirely from their liabilities, but as long as they provide conditions in their policies, under which buildings situated on leased premises may be insured, when fully advised of the extra hazard of insuring buildings so situated, it is no hardship to require them to make an inquiry as to the nature of the title of the insured to the grounds upon which the building is located, before accepting the premium and delivering a policy of insurance covering such risk. It seems to us, that as long as insurance companies desire to avail themselves of the profits that may arise from issuing policies on buildings situated on grounds to which the assured has not the fee simple title, they should either voluntarily carry the extra hazard of such risks or use ordinary diligence in inquiring as to the character of the title before accepting the benefit of the undertaking. We believe the rule of this court announced in *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537; *Insurance Co. of North America v. Bachler*, 44 Neb. 549; *Hanover Ins. Co. v. Bohn, supra*, and *Phenix Ins. Co. v. Fuller, supra*, is sound in principle and should be adhered to.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

LINCOLN TRACTION COMPANY V. LUCY A. HELLER, ADMINISTRATRIX.*

FILED JUNE 9, 1904. No. 13,549.

1. **Negligence**: QUESTION FOR JURY. Where the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a proper question for the consideration of a jury.

2. ———: ACTION. The violation of any statutory or valid municipal regulations, established for the purpose of protecting persons or property from injury, is, of itself, sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, followed and approved.

3. **Street Railways**: LIABILITY FOR INJURIES. Street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, followed and approved.

4. ———: ———. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and, to escape liability, it must show that it has discharged the full measure of its legal duty, and was in nowise to blame for the accident, unless defendant's negligence contributed thereto. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672.

5. **Trial**: REVIEW. Action of the trial court in refusing to enter judgment on a verdict not agreed to by all of the jury is correct.

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

Clark & Allen, for plaintiff in error.

Burr & Spencer, contra.

* Rehearing allowed. See opinion, p. 134, *post.*

OLDHAM, C.

Plaintiff, as administratrix of the estate of Thomas C. Heller, sued the defendant, the Lincoln Traction Company, alleging that through the negligence of the defendant, Thomas C. Heller was killed while being transported as a passenger on the defendant's car. The negligence charged in plaintiff's petition, briefly summarized, is, that there was no conductor on the car at the time deceased was injured; that the car was overheated; that the folding gate on the left side of the front platform was open; that the car was not provided with proper guards and fenders, was not a car of the latest pattern and was being operated in violation of the provisions of a city ordinance of Lincoln; that plaintiff's intestate while riding on the car became sick with vertigo and in attempting to leave the car fell from the front platform and was killed because of the dangerous and improper construction of the car. Defendant's answer was in substance a general denial and plea of contributory negligence. On issues thus joined there was a trial to the jury and verdict for plaintiff for $700; judgment on the verdict, and defendant brings error to this court.

The first question called to our attention in the brief of defendant company is, that the evidence is not sufficient to sustain the judgment. This contention has necessitated a careful review of a lengthy bill of exceptions, in which we find competent evidence introduced by plaintiff tending to show the following material facts bearing on the cause of the injury: About 6 o'clock on the evening of the accident, plaintiff's intestate entered defendant's street car at 11th and O streets, presumably intending to go to his residence in the southeastern portion of the city. The car was being operated by a motorman, without a conductor, and fares for the passage were deposited in a box at the end of the car, arranged for that purpose. After the deceased entered the car, he sat down for a few minutes, and when the car had gone near to C and 14th streets, he arose and rang the bell, presumably to have the

car stopped for the purpose of permitting him to alight. Plaintiff's testimony tended to show the deceased had suffered from a sunstroke sometime before the injury, and that when overheated he was subject to dizziness and sometimes to vertigo. Two of the passengers on the car noticed that deceased appeared to walk unsteadily from the car when he approached the forward door. The motorman was checking the car in obedience to his signal, preparatory to stopping it at the 14th street crossing, when the accident occurred. When deceased stepped on the platform of the car, according to the evidence of those who saw the accident, he reeled and pitched forward to the ground. His clothing was caught by either the projecting hub or the oil can on the side of the car and he was drawn along the rail on the track for probably twenty feet, where he was picked up with his skull crushed and most, if not all, of his ribs broken. Plaintiff's evidence showed that the car operated by defendant company was an old horse car that had been reconstructed into an electric car, and that the car was what one of their witnesses called a "bob-tailed" car, that is, it was shorter and narrower than a modern car constructed for electric lines; that the wheels of the car projected even with and beyond the sides of the car. A platform had been built out at each end of the car when it had been reconstructed, causing the ends to project beyond the wheels under the car, which gave it an unsteady and rocking motion. It was in evidence, without dispute, that there were no fenders at the end of the car and no wire netting or other guards at the sides to protect the machinery underneath. Evidence was also introduced on the part of plaintiff, tending to show that the car was in no sense one of modern construction; but on the contrary, that it lacked many of the essential appliances for public saftely which are in common use by electric street railways at the present day. An ordinance, regulating street railways of the city of Lincoln, duly enacted in 1898, was introduced, which provided as follows:

"The cars shall be of the latest pattern and provided with suitable guards or fenders, and at night a headlight shall be fixed to the front dash, or upon the roof thereof, and each car shall be operated by a competent and skilled motorman, and also, at such times and places as shall be required for the safety of the public, and passengers upon said cars, by a conductor, and said cars shall not be propelled at a dangerous rate of speed. The motorman or conductor as the case shall be, in charge of said cars, shall at all times be prepared to make change to an amount not to exceed two dollars."

The allegations with reference to the car being overheated and with reference to defendant's negligence in not closing the gate on the front end of the car were taken from the jury by the trial court, and the cause was submitted on the question of defendant's negligence in the construction of the car, and its failure to provide a conductor as well as a motorman for its operation. In support of the allegation of the petition, as to the necessity of a conductor, evidence was introduced tending to show that the car passed along the streets on which there was a large amount of travel, and particularly so at the hour at which plaintiff's intestate entered the car. In opposition to this, defendant interposed testimony tending to show that the car in use was one of a pattern frequently used on modern electric railways, and that plaintiff was under the influence of intoxicating liquor at the time of the injury, and also that the presence or absence of a conductor on the car was in no wise connected with the injury. After a careful examination of the record in this case, we are convinced that the question as to whether or not the car in which deceased was riding was properly constructed and protected by modern fenders and guards, was, under the testimony offered, a proper question for the determination of the jury.

The question as to whether the absence of wire netting, fenders and guards around the car was the proximate or only a remote cause of the injury, was one depending on

a state of facts from which different minds might reasonably have drawn different inferences, and under a well established rule of this court a proper question to be left to the jury. *Omaha Street R. Co. v. Loehneisen,* 40 Neb. 37. It seems to us that the question of the presence or the absence of a conductor on the car at the time of the injury, is likewise one from which different inferences might have been drawn by fair and reasonable minds. This conclusion is well illustrated by the arguments of the learned counsel for the contending parties, in the case at bar. It is claimed by counsel for the company that the presence of the conductor on the car, if one had been there, could have made no difference to the protection thrown around the deceased; that if such an employee had been on the car he would have been on the rear end platform, waiting to assist passengers to alight or to enter the car when the 14th street crossing was reached, and would not have had his attention directed to deceased as a passenger needing special assistance in alighting from the car. On the contrary, it is urged by counsel for the administratrix, that if a conductor had been on the car and doing his duty he could not have helped taking notice of the fact that the deceased was a sick man, who needed assistance in alighting from the car, and that it is the duty of the street railway to protect sick and afflicted people, whom they have accepted as passengers, with such extra care as their condition reasonably requires. This illustrates how different minds may draw different conclusions from a fact which might or might not be a contributing cause to this injury. Again, the ordinance of the city, introduced in evidence, required a conductor, as well as a motorman, to be provided wherever the necessity of public travel required it, and this court has laid down the rule in *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, that "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negli-

gence, if the other elements of actionable negligence concur."

Complaint is next urged against the action of the trial court in giving paragraphs 5 and 6 of instructions of the court, on its motion, which are as follows:

"When the plaintiff has shown that the deceased met with an injury, while being transported by the defendant, and plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death. This is true unless the plaintiff's own testimony shows negligence upon the part of the deceased, contributing to his death, as approximate cause thereof.

"The burden of proof is upon the plaintiff to prove by a preponderance of the evidence the other allegations of its petition, that the deceased received injuries while being transported by the defendant company resulting in his death, that by reason thereof the plaintiff has sustained pecuniary damages as alleged in the petition, and the amount of such damage, if any."

It is urged that these instructions erroneously shifted the burden of proof on the defendant to show contributory negligence when the fact of the injury had been established. It seems to us, however, that these instructions are fully supported by the doctrine announced in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, wherein SULLIVAN, J., speaking for the court said: "It is settled by the decisions of this court that street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's

negligence; and to escape liability it must show that it has discharged the full measure of its legal duty and was in nowise to blame for the accident."

It is last urged that the district court erred in not entering judgment on the first verdict returned by a jury in this case in the lower court. The facts underlying this contention are, that when the case was first called for trial in the district court, a jury was impaneled, testimony was offered and arguments delivered by counsel and the jury instructed and directed to return a sealed verdict in the morning. When the jury returned in the morning, the foreman passed up a general verdict, with answers to special findings submitted by the court. When the verdict and answers to the special findings were read, the court asked the jury if the verdict, and special findings, "Was the verdict of you all?" One of the jurymen answered in substance that it was not his verdict and that he did not agree to the special findings. The court thereupon gave additional instructions to the jury, and directed them to return to their room for further deliberation. After lengthy deliberation the jury reported that it was unable to agree and was discharged. Later in the same term another jury was drawn, and the trial proceeded anew. Counsel for the defendant company do not cite us to any legal principle, and certainly to no section of the statute, that was violated in refusing to receive the first verdict, when one of the jurors answered that such was not his verdict. In fact the court did just what section 290 of the code directs it to do, when on a poll of the jury one member answers in the negative.

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

LETTON, C., concurs. AMES, C., not sitting.

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

AFFIRMED.

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

1. **Common Carrier: INJURY: INSTRUCTION.** In an action against a common carrier on its common law liability for negligence to recover damages for an injury causing the death of a passenger, it is error to instruct the jury that, "When the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death."

2. **Case Approved.** *Lincoln Traction Co. v. Webb*, 73 Neb. ——, approved and followed.

BARNES, J.

In this case Lucy A. Heller, as administratrix of the estate of Thomas C. Heller, deceased, recovered a judgment against the Lincoln Traction Company for alleged negligence, which it is claimed caused the death of the intestate. The company prosecuted error, and the judgment was affirmed. See opinion, *ante*, p. 127. A rehearing was ordered, and on the reargument it was strenuously contended that our opinion was wrong in approving of the 5th instruction given to the jury by the trial court, which reads as follows:

"When the plaintiff has shown that the deceased met with an injury, while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove, by a preponderance of the evidence, that it was not guilty of negligence, the proximate cause of his death. This is true unless the plaintiff's own testimony shows negligence upon the part of the deceased, contributing to his death, as approximate cause thereof."

We have just had a similar question under consideration in *Lincoln Traction Co. v. Webb*, 73 Neb. ——, where we held that a like instruction was erroneous, because it placed the burden of proof on the wrong party.

Its effect being to shift the burden of proof from the plaintiff to the defendant, and because it also announced the rule that mere proof of injury, without more, raised the presumption of negligence on the part of the defendant company.

We cannot approve of the instruction quoted, for the reasons given in our opinion in the case last above mentioned. We have carefully read the record and instructions in the instant case to see if we could, in reason, adhere to our former opinion, but we are unable to do so. The instruction complained of is at variance with what we think is the true rule in such cases, and is quite inconsistent with the other instructions given by the trial court.

It appears that the deceased arose from his seat in the defendant's car, while it was in rapid motion, and without warning went to, and fell from, the front platform of the car to the ground; that he was caught by some part of the car and dragged some distance before it could be stopped, and that he died from the injuries thus received. The negligence charged was improper construction of the car; a violation of certain city ordinances; the want or lack of a conductor; and some other matters, none of which were of such a nature as to raise the presumption of negligence without direct proof of that fact. Therefore the instruction complained of was highly prejudicial to the rights of the defendant company, and falls clearly within the rule announced in *Lincoln Traction Co. v. Webb, supra.*

Our former opinion is therefore reversed and set aside, and the judgment of the district court is also reversed and the cause remanded for a new trial.

REVERSED.

FARMERS CANAL COMPANY ET AL. V. WILLIAM FRANK ET AL.

FILED JUNE 9, 1904. No. 13,370.

1. **Irrigation: PETITION: JURISDICTION.** By the irrigation act of 1895, the right to the use of water for irrigation purposes is attached to the land to be irrigated, and an application to the state board of irrigation for a permit to appropriate water for irrigation, which does not describe the location of the proposed canal nor contain a description of the land to be irrigated thereby, is too vague and indefinite to authorize the board to act, and no jurisdiction is acquired thereby to issue any permit thereupon.
2. **State Board: POWERS: DECISIONS: COLLATERAL ATTACK.** The powers of the state board of irrigation exercised under section 16, article II, chapter 93*a* of the irrigation act of 1895, are *quasi* judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked.
3. **Abandonment of Right.** Under the facts in this case, *held*, that the right of the Farmers Canal Company and its successor, Roberts Walker, to the appropriation of water awarded under the adjudication of the state board of irrigation has not been lost by abandonment.
4. **Nonuser: LIMITATIONS.** Nonuser must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property, in order to lose the right of appropriation.
5. **Constitutional Law.** The provisions of section 28, article II, chapter 93*a*, Compiled Statutes, *held* not to be inimical to any provisions of the constitution of the state of Nebraska.

ERROR to the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Wilcox & Halligan, for plaintiffs in error.

Charles F. Manderson, W. A. Dilworth and *Wright & Stout, contra.*

LETTON, C.

On the 14th day of April, 1902, William Frank, defendant in error herein, filed in the office of the secretary

of the state board of irrigation, his application for an appropriation of 2200 cubic feet per second of time of the water of the North Platte river for irrigating and other beneficial purposes, proposing to construct a canal about 150 miles in length and to irrigate about 150,000 acres of land. The point of diversion of the water and the line of the proposed canal being substantially the same as that of a canal, the construction of which had been begun by the Farmers Canal Company in March, 1888, but which had only been partially constructed to a distance of about 20 miles from the point of diversion and was only in actual use to such an extent as to water about 5,000 acres of land. In the application filed by Frank with the state board of irrigation, which application is made out upon a printed form furnished by the state board, the location of the proposed canal and the description of the lands which it is proposed to irrigate are set forth as follows:

"7th. That said ditch or canal will be *about 150 miles* in length, and pass through the following sections of land, as shown on the accompanying township plats, viz.: See plat herewith. (Describe each section through which the canal passes, stating township and range.)

"11th. That the proposed ditch or canal is to be built with the intention of supplying water to irrigate the following sections or quarter-sections of land, viz.: *All lands between the line of proposed canal and North Platte river, as shown by the accompanying plats* (give sections and quarter sections, stating number, township and range), amounting in all to *about 150,000* acres. (Total number of acres.)" The words in italics are written, the others are printed in the blank form.

Accompanying this application were four blank township plats, but these plats are totally devoid of any indication as to what township, county or state they are intended to represent, and contain no line, mark or tracing to indicate the location of any proposed canal, or anything to show the lands it is intended to irrigate. In fact they are an absolute nullity so far as giving any information

in regard to the location of the proposed canal or the description of the land sought to be reclaimed is concerned.

There are two conflicting ideas upon which the laws of the several states and territories relating to the use of waters for the purposes of irrigation are based. One is that any person or individual may appropriate surplus waters which have not theretofore been appropriated, and may use the same to irrigate such lands as he may see fit. This was the basis of our irrigation law in this state until the passage of the act of 1895. Laws 1895, ch. 69. This system tends to breed monopolies, and to lead to antagonisms, strife and dissension. Since the land in arid regions is useless for the purpose of agriculture unless water is applied to it, this doctrine makes the landowner dependent upon the owner of the water right and leads to gross exactions and abuses. The doctrine of private ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. It has proved productive of endless controversies and abuses, and has given rise to interminable litigation.

The other doctrine is that the right to the use of water should never be separated from the land to which it is to be applied. "Where this doctrine prevails, canals and ditches become like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, but having no ownership in the property distributed." Report on irrigation in California, United States Agricultural Department, 1901. It is unnecessary to set forth here the advantages of this idea. By the adoption of the irrigation law of 1895, which was modeled upon the Wyoming law, this state adopted the latter policy, by which the right to use the water shall not be granted separate from the land to which it is to be applied, and that the right to use the water should attach to the land, and, when the land is sold, be sold with it; and, for this reason, the statute is

explicit in requiring a description of the land to be irrigated and the amount thereof to be set forth in the application.

Section 28, article II, chapter 93*a*, Compiled Statutes (Annotated Statutes, 6782), provides:

"Every person, association or corporation hereafter intending to appropriate any of the public waters of the state of Nebraska shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the state board for a permit to make such appropriation. Said application shall set forth the name and post office address of the applicant, the source from which said appropriation shall be made, the amount thereof as near as may be, location of any proposed work in connection therewith, the time required for their completion, said time to embrace the period required for the construction of the ditches thereon and the time at which the application of the water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of the work when prosecuted with diligence, the purpose for which water is to be supplied, and if for irrigation *a description of the land to be irrigated thereby, and the amount thereof,* and any additional facts which may be required by the state board. On receipt of this application, which shall be *of a form prescribed by the state board* and to be furnished by the secretary without cost to the applicant, it shall be the duty of the state board through its secretary, to make a record of the receipt of said application and cause the same to be recorded in its office, and to make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the state board to determine the nature and amount of the proposed appropriation. If such an examination shows the application in any way defective it shall be the duty of the state board to return the same to the applicant for correction. * * * Provided, however, That the state board, through its secre-

tary, may, upon examination of such application, endorse it approved for a less amount of water than the amount of water stated in the application, or *for a less amount of land* or for a less period of time for perfecting the proposed appropriation than that named in the application." (The italics are not in the statute but are inserted by the writer.)

The law further requires, upon the approval and allowance of an application, that the applicant shall file in the office of the state board, within 6 months thereafter, a plat which shall show, among other things, *the legal subdivisions of the land* upon which the water appropriated is to be applied. Further than this the approval of the application by the secretary may be for a *less amount of land* or less amount of water than asked for in the application; and the final certificate of appropriation provided for by section 21, article II, chapter 93*a*, Compiled Statutes (Annotated Statutes, 6775), is required to set forth a *description of the land to which the water is to be applied* and the amount thereof.

It will be observed that the application filed by Frank falls far short of complying with the requirements of the statute. It further disregards entirely the requests set forth in the blank form upon which the application is made. In the form furnished by the board, the applicant is requested to "describe each section through which the canal passes, stating township and range," and is further requested to give "sections and quarter-sections, stating number, township and range and total number of acres" of the sections or quarter-sections of land which it is intended that the proposed canal shall supply water to irrigate. None of this is done in Frank's application.

At the hearing before the board upon this application, protests were filed by the Farmers Canal Company and Roberts Walker who claimed to have a prior appropriation of water to irrigate the lands for a distance of 80 miles under the proposed canal; and a petition in intervention was filed by the Farmers Irrigation District, which had

filed a subsequent application for an appropriation of water covering a part of the same territory. At the hearing, an opinion and order was rendered by the board of irrigation in favor of William Frank, Roberts Walker and the Farmers Canal Company, which confirmed the rights of the Farmers Canal Company and Roberts Walker to an appropriation of water as provided in an order of the board of irrigation made January 9, 1897; granted the application of William Frank, subject to the rights of the Farmers Canal Company, under the aforesaid order, and dismissed application numbered 675 filed by the Farmers Irrigation District, for the reason that the lands described in said application were covered by the canal of the Farmers Canal Company and by the application filed by William Frank prior to the filing of the application of the Farmers Irrigation District.

From this judgment of the board an appeal was taken to the district court for Scott's Bluff county. Issues were made up and a trial had before said district court, whereupon the order of the state board of irrigation was reversed and modified so that Roberts Walker was allowed an appropriation of water to irrigate the lands lying under the completed portion of the canal of the Farmers Canal Company; the application of William Frank was allowed and approved for all the lands lying under the contemplated canal east and beyond the constructed portion of the Farmers Canal Company, subject to the rights of the Farmers Canal Company, and the application of the Farmers Irrigation District was denied and dismissed. From this judgment of the district court, the Farmers Irrigation District, Roberts Walker and the Farmers Canal Company have prosecuted error proceedings to this court.

The application of William Frank failing to describe specifically the course of his intended canal, and to identify the specific tracts of land to which it is his intention to apply the water which he seeks to appropriate, does not state sufficient facts to justify the state board of irriga-

tion to allow him any appropriation of water for irrigation purposes. The order of the state board granting his application is equally vague and indefinite, and fails to describe the lands to which the beneficial use of the water is to be applied, and so likewise is the judgment of the district court. Indeed, neither of these attempted adjudications could well be otherwise, since there is absolutely nothing in the application of William Frank, and nothing in the evidence, either before the state board of irrigation or the district court, which attempts to describe definitely and specifically a single tract of land which it is intended to irrigate. This being the case, neither the state board of irrigation nor the district court ever acquired jurisdiction to grant Frank's application. For these reasons, the application of William Frank should have been dismissed, and, since there has been a lack of jurisdiction to act since the first filing of the petition, we recommend that the judgment of the district court as to William Frank be reversed, but that, since his application was made in good faith, he be permitted to amend the same, if he so desire, without losing his right of priority.

There remains to be considered the issues raised between the Farmers Canal Company and Roberts Walker, on the one hand, and the Farmers Irrigation District, upon the other, and this will necessitate an extended examination of the facts as to the respective interests of these parties.

On the 16th day of September, 1887, the Farmers Canal Company, a Nebraska corporation, organized for the purpose of constructing an irrigating canal in Scott's Bluff and Cheyenne counties, hereinafter styled the company, posted notice of appropriation for the diversion of water from the North Platte river at a certain point in Scott's Bluff county, to the extent of 1142 6-7 cubic feet per second of time, to be used for the purposes of irrigation. The notice was duly filed for record in the office of the county clerk of Cheyenne county, at Sidney, Nebraska; Scott's Bluff county at that time being a part of Cheyenne county. On November 17, 1890, the same company posted notice of

additional appropriation of 200,000 cubic inches per second of time at the same point of diversion as the first notice, and on the same day filed the same with the county clerk of Scott's Bluff county with proof of the posting, and on March 12, 1895, the company posted another notice of appropriation at the same point of diversion, increasing the amount to be diverted to 225,000 cubic inches per second of time, and filed the same with the county clerk of Scott's Bluff county. All of said appropriations being for the purpose of irrigating lands lying under the proposed canal of the Farmers Canal Company. Under the plan of the company it was proposed to construct a canal 80 miles in length, of sufficient capacity to irrigate 80,000 acres of land. All of these notices were filed and appropriations made before the taking effect of the present irrigation law, which was passed and took effect April 9, 1895. The company began work upon its canal about the 1st day of March, 1888, and continued to work upon the same until about November 1, 1893. It erected a substantial headgate of sufficient size and capacity to irrigate the lands for which its appropriations were made, and expended in the erection of the headgate and on the construction of the ditch over $80,000. The canal was excavated the full width for about the distance of a mile from the headgate, and for the distance of 19 miles farther at about half the full size. Below the end of the excavated portion on the line of the survey, it excavated two detached portions, together making about two miles of ditch. All of this work was done before the 1st of November, 1893, and since that time no actual construction work has been done upon the canal, but from time to time certain repair work has been done, either by the company itself, or by the owners or occupiers of lands near the portion of the ditch in which water was running, at the procurement or by the consent of the company. The company has issued permanent water rights to cover about 2,000 acres upon lands lying between the headgate of the canal and the end of the 21 miles constructed. The whole amount of lands irrigable by the company from

the canal actually dug amounts to not more than 5,000 acres, but, on acount of a washout in the canal, it has been impossible to use water on all of said land. After the passage of the present irrigation law creating a state board of irrigation and providing for the determinination of the priorities of right to use the public waters of the state by the state board, the company filed its claim for appropriation in conformity with the notices of appropriation, and, on the 9th day of January, 1897, the secretary of the state board of irrigation adjudicated the claim and allowed the same.

The company in order to procure money for the carrying out of its enterprise issued bonds and gave a mortgage to secure the same, and, being unable to meet the payment upon said bonds, the bond holders, in 1902, foreclosed their lien in the United States circuit court, and the property was sold and conveyed to the appellant, Roberts Walker, who is now the owner of the franchise and property of the company.

After the passage of the act allowing the organization of irrigation districts, an irrigation district known as the Farmers Irrigation District was organized for the purpose of irrigating the land lying under the line of the Farmers Canal Company's proposed canal, and bonds of the district were voted to the amount of $400,000 with the purpose of raising money with which to purchase the rights of the Farmers Canal Company, and to complete the canal. The district, however, was unable to dispose of its bonds, and, while the negotiations between the company and the Farmers Irrigation District were pending, William Frank, defendant in error, filed his application. After the filing of the application of William Frank, and on the —— day of June, 1902, the Farmers Irrigation District filed with the secretary of the state board of irrigation its application for water to irrigate the lands within said district. The lands proposed to be irrigated in said application being about 50,000 acres lying below that portion of the canal of the Farmers Canal Company actually in operation, and

covering a portion of the same territory embraced in the application of William Frank, the line of the proposed canal being substantially the same as that of the Farmers Canal Company and of the proposed canal of William Frank.

The Farmers Canal Company contends that by the adjudication made in 1897, allowing its claim for the appropriation of water for a canal 80 miles long and allowing 1142 6-7 cubic feet per second, it became vested with the absolute right to an appropriation of water to that extent for the purposes of irrigation, and that it has a vested right therein which it has never abandoned nor lost by nonuser.

The Farmers Irrigation District asserts on the other hand, that the allowance of the claim to the Farmers Canal Company, in 1897, did not rise to the dignity of an adjudication of a perfected appropriation, but was merely an administrative order or allowance, only to be perfected by the actual application of the water to the land. It further contends that, even if the allowance of the state board constituted an adjudication, the Farmers Canal Company has lost all its rights beyond the line of the canal actually constructed and operated, by reason of abandonment and nonuser. It further contends that, under the constitution, an exclusive appropriation of water cannot be made so as to prevent the district from also making an application for water to irrigate the land within the district.

The first question which it is necessary to determine under these issues, is as to the status of the Farmers Canal Company and Roberts Walker with reference to the adjudication of priority of appropriation made by the state board of irrigation on the 9th day of January, 1897. This will involve a construction of certain sections of the act of 1895, found in sections 1-64, article II, chapter 93*a*, Compiled Statutes (Annotated Statutes, 6755-6886), being the general law relating to irrigation, and, in order to have a proper consideration of the meaning and intent of the legislature in the enactment of such provisions, it will be

necessary to consider the whole course of legislation in this state upon this subject, and the construction given to similar statutory and constitutional provisions by the courts of other states and territories. On February 19, 1877, an act was approved providing for the organization of corporations for the purpose of constructing and operating irrigation canals, and giving such corporations the necessary powers to carry out the purpose of their organization. Laws 1877, p. 168. In 1889 another irrigation law was passed, repealing the law of 1877, but covering the subject more extensively and supplying the deficiencies which experience had shown to exist in the operation of the former law. Laws 1889, ch. 68. It is a matter of public knowledge that, after the passage of these acts, many irrigation enterprises were commenced in the western part of the state, both by private individuals and corporations. These interests became so extensive, and the subject of irrigation of such economic importance, that, in 1895, new and comprehensive laws were enacted covering the entire subject of the application of the waters of the state by private individuals and corporations to a beneficial use, creating a complete and harmonious system for the determination of the respective rights of persons interested, and providing an orderly method of administration. At the time of the passage of the act of 1895 many persons and corporations had acquired vested rights in the appropriation of water for irrigation purposes. It was not the intention of the legislature to create confusion and stir up strife, controversy and litigation over the water rights theretofore acquired, but it is manifest from a consideration of the law of 1895 that, among the main inducements to its passage, were the features requiring the adjudication of the priorities of appropriation upon all the streams of the state up to the time of the passage of the act, and the creation of a state board of irrigation whose records would evidence the priorities of title to the appropriation of water in such a public manner that no one might be misled. Publicity of

right and stability of title were matters which the legislature evidently intended to establish so far as lay within its power, and the provisions of the law under consideration seem admirably fitted to accomplish this object.

The first 27 sections of the act apply mainly to rights already vested, they provide for a division of the state of Nebraska into two water divisions and fix their boundaries, and for a state board of irrigation consisting of the governor, attorney general and the commissioner of public lands and buildings.

Section 16 is as follows: "It shall be the duty of the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state, which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated. The method of determining the priority and amount of appropriation shall be determined by the said state board, which at its first meeting shall designate the streams to be first adjudicated."

Section 21 provides for the issuance of a certificate by the state board to the appropriators, setting forth the name and post office address of the appropriator, the priority number of each appropriation, the amount of water appropriated, the amount of prior appropriation and a description of the land to which the water is to be applied and the amount thereof.

Sections 22 to 25, inclusive, provide for appeals to the district court by any persons feeling themselves aggrieved by the determination of the state board.

Sections 26 and 27 provide for the transmission by the county clerk of each county of a transcript of all claims to the appropriation of water then on file in their respective offices to the secretary of the state board, and for the classification and arrangement of said claims by him.

It will be apparent from an examination of these provisions that it was the intent and purpose of the legislature

thereby to provide a tribunal and a method of procedure whereby the respective rights of priority of appropriation of all persons should be finally fixed, settled and determined in such a manner as to create a public record of all rights to the use of the waters of the state by appropriators up to the time of the act, and from which other persons desiring to appropriate water could learn the exact status of the title to the water in each stream.

Sections 28 to 31, inclusive, institute a new method of procuring appropriations of water up to that time not appropriated. The old method, by posting notices and filing copies of the same in the office of the county clerk, was done away with, and in its stead it was provided that an application should be made to the state board for a permit to make the appropriation. They provide for action upon this application by the state board, and for an appeal from the action of the board by any applicant feeling himself aggrieved; and also provide for a certificate that the application has been perfected in accordance with law in like manner as in the preceding sections.

Sections 32 to 64, inclusive, being the remainder of the act, consist mainly of general provisions creating a system of supervision of the use of the waters of the state, granting the right of condemnation to appropriators, providing penalties against the wrongful diversion of water, regulating the rights and duties of ditch owners with reference to public highways, and providing for many other matters of administrative detail which are not of importance in the consideration of this case.

It appears that after the organization of the state board of irrigation, in pursuance of the duties imposed upon it by section 16 of the act, the board proceeded to determine the priorities of right to use the waters of the North Platte river, after giving notice to persons interested. That, after the hearing upon the claim of the Farmers Canal Company, the state board, by its secretary and state engineer, entered the following order: "The claim set forth in this record is for a right to the use of a portion of the

water of the North Platte river for irrigation purposes, and is made by virtue of posting three notices of appropriation at the proposed point of diversion, No. 1 being posted on the 16th day of September, 1887, and filed for record in the office of the county clerk of Cheyenne county, at Sidney, Nebraska, on the 19th day of September of the same year. No. 14 was posted on the 17th day of November, 1890, and filed for record the same day. No. 43 was posted on the 12th day of March, 1895, and filed for record in the office of the county clerk on the 14th day of March, 1895, and commencing the work of excavation and construction upon a proposed ditch or canal on or about the 1st day of March, 1888.

"It appears from the record in the matter of this claim:

"1st. That the name adopted for the ditch or canal is the 'Farmers Canal.'

"2d. That the source of the appropriation is the North Platte river.

"3d. That the object of the appropriation is the irrigation of lands.

"4th. That the work of actual construction was begun on or about the 1st day of March, 1888.

"5th. That the priority of the appropriation dates from the 16th day of September, 1887, when the first notice of appropriation was posted at the proposed point of diversion.

"6th. (*a*) That the priority number of the appropriation for the water-shed is No. ...., Water Division No. 1-A: (*b*) That the priority number of the appropriation for the stream is No. ...., North Platte river.

"7th. That the ditch, or canal, heads on the north bank of the stream in the S.W. ¼ of the S.E. ¼ of Sec. 3, T. 23, N. R. 58, west of the 6th P. M., near the west line of Sec. 10, T. 23, R. 58.

"8th. That said ditch is about 81 miles in length and passes through the following described lands, viz.: Beginning at a point on the north side of the North Platte river, near where the river intersects the west line of sec.

10 in T. 23, R. 58, in Scott's Bluff county, Nebraska, on the N.W. ¼ N.E. ¼ of said section 10, thence through and over the E. ½ N.E. ¼ N.E. ¼ S.E. ¼ of said section 10 * * * (and describing about 140 other tracts). * * *

"9th. That said ditch or canal covers and reclaims the following described lands, viz.: a part of Lot 1, T. 22, R. 58; parts of Lots 1 and 2, in Sec. 11: Lots 1 and 2 and a part of N.E. ¼ N.E. ¼, Sec. 14 * * * (and further descriptions of land covering over three typewritten pages of legal cap) * * * amounting in all to about 80,000 acres.

"The claim is allowed subject to the following limitations and conditions, viz.:

"1st. The water appropriated shall be used for the purpose of irrigation.

"2d. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

"3d. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths (1142 6-7) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth (1-70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904."

This order and allowance is the adjudication under which the Farmers Canal Company and Roberts Walker claim.

In the larger number of states and territories within the arid section of this country, the usual method of obtaining the right to an appropriation of water for irrigating purposes is by means of posting a notice at the point of diversion, filing a copy of such notice in the office of the county clerk of the county in which the point of diversion lies,

diverting the water and actually applying it to the beneficial use for which it is sought to be appropriated, at the place designated in the notice. The experience of many years shows that this method often led to strife, contention and sometimes to bloodshed, on account of the lack of a clear record of the rights of claimants. In order to remove this state of affairs, in Colorado and Washington, the legislature vested the district court with special jurisdiction, for the purpose of determining the respective priorities of rival appropriators of water, by a special proceeding somewhat in the nature of a bill of peace, bringing in all parties interested and adjudicating their rights and priorities. This method proved to be a great improvement upon the loose methods theretofore existing, and has proved exceedingly satisfactory to the people of these states.

Following this idea and improving upon it, the state of Wyoming, having experienced the same difficulties with reference to controversies between water claimants, in its constitution established a new system with reference to the matter of irrigation, and adopted an entirely new scheme for the adjudication of rights, the appropriation of water, and for the administration of rights to the public waters of the state. An act was afterwards passed by the legislature of that state to carry out these constitutional provisions. In this act there was created for the first time by any of the states or territories a state board of control, which was given *quasi* judicial powers in regard to the ascertainment and adjudication of the rights of appropriators of the public waters of the state which had vested up to that time, and to which board was further committed the allowance of claims to, and the general regulation of, all rights to water thereafter. The Nebraska statute of 1895 is substantially an adoption of the Wyoming system. While the state board of irrigation is differently constituted from the board of control in Wyoming, its powers and functions are the same, and the provisions of the section by which the board was directed to begin the deter-

mination of the priorities of right to use the waters of the state are identical with those in the Wyoming act.

In *Farm Investment Co. v. Carpenter,* 9 Wyo. 110, 50 L. R. A. 747, 87 Am. St. Rep. 918, the constitutionality of this act was upheld, and, among other matters, the court held that the proceeding to determine priorities is not a part of the process by which an individual appropriation is completed, but the proceeding is instituted by the board in an official capacity, representing the public for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters. A part of the object also is public recognition of an appropriation previously made and the issuance of documentary evidence of title. In *Crawford Co. v. Hathaway,* 67 Neb. 325, the same attack was made upon the constitutionality of the Nebraska law, and this court reached the same conclusion as the Wyoming court. It would seem that an adjudication made by the state board of irrigation upon a matter properly before it, and within the scope of its powers and duties, is final, unless appealed from to the district court. Its action stands upon a somewhat similar footing to that of county boards in passing upon claims against their respective counties. It has been held repeatedly that when a county board acts upon claims against the county, the amount of which is not specially fixed by the statute, its action is judicial in its nature and, unless appealed from, is final. Indeed, if the determinations of the state board of irrigation with reference to the priorities of appropriators are not of this final character, of what benefit or use would they be? For the board to attempt to decide a controversy or to establish a right, when, in fact, after it had acted, no right was established or controversy settled, would be a vain thing. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch,* 67 Neb. 377.

In Colorado the findings and adjudications of the district

court, while acting as a special tribunal to determine priorities and amounts of appropriation, are *res judicata. New Mercer Ditch Co. v. Armstrong,* 21 Colo. 357; *Platte Valley Irrigation Co. v. Central Trust Co.,* 32 Colo. 102. The proceedings before the board of control in Wyoming and the state board of irrigation in Nebraska, in determining priorities, are essentially the same as the proceedings before the district court in Colorado, when it sits for the purpose of adjudicating priorities, and their findings and adjudications are of like weight.

While the transcript of the proceedings before the state board, by which the priorities of appropriation of the Farmers Canal Company were determined in 1897, does not set forth in full the three notices of appropriation which were posted under the former law, nor fully set forth the original claim which was filed before the board, still the adjudication based upon the notices and the prior appropriation describes specifically the lands through which the ditch passes, and sets forth definitely the government subdivisions which the ditch or canal covers and reclaims, and there is no provision in the statute requiring any formal application to be made in such proceedings, or anything more than the copy of notices filed in his office to be furnished by the county clerk. A very large portion of the land covered and reclaimed is described as "a part of" a government subdivision. While this is somewhat indefinite, it will be taken to mean all that part of the government subdivision described which is capable of irrigation, and the description is not so indefinite, when it is taken and considered in connection with the actual construction of the canal and laterals, as to be incapable of identification.

In the order adjudicating the priority of appropriation of the Farmers Canal Company, the state board fixed a limit of time for the completion of the application of water to the beneficial use proposed. Since the board was acting, not upon an application for a permit to appropriate water under the provisions of sections 28 to 31, inclusive, of

the act, but derived its power to adjudicate priorities from sections 15 to 27, inclusive, and was acting under the provisions of those sections at that time, it had no authority in such a proceeding to make such order. Its sole duty was to ascertain and determine existing rights, not to grant new and conditional privileges in that proceeding, without an application for a permit. Its order limiting time, therefore, was null and void.

Though the board in adjudicating the claim of the Farmers Canal Company, in all probability, acted erroneously, and made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, still, it had jurisdiction to hear and determine, and no appeal having been taken from its determination, its order allowing the appropriation is final and cannot be attacked collaterally. This conclusion is not in conflict with the principle laid down by the learned district court, that an appropriation is not complete unless the water is applied to a beneficial use within a reasonable time. All applicants for a new appropriation made after the passage of the act under the regulations laid down therein must comply with this rule, and complete the appropriation by applying the water to the land before their appropriation is complete, their right is vested, and they are entitled to a certificate.

The next question presented is, whether the Farmers Canal Company has lost its right to the appropriation by abandonment. There can be no question from the evidence that the company never actually gave up the possession of the ditch so far as it was actually constructed, nor had it or its successor Roberts Walker ever given up the idea or intention of completing the canal to the full extent of its appropriation. Abandonment is a mixed question of law and fact. There must be both a relinquishment of possession or nonuser of the right granted, together with the intention to abandon. Mr. Long in his work on Irrigation (sec. 85) says: "Abandonment is a matter of both intention and act, and consists in the

relinquishment of possession without any present intention to repossess. Mere nonuser is not in itself an abandonment, though, if continued for a sufficient length of time, it may result in a forfeiture of the water right by prescription."

Whether an act of a party constitutes an abandonment of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it. But mere absence from and nonuser of the property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. *Derry v. Ross,* 5 Colo. 295; *Sieber v. Frink,* 7 Colo. 148, 2 Pac. 901; *Richardson v. McNulty,* 24 Cal. 339; *Judson v. Malloy,* 40 Cal. 299; *Mallett v. Uncle Sam Gold & Silver Mining Co.,* 1 Nev. 188; *Putnam v. Curtis,* 7 Colo. App. 437, 43 Pac. 1056.

The question is to be determined by the evidence in each particular case, and, in the case at bar, we hold that the evidence is not sufficient to show that the Farmers Canal Company or Roberts Walker ever abandoned its appropriation for the uncompleted portion of the canal. As to nonuser, we are of the opinion that, unless the nonuser has existed for a length of time requisite to obtain a title by prescription under the laws of the state, it will not be sufficient to divest the right of an appropriator of public waters. Mr. Long says, in section 83, "If the appropriator has in fact abandoned his right, the length of time for which he has ceased to use the water is wholly immaterial, for the moment the abandonment itself is complete, the rights of the appropriator are extinguished. But in the case of mere nonuser, the rights of the appropri-

ator are not affected until he has failed to make any beneficial use of the water for the prescriptive period, when they become extinguished."

In California, the time fixed by law for the limitation of action to recover real property is five years, and by analogy the courts hold the same period is requisite to divest the title to water by nonuser, and this idea seems to prevail in other arid states. Nonuser must be continued for a time equal to the statutory limitations upon actions to recover the possession of real property, in order to lose the right of appropriation. The evidence in this case fails to show a nonuser of the appropriation for the term of ten years before this action was commenced. Hence, the Farmers Canal Company had not lost its appropriation by nonuser.

We hold, therefore, that Roberts Walker and the Farmers Canal Company were, at the time of the beginning of this proceeding, the owners of, and entitled to, an appropriation of water to the extent, and for the purpose, as allowed to them by the state board of irrigation in 1897.

In this connection it should be observed that these considerations do not apply to cases where an application for water has been granted by the state board, and the applicant has failed to complete the work within the specified time. Nor do we mean to say that an irrigation company may refuse or neglect, with impunity, to supply water to persons for whose lands it has been allowed to appropriate the same. The law grants to corporations of this character valuable rights, but with these rights are accompanying duties to the landholders for the irrigation of whose land the rights are granted, and if these obligations are not fulfilled, the law will interfere at the request of the party injured.

The irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated, and this service it is bound to perform.

There remains the important question, whether or not the appropriation of the Farmers Canal Company and Roberts Walker should be held to be exclusive in its character, and whether the granting to the same makes it imperative upon the state board and upon the courts to refuse a subsequent application for an appropriation of the surplus waters from the same stream, for the purpose of irrigating the same land.

It is admitted by the agreed statement of facts that there is unappropriated water in the North Platte river sufficient to supply the application of the Farmers Irrigation District. Section 28 of the act of 1895, so far as it affects this question, is as follows: "If there is unappropriated water in the source of supply, named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same. * * * If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force."

If the language of this section is to be construed literally, there is no doubt that the action of the court, dismissing the application of the Farmers Irrigation District, is correct. The contention of the Farmers Irrigation District with reference to this section is that it should be construed as though it read, "or if a prior appropriation has been perfected," and that, unless a prior appropriator has actually completed his appropriation by an application of the water diverted to the land sought to be irrigated, no "prior appropriation" in the language of the section has been made. They further urge that a literal construction of this provision would be in violation of section 15, article 3 of the constitution of the state of Nebraska, providing: "The legislature shall not pass local or special laws * * * granting to any corpo-

ration, association, or individual any special or exclusive privileges, immunity, or franchise whatever." And further that it contravenes the provisions of section 16, article 1, providing that no law "making any irrevocable grant or special privileges or immunities, shall be passed."

The object of the law in question is the promotion of irrigation within the state of Nebraska by a just and fair apportionment of the waters of the state among its people in such manner as to utilize the waters to the fullest extent. To this end the state has in a manner seized upon these waters, and, as a matter of police regulation, for the public benefit has prescribed certain rules applicable to all persons alike regarding the methods of procuring the right to the water, the quantity to be applied to each acre, and the preservation of rights which have become vested. As in all other states and territories where irrigation is practiced, priority of appropriation gives priority of right, and no person or corporation is favored more than another. The law gives to every citizen of the state the right, upon complying with certain prerequisites, to appropriate for beneficial purposes the unappropriated public waters of the state, and it protects him in the enjoyment of this appropriation after his right is once vested. He takes this right, however, subject to the rights of all prior and subsequent appropriators, and he cannot infringe upon their rights and privileges. Section 20 of the act provides: "That such appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made."

Section 42: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided."

Section 43: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better

right as between those using the water for the same purpose."

It is the evident purpose of the law, taken as a whole, to enforce and maintain a rigid economy in the use of the waters of the state. It has been, and is, the policy of the law in all the arid states and territories to require and enforce an economical use of the waters of the natural streams. The urgent necessities of the situation compel this policy by the very force of circumstances. One of the main objects of the system of administration of public waters prescribed throughout the arid regions is to restrain unnecessary waste, and to provide for an economic distribution of that element so necessary to the very existence of agriculture in those regions. This is also the policy of the state of Nebraska in its regulation of the use of the waters of the state, and the law should be construed so as to effect a reasonable, just and economic distribution of water for irrigation purposes. The court will take judicial notice of the fact that there are hundreds of acres within the state susceptible of irrigation to every acre which there is water enough to supply, and it is obvious that a construction of the law that will best distribute the use of the waters is to be preferred, if such construction is not inimical to any constitutional inhibitions or limitations.

The person making the first application for the use of water to water any particular tract of land is given by the law an exclusive right to the water, so long as he applies it to the beneficial use, and is granted, therefore, in a certain sense, a monopoly of the use of the water which he has been allowed to appropriate. But this monopoly or privilege, while exclusive in its nature, is not such a special privilege or immunity, a grant of which the constitution seeks to prevent. In the very nature of things, a grant of water for irrigation purposes which was not exclusive would be worthless. Unless his right to use water to a certain extent was sure and certain no person would be guilty of such folly as to attempt the pursuit of

agriculture in an arid region, when the supply of the only agency by which he might hope to raise a crop might be cut off by another claimant. The privilege granted by the operation of the act is not "special." On the contrary it is general in its operation, and applies to every citizen of the state who seeks to avail himself of the use of the public waters. It is obvious that, if an appropriation of a certain amount of water is allowed to an individual to water a certain tract of land, and out of the surplus waters in the stream a subsequent appropriation of water is made to the same extent to water the same land, there is thereby withdrawn from use by other persons who may desire to use it an amount of water equal to one of these appropriations, and that an area of land equal to that which the appropriations cover is deprived of the benefit of irrigation. Instead of the refusal to allow a subsequent appropriation of water to water the same land creating a monopoly, it would rather seem that to deprive another applicant of the use of water, by granting the right to use a double appropriation upon one piece of land, would tend to create a monopoly. It is objected that the exclusive right granted to a canal company to carry the water to the land to be benefited may be subject to abuse by extortionate charges, but the public have an interest in such a corporation, and the law may interpose if necessary for the protection of the individual. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch,* 67 Neb. 377. Further, the construction of works of the magnitude required to carry on extensive schemes of irrigation requires the expenditure of large sums of money, and it was no doubt the intention of the legislature to protect the men who put their money into such enterprises from the risk of loss by being unable to dispose of the water after it had been carried by them to the land upon which it was designed and appropriated to be used. The object of the law was to encourage, not to repress, irrigation enterprises. The right to prescribe the manner of using the waters of the state, and apportioning the use among the

people of the state, rests with the legislature, and is a proper exercise of its general police powers. The provisions preventing two appropriations of water for the purpose of watering the same land seem to be a just and fair exercise of this power, and rest upon sound policy.

It is unnecessary to consider further the validity of the provisions of the statute under consideration. The legislature having spoken, unless its language contravenes the constitution it is final. While it may be conceded that the legislature took a step farther than that of any other state or territory up to that time, in thus specifically declaring that an appropriation should be refused if a prior appropriation had been made to water the same land, yet we see in such provision nothing which is contrary to any constitutional provisions.

We recommend, therefore, that the decree of the district court be reversed and this cause remanded to the district court, with directions to enter judgment in favor of the Farmers Canal Company in accordance with this opinion, and with directions to remand the application of William Frank and Farmers Irrigation District to the state board of irrigation with leave to amend, if desired, and for further proceedings in accordance with this opinion.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and this cause remanded to said district court, with directions to enter judgment in favor of the Farmers Canal Company in accordance with this opinion, and with directions to remand the application of William Frank and Farmers Irrigation District to the state board of irrigation with leave to amend, if desired, and for further proceedings in accordance with this opinion.

REVERSED.

STEPHEN B. SCACE V. WAYNE COUNTY.

FILED JUNE 9, 1904. No. 13,455.

1. **Eminent Domain: DAMAGES.** The provisions of section 21, article I of the constitution, allow a person whose property has been taken for a highway, not only the fair market value of the land actually taken, but also such additional damages as accrue to the remainder of the tract by reason of the opening of the road.
2. **Highway: DAMAGES.** Where a highway is laid out by which a tract of land is divided into two parts, the depreciation in value, if any, of the entire tract, after deducting any special benefits which may accrue by reason of the opening of the road, is a proper element of damage.
3. ———: ———. The rights of the owner of land over which a section line extends are the same, with reference to the assessment of damages for the location of a highway thereon, as those of the owners of other real estate. The statute making all section lines public roads merely dispenses with the necessity of a petition and other formal proceedings before the county board is authorized to open the road.

ERROR to the district court for Wayne county: JOHN F. BOYD, JUDGE. *Reversed.*

Wilbur & Berry and *Allen & Reed,* for plaintiff in error.

H. E. Simon, contra.

LETTON, C.

The plaintiff in error, Stephen B. Scace, is the owner of 313 acres of land adjoining the city of Wayne, part of the same lying in section 16 and part of it in section 17. A road was established by the county commissioners of Wayne county on the section line between sections 16 and 17 across his land. The entire tract was fenced in one body and was used by the plaintiff to furnish pasturage for hire to the inhabitants of the adjoining city of Wayne for their horses and cattle. The tract was irregular in shape. The proposed road entirely cut off and separated one 80 acre tract from the remainder of the

pasture and deprived the plaintiff of the use of a well, windmill and tank situated upon the land taken for the road, and necessitated removing the fence, or building a new one half a mile long. Before the road was established, a notice was published by the commissioners fixing the 25th day of May, 1901, as the time for the presentation of claims for damages by reason of the opening of the road, and on May 24 the plaintiff in error filed a claim in the sum of $2,500 for damages accruing to the 80 acres on each side of the road immediately adjoining the proposed highway. On May 25 appraisers were appointed to ascertain and fix the amount of damages sustained by the claimants by reason of the establishment of the road. On the same day the appraisers reported, assessing the damages to the plaintiff in error at the sum of $340. On the 1st of June Scace filed an application for an extension of time for making proof and the hearing of his claim for damages until June 17, and on the same day a resolution was adopted that the road be opened and worked as a public road, and the hearing of Scace's and all other claims for damages was continued to the 17th day of June, 1901. On the 17th of June Scace filed another claim for damages in the same amount, to wit, $2,500, but this claim differs from the first claim filed by him in that it seeks to recover damages to the whole tract of 313 acres, instead of to 160 acres as in the first claim. A hearing was had, fixing and assessing the damages to Scace at $375, from which an appeal was taken by him to the district court. He filed a petition in the district court, claiming that he was damaged by the taking of his land and for damages to the entire tract in the sum of $3,985. Before the trial in district court, a motion was made by the defendant in error to require the plaintiff in error to elect whether he will submit the case as on appeal from the action of the county board or as an original action in this court, which motion was sustained by the court, and exception taken by the plaintiff, whereupon he elected to submit the case as an appeal from the action of the board of

county commissioners. This is the first assignment of error made by the plaintiff in error. The petition in error contains 90 other assignments, of which it will only be necessary to consider one or two.

We have been unable to ascertain from the record that the plaintiff was in any wise prejudiced by being required to elect whether to proceed as upon appeal or as an original action. We do not think the action of the district court in requiring his election was erroneous, though it was probably unnecessary, since the cause was in court upon appeal as it was, and this election did not change the status of the case.

From an examination of the rulings of the trial court upon the introduction of evidence, and of the instructions to the jury, it is apparent that the jury were confined in their estimation of damages to the fair market value of the land actually taken, together with the expenses of moving the fence. The plaintiff in error testified that the value of the land before taking for the road was $125 an acre, and offered to show what the value of the entire tract was after the taking of the one-half mile strip for the road, which offer was rejected by the court. The court also refused to allow him to show that the principal value of the land was for pasturage, and to show the effect on its value for that purpose that the cutting off the 80 acre tract would have. It is clear that a tract of land may, on acount of its close proximity to a town or city, be enhanced in its value by reason of its advantage of situation for pasturage purposes. If this be so, then the person from whom it is taken, or whose estate in it has been diminished in value, should be allowed to recover the entire pecuniary injury which he has suffered, and should be permitted to prove the value of the entire tract of land before and after the taking, for whatever purpose it may be used, as the means of ascertaining whether he has been damaged by the taking thereof. Instruction numbered one given by the court upon its own motion is as follows: "You are instructed that the only issue for you to deter-

mine in this case is the fair market value on the 1st day of June, 1901, of the 3 and 95-100 acres of land taken by the defendant for a public highway, and the reasonable expense of moving the fence therefrom to the side of the road." Instructions were asked by the plaintiff in error to the effect, in substance, that the damages recoverable in such a case are not confined to the market value of the land taken, but that the plaintiff would be entitled to recover damages to the remainder of his adjoining or abutting lands, if any, shown by the testimony, and that he should be allowed damages, not only for the value of the land actually taken, but for the permanent depreciation, if any, in the value of the entire tract of land. These requests were refused.

Section 21, article I, of the constitution of 1875, provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor." It has been the settled doctrine of this court since the adoption of this provision that, whenever the property of any person has been injuriously affected by the appropriation of the property itself, or property adjoining, for public purposes, the person injured has been entitled to recover the actual damages suffered by him. The words "or damaged" were not contained in the constitution of 1866. The object of the insertion of these words in the constitution of 1875 was, as is said in *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550: "To grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large." This court has so often construed this constitutional provision that it is unnecessary to discuss it further. *Schaller v. City of Omaha*, 23 Neb. 325; *City of Omaha v. Kramer*, 25 Neb. 489; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *McGavock v. City of Omaha*, 40 Neb.

64; *City of Harvard v. Crouch*, 47 Neb. 133; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239. The instruction given by the trial court was erroneous, and the refusal to instruct that the plaintiff in error was entitled to damages for the depreciation, if any, in the value of the remainder of the tract was also prejudicial error.

As to the contention of defendant in error that, since the statute makes all section lines public roads, and that the plaintiff bought the premises charged with knowledge of these statutory provisions, and hence must be deemed to have accepted the property with the burden of the liability to damage by the taking of the same by the public, we have only to say that the object of the statutory provisions was to avoid the necessity of the filing of a petition before a road upon a section line could be opened. The status of land over which a section line runs is no different from that of other real estate, and the property rights of the owner of such land are as fully protected by the constitutional guarantees as are those of the owner of any other real estate. The provisions of the statute merely dispense with the necessity of a petition for the location of the road before the county board can act upon the matter.

For these reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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

REVERSED.

WILLIAM BROWN, APPELLANT, V. VICTOR REED, APPELLEE.

FILED JUNE 9, 1904. No. 13,482.

1. **Equity.** Where an adequate remedy exists at law equity will not assume jurisdiction.
2. **Evidence** examined, and *held* to sustain the findings and judgment of the district court.

APPEAL from the district court for Boone county: JAMES N. PAUL, JUDGE. *Affirmed.*

H. C. Vail and *Rose Bros. & Reid,* for appellant.

R. F. Williams, contra.

LETTON, C.

This is an equity proceeding brought by William Brown as plaintiff, hereinafter named the plaintiff, against Victor Reed as defendant, hereinafter named the defendant, for the purpose of obtaining an injunction to restrain the defendant from driving away the plaintiff's cattle from certain fields of cornstalks and from certain yards, feed pens and water tanks of defendant, and from preventing the plaintiff's cattle from having access to and being fed certain straw and cornstalks, which the plaintiff alleges were the joint property of the plaintiff and defendant. In substance, the plaintiff's claim is that he and the defendant, who both reside in Nance county, Nebraska, and are each engaged to some extent in the business of feeding and raising live stock, the plaintiff owning at this time about 105 head of cattle and defendant about 60 head, made an agreement whereby the cornstalks and straw situated upon certain sections of land in Boone county should be purchased for their joint benefit; that the defendant would furnish yards and water for said cattle upon land he owned in section 12 in Boone county; that the plaintiff would furnish additional water tanks, feed racks and wind-

breaks for all of the stock, and that a man should be hired to care for the stock whose wages should be paid jointly; that the plaintiff furnished the tanks, erected the feed racks and wind breaks upon the defendant's place; that a man was hired by both parties, and that the plaintiff paid for his share of the cornstalks and straw and drove his cattle to the defendant's premises in accordance with the agreement, but that the defendant wrongfully drove the plaintiff's cattle away and refused to allow them to remain on the premises. The evidence on the part of the plaintiff, if it stood alone, tends to substantiate this contention. The defendant's evidence, however, is in substance to the effect: That early in September, 1901, he had purchased the straw, feed and cornstalks situated upon section 13 in Nance county, Nebraska, from one Eli Harvey, the foreman of P. D. Smith, who was the owner of the land. That shortly afterwards he was in Genoa, Nance county, in the plaintiff's saloon, and in the course of conversation mentioned the fact that he had bought this feed, or "roughness," as it was called. That the plaintiff asked him if he could buy some in that locality for him, as he had about a hundred head of cattle he desired to winter, and that at the plaintiff's request the defendant bought from Harvey for him for $70 a number of straw stacks situated on section 15 in Nance county, also belonging to P. D. Smith, and that the plaintiff paid the defendant the $70 which he had expended in this purchase. That afterwards arrangements were made between them whereby the defendant agreed to let the plaintiff put his cattle with the defendants; that they should hire a man jointly to herd them; that the defendant would allow them to be kept in his corral, and that the plaintiff should furnish such additional feed racks and water tanks as were made necessary by the bringing of his cattle there, the defendant having sufficient appliances in the way of feed racks, water tanks and windmill to care for his own cattle, but not for the additional number if plaintiff's were added.

It was a condition of the sale of the stalks by Harvey that no cattle with cockle burrs upon them should be allowed on the place, and the defendant's testimony goes to show that it was made a condition by the defendant that the plaintiff's cattle should be native cattle and be free from cockle burrs. The plaintiff's cattle were driven to the defendant's place in the latter part of November, 1901. The defendant had Mr. Kilham, the hired man, write the plaintiff a letter to the effect that his cattle had come; that he had said they were free from cockle burrs, and that they were full of burrs, and refusing to allow them to come into the stalks until the burrs were taken out, telling him he would have to go up there and attend to it; and the next day the defendant drove to Genoa and told the plaintiff that he must take his cattle home. Plaintiff failing to do this, defendant drove them to the farm of the plaintiff's father and refused to allow them on his place. The trial court found generally for the defendant, dismissed the action and dissolved the temporary injunction which had been granted.

We are unable to see any grounds for the interposition of a court of equity in behalf of the plaintiff in this case. He has utterly failed to show that he is without an adequate remedy at law.

There is no allegation in the petition that the defendant is insolvent, and the evidence shows that he is financially able to respond for any damages which the plaintiff may have suffered. There is no testimony in the record except the mere statement by the plaintiff, that he did not know of any other feed of like nature to be procured in the neighborhood, to show that he might not have bought in the open market all the feed necessary for his cattle, and that the ordinary process of law would not afford him a full and adequate remedy for all loss which he might suffer. There is evidence on the part of the defendant to show that there was plenty of feed in the immediate neighborhood which he might have procured. In fact, Harvey testifies that he had plenty of stalks on section

15 that he wanted to sell and that in February he sold 105 acres of stalks to the defendant. Aside from these considerations, however, we are of the opinion that the plaintiff has failed to sustain the burden of proof which rests upon him. A large part of the testimony of his witnesses is reconcilable with the defendant's theory of the transaction, and the documentary evidence strongly tends to substantiate the defendant's position. The trial court with all the witnesses before it found for the defendant, and we are satisfied that its decision upon the facts and law of the whole case was correct and should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

EDWARD J. SMITH, TRUSTEE, APPELLEE, v. JONAH B. ALLEN ET AL., IMPLEADED WITH JAMES A. OLLIS, JR., APPELLANT.

FILED JUNE 9, 1904. No. 13,527.

1. **Mortgage Foreclosure: DEFAULT: RES JUDICATA.** Where a cross-petition for the foreclosure of a mortgage alleges that one of the defendants assumed and agreed to pay the mortgage debt, and no answer is filed by the defendant, who appeared in the action, a finding by the court that the allegations of the cross-petition are true concludes the defendant upon that point, and he will not be allowed to relitigate the question of his assumption of the debt, upon a motion being made for a deficiency judgment.

2. **Deficiency Judgment: APPEARANCE: JURISDICTION.** A general prayer for equitable relief in a petition for the foreclosure of a mortgage, followed by a motion for a deficiency judgment, notice thereof to the defendant and his appearance to contest the same confer jurisdiction upon the court to render a deficiency judgment.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

J. W. Eller and *E. J. Clements,* for appellant.

J. H. Van Dusen, contra.

LETTON, C.

This is an appeal from a judgment of the district court for Douglas county upon a deficiency arising upon the foreclosure of a mortgage. The main action, under the title of *Smith v. Allen,* was appealed to this court and the judgment therein affirmed (63 Neb. 74). The controversy in the case at bar is between the cross-petitioner, Van Sant, and the defendant, James A. Ollis, Jr. In the foreclosure case the cross-petition of Van Sant contained the following allegation: "That on the 6th day of January, 1894, said defendants Dora Pertz and August Pertz, her husband, sold and conveyed said mortgaged premises to the defendant, James A. Ollis, Jr., and that said James A. Ollis, Jr., assumed and agreed to pay said note and mortgage to this cross-petitioner as part of the purchase price of said premises, and that said defendant James A. Ollis, Jr., further, upon the back of said notes, as shown in the exhibits hereto attached, guaranteed the payment of the same." Defendant Ollis failed to plead to this cross-petition. A trial was had, which resulted in a finding and decree for the plaintiff and for the cross-petitioner, according to the prayers of their respective petitions.

Upon appeal to this court, the decree in favor of the cross-petitioner Van Sant was affirmed, but the decree in favor of the plaintiff was reversed and the cause remanded for further proceedings. Upon a second hearing in the district court, the plaintiff, Smith, recovered another decree, under which the premises were sold, and the proceeds being insufficient to satisfy the first mortgage, the cross-petitioner, Van Sant, filed his motion in the

district court for Douglas county, praying for a deficiency judgment against the defendant Ollis. The defendant Ollis answered the motion, denying that he assumed and agreed to pay the mortgage debt, and alleging that the court had no jurisdiction to render a deficiency judgment. Upon a hearing, the motion was sustained and judgment rendered against Ollis for the amount of the deficiency, from which judgment this appeal is taken.

The defendant's first contention is that there is no evidence to support the judgment. If the facts which determined the liability of the defendant to a judgment for a deficiency were ascertained and adjudicated upon the original decree in the foreclosure case, it is now too late for him to seek a re-examination of this question. This court has been very liberal in its holdings in regard to the right of parties to litigate the question of liability for a deficiency at any stage of the proceedings. But it has uniformly held that, where this issue has been determined in the original decree the parties will not be allowed to open up the same and relitigate the question upon a motion for a deficiency judgment. In the former opinion in this case the court held that Ollis had appeared in the case and said, "As regards the cross-petitioner, Van Sant, the defendants, having failed to plead to his cross-petition, will not now be heard to say that any of the allegations therein contained are not established by the evidence."

The cross-petition alleged that the defendant Ollis assumed and agreed to pay the mortgage debt as part of the purchase price of the premises. Part of the decree relating to the cross-petition is as follows: "The court further finds that there is due to the cross-petitioner William B. Van Sant upon the note set forth in the cross-petition, which said mortgage was given to secure the sum of $652.80 with interest thereon at the rate of 8 per cent. per annum from May 2d, 1898, which amount is a second lien on said real estate, and that said cross-petitioner is entitled to a foreclosure of said mortgage as prayed in his said cross-petition, and that the allegations in said cross-

petition are true." While this finding is general in its terms, it certainly is a finding upon the statement of the petition that the defendant assumed and agreed to pay the note and mortgage, so that the question upon which his liability to the deficiency judgment depends has been conclusively settled against him by the former decree and cannot be relitigated upon a motion for deficiency judgment. *Kloke v. Gardels,* 52 Neb. 117.

As to the contention that the district court had no jurisdiction to render a deficiency judgment, it seems that this is based upon the proposition that the prayer of the cross-petition is not sufficient to justify the rendition of such a judgment against the defendant. The prayer was a general prayer for equitable relief. In *Grand Island Savings & Loan Ass'n v. Moore,* 40 Neb. 686, in which there was only a prayer for general equitable relief, as in this case, it was held that this was sufficient to justify the rendition of the deficiency judgment. See, also, *Kelley v. Wehn,* 63 Neb. 410. The decree upon the cross-petition conclusively determined the facts as to the defendant's liability which were alleged by the petition, and the defendant is concluded thereby as to these facts. After these facts had been determined, the cross-petitioner filed his motion, to which the defendant appeared and answered. The court then had jurisdiction to hear and determine the matter of the motion, and since the former decree had found the facts upon which the defendant was liable, and no valid defense was made, it rightly rendered judgment against the defendant for the deficiency.

For these reasons, we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

NELSON MORRIS ET AL., APPELLANTS, V. WASHINGTON COUNTY ET AL., APPELLEES.

FILED JUNE 9, 1904. No. 13,636.

1. **Drainage.** Where a ditch constructed jointly by two counties has proved insufficient to drain properly the lands it was intended to benefit, the county board of one of the counties has the power to adopt a new system of drains of which the old ditch, straightened, widened, altered or deepened, shall form a part, and assess the cost of location and construction upon the lands benefited, upon the proper proceedings for that purpose being taken; and the fact that prior to the adoption of the new scheme of drainage it had failed to clean out the old ditch for several years is immaterial.

2. **Powers of County Board:** CONSTITUTIONAL LAW. The provisions of the drainage law, sections 1-28, article I, chapter 89, Compiled Statutes, confer power upon the county board to provide means for raising a fund from which to compensate landowners whose property has been taken or damaged in the construction of the proposed improvement, and its provisions do not violate section 21, article I of the constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor.

APPEAL from the district court for Washington county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

E. J. Jackson, for appellants.

Walton & Mummert, contra.

LETTON, C.

In 1883 the county board of Washington county, acting in conjunction with the county board of Burt county, caused to be constructed a drain or ditch from a point in the county of Burt, in a south and southeasterly direction through the county of Washington, to an intersection with a natural water course known as Fish creek. Fish creek at that time emptied into the Missouri river, a short distance below the city of Blair. The ditch as

originally dug had several lateral or spur ditches connecting with it for the purpose of draining the lands lying to the westward of the main ditch, the spur or lateral which is considered in this case being known as York creek spur ditch or spur ditch numbers 10 and 11. The ditch as originally constructed was from 8 to 12 feet wide at the top, about 6 feet wide at the bottom and from 6 to 8 feet deep. The land lying to the west of the ditch is high and rolling, while the land through which the ditch passes and through which Fish creek ran from the intersection of the ditch to where it emptied into the Missouri river is low and flat, and in many places stagnant water, in times of heavy rains, accumulates thereon. For a number of years after its construction, the main and spur ditches were cleaned out within the county of Washington by that county, the evidence showing that four years ago the witness George Sutherland was paid $700 by the county for cleaning out spur ditch number 11. The creeks and water courses running from the westward toward the line of the ditch have a fall of 12 or 14 feet to the mile, and, in times of heavy rains, water is discharged into the lower country where the ditch lies with great force and rapidity. From the point where the water strikes the low lands to the Missouri river, a distance of about 8 or 9 miles, the land is almost level and the fall is only from 12 to 16 inches to the mile. The original ditch and spur ditches not being of sufficient capacity to carry off and discharge the flood waters flowing from the west, as a natural consequence, when these waters, heavily charged with silt and alluvium, spread out upon the lower land and their flow was checked, the solid matter held in suspension settled, and a deposit of alluvium has been made extending for about a half mile east of the bluffs and for 5 or 6 miles north and south, to the depth of about from 2 to 4 feet above the original surface. The main and spur ditches became so filled with this deposit that the waters flow in a meandering channel partly upon the line of the old ditches and partly outside, their course depending upon

the nature and amount of the obstruction in the ditches. The bed of Fish creek below the point of intersection of the ditch became largely filled with the accumulation of matter brought down from above, so that it became shallow and did not afford sufficient drainage capacity for the waters flowing into it.

In March, 1903, a petition was filed with the board of supervisors of Washington county under the provisions of the drainage law, being sections 1-28, article I, chapter 89, Compiled Statutes (Annotated Statutes, 5500-5527). This petition was signed by W. G. Howell and others. It set forth that the petitioners were the owners of lots and lands which will be benefited by the ditch, drain and improvement prayed for, and prayed the board to cause "the present Fish creek ditch situated in Washington county, Nebraska, and commonly known as the Fish creek ditch improvement, to be straightened, widened, altered and deepened as follows from (here describing courses and distances). Also that spur ditches numbers 10 and 11 be straightened, widened, altered, and deepened from (describing courses and distances). Also that the board cause to be located and constructed a new ditch commencing at the termination of the present Fish creek ditch and running thence in a south and southeasterly direction (describing courses and distances) to the Missouri river." The petition further sets forth the necessity for such improvements. A bond was filed with the petition according to law. The county board made an actual view of the line of the ditch, made some minor changes regarding its location and dimensions, made the necessary findings that it was conducive to the public health, convenience and welfare, and employed an engineer to survey, level and stake the ditch and to make the report, profile and plat and return the schedule provided for by law. The apportionment made by the engineer was adopted and approved by the board except as to one small item. Following the filing of the engineer's report, the county clerk fixed the 17th day of October, 1903, at

the county clerk's office in Blair, Nebraska, as the time and place for the hearing of the same, and personal notice to resident landholders and notice by publication to non-residents was given as the statute provides. The board met at the time and place fixed in the notice and proceeded to hear objections to the reports and claims for compensation and made findings and adjudications as to all such matters.

After this had been done the plaintiffs, Nelson Morris and John H. Cameron, for themselves and on behalf of all other persons similarly situated, brought this action for the purpose of enjoining the county of Washington and the board of supervisors of said county from making any contract for the construction of the ditch, from determining at what time and in what number of assessments they would require the plaintiff to pay the sums charged against their land, from ordering that such assessments be placed upon the tax books against said lands, from going upon or authorizing any person to go upon the plaintiffs' land for any purpose, except to move obstructions from the ditches heretofore constructed, and asking that the proceedings of the board of supervisors be adjudged and determined null and void. A number of reasons are alleged why the proceedings are void and of no effect, but in the briefs and at the hearing before the court two grounds are mainly relied upon. First, it is urged that where it appears that a county has failed to perform its duty and keep existing ditches, constructed under the provisions of sections 24, 25 and 26 of the act, free from dirt and debris, no power is conferred upon the county board to assess the cost of cleaning out such ditches or keeping them free from obstructions under the guise of straightening, widening, altering or deepening them. The correctness of this contention is so clear that the proposition requires no argument to support it. If the evidence showed that the original Fish creek ditch, which was a ditch in two counties, was of sufficient capacity to perform the duty for which it had originally

been constructed, provided it had been kept cleaned out, then, certainly, the county board would have no authority to charge the duty of cleaning it upon the abutting owners, under the pretext of straightening, widening, altering or deepening it. We are satisfied, however, from the testimony in this case, that the evil which it was sought to remedy actually exists, and that the inadequate provisions made by the construction of the first ditch have failed to afford the necessary relief. By the report of the engineer, which has been adopted by the board, it would seem that instead of a ditch from 8 to 12 feet wide at the top, 6 feet wide at the bottom, 6 to 8 feet deep, as the original ditch was, being sufficient to properly drain the territory sought to be benefited it will require such a ditch as proposed, which will be at the point of com mencement, 31 feet wide at the top, 16 feet wide at the bottom and 8.13 feet deep, and is to be gradually widened and deepened until it shall be 35 feet wide from the junction of spur ditch number 11, until it reaches the Missouri river, and be 12.58 feet deep at the Missouri river, and that Fish creek itself shall be straightened, deepened and widened from the end of the original Fish creek ditch throughout its course from that point to the Missouri river and be made to empty into the river at a new place. This contemplates a vastly different enterprise from the mere cleaning out of the old ditches, and, from the testimony as to the conditions, it seems clear that nothing less than a work of similar magnitude would be of any avail to carry off the floods of water which descend during heavy rains in that locality. We are of the opinion, therefore, that this objection is not tenable and that the county board were acting in strict good faith when they adopted the improvement, and did not do so merely as a pretext in order to clean out the old ditches at the expense of the adjoining landowners.

The next objections urged are that, assuming that the act is valid, it confers no authority to exercise the power

of eminent domain, because it makes no provisions for raising money by taxation or otherwise, to pay for lands taken or damaged, and that no provision has been made for such payment in the proceedings sought to be enjoined. And, further, it is urged that the act is unconstitutional because it purports to exercise the power of eminent domain, and makes no provisions for the payment of property taken or damaged.

The constitutionality of the act as a whole has been attacked in this court at least twice, and has sucessfully withstood the assault. *Darst v. Griffin,* 31 Neb. 668; *County of Dodge v. Acom,* 61 Neb. 376. In neither of these cases, however, was the precise point raised in this case argued or considered by the court, hence it will be necessary for us to consider whether the proceedings which are attacked are void or whether the act itself is vulnerable to the objection of unconstitutionality, for the reasons assigned by the plaintiffs in error.

It is argued that under the law, if the county board find for the proposed improvement, they shall cause the engineer to make a return and schedule of the lots and lands that will be benefited and an apportionment of the number of lineal feet and cubic yards to each tract of land, and so forth, according to the benefits which will result to each from the proposed improvement, and an estimate of the cost of location and construction to each and a specification of the manner in which the improvement shall be made and completed, but that this report and estimate takes no account of compensation for land taken or damaged. It is said that the engineer does not take into consideration compensation to the landowners. By sections 12 and 13, persons whose lands are taken or affected may file their claim for damages and the commissioners on actual view shall fix and allow such compensation and damages as may accrue. But it is urged that no method is provided for paying such compensation or damages in any manner whatever, and that in this case the land of the plaintiff Cameron is taken without

any provisions for compensation and no authority of law to make provision for compensation.

It is the settled doctrine of this court that the just compensation required by section 21, article I of the constitution, to be made for taking or damaging private property for public use must, before such taking, be ascertained and payment made, either by the appropriation of money from the proper fund for such purpose, or by a levy of sufficient taxes to pay the damages, upon which a warrant may be drawn. Until the compensation of the landowner has been made sure and certain, he may not be compelled to give up his property, and the public use of the same may be enjoined. *Zimmerman v. County of Kearney,* 33 Neb. 620; *Livingston v. Johnson County,* 42 Neb. 277. If in the course of the procedure provided for by the statute, the time has not arrived by which the provision for the payment of compensation is to be made by the county board, and in the act there is to be found a means whereby a fund is to be created for that purpose, the plaintiff cannot at this time maintain this action, for it will be presumed that the county officers charged with the duty of assessing taxes for his benefit will proceed at the proper time to do so, and until it becomes impossible he will not be heard to complain. But if in the act there is no provision made for a fund from which to pay the damages which he has suffered, then the whole proceedings must fail, and they may be attacked at any stage.

It is evident from an inspection of the act as a whole, that it was provided by the legislature that all persons whose property would be taken or damaged by the proposed improvement shall have notice of that fact, and shall have an opportunity to have a hearing upon the question of the amount of their damages.

Section 13 provides that the commissioners, on actual view of the premises, shall fix and allow such compensation for land appropriated, and assess such damages as will in their judgment accrue from the construction of the improvement, to each person or corporation making

application as provided in section 12, and, without such application, to each idiot, insane person or minor owning lands taken or affected by such improvement.

Section 14 provides that exceptions may be filed to the apportionment, or to any claim for compensation or damages, and for the hearing of testimony, and power is given to compel the attendance of witnesses. In other sections an appeal to the district court is allowed from any final order or judgment in these proceedings, and provision is made that no appeal shall affect the progress of the construction of the proposed improvement, provided the petitioners shall enter into a good and sufficient bond, to be approved by the clerk of the district court or the judge thereof, conditioned for the payment of all damages and costs that the appellant may sustain on the trial of the appeal. It is provided that the clerk of the district court shall certify to the board of county commissioners a full and complete transcript of the proceedings had upon such appeal in the district court.

Section 18 provides that immediately after the transcript is returned to the county clerk, or immediately upon the filing of the bond mentioned, or in case there is no appeal, then immediately after the hearing of the report of the engineer, the commissioners shall advertise for bids for the construction of the work, which bid shall not exceed the estimated cost.

Section 21 is as follows: "When the working sections are let, as hereinbefore provided, and the cost and expenses of location and construction, and all compensation and damages are ascertained, the commissioners shall meet and determine at what time and in what number of assessments they will require the same to be paid, and order that the assessments as made by them be placed on the duplicate tax list against the lots and lands so assessed."

Section 22 provides for an order to the county clerk to make and furnish to the treasurer a tax duplicate with the assessment arranged thereon as required by their order,

and provides that the unpaid assessment shall be a perpetual lien on the premises assessed and for the collection of the same in the usual manner by the county treasurer.

From a consideration of these provisions, it appears that the county commissioners have no power to enter into a contract for the construction of the proposed improvement until after the allowance of damages or compensation to the landowner, and the final determination by the district court of any appeal from the decision of the county board upon the same, unless the petitioners for the improvement have filed a good and sufficient bond with the clerk of the district court for the payment of all damages and costs that the appellant may sustain, when, it is provided, the work of construction may proceed. After the contract has been let, and after the determination of the amount of damages which have been suffered by landowners, the whole amount of the cost of the proposed improvement is known to the county board, save for the contingency that the amount of damages adjudged to be paid may be changed upon appeal. Up to this time it would have been impossible for them to make an assessment for the costs of the improvement, since only one of the two necessary factors would have been within their knowledge. Then, and not until then, could they act intelligently, and the law, recognizing this, provides, in section 21, that after these matters are ascertained the commissioners shall meet and determine at what time and in what number of assessments they shall require the same to be paid, and shall order that the assessments as made by them be placed on the tax list against the lots and lands assessed.

It is argued by the plaintiffs in error that the statute does not confer power to impose a tax, that in all probability one or more sections were omitted in the preparation and passage of this act, and that the drainage statutes of a number of other states provide absolutely and specifically for compensation for land taken and the assessment and levy of a tax for that purpose. The law

under consideration, while it does not say in so many words that the commissioners shall make an assessment, requires them, after the cost of location, construction, compensation and damages have been ascertained, to meet to determine at what time and in what number of assessments they will require the same to be paid, and that they shall order that the assessments as made by them be placed on the tax list. When the proportionate benefit to each tract has been ascertained, when the commissioners know the total amount of money which it is necessary to raise, when they have determined the number of assessments in which this sum of money is required to be paid, and the times of payment, and when they order these assessments to be placed upon the tax list, what is there lacking of a complete assessment? In Black's Legal Dictionary, assessment is defined as follows:

"Assessment, in a general sense, denotes the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received. Assessment in taxation: The listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to benefit received. Also determining the share of a tax to be paid by each of many persons; or apportioning the entire tax to be levied among the different taxable persons, establishing the proportion due from each."

When a tax-levying officer knows the proportionate benefit to each tract, the amount of money necessary to be raised for a special improvement, and when he has determined the number of payments in which it shall be paid and the time of payment of the same, and has ordered these determinations placed upon the tax list for collection by the proper officers, he has made an assessment. When these acts are performed, the assessment is made and the fact that the statute provides in detail that the commissioners shall do the several acts which constitute an assessment is no less effectual than if it had stated in

general terms that the board should make an assessment and then had specified the manner of procedure.

It may be objected that the landowner has not had an opportunity to be heard upon the question as to whether his land has been specially benefited to the extent of the amount necessary to be levied to compensate the landowner for land taken or damaged. But the statute (section 8) provides that after the engineer has made his report to the county board, in which report he is required to make "an apportionment of a number of lineal feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefits which will result to each from the improvement, and an estimate of the cost of location and construction to each," the county clerk shall fix a day for the hearing of the same and shall give a notice which shall set forth a tabular statement of the apportionment as made by the engineer in his report, and that, *before* the day set for hearing, all persons whose lands are taken or affected shall make application for compensation or damages. These provisions enable each landowner, on the day set for hearing of the report, to know just what proportionate amount the engineer has found that his land has been benefited by the proposed improvement, and also to know what is the total amount of compensation for lands taken, or damaged, claimed by landowners along the line of the ditch. When he knows these two facts he is apprised of the utmost amount to which his land may become liable to be assessed, and he has the right to be heard upon the making of such assessment before the board at the hearing. It is evident that the amount of damages allowed as compensation to landowners must be apportioned by the county board upon the land affected according to benefits, and in the same ratio as to the amount levied upon each particular tract of land, as the apportionment of lineal feet and cubic yards, and the cost of location and construction are apportioned.

Before the report is finally confirmed by the board, all parties have had an opportunity to be heard upon all

questions affecting their interests, and at the time of hearing they have full and adequate information in regard to the estimated cost of construction and location and the entire amount claimed as compensation for land taken or damaged. No further hearing is necessary during the further course of the proceedings, since all questions in which the landowner is interested may be passed upon at this time. The landowner therefore has had his day in court and his property is not taken without due process of law. The compensation and damages are apportioned as to benefits and upon the same basis as the cost of construction and location.

It is objected that the damages allowed may be largely increased upon appeal to the district court nd that no means have been provided whereby the increased compensation may be provided. But the commissioners are not required to make the assessment until the final judgment in the district court has been certified to the county clerk. By section 16, however, it is provided that the work shall not be delayed if the petitioners shall give a bond, conditioned for the payment of all damages and costs that the appellant may sustain. But it is said that the landowner should not be compelled to look for his compensation to the uncertainties of a suit upon a bond of a private citizen. To this we assent. The county is the party that is primarily responsible to the landowner for the damages which he has sustained. It has made a special assessment by which to raise a fund out of which he is to be paid. He is entitled to look to the county for his compensation. The county, however, may look to the petitioners, and their sureties under the conditions of their bond, to pay all damages and costs that the court may find the landowner entitled to, above the amount of the original allowance which has been assessed against the property specially benefited. While this manner of providing for the contingency of the damages being increased upon appeal may seem somewhat clumsy, it is the county alone that may suffer from being compelled to

bring an action upon the bond. The landowner cannot complain in this regard, since his right to recover is not from the petitioners but from the county. The provisions of sections 21 and 22 providing for the means of compensation and furnishing the method of determining the amount of each assessment, the time it shall be paid, and the method of collection, are sufficient to accomplish the desired end, when taken in connection with the apportionment according to benefits to each particular lot or tract of land reported by the engineer and confirmed by the board.

In this action the question of whether or not there were irregularities or errors of judgment in the proceedings of the county board cannot be inquired into. It is an original action based upon the idea that the board had no jurisdiction to act. Since we have come to the conclusion that the objections to the jurisdiction of the board urged by the plaintiff in error are not well taken, the judgment of the district court was right and should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. JOHN FICKENSCHER.

FILED JUNE 9, 1904. No. 11,939.

Evidence examined, and *held* not sufficient to support the verdict and judgment.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin, Edson Rich, E. A. Cook and *John M. Ellingsworth,* for plaintiff in error.

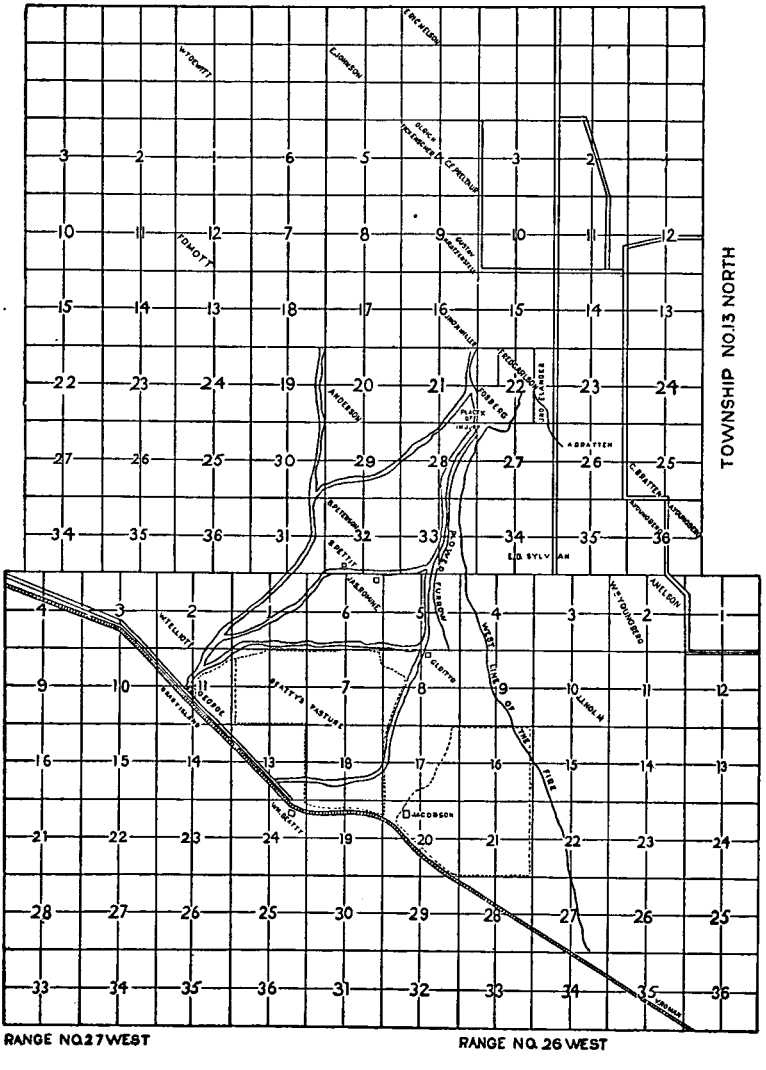
Warrington & Stewart, George W. Thomas and *H. M. Sinclair, contra.*

DAY, C.

This action was brought by John Fickenscher in the district court for Dawson county against the Union Pacific Railroad Company to recover damages sustained by him on acount of having been burned in a prairie fire, which he alleged in his petition was started through the negligence of the railroad company. Upon the trial the plaintiff recovered a judgment for $1,175, to review which, the defendant has brought error to this court.

It was contended upon the part of the defendant that the fire which it was alleged to have negligently set out never reached the point where the injury occurred, and that the fire which burned the plaintiff, was a fire which originated from unknown causes, and was driven down from the northwest by a heavy gale which was blowing from that direction at the time of the injury. The petition in error contains 63 assignments of error, but, in the view we have taken of the evidence, it seems unnecessary to consider any of the assignments of error except those relating to the sufficiency of the evidence to sustain the verdict and judgment. For the purpose of

elucidating the opinion, we have attached a map showing the distances and relative positions of places mentioned in the opinion:


TOWNSHIP NO.13 NORTH
RANGE NO.27 WEST
RANGE NO.26 WEST
ELDORADO
ANDERSON
BRATTS
ELDORADO
ELDORADO
ELDORADO

The record shows that about noon on April 16, 1899, a fire was discovered along defendant's right of way soon after a train on defendant's railroad had passed, going west. The fire started in section 27, township 12, range 26, near the town of Vroman, and during the afternoon and evening burned in a northwesterly direction and by dark it had reached Fosberg's place some seven miles north and a mile and a half west of the point where it started. During the afternoon and evening a light wind was blowing slightly west of north. The country over which the fire spread, and, in fact, all of the country in that vicinity north of the railroad, is a rough sand-hill country, sparsely covered with grass. The testimony shows that about dark on the evening of the 16th, the fire had reached the south line of land owned by one Fosberg, to wit, the southwest ¼ of section 22, township 13, range 26, and that the neighbors living to the north and northwest of his place came to his house to assist in fighting the fire, and among those who came were the plaintiff, his father and brother. These parties started in at Fosberg's and plowed a furrow and back-fired along the east side of a road running from Fosberg's in a southerly direction to one Ditto, residing on the northeast ¼ of section 8, township 12, range 26. The testimony of all the parties is clear that this fire did not spread west of the road above described, or north of the south line of Fosberg's, except as indicated by the line representing the outline of the fire and not material to this discussion, as it is conceded that this branch of the fire did not reach the point where the injury occurred. Fosberg and his neighbors who were fighting the fire turned out of the road a short distance north of the Ditto place and changed their course to a southeasterly direction, and continued to fight the fire, keeping upon the west line of it until they reached a point somewhere near the center of section 16, in a pasture known as Larson's pasture. At about three o'clock in the morning several members of the party made an observation from the top of one of the hills near the

center of the section, and all of them say that the reflection of fire could be seen to the west and southwest of them, but none of them were able to place the distance of the fire with any accuracy. About that time the wind began to change, and in a very short time a heavy wind was blowing from the northwest. The Fosberg party then abandoned the fight and started north along the road leading from Ditto's to Fosberg's. The testimony is not clear as to the exact time they reached Fosberg's, but it was somewhere near four o'clock; all agree, however, that a terrific gale was blowing from the northwest. The plaintiff, his father and brother, left Fosberg's at his southwest corner and continued northward toward their home in section 4, township 13, range 26. At that time the reflection of a fire to the northwest could be plainly seen, and some of the party urged the plaintiff not to attempt to go forward. After going some sixty rods north of Fosberg's corner, a fire from the northwest swept down upon them, and the plaintiff, his father and brother, were more or less burned and injured. The testimony also shows that parties who were interested in Larson's pasture were also fighting the fire during the afternoon and evening from a point about the middle of section 16 and along the southeast line thereof toward the railroad track, and that the fire did not pass west of the east line of sections 16, 21 and 28. There is some testimony, however, that in the middle of the afternoon a line of the fire had spread through the hills along the north side of section 16, and that it had spread into section 17, but the testimony shows that this fire was put out. The neighbors who live immediately to the west of the Ditto-Fosberg road are positive that the fire which was burning in the afternoon southeast of Pettit's was put out.

The theory of the plaintiff was that the fire had crept around and through the sand hills along the north side of sections 16 and 17, and thence through the north side of Beatty's pasture until it reached a point nearly north of Brady Island; that it then spread northeasterly until it

reached a point northwest of the place where the injury occurred, and that, when the wind changed to the northwest, this branch fire was driven back upon the plaintiff and injured him. In support of this theory the plaintiff relies solely upon the testimony of witnesses residing from three to four miles south of Brady Island, and who viewed the fire during the afternoon and evening from that distance south of Brady Island. Some of the witnesses say they watched the fire all afternoon, saw it gradually spread west until late in the evening it appeared to be going north, directly north of George's pasture, which adjoins Brady Island on the east. None of them, however, pretend to trace the fire but a short distance north of Brady Island.

It seems a striking fact that none of the neighbors living in the vicinity of where the fire is supposed to have burned saw it or even the reflection of it. Granting that the fire was burning north of Brady Island late in the evening, it does not seem to us that that fact alone would be sufficient to go to the jury that it was the cause of an injury occurring six hours thereafter and six miles distant. It is a fact within the common observation of men, that the location of a fire is but a mere conjecture when the reflection of it on the sky is the only known fact to determine its location. Even when the fire itself can be seen, its location is very deceptive. Taking this whole evidence it seems to us that the verdict of the jury is founded upon a mere conjecture.

The testimony is clear that soon after three o'clock the wind changed to the northwest and blew a gale, some of the witnesses placing its velocity at upwards of thirty miles an hour. The testimony is also undisputed that for several days prior to the injury, a fire had been seen a long distance to the northwest of the place of the injury, and that it was driven down over the country in that vicinity is shown beyond any doubt.

The plaintiff contends that it could not have been the northwest fire which did the injury, because that fire did

not reach that locality until some time after the injury, possibly an hour. To establish this fact, the plaintiff shows that the fire from the northwest did not reach his home or Kratzenstein's place until an hour or more after the injury. This fact, however, is far from showing that it was not the northwest fire which did the injury or that it was the branch fire from the Vroman fire which did. It is also a matter of common experience that in a prairie fire that a part of it, known as the head fire, travels much faster than the side fire, and if it was the head fire which caught the plaintiff, it is not at all improbable that the side fire might not have spread to Kratzenstein's and to plaintiff's place for an hour or more after the head fire had passed.

The rule of law requires of the plaintiff that he make out his case by a fair preponderance of the evidence, and the evidence must relate to facts which establish with reasonable certainty the plaintiff's cause of action; and while it is for the jury, and not for the court to pass upon the weight to be given the evidence, it does not seem to us that the rule should be carried to the extent of allowing a verdict to stand, based upon evidence which at best is a mere conjecture. The plaintiff's theory of the case is possibly the correct one, but, if so, he is unfortunate in not having witnesses who are able to trace the fire with a reasonable degree of certainty to the place of the injury.

For the reason that the testimony fails to sustain the verdict and judgment, we recommend that the judgment should be reversed and the cause remanded for further proceedings.

HASTINGS, C., concurs.

DUFFIE, C., concurring.

It is practically conceded that a fire was started by a Union Pacific train Sunday the 16th of April, 1899, between the stations of Vroman and Brady Island. The wind was blowing from the southeast and this fire worked its way in a northwesterly direction into the sand hills.

The plaintiff below claims that there were two branches of this fire, one running in a more westerly direction than the other, and that this westerly branch worked its way west and north until it reached a point some distance west of Brady Island and north of that point several miles, until a change in the wind which occurred about two or three o'clock Monday morning, when it was driven back in a southeasterly direction and caught the plaintiff who was on his way home from a point some four or five miles northeast of Brady Island, where he and his neighbors had been fighting what the plaintiff claims to have been the east branch of the fire. The theory of the defendant below is that the fire never got as far west as Brady Island and no further west than to the point where plaintiff below and his neighbors were fighting it. There was a fire started many miles northwest of the place where the plaintiff was injured and had been burning all day Sunday. The wind, when it changed from the southeast to the northwest Monday morning, commenced to blow with great violence, some of the witnesses placing the velocity at from thirty to sixty miles an hour. This wind undoubtedly brought down the fire which had started a day or two previously in the northwest, and the controverted question was, did this fire do the injury complained of or was it a branch from the fire set by the engine of the railroad company which had worked west and north until a change in the wind from the southeast to the northwest brought it back in a southeasterly direction to the place where the injury occurred. There is some evidence to support the verdict of the jury. Most of this evidence comes from parties living south of the Platte river and four miles or more south of Brady Island, who testify that they saw the fire about the time that it started along the right of way of the railroad company and watched it at different times during the afternoon and evening of Sunday. These witnesses testify that the fire had worked its way west and north of Brady Island. If this be true, the course of the fire from the burnt ground

that it passed over, must have been clearly distinguishable and yet parties living in the vicinity where the fire is claimed to have passed, testify that the grass was unburned Monday morning, and parties from the north who had occasion to visit Brady Island Monday morning, are very positive in their testimony that the grass between what is called the east line of the fire and Brady Island was wholly unburned. It seems to me that the positive evidence of those living in the vicinity and others who had occasion to pass over the section of country where the fire is claimed to have run, that the grass was wholly unburned, that no trace of the fire existed, ought to be accepted as conclusive upon that question, and conclusive upon the fact that it was the fire which originally started in the northwest that was the cause of the injury.

The opinion of Judge DAY upon this branch of the case is so conclusive that I think it ought to stand.

By the Court: This case has been several times argued, and there being some difference of opinion among the commissioners who heard the several arguments, it was heard again by the court. With the assistance of able counsel for both parties, we have examined the entire record and conclude that the foregoing opinions of Mr. Commissioner DAY and Mr. Commissioner DUFFIE show the true condition of the evidence.

For the reasons there given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SARAH J. RICHARDS V. MAXEY H. HASKINS.

FILED JUNE 9, 1904. No. 13,463.

Adverse Possession: ABANDONMENT. One holding adverse possession of land which he has inclosed, does not abandon such possession by his failure to have it occupied by a tenant or otherwise for a reasonable space of time, no other person making claim to the property or taking possession during such nonoccupation, and there being no evidence of any intent on his part to abandon his possession and claim to the land.

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

B. N. Robertson, for plaintiff in error.

D. W. Merrow, contra.

DUFFIE, C.

This is an action in ejectment. Plaintiff in error, who was the plaintiff below, claimed title to 160 acres of land in Harlan county. The defendant is in possession as the tenant of Walter G. Clark, who also claims title. It was stipulated in the record that David Whitney and Samuel Bauserman, partners, were the owners of the land in July, 1878. In August of that year these parties filed a petition in bankruptcy in the district court of the United States for the district of Nebraska, which petition was, by order of the court, referred to J. L. Webster, register in bankruptcy. T. W. T. Richards was chosen assignee, and the register thereupon conveyed to him by deed all the property of the said Whitney and Bauserman, as required by the bankrupt law of 1867. The land in question was listed among the assets of the bankrupt. In December, 1878, the trustee petitioned the federal court for leave to sell certain assets of the estate, including the land in suit, at private sale, and this petition was indorsed by the register in bankruptcy and concurred in by the judge of the

federal court. Sometime thereafter said land was sold by the trustee to Burr H. Richards for the sum of $1,200, subject to the taxes due thereon, and a deed executed and delivered July 24, 1885. In November, 1901, the trustee filed a motion and affidavit in the federal court setting out the fact of a sale of said land, the execution and delivery of the deed, and that the records of the court did not disclose that an order of confirmation had been made by the court, although it was alleged that the trustee supposed and believed that the sale had been confirmed long prior thereto. And thereupon the federal court entered an order confirming said sale. Burr H. Richards departed this life in the city of Baltimore sometime in 1890, and by the terms of his will, the land in controversy was devised to the plaintiff, Sarah J. Richards. The foregoing constitutes the plaintiff's chain of title.

The defendant's chain of title is, first, a tax deed made by the treasurer of Harlan county, Nebraska, to C. C. Flansburg of date December 30, 1882. Flansburg conveyed to Lee A. Adams, December 15, 1883. Adams conveyed to Hugh G. Clark, June 7, 1884, and David Whitney and Samuel Bauserman quitclaimed to Clark, May 13, 1884. Clark died in 1892, and Walter G. Clark is his only heir and administrator of his estate. Adverse possession for more than ten years was the principal defense. The case was heard by the Honorable H. M. Sullivan who took the same under advisement; but prior to a decision of the case, Judge Sullivan resigned, whereupon the parties had the evidence transcribed, and, by agreement, the case was submitted to Judge Adams, on said evidence, who entered a finding and judgment for the defendant, from which the plaintiff has taken error to this court.

In the printed brief of the defendant, as well as in the oral argument on the submission of the case, many exceptions were taken to the regularity of the bankruptcy proceedings through which plaintiff claims title; but as we are of the opinion that the evidence fully supports the claim of adverse possession asserted by the defendant, it

would be a waste of time to discuss the numerous objections made to the proceedings in bankruptcy, and the effect of the trustee's deed to Burr H. Richards.

Relating to the defense of adverse possession, the evidence is quite conclusive that Hugh G. Clark rented the land in question to one Frank Shaffer in 1890. It appears that other owners of land had built fences on the east, south and west lines of the land in dispute sometime prior to the spring of 1891, and that Shaffer, on obtaining a lease from Hugh G. Clark, erected a fence on the north line of the land in the spring of 1891. There is some controversy as to the duration of Shaffer's lease, and as to the time that he actually occupied the land. In September, 1890, Shaffer wrote to Clark desiring to lease the premises for two years, and on November 16, 1890, he wrote Clark to make out a lease for two years at twenty-five dollars a year, and indorsed on this letter in the handwriting of Clark is the following memorandum: "W ½ SW ¼ 14—E ½ SE ¼ 15-1-17—Harlan Co. 2 years $25 per year, payable May 1, 1891 and 1892."

Shaffer again wrote Clark, December 1, 1890, requesting Clark to make out a lease for two or three years and send to him at once, and on December 8, 1890, he again wrote, acknowledging receipt of a letter from Clark with a contract in it. In this letter he states that the contract is all right with the exception of one matter which Clark overlooked, which was in relation to Clark's buying, at the end of the lease, any fence that Shaffer might erect upon the land at 50 per cent. of its cost. May 9, 1891, Shaffer wrote to Clark, inclosing $12.50, one-half of the agreed rent for 1891, promising to remit the balance on November 1. These letters, together with Clark's memorandum on the letter of November 16, 1890, are quite conclusive in connection with Shaffer's oral evidence, that Clark rented the premises to Shaffer for the years 1891 and 1892 at $25 a year; and the evidence is undisputed that Shaffer held possession during 1891, having, as before stated, built a fence along the north line in the spring

of that year. In the year 1892, Shaffer went to Colorado, and sold his fence to Gifford & Williams. Whether he sold the unexpired term of his lease is a disputed question, and the evidence relating thereto is quite unsatisfactory. In his testimony Shaffer says:

"In 1892 I was going to quit down there and I brought some of my cattle up in the fall and I left some down there, and during this time I was figuring to sell the fence, and, as I stated, I wrote to Mr. Clark to take the fence, and he said he would prefer not to do it. He said to do the best I could; that he would rather I would sell it, because he was so far away from it; and I figured with somebody else in regard to selling it, and I turned this over to Gifford & Williams in 1892, but whether it was early in the spring or during the summer I couldn't tell you."

By the Court: When did you close up the deal with them about the fence?

A. In 1892.

Q. When did they take the land?

A. In 1892. * * *

By Mr. Merrow: In regard to the rent for the year 1892, state whether or not these men, Gifford and Williams, settled with you for the rent for that year?

A. I think they did—I wouldn't be positive—My best recollection is that they did—I am not positive in regard to that—I think that was included when I sold the fence.

Mr. Williams, whose deposition was taken in Colorado, stated that he occupied the land during the years 1892 and 1893; that he got possession from Frank Shaffer; that his best recollection is that he paid Shaffer the rent for one year, and J. B. Billings & Son for one year. The evidence is undisputed that J. B. Billings & Son took charge of the land at the request of Walter G. Clark in the spring of 1893, and they rented it to Gifford & Williams for the year 1893, and have continued to act as agents for Walter G. Clark from that time up to the date of the commencement of this action. While we are not

entirely satisfied from the evidence that such is the case, our best judgment is that Shaffer, at the time he sold his fence to Gifford & Williams, also turned over the land to them for the unexpired term of his lease; and while it is possible that Shaffer did not put Gifford & Williams in possession of the land for the time his lease still had to run from the date of their purchase of his fence, and that there was a break in the possession of the land by Clark, through his tenants, we do not think that such break in the occupation would work an abandonment of the possession or serve to interrupt the continuity of possession claimed by Clark. Many authorities are to the effect that where one has inclosed land and made improvements thereon that he does not abandon such possession by his failure to have it occupied by a tenant or otherwise for a limited time, no other person claiming or taking possession during such interval.

In *Hughs v. Pickering,* 14 Pa. St. 297, the following was held: "In order to destroy the continuity of possession, the vacancy must not be merely occasional, such as occurs in every case where a party, from some cause, unable to obtain a tenant, shuts up his property for a short time, or, indeed, for a long time." In *Crispen v. Hannavan,* 50 Mo. 536, there were several occasions when no one was actually cultivating the premises, the longest of which was from about 1861 or 1862 to 1865 or 1866. In discussing the charge to the jury as to what would constitute such a break as would destroy the possession, the court say: "It might have been inferred that living off from the premises, a failure to cultivate them for a year or more, for whatever reason, would constitute such a break. Nothing would be more erroneous. While an abandonment of the premises will so break the possession of him who has occupied, that the constructive possesion of the true owner will again attach, and thus save his right of entry, every failure to cultivate the field for a season, or a delay in repairing the fences when destroyed, will not be held to be an abandonment if sufficient reason appears."

This court in *Stettnische v. Lamb,* 18 Neb. 619, has said: "Where a party erects a building on a lot, and takes actual possession of the same as his own, the fact that afterwards he, or those claiming under him, rent the property, or in case it is unoccupied, have and claim the right to the possession of the same where there is no abandonment, is not an interruption to the possession. * * * The building at least belongs to the claimant. He may use it in any manner he sees fit; and so long as no one enters into possession thereof claiming adversely to him his possession is not interrupted; and possession being once established in Mrs. Towle by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have continued until an interruption therein is proved." An even stronger case is found in *De La Vega v. Butler,* 47 Tex. 529.

While citing the Texas case as showing to what extent some of the courts have gone, we do not wish to be understood as wholly approving the rule therein announced. We believe the true rule to be that an absolute abandonment by the claimant, however long his possession may have continued, and however great the improvements made by him, has the effect to vest in the true owner of the title constructive possession of the premises, and that the rule announced by this court in *Stettnische v. Lamb, supra,* is the rule which should prevail. Measured by this rule, Clark, who had taken actual possession of these premises by his tenant, in 1891, cannot be held to have abandoned his possession because his tenant may have left the premises before the expiration of the lease; there being no evidence in the record that Clark himself had done anything indicating an intention to disclaim title or to abandon the possession which he had taken through his tenant.

Holding these views, we recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

WILLIAM A. CAMPBELL, RECEIVER, V. NOYES, NORMAN & COMPANY ET AL.

FILED JUNE 9, 1904. No. 13,556.

1. **Decree:** INTERPRETATION. A decree wherein a party is directed to pay a specific fund in his hands into court for distribution among claimants thereto, will not be held to be a lien upon the real estate of such party in favor of the claimants unless it is provided by the decree that the claimants recover of the party holding the fund, and that in default of payment execution may issue.

2. ———: ———. Creditors of an insolvent debtor filed a bill against the debtor, joining with him as defendant a bank to whom the debtor was alleged to have made a fraudulent transfer of chattels, the object of the bill being to cancel the mortgage and subject the fund created by the sale of the chattels to their claims. The becree canceled the mortgage and ordered the bank to pay the fund into court. *Held*, that the decree did not constitute a lien on the real estate of the bank.

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

L. C. Chapman and *George A. Adams,* for plaintiff in error William A. Campbell.

S. P. Davidson and *Hugh LaMaster*, for Noyes, Norman & Co. et al.

George Adams and *Culver & Phillips,* for Kemper, Hundley & McDonald Dry Goods Co. et al.

KIRKPATRICK, C.

This case presents for determination a contest between plaintiff in error, William A. Campbell, receiver of the Chamberlain Banking House and representing its general creditors, and defendants in error, who claim a preferred lien upon certain money in the hands of the receiver realized from the sale of the real estate of the bank, con-

sisting of the banking house and the lot upon which it is situated. The banking house, hereinafter called the bank, is insolvent, and only a small per cent. of its liabilities can be paid. The trial court awarded defendants in error a preference over the general creditors, and the receiver prosecutes error to this court.

In order that a clear understanding may be had of the questions presented by the record, it will be necessary to give a brief history of the transactions leading up to the entry of the judgment complained of. In the year 1895 Renshaw & Company were engaged in the mercantile business in Crab Orchard, in Johnson county. At that time they were indebted to defendants in error, who are wholesalers, for goods. They were also indebted to the bank in a sum amounting to about $2,681. On November 6, 1895, Renshaw & Company executed a mortgage to the bank to secure the amount due it, and the bank immediately took possession of the stock of goods, and thereafter advertised the goods and sold them under its mortgage. Soon after the bank obtained its mortgage and took possession of the goods, the various defendants in error commenced actions in the county court of Johnson county against Renshaw & Company, prosecuted them to judgment, procured the issuance of executions, which were returned unsatisfied, and thereafter procured the bank to be garnished. The bank answered in the garnishment proceedings, denying that it was indebted to Renshaw & Company. The defendants in error generally took exceptions to the answer of the bank. None of the judgments obtained by defendants in error in the county court were ever transcripted to the district court. On June 1, 1896, the creditors of Renshaw Company, who had obtained their judgments in the county court, defendants in error herein, united in a creditors' bill asking to have the mortgage which Renshaw & Company had executed to the bank declared fraudulent and void, and to require it to pay the money, which it had realized from the sale of the stock of goods of Renshaw & Company, into court to be

applied in satisfaction of the judgments obtained in the county court. The bank answered, setting up the *bona fides* of its mortgage. Trial was had, and on November 8, 1900, a decree was entered holding that the mortgage in controversy was fraudulent and void, and ordering the bank to pay to the clerk of the court for the benefit of defendants in error, plaintiffs in the creditors' bill suit, the sum of $3,472.73, being the value of the goods sold by the bank under its mortgage, with interest thereon up to the date of the decree. The bank prosecuted error proceedings from the decree so entered to this court, where the decree was affirmed.

In the meantime the bank had become insolvent, and on September 11, 1902, plaintiff in error was appointed and qualified as receiver, and took possession of all the property of the bank. Thereupon, and on January 23, 1903, defendants in error commenced this proceeding against the bank, asking that they be allowed a preferred claim for the amount which the district court in the decree of November 8, 1900, directed the bank to pay to the clerk of the court for the satisfaction of the county court judgments, upon the ground that the decree of November 8, 1900, was of such a character as to become a lien upon the real estate of the bank, and thus make the claims of defendants in error superior to that of the general creditors.

Plaintiff in error, as receiver, resisted this application, claiming that the decree of November 8, 1900, was not a lien upon the real estate of the bank. The trial court found against the receiver, and adjudged the claims of defendants in error prior liens upon the fund to be applied pro rata upon their several county court judgments. The correctness of this judgment of the trial court is the question presented for determination in this case.

Before the trial of the case, the receiver, by order of the court, sold the real estate of the bank, consisting of the banking house and the lot upon which it stood. Defendants in error objected to the confirmation of the sale, and it was thereupon agreed between all parties that the sale

should be confirmed and the money retained in the hands of the receiver, pending the final determination of this case.

Defendants in error seem not to attach importance to the fact that garnishment was had upon the bank, further than to contend that the creditors' bill to set aside the mortgage given by Renshaw & Company to the bank was more than a creditors' bill, in that it was in fact a suit against the garnishee because of an unsatisfactory answer. The controlling question in the case, however, seems to be whether the decree of November 8, 1900, is of such a character as to become a lien on the real estate of the bank.

For the purpose of ascertaining the full import of the judgment under consideration, it will be convenient to quote at some length from both the petition of defendants in error and the judgment itself. From the former we will quote the following:

"Wherefore these plaintiffs pray that an account may be taken of the amount due each of said plaintiffs upon its judgment against said F. D. Renshaw & Co., that it may be found, adjudged and decreed that the said plaintiffs and each of them obtain a lien upon the goods of the said F. D. Renshaw & Co., so taken possession of by the said Chamberlain Banking House and the proceeds of said goods; and that said liens are still valid and subsisting and binding upon said goods and the proceeds of the same in the possession of the defendant bank and prior to all other liens thereon; that said chattel mortgage so made to the Chamberlain Banking House be found and decreed to be fraudulent and void as to these plaintiffs and each of them, and that the said mortgage may be canceled and set aside, and out of the proceeds of the sale of said goods the said Chamberlain Banking House may be ordered and decreed to pay to these plaintiffs, or into this court for them, the amount of the respective claims against F. D. Renshaw, and for such other and further relief as may be just and equitable."

From the decree it will only be necessary to quote the following:

"It is, therefore, considered, ordered, adjudged and decreed that the chattel mortgage executed by F. D. Renshaw & Company to the Chamberlain Banking House on the 6th day of November, 1895, to secure the payment of $2,681.23, be and the same is declared to be absolutely null and void, and that the defendant, the Chamberlain Banking House, pay to the clerk of this court the said sum of $2,681.23, together with interest at the rate of seven per cent. per annum from the 6th day of November, 1895, being a total sum of $3,472.73, including interest, and that said sums be distributed pro rata to the several plaintiffs in this action, that is to say," etc.

It will be observed that, in the prayer of their petition, defendants in error sought only to have the chattel mortgage declared to be a nullity, under and by virtue of which the bank should obtain no rights or claim to the goods of the Renshaw Company or any moneys realized from the sale of such goods; and further, to have the goods, or the money realized from the sale thereof by the bank, made available for the satisfaction of their liens and claims against Renshaw & Company. From the judgment, it is clear that the court attempted, and we think, did give them all that they asked; that is to say, the mortgage was nullified and canceled, so that any rights under it conveyed to the bank were abolished; and as the goods were converted into money, the decree directs that the money be paid into the court for distribution among defendants in error.

We have, then, a decree by which a certain instrument is canceled, the result of which presumably creates a fund; and thereupon a direction to the party in whose possession the fund is to pay it over. But there is no recital here that one party shall have and recover of the other a sum certain, and that in default of payment execution shall issue. It does not seem to us that the decree under consideration is one upon which an execution could

have issued against the bank, to be levied, as in the case of an ordinary money judgment, upon any of its property, no more than an order issues to the bank to pay into the court a fund presumably in its hands. The decree clearly adjudicates that the bank has no claim or right to that fund; but we read this decree in vain for any intimation of an intention to render a general money judgment against the bank. We do not think we are now concerned with the question whether the court had jurisdiction to give judgment in favor of defendants in error against the bank for a specific sum of money, in default of payment of which execution should issue. It is sufficient to say that defendants in error neither asked for such relief nor did the court grant it.

In order that defendants in error may now have the relief granted them by the lower court in the case at bar, it ought to be made to appear that the decree under consideration, as that decree stood of record, would charge a prospective purchaser of the real estate of the bank that there was a valid and subsisting judgment against the bank upon which an execution might issue. The view we entertain is that this decree would not constitute such notice. He who inquired would have ascertained that a certain chattel mortgage executed to the bank had been canceled, and that the bank's claim upon the fund created by its assumption of possession and sale of the mortgaged chattels had been adjudicated adversely to the bank, and that it had been directed by the order of the court to pay this fund into court for distribution among certain claimants thereof.

In view of what has been said, it follows that the judgment of the district court, giving to the defendants in error a preference over the other creditors of the bank, is wrong, and ought not to stand. It is therefore recommended that the judgment be reversed and the cause remanded for further proceedings.

LETTON, C., concurs.

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

REVERSED.

JOHN TODD, APPELLANT, V. YORK COUNTY ET AL., APPELLEES.

FILED JUNE 30, 1904 No. 13,214.

1. **Waters: DRAINAGE.** An owner has the right to protect his land from surface water, and, in the interest of good husbandry, to drain lagoons or basins thereon of a temporary character by discharging such surface waters by means of artificial channels into a natural surface water drain on his own property and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.

2. **Liability for Damages.** An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume and by means of an artificial channel discharge it upon another's land, contrary to the natural course of drainage, to the latter's damage and detriment.

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

Meeker & Wray, for appellant.

F. C. Power and *Charles F. Stroman, contra.*

HOLCOMB, C. J.

An injunction was applied for to restrain defendant from diverting surface water onto plaintiff's premises, and, from an order denying the application and dismissing

the action, the latter appeals. The plaintiff and defendant own adjoining quarter sections of land with a public highway running between. The plaintiff's land lies to the west of the defendant's, the county occupying its land as a "poor farm." A liberal quotation from the decision of the trial court will conduce to a more intelligent understanding of the case and of the legal propositions to be considered. What is there said is fairly reflected by the record. Says the trial court: "North and west of Todd's land a draw has its source which runs diagonally across the northeast corner of his land, crosses the public road and enters the land of the county well to the north side. This draw runs in a southerly direction for more than 60 rods upon the county farm, and then bears to the southwest across the public road, and then runs across the southeast corner of Todd's land, and from thence into Beaver creek, 4 or 5 miles distant. This draw is the natural surface drainage for more than 400 acres of land before it enters the county farm. Its bed is generally crossed in farming the land in and on either side of it. The east half of the county farm is low, and near its center is some basin land upon which the surface water naturally runs from 60 or 70 acres of surrounding land. Between this basin or low land and the draw west of it, there is a rim or ridge which would prevent the water from finding its way into the draw. About twelve years ago the then owner of the county farm dug a ditch or drain from this low land in a westerly direction through the ridge and into the draw, the ditch at its deepest point being about four feet. This ditch enters the draw at a point about 15 rods east of plaintiff's land. The county purchased its farm about three years since and has opened and cleaned the ditch, so that the basin land on the east side of its farm is drained into the draw and thence through plaintiff's farm. None of the water in the basin would find its way into this draw but for the ditch above mentioned. In wet seasons the flow through the draw is appreciably increased and it continues to flow longer than it did before the opening of

the ditch. This action was begun to enjoin the county and its officers from draining its low land into the draw. The plaintiff claims that his land has been injured in value by reason of the construction and maintenance of the ditch. The defendant claims that it has a lawful right to make use of this natural surface drainage for its own benefit. The facts are practically undisputed, and in view of the holding of our supreme court, it is believed that the issue is wholly one of law. It was neither alleged nor proved that the county was negligent in the construction or maintenance of the ditch, and the question for determination is, whether one may conduct surface water into a draw on his own premises and thus increase the flow of the draw to the injury of his neighbor. Whatever may be the rule in other jurisdictions, it is well settled that the proprietor of lands may by a proper use and improvement upon them deflect surface waters; and for consequent damages to his neighbor he is not liable in the absence of negligence." The surface water sought to be deflected in the manner complained of does not constitute a lake, pond or lagoon of a permanent character. In seasons when the precipitation is above normal and in the more rainy periods of the year, water collects therein and so remains for a period of time. In the drier portions of the year, by evaporation and percolation, the water passes off, leaving the land dry as other portions thereof. It is, as we understand the record, not denied but that the means resorted to by the defendant for the purpose of reclaiming the basin or swamp land on its premises and relieving it of the accumulation of surface water which would otherwise collect thereon are the most appropriate and best calculated to accomplish the desired result. While there are allegations in the pleadings tending to raise an issue as to whether the natural drainage is toward the draw and in the direction of the course of the artificial drain, and whether the methods adopted are reasonably well calculated to effectuate with the least possible injury the reclamation of the swamp or basin land, yet the evidence

clearly supports the inference that the improvement as it was undertaken is the practical, most natural, and reasonable plan that could be adopted. No inference of negligence or improper adoption and execution of plans in reclaiming the land sought to be relieved of the surface water collected thereon can be drawn from any of the evidence appearing in the record. It is the contention of counsel for plaintiff that, wholly aside from any question of negligence, it is an actionable wrong for the defendant to collect in the artificial drain constructed by it the waters draining naturally into the basin or low lying land on its own premises and discharge them into the draw running through its own land and thence through such draw on the premises of the defendant. This, it is claimed, is a wrongful invasion of a well established right. Notwithstanding the rule of the common law as to surface water being regarded as the common enemy, say counsel, the doctrine does not extend so far as to permit one landowner to cast surface water in a body upon his neighbor's land and if he does so, he is liable for the injury sustained. The draw or ravine into which the surface water from the basin on the defendant's premises is drained, is not a watercourse in the technical sense of the term. It is, however, unmistakably a natural waterway or channel in which surface water is collected and flows to its mouth, and affords an outlet for all the water naturally draining therein from the surrounding country into Beaver creek, a natural watercourse, where it finds its way some four or five miles distant. The draw in question is a natural surface water channel, not of course having a sustained flow nor any permanent source of supply. It carries to the creek the surface water after each recurring rain or the melting of snow and then becomes dry. It has not a worn channel cut in the soil and its bottom is grown over with grass when not in cultivation. It is one degree removed from natural watercourses according to their technical signification. The defendant's land lies within the territory drained by the draw in question; that is, the

surface water falling thereon naturally finds its way into this draw and thence into the stream into which the draw empties. The part of defendant's land sought to be reclaimed has no natural outlet. It is a basin, and the natural drainage is toward the center thereof. The basin acts as a receptacle for the surface water falling on 60 or 70 acres. If, however, the basin were filled up or if drained of its accumulated water, the natural drainage would be toward and into the draw passing through and over a part of the defendant's land and on and over the land of the plaintiff. Good husbandry is promoted by the reclamation of this waste land and using it for tillage purposes. But for its wet character because of the conformation of the surface, the land would be as useful and valuable as other farm lands in the immediate vicinity. If it is not permissible to drain the waters off and into the draw, and thereby improve the land for agricultural purposes, then defendant must permit the land to lie and remain useless and the water to stand and remain thereon, except as it may pass off by evaporation or percolation. Under facts and circumstances such as narrated, is it an infringement of the rights of the plaintiff by an artificial channel to drain the water from the swamp land of the defendant into the draw passing through its premises and there permit it to flow down and over the defendant's lands? In other words, by adhering to the natural course of drainage may the surface water draining into the draw be increased to the extent necessary to drain the 65 or 70 acres which would otherwise flow into the basin on defendant's land and there remain? It may be conceded that some injury results to the proprietor of the lower estate by reason of the increased flow of surface water thus drawn on his land, and the direct question is whether the law affords him a remedy or whether it is an injury *damnum absque injuria.* Surface water is regarded as the common enemy which every proprietor may fight or get rid of as best he may; and a landowner may expel from his land all mere surface water in draining his soil for

agricultural purposes, and an adjoining landowner will have no right of action by reason of such diversion. Gould, Waters (3d ed.), sec. 265 and authorities cited. The above rule, like all others, has its exceptions and limitations. Another rule well established and related to the first is that a landowner has no right to rid his land of surface water by collecting it in an artificial channel and discharging it upon an adjoining proprietor. To do so would violate elementary principles of justice. The adjoining proprietor's land ought not to be made to bear a burden naturally belonging to the other estate. But it is said a landowner may drain his land by artificial ditches and thereby cause the water to pass more rapidly and with increased volume onto the adjacent land of the lower proprietor if the same water would not naturally flow in a different direction and he acts with the proper regard for his neighbor's welfare. Gould, Waters (3d ed.), sec. 271. From these rules of general application and the prior decisions of this court touching the doctrine of surface waters, has the plaintiff brought himself within the rule and the reason of it and is he entitled to an order perpetually enjoining the defendant from maintaining the artificial ditch constructed for the purpose of reclaiming and utilizing for agricultural purposes the land drained thereby? In *Davis v. Londgreen,* 8 Neb. 43, an early case in this court, it is held that: "The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury." It is apparent from a reading of the opinion in that case that what the court in fact decided was that the surface water on the upper estate could not be collected in an artificial channel and thrown on the land below there to remain, or to cut a channel for itself to some lower level. The principle enunciated may be considered as the accepted common law rule relating to the deflection of surface waters, and is and has been the

doctrine obtaining in this state since its first announcement. The allegation in the petition in that case on which the right to relief was predicated, as disclosed by the opinion, was that the water drained through the artificial channel spreads over and into several acres of cultivated land and renders the same not cultivable and unfit for use; that it had begun to cut a watercourse and that the natural result from such ditch "is to cause all the water accumulating in said pond after each rain, and in the spring season, to flow over, into, and across the said land of plaintiff, thereby rendering the same wholly unfit for tillage, and to cut said watercourse across plaintiff's land of greater depth and width each time said pond is drained." The *Londgreen* case was followed in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138. It is there again held, that a party has no right to collect surface waters in a ditch and permit them to flow on the land of another without the latter's consent. *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90, was in the case last referred to cited and quoted from approvingly wherein it is said by the supreme court of Michigan: "One has a right to ditch and drain and dispose of the surface water upon his land as he sees fit; but he is not authorized to injure, by so doing, the heritage of his neighbor. He cannot collect and concentrate such waters, and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor." In the latter case decided by this court, as in the former, the question for consideration was the throwing of unusual quantities of surface water by means of artificial channels on the lower proprietor's land where it rested or found its way gradually to some lower level. In neither of these two cases was the question here presented, considered or decided. The right to the use of a natural surface waterway or channel in carrying off surface water or to increase its flowage by the drainage through artificial channels of ponds and lagoons of a temporary character did not enter into the consideration of either case, and in each it was very properly decided that

the lower proprietor should be protected from an invasion of a substantial right by throwing unnecessarily and in unusual quantities accumulated surface waters on the lower land to its damage and detriment. The act complained of and the wrong relieved against, was the burdening of the lower estate, and where the relief of one could be accomplished only by the imposition of a like burden on the other. Where there are two estates otherwise equally favorably situated by nature, and one is burdened by an accumulation of surface water in a pond or lake, it is difficult to conceive of any sound principle of justice which would permit the estate so burdened to be relieved by collecting in an artificial ditch such surplus waters, and casting them upon the land of the lower proprietor to his damage and detriment. Each proprietor takes the land as nature has formed it, and one ought not to improve his estate solely at the expense of his more fortunate neighbor. In the case at bar, strictly speaking, the defendant does not collect the accumulated surface water and by means of artificial channels cast it on the land of the lower proprietor. What it does, in fact, is to drain the basin on its own land by an artificial channel into a draw or natural waterway for surface water passing over its land, where the water flows according to the natural course of drainage over the lands of the lower proprietor, thereby increasing the flow of the surface water channel to the extent of surface drainage on 65 or 70 acres of land. It is argued that the natural course of drainage is toward the center of the basin on defendant's land, and therefore it cannot be said that the artificial drainage only expedites the flow of surface water which would otherwise find its way into the draw and onto plaintiff's land. What in fact is done, say counsel, is to divert into a new channel and in a different direction, contrary to the natural course of drainage, the surface waters collected in such basin and that such a drainage of surface waters is opposed to all the rules governing the control and deflection of surface waters. We do not regard the argument as wholly sound.

Of course the drainage is toward the center of the basin. This, however, may be said of thousands of depressions in the surface of land in any specified territory drained in one general direction and into a certain surface water drain. Yet one would not seriously argue that such depressions could not be filled or drained by ditches, and yet the waters therefrom would continue to flow according to the natural course of drainage. The territory immediately surrounding the basin except as modified by the basin itself drains into the draw passing over plaintiff's land. The draw is the natural outlet for the surface water falling in that territory and is the natural outlet for the basin and the land drained into it if it is to have any outlet at all. Treating the basin and the land drained into it as an independent watershed, then counsel's position is right; but viewing the land, as we think should be done, as having a natural drainage into some permanent lake or other similar body of water, or into a regular watercourse by means of surface water channels, the territory in question properly and naturally drains into the draw spoken of and thence into Beaver creek, a natural watercourse. In *Rath v. Zembleman,* 49 Neb. 351, a case decided in 1896 and upon a record presenting an almost identical state of facts as in the case at bar, after reviewing the prior decisions, it is by the court held, "In an action for damages alleged to have been caused by the drainage of surface water from a pond on defendant's land into a draw, by which such water was conducted to and across the land of plaintiff, an admission by plaintiff that the draw was a natural waterway and had, since his ownership of the land claimed to have been damaged, been such a waterway, and that the water generally from that portion of the country had flowed through this ravine, precluded the possibility of a recovery of damages for the destruction of grass in the bed of such draw on his premises caused by the additional flowage resulting from the aforesaid drainage." RYAN, C., writing the opinion of the court, says: "On the trial it was admitted by the plaintiff, in open court, that

the draw through which the water flowed from the defendant's land to and across plaintiff's, was a natural waterway running from Clay county, and that it had been such ever since the plaintiff had occupied his premises, and that the waters from that country were drained through this ravine or draw and ran down through plaintiff's land. In view of the holdings of this court since the trial of this case, announced in *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897; *Morrissey v. Chicago, B. & Q. R. Co.,* 38 Neb. 406; *Lincoln & B. H. R. Co. v. Sutherland,* 44 Neb. 526; *City of Beatrice v. Leary,* 45 Neb. 149, and *Jacobson v. Van Boening,* 48 Neb. 80, the plaintiff in no event could have recovered damages in the face of his admissions as to the flowage and the character of the waterway which it followed." The principles underlying the decision in the case cited and in the one at bar are almost if not quite the same. In fact the two cases cannot well be distinguished. If the injury to the hay in the draw because of the drainage therein of surface water by means of ditches afforded no ground of recovery, then the increased flowage in the case at bar, by reason of the drainage of the basin, cannot justify an injunction against its further continuance. We can hardly escape the conclusion that the *Rath-Zembleman* case must necessarily govern us in the disposition of the one at bar unless it may be said that the case ought not to be followed. The decision is based expressly upon the authority of the prior holdings in this jurisdiction. An examination of these several decisions warrants the conclusion that in this jurisdiction the rule is, the drainage of mere surface water collected from rains and melting snows in lagoons or basins, when done without negligence, and for the purpose of reclaiming what would otherwise be waste land, in the interest of good husbandry, by an artificial channel and according to the natural course of drainage, may be accomplished by diverting such waters into a natural surface waterway or channel on the owner's land where it finds an outlet in a stream or natural watercourse, and that the injury, if any,

resulting to a lower landed proprietor over whose land it flows is incidental only and for which no damages will accrue nor relief be awarded by enjoining a continuance of the drainage of such surface water by the method resorted to for that purpose. The authorities cited in the opinion of the case last referred to fairly support the proposition stated in the syllabus. *Morrissey v. Chicago, B. & Q. R. Co., supra,* was a case involving the right to deflect surface water in the construction of a railroad embankment, and it is held, following the common law rule, that where such an embankment is not negligently constructed and it deflects or throws back surface water from its natural course, the railroad company is not liable in damages to the proprietor of neighboring lands thereby incidentally overflowed and injured. A large number of authorities are reviewed in the opinion. Among others, *Gannon v. Hargadon,* 10 Allen (Mass.), 106. In that case it is said: "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. * * * A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria.*" *Anheuser-Busch Brewing Ass'n v. Peterson, supra,* announces the principle just alluded to in the fifth paragraph of the syllabus, wherein it is stated: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage." The next paragraph declares: "But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate

cause of injury to his neighbor, he is accountable therefor." *Lincoln & B. H. R. Co. v. Sutherland, supra,* reiterates that the doctrine of this court is the rule of the common law that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjacent proprietors by reason of such defense he is not liable therefor. It is said, however, "The rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor." In that case a railroad company was held legally responsible and liable for constructing its roadbed and embankment over a draw where surface water produced by rains and melting snow were wont to run from the surrounding territory and thence into the Platte river, without making provision for a culvert or opening through the embankment over such draw for the escape of waters flowing naturally therein. The same principle was again enunciated and adhered to in *City of Beatrice v. Leary, supra,* where the act of negligence, for which a recovery was allowed, consisted in the obstruction of a draw through which flowed surface water, resulting in the overflowing of the land of an adjacent proprietor. In *Jacobson v. Van Boening, supra,* the former decisions of this court were exhaustively reviewed and were declared to be harmonious and to rest upon the principles announced in the syllabus in that case. It appears from the opinion that an injunction against diverting surface waters collected in ponds and lagoons of an upper proprietor and throwing them on lower lands was granted and made perpetual, but solely on the ground that the plan adopted for the diversion of such waters was not the most reasonable and practical method of reclaiming the land sought to be relieved from such surplus waters, and that such plan unnecessarily burdened the plaintiff's land in that action with an increased flow of surface water by reason of the construction of the artificial channels or ditches constructed for such pur-

pose. In the opinion it is said: "The damage alleged is that whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north and thence along the highway of the draw, discharging a large body of water thereby across plaintiff's land, cutting trenches and covering the land with accretions. It also appears that by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land." Again, it is said by the author of the opinion, after discussing other matters: "With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land." See also *Churchill v. Beethe,* 48 Neb. 87, and *Gilmore v. Armstrong,* 48 Neb. 92. The supreme court of Illinois, in *Peck v. Herrington,* 109 Ill. 611, holds to the doctrine that "The owner of land upon which there is a pond, in which is collected the surface water, only, from rains and melting snow, when good husbandry so requires may drain the same by an artificial drain constructed upon his own land, whereby its water is thrown into the same outlet or natural drain it was accustomed to take before, when the pond was full, notwithstanding the flow of the water over a servient tract of land may thereby be increased." The same court in *Anderson v. Henderson,* 124 Ill. 164, again announces the same doctrine and holds to the rule that the drainage of surface water by ditches and drains into the natural and usual channels which nature has provided, even if the quantity of water thrown upon the next adjoining landowner is thereby increased, does not give rise to a cause of action. *Hughes v. Anderson,* 68 Ala. 280, declares the rule to be that "The owner of lands has a right to drain them by

artificial ditches, although thereby the water is precipitated more rapidly, and in greater volume on the lands of an adjacent proprietor below, provided he does not thereby cause water to flow on the lands of such adjacent proprietor, which, in the absence of the ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the welfare of his neighbor." In *Sheehan v. Flynn,* 59 Minn. 436, 61 N. W. 462, it is declared in the first paragraph of the syllabus that "The old common law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule, it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible; and, he is entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him." The doctrine thus announced is in the main the same as held to in this jurisdiction.

The common law rule as to the control and disposition of surface water is in force in this state. In fighting the common enemy, however, the rights of other landed proprietors are to be regarded. The upper proprietor may not act in a negligent manner. He may by artificial channels drain mere surface waters accumulated in ponds, lagoons or basins and throw them in greater quantities into a natural surface water channel or draw and onto an adjoining estate, even though the flow in such natural drain is thereby increased on and over the lower estate. He cannot divert the water in a different direction but must conduct it according to the natural course of drainage, and when such is done there is no legal wrong committed.

The following principles are, we think, fairly deducible from the authorities cited: 1. An owner has the undoubted right to protect his land from mere surface water and, in the interest of good husbandry, to drain lagoons or basins

thereon of a temporary character, by discharging such surface waters by means of artificial channels into a natural surface water drain and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria.* For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.

2. An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment.

The conclusion reached by the district court, as evidenced by its judgment, is supported by the prior decisions of this court, and is in harmony with the general principles governing the control of surface waters, and the same, therefore, should be, and accordingly is,

AFFIRMED.

THOMAS N. NAUDAIN, JR., APPELLEE, V. HERBERT R. FULLENWIDER ET AL., IMPLEADED WITH WILLIAM D. MIXTER, APPELLANT.

FILED JUNE 30, 1904. No. 13,456.

1. **Mortgage:** ATTACHMENT: PRIORITY. Where a mortgagee claims a lien on real estate through a deed filed for record subsequent to the levy of an order of attachment on the same land as the property of the grantor in such deed, the order of attachment and the return of the sheriff showing the levy being duly recorded in the office of the recorder of deeds before the recording

of such deed, the mortgagee takes with notice of the rights of the attachment creditor and subject to such infirmities as inhere in the title of the mortgagor.

2. ———: ———: ———. A prior unrecorded deed passing title to real estate, if made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before the deed based upon such attachment or judgment. *Harral v. Gray*, 10 Neb. 186.

3. Appeal: TRIAL DE NOVO. Upon an appeal in equity this court will try the issue *de novo*, and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusions of the trial court, derived from the consideration of the evidence of witnesses examined in the presence of the court, will not be regarded, unless upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730.

4. Evidence examined, and *held* that the deed through and under which the mortgagee claims a lien on the land in controversy was not delivered to the mortgagor until after the levy of the order of attachment, and that the mortgagee's lien is subject to that acquired by the attachment creditor by virtue of the levy of such attachment.

5. Reversal. The conclusions and decree of the trial court finding and holding to the contrary are reversed.

APPEAL from the district court for Garfield county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

Doyle & Berge, for appellant.

C. H. Balliet, contra.

HOLCOMB, C. J.

The right of the plaintiff, appellee, to the enforcement of a lien on the real estate in controversy, lying in Garfield county, arises by virtue of a mortgage executed on the 20th day of July, 1901, by one Herbert R. Fullenwider. The appellant, Mixter, who was a defendant below, claims a lien on the same land under an order of attachment issued in a certain action then pending in Lancaster county and resulting in a judgment in his favor, wherein he was

plaintiff and one John C. Fullenwider was defendant, which was on the 21st day of May, 1901, levied on the same real estate described in plaintiff's mortgage as the property of the attachment debtor. A copy of the order of attachment and of the return of the sheriff making the levy was duly filed in the office of recorder of deeds of Garfield county and recorded in the proper record on the same day the levy was made. On the 23d day of May following, a deed purporting to have been executed by the attachment debtor John C. Fullenwider to Herbert R. Fullenwider and bearing date May 3, 1901, was presented and duly filed for record and recorded in the office of the said recorder of deeds. Afterwards and on the 20th of July, the mortgage above mentioned was executed in favor of the plaintiff. In view of the foregoing circumstances, it is clear that the mortgagee when he accepted the mortgage under which he claims, took it charged with notice of the interest and rights of the attachment creditor by virtue of the levy of the order of attachment on the real estate as the property of the attachment debtor, and subject to any infirmities inhering in the title of the mortgagor, Herbert R. Fullenwider, by reason of the time and manner in which he acquired his title and interest in and to said land. When the mortgage was executed, the records of Garfield county, wherein the land was situated, disclosed that the order of attachment at the suit of the appellant had been levied on the land as the property of the attachment debtor and while the legal title, as appeared by the records, was in his name, and some two days prior to the time the mortgagor had recorded his deed evidencing a conveyance of the land from the attachment debtor to himself. The mortgagee had constructive if not actual notice of the then state of the public records and must be deemed to have acquired a lien subject to whatever rights the attachment creditor acquired therein prior thereto, and to stand in no more favorable light than would the mortgagor claiming under his deed from the attachment debtor.

In determining the respective rights of the parties to the controversy, regard is to be had to the rule that a prior unrecorded deed passing title to real estate, made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before the deed based upon such attachment or judgment. *Harral v. Gray,* 10 Neb. 186; *Mansfield v. Gregory,* 11 Neb. 297; *Hargreaves v. Menken,* 45 Neb. 668; *Peterborough Savings Bank v. Pierce,* 54 Neb. 712, 724; *Westervelt v. Hagge,* 61 Neb. 647, 659. The pith of the present controversy is with respect to the question of the good faith of the transaction whereby John C. Fullenwider transferred or attempted to transfer title to the real estate in controversy from himself to his son Herbert R. Fullenwider who afterwards executed the mortgage which is now assailed by the attachment creditor. And this question presents a dual aspect. Was the transaction a *bona fide* sale of the land and, if so, when was the deed actually delivered to the grantee? The determination of these questions requires a consideration and weighing of the evidence and an ascertainment of the proper inferences to be drawn therefrom. The case comes here by appeal and for a trial *de novo.* We are, says the statute, to reach a conclusion independent of and without reference to the conclusion reached in the trial court. The evidence in the case is partly in the form of depositions and partly from witnesses who appeared in court and before the trial judge on the hearing therein. Having due regard to the fact that the trial court possesses an advantage over a reviewing court in the consideration and weighing of evidence of witnesses who appear before the court in the trial of a cause, we are to decide from the record as presented whether in view of all that is disclosed therein and of the fact just adverted to, a different conclusion should be reached from that announced by the trial court. It has recently been announced in considering the effect of the new statute regarding decisions in this court on appeal in actions in equity that this court will try the issue *de*

novo and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusion of the trial court derived from the consideration of the evidence of witnesses examined in the presence of the court will not be regarded unless upon the whole record, in view of the position of the trial court in weighing such evidence they appear to be right. *Grandin v. First Nat. Bank,* 70 Neb. 730. It is in the light of the rule as thus announced that we undertake a consideration of the controverted questions of fact in the case at bar.

The attachment debtor, John C. Fullenwider, is the father of the grantee in the deed filed for record just a short time subsequent to the levy of the order of attachment. It is earnestly contended by counsel for defendant Mixter the evidence warrants a finding that the deed from Fullenwider to his son although executed on May 3d, was only partially executed and, at the time, the name of the grantee was left blank and that possession was retained by the grantor and later on, after the order of attachment against him was issued and levied, the name of his son was inserted as grantee, the deed presented for record and thereafter delivered to his son as an executed contract. At the time the father lived in Lincoln, the son in Omaha, and the land lay in Garfield county. In support of the plaintiff's version of the affair and to establish the *bona fides* of the transaction, there is found evidence in the record tending to prove that an oral arrangement was made between the father and son on the 1st or 2d of May that the latter should take the land which the former was then anticipating securing a deed for, and that on the third, a deed was duly executed conveying the land to the father and also, at the same time, the deed in controversy executed by him to his son in pursuance of the prior arrangement, and that this deed was actually delivered to the son at Omaha on the 9th of May and by the latter mailed to the recorder of deeds of Garfield county on the 20th or 21st of May and received and filed for record on

the 23d. The crucial point seems to be with respect to the question of when the deed was actually delivered by the father to the son. There is in the record, with nothing to controvert it, evidence sufficient to show that the son paid an adequate consideration; in fact, while it appears that the land is worth but $400 or $500 it is testified to by both father and son that the consideration paid by the latter was $1,200. The rule regarding transactions of this character is that a transfer of property by a debtor to a relative which has the effect of hindering or delaying other creditors in the collection of their debts will be scrutinized very closely, yet it will be sustained if made in good faith and for an adequate consideration. Other decisions go to the extent of holding that such transactions are *prima facie* fraudulent and the burden is cast upon a party thus claiming to clearly and satisfactorily establish the good faith of the transaction. There is strong evidence in the record, and as we view it, convincing, tending to show that the deed to the son was executed with the name of the grantee in blank. This is the best recollection of the notary public taking the acknowledgment of the grantors. It is also testified that on the 7th day of May, the father visited Garfield county and made inquiries regarding the probabilities of a sale and stated that he was in possession of a deed in blank so that a quick sale could be made if a purchaser could be found. At the time of receiving the deed for record, the county clerk testifies that the name of the grantee had been freshly written in the deed in ink the color of which had not changed as it would do after a short period of time. It is also testified that the deed when it was transmitted for record was sent by the father to the recorder with directions to record and to send to the grantee at his address in Omaha, and that with the letter of transmission was inclosed the necessary fee to pay for the recording of the instrument. There is evidence of an almost if not quite irrefragable character that the recording fee was transmitted with the deed by a money order drawn at the postoffice at Lincoln on the postoffice

at the county seat of Garfield county. According to the testimony of the grantor and grantee, the deed was transmitted for record from Omaha and the testimony to which we have just referred is wholly inconsistent with the theory of the plaintiff in this respect. The evidence to uphold the transaction and to prove delivery before the levy of attachment is confined altogether to the testimony of the father and the son. The original deed was not offered in evidence. Other evidence of a wholly disinterested character is in very sharp conflict with the evidence offered to uphold the validity of the conveyance. We find no way of reconciling the apparent conflict and are compelled to make such deductions as seem to be warranted from contradictory testimony of the character just referred to. The circumstances appear to us to point unmistakably to the fact that the conveyance of the father to the son and the delivery thereof were the result of and expedited by the suit instituted and the attachment levied by the defendant Mixter. We conclude from a careful consideration and full examination of the entire record that the delivery of the deed from John C. to Herbert R. Fullenwider was subsequent to the levy of the order of attachment, and consequently the grantee took the land charged with the lien of the levy, and the mortgagee's lien, likewise, is subordinated to that of the levy of the order of attachment. The conclusion reached by the trial court awarding to the mortgagee a first lien should be reversed and a decree entered in this court giving to the attachment creditor the first lien by virtue of his levy and to the mortgagee a second lien. A decree will be entered in this court in conformity with the conclusions we have herein announced.

DECREE ACCORDINGLY.

LENA MARGARET LILLIE V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,227.

1. **Criminal Law: JURY.** In criminal trials the question of the qualification of a juryman is one of fact for the determination of the trial court, and, unless it appears to be against the weight of the evidence, it will not be overruled by this court.

2. **New Trial.** In capital cases a new trial should not be allowed on account of newly discovered evidence unless its introduction on the trial might have been beneficial to the defendant, and might have led to a different result.

3. **Murder: PROOF OF MOTIVE.** Proof of a motive to commit the crime charged is always competent in murder trials; the fact that the alleged motive is out of proportion to the crime committed does not require that evidence of such motive be excluded. The supposed danger that the jury may give too much weight to the offered evidence is not a legal ground for excluding it.

4. **Trial: EVIDENCE.** When a witness testifies positively to a conversation with an acquaintance over the telephone, an objection to the evidence on the ground that the witness has not sufficiently identified the person with whom the conversation was held should not be sustained, the witness's knowledge of such identity not having been tested by cross-examination or otherwise. The force of the evidence is a question for the jury.

5. **Evidence: USE OF FIREARMS.** In the trial of a defendant charged with the crime of murder with firearms, it is not error to permit evidence that the defendant has for many years been familiar with the use of such firearms.

6. ———: **DISCRETION.** Under some circumstances it is in the discretion of the trial court to permit evidence of experiments to illustrate transactions that have been testified to; and, under the circumstances in this case, the court did not abuse its discretion in permitting such evidence.

7. **Harmless Error.** If, in a criminal trial, evidence is received that is not from its nature necessarily injurious to the defendant, and the receiving of such evidence is not objected to when the same is offered, nor complained of in the petition in error in this court, the error, if any, will be considered to be without prejudice.

8. **Evidence.** In a trial of an information for murder, it is proper to prove the physical conditions existing in the vicinity of the murder at the time the crime was committed. This applies to evidence of finding of unusual articles, as pepper and matches,

upon the floors of the living-rooms of the house where the crime was committed.

9. ———. In murder trials, it is competent to prove the conduct, appearance and actions of the accused immediately after the crime was committed, as well as subsequent statements of the accused tending to show her connection with the transaction being investigated.

10. **Instruction.** In criminal trials, the previous good character of the defendant has great weight as tending to show the improbability of guilt. The weight to be given such evidence is for the jury to determine. The court is not required to tell the jury that, if the other evidence is sufficient to satisfy the jury of the defendant's guilt, they must still consider whether previous good character, when weighed with all the other facts and circumstances in the case, raises a reasonable doubt of guilt.

11. ———. It is not error to instruct the jury that the defendant is under no obligations to testify in her own behalf, and that the statute expressly declares that her neglect to testify shall not create any presumption against her.

12. **Trial:** MOTIVE. It is not indispensable in criminal trials that a motive be shown for the commission of the crime charged. If the evidence shows beyond a reasonable doubt that the defendant committed the crime, the prosecution does not necessarily fail because the real motive for the act cannot be discovered and shown to the jury.

13. **Instruction:** REASONABLE DOUBT. An instruction that: "A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases, but in view of the former decision of this court in *Barney v. State*, 49 Neb. 515, we cannot reverse the judgment in this case solely on the ground of giving this instruction.

14. **Circumstantial Evidence.** When the evidence relied upon to establish the guilt of the defendant is circumstantial, the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with the guilt of the defendant. When the minds of reasonable men might fairly differ as to whether there is any reasonable doubt of the defendant's guilt,

the responsibility must be left, where the law places it, with the jury. The evidence in this case, under this rule, supports the verdict and judgment.

15. **Evidence.** In a prosecution for murder committed with firearms, evidence that the defendant had access to a weapon of that nature with which to commit the crime is important, but, if it appears that there was opportunity to conceal such weapon after the crime was committed, such evidence is not indispensable.

ERROR to the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matt Miller, C. H. Aldrich, Hamer & Hamer and *W. V. Allen,* for plaintiff in error.

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

SEDGWICK, J.

In the early morning of the 24th day of October, 1902, Harvey Lillie was killed at his home in David City. The circumstances were such that all parties agree that he was wilfully murdered. Lena Margaret Lillie, who was his wife, was charged with the crime, and upon her trial in the district court for Butler county was convicted of murder in the first degree, and sentenced to imprisonment for life. She has brought the record of her conviction to this court for review upon petition in error, and urges that the judgment against her should be reversed because the evidence was circumstantial and was insufficient to justify her conviction, and because of errors in the prosecution against her which prevented a proper investigation of the charge.

1. It is contended that the jury was incompetent; that two of its members, before the jury was impaneled, had formed and expressed opinions as to the guilt of the defendant. In the brief for the defendant, it is said: "The court will grant a new trial because of the prejudgment of a juror, when its attention is challenged to it after ver-

dict, in the same way that it excuses a juror on his *voir dire* examination when the thing was known."

In *Murphey v. State,* 43 Neb. 34, this court said: "Where the evidence by which it is sought to impeach a verdict on account of the prejudice of a single juror, subsequently discovered, is conflicting, an order denying a new trial will not as a rule be disturbed on appeal."

Substantially the same rule was announced in *Clough v. State,* 7 Neb. 320, 347; *Carleton v. State,* 43 Neb. 373; *Hill v. State,* 42 Neb. 503, and in other cases.

In *Bliss v. State,* 117 Wis. 596; 94 N. W. 325, the court said: "The question whether the juryman was disqualified was one of fact for the determination of the trial court, and as such decision does not appear to have been against the weight of the evidence it will not be determined by this court."

When may the evidence be said to be conflicting within the meaning of the decisions of this court? The conflict, of course, must be a substantial one. The evidence must be of such a nature that the presumption of the correctness of the ruling of the trial court is not overcome. The law affords the defendant in criminal prosecution great latitude in the examination of jurors to ascertain whether there are just grounds for challenge. The trial court hears this examination, and will suggest or propound further questions if necessary to ascertain whether the juror is fair and impartial, or may possibly be prejudiced for or against the accused or may have formed or expressed an opinion upon the merits of the questions that are to be tried. The trial court observes the conduct and demeanor of the juror during this examination, and will not hesitate to exercise its discretion and excuse the juror if there is substantial ground to believe that he is for any reason unfit for the service. The rulings of the trial court in the exercise of this discretion will not be disturbed simply because there may seem to be some preponderance of evidence against it. There must be such substantial evidence as to make it appear that in view of all of the evi-

dence bearing upon the matter, and the circumstances surrounding the examination of the juror, the trial court has abused its discretion in refusing a new trial upon this ground. In this case, the examination of the juror Carlisle is not preserved in full. It is shown by affidavits that upon that examination the juror stated that he had not formed or expressed an opinion as to the guilt or innocence of the accused. It is not shown in what connection that statement was made by the juror nor whether it was qualified or explained by him. It does not appear that the defendant might not have discovered the truth as to the qualifications of this juror by a proper *voir dire* examination. The evidence as to conflicting statements made by the juror, out of court, is somewhat indefinite. It is unqualifiedly contradicted by affidavits of other witnesses. The whole evidence is not sufficient to show that the trial court abused its discretion in overruling this objection.

Two witnesses testified by affidavit that the juror Joseph Hilger made statements in their hearing some time before the trial, which would show that he had formed an opinion as to the guilt of the defendant, and which amounted to an expression of such opinion. These affidavits are unqualifiedly denied by the affidavit of the juror and of Myrtle Hilger his wife. The conversation, in which the statements are alleged to have been made, was in the presence of both of the witnesses testifying thereto. The witnesses, however, do not precisely agree as to the form or substance of the statement. We find nothing in the record indicating that the evidence of these witnesses should prevail against the evidence of the juror and his wife, and we cannot see that in overruling this objection the trial court abused its discretion. The affidavit as to the statements of the juror Pool made prior to the trial, does not show that this juror had formed or expressed an opinion of defendant's guilt and is wholly insufficient to overcome the positive statements of the juror's affidavit, and the presumption of the proper exercise of its discretion on the part of the trial court.

2. One of the grounds of the defendant's motion for a new trial was that evidence in her favor had been discovered since the trial. Shortly after Mr. Lillie was killed, there was found on a vacant lot in another part of the city a man's shirt alleged to have been marked with blood spots indicating, as it was claimed, that it had been discarded by the murderer to avoid evidences of guilt. This circumstance was known generally by the public, and also by the defendant, long before the trial, and no reason is shown for not having brought this evidence to the attention of the jury, if it might be of any assistance to the defense.

It was not shown in the evidence before the jury that this defendant at the time was in possession of a weapon with which she might have committed the crime. This fact is of importance in connection with the question of the sufficiency of the evidence to sustain the verdict, as will be hereafter noticed. Upon the motion for a new trial on the ground of newly discovered evidence, it was shown by affidavit that sometime after the trial a revolver had been found in an unused well upon premises not far distant from those upon which the murder was committed. Three of the five chambers of this revolver were loaded with bullets at the time it was found, the other two chambers being vacant; and it was claimed that this evidence would indicate that the murderer, in his flight from the premises, had thus disposed of one of the evidences of his guilt. Counter affidavits were filed showing that Mr. Lillie, the deceased, had a similar weapon in his possession sometime prior to the murder. It has been held that in civil cases: "A motion for new trial will not be granted on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict." *Gran v. Houston,* 45 Neb. 813; *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753; *Hill v. Helman,* 33 Neb. 731.

In capital cases the newly discovered evidence must, at least, be of such a nature as to make it appear that its

introduction upon the trial might have been beneficial to the defendant, and might have led to a different result. The defendant was not arrested until several weeks after the crime was committed, and the finding of this revolver would no more tend to prove that some other party had committed the murder, and had placed it where found, than it would to prove that it was placed there by the defendant herself. No reason has been suggested for supposing that this evidence might have produced a different result in this case.

3. It was proved upon the trial that the defendant had been for several years dealing upon the Chicago board of trade. For some time her ventures had been profitable, so that on the first day of May, about six months prior to the murder, there was a balance with the broker in her favor of $510, but from that time until the death of her husband she was less fortunate. In this short period, her losses amount to more than $1,000, and although the evidence shows that during the entire time of her dealings her net loss was only $100, it appears from the uncontradicted evidence of her broker that she gave him an order on the day before the murder, in which she risked two or three hundred dollars more, and on that day she was notified that it would be necessary for her to "put up" two hundred dollars as the market then stood, and that if it should advance still further three hundred dollars would be required; although the broker had not in fact placed this order, yet, she supposed he had, and understood that she had incurred this loss.

It is contended that this evidence was incompetent, that it tended to prejudice the jury against her and served no legitimate purpose in the case. The same objection is made to receiving in evidence several letters written by the defendant to Mr. Runyon, her broker in the foregoing transactions. One of these letters was written within three or four days after the homicide and the others a little later. In one of these letters, she said:

"That little trade I had there I suppose you took care of

it and I will make it all right some day. I think it is going to make me some money soon. They have no way of knowing anything only through you and I beg of you to be careful and what trades on your books that I spoke of are mine and the rest are yours you understand.

"Be careful what you say. I told them that you never received any margin only through the mail and that the amount was merely inclosed in an envelope and sent. How they know anything is what I can't see, but they don't know much and if you want to ask me anything you can through the mail and it will be safe."

In another letter she said:

"And I will count on you staying by me as you should and you must as they are going to try to make your books a strong point against me and don't let them do it. They have not one single thing against me and so far they have not been able to dig up anything and do not be the means of such a thing yourself. I will count on you as a friend to do the right thing by me."

Another letter was as follows:

"Mr. Runyon:

"Remember that you are to stay by me on those books as you agreed to do. Do all you can for me and do me no harm."

Proof of a motive to commit a crime, is, of course, competent in murder trials. *Gravely v. State,* 45 Neb. 878; *St. Louis v. State,* 8 Neb. 405. It is argued in the briefs that it is so improbable that a wife would murder her husband for so small a consideration as to render this evidence wholly incompetent; but it should be improbable that a wife would murder her husband for any consideration, however large; and the fact that the motive shown is out of proportion to the crime committed does not require that the evidence shall be excluded.

Circumstances that tend to show a motive for the crime are to be considered by the jury, and in view of the fact that the defendant knew that Mr. Lillie's life was insured in her favor in something more than seven thou-

sand dollars, it seems proper that this evidence tending to show her disposition to speculate upon the board of trade, and her misfortune, and a special need of money at the time, should be given to the jury as tending to show a motive to commit the crime. It was for the jury to say whether an adequate motive had been shown, and the letters, showing her understanding of the transaction and her great interest in the details thereof, were clearly competent. For the same reason, evidence of her existing indebtedness to the banks at the time was proper to be proved to the jury.

Mrs. Lillie was engaged in dressmaking. She at times employed several girls to assist her in the business. One young lady was engaged with her at this time. The defendant appears to have had some credit with the banks. She occasionally borrowed small sums of money upon her unsecured note. She appears in one instance, at least, to have attempted to deal upon credit on the board of trade. Her statement in her letter to her broker that she would make her "little trade" with him "all right some day," and other circumstances in evidence, would indicate that she had no large amount of ready money. She appears to have been able to procure temporary loans. There is reason to believe from the evidence that she had no means of improving her financial condition permanently other than the earnings of her business, unless it should be from the insurance upon the life of her husband. It was certainly proper that the jury should understand these matters. There is nothing to indicate that the jury gave too much weight to the fact that she had been dealing on the board of trade. The fear that the jury might do so would be no legal ground for excluding evidence otherwise competent and proper.

4. In connection with the evidence in regard to the dealing upon the board of trade, the question arose as to Mr. Lillie's knowledge of these transactions. This was surely a legitimate inquiry. The defendant insisted, and introduced evidence tending to show that these dealings

were in reality with the sanction, and for the benefit of Mr. Lillie, and were carried on in Mrs. Lillie's name, at his request, to avoid objections that his employers might make to his dealing in options while engaged in buying and shipping grain for them. If Mrs. Lillie was not acting for herself in these matters, and was relying upon her husband's judgment to direct her proceedings, it was important that the jury should know the facts. Her broker testified that his instructions from Mrs. Lillie were to not let Mr. Lillie know of her board of trade transactions. The girls of the telephone exchange were called by the state to prove that Mrs. Lillie had, several years before, at the beginning of these transactions requested them not to inform her husband of her talks over the telephone with her broker in carrying her board of trade deals. These speculations seem to have been continuous from the beginning. They were during the whole time largely conducted by conversations over the telephone. If this evidence is to be believed these employees of the telephone company continued under these instructions of secrecy from the time they were given. We see no reason to doubt the materiality of such evidence.

It is further objected that these witnesses did not show themselves competent. The point insisted upon, as we understand counsel, is that the witnesses failed to show that in fact it was Mrs. Lillie with whom they were talking, it appearing that the conversation was over the telephone. No objection, however, was made specifically upon that ground. The witness testified absolutely that she had a conversation with the defendant. No attempt was made to cross-examine, either before or after the evidence was given, as to the witness's means of knowing the identity of the person conversing with her. The evidence was properly submitted to the consideration of the jury.

5. Objection was made to evidence showing that the defendant had for many years been accustomed to the use of firearms, and error is now assigned in overruling this objection. The jury was undoubtedly entitled to know

that fact, and its importance does not appear to have been exaggerated.

6. When Mr. Lillie was killed, there were two shots fired with but a short space of time between them. That the two shots were fired in quick succession is clearly shown by the evidence. One reliable witness, who was walking upon the streets of the town at the time, distinctly heard both of the shots and stated the distance he walked in the time that intervened between them. He was walking in an ordinary way, neither rapidly nor slowly. His evidence by ready computation shows that the time between the two shots must have been not more than eight seconds. It is assumed by both the prosecution and the defense that it was the first shot fired that killed Mr. Lillie, and that the second shot passed through the window glass, and also through the curtain on the inside and the wire screen on the outside of the window, and that both shots were fired by the same person. In determining whether these shots were fired by the defendant or by some other person, it became important to know at what distance from the window the last shot was fired. The curtain, the window and the screen through which the bullet passed were received in evidence, and witnesses for the state testified that they examined these immediately after the shooting and that the curtain was powder-burned. The state then offered evidence of experiments which had been performed for the purpose of illustrating how near the curtain the shot must have been fired to produce such result. This evidence was objected to and its admission is now assigned for error. The character of the curtain is not very clearly shown by the verbal testimony. It is described by some of the witnesses as a lace curtain, and by others it is said to have been made of cotton. The curtain itself was in evidence before the jury. The cloth used in making the experiments is described as common muslin. It is said in the defendant's brief that in making these experiments "the curtain itself was not used, nor a similar one, and was not hung five inches in front of the

original sash, or a similar one, with the wire screen three inches in back of that, similar to the one at the Lillie residence, and with the same gun that Harvey Lillie was murdered with, containing the same cartridges, or similar ones," and for these reasons it is contended that the evidence of the experiments should have been excluded.

In the experiments, the cloth was hung before a wooden surface and about six inches distant; no wire screen was used. It was not known what sort of cartridges were used by the assassin except that one of the bullets which was found in Mr. Lillie's head was in evidence before the jury, and also another similar bullet which was found in a building at some distance from the window and was at least partially identified by the evidence as the bullet fired at the second shot above referred to. It was therefore impossible in these experiments to use the same revolver with which Mr. Lillie was killed, or to be certain of the similarity of the cartridges used. In making these experiments, various revolvers were used of different pattern and of different length of barrel, and cartridges were used of different lengths, being what are called long and short cartridges, and of each length cartridge different kinds were used with reference to the character of the powder with which they were charged; some being filled with common black powder and others with lighter colored or semi-smokeless powder. A record was kept of each shot fired. The cloth used was in evidence before the jury. Each bullet mark through the cloth was fully explained to the jury, showing the kind of revolver and cartridge used in connection therewith, and the distance from which the shot was fired. The distances at which the various shots were fired range from about three inches to about three feet.

In *Davis v. State,* 51 Neb. 301, the court, after pointing out the similarity of the conditions existing in connection with the experiments proved, and the conditions existing in the transactions to explain which the experiments were offered, said:

"This was sufficient to make the evidence competent, and it was for the jury to consider the place where the displacement of the fixtures occurred and the place where the experiment was made and then to give such weight to the testimony of the state's witness who made the experiment as they thought it deserved."

And in *City of Ord v. Nash,* 50 Neb. 335, it was said:

"Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion."

The defendant offered evidence of experiments of the same general nature. The experiments complained of were under conditions as closely identical with the conditions of the transactions upon which they were intended to throw light, as the circumstances of the case would admit. The object of the experiments was to explain or illustrate how near a cloth curtain a pistol or revolver must be held in order that a shot fired from it through the curtain will powder-mark the curtain. It is true that it was not shown that any one of these revolvers used in these experiments was identical in construction and power with the weapon with which Mr. Lillie was killed, but there is evidence tending to show that the weapon from which the fatal shot was fired was an ordinary revolver. The defendant, in statements made immediately after the transaction, partially described the weapon, which she says she saw in the hands of the assassin.

We think the circumstances were such as to come within the above rule, and it was not an abuse of discretion on the part of the trial court to admit this evidence.

7. It is contended in the briefs that the court should not have allowed evidence that the sheriff organized a posse in the morning after the murder "with which he prospected the roads and streets, searched the alleys and questionable places, as well as the fields, without discovering a

questionable character, as he claims." When this evidence was first given no objection was made, and after the general statement had been made by the witness without objection and the witness was questioned further, the technical objection was made to the witness telling what they arranged to do, but no objection appears to have been made to evidence of what was actually done in that regard. There is no assignment in the petition in error raising this question. The defendant would certainly have a right to consent to the admission of such evidence as this, which might by some be regarded as likely to influence the minds of the jury favorably to the defendant, and having consented to its introduction cannot now predicate error in its admission.

8. Evidence was allowed that pepper was found sprinkled upon the floor at the foot of the stairway, matches and a "shoe-heel" were also found upon the floor of one of the lower rooms. It is said that it was error to receive such evidence. But it is certainly proper to show the conditions existing in the vicinity of the crime at the time. This evidence was directed to conditions observed so soon after the murder as to make its admission proper.

9. When the defendant first went downstairs with the girls after the murder, she went to the telephone and when the witness Hall arrived a few minutes later she was also at the telephone. She stated that she was trying to call assistance, but was unable to get any answer to her calls from the central office. The person in charge of the central office testified that no call was made, that he would have heard it if any had been made, as he had been aroused by another call shortly before five o'clock. It is urged that it was error to admit this evidence; that it was prejudicial as tending to create the impression with the jury that she was simulating and trying to hide appearances of guilt; but the evidence of defendant's actions at the time was competent as part of the *res gestæ*, and there was evidence supporting the defendant's theory that

she was unable to call the central office. One witness testified that he was sent to the central office to arouse the persons in charge and was for some time unable to do so. It was proper that the jury should consider all the testimony upon this point.

10. The court was asked to instruct the jury that "if, from all the other evidence, the jury would be satisfied of the guilt of the defendant they must still determine whether or not her previous good character, when weighed with all the other facts and circumstances in the case, raises a reasonable doubt as to her guilt; and, if such reasonable doubt remains, the jury must acquit," and it is insisted that it was error to refuse this request. There was ample evidence of defendant's previous good character. She ought to have the full benefit of that fact. We agree with her counsel that:

"Mrs. Lillie, having been put on trial for murder, had a right to have the jury know that she had an exceptionally high character; that her life had been pure and that she was devoted to the well being and happiness of her husband; and this being shown the jury had a right to say that it did in their judgment not only raise a reasonable doubt of her guilt but that her character was so strong they preferred under the solemnity of their oaths to believe she did not commit the crime."

Judge Cooley in *People v. Garbutt*, 17 Mich. 9, 25, said:

"Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of

guilt which would not otherwise exist, but it may bring conviction of innocence."

He also in the same case said:

"The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible. We refer particularly to the cases of *People v. Jenness,* 5 Mich. 305; *Maher v. People,* 10 Mich. 212, and *Durant v. People,* 13 Mich. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice. But to give it full effect, the jury must be left to weigh the evidence and to examine the alleged motives by their own tests."

The whole matter is for the jury to determine. The question being discussed is whether the matter was properly left to the jury. The proposition contained in the requested instruction is undoubtedly true. Good character has, and ought to have, great weight. The other evidence in the case may be sufficient to convict a person of bad character, when it would be wholly insufficient if good character were shown. But the same is true of other substantive matters of defense. Must the court single out each substantive fact in the evidence that tends to establish innocence, and tell the jury that if a consideration of all other evidence would require a verdict of

guilty, they must still consider whether the particular fact pointed out would not be sufficient to raise a reasonable doubt? The attention of the jury was directly called to the character of the defendant by the court, and they were told that evidence of good character was allowed as tending to show that she would not be likely to commit the crime charged against her, and that it was to be considered with all of the other evidence in the case and to be given such weight as the jury may deem it entitled to. There is nothing in the record to show that the jury did not give due weight to this evidence. We cannot say that there was error in this ruling of the court.

11. The defendant did not testify in her own behalf. An instruction based upon that fact was given to the jury copied from the instruction approved by this court in *Lamb v. State,* 69 Neb. 212, and we are asked now to say that it is erroneous. We are satisfied with the language there used and with the conclusion reached.

12. The court instructed the jury:

"You are further instructed that it is not indispensable that a motive be shown for the commission of a crime, but the existence or non-existence of such motive is a question of fact which must be determined by the jury from a consideration of all of the evidence in the case, and as a circumstance tending to show the guilt or innocence of the accused."

It is urged that this instruction is wrong because crime is not committed without some motive. But the instruction does not say that it is not indispensable that a motive exist. The human mind is sometimes unfathomable. A motive may exist, and there still be no direct evidence to show it. If, in fact, the crime was committed, and this is shown beyond a reasonable doubt, then it does not necessarily follow that no motive existed, because the evidence fails to show an adequate motive. It is therefore not erroneous to tell the jury that it is not indispensable that a motive be shown.

13. An instruction was given attempting to define what

is meant by the expression "a reasonable doubt." With the exception of one sentence, it was given to the jury in *Barney v. State,* 49 Neb. 515. The instruction here complained of contained the words:

"You are not at liberty to disbelieve as jurors if from all the evidence you believe as men."

These words were not included in the instruction quoted in *Barney v. State,* otherwise the instruction was practically the same in both cases.

This court refused to reverse the judgment in the case of *Barney v. State* on account of this instruction; but did not unqualifiedly approve of giving such language in the charge to the jury. The court said: "Whenever a court undertakes to define a reasonable doubt, it opens the way to a vast amount of speculative reasoning without any very practical application." The instruction may be deserving of some of the criticism it has provoked, but in view of the former decision of this court, we cannot reverse this judgment solely on account of the giving of this instruction.

14. The evidence relied upon to establish the guilt of the defendant is circumstantial. In such cases the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with the guilt of the defendant. It is earnestly contended that the evidence in this case does not meet this requirement. We cannot in this opinion reproduce this large mass of testimony, nor even set forth the substance of the evidence of the various witnesses. Some of the facts immediately surrounding the transaction of the murder are as follows: The defendant and her husband had for many years resided together as husband and wife in the community where the crime was committed. They appear to have lived happily together. There is much evidence in the record to that effect, and none to the contrary. The defendant had always borne a good character and reputation in the community where she lived, and is entitled to the presumption of innocence that always arises from a cor-

rect and blameless life. She was engaged in dressmaking and appears to have been generally active and diligent in her undertakings, but there is nothing established showing avarice or that she was a "greedy, grasping woman." That night as usual they occupied the chamber by themselves. It was not a large room. There was a window opening to the east which was not far from the south side of the room. The bed was immediately in front of this window. The south end of the bed, where their heads rested, was about ten inches from the wall in which this window was located, while the foot of the bed was at a greater distance, undoubtedly about twenty-two inches, as disclosed by the evidence.

Mr. Lillie occupied the side of the bed farthest from the window and there can be no doubt, under the evidence, that when his position was first observed after the murder, the body was lying upon the back. There is some conflict in the evidence as to the exact position of the head, which will be again noticed. The defendant occupied the part of the bed nearest the window. These details and others that will be noticed later, are very important in determining two questions: First, Was the fatal shot fired from the east side of the bed? Second, If it was fired from the east side of the bed, could it have been done by any other person than the defendant herself? The bullet entered Mr. Lillie's head upon the right side, a little above the ear and somewhat further forward than the center of the head. Upon this point there is no conflict in the evidence. There was a post-mortem examination made by several surgeons, and their evidence was taken as to the course of the bullet through the head. The bullet passed through the brain, struck the skull on the opposite side of the head, failed to penetrate it, and was found near where it had struck the skull. Verbal descriptions of the course of the bullet indicate that the line of its passage through the brain was nearly perpendicular with the side of the head. A human skull was in evidence which was marked by the expert witnesses to indicate the point where

the bullet entered the skull of the deceased and also the point where the bullet struck the skull on the opposite side of the head. The witnesses substantially agreed that these marks upon the skull in evidence correctly indicated the course of the bullet. From this evidence it appears that the line of the bullet's course was not at a right angle with the side of the head, but that the bullet took a downward and backward course so that the point at which it struck the skull on the opposite side of the head was about two inches lower and about the same distance farther toward the back of the head than the point where the bullet entered. In connection with this circumstance, it is urged by counsel that when the body of the deceased was first observed, after the crime was committed, the head was turned to the west so that it rested upon the left side of the face; and that therefore the bullet might have been fired from the west side of the bed. This would agree with the statements of the defendant, who, immediately after the crime was committed, declared that Mr. Lillie was shot by a burglar from the west side of the bed; that she was awakened by this shot and saw the burglar with a revolver in his hand which was pointed at herself, and that the burglar approached her, and, to avoid being shot, she threw herself from the bed, so that the second shot, which was fired almost at the same time, passed over her and through the window before mentioned.

As to the position of the head of the deceased when first observed after the crime was committed, the evidence is not entirely satisfactory. Evidence upon this point becomes of greater importance because it is established beyond controversy by the expert testimony produced upon the trial that the effect of such a wound, through that part of the brain traversed by this bullet, would be to immediately take away all power of voluntary motion, so much so as to render it impossible that the deceased might have changed his position after the fatal shot was fired.

The defendant's little girl 12 years of age appears to have been the first witness who observed the position of the

body. She seems to have gone into the room immediately. She says she tried to wake him up; that she took him by the ear, that it was his right ear that she took hold of. From the situation of the bed in the room, and the location of the door through which this child must have entered, as well as the location of the body upon the bed, she must have gone to the west side of the bed, and if she is correct in saying that she took hold of his right ear, the head must have been turned to at least a considerable degree toward the west.

Mr. Bert Hall, who appears to have been the next witness who saw the body, testified that the face was turned distinctly toward the west, and when further questioned as to the matter said that it was turned at least eighty degrees toward the west. By this he afterwards explained that he meant that it was turned at least four-fifths, and his evidence fairly construed is that the head was lying very nearly flat upon the left side of the face. He seems for some reason to have been very much confused, or, as he said, "nervous," and stated that he had testified a little differently he thought at a former examination, but that he was more confused then than he was afterwards.

Dr. Stewart, who first saw the body and afterwards changed the position of the head, was not called as a witness. The state refused to put him upon the witness stand at the request of the defendant. There were other witnesses whose evidence tends to show that the head was turned but very little, if any, and the face was directly toward the ceiling. It does not appear from the evidence whether these witnesses saw the body before the head had been moved by Dr. Stewart, or not until afterwards. There were several features of this evidence which rendered it a difficult task for the jury to determine the exact fact upon this question. The position of the head, when the shot was fired, may have been with the face turned somewhat toward the west from an upward position.

If the jury accepted the evidence of the witness Hall, and considered the course of the bullet through the head, it would lead to the conclusion that the weapon was held in a position directly over the head of the deceased. The shot then was fired either from that position, or from a position more to the eastward and, if the latter, the person who held the weapon must have been at the east of the bed at the time.

Another circumstance is worthy of mention in this connection. As before noticed the second shot was fired through the window. They were, of course, both fired by the same person. The bullet passed first through the curtain, then the window-pane, then an ordinary wire screen. It is beyond question from an inspection of these exhibits that the bullet in passing out of the window did not take a downward course. The evidence shows that the range of the bullet was such that if it had been fired from the west side of the bed, it must have passed within a few inches of the pillow upon which the head of the deceased rested. The weapon when the second shot was fired must then have been not more than six inches higher than Mr. Lillie's head. There was evidence from which the jury might reasonably believe that the weapon must have been much nearer the curtain to have powder-burned it as this curtain was. The circumstances seem to justify the jury in finding that the supposition that Mr. Lillie was shot from the west side of the bed was not a reasonable one. They are not, however, inconsistent with the view that the bullet came from the east. If the jury found, as it was not unreasonable to do from this evidence, that Mr. Lillie's face was turned but a few degrees to the west when he was shot, they must necessarily have found that he was shot from the east. We are driven to the conclusion that a finding that beyond all reasonable doubt Mr. Lillie was shot by some person who was then between him and the window in question cannot be held to be unsupported by this evidence. If the jury believed that this was the case, the conclusion that this defendant

and no other person did the shooting seems also to be justified. The space between the bed and the window was very narrow. The course of the bullet was downward from the top of the head. The person who did the shooting must have been at least far enough to the south to be between Mr. Lillie's head and the window. If he had shot Mr. Lillie from that position, it would have been impossible that the second bullet shot at Mrs. Lillie and missing her, should have passed out of the window, as she says the bullet so fired did.

The defendant on the afternoon before the murder stated to the girls in the house that she had a large sum of money and would go and deposit it in the bank; that she feared burglars might break into the house and the money be stolen. Also immediately after the murder, she in the presence of several persons opened a bureau drawer in the room, and thereupon stated that her money was gone, and that she had about three hundred dollars in the drawer.

No attempt was made upon the trial to support these statements with proof that the defendant was in possession of any such sum of money. On the contrary it was shown that after making the above statements to the girls in the house, she was at the bank and paid a small amount on a note of hers and she made no deposit in the bank. This, as her counsel say, was because she did not at that time have an account with this particular bank with which she made a payment upon her note. The defendant also immediately after the murder, in the presence of the same witnesses, examined the clothing of Mr. Lillie and declared that his pocket-book had been taken and his money was gone. There was no proof offered on the trial tending to show that any pocket-book or money of Mr. Lillie's was missing after the murder.

It appears that the defendant, immediately after the second shot was fired, after having by her screams alarmed some of the girls who were sleeping in bedrooms immediately across the narrow hall, went downstairs with all of

the girls, who immediately went to a neighbor's house to call assistance, leaving the defendant alone in the house with the murdered man. She afterwards stated that she found the kitchen door open, the key having been dislodged from the lock and lying upon the floor, and that the burglar after the shooting ran downstairs. The evidence showed that this kitchen door was locked when the family retired that night, and there was also evidence tending to show that the keyhole on the outside of the door was seen the next morning to be filled with cobwebs and dirt, indicating that the door, if it had been unlocked in the night, was unlocked from the inside rather than the outside.

15. There was no evidence before the jury that the defendant possessed or had access to a weapon with which to commit the crime, and although the house was searched after the murder and no such weapon was found, still, in view of the opportunity that the defendant had for concealing such weapon, these facts, though entitled to careful consideration, are not so conclusive as to overthrow the evidence of guilt.

The duty of determining whether or not a fellow being has been guilty of so cold-blooded and unnatural a crime imposes a terrible responsibility. A wise provision of our law requires the judgment of twelve men upon such questions. Every reasonable precaution is required to guard against an unjust conviction. It is the duty of the courts to see that these are observed. If all of the rights of the accused have been protected, if upon the whole evidence the minds of reasonable men might differ as to whether there is reasonable doubt of guilt, the conclusion of the tribunal to which the law commits the responsibility must be taken as just. The wisdom of the past tells us that thus we have greatest assurance of avoiding the mistaken judgments to which the frailties of human reasoning sometimes lead. We conclude that the law does not require nor allow us to interfere with this verdict.

The judgment of the district court is therefore

AFFIRMED.

FRANK HENRY V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,297.

Criminal Law: VERDICT: REVIEW. It is the province of the jury to determine disputed matters of fact in criminal as well as in civil cases. The verdict will not be set aside in this court upon proceedings in error for want of evidence to support it, unless it is clearly wrong.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

George F. Boyd, for plaintiff in error.

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

SEDGWICK, J.

This defendant, plaintiff in error, was tried in the district court for Antelope county upon the charge of robbery. He has brought the proceedings to this court for review, and urges here that the evidence is not sufficient to support the verdict which the jury returned against him.

At about ten o'clock on the evening of the 21st of March, 1903, Walter Older was assaulted on the streets in the town of Brunswick in Antelope county, and at the point of a revolver was compelled to submit to search and robbery. A small amount of money was taken from his pockets. He accused this defendant of the crime, and upon the trial testified that he had known the defendant, who was a resident of the same town, for eight or ten years. He testified that he saw the defendant on the street, and that the defendant then and there commited the robbery, giving the circumstances in detail. The evidence is consistent, and, if it is believed, establishes the guilt of the defendant as charged in the information.

The witness described the general appearance of the

defendant, and stated, among other things, that the defendant wore a common cap, and had a red handkerchief tied around the lower part of his face with the cap brought well down to his eyes, so that the witness could see that part of his face between the handkerchief and the cap. The witness was cross-examined in detail as to the appearance of the defendant at the time of the robbery, but he was not asked upon what he relied in identifying the defendant; and although it appeared that they were very close together, and the defendant spoke to him several times, the witness did not testify whether or not he recognized the defendant's voice. The witness had a lantern which furnished a strong light until it was extinguished by the defendant's orders. He positively identified the defendant, and there was nothing in his cross-examination making it necessary to believe that he was mistaken in this identification.

The defendant attempted to prove an alibi. Three witnesses testified that at the time the robbery took place, he was present while two of them were engaged in a game of billiards; but this evidence was contradicted by several apparently reliable witnesses who were at the billiard room at the time, and positively testified that the defendant was not there. The defendant testified in his own behalf and denied all connection with the crime, and corroborated the witnesses in support of his alibi. It was shown by undoubted evidence that the defendant on his preliminary examination testified that he had no revolver in his possession on the evening of the robbery; whereas it was proved on the trial, and admitted by the defendant, that he had two revolvers in his possession at that time. He was shown to have misstated other material matters. If this impeaching evidence was believed by the jury they would have been justified for that reason in rejecting his evidence so far as it was not corroborated by other proofs. It is the province of the jury to determine disputed matters of fact, and the evidence in this case is sufficient to support their verdict.

No other reason for reversing the judgment being urged, and no substantial error appearing in the record, the judgment of the district court is

AFFIRMED.

CHARLES STOCK V. MELCHOIR L. LUEBBEN.

FILED JUNE 30, 1904. No. 13,747.

Bill of Exceptions. The trial court has no authority to extend the time for preparing and serving a bill of exceptions more than 80 days from the adjournment of the term at which the cause was tried, motion for new trial overruled and judgment entered. A bill allowed in violation of this provision of the statute will be quashed upon motion duly made in this court.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Motion to quash bill of exceptions sustained.*

Tibbets Brothers & Morey, for plaintiff in error.

Thomas H. Matters, contra.

SEDGWICK, J.

This motion to quash the bill of exceptions is based upon the fact that the bill was not presented to opposing counsel within 80 days from the final adjournment of the term of court at which the case was tried. There was quite a satisfactory showing of diligence on the part of the attorneys who procured the bill to be settled and allowed. This evidence shows that it was solely the fault of the court reporter, and the question is whether, under such circumstances, the delay beyond the 80 days in presenting the bill to opposing counsel is fatal to the settlement of the bill. It was held that such delay is not fatal in *State v. Gaslin,* 32 Neb. 291, and in *Richards v. State,* 22 Neb. 145, but in *Horbach v. City of Omaha,* 49 Neb. 851,

the case of *Richards v. State* is reviewed fully and overruled upon this point, and the rule declared to be that the statute is mandatory, and that no bill of exceptions can be settled and allowed by the trial court that has not been presented to the opposing counsel within the 80 days. This ruling is followed in *Mathews v. Mulford,* 53 Neb. 252, and it is there stated that the remedy, when the delay has been caused by the neglect of the reporter in making the transcript, is by application for a new trial. Following these later cases, which seem to be well reasoned, this motion must be sustained. This places great responsibility upon the official reporters of the trial courts. It will rarely, if ever, happen that 80 days will be too short for the performance of this duty, if the importance of the matter is duly appreciated. Inefficient and negligent reporters should not be tolerated. The delay and expense of another trial, made necessary solely by the inefficiency of a court reporter, are serious matters.

MOTION SUSTAINED.

THOMAS B. STOCKER, APPELLANT, V. NEMAHA COUNTY ET AL., APPELLEES.

FILED JUNE 30, 1904. No. 13,285.

1. **Appeal: REVIEW.** Where, on appeal from a judgment of the district court in a suit in equity, it is found that the evidence fully sustains the findings and judgment of the trial court, such findings will not be disturbed, but will be adopted by the court of review.
2. **Highways: DAMAGES.** Where one files a claim for damages caused by the location of a public road, and accepts the allowance made him by the county board, he cannot thereafter maintain an action against the county for damages caused by opening such road, unless the same be negligently and unskillfully constructed and maintained.
3. **Res Judicata.** Where a plaintiff in an action for damages alleges facts, proof of which would entitle him to recover, and there is a verdict and judgment against him, it will be conclusively pre-

sumed that each of the facts so averred was determined against him, and he cannot thereafter maintain an action for equitable relief against the same defendant based on the same facts.

APPEAL from the district court for Nemaha county: JOHN S. STULL, JUDGE. *Affirmed.*

S. P. Davidson and *G. W. Cornell,* for appellant.

E. B. Quackenbush and *Kelligar & Ferneau, contra.*

BARNES, J.

Thomas B. Stocker commenced this action in the district court to restrain the county of Nemaha, its board of commissioners and one Charles D. Nixon from keeping open a certain ditch running along the west side of a highway situated in that county known as the Half Breed road; to obtain a mandatory injunction requiring defendants to fill up and obliterate certain ditches, and to recover damages to his farm lands lying along the east side of said road alleged to have been sustained by him by surface water thrown upon his said land by reason of the careless, negligent and unskillful construction of said highway and ditches. A trial to the court resulted in a general finding and judgment for the defendants from which plaintiff has appealed. The pleadings are too voluminous to be set forth in this opinion. It is sufficient to say that the petition states facts which, if true, would constitute a cause of action against the county, and in addition thereto it charges the defendant Nixon with having cut a ditch from a lake or lagoon situated on his own land to and into the ditch, on the west side of the Half Breed road, thus augmenting the flow of water onto the plaintiff's land to his irreparable damage and injury. Nixon's defense is in substance a general denial; while the county not only denied the allegations of the petition, but also set up in its answer and relied on: First, an estoppel by conduct; and second, the defense of *res judicata,* or estoppel

by record and judgment. The replies in effect are general denials.

Under the present law, and the rule announced in *Faulkner v. Simms,* 68 Neb. 299, the appeal requires us to go over all of the evidence and reach our own conclusions thereon. A careful examination of the record and bill of exceptions discloses the following undisputed facts: The land southwest of plaintiff's premises slopes generally downward in a northeasterly direction toward the Nemaha river bottom where plaintiff's land is situated. The Half Breed road, commencing on the Auburn and Brownville road which runs east and west on the north line of section 22, a little east of the middle of the northeast quarter of that section, runs in a southeasterly direction, for the distance of something over 2 miles, passing the plaintiff's land and forming its western or rather its southwestern boundary. This road also intersects another road or highway, called the Wheeler road, which runs due north and south on the section line between sections 22 and 23, township 5, north of range 14 east, at a point about 60 rods south of the Brownville road. The Missouri Pacific railroad is constructed about 40 rods west of the Half Breed road, and runs nearly parallel thereto. A considerable part of the east half of section 22, and all of section 23, in which plaintiff's land is situated, is low, level bottom land, lying in the valley of the Nemaha river which runs in a southeasterly direction half or three-quarters of a mile east of the highway in question for some 10 or 15 miles, where it empties into the Missouri river. The railroad company has made several openings or culverts through its embankment for the purpose of allowing the surface water, which falls on the sloping land west of its line of road, to drain off onto the river bottom. Commencing in the year 1898 or 1899, and continuing from time to time until 1900 or 1901, the Half Breed road was established, constructed and opened for public travel, the plaintiff being one of the petitioners therefor. It appears that all of the water which plaintiff alleges causes

the damage to his land is surface water; that which falls on the slopes to the west and southwest of the railroad track and highway in question. This water it is claimed is accumulated in the ditch made by the county in the construction of the public road, and is carried to a point west of the plaintiff's land, turned through a culvert in the highway, and allowed to spread out, over and upon his cultivated field. It further appears that some of the surface water, after it runs into the ditch on the west side of the Wheeler road, flows north to the Half Breed road and from there runs southeast in the ditch, which it is claimed is situated on the west side of that road, until it reaches the culvert above mentioned. It further appears that in order to facilitate the flow of the surface water from his land, the defendant Nixon has dug a small ditch about 26 rods long, in a northeasterly direction across the point of land situated between the two roads, and thus shortened the flow of the water, perhaps a third of a mile. There is no evidence showing, or tending to show, that the last named ditch drains any lake or spring or watercourse into the ditch on the Half Breed road; but, on the contrary, it simply carries off surface water caused by rains or melting snow from the lands to the west and southwest of the Wheeler road.

All of the other questions in this case are sharply contested, and the evidence relating to them is more or less conflicting.

The plaintiff claims that the Half Breed road is improperly and negligently constructed; that for that reason, and by the maintenance of a ditch on the west side thereof, the county has gathered up the surface water from the lands above described, and conducted it in a body through said ditch and thrown it upon his cultivated lands lying just east of the culvert above mentioned, which is designated in the record as culvert "B"; that if it were not for these wrongful acts on the part of the county, and the digging of the Nixon ditch, all of the water which flows onto his land would drain off to the east and north without

reaching his premises at all; while it is claimed on the part of the defendants that before the construction of the roads and ditches, before the Missouri Pacific railroad was built, and while the land in that vicinity was in a state of nature, unsettled and unimproved, the water complained of flowed by a slightly different route onto the plaintiff's land and rendered it unfit for cultivation in the same places and to a like extent as at the present time.

In order to maintain the issues on his part, the plaintiff employed a civil engineer, who surveyed the land in sections 22 and 23, including his farm situated in the last named section, and made a map or plat thereof with figures showing its contour. The defendants also employed a like expert, who performed the same services for them. These persons were called as witnesses, and, in addition to their oral evidence, presented their maps and figures to the court, in explanation of their testimony. Their statements differed but little; both testified that the lowest point on any of the lands in question, or in that immediate vicinity, is on the plaintiff's land, where he claims his crops have been destroyed; that from that point there is a gradual and almost imperceptible fall to the south and east into the Nemaha river. The engineer, called for the plaintiff, stated that the surface water, were it not for the road, ditches and culvert, would not reach the place where the damages are alleged to have been sustained; that a part of it would run off toward the north and east, and the balance would drain onto the plaintiff's land some 70 rods east of where it now flows. The surveyor called for the defendants testified that, were it not for the improvements complained of, all of the water, except in times of general overflows, would follow much the same course it does now; that some of it would pass around the point of the slight ridge west and north of the northwest corner of plaintiff's land, a little to the east of its present course, and finally reach the low ground immediately east of culvert "B," while the rest of it would flow onto his premises at another point about 70 rods east of his northwest cor-

ner, thus rendering two places wet and unfit for cultivation instead of one. A great number of non-expert witnesses were called and testified. Many of them were old settlers; some coming to the country as early as the year 1856; they were familiar with the situation of the plaintiff's land and the surrounding country, and had observed the course of the water complained of both before and after the roads and ditches were constructed; these witnesses testified that in early times the water ran in much the same course and direction as it does now; that the identical spot claimed to have been rendered unfit for cultivation was even then a low, wet, boggy piece of land; that when it was broken up it was so wet that the water ran in the furrows. It also appears that the water which falls on the land lying to the west and southwest of culvert "B" flows through certain openings or waterways in the track of the Missouri Pacific railroad into the wet place east of that culvert, and did so before the Half Breed road was constructed, that the ground there was so wet when the road was graded that it could not be worked with a road machine and could hardly be moved even with a common scraper. Of course the witnesses do not all agree on these matters, but the great weight and preponderance of the evidence establishes the foregoing facts.

There is no evidence in the record showing that the road was improperly or negligently constructed, except the statements of two or three witnesses who testify that culvert "B" is not in the proper place; that it should have been located about a half mile farther north and near the Nixon ditch, while the rest of the witnesses, including one of the engineers, stated that it is at the lowest spot on the road and the only proper place for its location. Many of the witnesses on both sides testified that the maintenance of the Half Breed road, which was made simply by plowing furrows on each side, and scraping the dirt therefrom into the center of the highway, does not cause any more water to flow onto the plaintiff's land than flowed there before its construction. So we are con-

strained to hold that the evidence amply sustains the general finding of the trial court. Indeed, we do not see how he could have found otherwise.

The evidence, so far as it relates to the acts of defendant Nixon, does not support the allegations of plaintiff's petition. It appears that Nixon's tenant at one time opened a small ditch from the lake or lagoon through which the water flowed as far as the land in question; that when plaintiff spoke to him about it he filled it up, and it has ever since remained in that condition; that the ditch which he dug from the Wheeler road across the point of land to the Half Breed road, does not increase the flow of water onto the plaintiff's premises. Therefore, the case as to Nixon was rightly dismissed.

It would hardly seem necessary for us to consider the defenses of estoppel and *res judicata* pleaded by the defendant county. However, we will dispose of these matters lest we be charged with overlooking them.

It is established beyond question that plaintiff, with others, petitioned for the location of that part of the Half Breed road which bounds his premises on the southwest; that he presented his claim for the damage which he believed would accrue to him by reason of the location and construction of the road, to the board of county commissioners of Nemaha county; that the compensation claimed was allowed, and he accepted and receipted for its payment. Ordinarily this would estop him from claiming any further damages by reason of the location of the road. It is claimed, however, that the compensation allowed him only included and embraced such damages as he would sustain by the proper construction and maintenance of the road; that if the road should be improperly constructed and should be maintained in such a manner as to flood his land with surface water and thus render it unfit for cultivation, he would still have the right to recover the damages caused thereby. This claim appears to be well founded. We think the courts generally have adopted this rule. But in this case the court found that

the county had not been guilty of any negligence in the construction and maintenance of the road, and therefore the plaintiff cannot recover.

Again, the record discloses that on the 28th day of November, 1900, plaintiff filed a claim for damages, which he alleged he had sustained during the years 1899 and 1900 by reason of the facts pleaded as the basis of this action, with the board of commissioners of the defendant county; that his claim was disallowed; that he appealed from the order of the board to the district court of said county where he filed a petition reciting the same facts on which he bases this action. In fact the petitions are almost identical with the exception of the prayer; that by a supplemental petition he sought to recover the damages sued for in this action. It is claimed, however, that this latter demand was withdrawn by leave of the court and was not litigated in that action. Issues were joined by pleadings almost identical with those filed in this action, and a jury trial was had which resulted in a verdict and judgment for the defendant county. So, even if it be conceded that the question of plaintiff's damages for the year 1901 was withdrawn from the consideration of the jury, yet that action was between the same parties, was based on identically the same facts, and presented the same issues that are joined in the case at bar. In that action it was found and adjudged that the road in question was properly constructed and maintained; that the county had not collected surface water in a body, and caused it, by ditches along the Half Breed road, to flow onto the plaintiff's land to his damage. Therefore, the questions of fact, on which he seeks to obtain equitable relief in this suit, have been settled and decided against him in a proper form of action by a court of competent jurisdiction. Where the same facts relied on for a recovery have been pleaded by the plaintiff in a former action, and in which proof of those facts would have resulted in a determination in his favor, the verdict and judgment in that suit having been against him, the record conclusively establishes an adjudication

of the issues in the subsequent action, and is a complete bar to a recovery therein. *Slater v. Skirving,* 51 Neb. 108.

For the foregoing reasons, the judgment of the district court is right and is therefore

AFFIRMED.

FRANK DONNER V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,436.

1. **Larceny:** EVIDENCE. A record kept by a stock yards company of the receipt, handling and disposition of car or train loads of stock, copied from a book or tab of original entries and from hearing another read the railroad company's waybills, is not competent evidence in a criminal case for the purpose of tracing cattle, alleged to have been stolen, to the possession of the accused.

2. **Witness:** INSTRUCTION. The law makes a defendant in a criminal trial a competent witness in his own behalf, and the court should in no manner disparage his evidence. Therefore, an instruction, otherwise correctly stating the rules by which the jury should determine the weight to be given to the evidence of the accused, and which concludes with the words, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction," is prejudicial to the defendant's rights.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE, *Reversed.*

Jackson & Williams and *Brome & Burnett,* for plaintiff in error.

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

BARNES, J.

Frank Donner was charged, in the district court for Antelope county, with the larceny of two steers, the property of one John Thompson. A trial resulted in his con-

viction, and he was sentenced to the penitentiary for the term of four years. On error proceedings the judgment was reversed and the cause remanded for a new trial. He was again tried, found guilty and sentenced to the penitentiary for a term of six years. From that judgment he brings error, and the case is now before us for the second time.

It appears that the steers described in the information were kept in the pasture of one Henry Wilson, situated in said county, and were seen there up to a short time before July 17, 1902, the date at which it was alleged they were stolen. It was shown that the plaintiff had a car load of stock in his possession on the 16th day of July, 1902, in the stock yards of the Fremont, Elkhorn & Missouri Valley railway company, at Oakdale, in Antelope county, Nebraska, and on that day shipped the cattle, consigned by the Antelope county bank, to the commission firm of Shelley, Rogers & Company, at South Omaha. It further appears that on the morning of the 17th day of July, 1902, a car load of stock was received by the South Omaha Stock Yards Company, which it is claimed was delivered to Shelley, Rogers & Company, and sold by that firm and accounted for to the Antelope County Bank. The testimony discloses that one of the steers in question was shortly afterwards found in the stock yards of Shelley, Rogers & Company; that it was purchased from them and shipped back to Antelope county. There was no direct testimony that the stolen cattle were in the plaintiff's possession in the stock yards at Oakdale with the cattle which made up his car load of stock shipment from that place to South Omaha, and in order to trace the stolen property it was necessary for the state to show that the identical shipment of cattle made by the plaintiff from Oakdale to South Omaha, after having been received by the stock yards company, was turned over to Shelley, Rogers & Company, and that the steer described in the information and found in the yards of the last named company was contained in said shipment. In this manner the state

sought to show that the stolen property had been in the possession of the plaintiff. In order to make this proof the state introduced in evidence a book said to have been kept by the Omaha Stock Yards Company, which is referred to in the bill of exceptions as exhibit "D." The introduction of this evidence was objected to as incompetent, immaterial, hearsay, and because the proper foundation had not been laid. The objection was overruled in so far as it related to page 2 of the book offered, and the same was received and read in evidence over the plaintiff's objections. This is assigned as one of the grounds of error. It appears that one William R. Thompson identified exhibit "D" and testified that he made it up from a tab that he used in the yards at the time the train containing the car load of cattle in question was backed into the chutes at the South Omaha Stock Yards, and from hearing another person read the way-bills. His cross-examination discloses the following facts in relation to this book.

Q. Mr. Thompson, the only entry that you made out at the time this car was backed into the chutes was the figures in the line under the words "car number"? A. Yes, sir. Q. That was the only entry you made in this book at the time you was out in the yards—at the time the cars were backed in? A. I copied this off of my tab. Q. You made no entries in this book at the time you were out in the yards? A. No, sir. Q. This book that you have here is a book that is made up afterwards? A. Yes, sir. Q. After these entries are put onto a book which you use in the actual work of checking they are afterwards transferred to this book? A. Yes, sir.

Thereupon counsel moved the court to strike out the entries on page 2 of exhibit "D" because they were hearsay, incompetent and immaterial, not the best evidence, and because no proper foundation had been laid sufficient to authorize the book to be received in evidence. The court overruled the motion, and the defendant excepted. This was the only way by which

the state attempted to trace the car load of cattle from the railroad company into the hands of the the stock yards company, and from that company to the consignee. It thus appears that the evidence in question was very material, and without it the stolen cattle were not traced into the possession of the plaintiff. It is therefore necessary for us to determine whether the court erred in receiving the book exhibit "D" in evidence. This book was not a book of accounts; neither was it a book of original entries, nor the original record of the transaction relating to the car load of stock sought to be traced from the possession of the plaintiff into the hands of Shelley, Rogers & Company. It appears from the evidence of the man who says that he made the entries that as to the record of the receipt of the car and its number, there was better evidence than the book. He testifies that the original entry or record was made on another book or tab, which he had in his possession in the stock yards at the time the stock was checked in. It further appears that he did not make the other entries in the book from his own examination or knowledge, but from hearing another person read the way-bills of the railroad company. He nowhere testifies that he ever compared the entries so made with the way-bills themselves, or with his book or tab of original entries, and strange to say he was not asked as to whether or not the entries contained in exhibit "D" were correct. So it clearly appears that no proper foundation was laid for the introduction of this evidence. Original books of account or letters cannot be admitted in evidence until the proper foundation has been laid. *Norberg v. Plummer,* 58 Neb. 410. In the case of *Holland v. Commercial Bank,* 22 Neb. 571, it was held error, and a new trial was granted on account of the introduction of books of account made by and in the handwriting of a clerk, who was neither called nor subpœnaed to verify the entries therein, nor was his absence accounted for. Books of account are receivable in evidence only when verified in the manner provided by section 346 of the code. *Gilbert*

v. Merriam, 26 Neb. 194; *Pollard v. Turner*, 22 Neb. 366; *Atkins v. Seeley*, 54 Neb. 688. The book in question does not even purport to be a book of accounts. The most that can be said for it is that it is a record of car loads of stock received by the stock yards company, and it would seem that, being in the nature of a memorandum, even with the proper foundation laid, it could only be used by the witness who made it for the purpose of refreshing his recollection. This same book was offered and received in evidence on the former trial of this case. On that trial no evidence was introduced to show who made the entries therein, when they were made, or under what circumstances. For these reasons its admission was held error. It is apparent, from an examination of the record herein, that the state attempted to supply such omission on the second trial. In doing so it was disclosed that the book was not one of original entries, and was therefore not the best evidence. The failure to produce the original entries, or in other words the best evidence, was not explained, and the witness who copied such original entries into the book in question did not even testify that they were correct. So it is clear that the admission of this evidence was reversible error.

Plaintiff further complains of certain instructions given by the court on his own motion. It is said that although it was not reversible error to give either of the instructions numbered 8 and 9, yet the giving of both of them grouped together was prejudicial to the plaintiff. Both of these instructions define and explain a reasonable doubt. It is apparent that either one of them would have been sufficient, and that one is practically a repetition of the other. We have held, in several cases, that it is not reversible error to repeat an instruction unless it appears that such repetition might operate to the prejudice of the accused. Yet, we are frank to say that we are unable to commend such a course.

It is further contended that the court erred in giving instruction No. 10, on his own motion. This instruction

concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction." It is urged that it was reversible error for the court to thus suggest to the jury that the testimony of the defendant may have been given for the purpose of avoiding a conviction; and that this suggestion was calculated to disparage the testimony of the accused. The case of *Clark v. State*, 32 Neb. 246, is cited in support of this contention. In that case it was held that, "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." The state, to support the instruction, cites the case of *Carleton v. State*, 43 Neb. 373, where the trial court charged the jury as follows: "The jury are instructed that they have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of a crime; nor are the jury required to blindly receive the testimony of the defendant as true, but the jury are to fully and fairly consider whether it is true and made in good faith, and for this purpose the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony together with all the other evidence in the case, and if from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt and acquit him." The court after much discussion, in which it was said that "true" and "made in good faith" were

synonymous terms, reluctantly approved of the foregoing instruction; but it will be observed that the instruction complained of, in this case, is much broader in its terms, goes farther and is more prejudicial to the accused than the one above quoted. In that instruction it was not suggested that the testimony of the accused might have been given in bad faith, and for the purpose of avoiding a conviction, while this one goes to that extreme length. We are unwilling to go any further in approving instructions of this kind than the rule announced in the *Carleton* case. No case has been called to our attention, and we have not been able to find one which seems to justify us in so doing. Indeed common experience teaches us that juries are prone to view the evidence of one who is on trial for a criminal offense with suspicion, and the court should not, by his conduct or instructions, in any manner disparage the evidence of the accused.

It is further contended that the court erred in receiving the testimony of the state's witnesses by which it was sought to prove confessions of guilt on the part of the plaintiff in error. It is unnecessary to determine this question, for the reason that the judgment must be reversed and a new trial granted on account of the matters hereinbefore considered. It may not be amiss, however, to say that it is the duty of the state when offering witnesses to prove the confessions or admissions of a person charged with crime, to fully qualify its witnesses by showing that such confessions or admissions were made voluntarily, in such a manner and under such circumstances as to make them competent evidence: that it is no part of the duty of the accused or his counsel to supply the element of competency by a cross-examination of the witnesses or otherwise.

For the foregoing reasons, we hold that the court erred in the admission of exhibit "D" in evidence, and in giving instruction numbered 10 to the jury on his own motion. The judgment of the district court is therefore reversed, and the cause is remanded for a new trial.

REVERSED.

OTIS A. WILLIAMS V. DANIEL B. DAUGHETEE, APPELLEE, C. F. SMITH, APPELLANT.

FILED JUNE 30, 1904. No. 13,507.

Action: TITLE TO LAND: PROOF. In an action to try title to land against one in possession, when the issues are substantially the same as in the ordinary action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title, and not because of the weakness of that of his adversary.

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

Jackson & Williams, for appellant.

E. D. Kilbourne, contra.

AMES, C.

This action was begun by Williams against the unknown heirs and devisees of one Robert Howell, and Daughetee and Smith, to foreclose a tax lien. The record title was in Howell, and Daughetee was in possession claiming title. There was no resistance to the tax lien and a decree of foreclosure thereof was rendered as prayed, but issues were made up on a cross-petition and answer between Daughetee and Smith, the latter claiming to have acquired the title of Howell by an executor's deed. The issues between the parties were thus substantially the same as they would have been in an action of ejectment, by Smith, as plaintiff, to recover title and possession.

It is elementary that in such an action the plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness of that of his adversary. Smith traced his title from the United States to one Henry Brown. Then follows a deed properly executed by Brown, but naming no grantee, and an instrument in the form of a deed to Smith, as grantee, executed by one Robert H.

Morey, who describes himself as executor of the last will and testament of Robert Howell, late of Tioga county, New York, deceased; but there is no proof of the death of Howell, nor exemplification of a probate of his will either in New York or in Nebraska, and nothing therefore to establish that Smith has any title or interest in the land, and nothing entitling him to ask the court to inquire into the rightfulness of the possession of his adversary.

The district court rendered a judgment quieting title in Daughetee as against Smith, and the latter appealed. It is recommended that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

MARLIN C. YOUNG, APPELLEE, V. SARAH C. FIGG ET AL., APPELLANTS.

FILED JUNE 30, 1904. No. 13,579.

Action: VENDOR'S LIEN: DEFENSE. To an action by a vendor against a vendee of real estate in undisputed possession of the premises, to enforce a lien upon the lands for an unpaid residue of the purchase price, want of title in the vendor at the time of the sale or afterwards is no defense.

APPEAL from the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed.*

George A. Magney, Elmer S. Nickerson and *Wright & Stout,* for appellants.

Anthony E. Langdon, contra.

AMES, C.

This is an action in equity by a vendor in an executory contract for the sale of real estate to charge an unpaid

residue of the purchase price as a lien upon the land and obtain a decree of foreclosure and sale for its satisfaction in like manner as in case of a mortgage. The making of the contract itself is put in issue, but the findings of the district court, upon what we think is sufficient evidence, establish its existence and the possession of the defendant under it.

It is first contended that the vendor was not at the time the contract was made, and is not now, the owner of the legal title to the lands in question but that it belongs to a third person. The doctrine was established in this state so long ago as *Scott v. Twiss,* 4 Neb. 133, and, so far as we know, has never since been questioned, that this fact, if it exists, cannot be availed of by a vendee in undisturbed possession as a defense to an action to enforce a lien for the purchase price upon the land.

Secondly it is objected that the land lies outside of the territorial limits of Sarpy county and that therefore the district court for that county had no jurisdiction of the action. A careful examination of the evidence upon this point convinces us that it is not in substantial conflict, and that it abundantly supports the finding of the trial court in that regard, which is as follows:

"The court further finds that after the original government survey of Iowa and Nebraska the Missouri river slowly and gradually receded from the southerly meander line of Bellevue Island toward the south and southeast and that about the year 1881 that portion of the Missouri river running west of Bellevue Island abandoned its course also running east of the island. That during the years from the time of the government survey of Nebraska of 1856 down to the present time the lands in question were added slowly and gradually and imperceptibly on the southerly portion of Bellevue Island by the slow, imperceptible and gradual deposit of alluvium and accretions to said island and to the state of Nebraska."

The boundary line of the state at the place mentioned is also the eastern boundary of Sarpy county, so that the

contention of the defendants that the land lies between that boundary and the Iowa state line is disposed of under this finding by section 2, article I, chapter 18 of the Compiled Statutes (Annotated Statutes, 4420), which reads as follows:

"In all cases where any organized county lies adjacent to any boundary line of this state, and it shall appear that any island, territory or tract of land lies between such county and the state boundary, and is not included within the defined boundary of any organized county, and is not a military reservation of the United States, such unincluded island, territory or tract of land shall attach to and be a part of such adjacent county for all purposes, until otherwise provided by law."

If this provision of the statute were not applicable, the jurisdiction of the court, at all events, would be unquestionable under the provisions of section 146 (Annotated Statutes, 4495) of the same article.

The district court found generally and specially for the plaintiff and entered a judgment as prayed. The defendants appealed.

It is recommended that the judgment be affirmed.

LEITON and OLDHAM, CC., concur.

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

AFFIRMED.

HANNAH PENN V. JOHN J. TROMPEN, SHERIFF, ET AL.

FILED JUNE 30, 1904. No. 13,376.

1. **Trial**: PLEADINGS. Action of the trial court in making up the issues examined, and *held* not prejudicial.
2. **Fraudulent Conveyances.** Transactions between near relatives which have the effect of hindering, delaying and defeating creditors, should be carefully scrutinized.
3. **Instructions of the trial court examined and approved.**

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

Billingsley & Greene, for plaintiff in error.

John S. Bishop and *A. S. Tibbets, contra.*

OLDHAM, C.

This is an action in replevin for the recovery of a corn sheller and the undivided half interest in a crop of growing corn and five horses. The suit was prosecuted by the plaintiff against John J. Trompen, sheriff of Lancaster county, and Charles Anderson and others, as defendants. Plaintiff claimed a special interest in the property replevied under two chattel mortgages, one executed by her son, Harwood Penn, and the other by her daughter-in-law, Stanza J. Penn. The sheriff claimed possession under an execution issued on a judgment of the county court against Harwood Penn and others; defendant Anderson claimed a special property in the five head of horses in controversy on a chattel mortgage executed by Harwood Penn, prior to the rendition of the judgment and prior to either of the mortgages executed to plaintiff. The only question involved in the controversy between plaintiff and the sheriff was as to the *bona fides* of plaintiff's mortgages. The question of the *bona fides* and priority of the mortgages of defendant Anderson was clearly and unequivocally established and the court properly directed a verdict in his favor, finding him entitled to a special property in the horses for the amount due on his note and mortgage. As between plaintiff and the sheriff the question of the good faith of plaintiff's mortgages was submitted to a jury; a verdict was rendered in favor of the defendant sheriff for possession of the corn sheller and the corn, and plaintiff brings error to this court.

This case was continued for a long time in the district court for Lancaster county before reaching this tribunal,

and many things are charged in connection with the preparation of the record in the cause below, which we can but hope are to be attributed to over-zeal of certain of counsel engaged in the trial of the cause, rather than to a deliberate attempt to mutilate and falsify the record. Be this as it may, the record first presented to this court was corrected by an additional transcript, made under the supervision of the trial judges before whom the proceedings were had, and, of course, on this record alone, the cause must be determined. It would serve no good purpose to even discuss the contentions with reference to the manner in which the original record was made up. Suffice to say, that it appears clearly from the additional transcript that the cause was originally instituted against the sheriff and Charles Anderson and others as defendants. It also clearly appears that although Anderson was not served with process, he came into court and filed an answer that the case was once tried before one of the judges of the district court for Lancaster county; that Anderson appeared and had judgment directed in his favor in that proceeding for the possession of the five head of horses, and, subsequently, for errors occurring on the trial, this judgment was set aside and the cause was transferred to the docket of another of the judges of the district court, where numerous motions were filed and ruled upon, the judge finally directing the defendants to each defend under the general denial contained in the sheriff's answer, and striking the other pleadings. The cause was then transferred to the docket of the third judge of the district court, before whom the trial was had, which we are now called upon to review. During the progress of the trial it was contended by defendant, that he should be permitted to file a separate answer in his own behalf as he claimed an interest in the five horses, which he could not prove under the sheriff's general denial. The court, thereupon, permitted the defendant Anderson to file a separate denial. This action is alleged against as prejudicial error. We cannot see how plaintiff was in any manner prejudiced

by this order. The case had been long pending with an answer by defendant Anderson alleging his special ownership in this property under his chattel mortgage. This answer was only stricken when the court made the order attempting to consolidate this defense with the sheriff's defense, under his general denial. Before the new answer was permitted to be filed, the trial judge called in his associate, who had made the order consolidating the two answers, and with his consent and concurrence permitted defendant Anderson to file his separate answer. The only party that could have been prejudiced by this answer was the defendant sheriff and he makes no complaint. Under the issues as found by the jury, if this separate answer had not been allowed, the verdict would have been for the sheriff for the entire amount for all the property on which he had levied his execution, and this included the five horses awarded to defendant Anderson.

Numerous errors are charged against the action of the trial court in the admission and exclusion of testimony. The record in the case is very voluminous and the proceeding was conducted evidently with much hostile feeling between counsel representing the litigants. The court, however, appears to have used commendable discretion in his rulings on evidence either admitted or excluded. While he permitted a liberal range of investigation into all the transactions between the plaintiff and her son and daughter-in-law, which led up to the execution of the mortgages on which she relied, in this, we think, he but followed the well approved rule that transactions between near relatives, which have the effect of hindering, delaying or defeating creditors should be carefully scrutinized.

The instructions given by the trial court are generally attacked by plaintiff's counsel, without pointing out any special defect in any of them or any particular paragraph which announced a vicious principle concerning fraudulent transfers. We have examined the instructions and they seem to have been prepared with great care and precision by the learned trial judge and to have submitted the

sole question of fact on which the controversy depended, that is, the consideration and good faith of plaintiff's mortgages, in a manner as favorable to plaintiff as the law permits. Finding no reversible errer in the record, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, EX REL. KNUT B. HOLM, V. M. L. ELLSWORTH, JUSTICE OF THE PEACE.

FILED JUNE 30, 1904. No. 13,577.

1. **Review:** NEW TRIAL. Where no motion for a new trial is filed in the district court, errors alleged to have occurred during the progress of the trial will not be examined by this court.
2. **Transcript.** An offer to confess judgment in a suit before a justice of the peace need not be included in the transcript of such proceeding; it is sufficient if such offer be filed and certified to the district court with other papers in the case.

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

John H. Barry, for plaintiff in error.

V. L. Hawthorne, contra.

OLDHAM, C.

This is a proceeding in error to review the action of the district court for Saunders county, denying a writ of mandamus. There is no motion for a new trial in the record nor are there any suggestions therein that one was filed in the court below. A motion for a new trial is a

prerequisite to a review of alleged error, occurring during the progress of the trial in the district court, by this tribunal. It may be incidentally mentioned, however, that on the statements of the petition, the writ was properly denied. The object of the writ as shown by the petition was to compel a justice of the peace to incorporate in his transcript an offer by the defendant in that court to allow judgment to be taken against him in a certain amount. This offer need not be included in the transcript; it is sufficient if in writing signed by the party and filed with the justice at any time before trial. On appeal it should be certified up. This is all that is necessary to have it considered by the district court on the question of costs. *Ossenkop v. Akeson,* 15 Neb. 622.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

LOUIS ISKE ET AL. V. STATE OF NEBRASKA, EX REL. HERMAN E. PANKONIN, ET AL.

FILED JUNE 30, 1904. No. 13,584.

1. **Counties: BRIDGE REPAIRS.** Where there is a bridge over a stream which divides two counties and is a charge upon each, it is the duty of the county board of either county, when notified in writing by the other to join in a contract for the repairs of the bridge, to either comply with the notice by joining in the contract or unequivocally refuse to do so.

2. **Mandamus.** This duty may be enforced by mandamus.

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

W. R. Patrick, for plaintiff in error.

Byron Clark, contra.

OLDHAM, C.

This action is brought to this court on error to review the judgment of the district court for Sarpy county, allowing a mandamus against the board of county commissioners of Sarpy county, commanding them to take action either affirmatively or otherwise upon the notice given by the county board of Cass county, that the wagon bridge across the Platte river, which divides the counties of Sarpy and Cass, is in need of immediate repair and that said board is requested to join the said board of Cass county in repairing the same.

The petition alleges, in substance, that the boundary line between the counties of Cass and Sarpy is the Platte river; that a bridge had been built across said river in said counties, and that said bridge is part of the public highway therein; that a part of said bridge had been recently washed away by high water and thereby rendered impassable; that it is in need of repair; alleges notice of these facts, and a refusal to act on such notice by the county board of Sarpy county. The return to the alternative writ admits that the Platte river forms the boundary line between the counties and was at one time *spanned by a structure called a bridge,* which has since been washed away; it alleges that there is a suit pending in the supreme court between the respective counties over the liability of Sarpy county for repairs of this same bridge, which is undetermined, and further that there are no funds on hand to be used for the purpose of making the repairs.

The trial court held the return insufficient and granted the writ. In this we think the trial court was clearly right. There is no merit in the contention that an action was pending in the supreme court for the reason that the question therein involved was the validity and construc-

tion of sections 87, 88 and 89 of chapter 78, Compiled Statutes (Annotated Statutes, 6085-6087), these being the sections which relate to bridges over streams which divide counties, and there had been already two opinions holding the statute valid and that each county may be compelled to contribute its share of the expense of necessary repairs made upon the bridge. *Cass County v. Sarpy County*, 63 Neb. 813, 66 Neb. 473. This last decision, while affirming the validity of the statute and recognizing the liability of each county to contribute, held, in effect, that there could not be a recovery by one county against the other on the contract made unless the contract was "entered into in such form and manner as would have been requisite to its validity if the bridge had lain wholly within Cass county, and its maintenance had been a charge upon its funds exclusively." In *Cass County v. Sarpy County*, 66 Neb. 476, this second opinion was set aside and the first decision reaffirmed. But during the extended and varied course of that lawsuit, the principle that each county was liable was distinctly pronounced, and was never shadowed by a doubt.

Section 88, chapter 78, Compiled Statutes (Annotated Statutes, 6086), provides, in substance, that if either county shall refuse to join with the other county to contract for the repair of any such bridge, the other county may make the contract and make the repairs and recover by suit from the county refusing its proportionate share of the expense. The foundation of this liability is an opportunity to join in making the repairs and a refusal of such opportunity. *Saline County v. Gage County*, 66 Neb. 839. The opportunity was offered the county board of Sarpy county and it cannot be permitted to escape liability, nor prevent the other county making repairs by non-action. If for any reason it should not want to join the other county, it was its duty to refuse to do so, and this refusal should have been unequivocally made. The fact that it may or may not have funds on hand to be used in making the repairs is no ground for non-action. Nor do we think it

just grounds for refusal. There is no provision of the statute making it such. On the other hand, the statute is express in its terms that if either county refuse to enter into contracts to repair, the other county may, and recover the proportionate share of the costs of making such repairs from the county so refusing.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

ELIZABETH E. SHANNON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED JUNE 30, 1904. No. 13,447.

1. **Nuisance:** ABATEMENT: NOTICE. Where a city of the metropolitan class seeks to abate a nuisance consisting of stagnant water standing upon vacant lots, and where the statute and ordinance require that notice be given to the owner and an opportunity be given him to perform the work himself, the city authorities have no power or jurisdiction to proceed with the improvement until such notice and opportunity have been given.

2. **Notice.** BOARD OF EQUALIZATION. Where a statute requires that notice be given for "at least six days prior" to the meeting of the city council as a board of equalization, the notice must be given during the six days immediately prior to the date of the meeting.

3. ———: CITY OFFICIAL. The fact that the city attorney is the owner of lots which the city seeks to charge with a special assessment does not necessarily charge him with notice of the action of the various boards and officers of the city with reference to such lots.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Reversed.*

Franklin J. Griffen and *Richard S. Horton,* for appellants.

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

LETTON, C.

This action was begun in the district court for Douglas county by Elizabeth E. Shannon and others, to enjoin the collection of certain special assessments levied to pay the expense of filling four lots owned by plaintiffs, the city of Omaha having by ordinance declared the lots to be a nuisance, by reason of the accumulation of stagnant water thereon. From a decree rendered dismissing the action for want of equity the plaintiffs prosecute this appeal. They rely upon the following points: First, that no notice was given to the owner of the premises before the alleged nuisance was abated; second, that the nuisance, if any, was created by the city, and that signing the petitions for grading by the then owner of the lots did not create an estoppel; third, that no legal notice of equalization was given, and, fourth, that no legal equalization was ever had.

It appears that on the 19th day of April, 1893, an ordinance was passed by the city council of the city of Omaha, the provisions of which are substantially as follows so far as pertains to the premises in controversy: Section 1. The present condition of the following lots and lands is hereby declared to be a nuisance, by reason of the existence of stagnant water upon the same or banks of earth caving over adjacent sidewalks: Lot 10, block 20, Poppleton Park, and lots 9, 10, 11, block 10, Poppleton Park.

Section 2 provided for notice in writing to be served upon the owner, occupant or agent of any lot upon which any of said nuisances may be found; fixed a date for hearing before the board of public works regarding the same, and provided for a notice by publication, if the owner, occupant or agent is unknown or can not be found.

As to lot 10 in block 20 the only testimony upon the subject of notice to the owner of the hearing before the board of public works as required by the ordinance is the fact that Exhibit 5 which purports to be a notice directed to A. J. Poppleton notifying him to abate the nuisance upon said lot within 60 days, and of the time and place of the session of the board of public works at which he might be heard in regard to said nuisance, was found among the files of the office of the board of public works, and that no other notice or notices of any kind served upon the owner of said lot was found in that office after a search made by the secretary of said board. The evidence shows that A. J. Poppleton was at the time of the passage of the ordinance the owner of this lot, and that he was a resident of the city of Omaha. There is nothing in the record showing any service of this notice, nor any proof whatever in regard to the service of any notice of any kind upon Mr. Poppleton with reference to this hearing. The giving of this notice was a jurisdictional prerequisite to the taking of any action by the board of public works with reference to the abatement of the nuisance. No notice having been given, the subsequent proceedings with reference to this lot were without authority of law and void. *Horbach v. City of Omaha,* 54 Neb. 83.

As to the lots in block 10, a similar notice was produced by the secretary of the board of public works. Below this notice and upon the same appeared the following words: "Please do the work at once and charge to property. A. J. Poppleton. S." The evidence shows that these words and signature were written upon the notice by one F. J. Sutcliffe. Mr. Sutcliffe testifies that he was in the employment of A. J. Poppleton during part of 1892. That it was his duty to have charge generally of his properties throughout the city and that he handled generally the properties. That it was his custom to look after all properties of Mr. Poppleton. That he looked after the repairs and improvements and took general charge of the property. From this evidence we are satisfied that Mr. Sutcliffe at the time he

wrote the order upon the notice was such an agent of Mr. Poppleton with reference to this property, that notice under the ordinance might properly be served upon him, and that the evidence is sufficient to show a compliance with the requirements of the ordinance as to notice.

It appears that a notice of the sitting of the council as a board of equalization to equalize a proposed levy to defray the cost of filling said lots was published in the Omaha Daily World-Herald and in the Omaha Daily Bee, two newspapers printed in the English language, 7 consecutive days next after and including the 14th day of March, 1893, and was also published in the Omaha Daily and Weekly Tribune, a newspaper printed in the German language, on the 14th, 15th, 16th, 17th, 18th, and 20th of March, 1893. Notice in the German newspaper was printed in the English language. The statute required this notice to be published for at least six days prior to the meeting of the board in three daily papers of the city. It appears that the Daily Bee and World-Herald were the only daily papers printed in the English language in the city. In the case of *John v. Connell,* 71 Neb. 10, it is said, in applying this statute to a similar state of facts: "The requirement of the rule as to publication of notice in the English language is met by the publication in both dailies printed in that language, they being all the daily publications in the city printed in English. The legislature hardly contemplated an impossibility, nor that a publication of the notice in English in a German daily paper should be had in order to comply with the statutory requirement." It would seem therefore that the requirements of the statute as to the papers in which the notice should be published have been complied with.

In *Leavitt v. Bell,* 55 Neb. 57, the phrase in the statute "for at least 6 days prior," is construed by the court and it is therein held that "the word 'for' in that phrase means 'during,' and the phrase must be construed as though it read, that the city council shall give notice of its sitting as a board of equalization at least during the 6 days im-

mediately prior to the date of its so convening." According to this rule the notice should have been published for the 6 days immediately prior to the 24th day of March and this not having been done the notice was invalid.

If there was no proper and legal notice given of the time and place of the meeting of the board of equalization, it had no jurisdiction to act and its action was a nullity. For this reason the action of the board and the levy of the special tax complained of by the plaintiffs were of no force. *Wakeley v. City of Omaha,* 58 Neb. 247.

Since no brief has been furnished by the appellee, we are unable to ascertain upon what ground the trial court dismissed the pleadings for want of equity. It appears that Mr. Andrew J. Poppleton was city attorney of the city of Omaha at the time of these proceedings. But it could hardly be presumed that he was cognizant of the proceedings of every one of the city's various departments. The request to proceed with the work made by his agent, Sutcliffe, at most can only be presumed to be a request to proceed with the work in a legal and authorized manner and cannot be urged as an excuse for a failure to comply with the statutory prerequisites to jurisdiction to levy the tax. For these reasons we recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

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

REVERSED.

HOLCOMB, C. J.

I do not agree to the proposition announced in the second paragraph of the syllabus.

M. C. CLARKE, RECEIVER, APPELLANT, V. CHARLES E. WOODRUFF ET AL., APPELLEES.

FILED JUNE 30, 1904. No. 13,466.

Usury. The loan made to the appellee in this case *held* to be tainted with usury under the rule stated in the case of *Anselme v. American Savings & Loan Ass'n*, 66 Neb. 520, which is followed.

APPEAL from the district court for Buffalo county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

M. D. Tyler, for appellant.

Harrison & Pearne, contra.

LETTON, C.

This is an action to foreclose a mortgage executed by the appellee Woodruff to the American Building & Loan Association of Minneapolis, the name of which association was afterwards changed to the American Savings & Loan Association. This corporation afterwards became insolvent and the appellant Clarke was appointed receiver. In 1889, the appellee Woodruff made application to the association for a loan of $500. By the rules of the corporation the shares were of the par value of $100 each. Woodruff was an original subscriber for five shares and acquired five by purchase before he made application for the loan. His application was approved, the loan was made and he gave a bond and mortgage to the association for the sum of $1,000, payable on or before 9 years from the date, which was December 31, 1889. The bond and mortgage provided for the payment of interest at 6 per cent. per annum payable monthly on the sum of $500, and also for the payment of $7 per month as "dues on the said shares of capital stock." Woodruff actually received $495 in cash, $5 being retained for expenses of recording, etc. He made monthly payments as required by the terms of the bond and mortgage up to January 6, 1896, when he

ceased to pay. The appellant was appointed receiver on the 5th day of February, 1896, a short time after the last payment made by Woodruff. Up to this time Woodruff had paid in all $660 upon the bond and mortgage. The district court found that the loan was usurious, and had been paid in full, and canceled the mortgage, from which decree this appeal is taken.

At the time the loan was made there were no provisions in the statutes of Nebraska allowing foreign building and loan companies to do business in this state, hence the transaction must be governed by the same rules as apply to other cases of loans made and mortgages given to secure the same, and the peculiar character of the association as a mutual concern is no protection against the penalties imposed by the statute for the exaction of usurious interest.

The appellant concedes that if the rule announced in *Anselme v. American Savings & Loan Ass'n,* 66 Neb. 520, is adhered to in this action, the appellant is not entitled to recover the amount he claims is still due and unpaid, and asks us to overrule the doctrine of that case, citing numerous authorities in his brief.

The first opinion filed in the *Anselme* case was in line with the rule contended for by the appellant. *Anselme v. American Savings & Loan Ass'n,* 63 Neb. 525, but a rehearing was allowed and upon reargument and further consideration the rule announced in the later opinion was adopted. There is not an unanimity of mind in the courts of the several states as to the proper rule to apply in cases where a building and loan association becomes insolvent and seeks to foreclose on mortgages executed by borrowers. The authorities cited in the appellant's brief have failed to convince us that the rule laid down in the *Anselme* case is wrong. On the contrary we are satisfied with its correctness and it will be adhered to.

But appellant claims that even if the rule of the *Anselme* case is adhered to there is still a balance of $80 due on the bond and mortgage. It appears that the appellee made 80 payments in all, the first 8 payments before

the loan was received being of $7 each, dues upon his 10 shares of stock, and after the loan was made he testifies he paid $8.50 each month, $6 as dues and $2.50 as interest. The whole amount paid by him was $660. Even if we allow the appellant the benefit of the 10 cents per share per month, which he claims was paid for expenses, which we do not decide he was entitled to, there was still an amount paid by appellee in excess of the amount received by him, and this, under the operation of the usury law, was all he was bound to repay.

The judgment of the district court should be affirmed.

AMES, C., concurs. OLDHAM, C., not sitting.

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

AFFIRMED.

FRED M. HANS V. STATE OF NEBRASKA.

FILED JULY 13, 1904. No. 13,486.

1. **Criminal Law: INSTRUCTIONS.** Upon the trial of an indictment for murder in the second degree the defendant is entitled to a plain and correct statement from the court to the jury of the charge against him. An instruction purporting to state the offense for which he is being tried which omits material elements of the offense charged in the indictment is erroneous.
2. ———: ———: **SELF-DEFENSE.** When, in a trial for murder, the defendant produces evidence tending to justify the killing on the ground of self-defense, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous.

ERROR to the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Gurley & Woodrough and *A. W. Scattergood,* for plaintiff in error.

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

SEDGWICK, J.

The defendant was tried in the district court for Brown county upon an indictment of the grand jury which charged him with the crime of murder in the second degree. In support of the charge, which contained the usual words, "but without premeditation and deliberation," the trial court, over the objection of the defendant, permitted evidence tending to show a conspiracy on the part of the defendant, with other persons, to murder the deceased, and also evidence of the doings and sayings, in the absence of the defendant, of his supposed conspirators; in other words he permitted the prosecution to try the case in all respects as though the defendant had been charged with deliberation and premeditation in committing the crime, and had entered into a conspiracy with divers other persons, the result of which was the murder for which he was being prosecuted.

The court also in instructing the jury stated to them the charge against the defendant upon which he was being tried, which charge purported to give the language of the indictment. It was first written upon a typewriter and contained the words "without deliberation and premeditation," found in the indictment. The court erased those words, thus expressly telling the jury that the defendant was charged with the crime of murder in the first degree, and withdrawing from the jury the information that the state had admitted in the most solemn form that the defendant had not used deliberation and premeditation, and therefore could not have conspired with others to commit the crime. Of course, such a conviction cannot be sustained. The defendant was entitled to have the jury plainly and correctly told the nature and legal effect of the charge that had been made against him upon which he was being tried, and this is especially true when the nature of the charge itself precluded the possibility of the existence of conditions peculiarly pre-

judicial to the defendant, conditions which the state strenuously insisted existed, and which the defendant strenuously denied.

Ordinarily competent evidence that tends to prove a material fact in issue is not rendered incompetent by the fact that it tends to prove more than is necessary to support the indictment, but this rule has no application in a case like this. The error in this proceeding is not predicated upon the proposition that, although the evidence tended to prove the malicious killing of the deceased, it was rendered incompetent simply because it tended likewise to prove deliberation and premeditation. In this case, the state solemnly admitted that there was no deliberation and premeditation, and this fact was not only purposely withdrawn from the jury, but the case was in all respects tried as though no such admission had been made.

In *State v. Boyle,* 28 Ia. 522, the indictment failed to charge deliberation. For that reason it was held insufficient as a charge of murder in the first degree. The trial court, however, considered it sufficient for that purpose, and tried the defendant upon that theory. The jury found the defendant guilty of murder in the second degree, which was sufficiently charged in the indictment. It was held that to try the defendant as though he were charged with murder in the first degree, when the indictment was insufficient for that purpose, was prejudicial to the defendant, and although he was convicted of murder in the second degree only, which was sufficiently charged, the judgment could not be sustained.

In so ruling the court followed and approved the case of *State v. Tweedy,* 11 Ia. 350. In that case the defendant was put upon trial for a crime of which he had been acquitted upon a former trial, and was convicted of a lesser crime, and the court held that the conviction could not stand, because of the fact that he was erroneously tried for the greater offense. These cases are not precisely in point here, but, for similar reasons, the error in

the proceedings in the present case is much more manifest.

2. The court instructed the jury: "Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack, there is reasonable ground to believe that there is a design to take his life, or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable, although it should afterwards appear that no injury was intended and no real danger existed." The vice of this instruction will be more apparent upon consideration of the condition of the evidence in this case. The defendant insisted that he had been deputized by the sheriff to arrest the deceased, and that he was at the time therefore in the "lawful pursuit of his business." The state as strenuously insisted that he was not properly deputized, that the attempted appointment by the sheriff gave him no authority whatever, and that he was therefore a trespasser and not in the lawful pursuit of his business. In this condition of the evidence, this instruction informed the jury that, if they should find that the defendant was not properly deputized, then they must find that he was not entitled to the right of self-defense, which clearly is not the law. A trespasser may defend himself against murder, and the fact that a man may be upon another man's premises, and that he may mistakenly suppose that he is acting lawfully, will not justify the taking of his life.

It is said that this instruction is approved in the case of *Coil v. State,* 62 Neb. 15. It is true that a similar instruction was given in that case and that the conviction was affirmed. Whether the rule announced in that case should be approved, or should be repudiated, is not now the question, as this case is clearly distinguishable. There was no question raised, in the case referred to, as to whether the defendant was or was not in the lawful pursuit of his business at the time of the homicide, and there was possibly no danger that the jury might suppose

that the defendant was placed in a position where he had no right to avail himself of the law of self-defense. The question here discussed was not insisted upon. And again, there was in the instruction given in that case a plain, comprehensive and correct statement of the defendant's right of self-defense under the particular circumstances disclosed by the evidence. In the case at bar the court gave further and more particular instructions as to the right of self-defense under the facts in evidence, but that right was made to depend upon the defendant's having actually arrested the deceased immediately before the killing, which was a disputed question, and the court refused a requested instruction which correctly stated the law.

3. Many other errors are assigned in the petition in error in this case, but as there must be a new trial, it is not thought advisable to discuss them.

For the reasons above given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HOLCOMB, C. J., dissenting.

I am of the opinion that the charge of the court fairly stated the material elements of the offense, for the commission of which the accused was indicted, and that the jury could not possibly have been misled, nor the defendant prejudiced by reason of its failure in its first instruction to reiterate the words found in the indictment, wherein after charging an unlawful and malicious killing there is added: "but without premeditation and deliberation." There is nothing in the transcript indicating any erasures in the instruction, although defendant's counsel in their briefs say such is the fact. I do not, however, regard this as in anywise material nor as affecting the question under consideration. If instructions are to be condemned because of erasures or interlineations, then

but few would stand the test if rigorously applied. The real question is whether the instructions as given are prejudicial to the substantial rights of the accused. The indictment charged that the killing was done unlawfully, purposely and maliciously, but without premeditation and deliberation, and this was the basis of the prosecution and of which defendant and the jury were fully informed. The phrase "but without premeditation and deliberation" was certainly not such a solemn admission as would preclude the admission of any evidence tending to prove the crime charged, even though such evidence may have also had a tendency to establish murder in the first degree. The most that can be said is that the indictment, as returned, charged murder in the second degree and negatived a charge of the higher crime. Under the indictment, the defendant, on the evidence, could not be found guilty of a greater crime than murder in the second degree. This is all he was tried for and what he was found guilty of. The Iowa cases are not in point, because in each of them the accused was attempted to be charged and was tried for a crime for which a verdict of guilty could not be legally returned and sustained under the indictments. In these cases the defendants were compelled to, and did, defend in a prosecution for crimes of which they were not legally charged. Manifestly such proceedings are erroneous, even though a verdict of guilty of a lower crime and one which is sufficiently charged be the result of the trial.

The question, as it seems to me, resolves itself into one of whether, when one crime is distinctly and legally charged and the person is being prosecuted for it, evidence may be introduced which, while tending to prove the crime charged or some essential ingredient thereof, may also tend to prove another crime of which he is not charged, and the authorities, so far as my examination extended, are unanimous that such may be done. *Hope v. People*, 83 N. Y. 418, 427; *State v. Folwell*, 14 Kan. 105, 109; *State v. Adams*, 20 Kan. 311, 319. Any evidence tending

to show that the accused conspired with others to kill the deceased, or which is connected with, or has a bearing on the acts resulting in the alleged killing and which tends to prove plans, methods, or arrangements entered into, with a view to the commission of the crime charged, are certainly material for the purpose of showing that a malicious killing was consummated, even though the tendency of such evidence may also be to prove that there was premeditation and deliberation.

In the first paragraph of the instructions given the jury, it is said the indictment charges in substance that the accused did unlawfully, purposely, feloniously and maliciously kill the deceased. In the second paragraph, section 4 of the criminal code is quoted wherein it is declared: "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." In instruction 4 the jury were told that the indictment charges the defendant with the crime of murder in the second degree, which is a violation of section 4 of the criminal code which has been set out in paragraph 2 of the instructions. By paragraph 6 the jury were told that the following material facts were necessary in order to constitute the crime of murder in the second degree: First, the time and place as charged; and second, that the killing was done purposely, unlawfully, feloniously and maliciously. With these instructions before the jury, I cannot conceive how the defendant could have been prejudiced, how the jury could have been confused, or how it can be said that material elements of the offense charged are omitted in the instructions. The failure to use the statutory phrase "but without deliberation and premeditation" is not, as I view it, an omission of an essential element necessary to constitute murder in the second degree. The words are used in the statute for the purpose only of differentiating between the lesser and greater crime. If deliberation and premeditation is charged, it constitutes murder in the first degree; and if omitted, the

offense charged cannot be greater than murder in the second degree. To charge murder in the second degree by charging the essential elements—malice, purpose and unlawful intent—and thereafter to add the phrase "but without premeditation and deliberation," is but to amplify the charge and adds no essential ingredient to the crime. Murder in the second degree is included in every charge of murder in the first, and the crime exists whether there is or is not premeditation and deliberation. I am of the opinion, therefore, that the instructions of the trial court cannot rightfully be condemned for the reasons given in the majority opinion.

The instruction regarding the law of self-defense is of approved form and has been in general use in the trial courts of this state for many years. It is, I think, undoubtedly the law, and rests upon sound principles in criminal jurisprudence. Of course, the instruction when given must be applicable to the evidence in the particular case. It is approved in *Hoy v. State,* 69 Neb. 516; *Coil v. State,* 62 Neb. 15; *Carleton v. State,* 43 Neb. 373. The principle to be deduced from the instruction is recognized and given expression in *West v. State,* 59 Ind. 113; *Parker v. State,* 55 Miss. 414, and *Kennedy v. Commonwealth,* 14 Bush (Ky.), 340. The rule is stated in Bishop, Criminal Law, sec. 865, thus:

"If one who is assaulted, * * * being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable." And in 1 McClain, Criminal Law, sec. 311, it is said:

"One who is not in fault, and is in a place where he has a right to be, may, without retreating, resist an attack which reasonably appears to imperil his life or threaten him grievous bodily harm, and take the life of the aggressor if necessary."

It seems to me manifestly an unsound doctrine to hold that a trespasser, or one who by his own fault and wrongdoing invites resistance to his unlawful acts, may avail

himself of the law of self-defense to the same extent as one who in the peaceful pursuits of his legitimate business is unlawfully attacked by another. The instruction given is strictly applicable to the evidence in the case. Had the court assumed that the accused was a trespasser and given a proper instruction as to his right to avail himself of the law of self-defense, under such circumstances he would have been here complaining, and with good right to complain, because his case was not submitted by instructions fairly applicable to the evidence introduced in the case. It is the theory of the defense that, while serving a legal process for the arrest of the deceased, he was suddenly assaulted by the deceased with a gun in such a manner as to induce in him a reasonable belief that his life was in imminent peril and that the deceased was killed in resisting such attack and purely in self-defense. In this view of the case, the instruction was altogether appropriate and in response to the defendant's evidence introduced on the subject. On the other hand, the state sought to show that the use of the process and the alleged effort to arrest the deceased was simply a ruse and subterfuge and a pretext resorted to for the purpose of shielding the defendant from the consequences of the commission of a heinous crime. Whether or not the process under which the defendant claimed he was acting invested him with legal authority to make an arrest was wholly immaterial save as it threw light on the contentions of the respective parties. No question of resisting of unlawful arrest was in the case. There is no evidence in the record tending to prove that an illegal arrest was resisted by the deceased because of its illegality, or that the authority, or lack of it, by the defendant to make an arrest in any manner contributed to the causes which led to the commission of the homicide. If, according to the defendant's theory, he was endeavoring to arrest the deceased and in good faith to execute the process in his hands, and while so doing was assaulted by the deceased in the manner testified to, then the killing

was justified even though, as an abstract legal proposition, the process under which he acted was not such as to constitute him for the time being a special officer, legally authorized to make the arrest. On the other hand, if the use of the process was only for the purpose of shielding him from the consequences of the crime, no arrest in fact being attempted, and he killed the deceased without provocation or justification, as is contended by the prosecution, then the question of the legality of the authorization of the defendant as a special officer to serve the process becomes wholly material. The issue of fact which the jury was called to pass upon was whether the accused shot the deceased purposely, wilfully and maliciously, or whether the homicide was committed in resistance to an assault made by the deceased on the accused, of such a character as to lead him to believe that his life was in imminent peril or great bodily harm threatened. The question here being considered is, I think, fully covered by the instructions of the court to the jury, wherein, after stating what is required to make a legal appointment of a deputy sheriff or to constitute a special officer for a particular purpose, it is stated:

"But you are further instructed that if you find that the defendant had no authority to arrest the deceased, David O. Luse, nevertheless, if you find that he did in truth and in fact arrest the deceased, and that said deceased submitted to such arrest, and subsequently took hold of a gun and turned it upon the defendant in a threatening manner, and in such a way as to make the defendant honestly believe that he was in imminent danger of losing his life, or of receiving great bodily harm, then the defendant under the law would have the right to even take the life of the said David O. Luse, if he honestly believed that the taking of the life of the said David O. Luse was necessary in order to save his own life or to prevent himself from receiving great bodily harm." It is, therefore, apparent that the authority of the defendant to make the arrest, if he did undertake to

make one, became an immaterial question and could not have influenced the finding of the jury against him. The jury must have given him the benefit of the law of self-defense as though he was lawfully at the home of the deceased, but found against him on the ground that the killing was wilful, wanton and malicious and without legal justification. Had the accused desired more specific instructions than those given, or to fit some theory of the case regarding which there was competent evidence to support, it was his duty to have drafted a suitable instruction with the request that it be given with the general charge. It is manifest that an instruction on the theory that the accused was a trespasser and was unlawfully attempting to arrest the deceased and was seeking to avail himself of the right of self-defense under such circumstances would be more unfavorable to him than those given by the court on its own motion. The defendant could not invite by an unlawful act resistance from the deceased and then be permitted to avail himself of the law of self-defense to the same extent he would if he were not at fault. If he were in fact a trespasser, then it would have been his duty to decline to enter into the strife. The right of self-defense, it is true, would not be lost to him because he was the first wrongdoer, but it would be his duty to withdraw from the difficulty, if opportunity so to do occurred, and only resist the assault of the deceased without retreating, when it was of so sudden and perilous a nature as to afford no opportunity to decline and where he could not retreat with safety. It is only in the latter case that the greater wrong of the deadly assault is upon his opponent and which justifies him in slaying the assailant in self-defense. *People v. Hecker,* 109 Cal. 451. The rule of self-defense is found in the law of necessity. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it. No man can by his own lawless acts create a necessity for acting in self-defense and thereupon killing the person with whom he seeks the difficulty, interpose the plea of

self-defense. No doubt, a person may actually and *bona fide* withdraw from a strife of his own seeking and thereafter, if attacked, if he is without fault, resist the attack and avail himself of the plea of necessary self-defense. It is argued that *Hoy v. State, supra,* lays down a rule regarding self-defense contrary to the one given by the court in the case at bar. In this counsel are in error. It is true, it is there announced that the right of self-defense does not belong alone to persons engaged in their lawful business, and is available to every person regardless of the nature of his business who is assaulted, or who upon just grounds apprehends an immediate unlawful attack. The instruction does not limit the right of self-defense to those engaged in the lawful pursuits of their business. It declares only that such persons, that is, those without fault on their part and who are unlawfully attacked, may avail themselves of this defense to the fullest extent. Instead of condemning the instruction, the court approves it. The instruction is identical with the one under consideration. It is said in the opinion: "We do not condemn the instruction. When read in connection with the seventh paragraph of the charge it is probably not misleading." In that case, the evidence all conclusively established the fact that the assaulted parties were trespassing on lands of another, and it further appeared that they were endeavoring to escape when assaulted. Under such circumstances, the right of self-defense was available even though they were at the time engaged in such unlawful act. The instructions in that case, when considered together, were deemed to have properly submitted to the jury the question of self-defense. Regarding other alleged errors assigned as grounds of reversal, I have neither examined nor considered them, and can therefore express no opinion thereon. It would be productive of no good results for me alone to consider them. I cannot believe, from an examination of the record relative to the points considered in the majority opinion, that any substantial right of the

accused has been disregarded or trampled upon, nor that, for the reasons given, he should be relieved of the punishment meted out to him by the trial court, and which, under the verdict of the jury and the evidence, he so richly deserves.

LOUIS D. HOLMES V. WILLIAM T. SEAMAN ET AL.*

FILED JULY 13, 1904. No. 13,407.

1. **Trial:** ESTOPPEL. A party is estopped to complain of a ruling of the trial court made at his request.
2. **Covenants:** ACTION FOR BREACH: PAROL EVIDENCE. In an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, the defendant is not concluded by a recital of consideration in the instrument, but the real consideration may be proved by parol.
3. **Measure of Damages.** It seems that in such an action, growing out of an exchange of lands, the measure of damages is the value of the property to which the plaintiff was entitled, but which he failed to receive, in the transaction.
4. **Justice of the Peace:** JURISDICTION. A justice of the peace has jurisdiction of such an action when the damages do not exceed the same, and the title to land is not drawn in question.

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

Louis D. Holmes, pro se.

Baldrige & De Bord, contra.

AMES, C.

For an expressed consideration of $6,000, the defendant, William T. Seaman, conveyed to the plaintiff Holmes an improved Omaha city lot, by a deed of general warranty subject to a mortgage lien for $2,500, which the grantee assumed and agreed to pay. In full payment of the pur-

* Rehearing allowed. See opinion, p. 304, *post.*

chase price, Holmes at the same time conveyed to Seaman 13 outlying lots, known as "Baker Addition" lots, subject to a mortgage lien on 9 of them to secure the personal obligation of Holmes, which Seaman, by a stipulation in the deed, assumed and agreed to pay and which he afterwards did pay and cause to be satisfied and discharged. Holmes went immediately into possession of the city lot, but has never paid any part of the mortgage debt thereon, and some years subsequently he was evicted by a judicial sale of the premises under a prior incumbrance.

This is an action for damages by Holmes against Seaman for a breach of the covenant for quiet enjoyment contained in the deed by the latter of the city lot. The other defendant is the wife of Seaman, who joined in the last mentioned deed for the sole purpose of releasing dower and who is not bound by its covenants. The answer admits the eviction and there is no issue in the pleadings, or conflict in the evidence, as to any of the foregoing facts.

The sole controversy at the trial was with respect to the measure of the plaintiff's damages. The defendant offered to prove the value of the city lot, for the purpose of showing that it was no greater than the amount of the incumbrance thereon, assumed by his grantee in the deed conveying it, but the plaintiff objected and his objection was sustained by the court on the ground that the true rule of damages is that announced by this court in *Cheney v. Straube*, 35 Neb. 521, namely, the purchase price and interest, there having been no costs or expenses incurred by the covenantee in resisting eviction. The defendant then undertook to show, and did show to the satisfaction of the jury, and, we think, by a preponderance of the evidence, that the value of the Baker addition lots was not greater than the mortgage debt and incumbrance on a part of them, which he assumed and agreed to pay, and did pay, pursuant to his covenant in the deed by which he acquired them.

Upon the issues and evidence thus presented the court submitted the case to the jury by a series of instructions,

to none of which the plaintiff took an exception, and a verdict was returned for nominal damages only, and from a judgment thereon this proceeding is prosecuted.

In this court, the plaintiff contends that the defendant is not entitled to dispute the recital of consideration contained in his deed conveying the city lot, especially because the transaction was an exchange of property, and that in such cases the parties are finally and conclusively bound by the estimate of values which they have, at the time of the trade, put upon their respective properties, or, alternatively it is said that the deed, by which the Baker addition lots were conveyed, recites a consideration of $4,650 which, after deducting the amount of the incumbrances thereon, assumed and paid by the defendant, leaves a clear balance of $3,500, which, with interest, the plaintiff is entitled to recover.

In support of the first branch of this contention, the plaintiff cites no authority, and we understand him to have abandoned it in his reply or supplemental brief. In that document, he argues that although the real consideration in the defendant's deed could have been inquired into under proper issues, such an inquiry is not proper in this case, because the answer denies that there was any consideration, which the recital estops the defendant to do, instead of pleading the real consideration which would have been permissible. With respect to this matter, it must suffice to say, that we do not so understand the pleading. Both the petition and answer set forth the transaction in great detail and are supplemented, in this respect, by the reply, so that the entire controversy was before the court for such disposition of it as the law required, in view of all the facts out of which it arose. In connection with this argument the plaintiff cites 2 Sutherland, Damages (2d ed.), sec. 575: When there is an exchange of land, the rule of ascertaining the damages seems to be that the plaintiff is entitled to recover the value of the lands he was to receive from the defendant. We are satisfied with this rule, and so, as we understand, would

have been the defendant, had the testimony he offered tending to prove such value not been excluded by the plaintiff's objection. The plaintiff can, of course, not now be heard to contend that the ruling of the court sustaining his objection was erroneous.

In support of the second branch of his contention, namely, that the recital in the deed of the addition lots is conclusive, he cites the apparently somewhat inconsiderate decision of the supreme court of Iowa in *Williamson v. Test,* 24 Ia. 138. This decision is in conflict with the rule above quoted from 2 Sutherland, Damages, and, we think, with the great weight of authority and the better reason.

Complaint is made because the court excluded a printed price list of the Baker addition lots, by which the defendant offered them for sale after he had acquired them, but the defendant admitted on the witness stand that he held the lots and offered them for sale at the time mentioned at prices identical with those named in the list, so that it does not appear that the plaintiff was prejudiced by the exclusion.

The court taxed the plaintiff with his own costs because the recovery was within the jurisdiction of a justice of the peace. There was no issue in the pleadings or evidence drawing in question the title to lands, and the action was for damages for the breach of a personal covenant. *Norval v. Zinsmaster,* 57 Neb. 158; *Hesser v. Johnson,* 57 Neb. 155.

We are unable to discover reversible error in the record, and recommend that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed December 21, 1904. *Former opinion modified:*

1. **Justice of the Peace: JURISDICTION.** A justice of the peace has no jurisdiction of an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, where such breach consists of an eviction by one having a paramount title.

2. **Opinion Modified.** Paragraph four of the syllabus to our former opinion herein, *ante*, p. 300, overruled, and the opinion is modified to conform to the rule above stated.

BARNES, J.

This case is before us on a motion for a rehearing, and, after an examination of the brief in support thereof, we are satisfied that our former opinion, *ante*, p. 300, should be adhered to, except as to the matter of the taxation of costs. On that question an oral argument was ordered, which has been made, and is supplemented by additional briefs. It appears that the plaintiff commenced this action in the district court for Douglas county to recover damages for a breach of the general covenants of warranty contained in a deed conveying real estate. The amount sued for was $5,000, but the recovery was less than $200. The trial court, for that reason, held that the case should have been commenced before a justice of the peace and, under the provisions of section 621 of the code, taxed all of the costs to the plaintiff. A motion to retax was filed, which was overruled, exceptions were taken and the matter properly presented to this court. In our former opinion, we held that a justice of the peace had jurisdiction of the subject of the action, and we are now asked to reverse that holding. We have frequently decided, that a justice has jurisdiction in an action for a breach of covenant against incumbrances, because such covenant is personal; it does not run with the land, and is broken as soon as made. The question of title neither arises nor can it be drawn in question in such a case. *Brass v. Vandecar*, 70

Neb. 35; *Hesser v. Johnson,* 57 Neb. 155; *Campbell v. McClure,* 45 Neb. 608; *Merrill v. Suing,* 66 Neb. 404.

This, however, was an action to recover damages for a breach of covenants for quiet enjoyment, and presents an entirely different question. In order to recover, as was stated in *Merrill v. Suing, supra,* it was necessary for the plaintiff to allege and prove the conveyance with the covenants of warranty, the breach thereof, and that he had been turned out of the possession of the granted premises, or some part thereof, or compelled to yield possession to one having a paramount title. So it is clear, that in this action, from the pleading itself, the question of title to real estate was involved, or at least might have been drawn in question. By section 907 of the code, it is provided:

"Justices shall not have cognizance of any action: *First*—To recover damages for an assault, or assault and battery. *Second*—In any action for malicious prosecution. *Third*—In actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this title. *Fourth*—In actions for slander, verbal or written. *Fifth*—In actions on contracts for real estate. *Sixth*—In actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for tresspass on real estate, which are provided for in this title."

By this statute, the legislature has expressly prohibited justices of the peace from taking jurisdiction of cases like the one at bar. The defendant contends, however, that it is the amount recovered which alone determines the question of jurisdiction. In this counsel are mistaken. It is true, that a justice has jurisdiction where the amount involved is not more than $200 in all actions except those named in the section of the statute above quoted. But in cases which fall within such exceptions, he has no jurisdiction of the subject of the action, no matter what amount is sued for or recovered. In cases where the question of jurisdiction is determined solely by the amount sought to be recovered, it may be well said, that the plaintiff is bound

to know, at least approximately, the amount he is entitled to, or will recover. In such a case, he has the power to chose his own forum, and must do so at his peril. If he sues for more than $200 and recovers less than that sum, having brought his action in the district court, he cannot recover costs. But in an action like the one at bar, where the title to real estate is, or may be, drawn in question, he is not required to anticipate the course which may be pursued by the defendant, but must bring his action in a court which will have jurisdiction, no matter what defense is interposed. The fact that the defendant may not raise the question of title does not, in such cases, determine the question of jurisdiction. If the defendant's contention is correct he could, where such an action is brought before a justice of the peace, raise the question of title and oust the court of jurisdiction, and when sued again in the district court could change his defense, and by reducing the amount of recovery to less than $200 compel the plaintiff to pay the costs necessarily incurred by him in order to redress his wrongs. We are not disposed to establish a rule which will, in effect, subject a plaintiff to the mere sport or whim of his adversary.

We are not aware that this question has been heretofore directly determined by this court, but in other jurisdictions, under statutes similar to ours, it has been held that where from the nature of the case, as disclosed by the plaintiff's pleading, he has reason to believe that the title to real estate will be brought in dispute, the action should be commenced in the district court, and the prevailing party will be entitled to his costs regardless of the amount of his recovery. 11 Cyc. 48; *Gay v. Hults,* 55 Mich. 327, 21 N. W. 357; *Kelly v. Manhattan Beach R. Co.*, 81 N. Y. 233.

We therefore hold that a justice of the peace has no jurisdiction of an action on general covenants of warranty for quiet enjoyment, like the one at bar; that the action was properly commenced in the district court, and plaintiff is entitled to recover his costs.

For the foregoing reasons, the fourth paragraph of the syllabus to our former opinion is overruled, and the opinion itself is modified to conform to the rule announced herein. The order of the district court overruling the motion to retax the costs is reversed and the cause is remanded, with directions to the trial court to retax the costs in accordance with this opinion. In all other things the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HARVEY N. LINK V. SYLVESTER O. CAMPBELL.*

FILED JULY 13, 1904. No. 13,500.

1. **Instructions:** ERROR. An instruction which submits to the jury the affirmative of an issue which there is insufficient evidence to maintain is prejudicially erroneous.
2. **Trial:** EVIDENCE. A preponderance of evidence is all that is required to maintain an issue in a civil action.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed.*

Jackson & Williams and *Roscoe Pound,* for plaintiff in error.

Samuel J. Tuttle and *William V. Allen, contra.*

AMES, C.

Plaintiff and defendant are the owners, respectively, of adjoining governmental subdivisions, or tracts of land. There is no dispute about the title of either, but the divisional line between them is a section line, and the government surveyor's monuments at the corners of the sections have been effaced by time and the action of the elements, and the plaintiff, claiming that the defendant

* Rehearing allowed. See opinion, p. 310, *post.*

had encroached upon a strip of his tract lying along the section line, began this action in ejectment to recover possession.

The sole subject of the controversy is the location of the line and each party offered evidence in support of his contention, thus producing a sharp conflict in the evidence.

One of the instructions given, and excepted to, submitted to the jury the defense of 10 years' adverse possession which was pleaded in the answer, but which was admitted on the oral argument to be without sufficient support by the evidence.

Another instruction, also excepted to, advised the jury that the plaintiff "must recover, if at all, upon the strength of his own title to the property in controversy and that he cannot rely upon any alleged weakness or want of title in the defendant, and if the plaintiff has failed to prove his title and right of possession to the land in dispute by a fair preponderance of all the credible evidence, you must find for the defendant." There were a verdict and judgment for the defendant and the plaintiff prosecutes error.

We think that both of these instructions were erroneous. From the former of them the jury had a right to infer, and perhaps did infer, that there was evidence sufficient to support a finding of adverse possession, and for aught that we know to the contrary, their verdict may be founded upon that supposition. It seems to us very nearly self-evident, that an instruction submitting to a jury the affirmative of an issue which there is insufficient evidence to maintain, is prejudicially erroneous.

Eliminating the defense of limitations, as upon this record must necessarily be done, there is no question of title involved in the litigation. The sole controversy is about the definition of a boundary line and rights of possession dependent thereon. The latter of the foregoing instructions has no meaning applicable to this record, unless it is interpreted as requiring the plaintiff to es-

tablish his contention as to the location of the boundary line, with that degree of certainty which is required of a plaintiff in ejectment in proving his title when the latter is in dispute, and this requirement is emphasized by qualifying the word "preponderance" by the word "fair." It is true that in *Altschuler v. Coburn,* 38 Neb. 881, this court held that the use of the word "fair" in a like connection was not error, citing *Dunbar v. Briggs,* 18 Neb. 94, and showing quite distinctly that there is no practical difference between such use and a similar employment of the word "clear," which latter was condemned in *Search v. Miller,* 9 Neb. 26, and in *Marx & Kempner v. Kilpatrick,* 25 Neb. 107, and in several other cases. But these latter cited cases were not overruled. Neither were they overruled in *Dunbar v. Briggs, supra,* which is entirely consistent with them. It was there held that the use of the qualifying word "fair," in one instruction, was not reversible error, because the correct rule was stated in another instruction, and under the circumstances of the case it was evident that the jury could not have been misled. But there is no intimation of an intention to overrule or qualify the preceding opinions written by the same hand, nor any evidence of dissatisfaction with them. On the other hand, the writer indicates quite clearly that, in his opinion, the use of any expression requiring more than a mere preponderance of the evidence is erroneous, unless the vice is corrected by some other feature of the record. The logical deduction from the argument in the opinion in *Altschuler v. Coburn, supra,* is, therefore, the opposite of the conclusion at which the court arrived, and required a reversal instead of an affirmance of the judgment. In the case at bar the error under consideration is emphasized, rather than otherwise, by directing the attention of the jury, in the same instruction, to the abstract and irrelevant proposition of law that a plaintiff in ejectment whose title is in dispute must recover, if at all, upon the strength of his own title and not because of the weakness of that of his adversary.

For these reasons, it is recommended that the judgment be reversed and the cause remanded for a new trial.

LETTON and OLDHAM, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed October 5, 1905. *Judgment of district court affirmed:*

1. **Ejectment**: GENERAL DENIAL: INSTRUCTIONS. In an ejectment case, title by adverse possession may be proved under a general denial, and, when such title is one of the defenses relied upon by the defendant, he is entitled to have the jury instructed with reference to the same if any competent evidence has been introduced to support that issue, even though the evidence may be contradicted or may be considered insufficient by the jury.

2. ———: ———: ———. In an ejectment case, where the defendant's answer is a general denial, it is not error to instruct the jury that the plaintiff must recover, if at all, upon the strength of his own title to the property, and that he cannot rely upon the weakness of the defendant's title.

3. **Instructions.** The use in an instruction of the phrase "a fair preponderance of the evidence" criticised, but *held* not to be prejudicially erroneous.

LETTON, C.

The facts in this case are recited in the opinion filed at the former hearing, *ante*, p. 307. At the former hearing, the cause was reversed on account of the giving of two instructions, the first of which submitted to the jury the question of whether or not the defendant Campbell and his grantors had been in possession of the strip of land in controversy for 10 years prior to the time the action was begun. This instruction was held to be erroneous, mainly because it "was admitted on the oral argument to be without sufficient support by the evidence," and it is said that

an instruction submitting the affirmative of an issue which there is insufficient evidence to maintain is prejudicially erroneous. We have heretofore said: "Where there is any evidence to support an issue presented by a party to an action, he is entitled to have the jury instructed with reference to his theory of the case, if supported by competent evidence and presented by the pleadings." And this may be considered to be settled law in this jurisdiction. *Hancock & Walters v. Stout,* 28 Neb. 301; *Cunningham v. Fuller,* 35 Neb. 58; *Boice v. Palmer,* 55 Neb. 389; *Western Matress Co. v. Ostergaard,* 71 Neb. 575.

A re-examination of the record shows that while the evidence is conflicting, a number of witnesses testified to the adverse holding of the tract of land in question for more than 10 years by defendant and his grantors. The force of this evidence is weakened by testimony upon the part of the plaintiff's witnesses, that for a part of the time rent was paid for the use of such land to the plaintiff, but the identity of the tract of land for which rent was paid with that claimed by the defendant is in dispute. The testimony of the defendant's witnesses if uncontradicted would have sustained a verdict based upon adverse possession and this is sufficient to justify the giving of the instruction. The weight and sufficiency of the testimony were for the jury. They may have disbelieved the testimony of one side and believed the other. It is true, that upon the first oral argument in this court, it was admitted by one of the counsel for defendant that the evidence was not very strong upon this branch of the case, but it was not conceded that the question was erroneously submitted. One of the theories upon which the case was tried was that the defendant and his grantors had occupied the premises for the statutory period, and he was entitled to have that question submitted to the jury.

As to instruction number two, requested by defendant, which is assigned as error, it is objected that the instruction so far as it advised the jury that the plaintiff must recover, if at all, upon the strength of his own title to

the property, and that he cannot rely upon any alleged weakness of title in the defendant is erroneous, and it is argued that this is a dispute as to the boundary line and not as to a question of title. But the issue presented by the pleadings was as to the title to a certain strip of land containing about 18 acres. The plaintiff alleged ownership which the defendant denied. The plaintiff was required to establish his title to the same by competent proof of ownership, and if he had failed to do so, he could not recover in the action. At the trial he produced his muniments of title, but he was further required to show, that the particular tract in dispute was covered by the description in his paper title and he was in fact compelled to recover upon the strength of his own title to the property in controversy.

Objection is further made to the phrase "a fair preponderance of evidence" used in this instruction. The use of the expression "a fair preponderance of the evidence" has been repeatedly held by this court not to be reversible error. *Murray v. Burd,* 65 Neb. 427; *Dunbar v. Briggs,* 18 Neb. 94; *Marx & Kempner v. Kilpatrick,* 25 Neb. 107; *Altschuler v. Coburn,* 38 Neb. 881. We agree with the former opinion that the use of the qualifying word "fair" is inadvisable and not to be commended, but as the record stands in this case we cannot see wherein the jury were in anywise prejudiced thereby.

Instruction number eight, as to the weight to be given the original field notes, is complained of. Taken with the other instructions upon this point, we see no error therein. While perhaps its statements would not be sufficiently specific if standing alone, the instructions asked for by plaintiff, and given upon this branch of the case, supply what may be lacking in particularity.

Much the greater part of the evidence in the case, which consists of nearly 500 pages, is directed to the question of where the true original government corners upon the line between sections 15 and 16 were situated, and it is evident that this was considered the most important question in the case. We are satisfied that the attention of the jury

to the determination of this question of fact, was in no wise prejudicially affected, either by these instructions or by the other matters complained of by plaintiff in error.

In the whole case, we find no error prejudicial to the plaintiff in 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.

WESTERN FLY GUARD COMPANY ET AL., APPELLANTS, V. PHILIP F. HODGES ET AL., APPELLEES.

FILED JULY 13, 1904. No. 13,600.

1. Pledge: SUIT TO ENFORCE. A pledge of money or negotiable paper in the hands of a third party to secure the payment of the purchase price of chattels upon an executory contract of sale vests in the vendor a lien upon or interest in the fund, which, upon performance of the contract by him, he may enforce by a suit in equity.
2. Evidence examined, and *held* to support the findings of fact and judgment of the trial court.

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

Doyle & Berge, for appellants.

Mockett & Polk and *Sawyer & Snell, contra.*

AMES, C.

Appellants were the owners of a patent for, and the manufacturers of, a device called a fly guard, which was designed to be attached to doors for the prevention of the ingress of flies when the former were in use. They entered into a written agreement with the appellees to sell and deliver to the latter, at a specified date, 1,000 of these

contrivances for a purchase price of $500, to be paid on delivery, and the appellees, as a pledge for the performance of the contract on their part, deposited with the First National Bank of Lincoln, a promissory note against a third person, agreeing that it or its proceeds, in case of collection by the bank, should be turned over to the appellants in satisfaction of the purchase price upon performance of the contract by the latter. At the time the agreement was made the device was in an experimental stage, but a small model of it was exhibited with reference to which the contract was made, and there was, as the district court correctly found, an implied agreement that the fly guards to be delivered should conform thereto, or be equally as well adapted to accomplish the purpose intended. But certain castings entering into the structure of the model were made of brass, for which iron or steel was intended to be substituted in the manufacture of the guards for practical use, and it was found, upon the attempt being made, that it was difficult, or perhaps impossible, to make the substitution without changing the form of the castings in such manner as to seriously impair the efficiency of the device. At any rate, on the day specified by the parties for the delivery, appellants tendered to the appellees 1,000 of the guards as a compliance with the contract, but the latter refuesd to accept them on the ground, that by reason of the fact just mentioned, they were unsuitable for the purpose intended and were unsalable and without value. Thereupon this action was begun against the appellees and against the bank, as trustee or pledgee of the note and its proceeds, to compel the delivery thereof to the appellants pursuant to the contract. The bank filed an answer in the nature of interpleader and was permitted to retain the money to await the determination of the controversy between the parties claiming the fund, and to be discharged from the litigation.

Upon the trial the court made 10 special findings of fact, the last three of which are in the following language and

are in our opinion supported by a preponderance of the evidence:

"8. That at the time of making the contract between the parties herein the plaintiffs furnished to the defendants a certain model of the fly guards so to be manufactured and said model was delivered into the possession of the defendants, and the said defendants retained possession thereof producing the same at the trial of this cause, and there was an implied understanding and agreement between the parties that said fly guards were to be manufactured and constructed in accordance with said model, and that said guards would answer the purpose for which they were intended.

"9. That after the making of said agreement by the parties, the plaintiffs proceeded to the manufacture of such guards and the defendants assisted therein, making suggestions and assisting in experiments and attempting to make such guards out of other and different material other than the model as was first exhibited, in order that the same might be manufactured at less cost and thereby sold cheaper on the market. That said guards were not practicable in the manner in which they were made, and the device was only in the experimental stage and had not been useful or successful up to and including the times herein complained of and set forth in the issues between the parties herein.

"10. That the defendants gave notice to plaintiffs of the failure of said guards to perform the work and purposes for which they were intended and of the various defects therein and sought to aid the plaintiffs to perfect and make serviceable the said device, but that up to and including the time of the attempted delivery on the part of the plaintiffs to the defendants, the said device had not been perfected and made serviceable or useful for the purpose for which it was intended. That at the time of the making of such agreement and the depositing of the note in the First National Bank as herein described, the defendants relied upon the implied warranty that said de-

vice was serviceable and sufficiently perfected in its manufacture as to enable defendants to procure purchasers therefor, and that upon the discovery of the imperfections of such device and the impracticability of the same, the defendants therefore refused to accept the same upon being tendered by the plaintiffs, and refused to execute the order to the First National Bank for the delivery of the note, or the proceeds collected thereon, to the plaintiffs."

As conclusions of law the court found, in substance, that the note and its proceeds are not a trust fund or pledge for the performance of the contract by the appellees and that the appellants, even in case of full compliance with the contract on their part, would have had no interest therein, or lien thereon, and no right of action in equity, but would have been limited to their suit at law for damages for breach of the contract. Thereupon there was a judgment for the defendants of dismissal and for costs from which this appeal is prosecuted. The contract and note were inclosed in an envelope and deposited with the bank at the same time, and a memorandum was indorsed on the envelope to the effect that the note or its proceeds was not to be delivered to the appellants except by the order of the vendees, and this latter circumstance seems to have been responsible for the conclusion of law by the court, but it ought to have been considered in connection with all its related circumstances, and it cannot be supposed to have been intended wholly to defeat the purpose and practical importance of the deposit.

We think that the conclusions of law are erroneous, but that the judgment is right. It was for the very purpose of avoiding the necessity of a resort to the law courts and reliance upon the pecuniary responsibility of the vendees, in event of a breach of the contract by the appellees, that the deposit was required to be made and was made. If appellants had not an interest in and a lien upon the deposit enforceable in equity, in case the purchase price had become payable by fulfilment of the contract, it might have been withdrawn by appellees at any time, and appellants

deprived of their sole inducement for entering into the contract, and their sole security for the payment of the consideration money. But we are satisfied from an examination of the record that there was not such a performance of the contract by appellants as entitles them to recover and therefore recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

MARY P. LONERGAN ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED JULY 13, 1904. No. 13,568.

Proof of Publication, by the affidavit of a person having knowledge of the fact, must be made within six months after the last day of publication.

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

A. H. Murdock, for appellants.

Leffler & Winters, contra.

OLDHAM, C.

This is an action to restrain the collection of a special grading tax levied by the mayor and council of the city of South Omaha on certain lots situated in grading district No. 42, in the above named city. The material allegation of the petition is, that the tax is illegal and void because the petition was not signed by the requisite number of freeholders; because there was no sufficient

notice given by the city council of its intention to sit as a board of equalization prior to the levy of the taxes complained of; because there was no legal meeting of the board of equalization held prior to the levy of the taxes, and because chapter 15 of the session laws of 1891 and chapter 7 of the session laws of 1893, which authorized the levy, were unconstitutional. The city answered with a general denial and a plea of estoppel. On issues thus joined, there was a trial to the court, judgment for plaintiff, and defendants bring the case to this court on appeal.

At the trial in the court below, the learned district judge held that the petition for grading, at the expense of the owners of the property, was sufficient and an examination of the record leads us to the conclusion that this holding is fully supported. The court also held that there was no proof of a notice by publication of the meeting of the board of equalization before the levy of the tax against the property in the grading district. An examination of the record shows that plaintiffs, to support this allegation of their petition, introduced in evidence the record of the proceedings of the board which failed to show any notice by publication of the meeting. The defendant city introduced the following alleged proof of publication:

"J. M. Tanner, being duly sworn, says that he is one of the proprietors of the *Daily Tribune,* a newspaper of general circulation in said county and state, published in the city of South Omaha, Neb., and that the notice, a copy of which is hereto annexed, was published in said newspaper for six times commencing on the 8th day of May to the 15th day of May, inclusive, 1900. J. M. TANNER."

This proof was subscribed and sworn to on the 8th day of July, 1903.

The sufficiency of this proof is challenged because it fails to specifically show that the notice was published for six consecutive days immediately preceding the meeting of the board of equalization and also for the reason that it was sworn to on the 8th day of July, 1903, more than

three years after the last publication. Section 403 of the code provides: "Publications required by law to be made in a newspaper, may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made, but such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication." It is apparent, that to entitle defendants to prove the publication in the newspaper by the affidavit of a person having knowledge of the fact, such affidavit must be made within six months of the last day of the publication. As this affidavit was the only proof offered by defendants, tending to show publication of the notice during the time required by the statute, we think the learned trial court was fully justified in finding that there was no sufficient proof of publication of notice of the meeting of the board of equalization, and, as such notice is jurisdictional, we need not examine into the question of the constitutionality of the statute under which the tax was sought to be levied.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

MARGARET GOMBERT ET AL., APPELLANTS, V. MARY J. LYON ET AL., APPELLEES.

FILED JULY 13, 1904. No. 13,581.

1. **Occupying Claimant.** Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. *Lothrop v. Michaelson*, 44 Neb. 633, followed and approved.

2. **Evidence** examined, and *held* insufficient to sustain the trial court.

APPEAL from the district court for Nuckolls county: GEORGE W. STUBBS, JUDGE. *Reversed.*

J. H. Broady and *Cole & Brown,* for appellants.

L. C. Burr, contra.

OLDHAM, C.

This is a supplemental proceeding under the occupying claimant's act to determine the value of the improvements on a half section of land situated in Nuckolls county, Nebraska. The case was before this court on its merits and the title quieted in the appellants, in the case of *Lyon v. Gombert,* 63 Neb. 630. After the judgment of this court quieting the title in the present appellants, appellees filed a supplemental petition, asking in substance to have the value of the improvements placed on the premises determined under the provisions of the occupying claimant's act, chapter 63, Compiled Statutes (Annotated Statutes, 10259-10269). Proper orders were made by the district court on this application, appraisers were appointed as provided by the act, and returned the following findings:

"The undersigned appraisers respectfully report that in pursuance of the instructions of this court, we did on the 30th and 31st days of July, 1903, make the following appraisement as per your instructions in the above entitled cause:

200 acres of breaking on the north half of 14-3-8..	$400.00
House on said land.....	60.00
Stable on said land.....	60.00
300 rods of wire fence on said land.....	50.00
Total improvements	$570.00
Net value of rents and profits under your order	$2,540.00
Less value of improvements above mentioned..	570.00
Balance.....	$1,970.00

Value of said land in 1893, $4,000.00.
Value of said land in 1903, $7,500.00."

Objections were filed to this report by the appellees, for the reason, among other things, that the appraisers did not appraise and fix the amount the real estate was increased in value, by reason of the improvements placed upon said land by the objectors. The court overruled these objections and entered judgment on the findings of the appraisers without any other testimony being produced, and allowed the appellees a credit of $3,500 for the increased value of the land between 1893 and 1903, as shown by the report of the appraisers, and to reverse this action the landowners have appealed the case to this court.

It is urged by the appellants that the occupying claimants are only entitled to the actual value of the improvements placed upon the land by them, and that this is the full measure of their recovery; that this court should, from the report of the appraisers, make a finding allowing the claimants $570 as shown by the report of the appraisers, and charge them with rents and profits in the sum of $2,540, and either render a judgment here, or direct a judgment to be rendered by the lower court on reversal, for $1,970 in favor of appellants.

It is contended on the contrary by the appellees, that there is sufficient evidence in the report of the appraisers to uphold the judgment of the district court in awarding the occupants the $3,500 as the increase in the value of the real estate, which was occasioned by their cultivation and improvement of the premises. We cannot fully agree with either of these contentions; for the rule is well established in this state, that "Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same." *Lothrop v. Michaelson,* 44 Neb. 633.

We think, under this rule, that the report of the appraisers should have been set aside, or that the court should have directed the appraisers to supplement their report with a finding not only as to the value of the land in

its unimproved state, but as to its enhanced value, if any, by reason of the improvements erected thereon by the occupants. The report before us plainly indicates that the appraisers were attempting to fix the actual cost of the improvements placed on the land, and this, standing alone, is not sufficient evidence on which to make a finding as to the enhancement of the value of the land by reason of the improvements. They have also found, as they should have done, the value of the land in its unimproved condition in the year 1893, the time the action began, and they found the value of the land and improvements in the year 1903; but as to how much the value of the land has increased by reason of the general rise in land values in that county, and how much, if any, of its increased value is due to the improvements and cultivation of it by the occupant, we are without competent testimony before us to make a proper finding.

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

AMES, C., concurs. LETTON, C., not sitting.

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

REVERSED.

MICHAEL LAMB V. PATRICK J. ROONEY ET AL.

FILED JULY 13, 1904. No. 13,601.

1. **Election of Remedies.** If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy. *Pekin Plow Co. v. Wilson*, 66 Neb. 115, followed and approved.

2. **Trusts, Enforcement of: EQUITY.** The conventional relation of trustee and *cestui que trust* or other fiduciary relation is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner. *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, followed and approved.

ERROR to the district court for Greeley county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

T. J. Doyle and *H. C. Vail*, for plaintiff in error.

James R. Swain and *Abbott & O'Malley, contra.*

OLDHAM, C.

The facts underlying this controversy are, that on the 22d day of April, 1902, Harry Hill and Verne Stewart stole and drove away from a herd of cattle owned by plaintiffs, 10 head of steers which they delivered to defendant Michael Lamb, who intermingled the stolen cattle with 15 head of his own and shipped the same to South Omaha, Nebraska, where they were sold to the commission firm of Ralston & Fonda, the proceeds of sale amounting to $1,800; $830 of the proceeds of the sale of this carload of cattle were invested in 49 head of yearling steers by defendant Lamb, and the cattle purchased were shipped to his ranch in Greeley county, Nebraska. Subsequently the defendant Lamb was arrested on a criminal warrant and charged with aiding and abetting the larceny of the cattle and with receiving the stolen cattle, knowing the same to have been stolen. He was convicted of this criminal charge in the district court for Greeley county, Nebraska, and sentenced to the penitentiary for a term of nine years. The judgment of the district court was subsequently affirmed by the court in the case of *Lamb v. State*, 69 Neb. 212. Shortly after the larceny of plaintiff's cattle they began an action against the defendant Lamb to recover the value of the stolen cattle and procured an attachment to issue and levied the same upon the cattle now in dis-

pute. Subsequently, the attachment proceeding was dismissed by plaintiff and the instant case, a bill in equity to impose a resulting trust on the 49 head of cattle purchased from the proceeds of the sale of the cattle stolen from plaintiffs, was instituted. Issues were properly joined on the petition in the court below, and a trial had to the court, which resulted in a judgment for plaintiffs and a decree quieting title to the 49 head of cattle in dispute in plaintiffs. From this judgment and decree, the defendant brings error to this court.

The first contention urged for a reversal of the cause is, that the plaintiffs by instituting suit against the defendant to recover the value of the property stolen, and having an attachment issued, elected to treat the cattle as the property of the defendant, and that, having so elected, they are now estopped by this act from claiming the equitable title to the cattle in dispute. There are two sufficient answers to this contention: The first is, that by instituting a suit at law against the defendant for the recovery of the value of the cattle alleged to have been stolen, plaintiffs by this act did not elect to declare that the defendant was the owner of any particular property. Nor did they by this act disaffirm their title to the property stolen by the defendant, nor their right to trace the proceeds of such property when reinvested and have a trust declared therein. And again it clearly appears from the testimony that at the time the attachment proceeding was instituted, plaintiffs had no knowledge of the fact that the 49 head of cattle now in dispute had been purchased from the proceeds of the sale of their cattle. In *Pekin Plow Co. v. Wilson,* 66 Neb. 115, this court said that, "If in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy."

The next question urged is, as to the sufficiency of the

testimony to impress a resulting trust in favor of plaintiffs on the cattle in dispute. The evidence as to the larceny of the cattle and defendant Lamb's participation therein was the same in the case at bar as it was in the criminal proceeding, and we may say that, in full compliance with all rules of evidence, this fact has been fully established. That a thief who steals the property of another and changes its form by reinvestment is a trustee *ex maleficio* of the owner of the property is well established in this state, and as was said by POST, C. J., in *Nebraska Nat. Bank v. Johnson,* 51 Neb. 546, "The conventional relation of trustee and *cestui que trust,* or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner."

Then the question to be determined is, how much, if any, of the proceeds of the cattle stolen from plaintiffs have been traced by the testimony in the record to the purchase of the cattle in dispute? The evidence shows that before the theft of the cattle the defendant had a small balance of about $76 in the Spaulding State Bank; that after the sale of the car-load of cattle at South Omaha defendant deposited in this bank a draft on the Packers National Bank of South Omaha for $1,589.92; that from the moneys so deposited in the Spaulding bank he purchased a draft of $555.93 which was applied as payment of a part of the purchase price of the cattle in dispute. The evidence shows that the 10 head of plaintiff's cattle, which were intermixed with the 15 head of defendant's cattle, were of the value of about $850 and that the draft for $1,589.92 was part of the proceeds of the sale of all those cattle. This is all the evidence in the record which tends to trace the proceeds of plaintiff's cattle into the purchase of the herd in controversy. It seems to us, in view of this state of the record, that the learned trial court went too far with his decree in declaring plaintiffs the absolute owners of the property in dispute. Plaintiffs voluntarily abandoned a court of law for the redress of their civil

wrong and sought the assistance of a court of chancery, which always abhors forfeitures and penalties. Having thus selected a forum of conscience for relief, although in a contest with a convicted felon, they are only entitled to such a decree as equity provides, which is to have a resulting trust declared in the property in controversy, to the extent that they have traced the proceeds of the sale of their property to the chattels in dispute.

We therefore recommend that the judgment of the district court be reversed, and that the cause be remanded with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of $555.93, with seven per cent. interest from May 1, 1902, and to declare this trust a first lien on the property in dispute and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within 20 days from the entry of judgment.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of $555.93, with 7 per cent. interest from May 1, 1902; and to declare this trust a first lien on the property in dispute, and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within 20 days from the entry of judgment.

JUDGMENT ACCORDINGLY.

CITY OF OMAHA V. MARY HOULIHAN.

FILED JULY 13, 1904. No. 13,464.

1. **Personal Injury**: QUESTION FOR JURY. Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the

evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established.

2. **Pleading and Proof.** Proof as to the distance of the surface of the sidewalk from the ground and the slope of the ground at the end of the walk, *held* to be within the issues.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

C. C. Wright and *W. H. Herdman,* for plaintiff in error.

James H. McIntosh, contra.

LETTON, C.

This action was brought by Mary Houlihan, defendant in error, hereinafter styled the plaintiff, against the city of Omaha, plaintiff in error, hereinafter styled the defendant, to recover damages for personal injuries alleged to have been suffered by her by reason of a defective sidewalk in said city. The plaintiff, at the time of the accident, was an unmarried woman, about 50 years of age, who had been engaged in domestic service for 10 or 12 years previously, and was a stout healthy woman weighing about 170 pounds. She was injured at a point where a wooden sidewalk running on the west side of 24th street between Cuming and Burt streets intersects the alley on the west side of the street. The evidence shows that the sidewalk is made of two-inch planks laid crosswise on four-by-four stringers; that at the point where the sidewalk reaches the alley there is no crosswalk and that the middle of the alley is about 16 to 18 inches below the level of the surface of the sidewalk; that immediately at the end of the walk upon which the plaintiff was walking the distance from the surface of the sidewalk to the ground is from eight to ten inches, and that from that point there is quite a steep slope for the remainder of the distance to the level of the middle of the alleyway. The plaintiff was familiar with the locality;

she testifies that the sidewalk was clear and all right at the place; that as she was proceeding along the walk in the direction of Cuming street she stepped down from the surface of the plank walk to the ground, when her foot slipped and she fell backward upon her other foot in such a manner that the bones of her leg were broken just above the ankle. It appears that after the bones were set by the surgeons she employed, a plaster cast was placed upon the injured member and she was compelled to remain in bed for about nine weeks; that afterwards she was obliged to use crutches for a long period of time and was still to some extent incapacitated from labor by the injury received. She recovered a judgment in the district court from which the defendant city prosecutes error.

The principal contention of the defendant is that the verdict is not sustained by sufficient evidence, is contrary to law and that the court erred in refusing to direct a verdict for the defendant. The argument of the defendant is mainly devoted to two points. First, that the plaintiff was clearly guilty of contributory negligence since she was acquainted with the condition of the walk at the point where the injury occurred and that she with full knowledge of this defective condition attempted to pass over the dangerous spot. That the danger was well known to her and that she having deliberately attempted the passage must be taken to have assumed the risk.

The first question to be considered is whether or not the plaintiff knowing the condition of the walk when she made the descent was guilty of contributory negligence in attempting to pass. Certain photographs were introduced in evidence which show clearly the condition of the sidewalk and "the vertical cut-off," of which the plaintiff complains, at the time of the accident. The plaintiff testifies that she did not see any ice or snow when she fell, if there was any it must have been covered with dust; while the testimony of Dr. Upjohn, the doctor who was called to her at the time of the accident, was that there was a small piece of ice about four inches from the end

of the sidewalk, occupying about eight inches of the center of the walk, and that a person could have stepped to one side of the ice had they taken the pains. He further testified that the plaintiff told him that she had fallen there when she was running for the car, that she noticed the car standing and she was running to catch the car and stepped on the ice and fell. The plaintiff denies that she told the doctor that she was running; but her testimony as to whether she said she stepped upon the ice is that she told him she stepped out in the alley and fell; that she does not believe she told the doctor she stepped on the ice, she could not say, that it might be icy, but that she did not see it, it must be because of the dust. The witness Johnson testified that at the time of the accident he looked to see if there was ice there and there was none.

The evidence showed that the sidewalk upon the other side of the street was not in good condition. The photographs show that the middle of the street was rough and frozen and also show a steep bank at the edge of the sidewalk next the street higher than the step from the sidewalk to the alley. Under these circumstances we believe that a person of ordinary prudence would be justified in stepping down from the end of the walk a distance of eight to ten inches, which is not an unusually high step. Had the condition of the ground beyond been level, in all probability no injury would have resulted, but doubtless owing to the sharp slope beyond the first step down, the plaintiff's foot slipped and she fell.

We are convinced from the evidence that the proximate cause of the injury was the abrupt descent from the surface of the sidewalk to the level of the alley. There was a vertical descent of from eight to ten inches, then a sloping descent for about the same distance. Had the sidewalk been constructed so as to leave no abrupt descent the accident in all probability would not have happened. It is probable that a small part of the surface of the slope was icy but was covered with dust, since the plaintiff testifies that she did not see any ice when she stepped down,

and it is not at all improbable that the fall of the plaintiff to the ground brushed the dust away and made the ice visible. Although the plaintiff was well acquainted with the condition of the sidewalk at this point, her knowledge would not prevent her recovery in this action, provided that she used ordinary and reasonable care considering all the circumstances at the time she was injured. *Union P. R. Co. v. Evans,* 52 Neb. 50. There is no clear and satisfactory evidence of the intervention of any other agency causing the plaintiff to slip, than the defective and improper situation and construction of the end of the sidewalk so that it was left elevated such a height above the alleyway, and the nature of the ground at the bottom of the step.

The question of whether or not the plaintiff was negligent was submitted to the jury by appropriate instructions, and the jury found against the defendant on this issue. The question of contributory negligence becomes a matter of law for the consideration of the court only when the inference to be deduced from the testimony is so clear and positive that reasonable minds could not well differ, but where persons of ordinary good judgment might reasonably differ in the conclusion drawn from the facts as to whether or not a person has been guilty of contributory negligence, it is a matter entirely for the jury to determine. In this case, the court cannot say as a matter of law that the plaintiff was guilty of contributory negligence and the matter was properly submitted to the jury.

The defendant's second contention is that the negligence of which the plaintiff complains was not the proximate cause of the injury, but that the injury was caused, not by the defective condition of the sidewalk but by the lack of a cross-walk across the alley, or by the accumulation of ice or snow at the point of crossing and that hence the evidence does not support the allegations of the petition. The petition charges "that said sidewalk as so constructed and maintained by said defendant is, and during all the times herein mentioned, was dangerous to foot passengers;

that during the winter season ice, snow and mud accumulate on the ground at the bottom of said vertical cut-off, so that passengers walking along said sidewalk, and stepping down said vertical cut-off were in great danger of slipping and falling and sustaining injuries thereby; that said defendant was negligent in constructing and maintaining said sidewalk with said vertical cut-off in manner and form as aforesaid, and the said danger to foot passengers by reason thereof was at all times well known to the said defendant." While it is true that the petition does not describe the precise nature and every element of the defect that caused the accident, it sufficiently appears that it was the distance between the surface of the walk and the ground, and the uneven condition of the surface of the ground at the foot of the step that was complained of. No motion to make the petition more specific was filed and we think its allegations broad enough to admit of the proofs furnished.

A number of objections are urged to the instructions of the court, but we are satisfied that the instructions given fairly submit the issues to the jury. It is objected that the court erred in instructing the jury that the life expectancy of the plaintiff was 21.11 years. The parties stipulated that, according to the Carlisle table of expectancy of life, the prospective life of a person of the age of 50 is 21.11 years when in good health. There was no other evidence as to expectancy. The evidence shows that the plaintiff was in good health at the time of the accident. It is true that the Carlisle table of expectancy is not conclusive of the question of the probable duration of life of an individual, but is merely a matter of evidence to be taken into consideration by the jury the same as other evidence and that in some cases an instruction of this kind might be prejudicial; but in the case at bar the evidence was undisputed. The only effect that the introduction of this table could have would be to affect the amount of the plaintiff's damages. The defendant does not complain that the damages are excessive, and even if it did there

would be no ground for the complaint. The action of the court was not prejudicial.

The case was fairly tried and submitted to the jury, and we find no error in the record prejudicial to the defendant.

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.

EDWARD NELSON V. J. R. WEBSTER, SHERIFF, ET AL.

FILED JULY 13, 1904. No. 13,576.

1. **Judgment**: PRINCIPAL AND SURETY. A defendant, who had been found to be a surety by the judgment in the original action upon a promissory note, paid the amount of the judgment and took an assignment of it to himself for the purpose of enforcing it against his principal. *Held*, That, as between the parties, the judgment had not been satisfied and extinguished, and that the surety was entitled to collect the same by the issue of execution against his principal.

2. ———: CONCLUSIVENESS. Where in an action against a principal and surety, that issue has been presented and a finding made under section 511 of the code, the relation of the parties as principal and surety has been conclusively determined, and need not be relitigated in an action to subrogate the surety to the rights of the creditor against the principal.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

John H. Barry, for plaintiff in error.

V. L. Hawthorne, contra.

LETTON, C.

This is an action of replevin brought by Edward Nelson, plaintiff in error as plaintiff, against J. R. Webster, Sheriff of Saunders county, and Peter Johnson, defendants in error as defendants, in the district court for Saunders county. The case was tried to the court upon an agreed stipulation of facts which are substantially as follows: That on March 29, 1897, the Farmers & Merchants Bank recovered a judgment against Friberg, Nelson and Johnson in the sum of $154.25 and costs taxed at $11.55 upon a promissory note signed by said parties; that the evidence, findings and judgment of the court show that Peter Johnson signed the note as surety; that afterwards Peter Johnson paid the full amount due upon the judgment of the plaintiff by his attorney, S. H. Sornborger, and the following record was made upon the court docket upon which the judgment appears:

"April 8, 1897. In consideration of the payment of $163.81 by Peter Johnson, surety of the plaintiff, this judgment as against Andrew Friberg and Edward Nelson is hereby assigned and set over to said Peter Johnson to proceed herein in plaintiff's name or otherwise against said Friberg and Nelson but not at plaintiff's costs. Farmers & Merchants Bank, by S. H. Sornborger, its attorney." That a transcript of the judgment and assignment was filed in the district court for Saunders county and an execution issued thereon, by virtue of which execution the defendant Webster as sheriff seized the property described in plaintiff's petition which is of the value of $690; that Peter Johnson, the defendant, caused the execution to issue claiming to own the judgment by virtue of having paid the same and receiving the assignment thereof. Upon the pleadings and evidence, judgment was rendered for the defendant, and the plaintiff prosecutes error to this court.

The plaintiff in error contends, first, that Johnson, having paid and satisfied the judgment, it was extinguished and no longer remained a valid judgment against any one;

second, that one of several judgment defendants cannot become the assignee of the judgment, as against the other defendants.

It is admitted by the plaintiff in error that had Johnson, after paying the judgment, filed his petition containing the proper averments in a court having jurisdiction against Nelson and Friberg, his codefendants, had brought them into court and sustained the allegations of his petition with proper proof, he would have been subrogated to the rights of the bank. But it is contended that he cannot summarily acquire the right to enforce the judgment against his codefendants, and determine his rights and the rights of Nelson without giving Nelson his constitutional right to be heard in his own defense. The defendants in error upon the other hand contend that the fact that Johnson was only a surety is *res adjudicata,* that payment to the bank and the assignment of the judgment to him operate as a transfer of the judgment, and that thereby he was subrogated to all the rights and remedies possessed by the bank at that time, and can enforce the judgment as to his principal as fully as the bank could have done. In the original action in the county court, issues were tendered upon the question of whether the relation of principal and surety existed as between Johnson and his codefendants; evidence was taken and a finding and judgment was had upon such issue, which determined as between the parties the fact that Johnson was merely a surety. So that the status of the parties as principal and surety was conclusively determined before the payment of the judgment and its assignment to Johnson took place.

By section 511 of the code it is provided that "in all cases where judgment is rendered in a court of record within this state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their codefendant, it shall be the duty of the clerk of said

court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail." By the provisions of this section, the question of whether the parties stand in the relation of principal and surety may be as effectually litigated and settled in the original action, as could be done under the common law in a subsequent action in which the surety sought exoneration. One of the principal objects, therefore, of the surety's suit had been realized by the adjudication in the original suit that Johnson stood in the relation of surety to his codefendants.

It is further established that the surety has paid the judgment creditor the full amount of the judgment and costs and obtained an assignment thereof. Under the pleadings in this case no issue is tendered that could be litigated in an action for exoneration, other than the allegation in the reply that Nelson was only a surety upon the obligation and not a principal, but this issue as we have seen has been adjudicated and settled as between these parties.

Under the civil law not only is the surety entitled where he pays the whole debt to the benefit of all 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. And upon such cession or assignment * * * the debt is, in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal." 1 Story, Equity Jurisprudence (13th ed.), section 500. And this it seems was the earlier doctrine at common law. See cases cited in 1 Story, Equity Jurisprudence (13th ed.), section 499. Mr. Story, however, states that the doctrine is now established, that the surety has no such right to be enforced in equity and that he cannot insist upon any assignment, upon the ground that by the payment of the debt the debt has become extinguished, but he comments upon this doctrine as follows:

"It is observable that the whole of this reasoning proceeds upon the ground that by the payment by the surety the original debt is extinguished. Now that is precisely what the Roman law (as we shall presently see) denied; and it treated the transaction between the surety and the creditor according to the presumed intention of the parties to be not so much a payment as a sale of the debt. 1 Domat Civil Law, Book 3, tit. 1, sec. 6, art. 1; *post*, sec. 500 and secs. 635, 636, 637. It is not wonderful that courts of equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties as well as to the demands of justice, should have struggled to adopt it into the equity jurisprudence of England. The opposing doctrine is founded more on technical rules than on any solid reasoning founded in general equity. In truth courts of equity in many cases do adopt it and act upon it." (Sec. 499*d*.)

It will be observed that in the case at bar, the purpose and object of the usual action in equity, by which the surety seeks to be subrogated to the rights and remedies of the creditor, has been effectually accomplished by the assignment of the judgment. The object of the equitable action was to procure the right to the surety who had paid the debt, to have the advantage and benefit of every lien, claim or security which the original creditor had against the principal debtor. We think that the equitable doctrine of the civil law has become the doctrine of the majority of the American courts.

In *Townsend v. Whitney*, 75 N. Y. 425, the whole subject is examined and it is said, that it has not always been easy to define the cases in which subrogation could be had and the English authorities are not all consistent, and in that case it was held that where a judgment has been rendered upon the surrogate's decree against an administrator and the judgment has been paid by one of the sureties he may have the decree assigned to himself or to some one else for him and enforce it by attachment against the administrator.

In a leading case in New Hampshire, there is an extended discussion of the legal principles involved in this case in which the language used by the writer of the opinion is so apt that we quote from it at length. The court say, by Bell, J.:

"The general principle, that a surety is entitled in equity, to be subrogated to all the securities which the creditor holds against the principal, is everywhere admitted. (Citing cases.) So it is beyond question that the surety, paying the debt, may stipulate for an assignment of all the collateral securities of the creditor against the principal, and such assignment will be protected in courts of law, as well as in equity. (Citing cases.) It is equally clear, that the payment of a debt by any person who is liable to its payment is a discharge of it. It is thenceforward *functus officio,* and cannot be enforced against any person, who is liable to its payment in the same degree as the party paying. *United States v. Preston,* 4 Wash. (U. S. C. C.) 446. So payment of a judgment, or execution, by either of the judgment debtors, discharges the execution, and is a satisfaction of the judgment. (Citing cases.) And, as a general rule, the same result follows from a payment made by any other person; and any agreement made by the party making the payment with the creditor, that the execution shall not be discharged, or returned satisfied, in order that the party paying may collect upon it a part or the whole of the judgment debt from another of the judgment debtors, will be entirely nugatory. * * * But the rule, that a surety may take an assignment of any security for the payment of the debt, which is held by the creditor, unavoidably implies an exception to the general rule that payment of a debt by a codebtor discharges the other codebtors, whether the debt rests in contract merely, or is merged in a judgment. * * * We apprehend, therefore, that the rule, that payment by a codebtor discharges the debt, must be subject to this exception; if the codebtor, making the payment, is a surety, the debt will be holden undischarged, so far as

is necessary to preserve and give effect to the collateral securities against the principal, assigned by the creditor to the surety, either voluntarily, or by a decree of a court of equity. * * * The payment, for most purposes, discharges the debt, but does not so discharge it, as to destroy the security of the surety; but a judgment may be entered up, to be levied on the property attached, or, if judgment be rendered, a levy on that property may be effectually made, though the execution would be enjoined, or set aside, if used for any other purpose." *Edgerly v. Emerson,* 23 N. H. 555, 55 Am. Dec. 207.

The American cases on this subject are collected and distinguished in 24 Am. & Eng. Ency. Law (1st ed.), 204-206, and notes. See, also, *Liddcrdale v. Robinson,* 12 Wheat. (U. S.) 595; *Pott v. Nathans,* 1 Watts & Ser. (Pa.) 155, 37 Am. Dec. 456; *Searing v. Berry,* 58 Ia. 20, 11 N. W. 708; *Bank of Montpelier v. Dixon,* 4 Vt. 587, 24 Am. Dec. 640; *Mason v. Pierron,* 63 Wis. 239, 23 N. W. 119; *Mitchell v. DeWitt,* 25 Tex. Supp. 180, 78 Am. Dec. 561.

The case at bar is easily distinguished from the cases of *Potvin v. Meyers,* 27 Neb. 749, and *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685, cited by plaintiff in error. In each of these cases, the defendant who paid the judgment was apparently primarily liable for the debt and it was not ascertained by the judgment that he stood in the relation of surety to the principal debtor.

In *Wilson v. Burney,* 8 Neb. 39, the facts were that Humphrey Brothers had commenced an action against Horace Taylor, E. A. Berry and the defendant Burney, and recovered a judgment against Taylor as principal and Berry and Burney as sureties. An affidavit for garnishment was filed against the firm of Wilson & Phillips, summons issued thereon, the answer of the garnishees taken and an order made that the garnishees pay the sum of $85 into court. After this order was made an execution was issued on the original judgment and the amount due thereon was paid by Burney, who took an assignment of the judgment to himself and brought an action under the

judgment against Wilson & Phillips as garnishees. Judgment was rendered in his favor and Wilson & Phillips prosecuted error. This court held, the opinion being written by Chief Justice MAXWELL:

"The principle is well settled that upon the payment of the debt by the surety, he is entitled to the securities held by the creditor against the principal debtor, and to stand in his shoes, and it can make no difference that the security is in the form of an order upon garnishees to pay money into court. It follows that the defendant, being entitled to be subrogated to the creditor's rights in the premises, the judgment of the court below must be affirmed."

The only difference in the facts between this case and the case at bar is that an order had been made upon the garnishees to pay the money into court before the surety took the assignment of the judgment, but this does not change the principle which is applicable.

Since the relation of principal and surety has been adjudicated and established between these parties, and since an assignment has been made of the judgment from the creditor to the surety, all that could be done in another action has already been performed. Laws are established for the purpose of affording a remedy where a person has suffered a wrong. It was the plaintiff in error's duty to pay the judgment to the bank. Failing this, if he is called upon by any other person to pay the debt, he has the right to have it conclusively established that the person now calling upon him for payment occupies such a position that if he pay the debt to him, he cannot be compelled to pay the debt again to the original creditor.

When the person seeking payment has conclusively shown that he was the surety, that he paid the full amount of the debt, and that the judgment against the defendant has been assigned to him, there is nothing further necessary to be proved to authorize him to compel payment. These facts may be established by a separate action in the nature of a suit in equity for subrogation, or suretyship

may be shown, under the provisions of our statutes in the original action itself, and if the judgment is in fact assigned, the surety may enforce it. No good can result from compelling the defendant in error to maintain another suit. The plaintiff in error has had his day in court and should pay the debt without further litigation.

For these reasons the judgment of the district court is correct and should be affirmed.

OLDHAM, C., concurs. AMES, C., dissents.

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

AFFIRMED.

WILLIAM F. MALONEY ET AL. V. JOHNSON-MCLEAN COMPANY ET AL.

FILED JULY 13, 1904. No. 13,598.

1. **Appeal Bond: VALIDITY.** An appeal bond in an action for the foreclosure of a mechanic's lien, in which a personal judgment has been rendered against the obligors, which is conditioned that the appellants will pay all condemnation money, judgment and costs which may be found against him or them on the final determination of the cause in the supreme court, complies with the first subdivision of section 677 of the code, is based upon a sufficient consideration, and is valid.

2. **Judgment, Finality of.** The "condemnation money" mentioned in the conditions of a bond given under the first subdivision of section 677 of the code is "found against the defendant" when the judgment of the district court appealed from is affirmed by this court.

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

G. W. Shields, for plaintiffs in error.

C. S. Lobingier and *J. L. Kaley, contra.*

LETTON, C.

This is an action upon an appeal bond. The original action was brought in the district court for Douglas county by the defendants in error to foreclose a mechanic's lien against William F. Maloney and Emma F. Maloney, plaintiffs in error. A judgment and decree was rendered therein against the plaintiffs in error, whereupon they filed an appeal bond, with themselves as principals and Hans Peterson as surety, which appeal bond was conditioned as follows:

"Now, therefore, the condition of this obligation is such, that if the said William F. Maloney and Emma F. Maloney shall prosecute said appeal without delay and pay all condemnation money, judgment and costs which may be found against them on final determination of the cause in the supreme court, then this obligation shall be null and void, otherwise to remain in full force and effect." The cause was appealed to this court and by it affirmed, *McHale v. Maloney,* 67 Neb. 532, and a mandate issued, directing the district court to carry the judgment into effect. In the case at bar, judgment was rendered in the district court in favor of the obligees in the bond. It is argued by the plaintiffs in error, first, that the appeal bond was not a statutory bond, did not supersede anything and was void for want of consideration; second, that the bond was conditioned to pay only such condemnation money, judgment and costs as should be rendered by and in the supreme court, while the supreme court did not render any judgment but simply affirmed the judgment of the lower court.

In the action to foreclose the mechanic's lien a personal judgment was rendered against the plaintiffs in error. At the same time the decree found that their interest in the premises was a leasehold interest, and ordered that in case the judgment was not paid within 20 days, an order of sale be issued to sell the leasehold interest and the buildings and improvements on the real estate to satisfy

the debt. Under the system of pleading and practice which has prevailed in this state for many years with reference to the foreclosure of mechanics' liens, a plaintiff may in the same action pray for and receive a personal judgment against a defendant for any amount found to be due him from said defendant upon the contract between them under which the labor or material was furnished, and may also have a finding and decree adjudicating the existence and validity of a mechanic's or laborer's lien upon the property described in the claim of lien filed, and in the petition, and an order of sale of the property on which the lien exists to satisfy the amount due upon the contract. The sale of the property upon which the lien exists does not cancel or extinguish the debt or the judgment, unless the proceeds of the same are sufficient to pay the debt in full; the defendant still remains liable to the plaintiff for any amount which may remain unpaid on the judgment after the application of the proceeds of the sale *pro tanto* upon the judgment, and the plaintiff may have execution therefor. *McHale v. Maloney, supra.*

The case of *Clapp v. Maxwell,* 13 Neb. 542, cited by plaintiff in error, is not in point in this case, since an action for the foreclosure of a mortgage and one for the foreclosure of a mechanic's lien differ in many respects in this state. That case merely decides that personal judgment cannot be rendered in the first instance in an action for the foreclosure of a mortgage.

The conditions of the bond under consideration are those prescribed by the statute in cases of personal judgments for the payment of money. Since the judgment was a personal judgment which directed the payment of money, a bond which is conditioned that the appellant will pay all condemnation money and costs which may be found against him or them on the final determination of the cause in the supreme court complies with the first subdivision of section 677 of the code, is based upon a sufficient consideration, and is valid.

As to the second contention of the plaintiffs in error, in

which they urge that no judgment was rendered against them in the supreme court and that consequently there is no breach of the condition, it is sufficient to say that by the words "condemnation money" is meant the damages which the party failing in an action is adjudged or condemned to pay. When the supreme court affirmed the judgment of the lower court, it "found" the condemnation money "against the defendant." It is true that the appeal in the supreme court was a trial *de novo*. But it was at the same time a review or re-examination of the decision of the district court upon the facts. When this court reaches the same conclusion upon appeal as the trial court, its practice is to affirm the judgment of the district court, which is in effect a finding and judgment against the same parties, to the same effect, as the findings and judgment of the district court. It is to be preferred that the records of the district court of each county show judgments against the persons residing therein, rather than the records of the supreme court. When the judgment of the district court awarding a money judgment against an individual is affirmed by this court the "condemnation money" is found against him, as contemplated by the language of the statute.

We find no error in the record and the judgment should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1904.

JOHN D. SMITH ET AL. V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,657.

1. **Information.** In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute. *Whitman v. State*, 17 Neb. 224.

2. ———: SUFFICIENCY. The court will give the words used in the information their ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld.

3. ———: ———. Whether allegations in an information charging an assault and an attempt to commit a robbery include the essential element of a felonious intent to rob, *quære.*

4. ———: ———. The allegations of the information set out in the opinion *held* sufficient to charge an assault with intent to commit a robbery, and to support a judgment of conviction of such an offense.

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

Martin Langdon and *Dan J. Riley*, for plaintiffs in error.

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

HOLCOMB, C. J.

Plaintiffs in error, defendants in the court below, were informed against and convicted of the offense of an assault with the intent to commit a robbery. The sufficiency of the information to support a judgment of conviction is challenged on the ground that the intent with which the assault was committed is not sufficiently and specifically charged in the information. The charging portion of the information is "that on the 22d day of September, in the year of our Lord nineteen hundred and three, John D. Smith and James Gaughan, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there in and upon one Henry Herman unlawfully, feloniously, forcibly, and by violence did make an assault, and then and there with menaces, forcibly and with violence, feloniously did attempt to take from the person of the said Henry Herman, and against his will, thirty-five cents (35-100) in money, of the value of thirty-five cents (35-100), the personal property of the said Henry Herman, with the intent of them, the said John D. Smith and James Gaughan, then and there feloniously, forcibly and violently from the person of him, the said Henry Herman, against his will to steal, take and carry away said property; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It is argued that the gist of the offense sought to be charged consists in the intent with which the assault was committed; that such intent must be distinctly alleged and proved and that there is no intent whatever alleged as to the assault charged in the information in the case at bar. It is urged that the latter clause wherein it is charged after the alleged attempt at robbery that it was with the intent of the defendants "then and there feloniously, forcibly, and violently from the person of him the said Henry Herman, against his will to steal, take and

carry away said property" has no connection with the alleged assault, and that such intent as therein alleged cannot refer back and show the intent with which the alleged assault was committed. It is the well settled doctrine in this state, that in charging the commission of an offense in an indictment or information it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute. *Whitman v. State,* 17 Neb. 224; *Kirk v. Bowling,* 20 Neb. 263; *Hodgkins v. State,* 36 Neb. 160; *Wagner v. State,* 43 Neb. 1; *Bartley v. State,* 53 Neb. 310; *Carrall v. State,* 53 Neb. 431. Section 14 of the criminal code provides that, if any person shall assault another with intent to commit a robbery, every person so offending shall be imprisoned, etc. It is clear that the gravamen of the offense sought to be charged in the information in the case at bar is the intent of the accused to commit a robbery; that this intent is the very essence of the crime and must be charged explicitly. The allegation of intent cannot be aided by intendments. *O'Connor v. State,* 46 Neb. 165; *State v. Hughes,* 38 Neb. 366; *Smith v. State,* 21 Neb. 552. It is, however, the duty of the court to give the words used in the information the ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, then the information should be sustained.

It is insisted by the state the allegation that the defendants, at the time of the assault, attempted with menaces, forcibly, and with violence to take from the person therein mentioned, the money described, is in and of itself sufficient to charge an assault with intent to commit a robbery. The word attempt, it is argued, is broader and more comprehensive than the word intent and includes within its meaning the latter term; that in charging the attempt to take from the person named, forcibly and with violence, the property mentioned, it is charged that the defendants not only intended to commit a robbery but

also went further and endeavored to carry out and to execute the intent. Authority entitled to weight and respectful consideration is not found wanting in support of this view as to the force and effect of the allegation of an attempt to commit a robbery found in the information. In Bishop, Criminal Procedure, sec. 80, the author, quoting an expression found in an opinion of the supreme court of Alabama (*Prince v. State*, 35 Ala. 367), says:

"It seems impossible to doubt that the only distinction between an *intent* and an *attempt* to do a thing, is, that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution"; and it is then observed by Mr. Bishop: "Since, therefore, the word 'attempt' embraces the full meaning of 'intent,' with something more, it is not impossible the courts may hereafter hold it to be an admissible substitute in an indictment." The text in the authority quoted from is fully supported and borne out by the decisions of the court of criminal appeals of Texas, in *Atkinson v. State*, 34 Tex. Cr. App. 424, 30 S. W. 1064; *Runnells v. State*, 34 Tex. Cr. App. 431, 30 S. W. 1065. We prefer, however, not to rest our conclusion as to the sufficiency of the information in the case at bar on the construction of the allegation of attempted robbery to which we have adverted, but rather to hold to the view that the allegation of an assault with the intent to commit a robbery is sufficiently explicit and distinct in other language found in the information. A fair interpretation of the language used justifies the view that the averments found in the information charge that on the 22d of September in the year stated, and in the county and state mentioned, the defendants made an unlawful assault on the person of Henry Herman and that they then and there —that is, at the same time and place, and necessarily as a part of the same transaction—with menaces, forcibly and with violence, and feloniously attempted to take from the person of the said Herman against his will 35 cents, being the personal property of the said Herman, with the intent

then and there—that is, at the same time and place, and as a part of the same transaction—feloniously, forcibly and violently and against his will to take from the person of the said Herman and to steal and carry away said property. The assault, the attempt to rob, and the alleged intent to commit a robbery, are manifestly joined together as one transaction and involve an act or a series of acts with the felonious intent accompanying the same, all of which are connected and relate to the one transaction charged and complained of in the information. The acts charged and the evil intent as alleged combine and in point of time concur, and this in law charges the crime of an assault with intent to commit a robbery. The alleged attempt to commit the robbery, as charged, manifestly, under a familiar rule of law includes the lesser offense, to wit, the assault; and the conclusion, therefore, is fairly warrantable that the acts charged, that is, the attempt to commit a robbery, including the assault, were with the intent, as alleged, to by force and violence take from the person mentioned the money described, and this would constitute, if accomplished, the crime of robbery. The assault is undoubtedly specifically charged, and that it was with the intent to commit a robbery is as clearly inferable from a consideration of the language used in the charging part of the information as that an unlawful assault is properly alleged. The conclusion proper to be drawn from the allegations of the information is, that the defendants are distinctly charged with an assault with the intent to commit a robbery, and that it is sufficient to support the judgment of conviction pronounced against them.

It is further urged that the information is vulnerable to the objection of insufficiency in that it does not charge that the intended robbery was to be accomplished by violence but only with violence; that the words as used mean nothing more than that the act contemplated and complained of was to be accompanied with violence but not accomplished by violence, which it is said are not at all the same. The reasoning urged in support of this objection is quite

ingenious but not convincing. Giving the words used their ordinary meaning, the only inference to be drawn therefrom is that the defendants made an unlawful assault with the intent to by force and violence commit a robbery. What is alleged is that the defendants intended to commit the crime of robbery in making the assault charged and that the instrumentalities to be used to accomplish the crime were force and violence to be exerted toward or against the person assaulted. The line of reasoning urged is altogether too subtle for practical purposes and its adoption would render the court's administration the means for escaping justice rather than for the promotion and enforcement of it.

The information being sufficient to support the judgment of conviction, the same should be affirmed, which is accordingly done.

AFFIRMED.

EUGENE L. FERGUSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,675.

1. **Cross-Examination of Witness.** "When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question." *Johnston v. Spencer*, 51 Neb. 198.
2. ———: COLLATERAL FACTS. "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea." *Johnston v. Spencer*, 51 Neb. 198.
3. **Accused as Witness.** In a criminal action, when an accused takes the witness stand in his own behalf, he is put in the position of an ordinary witness and subject to the rules governing the usual cross-examination.
4. ———: CREDIBILITY. The credibility of such a witness is to be determined and tested by the same principles that are applicable alike to all witnesses who testify in a case.

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

William M. Clark, for plaintiff in error.

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

HOLCOMB, C. J.

An information was filed in the district court for Clay county against the defendant, who appears in this court as plaintiff in error, consisting of two counts; the first charging him with a night-time burglary of a store building, with the intent to steal and with the stealing of certain property from the building alleged to have been burglarized, of a certain description and value as set forth in the information. In the second count, the defendant is charged with having received the property thus alleged to have been stolen, knowing the same to have been stolen. A trial upon the issue raised by a plea of not guilty resulted in a verdict in favor of the defendant on the first count and finding him guilty on the second. The burglary and larceny alleged were located in the town of Harvard in said county.

Several errors are complained of but we shall content ourselves with the discussion and consideration of one only; deeming a more extended review of the record unnecessary and unprofitable.

The defendant was a witness in his own behalf. In giving his testimony during his examination in chief, it developed that, at or about the time of the alleged crime, he was engaged in selling a patent self-wringing mop, the business being conducted by canvassing the different towns and homes throughout the county where the offense was alleged to have been committed. On cross-examination, the defendant was asked if he had not, at the time of the alleged offense, been engaged in other than the mop business and answered that he had sold some other things. On further cross-examination, it was developed that the witness had sold as a "side line," as he termed it, cream barom-

eters, and a few ladies' furs. He was then asked where he obtained these latter mentioned articles which he had sold and answered that he had received them from a brother at Pleasant Hill, Missouri. He was then asked if he had not sold one of the furs to a Mrs. Gordon residing in Clay county where the offense was alleged to have been committed, and answered that possibly he had. This is the substance of the cross-examination regarding the point referred to. After the defendant had rested, the prosecution was permitted over the defendant's objection to prove by the Mrs. Gordon mentioned, that she had purchased a fur collarette from the accused and that, at the time of the purchase, it had a paper tag attached showing the cost and selling price such as is used by merchants generally. The prosecution was then permitted to prove further by one Kemp, who was in the mercantile business at Fairmont, Nebraska, that the collarette purchased by Mrs. Gordon from the defendant was or had been a part of his stock of merchandise, and that the tag which was introduced in evidence was one used by him in his business, and the marks thereon were in his handwriting. This is the substance of the evidence permitted to be introduced by the state over defendant's objection, for the purpose, it seems, of contradicting his statements as to where he had obtained the furs he had testified to having and selling, and of impeaching his credibility as a witness. Touching this feature of the case, the court instructed the jury when the case was submitted to them for consideration as follows:

"The testimony that has been offered in this case with reference to other property in the possession of the defendant, other than that charged to have been feloniously taken from the Higgins Hardware Company, is to be considered by you for no other purpose and as having no other bearing upon your conclusions in this case save and except as affecting the credibility of the defendant E. L. Ferguson as a witness in his own behalf." In the twelfth instruction, among other things, it is further said:

"The credit of a witness depends largely upon two

things; that is, first, his ability to know what occurred, and his disposition for telling the truth."

It is earnestly urged on the part of the defendant, that error was committed to his prejudice by the admission of the impeaching testimony to which reference has been made, and the giving of the instruction which we have quoted at length. We are of the opinion that the evidence objected to, and the instruction complained of, both of which are related and may be considered together, do not conform to the principles governing the competency and admissibility of evidence, and was error prejudicial to the substantial rights of the defendant. While no evidence appears in the record tending to show that the furs which the defendant had been selling, or the one sold to Mrs. Gordon which was introduced in evidence, had been stolen, yet one can hardly escape the conviction from a reading of the record, notwithstanding the court's instruction, that the prosecution not only sought to show that the defendant had falsified in stating he had received these articles from his brother in Missouri, but also that he had come into possession of them by some questionable method. We may assume, however, that the instruction quoted limiting the scope of the evidence to the defendant's credibility as a witness, removed objections otherwise, and yet it is manifest that the controversy regarding where the defendant obtained the furs he was selling while prosecuting his other business was a collateral matter wholly immaterial to the real issue to be tried in the case. If that were an issue, then, in all fairness, the accused should have had an opportunity to procure the testimony of his brother in Missouri and probably other witnesses, to establish the truth of his version as to where he obtained these articles; and this but illustrates the wisdom of adhering to the issues fairly raised by the charge in the information and the plea of not guilty thereof. If an issue might be raised as to where the furs were obtained, a like issue might also be raised regarding where he obtained his cream barometers and his patent mop sticks, and by these side excursions

sight would be altogether lost of the question of his guilt of the crime charged in the information. Such inquiries into collateral matters would raise such a multiplicity of issues as to render litigation interminable, and could but have the effect of confusing the jury, who are the triers of fact, to such an extent as to prevent a fair and intelligent verdict on the real issues of fact in many of the cases submitted to them. Whether the defendant obtained the fur collarette from his brother in Missouri, or whether it was a part of the stock of merchandise of the witness Kemp, and secured by some undisclosed means from him, would in nowise throw any light upon the question of his having received the stolen property alleged in the information, knowing it to have been stolen. Whether he told the truth as to where he obtained these articles would, in a sense, affect his credibility as a witness, but not in a legal sense unless it was regarding a matter material to the main issue and to the facts which it is permissible to prove in establishing that issue. In *Johnston v. Spencer,* 51 Neb. 198, the rule is stated thus:

"When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question." In the same case it is held that "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea." See also *Davis v. State,* 51 Neb. 301, 340; *Myers v. State,* 51 Neb. 517, and *Zimmerman v. Kearney County Bank,* 57 Neb. 800. In an early case—*Smith v. State,* 5 Neb. 181—it is ruled that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. Stated another way, the rule is that, when a party on cross-examination asks a witness an immaterial or irrelevant question, he is concluded by the answer and will not be permitted to call a witness to contradict it. *McDuffie v. Bentley,* 27 Neb. 380.

The accused when he took the witness stand in his own behalf put himself in the position of an ordinary witness and was subject to the rules governing the usual cross-examination. His credibility as a witness was to be determined and tested by the same principles that are applicable alike to all witnesses who testify in a case. The rule seems to be universal to the effect that self-contradiction of a witness can be established by direct testimony of an opposite character only when the statements to be contradicted relate to a material fact in issue in the trial of the particular case. This is not saying that in the cross-examination itself a witness may not be interrogated as to facts or statements upon collateral matters, but only that his denial or his testimony in relation to such collateral matters will furnish no foundation for further testimony of an impeaching character on the point, unless the testimony sought to be impeached relates to facts and statements which are material to the issues. Applying the principles deducible from the authorities above cited to the facts as disclosed by the record in the case at bar, it becomes apparent that the method adopted by the prosecution and permitted by the court over the defendant's objections to impeach his credibility as a witness does not find support or sanction under the rules of evidence governing such questions, and it goes without saying that if these principles have been violated in this respect that the error committed was highly prejudicial to the defendant and calls for a reversal of the sentence of imprisonment pronounced against him on the verdict of guilty returned by the jury. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED.

MARY E. GANDY V. ESTATE OF WILLIAM C. BISSELL ET AL.

FILED SEPTEMBER 22, 1904. No. 13,359.

1. **Trial:** EVIDENCE. The evidence in this case is found to be sufficient to require the submission of the issue to the jury.
2. **Pleading:** EVIDENCE. A fraudulent alteration of the note sued upon may be shown under the general issue, and, when the whole evidence fairly raises the question, testimony tending to show that no such indebtedness as the one sued upon ever existed is competent upon the issue of alteration.
3. **Action on Note:** EVIDENCE. In an action upon a promissory note, the plaintiff's possession and production of the note at the trial is *prima facie* evidence of delivery and ownership.
4. ———: DELIVERY. If the note when executed is by agreement of the parties delivered to a third person to be by him delivered to the payee upon the performance of a condition precedent, and the condition is performed after the death of the maker of the note, the delivery becomes complete by the performance of the condition.
5. ———: EVIDENCE. When, in an action upon a promissory note, there is evidence tending to show that the note sued upon is not the genuine note of the defendant, it is completent to show the circumstances surrounding the parties at the time of the alleged execution of the note.

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

S. P. Davidson and *Reavis & Reavis,* for plaintiff in error.

C. Gillespie and *Francis Martin, contra.*

SEDGWICK, J.

The nature of this case is sufficiently stated in the former opinions of this court. In *Gandy v. Estate of Bissell,* 3 Neb. (Unof.) 47, a judgment of the district court for Richardson county in favor of the defendant estate was reversed for errors there pointed out. After another

trial in the district court, the case was again brought here, and a second judgment of the district court in favor of the defendant estate was affirmed. 5 Neb. (Unof.) 184. Upon rehearing and further argument we are convinced that the last judgment of the district court is also erroneous, and a new trial must be had.

1. The plaintiff insists that the court should have given a general instruction in her favor, but we are satisfied that the plaintiff was not entitled to such instruction for the reasons stated in the former opinion herein, and for other reasons that appear in the record. We are satisfied that the question of the sufficiency of the evidence in this case is preeminently one for the jury, and not a question for the court, and as there must be another trial, it is apparently unadvisable to state further reasons for this conclusion.

2. No doubt the evidence of the witness Hawley was competent. There was sufficient evidence before the jury to justify the conclusion that Mr. J. L. Gandy was either the real party in interest or had such control of the business of Mrs. Gandy that his admissions in regard to this note would be competent. His wife, Mary E. Gandy, took no part in transacting any of the business with Mr. Bissell. If she had any interest in the business whatever, she was content to leave the entire management thereof with her husband. There was evidence that Mr. Bissell had been told that the Gandys—that is, J. L. Gandy and his wife—claimed to hold a large demand against him. He therefore sought a settlement, and it was in pursuance of this desire of Mr. Bissell's that the Hawley settlement was made. Mr. Gandy knew this, and, although he was acting for his wife in all things as well as for himself, he completed a settlement with Mr. Bissell without mentioning the existence of this extraordinary claim. Not only so, but if Mr. Hawley's testimony is to be believed, Mr. Gandy assured him that all claims of both himself and wife were settled, and that his interest and authority were such that it was unnecessary to have Mrs. Gandy's signature to the receipt which was given as evidence of complete settlement.

Such evidence tends to show that at that time, at least, no such claim existed as the one now sued upon, and was competent for that purpose. There was no plea of payment or settlement of this particular claim, and such defense, of course, could not be available to the estate. This distinction should have been made clear to the jury in the court's instructions. It was competent to prove under the issues joined that no such claim as that sued for ever existed, and because the proof offered tended in that direction it was competent. The jury should have been informed of the fact that there was no allegation of payment or settlement of the claim, and that the evidence in question was not allowed for the purpose of proving such payment or settlement.

The third instruction asked by the plaintiff was an attempt to supply this necessary information to the jury, but was properly refused by the court because it contained the statement that if "the signature to the note in controversy is the genuine signature of William C. Bissell they will find for the plaintiff." This was not the law of the case, because under the issues formed, the signature might be genuine; in fact, it would seem from the evidence that the name signed to the note was the genuine signature of Bissell, and yet under the issues it was competent to prove that Mr. Bissell did not sign the note sued upon. If the note had been fraudulently changed and the amount raised after the signature of Mr. Bissell, it was a forgery and was no more the note of Mr. Bissell than if the signature itself had been forged and was not the genuine signature of Mr. Bissell. This defense may be made under the general issue. 3 Randolph, Commercial Paper (2d ed.), sec. 1783. There was evidence tending to show that Bissell had given small notes to plaintiff, and under all of the evidence it was for the jury to say whether the note sued upon was genuine. As well might the court have instructed the jury to find a verdict for the plaintiff as to have given this instruction as asked.

3. The third and fourth instructions given by the court

for the defense, we think, are clearly erroneous and require a reversal of the judgment. The plaintiff had possession of the note, produced it upon the trial and it was received in evidence. This made a *prima facie* case of due delivery of the note. The defense undertook to prove that the note was, in fact, not delivered to Gandy until after the death of Mr. Bissell. This evidence on the part of the defense was not very satisfactory, and tended likewise to prove that Mr. Bissell had made himself liable upon some kind of bond at Mr. Gandy's request, and that when the note in suit was executed, it was, by agreement between the parties, left in the hands of a third party until such time as Mr. Gandy should cause Mr. Bissell to be released from liability upon his account, and that after Mr. Bissell's death the bond upon which Mr. Bissell was liable for Mr. Gandy had been satisfied, and the note then delivered to Mr. Gandy by the holder thereof pursuant to the original agreement. This seems to be the only evidence offered to overcome the presumption of due delivery of the note, which arises from the fact of possession. In this condition of the evidence upon this point the four instructions, which are set out in the former opinion herein, were given in behalf of the defense.

In an early Massachusetts case, which may be said to be a leading case upon this point, it was said by Mr. Chief Justice Parsons:

"If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed—here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition." *Wheelwright v. Wheelwright*, 2 Mass. *447, 3 Am. Dec. 66; 6 Am. & Eng. Ency. Law (1st ed.), 870, 871.

The statement is repeated in these instructions that to constitute a delivery that would be recognized in the law, the note must have been delivered to Mr. Gandy by

Mr. Bissell in his lifetime, or by the duly appointed executor of his estate after his death. It is insisted that this proposition is technically correct and that a delivery in escrow, as indicated in the evidence above referred to, if the conditions afterwards were complied with by Mr. Gandy, would be, in the view of the law, a delivery by Mr. Bissell in his lifetime to Mr. Gandy, and so come technically within the language of the instructions; but there is nothing in the record to indicate that the jury understood this technical meaning to be intended by the court in these instructions. On the other hand, it seems very probable that from the repetition of this language, in the absence of any further explanation, the jury understood the court to mean that unless Mr. Bissell in person, or the executor of his estate after Mr. Bissell's death, manually delivered the note to Mr. Gandy, it was no delivery which the law would recognize. The jury should have been fully instructed upon the law of conditional delivery, which was not done, and we think that, in view of the circumstances under which these instructions were given, they were clearly erroneous.

4. It was maintained by the defense that Mr. Bissell was a well to do man, and that it was highly improbable that he should have been indebted to the plaintiff for so long a time. The evidence of the witness Wilson tended to show that it was necessary for Mr. Bissell to borrow money with which to pay his taxes in 1889. It seems to have been the contention of the plaintiff, and supported by some evidence, that the indebtedness for which the note in suit was given existed at that time. We think, therefore, the court erred in not allowing the jury to consider the evidence of the witness Wilson.

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

REVERSED.

ALFRED MOLINE V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,381.

1. **Constitutional Law.** Chapter 104 of the laws of 1899, amending section 125, chapter 58 of the criminal code of 1873, is valid, and not in conflict with section 11, article III of the constitution. The amendatory act is germane to the subject of the original section.
2. **Statutes:** AMENDMENT. The language of the section as amended fairly includes written instruments conveying the title to real estate to the one perpetrating the fraud, and thus securing the signature of a person or persons thereto.
3. **Information.** While the section as it now stands defines two offenses, to wit, obtaining money or property by means of fraud and false pretenses, and fraudulently disposing of property to defeat creditors, but one of these offenses is charged in the information, and it is not vulnerable to a motion to quash for duplicity.
4. ———: DEMURRER. The information examined, and *held* sufficient in form and substance to resist a demurrer.
5. **Instructions** given by the court on his own motion examined and approved.
6. **Evidence** examined, and found sufficient to sustain the conviction and sentence herein.

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

W. P. Hall, J. L. McPheeley and *H. M. Sinclair,* for plaintiff in error.

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

BARNES, J.

An information was filed in the district court for Phelps county, against the plaintiff in error, by which it was attempted to charge him with a violation of the provisions of section 125 of the criminal code, by obtaining, through

fraud and false pretenses, the signatures of Frederick Krapf and his wife, Christina, to a certain warranty deed, an instrument in writing, conveying to him their farm described as follows: The southeast quarter of section 24, township 5 north of range 20 west of the 6th P. M., situated in Phelps county, Nebraska. A trial resulted in a verdict of guilty and a sentence thereon. The accused prosecuted error, and the judgment was reversed on account of the insufficiency of the information. *Moline v. State,* 67 Neb. 164. When the mandate was returned a new information was filed charging the same offense, but in more explicit terms, and which was sufficient in form and substance to comply with the rules of criminal pleading. A second trial resulted in another conviction, and the accused was sentenced to serve a term of two years and four months in the state penitentiary. He thereupon prosecuted error, and the case is again before us for determination.

1. It is strenuously urged that section 125 of the criminal code as it now appears in the Compiled Statutes, is unconstitutional and void. The original section, as found in the criminal code of 1873, reads as follows:

"If any person by false pretense or pretenses, shall obtain from any other person, any money, goods, merchandise, or effects, whatsoever, with intent to cheat and defraud such person of the same, or shall fraudulently make or transfer any bond, bill, deed of sale, gifts, grants, or other conveyances, to defeat his creditors of their just demands, such person so offending, shall be fined in any sum not exceeding five hundred dollars, or be imprisoned in the jail of the county, not exceeding ten days, or both, at the discretion of the court."

Several ineffectual attempts were made to amend this law, and finally the legislature, at its session in 1899 (Laws 1899, ch. 104), passed an act by which the section was made to read as follows:

"If any person by false pretense or pretenses shall obtain from any other person, corporation, association or partnership, any money, goods, merchandise, credit or effects

whatsoever with intent to cheat or defraud such person, corporation, association or partnership of the same, or shall sell, lease or transfer any void or pretended patent right, or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, or shall fraudulently make and transfer any bill, bond, deed of sale, benefit or grant or other conveyance to defraud his creditors of their just demands, or if he shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five (35) dollars, or upwards, such person so offending shall be imprisoned in the penitentiary not more than five (5) years nor less than one (1) year; but if the value of the property be less than thirty-five (35) dollars, the person so offending shall be fined in any sum not exceeding one hundred (100) dollars, or be imprisoned in the jail of the county not exceeding thirty (30) days and be liable to the party injured in the amount of damages sustained."

The information herein is founded on a violation of that part of the section inserted by the amendment, to wit:

"Or if he shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five (35) dollars or upwards, such person so offending shall be imprisoned in the penitentiary not more than five (5) years nor less than one (1) year."

And the contention is that this provision is void, because it is not embraced in the title of the amendatory act, and is not germane to the subject of the section amended.

It is conceded that the title of the act of 1873, establishing a criminal code, was broad enough to embrace section

125, as it now stands. This disposes of the question of the title, for it is a rule of general application that where the title to the original act is broad enough to embrace the amendment, the new matter inserted thereby, if germane to the act or section of the act amended, will be held valid. Cooley, Constitutional Limitations (5th ed.), *146, and note; *Brandon v. State,* 16 Ind. 197; *State v. Bowers,* 14 Ind. 195.

This brings us to the question as to whether the amendment is germane to the subject matter of the original section. It must be remembered that the subject of the section was fraud. By its enactment it was sought to prevent persons from obtaining money or property by means of fraud and false pretenses, and to prohibit persons from fraudulently disposing of, or conveying away their property for the purpose of defrauding their creditors. It has been amply demonstrated by experience, that the original section was not specific enough in its terms to embrace many of the transactions resorted to by dishonest and evilly disposed persons to fraudulently obtain the money, property and effects of their victims. And so, the legislature, to make the law more far-reaching and effective, adopted the amendment under consideration, which provides that to obtain, by means of fraud and false pretenses, the signature of a person to an instrument in writing by which property is conveyed to, or anything of value obtained by, the person perpetrating the fraud, is a violation of the act and punishable as therein provided. This provision is certainly germane to the subject of the original section; it is merely an amplification thereof. It is conceded that the whole matter as it now appears in the section as amended might have been included in the original section, and would have been embraced in the title to the act in which the section in question is found. It seems clear that the matter contained in the amendment is simply a description of fraudulent acts or transactions not embraced in the original section, and of the same nature, and is germane to the subject thereof. In

the case of *Perry v. Gross,* 25 Neb. 826, the title to the amendatory act in question was: "An act to amend section 214 of the criminal code, chapter 58 of the General Statutes of 1873." (Laws 1875, p. 2.)

The object of the original section was to prevent gambling. The title was held sufficient to authorize an amendment to the section giving the right to recover money or property lost in gambling, and that the amendment was germane to the subject of the original section. See also *Henry v. Ward,* 49 Neb. 392; *Larned v. Tiernan,* 110 Ill. 173; *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.,* 86 Va. 1, 19 Am. St. Rep. 858, 872, and note; *Bobel v. People,* 173 Ill. 19, 64 Am. St. Rep. 96, and note. We therefore hold that section 125 of the criminal code, as amended, is valid, and is not in conflict with the provisions of section 11, article III of the constitution.

2. It was contended orally, at the hearing, that the language of the section is not comprehensive enough to include a deed like the one in question, and the maxim *Expressio unius est exclusio alterius* was invoked to sustain this contention. It seems clear that this rule should not be applied to the act in question. By enumerating certain instruments in writing, none of which conveys property, and then concluding with the words:

"Or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained *or conveyed* as aforesaid, shall be thirty-five (35) dollars or upwards."

The legislature must have intended to include deeds conveying real estate, and so understood the matter at the time the amendment was adopted. We therefore conclude that such deeds are fairly embraced by the language of section 125 in question.

3. It is further claimed that the trial court erred in overruling the defendant's motion to quash the information, because it charged two distinct and separate offenses,

viz., obtaining property by false pretenses, and obtaining signatures to a written instrument. It seems clear to us that the information charges but one offense. It is charged, in the information, that the defendant, by means of fraud and false pretenses, obtained the signatures of Frederick Krapf and wife to a certain warranty deed by which the title to their farm was conveyed to him, and that the value of the deed thus obtained and of the land conveyed was $2,500. So we conclude that the information charges but one offense.

Under this head, it was further contended that the accused was charged with the independent and distinct offense of selling and conveying land without a title; or in other words a violation of section 127 of the criminal code. It is a sufficient answer to this contention to say that he was charged with a violation of the provisions of section 125, and was tried for that offense, and no other. It further appears, from the evidence, that he did not convey the Indiana land to the prosecuting witness, for the deed therefor was executed by one C. N. Miller, and not by the accused. It thus appears that a prosecution under section 127 would have failed for want of evidence to sustain it.

4. It is insisted that the trial court erred in overruling the defendant's demurrer to the information, for the reason that it was charged that the value of the deed in question was $2,500, when in fact and in truth it was worth nothing, and the accused therefore obtained nothing by his fraudulent acts. We do not so view the question. The words of the statute (sec. 125, criminal code) are: "If the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid," and it is evident that the legislature intended the word "value" to mean the amount of the liability expressed, assumed or incurred by means of the written instrument to which the signature was fraudulently obtained. It is true that at the common law a promissory note had no intrinsic value, and the same may be said of a deed or other instrument in writing. 1 Mc-

Clain, Criminal Law, sec. 543. But promissory notes and like instruments in writing are made the subjects of larceny by statute in this and many other states. And by the section in question, they are also made the subject of the crime of obtaining property by false pretenses. Therefore, the value of an instrument in writing, within the meaning of the statute, must be taken to be the amount of the liability expressed therein, or assumed thereby. The execution of a warranty deed necessarily includes covenants of title, and the liability of the grantor incurred thereunder may equal the consideration paid therefor, or incurred thereby, which also may be the full value of the land conveyed. *State v. Butler,* 47 Minn. 483, 50 N. W. 532. And this rule seems to be recognized in *Turner v. State,* 1 Ohio St. 421. For these reasons we hold that the demurrer was properly overruled.

Some stress is placed on the fact that the land was reconveyed to Krapf after the information was filed and the accused placed on his trial. It is clear, however, that a reconveyance of the land constituted no bar to the prosecution.

5. Complaint is made of some of the instructions given to the jury by the court on his own motion. We have carefully examined these instructions, and find that they fairly state the law applicable to the facts in question herein. It seems clear from the record that the accused, by means of fraud and false pretenses, obtained the signatures of Frederick Krapf and his wife to the deed in question, as alleged in the information; that it is such an instrument in writing as is embraced by the letter and the spirit of section 125 of the criminal code; that it conveyed the land described therein to the accused; that the value of the deed in question within the meaning of the statute was more than $35, to wit, $2,500; and that the evidence is sufficient to sustain the conviction and sentence herein.

We find no reversible error in the record, and the judgment of the district court is therefore

AFFIRMED.

ALEXANDER BLAIR V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,703.

Instructions to the jury must be based upon and applicable to the evidence; and where in the trial of a criminal case an instruction is given without any testimony to sustain it, and prejudice results thereby, a new trial will be granted.

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

J. C. Engleman and *W. E. Gantt,* for plaintiff in error.

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

BARNES, J.

At the November, 1903, term of the district court for Cedar county, an information was filed against one Alexander Blair, charging him with the crime of murder in the first degree for the killing of one Cornelius Balliet. To this information the accused entered a plea of not guilty. He was thereupon tried, and found guilty of manslaughter. From a sentence of seven years in the state penitentiary he brings error.

It appears from the evidence that on Saturday the 15th day of August, 1903, Blair called at the home of Balliet in Cedar county, and in the evening accompanied the family to a neighbor's where they had a dance; that during the day the deceased had been to Yankton, South Dakota, accompanied by a step-son, and while on the way had fallen out of the buggy, striking on his head; that thereafter he complained of being sick at the stomach and of having pains in his head; that he partook very freely of intoxicants during the day, and to use the words of the witnesses, "Was as drunk as he could be and get around." He went with the others to the dance, and there drank

considerable beer; it being shown that he, together with the other persons present, drank four four-gallon kegs of that beverage. When the beer was all consumed Balliet, with his family, accompanied by Blair, returned home, it then being about three o'clock on the morning of the 16th instant. It clearly appears that the deceased was very much intoxicated, and that when in that condition he was extremely abusive and quarrelsome. For some reason, not disclosed by the record, on arriving at his home he became very angry with, and abusive towards Blair; calling him vile names and threatening him with violence. Thereupon the accused, who had retired, got up, put on his clothing and started to leave the house, when the deceased called him back, and for a short time seemed to be in a better humor. Blair then took off his shoes and was about to go to bed again when Balliet repeated his abuse and threats of violence. Blair again stated that he would go away, and put on his shoes for that purpose, when the deceased violently assaulted him, striking him with such force as to stagger him. The events which followed were detailed by one Charles Frost, the only eye-witness to the whole transaction, in substance as follows:

"When we came back from Heitman's place Alex (meaning the accused) went to bed with the boy, John Seiler. I also went to bed, but Balliet was out in the yard cursing. He cursed Alex and called him a s—— of a b——. Alex said to me, what is that Mr. Balliet said about me? Oh, nothing much said I; he says yes he did, I hear him and I am going away, and he got up and went out of doors. When he went out him and Balliet talked a few minutes and they come back in as good friends as could be, and he (meaning the defendant) sat down on the edge of the bed and started to pull off his shoes; then Balliet came in and went right by me and talked just as nice as anybody could for a few minutes, and then he commenced cursing again. Alex says, I am going if you are going to act that way. I am going down to Lee's, and he pulled his shoes right on again and started, and he almost got out when Balliet

called him back, and says: Come back here, there is no use of going off mad that way. And Alex turned and came back and sat down on the edge of the bed and commenced to take off his shoes again. At that Balliet commenced cursing him again, and he hauled off and struck Alex, and Alex struck him and he went about two-thirds of the way back down, and as he raised up he come back at Alex with all his force and struck him; Alex fell back and Balliet fell on his face and struck the floor, and hollered 'help me-Charlie'; he never knew anything more; Alex did not have any instrument, just his naked hands."

It also appears that before the assault Balliet had said there was going to be trouble, and he wanted the witness Frost to help him. John Seiler who saw part of the transaction, testified in substance as follows:

"I was in bed asleep, and when my step-father (meaning the deceased) hollered for help I woke up, and I seen my father going for the floor; Alex was trying to hit him, and my uncle Charlie Frost was holding him."

It further appears that the deceased fell on his face striking the edge of some boards that were in the corner of the room; that he lay there until he was picked up and carried out of doors; that Blair helped to carry him out and went for the doctor, and in other ways rendered what assistance he could. No evidence was introduced showing or tending to show any previous difficulty between the accused and Balliet. It was not shown that any ill-will existed between them, and it was impossible for the medical experts to say whether the injuries found on the person of the deceased were caused by a blow or by the fall described by the witnesses. On the facts, as shown by the evidence, epitomized above, the court gave the jury, among others, the following instruction:

"No. 18. The jury is instructed, that a party charged with an unlawful killing of a human being cannot avail himself of the claim of necessary self-defense, if the necessity for such defense was brought on by his own deliberate, wrongful act. Therefore, if the jury believe, from the

evidence, that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased C. Balliet, for the purpose of wreaking vengence upon him, or for accomplishing some unlawful purpose, or if the jury should find and believe from the evidence beyond a reasonable doubt that defendant killed the deceased at the time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation and revenge, then the defendant cannot avail himself of the law of self-defense."

The giving of this instruction is assigned as error. It clearly appears that the instruction is not supported by the evidence. There is nothing in the record which even remotely establishes or tends to establish a state of facts to which this instruction could apply. There was not a word of evidence introduced at the trial from which the jury might even infer that the accused had an unlawful purpose in view when he defended himself against the unprovoked attack of the deceased; or that in so doing he acted from a spirit of retaliation or revenge. It is a well settled rule that the instructions must be based on the evidence, and where an instruction has been given without any testimony to support it, and prejudice results thereby, it is reversible error. *Clark v. State,* 32 Neb. 246; *Curry v. State,* 4 Neb. 55; *Williams v. State,* 6 Neb. 334.

In *Walrath v. State,* 8 Neb. 80, it was said:

"Instructions to the jury must be based upon and be applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred."

This rule is approved in *Ballard v. State,* 19 Neb. 609, and *Morearty v. State,* 46 Neb. 652. By the instruction complained of the jury must have been led to believe that there was some evidence from which they might find that in repelling the assault made on him by Balliet, the defendant had in view an unlawful purpose, and acted in a spirit of hatred and revenge. Without doubt the jury must have

been prejudiced by this instruction, and the giving of it was reversible error.

The record contains many other assignments of error, some of which seen to require a reversal of the judgment, but it is unnecessary to consider them at this time. Neither is it proper or necessary to comment on the weight, character and effect of the evidence.

For the error committed by giving the instruction above quoted, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. WILLIAM SPORER, ADMINISTRATOR.

FILED SEPTEMBER 22, 1904. No. 13,811.

1. **Constitutional Law.** The act of 1901 amending section 592 of the code, limiting the time for commencing proceedings to reverse, vacate or modify judgments or final orders, is valid and not in conflict with section 11, article III of the constitution.
2. **Proceeding in Error.** The filing of a petition in error and the transcript of a judgment sought to be reviewed in this court after the expiration of six months from the rendition of such judgment gives this court no jurisdiction.
3. ———. The reasons given for failing to commence the proceeding in error herein within the time limited by the statute examined and *held* insufficient.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Dismissed.*

Samuel Chapman, M. A. Low and *W. F. Evans,* for plaintiff in error.

H. D. Travis, Jesse L. Root and *William Deles Dernier, contra.*

BARNES, J.

This case is before us on an objection to our jurisdiction. It appears that one William Sporer, as administrator of

the estate of Henry J. Hennings, deceased, commenced this action in the district court for Cass county against the Chicago, Rock Island & Pacific Railway Company to recover damages to the next of kin of the deceased, whose death, it was alleged, was caused by the wrongful act of the defendant company. A trial resulted in a verdict and judgment for the plaintiff, and the company prosecuted error. It further appears that the judgment of the district court was rendered on the 2d day of December, 1903, and the transcript and petition in error were filed in this court on the 18th day of June, 1904. It is thus clearly shown that more than six months had elapsed from the rendition of the judgment to the commencement of the proceedings in error herein, and this is the ground on which the defendant in error challenges our jurisdiction.

Section 592 of the code, as it stood before the amendment of 1901, provided that proceedings in error should be commenced within one year from the date of the rendition of the judgment in the district court, and by the amendment above mentioned the time within which such proceedings should be commenced was reduced to six months. The defendant company, in order to avoid the consequences of its delay and sustain the jurisdiction of this court, contends that the amendment of 1901 was unconstitutional and void, for the reason that the subject of the bill amending the original section is not clearly expressed in the title, as is required by section 11, article III of the constitution, which provides:

"No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

In determining this question we must keep in mind that it is the duty of this court to uphold the acts of the legislature, unless they clearly violate some constitutional provision. The object of the provision above quoted is to prevent incorporating into a bill before the legislature pro-

visions which have no connection with its general object, and of which the title gives no indication. *White v. City of Lincoln,* 5 Neb. 505. The title of the act in question in this case is:

"An act to amend section 592 of the code of civil procedure, Compiled Statutes of Nebraska for 1899, and to repeal said original section." (Laws, 1901, ch. 82.)

At that time the original section referred to provided for a limitation of the time for commencing proceedings to reverse, vacate or modify judgments or final orders. This was the only subject mentioned in the section, and in that respect section 592 of the code, as found in the Revised Statutes of 1866, has remained the same, and by the same number until the present time. The section has contained but one subject during all this time, to wit: The time for commencing proceedings in error. There is but one section 592 of the code, and ever has been. The bill in question contained nothing except that which was germane to the subject matter of section 592. Clearly there was nothing incorporated in the bill but that which had a direct connection with the general object of both the original section and the amendment. The title gave notice that it was intended to amend section 592. This section treated of but one subject. The bill amended it in regard to that particular subject, and no one, however dull of comprehension, could have been misled as to the purpose of the legislation proposed by the amendment.

Again, in *In re White,* 33 Neb. 812, it was held:

"The Compiled Statutes having been published under authority of law, and being supposed to contain all the laws in force at the date of publication, may be amended by a proper reference thereto, and if the amendatory act clearly points out the portion of the statute amended, the objection that the amendment is of the Compiled Statutes will be unavailing."

In that case it was further said:

"The legislature has the right to choose the title of any act passed by it, and although that chosen may not be the

most appropriate, yet unless the act is not within the title, or contains two or more subjects, or otherwise violates the constitution, it would not be declared unconstitutional."

In *McCall v. Bane,* 45 Fed. 828, it was held: An act "entitled 'An act to amend section 3101 * * * of the annotated laws of Oregon,' in which said section is set out as amended, is not in conflict with either section 20 or 22 of article 4 of the constitution of Oregon."

An examination of the constitution of that state discloses that, in addition to the provisions relied on by the defendant herein, it contains the following:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

It will be observed that the constitution of this state does not prohibit amendments by title; and if the amendment in that case under such a constitutional provision was valid, it would seem that the act in question is not vulnerable to the defendant's objection, that it conflicts with the provisions of our constitution. In *County of Cass v. County of Sarpy,* 63 Neb. 813, an act entitled "An act to amend section 88, chapter 78 of the Compiled Statutes of Nebraska of 1897, and to repeal said original section," was held valid. In *Brandon v. State,* 16 Ind. 197, and in *State v. Bowers,* 14 Ind. 195, it was held that if the title to the original act is sufficient to embrace the matters covered by the provisions of an act amendatory thereof it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. This rule also has the approval of Judge Cooley in his valuable work on Constitutional Limitations (5th ed.), *146, and note. See also *Miller v. Hurford,* 13 Neb. 13; *Fenton v. Yule,* 27 Neb. 758, and *Gatling v. Lane,* 17 Neb. 80.

It seems, therefore, both on principle and precedent, that the amendatory act in question is valid, and it is therefore upheld.

The filing of a petition in error with a transcript of the judgment complained of, and the issuance of a summons

in error thereon within six months after the rendition of such judgment, together with the service of such summons, alone gives this court jurisdiction to review the proceedings of the district court in an action at law. It follows that the objection to our jurisdiction must be sustained unless a valid excuse has been shown for a failure to perfect the error proceedings within the time limited by the statute. The only excuse presented by counsel for the defendant company is that he relied on the clerk of the district court to inform him of the time when his transcript must be filed in this court. This does not deserve serious consideration. Counsel who tried the case knew when the judgment was rendered and when his time to perfect his error proceedings would expire, much better than the clerk of the district court, or any one else. It is to be regretted that the defendant company cannot have the proceedings of the trial court reviewed. But we see no way to avoid the consequences of the delay, which unfortunately has occurred in this case. Therefore the objection to our jurisdiction is sustained, and the proceeding in error is hereby

DISMISSED.

EDWARD CASSIDY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13,547.

Review. In an action at law in which no motion for new trial has been filed in the district court, this court will not consider the question of the sufficiency of the evidence to sustain the judgment.

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

Hall & McCulloch, for plaintiff in error.

A. C. Troup and *Switzler & St. Clair, contra.*

OLDHAM, C.

This was an action on a claim filed in the county court of Douglas county against the estate of Henry L. Collier, deceased. The claim was disallowed by the county court and an appeal was taken by the claimant to the district court, where on a trial *de novo* a judgment was rendered in favor of the executor of the estate and against the claimant, and the claimant brings error to this court.

No motion for a new trial was filed in the court below. This being an action at law, questions concerning errors alleged to have occurred during the progress of the trial will not be considered by this court in the absence of a motion for new trial in the court below. It is not claimed that the pleadings are insufficient to sustain the judgment. The question urged is as to the sufficiency of the testimony to support the judgment, but this question we cannot examine in the absence of a motion for a new trial.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

JOHN H. LEVY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13,548.

Judgment of the district court affirmed for the reason set forth in *Cassidy v. Collier, ante*, p. 376.

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

Hall & McCulloch, for plaintiff in error.

A. C. Troup and *Switzler & St. Clair, contra.*

OLDHAM, C.

This case stands on all fours with *Cassidy v. Collier, ante,* p. 376, and was submitted on the same briefs, tried at the same time, by the same counsel, in the same court, on identical records. Hence, for the reasons assigned in *Cassidy v. Collier,* we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

LUCY A. COLBY V. MARY J. FOXWORTHY

FILED SEPTEMBER 22, 1904. No. 13,633.

1. **Petition:** SUFFICIENCY. Amended petition examined, and *held* to state a good cause of action.
2. **Contract:** ALTERATION. The alteration of a written contract by a stranger, without the privity or consent of the parties interested, will not avoid the contract, where the contents of the same, as it originally stood, can be ascertained.

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

Flansburg & Williams, for plaintiff in error.

L. C. Burr, contra.

OLDHAM, C.

This is an action to foreclose a real estate mortgage, and is before this court for a second review, this time on a petition in error by plaintiff to set aside a judgment for the defendant entered in the court below. The opinion in this case on the first hearing is found in 64 Neb.

216. This opinion contains a full and complete statement of the issues then involved in the controversy. At the first hearing, plaintiff alleged on her note and mortgage; defendant answered pleading a material alteration of the instrument by the insertion of the word "gold" before dollars in both the note and mortgage, after their execution and delivery to the Lombard Investment Company, without the knowledge, consent or acquiescence of the defendant. To this answer the plaintiff had replied with a general denial, and a plea of estoppel by reason of defendant having paid nine of the interest coupons attached to the note, containing the same alteration, without objection. At the first trial the district court found the issues in favor of the plaintiff, holding that, by the payment of the interest coupons, defendant was estopped from complaining of the alteration in the note. When this judgment was reviewed, we held that the alteration by the insertion of the word "gold" before dollars in the instrument was a material alteration, and that the evidence was not sufficient to show that defendant was estopped from pleading this alteration by payment of the different coupons attached to the note.

When the cause was remanded for a new trial, plaintiff filed an amended petition in the court below in which it was alleged, in substance, that the note was originally given without the word "gold" therein, but that, after the execution and delivery of the note and mortgage, some one to the plaintiff and the Lombard Investment Company unknown, without any authority and without the instructions or the concurrence of the Lombard Investment Company, or the plaintiff, accidently or inadvertently stamped the word "gold" therein. The prayer of the amended petition was that the contract as evidenced by the mortgage and note, with the word "gold" omitted, be enforced. Defendant filed a motion to strike the amended pleading from the files, for the reason that it was a sham pleading, and in conflict with and contradictory to the confessions made in the reply of the plaintiff

to the original answer of defendant, and to all the record made in the action upon the former trial in the district and supreme courts, and for the further reason that the amended petition alleged a new and different cause of action from that set forth in the original petition. Defendant also moved for judgment on the pleadings and mandate. The court sustained these motions, struck the amended petition, and entered judgment for defendant upon the mandate and original pleadings on file in the cause. To review this action plaintiff brings error to this court.

Three propositions are involved in this controversy, and but three are determined in our former opinion, and are now governed by the rule of "the law of the case." The first of these is that the alteration of the instrument by inserting the word "gold" before dollars was a material alteration; the second is that the defendant is not estopped from pleading this defense by paying without objection the nine interest coupons attached to the note, which contained this condition; third, that the alteration was made without defendant's knowledge and after the execution of the note and mortgage.

Plaintiff acquiesced in the questions of law and of fact determined by this court at the first hearing of the cause and filed an amended petition, the substance of which has already been set out in this opinion, in which she, however, denied any knowledge of herself or her assignor, the Lombard Investment Company, concerning the alteration and mutilation of the note and mortgage. We do not think the amended petition was a departure in any sense from the original cause of action. The original cause was instituted for the purpose of foreclosing a mortgage, securing a note and one coupon on certain lots situated in the city of Lincoln, Nebraska. The original petition was the ordinary statutory petition for the foreclosure of a note and mortgage. The amended petition aims at the same end, but alleges the existence of facts, probably unknown to plaintiff at the time the original petition was filed, which tend to

show a spoliation of the note and mortgage by an intermeddler, without the knowledge or consent of either plaintiff or her assignor. This allegation did not affect the relief prayed for in the original petition in any manner because the original petition did not ask for a judgment directing the payment of the indebtedness in gold dollars. The amended petition is not necessarily contradictory of any fact alleged either in the former petition or in plaintiff's reply to defendant's answer to such petition. It will be remembered that defendant's answer pleaded a fraudulent alteration of the instrument by plaintiff or her assignor. This was denied by the reply and the denial of a fraudulent alteration of the note and mortgage by either plaintiff or her assignor is in no wise inconsistent with or contradictory to the allegation of the amended petition.

It therefore seems clear that, under the liberal rule of our code permitting amendments in furtherance of justice, the trial court should have permitted the filing of this petition on terms as to payment of costs which he might have deemed fair and equitable, unless the petition wholly failed to state a cause of action. In view of the modern rule that the alteration of a written contract by a stranger without the privity or consent of the parties interested will not avoid the contract where the contents of the same can be ascertained, we think the petition stated a good cause of action. This rule is sustained by the holdings in *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; *Drum v. Drum*, 133 Mass. 566; *Fuller v. Green*, 64 Wis. 159, and is fully recognized in this state in *Walton Plow Co. v. Campbell*, 35 Neb. 173, and was commented upon with favor by Day, C., in the first opinion rendered in the instant case.

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

LETTON, C., concurs. AMES, C., not sitting.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

CITY OF SOUTH OMAHA V. SARAH MCGAVOCK.

FILED SEPTEMBER 22, 1904. No. 13,162.

Special Assessment: RECOVERY. A person seeking to take advantage of subdivision 63 of section 68, chapter 15, laws of 1889, known as the South Omaha charter of 1889, which allows taxes to be paid before delinquency under protest, and gives the right to recover the same back from the city if illegal, must bring himself within the provisions of the statute by paying the taxes before the whole amount is delinquent before he is entitled to recover.

ERROR to the district court for Douglas county: PAUL JESSEN, JUDGE. *Reversed.*

A. H. Murdock, for plaintiff in error.

F. A. Brogan, contra.

LETTON, C.

This action was brought by the defendant in error in the county court of Douglas county to recover the amount of certain special assessments on her property levied thereon by the city of South Omaha, and paid by her under protest. The plaintiff recovered a judgment against the city in the county court and also on appeal in the district court, to reverse which judgment the plaintiff in error has prosecuted this proceeding.

The action was commenced under subdivision 63 of section 68, chapter 15, laws, 1889, known as the "South Omaha charter of 1889." That part of subdivision 63 which is applicable to this case is as follows:

"Any party feeling aggrieved by any such special tax or assessment, or proceeding, may pay the said special taxes assessed and levied upon his, her or its property or such

instalments thereof as may be due at any time before the same shall become delinquent, under protest, and with notice in writing to the city treasurer that he intends to sue to recover the same back, which notice shall particularly state the alleged grievance and the ground thereof; whereupon such party shall have the right to bring a civil action within 60 days thereafter, and not later, to recover back so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the costs to follow the judgments, or to be apportioned by the court as may seem proper, which remedy shall be exclusive." It appears that the special assessment, which the plaintiff paid, was assessed against her property for the purpose of grading the street upon which her property abutted. The first instalment of the tax became delinquent in 1892. The whole tax became delinquent in 1897. The payment was made by defendant in error on October 8, 1900, several years after the last instalment became delinquent. The plaintiff in error insists that the defendant in error did not bring herself within the provisions of the statute quoted, having failed to pay the tax before it became delinquent, and having failed to give notice that she intended to sue to recover the same back, and that consequently the payment of the tax was voluntary, and cannot be recovered back. It is conceded by the defendant in error that unless she has brought herself within the statute, she is not entitled to recover.

The defendant in error contends that a proper construction of the statutory provision is, that a party who wishes to avail himself of its provisions may wait until after the entire tax is due and delinquent, and pay it as a whole, and then bring his action to recover back the amount; or, without waiting for the entire amount to mature, he may pay such instalments as are due, but in that case he must pay them before they become delinquent. In other words he contends that the phrase "before the same shall become delinquent" refers only to the instalments, and not to the entire tax.

We are unable to agree to this construction of the statute. The evident intention of the legislature was to encourage the payment of taxes before delinquency, by allowing to the taxpayer the right to pay the same under protest, and to recover the amount paid by a civil action if the tax was illegal; thus granting a special privilege which the taxpayer did not have before the enactment of the law. As we construe this subdivision, the taxpayer may pay any instalment that may be due at any time before the same becomes delinquent under protest, and recover the same by the proper action; or he may wait until the last instalment is about to mature, and pay the entire tax before the same becomes delinquent, and still have the right to recover. The defendant in error took neither of these courses, but waited nearly four years after the entire tax became delinquent before she paid the same and brought her action. Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. *Swancy v. Gage County*, 64 Neb. 627.

Since the defendant in error did not bring herself within the provisions of the statute, her payment was voluntary and she is not entitled to recover the same. For these reasons, the action of the district court was erroneous, and the judgment should be reversed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

CHARLES R. HACKER, COUNTY CLERK, ET AL. V. CHURCH HOWE.

FILED OCTOBER 5, 1904. No. 13,944.

ERROR to the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Reversed and dismissed.*

E. B. Quackenbush, Frank N. Prout, Attorney General, and *Norris Brown,* for plaintiffs in error.

E. Ferneau and *H. A. Lambert, contra.*

By the Court: The court is unanimously of the opinion that the judgment of the trial court is erroneous and should be reversed, which is accordingly done. An opinion will be hereafter filed.

Judgment reversed and action dismissed. Mandate to issue forthwith.

REVERSED.

The following opinion was filed November 2, 1904:

1. **Equalization of Taxes:** STATE BOARD. The state board of equalization and assessment, in the equalization of property as between different counties, under section 130, article I, chapter 77, Compiled Statutes, 1903, is not required to enter into a formal investigation, examine witnesses, etc., in ascertaining the relative values of the property of the different counties of the state. It may act upon the abstracts of assessments of the different counties and the knowldge of its own membership as to values generally.

2. **Findings.** The trial court having found that the state board acted in good faith and without fraud, and the evidence sustaining the finding, the elements of bad faith and fraud are eliminated from the consideration of the questions arising in the case.

3. **Assessment.** The values placed on property listed for assessment purposes by the county assessor and his deputies are not conclusive and final. The assessment as finally made is the values as found by the assessors and as corrected and equalized by the county and state boards of equalization.

4. ———. The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls.

5. ———. An assessment is an official listing of persons and property, with an estimate of the value of the property of each for purposes of taxation.

6. ———: COLLATERAL ATTACK. The state board, in the equalization of assessments as between different counties, acts in a *quasi* judicial capacity, and the action taken is not subject to collateral attack except upon grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law.

7. ———: IMPEACHMENT. The action of the state board in the equalization of assessments as between the different counties in ordering a per centum of increase in the aggregate valuation of some of the counties cannot be impeached in the absence of fraud, bad faith or usurpation of power, by evidence tending to prove that the property in the county affected was assessed by the county authorities at its actual cash value.

8. ———: NOTICE. No notice is required, other than that given by statute, of the time and place of meeting or of action taken by the state board in the equalization of the assessments of property of the different counties so as to conform to law.

9. Constitutional Law. The section of the statute providing for the equalization of the assessments of property as between the different counties by the state board by a per centum of increase or decrease of the aggregate valuations so as to make the same conform to law is not invalid because no provisions are made for an appeal from such action to the courts of the state.

10. ———. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection.

11. Equalization: STATE BOARD. The state board cannot, under the guise of equalization, raise valuations merely for the purpose of making such increase, but when an increase results incidentally in the equalization of property, so that all property may bear its equitable proportion of the burdens of taxation, such resulting increase is within the legitimate exercise of the power to equalize.

12. ———: ———. The state board of equalization cannot deal with

individual assessments, nor take into consideration inequalities as between individual taxpayers, but it deals only with the values of the taxable property of a county as a whole.

13. ———: COUNTY BOARD. Individual discrepancies and inequalities, the law contemplates, shall be corrected and equalized by county boards of equalization, who are specially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may be just. A taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all property in a county so as to conform with all other property throughout the state.

14. ———: CONSTITUTIONAL LAW. The fact that an individual taxpayer of a county has returned for assessment and taxation money on hand and in bank at its full face value will not prevent the state board from equalizing the assessment by raising the aggregate value of all property in such county the per centum found necessary to bring it to a uniform standard with all property of the different counties of the state, nor do provisions of this character violate the fundamental law requiring all persons and corporations to pay a tax in proportion to the value of his, her or its property.

15. ———: ———. Such an assessment of money at its legal value, and an order of increase in the value of all property of the county, including such money, can, at most, affect only the one item of property that is assessed in the first instance at its face value.

16. Equity. Whether a court of equity would grant relief from such overvaluation not determined.

17. Injunction. In no event will an injunction lie until taxes legally due on such assessment are paid or tendered.

HOLCOMB, C. J.

The state board of equalization and assessment, acting under the provisions and by the authority of section 130, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10529), being a part of the general revenue act, increased the aggregate assessment of several of the counties of the state, including that of the county of Nemaha, which was raised 5 per cent. above the amount as

assessed and equalized by the county authorities. The action thus taken being certified to the county clerk of said county, it became his duty under said section to add to the assessment of each piece or parcel of property assessed in said county an amount equal to the per cent. of increase so directed as aforesaid. The plaintiff in this action brought in the district court for said county an injunction suit for the purpose of restraining the county clerk and his deputy from extending on the tax rolls of said county the percentage of increase to the assessed valuation as certified by the state board of equalization. After joinder of issues and a hearing to the court, the injunction was made perpetual, and the defendants prosecute error proceedings in this court.

The substance of the allegations of the plaintiff's petition on which is grounded his right to the relief prayed for is to the effect that: (*a*) The state board of equalization, in ordering the increase complained of, acted arbitrarily, capriciously and fraudulently; (*b*) that all property, both real and personal, in Nemaha county, had been valued at its true, full and actual cash value, and assessed at one-fifth thereof as provided by law, by the local authorities, and that the proposed per centum of increase would operate to raise the value of all property above its actual cash value, discriminate against the taxpayers of Nemaha county and violate the provisions of the fundamental law which require that all property shall be assessed so that each person and corporation shall pay a tax in proportion to the value of his, her or its property; (*c*) that no notice of any kind was given to the taxpayers of Nemaha county of the proposed increase, and that no way is provided by which the action of the board can be reviewed in a court of last resort; (*d*) that the action of the state board of equalization was null and void, because the increase of the aggregate valuation of the several counties as ordered was, in effect, a reassessment of property, and not an equalization thereof, and that said board exceeded its powers and jurisdiction; (*e*) there are also allegations to be found in the

petition to the effect that two certain taxpayers of the county, who are named, listed and returned for assessment certain sums of money on hand and in bank, which were valued and assessed at their full legal value, and that there was returned for assessment and assessed in said county the aggregate sum of $306,505 in money at its full face value; and that the state board of equalization, knowing such facts, without authority, and in excess of its powers, by said order of increase raised the valuation of such property above its legal and face value, in violation of the provisions of the fundamental law requiring uniformity and equality in the valuation of property taxed for the purpose of raising needful revenues.

The constitutionality of the section under which the state board acted is specially challenged in the petition, but the grounds advanced are substantially the same as those above mentioned as the foundation for maintaining the injunction suit, and will be covered, without particularly referring thereto, in the general discussion to follow.

1. There are found in the petition allegations of a very general character charging that the state board of equalization in ordering the per centum of increase complained of, acted in a capricious, arbitrary and fraudulent manner. The trial court, while its principal finding was general and in favor of the plaintiff in the suit, found specially, "that the state board of equalization and assessment, in directing the increase of five per cent. to the assessed valuation, acted in good faith and without fraud." This finding is amply supported by the evidence, and is the only one that could have been sustained. It is not to be doubted that the state board of equalization, in taking the action and making the order complained of, acted in the utmost good faith, with a view solely of equalizing the assessments of the different counties of the state in the discharge of a duty imposed upon it by law. The board is not under the statute required to enter into a formal judicial investigation of the values of property to be affected by its action

in the discharge of its duties as a board of equalization. It is its duty under the law to adjust and equalize the valuation of real and personal property in the different counties by a per centum of increase or decrease of the aggregate valuation of the county, with the view of apportioning equitably the burden of state government, and, in doing so, each member acts upon his own knowledge of the facts and without requiring other evidence. The fact that valuations are increased or decreased in any one county without the examination of witnesses is immaterial. When the board has before it the abstracts of assessment of the different counties, such as are required to be formulated and furnished for its information under the law, it is in a position to proceed in the discharge of its duties pertaining to the equalization of assessments of the different counties, and is authorized to act upon such infromation and the knowledge of its members as to values of property generally, without further or different information or greater formality. 1 Cooley, Taxation (3d ed.), 784; 1 Desty, Taxation, 505; *People v. Lothrop,* 3 Colo. 428; *Mayor of City of New York v. Davenport,* 92 N. Y. 604; *St. Louis, V. & T. H. R. Co. v. Surrell,* 88 Ill. 535. The question therefore of fraud, arbitrary or capricious action, or other alleged improper motive or conduct on the part of the different members of the board in entering the order complained of, must be eliminated in the consideration of all further questions arising in the case.

2. Broadly stated, the principal ground relied on to maintain the injunction sued for is the alleged fact that all property in Nemaha county was valued by the county authorities at its full and actual cash value, and that the proposed increase ordered by the state board of equalization will result in an overvaluation of property, operate as a discrimination against the taxpayers of the county, in that it compels them to pay taxes on property they do not possess, in violation of the constitutional rule requiring taxation to be according to the value of the property taxed. The weakness of the position assumed lies in the premises

advanced in support of it. It is not conceded that the property assessed in this county as valued by the county authorities is assessed at its full value; nor can it be accepted as a sound proposition that the values placed on the property listed with and assessed by the county assessor and his deputies are conclusive and binding on the state board of equalization as being the true and actual values thereof. The values of property on which taxes are to be levied are, under the statute, to be determined, not by the county assessor alone, but only in conjunction with equalizing boards which are provided for the very purpose of correcting errors and inequalities in valuations as fixed by the assessor, and to bring all property values to a uniform standard. It is the duty of the county assessor and his deputies to list all property in the county subject to taxation, and value the same in the assessment thereof at its actual cash value. After the property has thus been scheduled and assessed and returned to the county board, it is the duty of the latter, under the provisions of section 121, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10520), to fairly and impartially equalize the valuation of the personal property and the real estate by raising or lowering the valuation as returned by the county assessor, and to hear grievances and complaints regarding the different assessments returned, and to review and correct the same as shall appear to be just; all of which is to be done in the manner provided in said section. By the section under consideration, after the forwarding of abstracts of the assessments of the different counties as is provided in the revenue act, it is made the duty of the state board of equalization, at the time and place therein stated, to meet for the purpose of equalizing assessments as between the different counties, and to examine the abstracts of property assessed for taxation in the several counties and to equalize such assessments so as to make the same conform to law. For that purpose, power is given the state board to increase or decrease the assessed valuation of any county by a per centum

and to certify the same to the county clerk of the county affected, whose duty it is to add to or deduct from each piece or parcel of property an amount equal to the per cent. of increase or decrease as thus fixed by the state board. The assessment and valuation of property, as well as the subject of taxation generally, is purely a matter for the legislature, whose power in the premises is plenary except as limited by the constitution. By the constitution it is expressly said that the value of property on which taxes are levied shall be determined in such manner as the legislature shall direct. The legislature has provided by statute that the county assessor shall ascertain the value in the first instance, and that the valuation as thus determined is subject to correction and review as between individual taxpayers and taxing districts in the county by the county board of equalization and that the values of the property of the different counties in the aggregate as thus determined may be adjusted and equalized by the state board of equalization, to the end that all property of the different counties may contribute its just and equitable proportion of the public revenues. These several steps, then, it will be observed, are necessary to be taken in order that values may be legally and finally ascertained for the purpose of levying taxes as a means of producing revenues. This method of determining values for purposes of taxation is contemplated not only by the statutory law, but also by the constitution, which in terms confides the subject to the legislative branch of government. That these different steps are all essential to the ascertainment of the true value of property, and the making of a valid assessment, is made manifest by the language of section 132, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10531). It is there declared that no assessment shall be deemed final until the action of the state board shall have been had and certified to the county clerks, and by them extended upon the tax rolls, and that the assessment as made and corrected by the county board of equalization and by the state board shall be the final assessment

of property for that year, and taxes for all purposes shall be levied upon such final assessment. An assessment means the determination of the value of a man's property for the purpose of levying a tax; an official listing of persons and property with an estimate of the value of the property of each for purposes of taxation. 3 Cyc. 1111. Wherein, then, may it be said that the state board of equalization has transcended its powers and acted beyond the scope of its authority in regard to the matters complained of? The actions not only of the county assessor in fixing the valuation in the first instance, but also that of the county board of equalization and of the state board of equalization in equalizing as between different counties, are in their nature *quasi* judicial, and are not subject to collateral attack except upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon them by statute. In *State v. Savage,* 65 Neb. 714, it is held:

"In assessing property for taxation purposes the board is clothed with *quasi* judicial powers as to the valuation of such property, and when it has once acted on sufficient information, and expressed an honest judgment as to such value, its judgment cannot be controlled by the writ of mandamus." Also "The presumption is that, when an officer or assessing body values property for assessment purposes, he or it acts fairly and impartially in fixing such valuation."

In 1 Cooley, Taxation (3d ed.), 784, it is said:

"Equalization of assessments has for its general purpose to bring the assessments of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. To accomplish this purpose assessment rolls are equalized by county courts, boards of supervisors or commissioners, and the aggregate of the county assessments by a state board established for the purpose. This is not done by changing individual assessments, but by fixing the aggregate sums for the several districts at what,

in the opinion of the board, they should be, so that general taxes may be levied according to this determination, instead of on the assessor's footings. These boards act judicially in equalizing, and their decision is conclusive. * * * In raising or reducing the assessment of a district, it is sufficient for the board to designate a percentage of increase or reduction."

Under a revenue statute essentially similar to ours in respect of the matter now under consideration, it is said by the appellate court of the state of Indiana:

"County boards of review and the state board of tax commissioners are clothed with *quasi* judicial powers in bringing about uniformity and equality of taxation. The acts of these boards are judicial in their character, and their judgments are not open to collateral attack. If errors or irregularities are committed, they must be corrected in the mode pointed out by the statute; and if not so corrected, they are conclusive; for courts have not the power to control their discretion." *Biggs v. Board of Commissioners*, 7 Ind. App. 142. See also *Jones v. Rushville National Gas Co.*, 135 Ind. 595. Other authorities might be cited without number, but the above are believed sufficient to set at rest the contention that the action of the state board, in regard to the order complained of, can be impeached by an attempt to show that the property in Nemaha county had been by the assessors valued at its full and actual cash value. As well might an issue be raised as to the value placed by the county assessor on the property of each individual taxpayer, and an attempt made to annul the assessment on the ground of overvaluation, which the authorities are all agreed cannot be done. In the absence of fraud, or other misconduct, or arbitrary exercise of power equivalent thereto, the rule is universal to the effect that the discretion of assessing officers and boards of equalization cannot be controlled by the courts in collateral proceedings, nor can errors of judgment and overvaluation in the assessment of property be rightfully reviewed by them in the absence of statutes authorizing

such proceedings. *Loewenthal v. People,* 192 Ill. 222; *New Haven Clock Co. v. Kochersperger,* 175 Ill. 383; *State v. Savage, supra;* 1 High, Injunctions (4th ed.), secs. 490, 493.

3. With reference to the alleged want of notice of the meeting of the state board of equalization, none is required. The section under which the board acted fixes the time and place of the meeting, and this of itself is sufficient notice, even though one were required, to the different counties and all persons interested, of the time and place of such meeting. By this statute all are warned as to when the meeting will occur, and the nature of the action which may be taken in pursuance of the power therein conferred upon the board. The section meets all legal requirements as to public notice, and no additional duty devolves upon the board to notify any of the time and place of its meeting, or of its contemplated action when convened for the purposes contemplated by the statute. *Hallo v. Helmer,* 12 Neb. 87, is a case directly in point. It is there held that where the valuation of property as returned by the assessor as to an entire precinct or tax district is relatively too low or too high, it may be raised or lowered by the board of equalization without notice previously given to the property owners. Citing *Dundy v. Richardson County,* 8 Neb. 508, in support of the rule. Of like effect is 1 Cooley, Taxation (3d ed.), 786; *Spalding v. Hill,* 86 Ky. 656; *State v. Armstrong,* 19 Utah, 117.

Whether or not the action of the state board of equalization in ordering a per centum of increase to the aggregate valuation of the property in the different counties affected by the order may be reviewed by proceedings in error in the courts need not here be determined. In either event, the plaintiff must fail in this action on the merits of the case as disclosed by the pleadings and the evidence. Judgment must go against him regardless of the question. He bases his right to an appeal to the courts, for the purpose of testing the legality of the proceedings of the state board of equalization, on the ground that its action is not review-

able in a direct proceeding, and at the same time complains that his property is being taken without due process of law. These are inconsistent positions. He certainly is not denied due process of law if the courts are open to him in which he may try the question of the scope of action and the power of the state board to equalize the valuation of properties as between the different counties so as to bring about uniformity and equality of taxation. It is not essential, in order to constitute due process of law, that a taxpayer shall have the right to a direct proceeding in the courts to review the action of persons, boards and tribunals empowered to assess property and levy taxes for the purpose of raising revenues for expenses of government. It is not required that judicial proceedings be resorted to in enforcing the levying and payment of taxes. The right to an appeal is purely statutory. 2 Cooley, Taxation (3d ed.), 1393. These are special officers and tribunals within themselves empowered to do and perform all acts necessary and essential in the accomplishment of the collection of the public revenues. Due process of law is observed if, in the different steps taken by the officers and tribunals created by statute, an opportunity is given to an individual taxpayer who may feel aggrieved to be heard with reference thereto, and power is given to redress such grievance as may be right and just. Personal notice is not always essential. Notice given by statute or by publication may be sufficient. An owner is not deprived of his property without due process of law if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection. 1 Cooley, Taxation (3d ed.), 60.

4. Concerning the contention that the state board in respect of the action taken did not equalize but reassessed the property of the several counties, raising the aggregate valuations thereof according to the percentage applied to each county, it may be said that, manifestly, the board has

no power to increase valuations merely for the purpose of making such increase. The limitations of law relative to tax levies, the fixing of valuations and the equalization thereof, cannot be nullified and rendered impotent by an attempt to increase the aggregate of the grand assessment rolls under the guise of equalization. *Poe v. Howell,* 67 Pac. (New Mex.) 62; *State v. State Board of Equalization,* 18 Mont. 473, 46 Pac. 266; 1 Desty, Taxation, 505. But, in the case at bar, we think it clear that the increase resulting from the action of the state board was purely incidental to a proper equalization of the assessment of the different counties as returned to that body. From the action taken, it is fairly inferable that, in 66 of the 90 counties of the state, property was found to be assessed uniformly and at its actual cash value, while, in 24 counties, the valuations placed upon property generally were relatively too low and required, in order that the rule of uniformity might be observed and equality attained, a raise of the aggregate valuation of those increased from two per cent. in one instance to ten per cent. in others. Surely it may not be said that, it having been ascertained that so nearly all of the property of the different counties had been assessed at its true value, in order to properly adjust and equalize, there must be a reduction of a certain percentage in this larger number of counties and a corresponding increase and less than was ordered in the smaller number, so that the grand total of the assessment roll should not be disturbed. While a plan or method of raising the value of some of the counties and lowering others may be generally resorted to in order to bring about equality, yet it would, in the present instance, be in a measure a perversion of the law to reduce below its actual value by far the larger proportion of the property in the state subject to taxation for the purpose of avoiding an actual increase in the total valuation of all property. The statute does not limit the state board in the matter of equalization to the aggregate value as shown by the returns of all the different counties. Its provisions are that the board may increase

or decrease by per centum to be added to or deducted from the aggregate value of the different counties to make them conform to law. Of course, they have authority to equalize; and to equalize is to adjust differences in values so as to bring all to a common standard, and to the end that all property assessed shall bear its just proportion of the burdens of taxation. Where equalization is the main object and the increase resulting therefrom is incidental, we think the action is undoubtedly a legitmate exercise of the powers conferred upon the board. If the object appears to be to raise the aggregate of the total assessed valuation, such action would, in our judgment, have to be condemned as an unwarranted exercise of the authority to equalize. The subject has received some consideration from the court in *Suydam v. Merrick County,* 19 Neb. 155, under a statute which prohibited the raising or lowering of the total valuation of the assessment roll of the county. It is there said:

"It is the duty of the board to find this medium—that is, the mean between the lower and the higher values—adopt it as the true standard, and raise the one extreme and lower the other to it and thus leave the general result or common aggregate of valuation of the property of the whole county neither raised nor lowered, 'except in such an amount as may be actually necessary and incidental to a proper and just equalization.'" See also *Bardrick v. Dillon,* 7 Okla. 535, where it is held that a county board of equalization may adopt as the basis for equalization the assessment of a township which, in their judgment, most nearly represents the true cash valuation, and add to or deduct from other townships such per cent. as will cause them to conform in valuation to the one adopted as a basis, and this notwithstanding such action may either increase or decrease the aggregate valuation as shown by all the township returns. The rule as thus announced in the opinion cited is probably stated too broadly. The opinion apparently overlooks the fact that the valuation of property assessed for taxation is primarily for assessing

officers, and that boards of equalization except as conferred by statutes are not authorized to change the result, and then only in order to effectuate an adjustment of values so as to bring about uniformity. Our statute, we think, contemplates that the state board of equalization may equalize valuations as between the different counties in the sense the word is usually and ordinarily understood. That is, the state board is empowered to correct and adjust inequalities in valuation to the end that all property shall relatively be valued on the same basis for purposes of taxation, as near as the same is practicable. In either view of the subject, however, the action taken by the state board was within the scope of its powers, and the increase in the aggregate valuation of the equalized assessments resulted only incidentally to the main object sought to be accomplished.

5. We are asked to declare the order of the state board of equalization as of no validity and as being in conflict with the constitution respecting the raising of needful revenues by levying taxes on all property according to its valuation, on the ground that, as alleged in the petition, there was returned by certain of the taxpayers of Nemaha county certain sums of money which it is asserted were valued and assessed at the full, fixed and legal value thereof, and that the order complained of results in the assessment of this class of taxable property at a greater valuation than it actually possesses. To this it may be said that the plaintiff is not in a position to raise the question. The increase complained of on this item of property could, at most, affect only the taxpayers listing and returning such property for assessment, and the plaintiff is not one of them. While he professes to bring the action in behalf of himself and all others similarly situated, there are none situated as he is with respect to the assessment of this particular kind of property. He has not stated a cause of action in favor of himself, nor shown himself entitled to the relief he seeks, because of his allegations to the effect that some third parties whose situation is entirely dis-

similar have grounds of complaint which may possibly entitle them to some equitable relief in an independent action. If money on hand or in bank, such as has been returned for assessment purposes, because of its character and characteristics as having a fixed legal value is assessed for a greater sum than is permitted by law, then obtaining relief and redress for the grievance is a matter only for those who have thus been injured. Again, it is manifest that the state board of equalization is powerless to deal with particular items of property returned for taxation and included in the abstracts of assessment on which the board acts. The law provides that the board may equalize only by increasing or decreasing by a per centum of the aggregate valuation of all the property in the county affected by the order. Absolute equality is unattainable, and the law contemplates only that it shall be approached as nearly as may be found practicable. If it were shown that some other class of property was assessed by the county authorities at its full cash value, or for a greater amount, this would be no valid objection to equalizing the property of the county as a whole. The state board does not deal with individual assessments but with the property of a county as a whole, and if it appears to them to be assessed at a valuation relatively lower or higher than the property in all other counties, the whole is affected by the order of equalization, and not the different items or classes. Individual discrepancies and inequalities the law contemplates shall be corrected and equalized by the county authorities, and a taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all the property in the county so as to conform with all other property throughout the state. The county board is especially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may seem just and equitable. The state board possesses no such power. The taxpayer returning money at its legal value

could, if he felt aggrieved, complain that his property was assessed too high as compared with all other property. He has the right to insist that all property be valued on the same basis, and just ground of complaint if such was not done. *State v. Osborn,* 60 Neb. 415. Not having done so, he is presumed to have been satisfied, and the state board was warranted in assuming that all property of the county, of whatsoever kind, had been assessed on the same basis of valuation, and to equalize accordingly. They could presume, and probably did, that all of the money required to be listed had not in fact been returned, or that it was assessed at the same relative valuation as all other property. That tribunal was not bound to, and did not, take into consideration inequalities as between individual taxpayers, and could not under the law do so had it been so inclined. *Orr v. State Board of Equalization,* 3 Idaho, 190, 28 Pac. 416; *Wells, Fargo & Co. v. State Board of Equalization,* 56 Cal. 194; *State v. Thomas,* 16 Utah 86, 50 Pac. 615. We are not to be understood as holding that property, such as money, which has a fixed, definite and unvarying value, and regarding which there can exist no difference of opinion, may be assessed and the owner required to pay a tax on a value greater than it actually possesses. If such results follow from the acts of the state board which are complained of, we are clearly of the opinion that the proper remedy is not an attempt to nullify the action taken by the state board, nor will an injunction lie restraining the county officers from extending the per cent. of increase as certified by the board, nor will such an overassessment of this one item of property affect the legality of the order of equalization, which directs that all property in the county be increased the amount of the percentage found necessary to make it conform to all other property throughout the state. Whether a taxpayer thus situated may find relief in a court of equity we need not here determine. But, if such can be done, it is obvious upon the soundest of equitable principles that an action would not lie until there had been paid or tendered the amount of tax

justly and legally due upon the face value of such property. Concerning a case of this character, we now have nothing to do, nor do we express any opinion thereon. A consideration of all questions presented by the record leads us to the conclusion that the state board of equalization acted within the scope of the powers conferred upon it by statute; that its order directing the increase which it made as affecting the county of Nemaha and the property of its taxpayers was valid, and that no provisions of the organic law are violated by its enforcement. It follows that it was and is the duty of the county clerk to extend the same upon the tax rolls of said county. The judgment of the trial court making the injunction perpetual is reversed, and the injunction suit is dismissed.

REVERSED.

STATE OF NEBRASKA, EX REL. GEORGE T. MORTON ET AL., V. PETER M. BACK ET AL.

FILED OCTOBER 5, 1904. No. 13,605.

1. **Railroads:** MUNICIPAL ASSESSMENTS. In the assessment of railway property for municipal purposes situated in cities of the metropolitan class, such as is required to be listed with and assessed by the state board of equalization for general revenue purposes under the provisions of sections 39 and 40, chapter 77, article 1, Compiled Statutes, 1901, as existing prior to the revenue act of 1903, it is made the duty of the tax commissioner or assessor of such city to accept the values of the fractional part of such railroad property situated in the municipality as the same is valued and assessed by the state board of equalization, and apportioned to such city in accordance with the provisions of said act.

2. ———: ———. The proportional share of railway property as valued and assessed by the state board of equalization belonging to and situated in such city and subject to taxation for municipal purposes may be equalized by the proper authorities of such city, by lowering or raising the value of the same, as thus ascertained, so as to bring about uniformity of valuation in respect of all property subject to taxation within the municipality.

3. ———: TAXATION. It is competent for the legislature to provide

for the valuation and assessment of the property of railway companies, such as is required to be listed and scheduled with the auditor of public accounts by sections 39 and 40, chapter 77, article I, Compiled Statutes, 1901, as heretofore existing, by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation in this state as a unit or as an entirety, and to distribute the value as thus found over the main line or track of such railway company and to the different taxing districts, municipalities, etc., on a mileage basis.

4. **Constitutional Law.** Such a scheme or plan of assessment and taxation of the property of railway companies as therein provided for state, county and municipal purposes does not violate the provisions of the fundamental law commanding uniformity in the valuation and assessment of property for the purpose of raising needful revenues by the levying of a tax upon all property subject thereto according to its value.

5. ———. The valuation and assessment of the property of a railway company, as therein provided, as an entirety, and the distribution of the value thus ascertained upon a mileage basis over the entire line of such railway does not operate as a changing of the situs of the property assessed. Its effect is only to distribute the value of an organic whole to the fractional parts situated in the different subordinate taxing districts through which the line extends and in which the property is actually situated, which is a legitimate exercise of legislative power.

6. **Railroads:** TAXATION. In the assessment of railway property for taxation, as therein provided, it is competent for the legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety, and the distribution of the total value to each taxing district according to the number of miles of main track located therein.

7. **Constitutional Law.** Said sections 39 and 40, as existing prior to their repeal by the revenue act of 1903, are not invalid as taking property by taxation without due process of law. *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, followed.

ORIGINAL application for a writ of mandamus to compel the city council of Omaha to meet as a board of equalization. *Writ denied.*

T. J. Mahoney, for relators.

C. C. Wright, contra.

HOLCOMB, C. J.

This action is begun in this court in the exercise of its original jurisdiction. The relators pray for a peremptory writ of mandamus to compel the respondents, the city council of Omaha, acting as a board of equalization, to reassemble and hear their complaint relative to the alleged low assessment of certain railroad properties situated within the corporate limits, and to equalize the assessment of such properties by raising the assessed value thereof to conform to the standard of value pertaining to all other property assessed for municipal purposes. The substance of the complaint is that the properties of the railroad companies mentioned in the alternative writ, situated within the city limits, are assessed at but a fraction of their true value, while all other property subject to municipal taxation is assessed at its commercial value. The return of the respondents to the alternative writ discloses that, in the assessment for municipal taxation of the railroad properties complained of, the assessing officer of the city accepted the valuations placed thereon by the state board of equalization and the distributive share thereof apportioned to the city of Omaha as the assessable value of such properties, and that, in the equalization thereof, the respondents, acting as a board of equalization, raised the assessments five times the value as fixed by the state board of equalization and returned by the city tax commissioner, which act of equalization, in the judgment of the board, brought the value of the railroad properties thus assessed to a uniform standard of value with other property assessed for municipal purposes and exhausted their powers in the premises. Reduced to its narrowest limits, the question presented for consideration by the pleadings and in briefs of counsel is in respect of the method of procedure by the tax commissioner and the city council in the assessment of railroad properties situated in part in such municipality and subject to municipal taxes, and also, whether the statute providing for the

assessment of railroad property as a unit and distributing the aggregate value to the different counties, townships, cities and towns through which the lines run, on a mileage basis, is in harmony with the fundamental law. The validity of such legislation is especially called in question when applied to the taxation of railroad property in the city of Omaha for municipal purposes.

The legal questions presented, says counsel for relator, are: First, have the respondents correctly interpreted the statutes? Second, are the statutes in question valid?

The answer to the first question must, we think, be in the affirmative. The old revenue act under which the assessment in question was made provided for the assessment of railroad property of the character under consideration by one assessing body, viz., the state board of equalization, for all purposes of taxation—state, county township, school district and municipal. This assessing body, the statute declares, shall value and assess the property of railroad corporations at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the *sum of the whole valuation* by the number of miles of such road or line. It is further provided that, after the valuation and assessment is made as aforesaid, the state auditor shall certify to the county clerks of the several counties in which the properties of such corporations are situated, or any part thereof, the assessment per mile so made on the property of such corporations, specifying the number of miles and the amount in each of said counties. Section 40, article I, chapter 77, Compiled Statutes, 1901. By section 98, chapter 12*a*, Compiled Statutes, 1903 (Annotated Statutes, 7547), the same being the charter act of cities of the metropolitan class to which the city of Omaha belongs, it is provided: "The tax commissioner shall take the valuation and assessment of railroad property within the city limits from the returns made by the state board of equalization to the county clerk." Assuming, as we do for present purposes, that the legislature may rightfully provide for

the assessment of the property of a railway company by one assessing body, and as one property or as a unit, and apportion the value thereof on a mileage basis, then, as we view the subject, it is not only manifest that the legislature intended but that it is quite appropriate that the disributive share belonging to any one taxing district should be taken and accepted as the assessable value of that part of the whole property which is situated in such district and which shall be subject to taxes as all other property therein. There appears to be no fundamental objection to such an assessment. The assessment thus made and returned would, doubtless, be subject to the authority and power of a board of equalization to raise or lower the value so as to comply with the rule of uniformity and conform to values generally obtaining in such taxing district. In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value. Different precincts have different assessing officers, and these different officers, we know by common experience, widely differ in their valuation of property of approximately the same value. This difference of opinion and judgment necessitates the establishment of a tribunal having authority and jurisdiction to equalize values and bring all property to a common standard of valuation, to the end that each item and class may bear its just and equitable share of the burdens of taxation. A question somewhat akin to the one under consideration was raised in *State v. Aitkin*, 62 Neb. 428, and the propriety of assessments of railroad properties by the state board of equalization, and the acceptance of the valuation thus ascertained for purposes of municipal taxation, was recognized and sanctioned. In upholding a law providing for such method of assessing railroad property situated in a municipality

for municipal purposes, the court, among other things, in the opinion, say:

"The legislature in its wisdom has decided that the value of railroad property can be more accurately and justly estimated by the state board of equalization than by local assessors, and has exercised its constitutional prerogative by providing that railroad property shall be assessed in that manner. Whether or not it is reasonable to suppose that the state board of equalization would have more knowledge and a better opportunity to make a just valuation of such property than local assessors is quite unnecessary to be determined in deciding upon respondent's right to act as tax commissioner. Why may not several valuers constitutionally act upon different kinds of property, or upon the same property, for the purpose of different taxes? The real objection to this act on the ground of uniformity is, evidently, the idea that value is not such a fixed quantity that it is possible for two independent appraisers to agree. If values are fixed for purposes of municipal taxation by one body of assessors, and for county and state by another, it is practically certain that the two will disagree. Enough is said above to indicate an opinion that the only uniformity required as to any tax is that it should be uniform throughout the jurisdiction, that is, that state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city." The result produced by this method of assessment is only that there are different assessing authorities for different kinds of property, each exercising an independent judgment in arriving at the value of the property assessed, and making due return thereof to the p oper authorities. The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equalization. If it be proper to assess railroad property as a unit and distribute the total value thereof on a mileage basis, it is obvious that the distributive share going to any one taxing

district may be required to be taken as the assessable value and as the basis of valuation for equalization and taxing purposes. The value of such distributive share of the whole property may, it would seem, be raised or lowered by an equalizing board in order that it may be brought to a common standard and conform to the values placed on all other property. This, as we understand the record, is what was done by the respondents in the case at bar, and if so is, we think, in harmony with legislative intendment. It is the business of such boards, say this court in *State v. Fleming,* 70 Neb. 523, "To fairly and impartially equalize the valuation of all personal property assessed in their respective jurisdictions and raise or lower the same as the justice and equity of the case may require. Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made, so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid, according to the real value of his property. * * * In this way, equality is attained and every interest protected." It is manifest that the legislative plan for the assessment of railroad property situated in a municipality, for municipal purposes, has been followed by the city authorities in the case at bar, and that the interpretation given to these several provisions of the statute by the respondents as to their authority and power is in harmony with the expressed will of the legislature.

The very able and helpful arguments and briefs of counsel on both sides of the controversy are devoted almost exclusively to the second question presented, that is, the alleged invalidity of the statutes providing for the assessment of the property of a railroad company as a unit, and the distribution of the value of the whole on a mileage basis by one assessing body for all purposes of taxation, and it is to this phase of the case that we have given the

fullest consideration and most thorough research at our command. It is the contention of counsel for relators that the provisions of the fundamental law governing taxation are violated in the assessment of railroad property for municipal purposes by the plan adopted and prescribed by the legislature. It is argued that railroad properties of great value located within the corporate limits of the city of Omaha pay taxes on but an insignificant part of the true value; that these properties escape a large share of municipal taxes for which they should be justly bundened and made to contribute to the revenues of the city in return for the protection received in the administration of the affairs of the municipality in which they are situated. Counsel says that here are located costly depots and terminal facilities, including real estate of vast value occupied for such purposes, which ought to respond to municipal taxation according to such values to be ascertained with reference to the actual location of such properties as if separate and independent properties, and without regard to their relation to and connection with the entire lines of railway of which they form a part. The right and power of the legislature to provide a scheme of taxation for municipal purposes by an assessment of railway property as an entirety, and the distribution of the aggregate value on a mileage basis, is boldly challenged, and we are asked to so construe the constitutional provisions relating to the subject as inhibiting such a plan and method of taxation of such properties for municipal purposes. Our complaint, says counsel, is not that the legislature has provided a different method for assessing railroad property from that provided for assessing other property, but rather that, under the statutes relied upon by respondents, a result is obtained which violates the constitutional requirement of uniformity. If, it is said, the legislature had provided for assessing the property of railroads extending into more than one county by determining the value of the railroad as a whole, and then apportioning such value to the several tax districts in pro-

portion to the real values in the several districts, rather than in proportion to the number of miles of main line, such a method would at least be theoretically correct; but that, when the apportionment of the total value is according to the number of miles of main line in any one taxing district, there is an ignoring of the question of value altogether. The mandate of the constitution, it is insisted, is imperative that in every taxing district every owner shall pay a tax in proportion to the value of the property in the district and not the extent of it. The constitutional provisions principally relied on by relators in support of their contention are found in section 1, article IX of the constitution, which declares that revenues are to be raised by levying a tax by valuation so that every taxpayer shall pay in the proportion to the value of his, her or its property subject to taxation, the value to be ascertained in such manner as the legislature shall direct. The necessity for uniformity and equality in taxation is emphatically expressed in *State v. Osborn,* 60 Neb. 415, wherein it is said:

"And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purpose of raising revenue. The constitution forbids any discrimination whatever among taxpayers, thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. The rule of uniformity is satisfied if observed by each jurisdiction imposing the tax." To the same effect is *High School District v. Lancaster County,* 60 Neb. 147. See also *State v. Poynter,* 59 Neb. 417, and *State v. Karr,* 64 Neb. 514.

By section 6, of article IX of the constitution, it is provided that for corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to person and property within the jurisdiction of the body imposing the same. The requirements of uniformity in

the assessment of property for municipal purposes generally is doubtless the same, and as obligatory under the provisions of section 6, article IX, as that required by the provisions of section 1 of the same article, and it is so held in *State v. Savage,* 65 Neb. 714. The construction given to the first section in the several decisions of this court which we have cited apply with equal pertinency and force to those of section 6. Uniformity with respect to person and property requires that the tax rate must be the same as to all persons affected, and the valuation of the property must be upon the same basis throughout the entire taxing jurisdiction. A departure either as to rate of levy or as to the standard of valuation of the different properties subject to taxation would violate the rule of uniformity demanded by the constitution, and render ineffectual legislation authorizing such a method of procedure in the levying and collection of municipal taxes. It is equally clear that, if property within a municipality having a fixed legal situs therein, was by a scheme or plan of assessment to escape in whole or part municipal taxes upon a valuation in substantial conformity with all other property within the taxing district, this would be a violation of the provisions of said section 6. May the legislature, without infringing on these provisions of the fundamental law, provide for the assessment of the property of railway companies such as is required to be included in the schedules to be returned to the state assessing board upon the unit plan or system, and distribute the value of the whole property along the line of the road thus assessed, and to the different tax districts on a mileage basis? It is earnestly contended by the relators that the several railroad companies having lines in the city of Omaha have valuable terminal facilities, depots and other properties on their right of way and side tracks which have a fixed and actual physical situs, and as such are subject to local taxation upon such values, and that by the distribution of the total value of any one road over the entire line on a mileage basis is to withdraw from

taxation for municipal purposes property situated within the municipality, thereby resulting in a violation of the provisions of the constitution that all property shall bear its just share of tax burdens of the taxing jurisdiction in which it is situated. In a sense, it is no doubt true, that the properties of the large railway corporations doing business in this state, with extensive terminal facilities, switching yards, depot grounds and costly structures in the large cities and towns, are much more valuable mile for mile than a corresponding length of the roadbed and right of way situated outside of such municipalities, consisting usually of but a single track and roadbed and the right of way of from 100 to 200 feet in width. In a legal sense, however, must it be said that the property thus situated is so localized that its situs for the purpose of taxation must be the same as where physically situated, and that any attempt to throw it with the whole mass of property with which it is connected, and of which it forms a part, and assess it as an entirety, and distribute the value on a mileage basis, contravenes the fundamental law?

We may assume that all the lines of railway in this state have been by the state board of equalization assessed at a valuation uniform with the values placed on all other property assessed for revenue purposes, and that the total value of each of such lines of railway has been distributed to the different counties, townships, school and road districts, cities and towns through which such lines extend according to the length of the line in each division for whose benefit taxes are levied. If those portions of the road lying in the city of Omaha are to be valued at a larger sum per mile than other portions of the same line, then it follows that there must be a corresponding reduction of the amount apportioned to the remainder of the line or else an overvaluation and double taxation would be the result, and this would violate the rule of uniformity the same as does undervaluation. The legislative plan contemplates a full valuation of all property of a railway line subject to taxation in this state, and the distribution

of that value equally over each mile of the line, and with equal benefit to every taxing district through which it extends. The relators contend for a method of taxation that recognizes differences of value of different parts of the same line, a localization of such property for taxation and an apportionment of values accordingly, as necessary to meet the demands of the constitutional requirement of uniformity. It is not for us to say that the method adopted by the legislature is the most approved and comes nearest reaching an ideal state in the levying and collection of the public revenues. Yet, it is quite true that this plan has been warmly commended by courts of last resort of many of the states and of the United States as best calculated to more nearly approach perfect uniformity than any other plan that has heretofore been devised. It may be, and possibly is, true that legislative provisions might be enacted in the interest of more just and equitable taxation that would allow some latitude on the part of an assessing body clothed with the power to value and assess railway property to vary the value of different parts of a railway line in the distribution of the value of the whole to conform to the improvements made and character of the property assessed in the different localities through which the right of way and roadbed extends. It is, however, for us to determine only, as best we may, whether the plan of valuing and assessing railway property as adopted by the legislature is in conflict with fundamental law. The courts have generally recognized that upon legal principles, and as a practical question, the properties of a railroad company, because of their peculiar character, can best be assessed by one assessing body, and cannot with any degree of satisfaction be left with local assessing officers. The wisdom and necessity for a taxing body having authority and jurisdiction over the territory covered by all the property of a railroad company, and with power to assess the whole of such property and to fix values which would be uniform over the different lines of railroads to be assessed, seem so apparent that argument can scarcely

add anything. At least the wisdom and experience of those having to do with the subject of taxation have in very many of the states of the Union brought about plans for the assessment of properties of this character by one assessing body, and this method is now quite generally resorted to as the best solution of a difficult problem of railroad taxation. As to those properties which have no fixed situs, such as the rolling stock, franchises and other intangible property, it is difficult to conceive of any more just or equitable scheme or plan than to find the value of the whole and distribute the same throughout the different taxing jurisdictions according to the distance of the line of road situated in each district for whose benefit taxes are levied. In a measure, this same principle, it is manifest, obtains in respect of the line of a railroad, including all properties necessary and used in its operation in the accomplishment of the objects of its incorporation. Carried to its logical conclusion, the contention of the relators would require the assessment of every fractional part of a railroad within any taxing district as separate and independent property, the aggregate of these several values representing the value of the entire property within the state. No two miles of a railway system, if regard be had solely to the real estate composing the roadbed and right of way, the cost of construction, and the value of the superstructures and buildings thereon necessary for the operation of the road, would be exactly the same. Each taxing district would have located therein property of a value peculiar to itself and to no other, and, if the rule of uniformity be observed, an assessment must be made of such property according to its value as thus localized. Must all railway property be thus localized for purposes of taxation? The assessment of the property, which is the subject of the present controversy and the validity of which is challenged, was made by the state board of equalization under the old revenue act. Compiled Statutes, 1901, chapter 77, article I. The provisions assailed are found in sections 39 and 40 of the act. The provisions of

the new revenue act, sections 85-87, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10484-10486), in regard to the questions herein being considered are believed to be in all material respects the same as the provisions of the old law. By section 39, article I, chapter 77, it is made the duty of certain officers of every railroad company doing business in this state and having property therein subject to taxation to file schedules under oath of the property of such company with the state auditor, at a time as therein stated. The schedule is required to disclose the number of miles of such railroad in each organized county, and the total number of miles in the state, including the roadbed, right of way, superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad lines. "Provided, however," says the statute, "That all machine and repair shops, general office buildings, store houses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property." By the succeeding section, authority is given to the state board of equalization to value and assess all property required to be listed and returned to the auditor of public accounts at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is also made the duty of the auditor to certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated the assessment per mile so made on the property of such corporation, specifying the number of miles

and amount in each of such counties. The value of the whole, when ascertained, is by this method apportioned to the several counties, townships, cities and villages and other subdivisions through which such railway line extends, according to the number of miles of railroad situated in such subdivision. It is further declared that all such property shall for the purpose of taxation be deemed "personal property" and placed on the tax lists as thereinafter provided. It will be observed that in the assessment of railroad property under this statute no property located off the right of way is assessed by the state board, and that there are certain exceptions as to property specified which is situated on the right of way. It is only the lines of railways, including superstructures, appurtenances and property on the right of way necessary to the successful operation of the road, and the rolling stock and franchises that are required to be assessed by the state board as a unit. In *Adams County v. Kansas City & O. R. Co.*, 71 Neb. 549, this court had occasion to construe the language of the proviso found in section 39, and it is there held that the phrase, "outside of said right of way," etc., qualifies only the word property immediately preceding it and not the specific terms used in the enumeration of other property therein. Accepting this as a correct construction, as we do, and keeping in view the entire act relating to the subject, it becomes obvious that the legislative intendment was to enlarge the situs of the property of a railway company necessary for and used in the construction of its lines and the prosecution of its business so as to cover the entire line of its roadbed and right of way. All of this property is so intimately related to each of the different parts, and so connected together, that it is, it seems, appropriate and legal to so treat and regard it when fixing its value for assessment purposes and apportioning the value to the different tax districts through which the road extends. A clear understanding of the character of the property of a railway company, which the statute requires to be valued and assessed as

a unit, and the value distributed on a mileage basis, is necessary to an intelligent understanding and application to the principles underlying the taxation of this species of property, and of the decisions of the courts of other states relating to the subject. The supreme court of Tennessee in the cases of *City of Chattanooga v. Nashville, C. & St. L. R. Co.*, 7 Lea (Tenn.), 561, and *Franklin County v. Nashville, C. & St. L. R. Co.*, 12 Lea (Tenn.), 521, by its opinions therein comes nearest supporting the contention of counsel for relators, and yet these cases are, we think, clearly distinguishable and are not authority of a decisive character in the determination of the questions as presented in the case at bar. In the first case cited, all the property of whatever description and wherever situated was for the purpose of taxation, under the statute being considered, to be thrown together as a unit or as one property valued as a whole and the value distributed on a mileage basis. In the latter decision of that court, judicial sanction is given to the validity of an assessing statute very similar to the one under consideration except that it was held that depots have a local situs and should be assessed accordingly. But the reasoning by which this conclusion is reached, as counsel well says, is somewhat bewildering. In a discussion of the character of railroad property required to be assessed by the state board of equalization and the reasons for legislation providing for the assessment of such property as a unit, the total value thereof to be distributed on a mileage basis, this court has expressed itself in *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, as follows:

"The common sense view of the subject would seem to be that such purpose was to enable the proper authorities to distribute the avails of such taxation equitably among all the municipal subdivisions through which a road may pass, in the ratio which the number of miles within each subdivision bears to the total number of miles of road within the state, treating each mile as equal in value to every other mile, and regardless of whence came the power under

which any particular portion of the road is constructed. A railroad might have vast terminals at one point, worth as much as the remainder of the line, though it extended through a dozen counties. The subdivision in which these terminals are located is not, under this law, permitted to reap an advantage over other localities, by reason of the mere accident of location; but must share its advantages with these others pro rata. That evidently is the reason behind and under this legislation. How a franchise has been acquired, or whether a particular portion of a line is more expensive to construct than others, is unimportant in determining whether the property should be taxed locally or otherwise. As a matter of fact, this inequality of value was the principal motive for the legislation, which sought to obviate the evils attendant upon such a state of facts. Without such inequality, no legislation would have been necessary, the general laws being in that event adequate for the purpose."

While the constitutionality of the statute was not directly involved, the discussion of the subject is valuable as showing the reasons for treating and assessing railroad property as a unit, and the difficulty of separating it into fractional parts, each piece for the purpose of assessment to be localized and treated as a specific item of property having a value independent of the other portions of the whole. In 1 Cooley, Taxation (3d ed.), p. 693, it is observed by the eminent author:

" 'The property of railroad and canal companies constitutes a legitimate class of property for the purposes of taxation—a class which, in order to treat it fairly in the matter of taxation, must be treated separately.' Indeed the difficulties of assessing, in the same way that property in general is assessed, lines of railroad extending through many municipalities are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed and valued as an entirety, and the value is then apportioned for taxation

among the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property, and it is perhaps more just than any other."

The supreme court of Colorado in the case of *Ames v. People,* 26 Colo. 83, 56 Pac. 656, in passing upon a controversy identical in principle with one in the case at bar, uphold the validity of statutory enactments providing for one body to value and assess all the property of a railway company as a unit and to distribute the value upon a mileage basis. The constitutional provisions as to uniformity in that state, while not the same, are substantially so in principle, and the necessity for equality of taxation is recognized in the decision rendered. In the opinion, it is said:

"In the method of laying a tax, either as to the assessment or the apportionment, the general assembly is not restricted by the constitution, and unless the legislation is palpably unjust, oppressive or inadequate, courts will not substitute their judgment for that of the legislature. Many tribunals of final resort, including the supreme court of the United States and our own court, as will be seen from the cases already cited, have held that the method of ascertaining and distributing values of railroad property like that prescribed in the statute under consideration, if not the only rational one, is, at least, the best and fairest thus far invented." And further on in the same opinion, the court treat the subject in the following manner: "It follows that, in order to secure a just valuation for taxation of this class of property, all of it that is used for the convenient and proper operation of the railway may be assessed as a unit, and the valuation thus ascertained may be apportioned to the various taxing districts upon a mileage basis. Indeed, construing, as we should, sections 3 and 10 together such of the property of a railroad company, real and personal, as is used for the convenient and proper operation of its railway can properly only be assessed and

apportioned for taxation as a unit; and the apportionment upon a mileage basis, as this act prescribes, will come as near to doing exact justice as it is possible to do. * * * This method of apportionment, in our judgment, gives to each local taxing district its just proportion of tax, that is to say, each taxing district gets for purposes of taxation the just valuation of the property physically situate within its territorial limits; for the value of property situate therein cannot be made to depend upon its so-called natural situs, entirely disassociated from the use made of it, but that value, in great measure, depends upon its connection with every other part of the corporation property so used, and situate in every other taxing district in which any part of its railroad lines, considered always in connection with the character of the use made of it. Thus the command of the constitution is obeyed, and, in fact, to each taxing district is given a fair valuation of the railroad property within its territorial limits, and that is all the section requires."

Say the supreme court of Michigan: "The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted." *Detroit Citizens Street R. Co. v. Common Council,* 125 Mich. 673.

In *People v. State Board of Equalization,* 205 Ill. 296, it is said: "The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock or freight in a

country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged, and the land upon which its side or second track and turnouts, and its station, machine shops, roundhouses, etc., stand, is as necessary to the successful operation of the road and as much a part of its right of way as the land upon which its main track is laid, and the value of each piece of its right of way must be determined by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way."

Many other authorities could be cited, but the foregoing give a very accurate idea of the trend of judicial opinions regarding the propriety and legality of this method of assessing the property of railway companies. The principle justifying the assessment of railroad properties as a unit, and distributing the value on a mileage basis to the different tax districts through which the railway line or track extends, seems to be that in fact and in legal contemplation for the purpose of assessment, use and sale such property may rightfully be regarded as a physical whole or one entire property extending over the whole line of the railway, the value of which depends not on any separate or fractional part, but upon the whole of the property as an entirety.

The fundamental idea underlying the relators' contention as to the proper method of local taxation of these properties is that the fractional parts of the different railway companies located in the city of Omaha, consisting of the depot grounds, main track and side tracks, and the structures thereon, have a fixed and natural situs, and that they are of themselves of especial value greatly in excess of other portions of equal length of the lines of which they are parts, and that such values are separable from the remainder, and, therefore, to meet the requirements of the

constitution as to uniformity and to the end that all property shall bear its just proportion of the burdens of taxation in the district where it is situated, these properties should be localized in the taxing district in which they are physically situated, and assessed upon their separate values for municipal purposes. Of course, if we assume that such properties have a legal situs and an ascertainable value of themselves within the limits of the municipality, separate and apart from the remainder of the line, and are possessed of a greatly enhanced value over other portions of the main track of equal extent, the contention of relators is conceded and there is left no room for discussion or argument.

The principle underlying the legislation complained of undoubtedly is that every portion of the property of a railway company going to make up the whole is interdependent, and that the situs must be determined with respect to the entire property and not any fractional portion of it. The legislature has fixed, or undertaken to fix, the legal situs of a railroad where the organic structure is, in all the counties and subordinate districts through which the road is constructed, and has provided for the apportionment of a share of the total value to each taxing district in proportion to the length of the main track in such district, upon which taxes are to be levied for all purposes. It is the fractional proportion of the whole distributed to any one taxing district that represents the taxable property of such railroad line in such district, rather than the physical property found therein. This method does not effectuate a moving about of property having a fixed place of location—a change of situs—but amounts only to the valuing of the whole as a unit, and the distribution of the total value along the line and throughout the extent of the physical property, on what is regarded as a fair, just and equitable basis. The nature and characteristics of the property are such as to render it incapable of division into fragmentary parts and the valuing of each of such parts for assessment purposes as though it were a separate and

distinct item of property having a location in a particular taxing jurisdiction. These properties have no market value when considered in fractional parts. Railroad properties are bought and sold as an entirety. The real estate on which the right of way is located cannot be valued in a commercial sense as so many acres, or as lots and blocks, since its value in such cases is determined, in a large measure, by reason of the use to which it is put and the improvements thereon, and then only in connection with the other property of which it forms a part. The legislature has declared that the property of railroad companies required to be valued and assessed by the state board of equalization should, for the purposes of levying and collecting taxes, be regarded as personal property. If this legislative declaration is to be given force, then the right to enact and the validity of the enactment providing for a distributive valuation on a mileage basis would necessarily follow. There will, we apprehend, be no serious contention against the power of the legislature to, by rule of law, fix the situs of all such property (if it may be regarded as personalty) for purposes of taxation. In *Missouri, K. & T. R. Co. v. Board of Commissioners,* 9 Kan. App. 545, 59 Pac. 383, the Kansas court of appeals say:

"Under section 6873, General Statutes of 1889, * * * all property used or held by a railway company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property. The statute declaring such property personal property for the purposes of assessing a tax against it, it follows that such tax must be collected as a tax upon personal property. * * * The legislature had the power to enact the statute declaring the right of way, roadbed and other property held or used in the operation of the railroad to be personal property for the purposes of taxation."

In *Ames v. People,* 26 Colo. 83, the court say:

"The whole argument, however, is based upon the proposition that the property is assessed not where it is physi-

cally situated, but all along the main track, each municipal corporation being given for taxation a value dependent not upon the actual value of the property therein physically located, but only such value of the entire property of the corporation as the length of the main track in the municipality bears to the total length of the line. This method of distribution is said to be contrary to the rule that property must be taxed at its actual *situs*. But it is settled by a long line of decisions that this rule is merely the law of the state that recognizes it; hence being a matter of legislation it is entirely competent for the legislature, unless restrained by the constitution, to fix for the purposes of taxation the *situs* of both real and personal property."

The Arkansas supreme court regarding a similar question states the principle as follows:

"The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, and the complaint of discrimination is groundless." *St. Louis, I. M. & S. R. Co. v. Worthen,* 52 Ark. 529, 13 S. W. 254.

The supreme court of the United States in *Columbus S. R. Co. v. Wright,* 151 U. S. 470, 480, has said:

"The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, *a fortiori,* its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the im-

provements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Again it is said by the supreme court of Wisconsin, in *State v. Anderson,* 90 Wis. 550:

"The utter impracticability, not to say impossibility, of treating it as real estate for the purposes of taxation, is illustrated, not only from the results that might follow tax sales, but in attempting to assess it as such under the provision that 'all real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies' (R. S. sec. 1039), and is well illustrated by the present case, where the property claimed to be real estate has a physical location in twenty-one assessment districts. How could it be entered on the rolls by lots and blocks, or by reference to plat or deed, or how otherwise, under secs. 1045 and 1046? It is part on and part in the soil, and part in the air. How are the twenty-one assessors to assess and value the tracts, ties, poles, trolley wires, etc., with certainty and in an intelligible manner in so many parcels? And are the twenty-one assessments to be followed by as many separate taxes and tax sales in case of nonpayment? It seems to us entirely clear that this property cannot be regarded as real estate for the purposes of taxation, and that it is not the 'land' and 'real property' described in these sections for assessment and taxation; and as already stated, it seems perfectly plain from the statute (secs. 1034, 1038, R. S.; ch. 285, laws of 1889), that this property is required by law to be assessed and taxed. * * * In view of the use made of the specific lots upon which the power houses

are situated, and upon a fair construction of the statute, and with a view to carry out its evident meaning, we hold that such real estate, thus devoted to such uses, is not the real property required by section 1039 to be 'entered upon the assessment roll in the assessment district where it lies'; it having acquired a peculiar character in the law by reason of having become a part of the entirety of a property subject only to assessment and taxation as an entirety, in the assessment district where the corporation owning it has its principal office and place of business."

We are satisfied upon principle and authorities cited that the legislature has not exceeded its powers in providing, as it has done, for the assessment of the property of a railway company as a unit, and the distribution of the value thus ascertained over the entire line of the railway assessed, and to the different tax districts and municipalities into which the roadbed or right of way extends on a mileage basis; that when the values are thus ascertained and apportioned and the distributive share assigned to any one district or municipality, such proportionate share legally represents the value of the fractional part of the entire property situated in such district or municipality for the purposes of municipal taxation, and that the fundamental law as to uniformity is not violated by such a scheme of assessment and distribution of values of the entire property.

It is also contended that the sections of the statute providing for an assessment of railway property by the state board of equalization is void because of the alleged deprivation of property by taxation without due process of law, in that no sufficient notice is given of the meeting of the state board of equalization when assessing such property. This question has been under consideration for some time and is disposed of in an opinion in the case of *Chicago, B. & Q. R. Co. v. Richardson County, post,* p. 482. On the authority of that decision these sections in respect of the objection urged against them of which we have just made mention must be held valid. The constitutionality of these

sections is also upheld in that opinion as to other objections herein discussed.

The application for a peremptory writ of mandamus should be denied, which is accordingly done.

WRIT DENIED.

LOUIS ZOBEL V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1904. No. 13,717.

1. **Criminal Law: APPEAL.** To render an appeal to the district court effective in a misdemeanor case, where conviction has been had in an inferior court, the defendant must enter into a recognizance, and with sureties, to be fixed and approved by the court or magistrate trying the case, as is provided by section 324 of the criminal code. A recognizance entered into by the defendant alone is insufficient to perfect a valid appeal.

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

W. P. McCreary and *W. M. Crow,* for plaintiff in error.

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

HOLCOMB, C. J.

Upon conviction of the defendant in the county court of a misdemeanor, he gave notice of an appeal, and in open court entered into a personal recognizance in the minimum sum provided by statute, but without sureties, for his appearance at the district court on the first day of the next regular term thereof. The county attorney moved to dismiss the appeal because the recognizance entered into for an appeal was not such as is required by statute. The motion was sustained, the appeal dismissed, and the defendant prosecutes error from the order of dismissal.

The sole question for consideration and determination

is whether the recognizance taken is such as is required by statute in order to appeal after conviction in a misdemeanor case, and is sufficient to effectuate a valid appeal, and give to the district court jurisdiction to entertain the charge and try the defendant in that court on the complaint filed against him. No objection is urged to the form or sufficiency of the recognizance, save that it was only the personal obligation of the defendant without sureties, and therefore not in compliance with statutory requirements, nor sufficient to perfect the appeal sought to be taken from the judgment rendered against the defendant in the county court.

The provisions relating to appeals in misdemeanor cases are doubtless for the benefit and advantage of those convicted of offenses of a minor character and, in order to perfect a valid appeal as contemplated by statute, there must be a compliance in all substantial particulars with the conditions upon which the right of appeal may be exercised. 5 Cyc. pp. 92, 94, secs. *b* and *e*. Of course the recognizance is for the benefit of the state, and to enforce the appearance of the defendant in the appellate court to answer the charge preferred against him. The holdings of the courts and in this jurisdiction especially are to the effect that such provisions are mandatory, and a failure to follow them in any material respect forfeits one's right to an appeal which, otherwise, he is entitled to. Section 324 of the criminal code declares that the defendant shall have the right of appeal, which shall be taken immediately upon the rendition of the judgment in a misdemeanor case. It is therein provided that no appeal shall be granted unless the appellant shall within 24 hours after the rendition of such judgment enter into a recognizance to the people of the state of Nebraska in a sum not less than $100, and with sureties, to be fixed and approved by the magistrate before whom said proceedings were had, conditioned upon his appearance before the district court for the county at the next term thereof to answer the complaint against him. It is held by this court in *In re Newton,* 39 Neb. 757,

that in order to effectuate a valid appeal the defendant must within 24 hours enter into a recognizance as required by the section to which reference has been made; and in *Pill v. State,* 43 Neb. 23, it is ruled that the recognizance is invalid if the court where and before which the prisoner is to personally appear is not stated in the recognizance. In the case last cited, the substance of the decision is to the effect that the provisions of the statute are mandatory and must be complied with in all material respects, otherwise the recognizance is fatally defective and confers no jurisdiction upon the district court. To the same effect is *Kazda v. State,* 52 Neb. 499. It would seem from a reading of said section of the criminal code respecting appeals in misdemeanor cases, that the entering into a recognizance by the defendant, and with sureties, to be fixed and approved by the court is just as imperative as the provisions relating to the time the appeal must be taken, the time when the recognizance must be entered into, and the amount of the same. If one of the provisions may be departed from or ignored, then why not either of the others? If the sureties alone attempted to enter into a recognizance for defendant's appearance in the appellate court, it can hardly be doubted that the failure of the defendant to become a party thereto would invalidate the attempted appeal, and we cannot see any good reason, on the other hand, for disregarding the plain statutory provision as to sureties and holding that a recognizance is sufficient and in compliance with the statute when entered into by the defendant alone. Both provisions seem equally binding and mandatory, and a failure to comply with one would be as fatal as would be the failure to comply with the other. The case of *Smith v. State,* 35 Tex. Cr. App. 9, 29 S. W. 158, where it is held that a recognizance which fails to state which of the obligors is principal and which are sureties, as required by the criminal code of that state, is insufficient, is in principle analogous to the case at bar, and may be accepted as an authority in the disposition of the present case. It is there said:

"A recognizance is a statutory obligation, and its requisites are prescribed by the statute. In order to constitute it a legal obligation, it must be made in conformity with the law authorizing it to be entered into, at least in a substantial manner. Its very basic principle is that there must be at least one defendant, and there may be sureties, and the further plain provision is that this obligation must show the relation of the parties to the obligation they have undertaken, whether principal or surety. It must be stated who is principal and who are sureties. The court cannot supply such omissions by inference, presumption, or intendment. The recognizance must substantially comply with the law. Appeals in misdemeanor cases will be dismissed unless the recognizance substantially complies with the statute, and forfeitures cannot be enforced if the provisions of the statute are not complied with. The reports are filled with cases sustaining this proposition."

Our attention is called to section 388 of the criminal code which provides, in substance, that an action on any recognizance shall not be defeated by reason of any defect in the form of the recognizance, if it sufficiently appears from the tenor thereof at what court the party was bound to appear, and that the court or officer before whom it was taken was authorized by law to require and take such recognizance. It is argued that this section gives support to defendant's contention that the recognizance as taken in the case at bar is authorized, and sufficient to render the attempted appeal effective. We do not think this section has any material bearing on the question now under consideration. The defect here goes to the substance rather than to the form. The question is, has such a recognizance been entered into as the statute says must be given as a condition to the right of an appeal? May a defendant have more time or give a recognizance in a less amount than is provided by section 324, or give one without the sureties as therein provided? The answer, as has been indicated, must, we think, be in the negative.

We are also cited to some cases where recoveries have

been allowed on recognizances not in some respects in substantial compliance with statutes regulating the giving of the same, but in such cases elements of estoppel entered into the consideration of the questions decided, and these matters do not properly enter into the discussion or consideration of the question presented in the case at bar.

We are of the opinion that the recognizance entered into by the defendant was fatally defective, and that no error was committed by the district court in dismissing the appeal because thereof. The judgment of the district court should be, and therefore is,

AFFIRMED.

THOMAS A. COLBURN, APPELLANT, V. JOHN W. MCDONALD, INTERVENER, APPELLEE.

FILED OCTOBER 5, 1904. No. 13,444.

1. **County Bonds: REFUNDING: APPEAL.** Chapter 8 of the laws of 1899, commonly known as the "Refunding Bond Act," as found in chapter 9 of the Compiled Statutes of 1903, provides for an appeal from the findings of the district court as to the validity of county bonds sought to be refunded, and authorizes the supreme court to make a finding and decision in such a proceeding which is binding upon the county board, the protestant and other parties to the record.

2. **Procedure.** In such a proceeding we should attempt to do no more than render a decision as to the validity of the bonds, and thereby affirm or reverse the finding of the district court, as the case may be.

3. ———. It is not necessary in such a proceeding to determine the effect of the decision as to innocent purchasers of the bonds who are not parties to the record.

4. **Laws: ENACTMENT.** An enrolled bill found in the office of the secretary of state, signed by the officers of both branches of the legislature and approved by the governor, is *prima facie* evidence of its enactment.

5. ———: ———. "Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted." *State v. Frank*, 60 Neb. 327.

6. ———: ———. "The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact, which ought to be recorded therein, regarding the enactment of a law." *State v. Frank*, 60 Neb. 327.

7. ———: ———. In order to overthrow such enrolled bill, it must be made to affirmatively appear by the journals that it did not pass.

8. Bonds: VALIDITY. A proposition to vote bonds to aid in the construction of a railroad or other work of internal improvement, otherwise in due form, will not be rendered void because it contains a clause authorizing the county to accept capital stock of the company.

9. ———: ———. Where, by the terms of the proposition voted on, the bonds are not to be issued until a future time and on the happening of a future event, the assessed valuation of the county last made before such bonds are actually issued should be taken as the basis in limiting the amount of such issue.

10. ———: REPUDIATION. A municipality ought not to be allowed to repudiate its bonds after the compromise of a suit, in which their validity was in issue, by which it received a substantial decrease of the interest rate thereon, and after it has paid the interest for 30 years and a part of the principal thereof, unless such bonds were absolutely void at the time they were issued.

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

E. F. Pettis and *Strode & Strode,* for appellant.

Sawyer & Snell and *Robert Ryan,* for appellee.

BARNES, J.

This case comes before us strictly under the provisions of chapter 8 of the laws of 1899, found in chapter 9 of the Compiled Statutes of 1903 (Annotated Statutes, 10780). It appears that on the 28th day of November, 1871, the county of Lancaster voted bonds to the amount of $100,000 to aid in the construction, extension and completion of the Midland Pacific Railway from the city of Lincoln to a junction with the Union Pacific Railroad. The bonds were dated January 1, 1873, and were delivered to the railroad company at about that time. The company in turn de-

livered $100,000 of its stock to the county board, which was retained until November 2, 1881, when the same was sold and the money covered into the county treasury. Interest was paid on these bonds continuously until January, 1885, at the rate of 10 per cent. per annum. In August of that year one Charles E. Lewis commenced a suit against the county in the circuit court of the United States for the district of Nebraska on a large amount of these bonds. The county board filed its answer, and the issues were made up, the question involved being the validity of the bonds. On the 22d day of April, 1886, and before the trial, the county and Lewis compromised the suit; all of the bonds were called in and stamped as bearing only 5½ per cent. interest, instead of 10 per cent., the rate at which they were issued, and thereupon the case was dismissed. From that time until the first day of January, 1903, the date when the bonds became due, the interest was regularly paid at the new rate agreed upon when the suit above mentioned was compromised and dismissed. Shortly after the bonds became due, there being no funds in the treasury for their payment, the county undertook to refund them under the provisions of the act above mentioned. Notice was published in the manner provided by law, and on the day appointed therein, one Thomas Colburn, a resident and taxpayer of Lancaster county, filed his protest and objections with the county board, by which he sought to prevent its proposed action. The county attorney thereafter made out and filed with the clerk of the district court for Lancaster county, a statement containing a complete history of the bond transaction in question, which showed the payments and the amount due on said bonds. Thereupon, one J. W. McDonald, a holder of one of the bonds, intervened, and at the first session of the district court thereafter that tribunal made a finding in which it was stated that the bonds were a valid obligation against the county of Lancaster, and that there was due thereon the sum of $98,000. From that finding Colburn, the protestant, has appealed to this court.

It is contended on behalf of the intervener, McDonald, that no appeal lies in these proceedings, and that therefore this court has no jurisdiction; and it is insisted that the question is determined by *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246. It is apparent, however, that the cases are distinguishable. The statute under consideration here authorizes an appeal to the supreme court from a decision of the district court, and provides the manner of taking such appeal. Notice thereof must be given at the time of the decision, and within 20 days the party appealing must give a bond in the sum to be fixed by the court; and the statute (sec. 39, ch. 9, Compiled Statutes, 1903, Annotated Statutes, 10781), then says: "If appeal in the foregoing manner is taken it shall stay proceedings on the part of such corporate authorities until such appeal is decided." So that the statute itself discloses the sense in which the word "appeal" is used. It appears that this statute has been compiled with, and that this court has jurisdiction to determine the questions presented herein.

It will be observed that this is neither an action at law nor a suit in equity, but is a special proceeding provided for by the terms of the refunding act above mentioned. Therefore our jurisdiction and all our powers herein are conferred and measured by the terms of the act itself. The county board is a proper party to this proceeding, and the protestant, together with the intervener, McDonald, are before the court. This gives us the power to examine the questions involved in this proceeding, and our judgment herein will be binding upon the parties to the record. We will therefore proceed to determine the questions involved in this controversy as to such parties without attempting to adjudicate the rights of those bondholders who are not parties to the record.

It is contended that the act of 1869 (laws 1869, p. 92), under the provisions of which the bonds in question were issued, was never legally or constitutionally passed by the legislature, and is therefore void. To support this con-

tention an abstract of the house and senate journals relating to the passage of that act is put in evidence. This copy or abstract fails to show in perfect form or order each successive step which occurred in the passage of the act, and in describing the bill its title was not always referred to in exactly the same language; but the journals do not show that the act, in the precise form in which it was signed by the chief officers of the house and senate and approved by the governor, was not passed. We think that it has finally become the settled law of this state that the enrolled bill signed by the officers of both houses and approved by the governor, as found in the office of secretary of state, is *prima facie* evidence of its due enactment. It is true that the legislative journals may be looked into for the purpose of ascertaining whether the law was properly enacted, but the silence of these journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. "Every presumption is in favor of the regularity of legislative proceedings; and it is rather to be inferred that the journals are imperfect records of what was done than that the legislature failed to perform the more solemn and important duties enjoined upon it by the constitution." So it must be made to affirmatively appear by the journals that the act in question did not pass. To hold otherwise would be to permit a mute witness to prevail over the *prima facie* case made by the bill itself. *State v. Frank*, 60 Neb. 327. The evidence introduced by the protestant being insufficient to show affirmatively that the act in question was not regularly and constitutionally passed by the legislature, this contention must fail.

It is next claimed that the act of 1899, under which this proceeding is prosecuted, was not constitutionally passed, and is therefore void. Answering this contention, we may say that the evidence introduced to support it is of the same kind and nature and of no more binding force than that introduced in relation to the passage of the act of 1869. It does not affirmatively show that the act was not

regularly and constitutionally passed, and the holding on this question must follow the rule announced above.

It is further claimed that the fact that the proposition on which the bonds in question were voted authorized the county to receive $100,000 of the stock of the Midland Pacific Railway at the time of the delivery of the bonds rendered them void. An examination of the proposition contained in the record shows that the bonds were to be issued "to aid in the construction, extension and completion of the Midland Pacific Railway," and we are not, at this time, and in this proceeding, prepared to hold that the mere fact that the corporation was to and did deliver $100,000 of its stock to the county, which it retained and sold, rendered the bonds void. The supreme court of the United States in the case of *Chicago, B. & Q. R. Co. v. County of Otoe,* 16 Wall. (U. S.) 667, held that there is no solid ground of distinction between a subscription to stock and a donation. It is not necessary for us to go that far in this opinion, because the proposition provided for a *donation* of the bonds to the railway company, not a stock subscription, and simply authorized the county to receive $100,000 of stock. The bonds in the case above cited were issued under the act in question herein, and were declared to be a binding obligation on the county. We are therefore satisfied that the proposition in question was not void. 20 Am. & Eng. Ency. Law (2d. ed.), p. 1102; *Mayor and Aldermen of Wetumpka v. Winter,* 29 Ala. 651; *Nelson v. Haywood County,* 87 Tenn. 781, 11 S. W. 885.

It is further contended that there was an overissue of bonds, in this: That the bonds in question, together with the amount previously issued, exceeded 10 per cent. of the assessed valuation of the county. We find it stipulated in the record that the assessed valuation of Lancaster county for the year 1871 was $3,184,036; that bonds in aid of works of internal improvement had been issued at that time to the amount of $330,000. So it appears that, if the bonds had been actually issued in 1871, such issue would have amounted to more than 10 per cent. of the assessed valua-

tion of the county. But it also appears from the stipulation that the assessed valuation of the county for the year 1872 was $4,482,117; that the bonds were issued during that year, bore date January 1, 1873, and were delivered about that time. It thus clearly appears that there was no overissue of bonds if the assessed valuation for the year 1872 should govern. The language of the act under which the bonds were issued is as follows: "That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city; *Provided,* The county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city." (Laws 1869, p. 92.) Construing this law in the case of *Chicago, B. & Q. R. Co. v. Dundy County,* 3 Neb. (Unof.) 391, we held that the time when municipal bonds were issued was when the municipality actually parted with their custody and control. It was held in the case of *Union P. R. Co. v. Board of Commissioners of Davis County,* 6 Kan. 256, that the vote authorizing the issuance of railway bonds was not the contract between the county and the railroad company; that such vote simply authorized the county board to enter into a contract, which was consummated and completed when the bonds were issued. In *Rathbone v. Board of Commissioners of Kiowa County,* 27 C. C. A. 477, 83 Fed. 125, it appeared that certain county bonds were issued under the laws of Kansas, which limited such issue to a certain proportion of the assessed valuation of the county. It was contemplated that the bonds should not be issued prior to December 31, 1887; none were issued until August of that year, and it was held that, under this state of facts, the assessment for 1887, made as of March 1 of that year, was the one that controlled. This rule finds support in *School District*

v. First Nat. Bank, 19 Neb. 89; *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56; *Bound v. Wisconsin C. R. Co.*, 45 Wis. 543; *Falconer v. Buffalo & Jamestown R. Co.*, 69 N. Y. 491; *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. 621. In the case at bar the proposition voted on did not contemplate that the bonds should be issued as of the date at which the vote was taken. They were to be issued and delivered from time to time as certain sections of the road were completed. They were in fact issued and delivered to certain trustees, to be turned over to the company at the proper time, just before the first of January, 1873. So, as a matter of fact, they were issued after the assessment of 1872 was made, and before the date of the assessment for the year 1873. According to the foregoing authorities the assessment of 1872 controls, and there was no overissue, as contended by the protestant.

If we are right in the foregoing conclusions, it is unnecessary to consider the other minor objections made to the validity of the bonds.

For the foregoing reasons, and in view of the further facts that the question of the validity of these bonds was put in issue by the pleadings in the suit between Lewis and Lancaster county in the circuit court of the United States for the district of Nebraska; that the suit was compromised; that in such settlement the county secured the benefit of the reduced rate of interest agreed upon therein; that it has ever since that time kept the interest on the bonds paid in full; and has paid and taken up a part of them, we are constrained to hold that the findings of the district court were right, and they are therefore

AFFIRMED.

SAMUEL ECCLES V. UNITED STATES FIDELITY & GUARANTY COMPANY.

FILED OCTOBER 5, 1904. No. 13,646.

1. **Motion to Dismiss.** A motion to dismiss a proceeding in error will not lie on the ground that no motion for a new trial was filed in the trial court by the plaintiff in error, because this court will examine the record so far as is necessary to determine whether the pleadings sustain the judgment.
2. **Parties.** All parties against whom a joint judgment has been rendered must be made parties to a proceeding in error. But this rule has no application where the judgment complained of is several, and in favor of the defendant in error alone.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Motion to dismiss denied.*

A. Harāy, for plaintiff in error.

Hazlett & Jack, contra.

BARNES, J.

The plaintiff in error commenced this action against William H. Walker, a justice of the peace, on his official bond, and impleaded the United States Fidelity & Guaranty Company, his surety, to recover the statutory penalty for taking and receiving illegal fees. The bond company filed a general demurrer to the petition, which was amended by interlineation; it thereupon answered over, and the cause was tried in the district court for Gage county to a jury. A verdict was returned for the plaintiff; both defendants filed motions for a new trial. Walker's motion was overruled, and judgment was rendered against him on the verdict; and the motion of the surety company was sustained. Thereafter the cause proceeded against the said company alone, and a second trial resulted in another verdict for the plaintiff. Thereupon the company filed another motion for a new trial, which was sustained;

and also filed a motion for a dismissal of the case, notwithstanding the verdict which was likewise sustained, and the action, as to said company, was finally dismissed. To these rulings the plaintiff excepted and prosecuted error. The bond company has filed a motion herein to dismiss the error proceedings, and on this motion the cause is now presented for our consideration. The substance of the first ground of the motion is that this is an action at law; that it was tried to a jury on questions of fact, in support of which evidence was introduced; that the court sustained defendant's motion to dismiss, because the petition did not state facts sufficient to constitute a cause of action, and that the evidence failed to prove a cause of action against the defendant herein; and the plaintiff, having failed to file a motion for a new trial, cannot obtain a review of the judgment of the trial court. The action of the district court brought here for review is, in effect, a judgment on the pleadings; a judgment, notwithstanding the verdict, which was summarily rendered in favor of the defendant over the plaintiff's objections and exceptions. In such a case it is not necessary for the plaintiff to file a motion for a new trial in order to obtain a review of the proceedings, for this court will examine the record so far as it is necessary, to determine whether the petition states a cause of action; in other words, whether the pleadings support the judgment complained of. *Schmid v. Schmid,* 37 Neb. 629; *Scarborough v. Myrick,* 47 Neb. 794; *Farris v. State,* 46 Neb. 857. One of the grounds of the defendant's motion to dismiss the action in the court below was that the petition did not state facts sufficient to constitute a cause of action. The ruling on that point can be reviewed in this court without a motion for a new trial, and the case cannot be disposed of on a motion to dismiss the proceedings in error.

The second and last ground of the defendant's motion is that the proceedings must be dismissed for want of necessary parties; and it is contended that Walker, against whom a judgment was rendered in the court below, is

a necessary party defendant in this proceeding. This would be true if the judgment complained of were a joint judgment; in other words, if it were a judgment against the plaintiff in error and in favor of Walker and the defendant company jointly. Such is not the case. Walker is neither liable under, nor is he bound by, the judgment complained of, and therefore is not a necessary party herein. *Kuhl v. Pierce County,* 44 Neb. 584; *Farney v. Hamilton County,* 54 Neb. 797; *Collins Mfg. Co. v. Seeds Dry Plate Co.,* 55 Neb. 577; *Richardson v. Thompson,* 59 Neb. 299.

It follows that the matters involved in this controversy cannot be disposed of on an objection to the jurisdiction or a motion to dismiss the proceedings in error. For these reasons the motion should be, and the same is, hereby overruled.

MOTION OVERRULED.

GEORGE W. MAURER ET AL V. GAGE COUNTY.

FILED OCTOBER 5, 1904. No. 13,705.

1. **County Treasurers: COMPENSATION.** Section 42 of chapter 28 of the Compiled Statutes of 1901, which provides that in counties having more than 25,000 inhabitants the county treasurer shall receive a salary of $3,000 a year, and such an amount as may be allowed by the county board as compensation for clerks and assistants, not exceeding $2,400 per annum, also limits the sum which may be retained by the treasurer for all such purposes to the amount of the fees and commissions actually received and collected by him.

2. **County Board: POWERS.** The powers exercised by the county board in examining the accounts of and settling with the county officer in this case are ministerial only; and in so far as they allowed such officer to retain a greater compensation than that fixed and limited by law, their action is void, and the county is not bound thereby.

3. **Recovery From Officer.** In such a case the county may, in a proper action, recover from the officer the amount of the excess so allowed and retained by him.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. W. Sabin and *Griggs, Rinaker & Bibb*, for plaintiffs in error.

H. E. Sackett and *H. E. Spafford, contra.*

BARNES, J.

This action was commenced in the district court for Gage county against George W. Maurer, and the Fidelity & Guaranty Company of Maryland, on his official bond as treasurer of that county to recover the sum of $1,388.76, alleged to have been retained by him for the payment of his assistants, in excess of the fees actually earned, received and collected by him as such officer during the term of his office. There was a trial to the court on an agreed statement of facts, which resulted in a finding and judgment for the county, from which the defendants bring error.

The court found the undisputed facts in substance as follows: That the county of Gage had a population of more than 25,000 inhabitants during the years of Maurer's official incumbency; that he was elected treasurer of Gage county for the term composed of the years of 1898 and 1899; that he duly qualified and held the office of county treasurer for said term; that the Fidelity & Guaranty Company of Maryland, George L. Platt and Lester L. Price were sureties on his official bond, which contained the usual provisions, and which was duly approved and accepted by the county board of Gage county; that during his term of office Maurer, as county treasurer, made out and filed with the county clerk, every three months, a quarterly report as required by the statute, showing the fees of his office and from what source obtained, and fully complied with the statute in that regard; that he made out and filed his semiannual statements in accordance with law, which showed the true condition of his office as county

treasurer; that for 2 years during which he held the office he received as total fees the sum of $7,736.92, and out of this amount he retained the sum of $6,000 as his personal salary, and the remainder of $1,736.92 he credited to the general fund of the county; that out of said general fund he paid the help of the office, during said 2 years, the sum of $3,125.68; that the amounts paid to himself as treasurer and to his clerks and assistants during said 2 years exceeded the fees and commissions of his office for that term by the sum of $1,388.76; that the county board of the plaintiff county, after knowing all of the foregoing facts, made semiannual settlements with Maurer, and at the conclusion of his said term of office, with said knowledge, made a full and complete settlement with him as county treasurer, and allowed him $6,000 as his salary, and all of the amounts paid by him to his clerks and assistants, as charged in his official report; and the county board made said final settlement a matter of record in regular and open session; that in making said settlement there was no fraud practiced, mistake made or imposition imposed, either by said county treasurer or the county board; that no more clerks and assistants were employed in the treasurer's office during said term than were actually necessary and were approved of by the county board; and no more money was retained by the treasurer, for the purpose of paying his clerks and assistants, than was actually paid to them, and that his office was run in an economical manner.

On these facts, as a conclusion of law, the court held that the county treasurer's office in the county of Gage is strictly a fee office; that Maurer as county treasurer was not entitled to any compensation for himself, his clerks and assistants beyond the fees earned, collected and paid out by him in discharging the duties of his office; that the settlement made with him as county treasurer by the county board, in so far as he was allowed any sum of money in excess of the fees actually received by him in his office as compensation for either himself or his clerks

and assistants, was absolutely void for want of power in the board to make such allowances. The court further found that the amount due from the defendants to the plaintiff county, including interest, was the sum of $1,592.09, for which judgment was rendered against the defendants. It will be observed that the plaintiffs in error relied on the defense of settlement in the court below; and they now contend that the county board having settled with the treasurer quarterly, semiannually and finally at the end of his term, and having allowed him to retain the amount in dispute—although it is admitted that such sum was in excess of the amount of fees earned and collected by his office during the term in controversy—such settlement constitutes a complete defense herein, and the county cannot maintain the action. This is the only question presented for our consideration, and its determination requires a construction of section 42, chapter 28 of the Compiled Statutes of 1901 (Annotated Statutes, 9069), together with the legal effect of the settlement in question herein. The section in question provides:

"That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand ($3,000) dollars per annum, and shall be furnished by the county commissioners the necessary clerks or assistants whose combined salary shall not exceed the sum of two thousand four hundred ($2,400) dollars per annum. * * * That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred ($700) dollars per year for each of such deputies or assistants, except in counties having a population over sixty thousand (60,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board; but in no instance shall such officers receive more than the fees by them respectively and

actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *and provided further,* that neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same necessary; and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

The statute above quoted, as it appears in the Compiled Statutes of 1901, clearly provides that in counties having more than 25,000 and less than 60,000 inhabitants the county treasurer shall receive a salary of $3,000 a year, together with such an amount as may be allowed him by the county commissioners for assistant or clerk hire, not exceeding $2,400 per annum, and he is authorized to retain such sum on express condition, however, that the fees actually earned and collected by him during the current term of his office are equal to or greater than those amounts. It thus appears that by positive provision of law the treasurer and his clerks and assistants can in no case receive more for their services than the amount of fees actually earned and collected by him.

It is strenuously urged, however, that the county board being invested with the power to settle accounts against the county, the settlements pleaded and established in this case are binding on the county, and that it is estopped thereby from prosecuting this action. We are not without authority on this question. In *Mitchell v. Clay County,* 69 Neb. 779, it was held:

"When the law commits to an officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial. * * * County commissioners act *quasi* judicially in passing upon claims against the county whenever their action is not merely a formal prerequisite to the issuance of a warrant, but in-

volves the determination of questions of fact upon evidence, * * * or the exercise of discretion in ascertaining or fixing the amount to be allowed. But they have no judicial power or discretion as to interpretation of the law. * * * Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only. * * * The action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article I, chapter 18, Compiled Statutes, 1901, is ministerial only."

In that case all of our former decisions on this question are reviewed, compared and distinguished, and as a result of such review the foregoing rules were announced. We are satisfied with the reasoning contained in the opinion in that case, and are thereby firmly committed to the rule that a county board has no power to settle with a county officer, and allow or pay him any greater sum as fees or salary than the amount fixed by law, because in so doing the board would, in effect, fix the fees of the officer, usurp an authority nowhere delegated to it by law, and thus abrogate the plain provisions of the statute. It is clear that in making such settlements county boards act in a ministerial capacity only, and if they exceed the authority conferred on them by law, by allowing fees to county officers in excess of the amount fixed by statute, such settlements are void, and constitute no defense to an action brought by the county to recover such excess allowed thereby. *Hazelet v. Holt County,* 51 Neb. 716; *Bush v. Johnson County,* 48 Neb. 1; 32 L. R. A. 223; 58 Am. St. Rep. 673.

This holding in no way conflicts with the rule laid down in our former decisions, wherein it is held that a settlement with a county board of all matters wherein a judicial discretion is or may be exercised is binding on the county, and unless set aside on appeal or error will, in the absence of fraud or mistake, constitute a complete defense to any action where the matters embraced in such settlement are involved.

For the foregoing reasons, we hold that the judgment of the district court was right, and the same is hereby

AFFIRMED.

DELLA MCLEAN, ADMINISTRATRIX, V. OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY.*

FILED OCTOBER 5, 1904. No. 13,602.

Directing Verdict. In an action by an administratrix to recover damages for the death of the decedent, alleged to have been caused by the negligence of the defendant, it is *held*, upon an examination of the record, that the court rightfully directed a verdict for the defendant because of the contributory negligence of the deceased.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Charles S. Lobingier, T. J. Mahoney and *N. A. Crawford,* for plaintiff in error.

W. J. Connell and *John L. Webster, contra.*

AMES, C.

This is an action by an administratrix to recover damages from the defendant for having, as it is alleged, negligently caused the death of the decedent. The answer, besides denials, pleads contributory negligence. The defendant owns, maintains and operates a system of street and interurban electric railroad in and between the cities of Omaha and Council Bluffs. Double tracks of the railroad extend through "Avenue A" in Council Bluffs from the intersection of the latter with 14th street, in or near the settled part of the city, in a nearly direct line to a point at or beyond the corporate limits at a distance of two miles or thereabouts from the intersection. The scene

* Rehearing allowed. See opinion, p. 450, *post.*

of the accident is on "Avenue A" in a sparsely settled outskirt of the town, from a mile to a mile and a half from 14th street. At that place the avenue had not been brought to a regular grade, and there was no pavement or sidewalk, but there was a traveled wagon way alongside the railway, apparently not much used by the public. The street railway rails were of heavy steel, of the T pattern, laid upon exposed ties from eighteen inches to two feet above the surface of the ground adjacent to the right of way, so that the roadbed presented the general appearance of that of an ordinary commercial railroad in a rural neighborhood. The avenue was unlighted and the accident happened at about 20 minutes past twelve o'clock of a dark and cloudy night. What occasion the deceased had for being in the locality, or where or when he went upon the roadbed is not known, but he was walking toward the west, on or near the outer rail of the track used by cars moving in the same direction, and, at a point about midway between two streets intersecting the avenue, he was struck by one of the defendant's cars approaching from the east, thrown violently into the air, and instantly killed.

The specific negligence charged is that the car was negligently and carelessly propelled and managed, and that the defendant's agents and servants in charge of it failed to give the usual and ordinary signals of approach, or to employ the usual appliances to prevent the accident, and that "had proper and usual precautions been taken and the proper and usual appliances been employed" the deceased "could and would, by the exercise of diligence and care, have been seen by the defendant's agents and servants in charge of said car in time to have stopped said car before the same struck" the deceased. It is also alleged that the car was being propelled "at a high rate of speed," but the rate of speed is not charged to have been excessive or negligent, or to have contributed unduly to the casualty. Indeed, such an accusation would have been somewhat inconsistent with the claim that, by the exercise of proper care and diligence, the deceased could

and would have been seen, and the car stopped in time to prevent striking him.

The allegation that there was a lack of proper and usual appliances is not substantially supported by evidence. All that the record discloses in that regard is the vague assertion of some of the witnesses that the headlight appeared to them to be dim, but the degree of its brilliance is not attempted to be described, and that one was burning is not disputed. The car itself was brilliantly lighted by electricity, so as to illuminate surrounding space to a distance of several rods in every direction. No one but the motorman is shown to have been in charge of the car, and he was not produced as a witness. What he knew or did about the matter is unknown except his statement, made at the time and admitted in evidence as a part of the *res gestæ,* that he saw the deceased walking on the roadbed near the outer rail of the track and supposed he would get off, but that he, the deceased, did not have time. How far apart were the car and the deceased when the latter was first seen by the motorman is not shown, so that it is impossible to say whether, after that time, there was opportunity for stopping the car and thereby preventing the accident. There is evidence from which it may be inferred that a gong was not sounded nor other signal given after the discovery of the deceased, but it may also be inferred that the discovery and the collision were so nearly simultaneous that opportunity for so doing was wanting.

"A high rate of speed" in an outlying district is not complained of by the petition as negligent. How high it was cannot be ascertained from the evidence, which upon this point is conjectural. The witnesses vary in their estimate from the ordinary rate of 12 miles an hour to 20 and 30. No two of them exactly agree. At the middle rate of 20 miles an hour the car was moving about 30 feet a second. Within what distance it could have been stopped may be inferred from the fact that it was stopped, apparently as soon as possible, after the happening of the

accident, but run 150 feet or more after that event. If under the pleading and evidence the motorman can be charged with negligence, it is for lack of vigilance enabling him to discover the deceased sooner. But the night was dark, and the street was unlighted, and it is not claimed that the illumination from the car or headlight extended, or ought to have extended, more than 150 feet from the car, a distance that, at the supposed rate of speed, would have been covered in five seconds.

The evidence was all offered by the plaintiff and is, of course, free from conflict. When she rested, the court, upon motion, directed a verdict for the defendant, upon the expressed ground that the deceased was a resident of the city of Council Bluffs and familiar with the scene of the accident and with the manner in which the defendant operated its trains, and that he was negligent in walking upon the track of the railroad without keeping a vigilant lookout for cars which he knew were likely to approach him from behind; and that the car which caused his death might, with ordinary care, have been seen approaching for more than a mile before it reached the place where the accident occurred. The plaintiff prosecutes error, but after a careful examination of the record we are convinced, contrary to our impression at the close of the argument, that the opinion of the learned trial judge was right, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed April 19, 1905. *Former judgment of affirmance adhered to:*

1. **Directing Verdict.** On a motion to direct a verdict for the defendant, the plaintiff is entitled to every inference which the

jury would have been warranted in drawing from the evidence adduced.

2. **Personal Injuries: ACTION: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** In an action for personal injuries, where contributory negligence is relied upon as a defense, and where, from the facts and circumstances proved, reasonable minds may draw different conclusions concerning the negligence of the plaintiff's intestate, such question should be submitted to the jury.

3. **Evidence** examined, and *held* not sufficient to bring the injury within the reason of the "humane doctrine" or "last chance."

OLDHAM, C.

The former opinion in this case is officially reported *ante*, p. 447.

A rehearing was granted for the further consideration of the question as to whether, under all the facts and circumstances surrounding the injury as shown by the evidence offered by plaintiff in the trial of the cause in the district court, the trial court was justified in directing a verdict for defendant on the doctrine of contributory negligence; and also for the purpose of further examining plaintiff's contention that the facts and circumstances surrounding the injury, as shown by plaintiff's evidence, brings the case within the reason of the "humane doctrine" or "last chance."

We agree with plaintiff's contention that, on a motion to direct a verdict for the defendant, the plaintiff is entitled to every inference which the jury would have been warranted in drawing from the evidence adduced. Now, it is clearly proved that at the point where the injury occurred there were two lines of defendant's street railway tracks, running east and west, and that there was a space of a few feet between and separating them. It was also proved that the north line of track was used by the cars going west, and that the south line of track was used by the cars going east. It was also shown by the testimony that the deceased was familiar with the running of these cars, as he had resided for a long time in Council Bluffs,

and passed over these car lines in going to and from his place of business in Omaha two or three times a day. The trial judge concluded from this testimony that deceased was clearly negligent in walking westward on the north track without looking behind him for an approaching car, because he must have known that the west bound cars used this track. This is perhaps a legitimate conclusion under the facts and circumstances proved.

It is also in evidence that the accident occurred after midnight, and was caused by the car making the last run for that night, which was then from 8 to 10 minutes behind time. Now, it is urged by counsel for plaintiff that if it was proper from the evidence introduced to impute to the deceased knowledge of the track on which the west bound car was accustomed to run, it was also competent to impute to him knowledge of the fact that the last car going west that night would, if on time, have passed the place where the injury occurred 5 or 10 minutes before the injury; and that this fact, if believed by the jury, might excuse him from the imputation of contributory negligence in not looking behind him for an approaching car coming from the west. If this directed verdict stood only on the doctrine of contributory negligence imputed to deceased for walking westward on defendant's north track at the time the injury occurred, without looking behind him for an approaching car, I would incline to the opinion that such question was one of fact for the jury, rather than one of law for the court. Contributory negligence is an affirmative defense in actions for personal injuries of this nature, and where reasonable minds may draw different conclusions from the conduct on which negligence is predicated, such question is for the determination of the jury and not of the court.

We have carefully reexamined the evidence contained in the record to see whether or not it tends to show any fact or circumstance that would bring the case within the reason of the "last chance" doctrine. This doctrine, as applied to this case, is based on the duty which the de-

fendant would owe on discovering the deceased in a perilous position, from which he apparently could not and would not escape, to use every reasonable means at the command of the servants in charge of its cars to stop the car for the purpose of avoiding the accident. This doctrine has found favor in this court, and was recently applied in the case of *Omaha Street R. Co. v. Larson,* 70 Neb. 591. We do not understand that it is the duty of the operators of a street railway car to stop the car as soon as they see a foot passenger occupying the track in front. We think that ordinarily the motorman may proceed toward such foot passenger on the presumption that such passenger will step off the track before the car reaches him, until it becomes apparent that for some reason such passenger, either on account of deficient hearing or other inability to apprehend his danger, cannot and probably will not be able to get off the track; and that then it becomes his duty to use all reasonable means at his command to stop the car. Now, the evidence in the case at bar wholly fails to show that the motorman, after discovering the perilous position of the deceased, could, by the use of all means at his command, have stopped the car and thereby avoided the accident. Consequently, we do not think that the evidence in the record brings this case within the reason of the "humane doctrine," nor do we find any competent evidence in the record to show actionable negligence on the part of the defendant which was the proximate cause of the injury. From a reexamination of the record, the accident appears to us to fall in that class of casualties frequently met in life, in which there is a serious injury sustained for which no one is legally to blame.

AMES and LETTON, CC., concur.

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

AFFIRMED.

ALGERNON S. PATRICK, EXECUTOR, V. ELIZA B. PATRICK.

FILED OCTOBER 5, 1904. No. 13,612.

Wills: DECEDENT'S DEBTS: PAYMENT: SETTLEMENT OF ESTATE. A testator devised lands in fee to his wife in lieu of dower and of her distributive share in his estate, that at the time of the execution of his will were free from incumbrance. Afterwards, he mortgaged them to secure his personal obligation. The will provided expressly that all his debts should be paid out of his personal estate. The mortgagee did not prove his claim in probate proceedings, but the county court, by order, directed the executor to pay the mortgage debt, which he did. *Held*, That upon final settlement of his accounts he was entitled to be credited with the sum so expended.

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

Robert W. Patrick and *Isaac E. Congdon*, for plaintiff in error.

Byron G. Burbank, contra.

AMES, C.

In 1888, Mathewson T. Patrick, a resident of the city of Omaha and the owner of a considerable estate therein, and elsewhere in Nebraska, executed his last will in which he provided, in the first instance, for "the payment of his funeral charges, the expenses of administering his estate, and all his debts, out of his personal property." Secondly, he devised and bequeathed a dwelling house property, described as lot 6 in block 56 in the city of Omaha, then owned by him and unincumbered, to his wife in fee, together with certain household property, and an annuity of $1,000 to be charged upon the residue of his lands and paid during her widowhood. These provisions were expressed to be "in lieu of her dower and of any distributive share in my estate to which she might otherwise be entitled." The residue of his estate, real and personal, he

bestowed upon his children; and he nominated his brother, Algernon S. Patrick, as sole executor of his will, and as guardian of his children.

In 1896 he executed his interest bearing promissory note to the National Life Insurance Company of Vermont for the principal sum of $10,000, and as security for its payment executed, together with his wife, a mortgage upon the above mentioned lot 6, together with an adjoining lot also owned by him. In 1899 he died seized of these lots and of a considerable additional estate, and still owing the principal of the mortgage debt. The widow elected to take under the will, which was duly admitted to probate, and Algernon S. Patrick duly qualified as executor and guardian. The usual orders were made and notices published for the presentation of claims, and on the 23d day of September, 1899, after the lapse of time prescribed by law and fixed by order of the court, an order was duly entered barring all claims not theretofore filed, among which was the above mentioned $10,000 note. Among the claims that were so presented and properly allowed were certain notes called the Kuhns' and Collins' notes. From the orders allowing them no appeal was taken. On the 11th day of November, 1901, the executor having come into the possession of sufficient personal estate of the deceased for the payment of the claims allowed by the court, and expenses of administration, the county court, on his application, made and entered the following order:

"This matter coming on to be heard on the petition of the executor, Algernon S. Patrick, to be directed by the court to pay to the National Life Insurance Company of Montpelier, Vermont, the sum of ten thousand ($10,000) dollars, together with interest thereon at the rate of six per cent. per annum from the first day of September, A. D. 1901, and the guardian *ad litem* being present in court, and the matter being heard upon the evidence and the law, it is hereby ordered, adjudged and decreed that the said executor pay the sum of ten thousand ($10,000) dollars, together with interest at the rate of six per cent.

per annum from the 1st day of September, A. D. 1901, to the said National Life Insurance Company of Montpelier, Vermont."

As is indicated by this order, upon the making of the application for it, a guardian *ad litem* had been appointed for the heirs, who were minors, and he participated in the proceedings. In compliance with the order, the executor paid off and discharged the mortgage debt. On the 9th day of January, 1902, the executor having paid and satisfied the claims allowed by the court against the estate of the deceased, rendered a final account, and prayed to be discharged from his trust.

At and for many years prior to the death of the testator, he and his brother, the executor, had constituted a partnership, owning a large amount of real and personal property, and engaged in the business of farming and the raising of live stock. When application was made for passing the final accounts of the executor, as above mentioned, the guardian *ad litem* and the widow filed separate exceptions thereto. On the hearing, the county court disallowed all the exceptions and granted the application of the executor, and by the same order relieved him of his trust as guardian, and substituted the widow in his place therein. The widow accepted the guardianship, but in her own behalf and in behalf of the minors appealed to the district court from the remainder of the decree. In the district court there was a trial to a jury, who returned a verdict against the executor for the sum of $2,287.74, upon which a judgment was rendered against him, to reverse which he prosecuted a petition in error in this court.

For some reason not made known to us, the briefs of counsel in this court described the parties as appellant and appellee, and the cause was argued by counsel as though it had been brought here by appeal; but, both because such procedure is inconsistent with the record and because there appears to us to be grave doubt, in view of the decision of this court in *Nebraska Wesleyan University v. Craig's Estate,* 54 Neb. 173, whether jurisdiction

can be acquired here by appeal, we shall treat the case as a proceeding in error.

The principal errors urged in brief and argument are that the trial judge, by his rulings and instructions at the trial, and by his judgment upon the verdict, denied to the executor credit upon his account for the payment of the $10,000 mortgage upon the homestead and of the Kuhns' and Collins' notes, and we shall confine what further we have to say to these items. As to the notes, it appears to us that but little need be said. They were executed by the testator and were unpaid at the time of his death, and were regularly proved before, and allowed by, the county court in the due course of administration. No objection was made, nor appeal taken, by or on behalf of the widow or children, and there is no accusation of fraud or lack of good faith in connection with them or with these proceedings. It was, indeed, alleged on the trial in the district court, and is urged here, that the notes were given for money which was borrowed for, and which was actually devoted to, the uses of the partnership, and that the funds of the latter ought to have been devoted to their payment. This fact, however, if it be a fact, would not have been a defense to the maker if he had been sued upon them in his lifetime, and, of course, his death clothed it with no new or additional importance. It is merely a matter to be taken into account upon a settlement of the partnership affairs between the surviving partner and representatives of the deceased.

As respects the mortgage to the life insurance company, the same claim is made as with respect to the notes and it should, of course, be disposed of in the same way; but it is further urged that this alleged debt never was presented or proved before the county court for approval or allowance, nor established in any manner as a valid claim against the estate, and that the executor was therefore wholly without authority or justification for its payment; and to the suggestion by the executor that the will expressly provides for the payment of all the debts of the

testator out of his personal estate, it is replied that, in the absence of proof and allowance by and before the county court, there is no competent evidence that the mortgage claim was a debt of the testator or is a valid charge against his estate. In support of this contention counsel cites *Huebner v. Sesseman*, 38 Neb. 78, construing and upholding the statute which makes the proof and allowance of claims in the manner mentioned the sole justification of an executor or administrator for their payment, and a large number of decisions from other states to a like effect. The correctness and authority of these decisions is not disputed by the plaintiff in error, nor doubted by ourselves, but it is found upon examination that they all have reference to alleged indebtedness of the testator not secured by mortgage on his real estate, or to deficiencies remaining after the exhaustion of such security. In the case before us there are two circumstances not present, or at least not adverted to, in the cases cited: *First,* an expressed intention of the testator that the indebtedness should be paid out of his personal estate; and, *Second,* the fact that the incumbered property was worth considerably more than the amount of the mortgage lien. The proof and allowance of the debt would have been the occasion of some expense and annoyance to the mortgagee, which it could safely avoid by reliance upon its security, and which there were no means of coercing it to incur. The contention of the defendant in error amounts, therefore, to saying that it lay within the power of the mortgagee, by mere inaction, to defeat the expressed intent of the testator. This is a conclusion to which we suspect that the court would, in the absence of authority, arrive with great reluctance, if at all. But it is in conflict with two well recognized principles whose united weight is sufficient for its overthrow. The first, in support of which it is not necessary to cite authority, is that it is the chief duty of courts and executors to carry into effect the intent of a testator, and the second is that it is the presumed intent of a testator, whether expressed in his will or not, that a

devisee of lands shall take them free from incumbrance and that even undevised lands shall be freed from incumbrances out of the personal estate, if there shall be sufficient of the latter for that purpose. Authorities go even further, and hold that, if an administrator of an intestate estate negligently permits real estate to be sacrificed for the satisfaction of liens which there is sufficient personal estate to discharge, he may be liable to the heir for waste. Thus says Dame, Probate and Administration, page 302:

"It is an old established rule of law that an administrator has the right to satisfy a mortgage debt from the personal assets of the estate, thus relieving the realty from the incumbrance; and it has been held that the heir may compel the application of the personalty to the discharge of a mortgage, unless he disposes of his entire interest in the estate or in the realty. There is little to be gained from such a course. The heir might just as well receive his share in cash, and apply it to the satisfaction of the mortgage, as to compel the personal representative to pay it. In regard to testate estates, the rule is necessarily different, the will often containing provisions setting apart certain property for the payment of debts, or a clearly expressed intention that the devisee should take subject to the incumbrance. If it clearly appears from the terms of the will that it was the intention of the testator that the devisee should take subject to the incumbrance, the personal estate cannot be used for that purpose; otherwise the same rule applies as in the case of intestate estates; and the same would be true of the payment of vendors' liens upon the realty. Taxes upon the realty accruing previous to the death of the decedent should be paid from the personalty. Those accruing after his death are a charge upon the land, and the heir or devisee takes subject to them, and the statute does not require them to be paid by the personal representative."

2 Woerner, American Law of Administration (2d ed.), sec. 518, says:

"Disbursements in Respect of the Real Estate. The executor or administrator is bound, whenever he is lawfully in charge of real estate of the decedent, to exercise the same diligence and prudence in its preservation and protection as if it were personal property in his hands. Hence they should be allowed credit for all disbursements, made prudently and in good faith, for necessary repairs, insurance against loss by fire, municipal assessments, and in discharging mortgages or other incumbrances upon the same, or interest thereon, or in redeeming lands sold for the nonpayment of taxes, not including, of course, such penalties and expenses as are occasioned by the negligence of the administrator. So also with respect to taxes; the executor or administrator should pay them and receive credit therefor whenever accruing while the real estate itself is lawfully in charge or under his control; and even when not, it seems to be generally held that he should pay such taxes as were assessed against the deceased and due in his lifetime, constituting a lien at the time of his death, and a liability of the estate, and this although such claim be not probated against the estate."

These opinions of text writers appear to be fully sustained by judicial decisions. *Brown v. Baron,* 162 Mass. 56, 37 N. E. 772; *Richardson v. Hall,* 124 Mass. 228; *Hoff's Appeal,* 24 Pa. St. 200; *Burnett v. Lyford,* 93 Cal. 114, 28 Pac. 857; *Sutherland v. Harrison,* 86 Ill. 363. This last is a very instructive case, a very considerable number of authorities being collected and quoted in the opinion. The rule of law is very old and well established and seems to be subject to a single exception in the American courts, namely, the case of the purchase of an estate incumbered for debt for which the deceased did not become personally liable. How universal in its application, or how well grounded in principle, this exception may be, it is not to the present purpose to inquire. The incumbrance that was discharged by the executor in this case covered property devised to the children, as well as that devised to the widow, and its payment was beneficial rather than in-

jurious to both. In no view can the payment be regarded as a tortious misapplication of funds by the executor, who derived no personal benefit from it. At the worst it would have been no more than an unauthorized conversion of personal into real property, and the devises and bequests to the children being residuary in their character, they have suffered no injury by reason of it. For there can hardly be a doubt that, as between them and the widow, the latter would have been entitled to have the estate devised to her exonerated from the burden. The payment neither devastated the estate, nor diminished the residuum.

We suppose the real motive of the appeal to the district court and the proceedings in this court to be a desire to shift the obligation to the partnership estate of Patrick Brothers. But we think this is not the proper course for the pursuit of that object. The will provides for the perpetuation of the partnership for a term of 5 years after the death of the testator, which term expired in February of the present year. There was a special administrator appointed to represent the interests of the testator in the partnership, and the business was continued after his death in much the same manner as had been done before. Upon the final dissolution of the firm and the winding up of its affairs, an accounting may be had, and the rights and obligations of the parties in interest ascertained and adjusted in like manner as in other such cases.

For the foregoing reasons, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and OLDHAM, CC., concur.

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

REVERSED.