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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1908.

VOLUME LXXXII.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

PREPARED AND EDITED BY
HENRY P. STODDART,
DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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		Lincoln Frost.....	Lincoln.
		Willard E. Stewart...	Lincoln.
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		Howard Kennedy....	Omaha.
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		Abraham L. Sutton..	South Omaha.
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		Benjamin F. Good...	Wahoo.
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		George H. Thomas...	Schuyler.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1908.

TOMKE M. TARNOW ET AL., APPELLEES, V. ENSLEY CARMICHAEL ET AL., APPELLANTS.

FILED JUNE 4, 1908. No. 15,040.

1. **Vendor and Purchaser:** COLLATERAL AGREEMENT: CONSIDERATION. A grantee in an executory contract for the sale and purchase of real estate refused upon the maturity of the contract to perform it, unless the grantor promised to procure for him the outstanding title of remaindermen in an entirely separate tract of land, and the grantor made such promise. *Held*, That the same was without consideration and unenforceable.

2. **Quieting Title:** REMAINDERMEN. The owner of a life estate in certain land claimed to own the fee title, and asked the court to quiet the same against the claims of remaindermen, who, in turn, prayed for a decree establishing their title. *Held*, That, the title of the remaindermen being established, they were entitled to a decree as prayed.

3. **Equity** will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person.

4. **Vendor and Purchaser:** DOCTRINE OF CAVEAT EMPTOR. The doctrine of *caveat emptor* should be invoked whenever necessary that one may not be deprived of his rights, but it will not be applied to assist one in getting or keeping what he is not entitled to.

5. **Dower:** ESTOPPEL. A widow who has asked the court to order the lands of her deceased husband sold as an entirety by the administrator to pay debts must, after the confirmation of such sale, look to the proceeds for the satisfaction of her dower, and not to the land.

6. Trusts: EQUITY. Equity will permit the beneficiary of a trust fund to pursue the same and enforce his rights against it wherever it may be identified, and the conversion of the trust funds into land and the land into money will not prevent the enforcement of such rights.

7. ———: ———. In a proceeding instituted by an administrator to obtain license to sell the land of the deceased to pay debts, the widow appeared and asked the court to order the land sold in its entirety, and that from the proceeds she be paid $2,000 in lieu of her homestead. She accepted the same from the administrator after the sale, with which and other funds she purchased a tract of land which she afterwards sold to the administrator's grantee, who gave to her as a part of the purchase price a mortgage on the land for $2,000. The $2,000 was paid, received and distributed through the mutual mistake of the administrator, the purchaser and the widow, who thought that the administrator's deed conveyed the homestead free from the claims of the widow and the remaindermen. In an action by the widow to foreclose the $2,000 mortgage, *held*, that the widow is estopped from claiming a life estate in the homestead, and *held*, further, that the amount paid to the administrator by the purchaser for the interests of the remaindermen became a trust fund which is now merged in the mortgage, and for which the mortgagor is entitled to credit.

APPEAL from the district court for Jefferson county: JOHN B. RAPER, JUDGE. *Reversed with directions.*

Heasty & Barnes and *John C. Hartigan,* for appellants.

C. H. Denney, contra.

F. L. Rain, Guardian *ad litem.*

EPPERSON, C.

December 24, 1894, Eilert O. Franzen died intestate, leaving seven children and his widow, Tomke M. Franzen, now by marriage Mrs. Tarnow, the plaintiff in this suit. Deceased owned at the time of his death 124 acres of land in section 33, and 160 acres in section 34, township 2, range 4, in Jefferson county, Nebraska. All of said land was incumbered by a mortgage of about $3,200. He and his family occupied the land in section 34 as their home-

stead. Decedent's estate was administered in the county court of Jefferson county, and an administrator appointed, who in November, 1895, filed in the district court a petition for a license to sell the real estate of said deceased for the payment of indebtedness allowed by the county court against the estate, and for the payment of the mortgage liens against the land. A hearing was had upon the administrator's petition, which resulted in the granting of a license to him, authorizing him to sell all of the land of the deceased to pay the general debts allowed against the estate, amounting to $3,394, and the costs and expenses thereof, amounting to $300. Said license specifically provided that the sale should be made "subject to all liens and incumbrances existing at the time of the death of the deceased, and subject to the homestead interest in said lands of Tomke M. Franzen to the amount of $2,000." With this license as his authority, the administrator proceeded to advertise and sell the land. The notice of sale recited that the real estate described would be sold "in pursuance of an order of C. B. Letton, one of the judges of the district court for Jefferson county." The administrator's return to the court showed that he sold the 160-acre tract to Carmichael for $4,000 and the 124-acre tract to the widow, plaintiff herein, for $3,100. The return made by the administrator to the court did not show that he had attempted to sell the homestead interest. On the contrary, he reported that the sale was made "in pursuance of the license granted on the 16th day of February, 1896." The sale thus reported to the court was affirmed April 14, 1896. On February 17, one day later than the granting of the license, the plaintiff herein filed in that proceeding a showing in the form of an affidavit, in which she said that she was the widow of said deceased and the mother of his children, naming them, five of whom were minors at that time. She set forth the homestead character of the land in section 34. She further alleged that it was to the best interest of the creditors that all of the land belonging to the estate should be sold and disposed of; that, by selling

it all, it would bring more money than it would if divided and the homestead set out. She asked the court to order all of said real estate sold, and that out of the proceeds thereof, after the mortgage indebtedness upon said land should be paid, she be allowed $2,000 in lieu of her homestead rights. This application was supported by a number of affidavits of disinterested witnesses, to the effect that it would be to the best interest of the said estate to sell the land as an entirety. It is possible that these affidavits were presented to the court prior to the granting of the license. If so, it is apparent that the request therein made was not granted. The administrator, misapprehending the authority given to him in the license, and believing that he had authority to sell the land free from mortgage liens and the homestead exemption, undertook to sell and convey the same in its entirety. The evidence discloses that the purchase price paid by each purchaser was the value of the respective tracts of land. Perhaps the administrator was misled by reason of the filing by the plaintiff herein of the affidavits and showing above described. The plaintiff herself and Carmichael were also laboring under the same mistake. After confirmation, although no order was made by the court impressing the homestead character upon the $2,000 of the purchase price paid by Carmichael, the administrator paid that sum to the plaintiff herein, and she accepted the same in lieu of the homestead. She, in turn, repaid it to the administrator as a part of the purchase price of the 124-acre tract in section 33. Carmichael thought he was buying the land free from all liens and incumbrances. He paid its full value. The administrator attempted to convey such title. The plaintiff herein considered that the homestead interest passed to Carmichael by the administrator's deed.

About two years after the administrator's sale plaintiff was desirous of disposing of the land she had purchased in section 33, and on August 15, 1898, plaintiff and Carmichael entered into a written contract, by the terms of which plaintiff agreed to sell and Carmichael agreed to

purchase the 124 acres for the expressed consideration of $3,700, $300 payable in cash, $2,700 on March 1, 1899, Carmichael assuming a $1,100 mortgage given by plaintiff, then an incumbrance upon the land, and upon performance of the written contract on March 1, 1899, plaintiff was to convey said land to Carmichael by good and sufficient warranty deed. However, before the maturity of the contract, Carmichael became apprehensive that his title to the land in section 34 and plaintiff's title to the land in section 33 were defective because of the homestead interest of the children of Eilert O. Franzen, deceased. He refused to fulfil his contract for the purchase of the 124 acres. The parties then had further dealings, described in Carmichael's testimony as follows: "A day or two before the first of March (1899) we came over to straighten the thing up. * * * I told her I wouldn't go ahead and take the land without she would make some provision to make the deed all right. I wasn't quite satisfied with the title. * * * She objected at the time, and thought it was all right. I proposed to let the trade fall through. * * * She didn't want to do that. * * * I made the proposal I would take the land on them conditions if she would take a mortgage of $2,000 until she furnished a quitclaim deed, and to put it in the mortgage that she would give a quitclaim deed from all the heirs, and I would take the land. * * * She objected to that; but on the 23d of March she said she had made up her mind to fix it up that way." Thereupon, Carmichael took the deed to the land in number 33, gave plaintiff the additional $300 provided for in the contract, and executed and delivered to plaintiff his promissory note for $2,000, due in six years, and gave a mortgage on the land in section 33 to secure its payment, and assumed the $1,100 mortgage. The following stipulation appears in the mortgage securing the $2,000 note: "This mortgage is given as a part of the purchase money of this land, and it is expressly understood and agreed that before the principal is to be paid the said Tomke M. Tarnow is to furnish a quitclaim deed

from all the heirs at law of E. O. Franzen, now deceased, conveying the land above described, and also the west half of the northwest quarter and the north half of the southwest quarter of section thirty four (34), town number two (2), range number four (4), Jefferson county, Nebraska." Substantially the same indorsement was made upon the note secured by the mortgage. Thereupon, Carmichael took possession of the land and paid interest upon the mortgage indebtedness at 6 per cent. per annum for six years. Upon maturity of the $2,000 note, plaintiff demanded payment, which was refused by Carmichael because plaintiff had failed to procure the quitclaim deed from the Franzen heirs as agreed, and plaintiff brought this action to foreclose her mortgage.

In an amended petition, plaintiff set forth the facts as above shown, and alleged, further, that she received no consideration for executing the stipulation incorporated in the mortgage and indorsed on the back of the $2,000 note, in which she agreed to procure a quitclaim deed from the heirs to the real estate in controversy. Upon request of Carmichael, the heirs were made parties to the action, and each filed a cross-petition, alleging ownership of an undivided one-seventh interest in remainder in the land occupied by their father as a homestead. The prayer of each cross-petition is to the effect that the court adjudge that each is the owner of a one-seventh interest in remainder, and for general relief. Carmichael answered, requesting the court to determine to whom the $2,000 remaining due on the note and mortgage belongs, and that it may be paid accordingly, and prayed that his title to all the land be confirmed and quieted against the claims of all other parties to the action. The district court found that there was no consideration for the promise made by plaintiff to furnish such quitclaim deed, and adjudged that the heirs are not now entitled to the relief prayed for in their answers and cross-petitions; but inquired no further into the equities of the parties, and denied all relief to Carmichael, and decreed a foreclosure of the mortgage for the

full amount thereof. Carmichael appealed from the decree of foreclosure, and the heirs appeal from the order dismissing their cross-petitions.

It may be well to say at this time that, in view of the record had in the proceedings instituted by the administrator and of the other evidence in this case relative to the value of the land, the homestead interest was not sold by the administrator. The doctrine of *caveat emptor* applies to Carmichael. He was bound to take notice of the license and of the authority of the administrator and the power of the court. The evidence discloses that the land was capable of division, and that the homestead could have been appraised and set out by metes and bounds. The title, therefore, of the Franzen heirs in remainder has never been disturbed by any proceedings had. They are the owners, and have been at all times, of the homestead of their father, subject to the life estate of their mother, the plaintiff herein. But it cannot be said that the plaintiff is now the owner of the life estate. She joined with the administrator in asking for the sale of all the land, and accepted a part of the purchase price thereof in lieu of her life estate. She is estopped from now claiming such title or interest in the land. That interest has been sold and conveyed to Carmichael. It is argued by Carmichael that, in the event the homestead title cannot be impressed upon the $2,000 for which he gave his note and mortgage, he should not be required to pay the same until quitclaim deeds from the Franzen heirs are procured by the plaintiff, as stipulated. Plaintiff contends that her agreement to secure quitclaim deeds from the Franzen heirs to the land in 34 cannot be enforced, for the reason that there was no consideration given for such promise, as Carmichael was bound by contract to pay her this $2,000 on March 1, 1899. If we could resolve this question against her, the case could easily be disposed of. A discussion of this question is unnecessary. We have given it careful attention, and have concluded that such promise was without consideration. See *Esterly Harvesting Machine Co. v. Pringle,* 41

Neb. 265; *Allen v. Plasmyere,* 3 Neb. (Unof.) 187; 9 Cyc. 349; *McCarty v. Hampton Building Ass'n,* 61 Ia. 287; *King v. Duluth, M. & N. R. Co.,* 61 Minn. 482; *Abbott v. Doane,* 163 Mass. 433, 34 L. R. A. 33, and note. Whatever rights plaintiff had to the $2,000 fund represented by the mortgage remained unchanged by reason of her promise to secure quitclaim deeds.

There are broad principles of equity which call for recognition, and which must control the disposition of this case. At the time of the administrator's sale, when the plaintiff by her conduct sold her interest in the homestead to Carmichael, or, in other words, barred herself from asserting title therein against him, she was entitled to receive the value of her interest at that time. She was entitled to the then value of the use of the homestead during her life. Whatever was hers, she received, but she received more. The excess did not belong to her. It was paid to her by mistake. It became a trust fund in her hands. Equity will so regard it, and will follow it so far as it may be identified.

It is argued that the doctrine of *caveat emptor* bars Carmichael from asserting any right to the fund in controversy. Indeed, purchasers at judicial sales buy at their risk, and to them the doctrine of *caveat emptor* applies, and they cannot take title as against parties not in court, or against those whose interests are not disposed of in the proceeding in which the judicial sale is made. We have applied this doctrine as against Carmichael and in favor of the Franzen heirs because the court in the proceedings instituted by the administrator did not attempt to dispose of their interests, and had no power to do so. But can it be said in justice and equity that this court will enforce the doctrine of *caveat emptor* as against Carmichael and in favor of the widow to the extent that we will permit her to retain the money she was not entitled to which was paid to her through mistake, and that mistake occasioned partially through her conduct? The doctrine of *caveat emptor* does not prevent a purchaser

at a judicial sale from enforcing whatever legal or equitable rights may be preserved to him. He is not the victim of every unfortunate contingency which may arise in a proceeding. The doctrine should be invoked that one may not be deprived of his rights, nor to assist one in getting or keeping what he is not entitled to. His rights to this money Carmichael could have enforced at any time. Had the mistake been discovered prior to the confirmation of the administrator's sale, no doubt would exist but that the court could have given relief. It could have been reached while it was in the land which was purchased in part by the fund. It could have been identified after the making of the executory contract for the sale of the land purchased with it, and before the giving of the mortgage, which the plaintiff now seeks to foreclose. Equity will not allow the conversion of land into money or money into land to stand in the way of doing justice. Good conscience demands that a court of equity recognize the rights of all the parties and adjust them when it may be done without prejudice to any one. This court will not falter or hesitate upon mere technical grounds of procedure, when by so doing gross injustice would be done. With all the parties now before us, there can be no doubt but that we can correct and place in order the respective rights of the parties, which otherwise would result in gross injustice to some of them. That justice may prevail, a court of equity will devise a remedy to meet every new emergency, and will enforce the restitution of property when it has jurisdiction of the same. It is for such emergencies that courts of equity exist, and whenever a decree can thus be made upon the record of a case presented, although no precedent may be found, the court will so proceed. But the enforcement of the rights to a trust fund, wherever the same may be identified, is doing no violence to equity jurisprudence. The idea is not a new one. 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1175 *et seq.* Carmichael's money was converted into land. That land was sold and the trust fund transformed

into a note and mortgage signed by the identical person who paid it by mistake. He is entitled to follow it and obtain that which in equity and good conscience belongs to him. Plaintiff, the holder of the trust fund, sought to foreclose the mortgage for the full amount thereof, which would operate to convert the trust fund into money in her hands. She is entitled to only a part of it. Her interest must be determined by taking into consideration the value of her life estate in the Franzen homestead as it existed when Carmichael bought it. The mortgagor is the beneficiary of the trust because he paid the fund through mistake for a title which he never acquired. He is entitled to reimbursement, and to have deducted from the mortgage the amount he paid for the title of the heirs which he did not acquire. He is entitled to interest upon that amount from the time he paid it, as the plaintiff has withheld it from him and she had the use of it. From the evidence before us we cannot make a computation, as we are unable to determine what was plaintiff's expectancy of life at that time. Additional evidence must be given that a computation may be made by the district court. Plaintiff is entitled to a lien upon the land in section 33 for the amount thus found due. We conclude, also, that the computation be made upon a 6 per cent. basis as a just and fair rate, and this is suggested by the parties, in that they agreed upon that rate in the mortgage. Carmichael has been rightfully in the possession of the property by the purchase of her life estate, and therefore need not account for its use.

It has been suggested that Carmichael might be entitled to subrogation to the $3,300 mortgage which was upon all of the Franzen land at the time of the administrator's sale, inasmuch as his money was used for the satisfaction of the mortgage. We cannot see wherein he is entitled to subrogation, or wherein it would avail him. As he is not required to account for the rents and profits during his occupancy of the land in controversy, he has received all the benefits which he would be entitled to re-

ceive if it were possible for the court now to decree him subrogated to the lien of the mortgage.

It is contended by the plaintiff that in the general distribution of her husband's estate she has received less than she was entitled to, taking into consideration the dower interest which the law would have given her, and which she claims she has never received. We consider it unnecessary to discuss this question at length. The following facts, however, stand out prominently in the record against her contention. By joining with her husband in the mortgages upon the land, she waived her dower interest therein to the extent of the mortgages. Considering the land worth $7,100, and deducting therefrom the amount paid in satisfaction of the mortgage and the value of the homestead, we find a surplus of but $1,761. Her dower interest at the time of the sale was not of very great value. And, again, in this connection, we mention the fact that she, as the widow of Franzen, made application to the court to have the land sold in its entirety, and therefore she should have looked to the proceeds of the sale for the satisfaction of her dower.

The Franzen heirs were not estopped from alleging their title to the homestead of their father by their failure to object to the confirmation of the administrator's sale. No record made in that proceeding challenged their attention to the attempted conveyance of the homestead by the administrator, and the court being without power to sell the homestead, and the heirs receiving no consideration for their interest therein, are not barred by the decree of confirmation nor by their own conduct from asserting the title they inherited. The district court should have affirmed their title to the homestead.

We therefore recommend that the judgment of the lower court be reversed and this cause remanded to the district court, with instructions to enter a decree quieting the title of the Franzen heirs as remaindermen in and to the homestead of their father, and further that an ac-

counting be had of the amount due to the plaintiff according to our findings and suggestions.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given above, the judgment of the district court is reversed and this cause is remanded to the district court, with instructions to proceed further in the matter as recommended in the opinion.

REVERSED.

HATTIE KEITH, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 4, 1908. No. 15,163.

1. **Master and Servant:** BENEFITS: DISABILITY. Railway employees only were permitted to join the relief department of the defendant company, an institution organized to pay disability benefits to members. The contract for benefits provided: "The word 'disability' shall be held to mean physical inability to work." *Held*, That the words "physical inability to work" mean inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally as remunerative.

2. ———: ———: ———. Under the provisions of such contract, if an injured member of the relief department recovers so that he is able to perform such work as is contemplated in the contract, or similar work equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. But recovery sufficient to enable him to earn much smaller wages at some other employment, or employment procured through the charity or indulgence of friends or relatives, when, in fact, he has not recovered from his disabilities, is insufficient to release defendants.

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

Greene, Breckenridge & Matters and *W. H. Hatteroth*, for appellants.

Smyth & Smith, contra.

EPPERSON, C.

This action was instituted by Gant Keith in his life time, and later prosecuted by the administratrix of his estate against the Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company to recover $638.70, alleged to be due upon a certificate of membership in the relief fund of the Burlington voluntary relief department for disability benefits at the rate of 75 cents a day from December 10, 1901, to April 4, 1904, at which time the said Gant Keith died. On September 11, 1900, the deceased entered the employ of the railway company as a switchman, and became a member of the relief department. Three days later, while thus employed, he received an injury from which it appears he never fully recovered. He was entitled to receive from the relief fund $1.50 a day for 52 weeks, and thereafter 75 cents a day during the continuance of his disability. He received such relief until December 10, 1901, at which time the defendants refused further payment, claiming that his disability had then ceased. At one time Keith attempted to resume his duties as a switchman, but was unable to do so. It is undisputed that he was disabled until December 10, 1901. At that time he reported for work to his employing officer, who tendered him some position as a utility man at the rate of $35 a month. This employment Keith refused, either because he was unable to do the work or because the wages offered were unsatisfactory. He then obtained employment as a bartender in his brother's saloon until April, 1902, and thereafter until his death was in the employ of one Dwyer, who succeeded his brother in the saloon business. While in the employ of his brother and for the first year of his employment

by Dwyer he received $50 a month wages, and thereafter $60 a month. During all this time Keith could not place the injured foot upon the ground naturally. He was required to use a crutch or a cane. The toes of the foot stood upright. Every night the foot was swollen. But as bartender he was able to spare his foot, not being required to stand upon it during all the time he was on duty. The evidence shows that he kept a chair behind the bar, which he used whenever he could; that he was enabled a part of the time at least to use a footrest. By reason of the injury he was required to quit work occasionally, sometimes one day and sometimes more, and some days he would have to quit for a short time only. His employer testified, in substance, that he was not a good man so far as his work was concerned, but from a business standpoint that he was very well thought of; that he took a good deal of interest in the place; that he had many friends throughout the country, and was a good talker. In the court below the plaintiff recovered judgment in the full amount claimed, and defendants appeal.

The rights of the parties depend upon the construction of a part of one section of the regulations of the relief department in force at the time deceased became a member, and which is as follows: "Wherever used in these regulations, the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work." It is the defendants' contention that the words "physical inability to work," as used above, mean physical inability to do any work whereby one could maintain himself, and that the deceased, having recovered from his injury so as to be able to perform the duties of a bartender, was under no disability within the meaning of the regulations quoted. The trial court refused an instruction submitting this theory to the jury. Instead, he gave an instruction in which he said: "By the word 'disability' is meant inability to perform the ordinary duties in the employment in

which Keith was engaged at the time of his injuries." It would, indeed, be a harsh rule which would require the relief department to pay to its members continuously the relief promised during disability in the event that such member, although unable to resume the employment in which he was engaged at the time of the injury, should so far recover as to be physically able to earn wages equal to or greater than the wages earned by him in such employment. Such construction cannot be given to the provisions of this contract. If an injured member of the relief department recovers to the extent that he is no longer disabled in the performance of the work contemplated or similar work, that is, employment, equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. The work contemplated is the work of railway employees. The purpose of the department is to partially indemnify its members against the loss of wages occasioned by their inability to perform such labor. In other words, the "disability" for which partial indemnity is paid is the disability which prevents the member from doing the "work" contemplated in the contract, and which results in his financial loss. The regulations of the relief department are similar to the by-laws of a mutual insurance company. They enter into and become a part of the contract. Indemnity to the injured member, and not profits, is the object of the department. This would be defeated if an injured member would be permitted to collect the benefits provided after he had recovered to such an extent that he could enter a similar employment equally as desirable and remunerative.

In *Chicago, B. & Q. R. Co. v. Olsen,* 70 Neb. 570, in the opinion overruling the motion for rehearing it is said: "There seems to be force in the argument that, if the plaintiff had recovered from the injury so as to be able to perform labor similar and equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an

engagement that was open and available to him, whereby he could support and maintain himself as he was able to do before the accident, he was 'able to work' within the meaning of that expression in the contract." This is a correct rule, and should be adhered to whenever applicable. Defendants invoke it here. It follows, of course, that the instruction given herein was erroneous, in that it defined "disability' as "inability to perform the ordinary duties in the employment in which Keith was engaged at the time of his injuries." But, as we view it, this error was without prejudice. Under the evidence the judgment rendered was the only one permissible. Keith never became physically able to resume his work as a switchman, nor did he ever become physically able to earn wages in any similar employment, nor was he ever able to earn wages equal to the wages of a switchman. He was retained as a bartender notwithstanding his physical defects, which partially incapacitated him. A review of the evidence leads us to the conclusion that he was able to hold this position by reason of his employer's indulgence, and, further, because of a tenacity of purpose on his part to earn what he could in spite of his impaired physical condition. His condition was such that he could not reasonably be expected to go into the business world and procure remunerative employment. He was badly crippled. People usually do not employ such help except at very small wages. The words "physical inability to work," as sued in the regulations of the defendant's relief department, mean inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured. The fact that the injured member earned wages by employment procured through charitable or indulgent relatives or friends is insufficient to establish his ability to work, within the meaning of the contract. The evidence shows that the minimum which Keith earned in such employment was $72.50 a month, with a prospect for higher wages. The greater

portion of his employment as a bartender he earned $22.50 less than his minimum wages as a switchman. There is no evidence that he could have commanded greater wages as a bartender or in any other employment.

The error of the district court being without prejudice, we recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN B. GREENWOOD, ADMINISTRATOR, APPELLEE, V. JOHN W. KING, APPELLANT.

FILED JUNE 4, 1908. No. 15,193.

1. **Death**: PLEADING. A petition filed by the personal representative of a deceased person under the provisions of Lord Campbell's act, as it has been adopted in this state, alleged that the next of kin, naming them, were dependent upon the deceased for support. *Held*, That this is a sufficient pleading of a fact from which it may be inferred that the next of kin had suffered a pecuniary loss by reason of the unlawful act of the defendant.

2. ———: ———. In an action under the provisions of Lord Campbell's act, the petition, in substance, alleged that the defendant as decedent's physician carelessly, negligently and unskillfully treated the plaintiff, and that he wrongfully and carelessly failed to make an examination of the deceased such as a physician of ordinary care would have done, and diagnosed her disease as one other than appendicitis, with which she was, in fact, suffering. *Held*, Sufficient to show that, had death not resulted through the alleged wrongful acts of the defendant, the deceased could have maintained an action in damages for the wrongs set forth.

3. ———: DAMAGES. In an action under the provisions of Lord Campbell's act to recover damages on account of the death of an unmarried adult where the father is the only next of kin entitled to the benefit of such action, the rule for measuring the compensatory relief is to ascertain, as nearly as possible, the

pecuniary benefit which the father might reasonably have expected to receive from his deceased child had her life not been terminated by the defendant's wrongful act.

4. ———: ———: QUESTION FOR JURY. It is not necessary that there should be a legal or even a moral obligation resting upon the deceased to support her next of kin in order to permit the personal representative to maintain an action under the provisions of Lord Campbell's act. The contributions to the support or benefit of the next of kin which might reasonably have been expected from the deceased had her life not been terminated by the wrongful act of defendant is an element of damages, but the same must be ascertained by the jury under proper instructions.

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

J. C. Robinson and *Millard & Snider,* for appellant.

Wilbur F. Bryant, contra.

EPPERSON, C.

In a trial to a jury the plaintiff, as administrator of the estate of Mary Maud Greenwood, deceased, recovered a verdict and judgment, from which the defendant appeals. In his petition plaintiff alleged that his decedent suffered death through the malpractice of the defendant, a physician and surgeon. At the beginning of the trial the defendant demurred to the petition *ore tenus.* His demurrer was overruled. It is contended that the petition is fatally defective because it does not allege that the deceased left surviving her any person who sustained a pecuniary loss on account of her death. In this respect the petition alleged: "The said Mary Maud Greenwood was 20 years of age and upwards at the date of her decease, and left surviving her next of kin, that is to say, her father, John B. Greenwood, the plaintiff, her mother, Lucy J. Greenwood, her brothers, Willie F. Greenwood, aged 18 years, Emory R. Greenwood, aged 16 years, Roy Greenwood, aged 7 years, and a sister, Bessie May Green-

wood, aged 12 years, dependent upon her for support, all of whom have suffered pecuniary damages by the death of plaintiff's intestate." The action was brought under the provisions of Lord Campbell's act, as it was adopted by our legislature. Section 5199, Ann. St. 1907, provides for the recovery of damages whenever the death of a person shall be caused by the wrongful act, neglect or default of any person, whenever the act, neglect or default is such that, if death had not ensued, it would have entitled the party injured to maintain an action for damages in respect thereof. Section 5200 provides: "That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow or widower and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the widow or widower and next of kin of such deceased person; provided, that every such action shall be commenced within two years after the death of such person." The sufficiency of a petition under this act with respect to allegations of damages sustained by the next of kin has been discussed by this court and the authorities reviewed in a number of cases. See *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747; *City of Friend v. Burleigh*, 53 Neb. 677; *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678. A review here of all these authorities is unnecessary. A clear distinction is made by the authorities between an action instituted for the benefit of the widow and the next of kin upon whom the law confers the right to be supported by the person killed, and those next of kin to whom the law does not necessarily give such right to support. In the opinion in *City of Friend v. Burleigh, supra*, we find the following:

"In the case of collaterals or others not legally dependent upon the deceased, at least where they are not heirs at law, facts must be pleaded showing an actual pecuniary interest in his life. Where, however, it is pleaded that the next of kin sustain such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary interest is pleaded."

The rule is that facts must be pleaded from which it may be inferred that the next of kin have sustained a pecuniary loss by reason of the wrongful act of the defendant. If the plaintiff discloses that the deceased was one upon whom the law imposed the duty of maintaining the next of kin, it is for this reason a sufficient allegation of fact from which a pecuniary loss may be inferred. But, if the deceased was one upon whom the law does not impose the duty of maintaining her next of kin, then the fact of their relationship alone is insufficient to show that the next of kin have sustained recoverable damages. And in those cases such facts as exist must be pleaded to show that the next of kin have sustained such damages. In the case at bar the deceased was an unmarried adult. She left surviving her both parents, a sister and brothers. Is the allegation of the petition that the next of kin of decedent were "dependent upon her for support, all of whom have suffered pecuniary damages by the death of plaintiff's intestate," a sufficient allegation of pecuniary loss sustained by her father? It is admitted that the father is the only one who is entitled to participate in the amount recoverable. We think the allegation is sufficient. "That her next of kin were dependent upon her for support" is the statement of a fact showing a pecuniary interest in her life. This allegation differs materially from the allegations in the petitions considered in the cases relied upon by the defendant. In those cases no allegation of fact appeared from which a pecuniary loss to the next of kin could be inferred; but the plaintiff in each case depended upon the alleged facts of the unlawful

killing, and the relationship existing between the deceased and his next of kin, or the conclusion that plaintiff had been damaged, as a sufficient pleading of a pecuniary loss. In *Chicago, B. & Q. R. Co. v. Van Buskirk,* 58 Neb. 252, the deceased, an adult, left surviving him his parents as his next of kin. The petition therein alleged no facts showing a pecuniary loss by reason of his death, but alleged the bare conclusion that the next of kin have been damaged. The same conditions also prevailed in *Chicago, B. & Q. R. Co. v. Bond,* 58 Neb. 385. Possibly the plaintiff's petition should have been made more specific and certain had a motion therefor been made by the defendant, but that a pecuniary loss is alleged by one depending upon the deceased for support there can be no doubt.

Another objection to the petition is that it fails to state any fact or circumstance showing that the deceased, if death had not ensued, could have maintained an action against the defendant. This objection cannot be sustained. The petition sufficiently alleges that the defendant as decedent's physician carelessly, negligently and unskillfully treated the plaintiff, and that he wrongfully and carelessly failed to make an examination of the deceased such as a physician of ordinary care would have done, and diagnosed the disease as one other than appendicitis, with which the deceased was, in fact, suffering. Had the deceased survived the defendant's treatment, under the allegations herein it is apparent that she could have maintained an action in damages for the wrongs alleged.

The defendant assails a part of instruction numbered 9, which is as follows: "And if you find for plaintiff the amount which he should recover in this action, if any, you should consider the situation of deceased as disclosed by the evidence, her annual earnings, her habits, her health, and her estate, if any, the profits of her labor, which she would have earned had she lived for the support of those entitled to recover, and the probability or the reasonable expectation of the life of deceased at the time of her death; and, in determining this, you may

take into consideration the tables of expectancy which have been introduced in evidence." This we will consider with instruction numbered 19, also objected to, which is as follows: "If you find for the plaintiff in this action, you will find the amount of his damage to be the net yearly earnings of Mary Maud Greenwood, multiplied by her expectancy of life, which according to the Carlisle table of mortality is 41.46 years." These instructions are erroneous, and require a reversal of the judgment. The evidence disclosed that deceased earned as a school teacher $300 during the year preceding her death. From this she paid her own expenses, and delivered to her mother for the support of the family the equivalent of about $190. The Carlisle table of expectancy was introduced in evidence without objection, according to which a healthy person of the age of the deceased had an expectancy of 41.46 years. It therefore appears that, under instructions quoted, the jury finding for the plaintiff should have returned a verdict for $7,877.40. The instructions assume that the deceased would have devoted the net income of the remainder of her life to the support and benefit of the plaintiff, and that the father's expectancy was equal to that of the deceased. The amount of damages sustained by the father is the present value of whatever sum the deceased adult child would have contributed to him or would have expended in his behalf. The rule for measuring such compensatory relief is to ascertain, as nearly as possible, the pecuniary benefit which the father might reasonably have expected to receive from his deceased child had her life not been terminated by defendant's wrongful act. The jury should have been so instructed. It is not necessary that there should be a legal or even a moral obligation resting upon the deceased to support her next of kin in order to permit them to maintain an action for her unlawful or negligent killing; but, if the facts established by the evidence are sufficient to show that a pecuniary loss has resulted, the next of kin are entitled to recover the amount thereof, to be deter-

mined by a jury, who take into consideration all the circumstances, the relationship existing between the parties, their mode of living, and the habits of the deceased with reference to contributing to the support of her family, and the probability of her continuing to do so. Although the verdict was for but $1,000, we cannot say that the erroneous instructions above quoted were without prejudice. The fact that deceased had contributed her one year's wages to her father's family does not of itself indicate that she would continue to do so for a number of years. It is not shown that the continued assistance of the deceased daughter was a necessity to the family. The older sons were earning fair wages, and at the time of the trial the father testified that he could then make his own living. Undoubtedly the contributions to the support of the family which the father might reasonably have expected from the deceased is an element of damages, but the same should have been ascertained by the jury under proper instructions. To hold that the errors complained of were without prejudice in this case would be equivalent to saying that the jurors were infallible, and that, too, when considering but meagre evidence, under instructions which their oaths required them to follow, and which directed that the damages be measured by a broad and erroneous rule. Probably the jury considered that the deceased would have contributed her life's earnings to her family, but that the father's interest therein would amount only to $1,000.

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

DUFFIE and GOOD, CC., concur.

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

REVERSED.

OMAHA LOAN & BUILDING ASSOCIATION ET AL., APPELLANTS, V. HORATIO K. HENDEE ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,352.

1. **Appeal:** LAW OF CASE. Ordinarily this court will not reexamine questions of law presented by and determined upon a former appeal, where the case was then remanded, with specific directions to the lower court.
2. **Costs.** Where upon showing made this court grants additional time to appellants to serve and file briefs, attorney fees for the adverse party occasioned thereby will not be taxed against appellants as costs upon motion afterwards filed.

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

H. P. Leavitt, for appellants.

McDonald & Woodland, contra.

EPPERSON, C.

This action was brought for the foreclosure of a mortgage by the Omaha Loan & Building Association. Its decree of foreclosure was assigned to Lobingier. He purchased the property at the judicial sale, and later assigned his bid to Ida M. Cronk. She also acquired the fee title by mesne conveyance from the legal owner. The Hendees claim under an agreement with the interested parties whereby they were to receive a deed to the premises upon the payment of the decree, and claim that the sale was made in violation of this agreement. The Hendees appealed from an order confirming the sale. Upon a hearing of said cause, this court reversed the judgment of the lower court and remanded the case, with instructions for the lower court to take an accounting of the amount due upon the decree, and that the Hendees be permitted to redeem within 60 days. In accordance with the mandate

the lower court took an accounting, finding that there was due upon said decree from the Hendees the sum of $963.40, upon the payment of which Mrs. Cronk was required to execute her deed conveying the premises to the Hendees, and that upon default of said deed the clerk of the court should execute and deliver a proper deed conveying to the Hendees the interest of said Ida M. Cronk in and to said premises. From this order of the court the plaintiff and Lobingier have appealed.

It is contended that the court had no jurisdiction over the matter urged by the Hendees in opposing the confirmation, and that no right to redemption founded upon the contract alleged by the Hendees can be urged in this case. By this contention the appellants directly assail the former decision of this court, in which it was held that such right existed. Specific directions were given by this court, which were followed by the lower court. Ordinarily, in such cases this court will not reexamine the questions of law presented by and decided upon the first appeal. *City of Hastings v. Foxworthy,* 45 Neb. 676. The case at bar does not fall within the more liberal rule which controls the second or any subsequent appeal of a case remanded generally for a new trial upon a former appeal. No extraordinary reasons are presented for the overruling of our former opinion. It has become the law of the case.

It is contended that the court erred in directing Ida M. Cronk to execute a deed to the Hendees upon the payment by them of the amount necessary to redeem. We are not satisfied that the appellants can complain of this order; but, if they are entitled to do so, no doubt can exist but that by redemption the Hendees are in equity vested with the title which they would have received upon the performance of their contract with the original parties to the action, who are Ida M. Cronk's grantors. A compliance with the court's order would but furnish written evidence of the title as it would exist upon redemption. Again, it is not absolutely necessary that Ida M. Cronk

comply with this order of the court. Other provisions of the decree are sufficient to bring about its full execution.

It is unnecessary to comment upon or review appellants' objections to the computation. We have examined the same, and find no error therein.

This cause was regularly reached and placed upon the trial calendar for the session of March 17, 1908, at which time appellants had not filed their briefs. They then asked for additional time to serve and file briefs. This request was granted. The appellees now ask that a reasonable attorney's fee be assessed as costs against appellants for the attendance of counsel at the March session. Appellants have shown a good reason for their delay, which was satisfactory to the court when the additional time was given. The record does not disclose that appellees requested any conditions to the granting of additional time when the order therefor was made. The delay was not malicious or vexatious, nor has it interfered with the due administration of justice. We recommend that the motion be overruled.

DUFFIE and GOOD, CC., concur.

By the Court: For the reason stated in the foregoing opinion, the judgment of the lower court is affirmed, and the appellees' motion that an attorney's fee be taxed as costs is overruled.

AFFIRMED.

JAMES I. LEE ET AL., APPELLANTS, V. CITY OF MCCOOK ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,139.

1. **Cities: VACATION OF STREETS: DAMAGES.** Where a part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled

to damages on account of such vacation. *Enders v. Friday*, 78 Neb. 510, followed.

2. Injunction: PUBLIC INJURY. A private party cannot enjoin a threatened wrong, where the injury which he would sustain would be no other or different from that suffered by the community generally.

3. ———: UNAUTHORIZED ORDINANCES. As a general rule, courts will not enjoin the passage of unauthorized resolutions or ordinances by a municpial corporation. An injunction should not issue until some effort is made to enforce the unauthorized resolutions or ordinances.

4. Cities: STREETS, VACATION OF. When a city enlarges its corporate limits and annexes territory over which there existed a highway previously laid out and established by the county board, such highway becomes impressed with the character of a street, and the city council is the only body thereafter vested with jurisdiction to vacate such highway or street.

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Affirmed.*

France & France and *Harlow W. Keyes,* for appellants.

James E. Kelby, W. S. Morlan, Frank E. Bishop, J. R. McCarl, J. F. Cordeal and *J. S. Le Hew, contra.*

GOOD, C.

James I. Lee, S. S. Garvey, and Fowler Wilcox brought this action against the city of McCook, mayor and council of said city of McCook, and the Chicago, Burlington & Quincy Railway Company to enjoin said city and its officers from vacating or taking any further steps toward vacating and closing a certain street or roadway, and to enjoin the defendant railway company from grading and laying railway tracks across, and from obstructing and closing, said street or roadway. The trial court sustained demurrers to the petition, and, the plaintiffs not desiring to further plead, their petition was dismissed for want of equity. The plaintiffs appeal.

It appears from the petition that the city of McCook is a city of the second class having less than 5,000 popu-

lation; that the east and west boundary lines of said city are the east and west lines, respectively, of section 29, township 3, range 29 west; that the Chicago, Burlington & Quincy Railway Company owns the south part of said section 29, being a strip one mile long, east and west, and a little more than a quarter of a mile wide, north and south; that McCook is a division point on the Burlington railroad, and that a large portion of said strip is occupied by railway tracks, yards and switches; that a part of the city of McCook lies to the north and another part to the south, of this strip of land; that many years ago the county commissioners of Red Willow county laid out a highway running north and south across this strip of land, it being about one-third of a mile west of the east line of said section 29. The defendant railway company, desiring to extend and build more tracks, filed a petition with the city council of McCook, praying to have said roadway vacated and another road or street opened on the east line of said section 29. At the time appointed for the hearing of this petition, objections and claims for damages were filed by a large number of persons. Upon the hearing the city council found that it was expedient for the public good that said roadway should be vacated, and passed a resolution providing for the vacation of the highway, to take effect when a certain other roadway or viaduct had been constructed and opened. This resolution was vetoed by the mayor, and thereupon this action was brought. It also appears by the petition that the appellants are the owners of considerable property in and about the city of McCook, no part of which, however, abuts upon or is adjacent to the roadway sought to be vacated. It is also alleged that the appellant Lee owns an ice plant situated some distance south of the railway, and that he uses the roadway in controversy in the serving of his customers in McCook, and that, if said roadway is closed, it will require him to travel a considerable distance further to reach and serve his customers. It is alleged that this will be destructive of his ice plant, and that he will

be injured in the sum of $9,000. It is claimed that the other plaintiffs will be damaged in the sum of $11,000. Plaintiffs aver that the city council of McCook has threatened to, and will, unless enjoined, pass the resolution over the veto of the mayor and declare the highway vacated; that said resolution, if passed, will be void; and that the city of McCook has no jurisdiction over the roadway, or to vacate same, because it was laid out by the county authorities, and has never been vacated or dedicated as a city street. It is also averred that the railway company is grading and constructing yards, switches and side-tracks across said roadway, which materially affect the passability of said road for travel. The petition is exceedingly voluminous, and teeming with details and conclusions which it is unnecessary to repeat or consider. The question is: Does this petition state a cause of action entitling the plaintiffs to relief?

In the case of *Enders v. Friday*, 78 Neb. 510, a case very similar to this one, it was held that, where part of a street is vacated, the general rule is that only those property owners whose property abuts upon that part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation. It would follow, therefore, that the plaintiffs suffered no wrong that would be actionable at law for damages. The only injuries they sustain are such as are common to the community generally. It is true that it is alleged that the appellant Lee will suffer damages, and that his ice plant will be practically destroyed; but the nature of the injury he sustains is not different from that sustained by other persons. He, like others, may be compelled to travel a greater distance in order to reach the north part of the city. The doctrine is well recognized that one cannot maintain a private action on account of wrongs or damages which he may suffer in common with the rest of the community. *Enders v. Friday, supra; Davis v. County Commissioners*, 153 Mass. 218. Where the injury complained of is really a public injury, or the

right violated is a public right, it is a general rule that individuals cannot maintain an action for injunction, unless they suffer an injury special or different from that sustained by the public at large. 22 Cyc. 760.

It also appears that, so far as the city is concerned, the action is really to enjoin it and its officers from passing a resolution or ordinance. It is a general rule that a municipal corporation, in the exercise of legislative powers in relation to the matters committed to its jurisdiction, can no more be enjoined than the legislature of the state. 22 Cyc. 890. "The courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available." 1 Dillon, Municipal Corporations (4th ed.), sec. 308, and note thereto. "The restraining power of the courts should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions or ordinances by municipal corporations. * * * It is time enough for equity to stretch forth its preventive arm when some attempt is made to enforce the unconstitutional act." *Stevens v. St. Mary's Training School,* 144 Ill. 336, 351. It does not appear from the petition that any attempt will be made by the city to vacate the roadway except by the passage of an ordinance or resolution. As the resolution passed was vetoed, and there is no ordinance or resolution now in force, it does not appear that the plaintiffs are entitled to an injunction against the city or its officers.

Appellants contend that the city is without any jurisdiction to declare a vacation of the roadway, because it was originally laid out by the county commissioners. The allegations of the petition clearly show that the roadway is now within the city, and we think it has thereby become impressed with the character of a street. If the road was laid out by the county commissioners, it was probably done prior to the land over which it was laid out being made a part of the city. When this roadway was brought within the boundaries of the city, in our opinion, the county commissioners lost control and jurisdiction over

it, and the city council became vested with jurisdiction, and was the only body that had authority to declare a vacation of the roadway. This view finds support in the following authorities: *McGrew v. Stewart,* 51 Kan. 185; *McCullom v. Black Hawk County,* 21 Ia. 409; Elliott, Roads and Streets (2d ed.), sec. 416; 15 Am. & Eng. Ency. Law (1st ed.) 1017.

So far as the railway company is concerned, nowhere is there any allegation that it has proceeded negligently in grading and laying its tracks across the roadway; and, if it is not maintaining proper crossings over its tracks and switches, ample means are afforded for compelling it to do so. But, even if it was negligently constructing its tracks and switches, so as to impede and obstruct the travel over and along the highway, the injury which the plaintiffs would sustain would be no other or different from that suffered by the community generally, and no right of action would be thereby afforded them against the railway company.

Appellants complain particularly because in the resolution which was vetoed and in the proceedings had before the council looking to the vacation of the street, section 8941, Ann. St. 1907, was not complied with in providing by ordinance for the election or appointment of five disinterested householders to determine by assessment the damages suffered by persons by reason of the vacating of the roadway or street; but, in the view we have taken of the case, it is not necessary to consider this question, nor is it necessary to determine whether or not the resolution or ordinance, if passed over the veto, would be of any force or validity. Upon the record as it now stands the plaintiffs were not entitled to an injunction. It appears that a temporary injunction had been granted, which has been kept in force by means of a supersedeas bond. It follows that this temporary injunction should be dissolved, and that the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

JAMES KIRKPATRICK, APPELLANT, V. LIZZIE FONNER, APPELLEE.

FILED JUNE 4, 1908. No. 15,231.

1. **Landlord and Tenant: SALE OF CROP: RIGHT OF ENTRY.** One who has purchased from a tenant matured crops still standing in fields on the leased premises has a right, during the term of the lease, to enter and harvest the crop in the usual and customary manner. A provision in the lease against subletting does not affect the right of the purchaser to enter upon the leased premises for the purpose of harvesting the crops.

2. **Injunction.** Plaintiff was not entitled to an injunction against the defendant to prevent defendant from interfering with plaintiff in the harvesting of matured crops, which he had purchased from defendant's tenant, and which were grown upon defendant's premises, where the only acts of interference shown on the part of the defendant consisted in ordering plaintiff not to come upon the premises, and in ordering him to remove therefrom after he had entered, and in fastening up certain gates, which did not have the effect of preventing plaintiff from harvesting the crops.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

O. A. Abbott, for appellant.

J. H. Woolley, contra.

GOOD, C.

Lizzie Fonner leased certain farm lands in Hall county to one Dou for a term of one year, beginning March 1, 1906, for cash rent. The lease contained a clause prohibiting the tenant from subletting the premises without the consent

of the landlord. In October, 1906, after the crops were matured and partially harvested, Dou, the tenant, sold the corn stalks, from which the corn had been gathered, together with 40 acres of ungathered corn, to Kirkpatrick. Within a few days the tenant removed from the farm and surrendered the keys of the house to Mrs. Fonner. The tenant claims that he surrendered only the possession of the buildings, while Mrs. Fonner claims that he surrendered his lease and all right to the premises. Within a few days of the purchase of the corn and corn stalks in the fields, Kirkpatrick turned about 50 head of cattle into the fields for the purpose of feeding down the corn and stalks that he had purchased. A controversy arose between Mrs. Fonner and Kirkpatrick with reference to the latter's pasturing his cattle upon the premises. The cattle were driven from the premises, and, when Kirkpatrick attempted to drive them back, there was a further controversy with Mrs. Fonner. He, however, put the cattle again in the fields, and it appears that they were driven out on two or three different occasions. Kirkpatrick brought this action to enjoin Mrs. Fonner from driving his cattle from the premises, or interfering with him in the harvesting of the corn and corn stalks which he had purchased from Mrs. Fonner's tenant. In his petition the plaintiff charged that the defendant had wrongfully driven his cattle off of the premises on several different occasions, and that she was interfering with his gathering and harvesting the crop which he had purchased, and that she had threatened and would continue to interfere with his gathering and harvesting the crop unless enjoined. Mrs. Fonner pleaded in her answer the provisions of the lease against subletting, and charged that Kirkpatrick's cattle were trespassing upon her premises and doing great injury thereto, admitted certain formal allegations in the petition, and denied all the other allegations thereof. Upon a proper showing a temporary order of injunction was allowed by the county judge. Upon a trial of the

issues thus framed the district court found in favor of the defendant, and dismissed plaintiff's petition for want of equity. Plaintiff has appealed.

A number of questions of law are presented and argued in the briefs, which are unnecessary to consider at length. We do not think the provisions of the lease against subletting were in anywise a bar to the right of the tenant to sell his crop upon the premises. We think the tenant had the undoubted right to sell the crop, including the corn stalks, and that the purchaser acquired the right to go upon the premises during the life of the lease for the purpose of harvesting or removing the crop in the usual and customary manner. And during the life of the lease the landlord would have no right to interfere with the purchaser in the proper harvesting of the crop. But in this case the evidence does not show that the appellee was guilty of such interference as would warrant the issuance of an injunction. It is very apparent that she did not want Kirkpatrick to pasture 50 head of cattle on her farm, and that she did not want his cattle to range upon and over her premises and about the buildings thereon, and it appears that she believed that the appellant was a trespasser, and ordered him on several occasions to take his cattle off, and that after the cattle had been driven off of the premises by some one she refused to permit the appellant to return the cattle to the premises. It appears, however, that he disregarded her refusal, and returned the cattle into the fields. The evidence shows that on several occasions thereafter the cattle were either driven from or permitted to escape from the premises. The appellant charges that appellee drove the cattle away, and, in fact, so testified. But it appears that his evidence in that respect is a conclusion, rather than a statement of fact. It is not apparent that he saw the appellee drive the cattle from the field, or that any other witness did so. She positively denied that she drove the cattle off, or authorized any one else to do so. In this state of the record we think the evidence was wholly insufficient to justify the issuance

of an injunction, as it does not appear that the appellee was in anywise actively interfering with the appellant in the harvesting of the corn and corn stalks which he had purchased from the appellee's tenant. The finding and judgment of the district court are supported by the evidence, and should be affirmed.

We therefore recommend that the temporary order of injunction, which has been continued in force by means of a supersedeas bond, be dissolved, and that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the temporary order of injunction granted in this cause be dissolved, and that the judgment of the district court be

AFFIRMED.

GEORGE HESS, APPELLANT, V. SIDNEY DODGE ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,178.

1. **Pleading**: GENERAL DENIAL. A general denial puts in issue every material averment in the petition.

2. **School Districts**: INJUNCTION: PLEADING: BURDEN OF PROOF. Where, in an action against a school district to enjoin the changing of the site of the school house and the appropriation of the moneys of the district for the erection of a school house on the new site, plaintiff alleges that "he is a resident taxpayer and qualified voter" of said district, such allegation is a material allegation, without which the petition would be demurrable; and, where such petition is met by a general denial, the burden is upon the plaintiff to prove such allegation.

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Affirmed.*

Morlan, Ritchie & Wolf and *Starr & Reeder,* for appellants.

Boyle & Eldred, contra.

FAWCETT, C.

This is a suit for an injunction to restrain the defendants from changing the site of the school house in school district No. 4, Red Willow county, from appropriating the moneys of the district for the erection of a school house on said new site, and for other relief of a similar character. From a decree favorable to defendants, plaintiff appeals.

In paragraph 1 of his petition plaintiff alleges: "(1) That he is a resident taxpayer and qualified voter of school district No. 4 of Red Willow county, Nebraska." This was a material allegation, without which the petition would have been demurrable. The answer of defendants is a general denial. So far as the record discloses, plaintiff did not attend upon the trial of the case, and there is an entire absence of proof even tending to show that he is a taxpayer or qualified voter, or even a resident, of the school district. Plaintiff having utterly failed to prove this material allegation of his petition, which stood denied by defendants' answer, we must decline to examine further into the case.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

THOMAS H. SAMPLE, APPELLEE, V. SUSAN O. SAMPLE, APPELLANT.

FILED JUNE 4, 1908. No. 15,219.

1. **Divorce: EXTREME CRUELTY.** Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious.
2. **Husband and Wife: MAINTENANCE.** A wife is not guilty of desertion in leaving the domicile of a husband who, addicted to drunkenness and association with women of doubtful character, fails to support her; and in such case she is entitled to an award of a reasonable sum for the support of herself and minor children until such time as the plaintiff shall provide them a suitable home and support, and shall satisfy the court that he is ready and willing, in good faith, to amend his conduct.

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

Hazlett & Jack, for appellant.

W. H. Ashby, contra.

CALKINS, C.

The plaintiff, Thomas H. Sample, and the defendant, Sarah O. Sample, were married in 1887, and had three children, aged, in 1905, 16, 12 and 7 years, respectively. For some years they had lived in Beatrice, in this state; but in June, 1904, the defendant, with her three children, removed to Boston, Massachusetts, and in July, 1905, the plaintiff filed a petition in the district court for Gage county, praying for a divorce from the defendant on the ground of cruelty and desertion. Service was had by publication, and a decree of divorce was taken by default August 29, 1905. On October 24, 1905, the defendant filed a petition and affidavit to set aside this decree, tendering an answer, in which she denied the allegations

made against her in the plaintiff's petition, and charged him with habitual drunkenness, adultery and failure to support her and their said children. She did not herself ask for a divorce, but prayed that an order might be made requiring the plaintiff to provide for the support of herself and children. On May 25, 1906, the petition to set aside said decree was granted, and the defendant was permitted to file her answer to the plaintiff's petition. No reply seems to have been filed, but the case was tried upon the merits as if the new matter alleged in defendant's answer had been controverted. The district court found for the plaintiff, and again rendered judgment granting him a divorce. From this judgment the defendant appeals.

1. As the desertion charged in the plaintiff's petition is neither alleged nor proved to have continued for the statutory period, it may be disregarded.

The precise charge of cruelty in the plaintiff's petition was that, "commencing with the year 1899, the said defendant has been guilty of extreme cruelty toward plaintiff, without cause or provocation on his part, in this: that said defendant would accuse this plaintiff of drunkenness, and of having sexual intercourse with women other than defendant, and accused plaintiff of associating with lewd women, and accused this plaintiff of being untrue to her, and constantly annoyed plaintiff by such taunts and accusations, harsh language and scornful actions; that said accusations, taunts, harsh language and scornful actions were all in the presence of plaintiff's children and others, and all for the purpose of humiliating this plaintiff, and said defendant tried to induce his children to be known by some other name than that of said plaintiff." To prove these allegations the plaintiff was sworn as a witness, and practically disclaimed the charge that defendant had accused him of drunkenness. With reference to the charge of improper conduct with other women, he says that, if he met a woman on the street, or went to a woman's house to hang paper, the defendant would

ask him not to go, and say he had been around some old hag; and, in answer to a question if she had charged him with having sexual intercourse with other women, he replied: "Yes, sir; in that way every woman I would see was an old rip." Upon his cross-examination he admitted that he "went out and got a little full after her continual carrying on," and admitted that he became familiar with a woman described in the testimony as of questionable character; but he insisted that their intimacy did not begin until after his wife left him. An examination of the testimony discloses that, in making this denial, he was referring to a time when his wife left him for a period some years prior to her going to Boston. He also called as a witness his father, who testified that she complained to him of the plaintiff's running with other women and staying out late nights, and that she would get mad at him and not speak to him for a week. He also testified that she accused plaintiff of drunkenness, but admitted upon cross-examination that she had some grounds for such complaint. The plaintiff also called his brother as a witness, who testified that on one occasion when the plaintiff was late to supper she complained, and said to him: "I suppose you have been out with the old hags all this time."

The defendant produced witnesses who testified to specific instances of the plaintiff's association with the woman already mentioned, under circumstances that would have justified his wife's suspicions of the existence of improper relations between them, and the facts so related were not denied by the plaintiff upon the stand. The strongest support for the charge in the plaintiff's petition is found in the testimony of the defendant, who said: "I frequently did talk with him about his drunkenness, which was witnessed by me and my children, and I frequently talked with him as to what I believed his relations were with Mrs. ———, and I did accuse him of being untrue and unfaithful to me, and it is very probable that some of this talk may have been in the presence of our children.

As to the correct language that I made use of at those times, I would say that I have no doubt it was harsh at times, because I was very indignant, and felt outraged and disgraced at his conduct and neglect of me, but I will say that that was not always true, because at other times I endeavored to persuade him and induce him for my sake, and his sake, and the children's sake, not to have anything more to do with this woman; but whatever I said my purpose was not to humiliate him, but to put a stop to the way he was living and going on, and that he might so conduct himself that he might maintain me and the children, and I have never at any time tried to induce his children to be known by any other name than his name."

Whether the conduct of the wife under the circumstances shown amounts to extreme cruelty within the meaning of the statute is therefore presented by the record. Unfounded and malicious accusations of infidelity, when made by the husband against the wife, have frequently been held to constitute such cruelty. *Berdolt v. Berdolt,* 56 Neb. 792; *Walton v. Walton,* 57 Neb. 102. Whether such accusations, when made by a wife against a husband, should be given the same effect has been doubted. *McAlister v. McAlister,* 71 Tex. 695, 10 S. W. 294; *Pfannebecker v. Pfannebecker,* 133 Ia. 425. But it is not necessary to make a distinction founded upon sex; the real question being the effect that such accusations produced, when made by one spouse against the other, in the case under consideration. Whether such accusations constitute cruelty must be determined as a matter of fact in each particular case. In this case the plaintiff does not seem to have been especially sensitive to either charge; and we should hesitate to hold that the accusations constitute cruelty, even if they were shown to be unfounded. In every case we have examined which holds such accusation to amount to cruelty, an essential element has been the untruth of such charges and the lack of any foundation for the same. We are not prepared to hold

that a wife, whose husband is addicted to drunkenness and to open association with women of doubtful character, may not complain of such conduct and admonish him against its continuance, without being guilty of such cruelty as will entitle him to a divorce; and we therefore conclude that there was nothing in the evidence to support the finding for the plaintiff.

2. The defendant in her answer asked the court to make a suitable allowance for the support of herself and children. It is settled in this state that a wife may bring a suit in equity to secure support and alimony without asking for a divorce. *Earle v. Earle,* 27 Neb. 277, 20 Am. St. Rep. 667; *Cochran v. Cochran,* 42 Neb. 612; *Brewer v. Brewer,* 79 Neb. 726. From what we have already said, it follows that the defendant was justified in leaving the plaintiff under the then existing circumstances. A wife is not guilty of desertion in leaving the domicile of a husband who, addicted to drunkenness and association with women of doubtful character, fails to support her; but we cannot adjudicate her right to live in separation, for that would be in effect to grant a divorce, for which she does not pray. The order for support where divorce is not prayed for must always be temporary in its nature; the court granting the same retaining jurisdiction to make such modifications in the order as changed conditions necessitate. In this case the district court should award to the defendant a reasonable sum for the support of herself and minor children until such time as the plaintiff shall provide them a suitable home and support, and satisfy the court that he is ready and willing, in good faith, to amend his conduct.

We therefore recommend that the judgment of the district court be reversed and this cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

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

and the cause remanded for further proceedings in accordance with such opinion.

REVERSED.

MARTIN SWANSON, APPELLANT, V. JOHN H. JAMES ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,180.

Specific Performance: RELINQUISHMENT BY VENDEE. A vendee in a contract for the sale of real estate, who voluntarily in writing relinquishes his rights therein, and thereafter leases the land from his former vendor, thereby abdicates his rights under the first contract, and cannot thereafter maintain an action for a specific performance thereof.

APPEAL from the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

T. J. Howard and *J. R. Swain,* for appellant.

G. W. Scott and *W. F. Critchfield, contra.*

ROOT, C.

In 1901 defendants, who are father and daughter, owned a quarter section of land in Greeley county, the legal title whereof was in the daughter. In October of said year Mrs. Adams agreed in writing to sell said land to plaintiff for the consideration of $1,600. One hundred dollars was paid down, $100 was to be paid on or before December 31, 1902, and $100 within one year thereafter, with 7 per cent. annual interest on the unpaid principal in each of said years. Upon the payment of the $300 the vendor was to execute a deed for the land, and the vendee a mortgage thereon, to close the transaction. Time was made of the essence of the contract, and it was agreed therein that the vendee should forfeit all payments by him made in case of his default, and that the right of possession should

thereupon vest in the vendor. In February, 1905, plaintiff, at defendant James' request, surrendered his contract to Mrs. Adams, and relinquished all of his estate in said land. James had received all payments made on the contract, and transacted all negotiations with plaintiff in regard thereto. Within six weeks of said relinquishment, James, who had acquired the legal title to the farm, rented it to plaintiff for one year, each party to said transaction joining in a written lease therefor. Within a few days of the expiration of said lease this action was instituted, for the alleged reasons that James had secured said relinquishment and had procured plaintiff to sign said lease by fraud and false representations. Plaintiff alleged that he was not in default on said contract of sale, but that it was still in full force, and prayed for its specific performance.

The farm was not plaintiff's homestead, and, if the issue of fraud was properly determined in defendants' favor, plaintiff was not entitled to a decree, and much of the argument and many of the authorities cited by counsel need not be considered. Plaintiff testified to a state of facts, which, if true, would warrant the court in ignoring the relinquishment and holding the contract of sale to be in force. Defendant James in his testimony flatly contradicted plaintiff, and we must search the record for corroboration of the one or the other to ascertain in whose favor the balance of evidence inclines. The wife, daughter and son of plaintiff testified to his statements, made under such conditions as to possibly bring them within the *res gestæ of* the transaction, and therefore competent evidence, and those declarations tend to support plaintiff's theory of the transaction. On the other hand, plaintiff was in default on the contract. According to its terms he should have paid before the date of said relinquishment, principal and interest, $594, besides executing his note and a mortgage for $1,300. Giving him the benefit of every reasonable doubt in the evidence, we cannot say that he had paid more than $364, nor had he paid the taxes upon the farm according to the contract. He had other transactions

with James, and seems to have been very slow pay; and James' statement that in February, 1905, he insisted that plaintiff should either pay up the arrears on or abrogate said contract seems reasonable. Furthermore, plaintiff signed the relinquishment in an attorney's office, and a few days thereafter, in connection with James, dictated to the same lawyer the terms of a lease for said land, which he signed. Plaintiff also delivered to defendant one-third of the crop grown on said land for 1905, and it was neither measured nor weighed. Plaintiff and all of his witnesses denied that the instrument which was produced duly signed by him, and with his written relinquishment upon the back thereof, was the contract under which he took possession of the land, or the document which had been in his custody for some three years. Those witnesses were clearly mistaken, and this fact tends to cast some doubt upon the strength of all of their testimony. Plaintiff can read and write the Swedish tongue, and can sign his name in, but cannot read, the English language; and we, therefore, have carefully read and reread every syllable of the evidence adduced, and after mature consideration we do not find that it preponderates in his favor, nor that he has established a condition that will warrant a decree for a specific performance of his contract. We have not been controlled by, but we have considered, the better opportunity that the trial court had to weigh and give proper effect to the oral evidence in this case. *Cooley v. Rafter,* 80 Neb. 181.

Plaintiff, by executing the relinquishment and leasing the land, divested himself of all right to have the contract specifically enforced, and we recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

IN RE LILBURN PHILLIPS.

G. L. GODFREY, APPELLANT, V. LILBURN PHILLIPS, APPELLEE.

FILED JUNE 4, 1908. No. 15,223.

1. **Intoxicating Liquors: LICENSE: EVIDENCE.** In a contest over an application for a license under sections 7150 *et seq.*, Ann. St. 1907, where the sole objection urged against the character of the applicant was that no man of respectable character would apply for a license to retail intoxicating liquors, and the only evidence presented to the city council upon that point was the testimony of a witness who stated under oath that the applicant was a man of good reputation and respectable character and standing, the city council properly determined that issue in favor of the applicant.
2. ———: LEGISLATIVE POWERS. In the absence of a constitutional provision regulating or prohibiting the traffic in intoxicating liquors, the power to so regulate or prohibit is vested exclusively in the legislature, and that function cannot be delegated by it to the courts, nor lawfully usurped by the judicial branch of the government.

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

G. L. Godfrey, pro se.

M. D. King, contra.

ROOT, C.

This is an appeal from a judgment of the district court overruling a remonstrance to an application for license to sell malt, spirituous and vinous liquors in the city of Minden. The parties will be referred to as applicant and remonstrant. The record is brief, the parties thereto having stipulated to most of the facts. Remonstrant denied that applicant was a man of respectable character, "under the general proposition that any man who will engage in the sale of malt, spirituous and vinous liquors is not such a man of respectable character and standing." Re-

monstrant further urged, in effect, that it was not within the power of the legislature to license said traffic, or to authorize any individual, board or official to issue a license for that purpose, because said business was vicious and demoralizing, and opposed to the laws of God and to the letter and spirit of the fundamental law of the land.

1. On the issue of applicant's character the only evidence offered was the testimony of one witness, who stated that applicant's reputation in the neighborhood where he resided was good, and that he was a man of respectable character and standing in the community. The city council properly held with applicant upon said issue. To adopt remonstrant's theory would invalidate the law, and we do not feel at liberty to so construe the statute.

2. In our judgment remonstrant has not sustained his contention that the legislature is without power to regulate the traffic in intoxicating liquors; that regulation, or its prohibition, is peculiarly within the police power. It is entirely competent for the people by constitutional enactment to restrict or render unlawful that business, but, if they fail to do so, the legislature is the exclusive repository of that power. Neither the constitution of 1866, nor that of the present day, will warrant the strained construction placed thereon by remonstrant. The language of the fundamental law and the interpretation given thereto by the legislative, executive and judicial branches of this government repel any such construction by the court. The legislature, since early territorial days, has exercised its function in attempting to minimize the evil inherent in and flowing from the trade in and the use of intoxicating liquors. The act of March 16, 1855 (laws 1855, p. 158), prohibited the manufacture of intoxicants; and section 172, ch. 11 of the criminal code, then in force, made it unlawful to furnish any such liquor to an Indian or to an intoxicated person. Chapter 29 of the criminal code of 1866 (Rev. St. 1866, pp. 671-676) minutely regulated said traffic, and provided both civil

remedies and severe penalties for the violation thereof. That part of the criminal code was carried into the General Statutes of 1873 (chapter LIII, p. 851) and was continued in force with little amendment till the enactment of the "Slocumb Law" of 1881. Nor was the legislature invading an unknown field or encroaching upon any other department of the government when it sought to control said traffic. Since the days of Edward the Sixth the parliament of Great Britain has taken jurisdiction of this subject and restricted and regulated the keeping of ale-houses and tippling-houses. The legislatures of the various states of the Union have also given this subject attention and exercised the police power to partially or totally restrain said business. *Metropolitan Board of Excise v. Barrie,* 34 N. Y. 657; *Commonwealth v. Kimball,* 24 Pick. (Mass.) 359, 35 Am. Dec. 326; *Schwuchow v. City of Chicago,* 68 Ill. 444; *City of New Orleans v. Smythe,* 116 La. 685, 114 Am. St. Rep. 566; *Mugler v. Kansas,* 123 U. S. 623. We cannot invade the province of the legislature, and by our judgment prohibit the traffic that it, in the exercise of its constitutional powers, has said may be licensed. We so declared in *State v. Hardy,* 7 Neb. 377, and our powers have not been enlarged since that day. The entire field covered by remonstrant's argument has been exhaustively considered, and the point settled adversely to him, in *Sopher v. State,* 81 N. E. (Ind.) 913.

There does not seem to be any error in the record, and for that reason we recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

JOHN ROBER, APPELLANT, V. ANTON MICHELSEN, APPELLEE.

FILED JUNE 4, 1908. No. 15,228.

1. States: RIVERS AS BOUNDARIES. If the middle of a river forms a state boundary, that boundary follows any changes in the stream which are due to gradual accretions to or degradation of its banks.

2. ———: ———. If the change is sudden and rapid, such as occurs when a river forms a new course by cutting through a bend, the boundary does not follow the stream, but remains in the middle of the old channel.

3. ———: ———. From about the year 1855 until about 1860, a tract of land within the state of Nebraska was bounded on the east by the Missouri river. Within three years of the last-named date said stream gradually encroached upon said land until all of said tract was under water; and, as the river advanced westward, accretions attached to the east bank of the river until they covered the site of the land first herein referred to. In 1874 said river suddenly changed its course much further east, and the water therein cut a new channel, so that said alluvion was isolated from the land in Iowa. *Held*, That by the first process of erosion and accretion said land was transferred from Nebraska to Iowa, and that the operation of avulsion did not restore said land to the former state.

4. Courts: JURISDICTION: LEGISLATIVE POWERS. The legislature is without power to authorize the courts of Nebraska to quiet title to lands within the boundaries of a sister state.

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

John Lothrop, for appellant.

E. C. Jackson, contra.

ROOT, C.

Suit to quiet title to real estate. The court held it did not have jurisdiction of the controversy, because the land therein involved was in Iowa, and dismissed the action. Plaintiff appeals.

The land was entered in 1855, and patent therefor was

issued in 1860, and, until the last-mentioned date, said land was all on the west side of the Missouri river and in Nebraska. During the years 1863, 1864 and 1865, the river gradually encroached on and finally washed away all of said land, so that none of it remained above water, but all formed part of the bed of said river; and still later said land was covered by accretions, which had attached to the eastern bank of the river, and the tract in dispute was included within the state of Iowa and east of said stream. In 1873 or 1874, the date being uncertain and unimportant, the waters of said river suddenly abandoned the old bed, and cut a new channel a very considerable distance east of the left bank of said stream, whereby said land was transferred from the east to the west side of said river, and was thereafter bounded on the north and east by the right bank of the new and present channel of said watercourse, and on the west and south thereof by the bed of the old channel, which became a lake.

1. The law upon this subject is plain, and was settled beyond peradventure by the supreme court of the United States in *Nebraska v. Iowa,* 143 U. S. 359, 36 L. ed. 186, and reaffirmed in *Missouri v. Nebraska,* 196 U. S. 23, 49 L. ed. 372. The boundary between Iowa and Nebraska was fixed by the respective acts of congress admitting said states to the Union as the center of the channel of the Missouri river. That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel. Applying the rule to the instant case, when this suit was instituted the land therein described was in Iowa, and not within the jurisdiction of the courts of Nebraska.

2. Counsel argues that citizens in their litigation cannot collaterally attack and have adjudicated state boundaries,

and that, as the twentieth session of the Nebraska legislature, in chapter 25, laws 1887, defined the eastern boundary of Washington county as the middle of the channel of the Missouri river, the courts cannot look beyond that act for proof of the location of said border. Although the legislature is vested with comprehensive power in its department of government, yet it cannot by mere enactment, without the cooperation of an adjoining state, extend the territory of Nebraska at the expense of that neighbor, nor thereby invest its courts with extraterritorial jurisdiction over the lands of a sister state. *Farmers Loan & Trust Co. v. Postal Telegraph Co.*, 55 Conn. 334, 3 Am. St. Rep. 53; *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126; *Lindley v. O'Reilly*, 50 N. J. Law, 636, 7 Am. St. Rep. 803; *Meyler v. Wedding*, 107 Ky. 310, 92 Am. St. Rep. 347; *Fall v. Fall*, 75 Neb. 120.

In the state tax suit for 1904 plaintiff herein defended an attempt to collect old delinquent taxes levied upon the real estate in controversy by the authorities of Nebraska, upon the ground that, by reason of the facts hereinbefore referred to, said land had been transferred from Nebraska to Iowa, and the court in that suit, on those facts, found for this plaintiff.

The district court was clearly right, and we recommend that its judgment be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND; ROBERT SMITH, CLERK DISTRICT COURT, APPELLANT.

KINGMAN IMPLEMENT COMPANY, APPELLEE, V. ALFALFA MEAL COMPANY; ROBERT SMITH, CLERK DISTRICT COURT, APPELLANT.

MOLLIE ROY, APPELLEE, V. JAMES W. ROY; ROBERT SMITH, CLERK DISTRICT COURT, APPELLANT.

J. A. TAMINOSIEN, APPELLEE, V. FRANK CRAWFORD; ROBERT SMITH, CLERK DISTRICT COURT, APPELLANT.

FILED JUNE 26, 1908. Nos. 15,640, 15,641, 15,642, 15,643.

1. Clerks of Courts: COLLECTION OF FEES. The clerk of the district court is authorized by law, and it is his duty when the statutes provide a fee for any service required of him as such officer, to collect or secure the payment of the same in advance of its performance; and this duty is one which he owes to the county, which has an interest therein, and to himself as a protection against enforced payment to the county treasurer of fees earned by him, but not collected.

2. ———: ———. The question whether that officer is to be held liable as an insurer of the collection of his fees, or is only required to exercise due diligence in that matter, not decided.

3. ———: ———. Where no fee is provided by statute for the performance of an official duty, such as keeping a record of the formal proceedings and orders of the court, the clerk of the district court is not authorized to charge a fee for performing such duty, and may be compelled to perform such services without compensation other than the salary allowed him by law.

4. ———: FEES: PAYMENT IN ADVANCE. The district court cannot compel its clerk to record a judgment or decree on its journal, or make a complete record in a case finally disposed of, without payment of his fees therefor in advance, or the giving of proper security therefor by the party requesting the performance of the service.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, WILLIAM A. REDICK and WILLIS G. SEARS, JUDGES. *State v. Several Parcels of Land affirmed: The remaining cases are reversed.*

F. S. Howell, for appellant.

W. H. Herdman, Frank Crawford, John P. Breen, and *Henry W. Murphy, contra.*

BARNES, C. J.

The foregoing were argued and submitted together as one case, and will be so considered by the court. The parties will, for convenience, be referred to as appellant and appellees, and the statute citations are by section number, as given in Ann. St. 1907. The appellant in each of the cases is the clerk of the district court for Douglas county, and complains of certain orders or judgments entered therein. In the *Pollack* case, No. 15,640, the court, on its own motion, vacated a prior order entered in said cause. The journal entry of the vacating order was prepared, signed and presented to the appellant, with a demand that he forthwith enter the same upon the court journal. The *Alfalfa Meal Company* case, No. 15,641, having been finally determined, and no waiver of a complete record having been made, a demand was made upon the appellant to make such complete record. In the *Roy* case, No. 15,642, a decree of divorce was duly rendered by the court. The journal entry thereof was prepared by counsel, and presented to the appellant, with a demand that he enter the same upon the court journal. In the *Taminosien* case, No. 15,643, the court made an order overruling the motion for a new trial and rendered judgment on the verdict, making a minute of the order and judgment on the trial docket. Demand was thereupon made upon the appellant to forthwith enter said order and judgment on the court journal. The appellant refused to comply with said demands and each of them, for the reason that his fees and costs for the services demanded had not been paid or tendered. Upon notice, a separate order was made by the court in each case, requiring the appellant, as clerk of said court, to enter and journalize said orders and de-

crees, and make said complete record. It is conceded that the appellant's fees and costs for the services demanded have never been paid or tendered; that he demanded payment thereof in advance of the performance of the services, and no excuse was presented for the refusal and failure to pay the same by the interested parties. The trial court held, however, as a matter of law, that it was appellant's mandatory duty to record and journalize the proceedings and judgments of the court above mentioned, and to make a complete record in all cases, unless duly waived, notwithstanding the fact that his fees and costs therefor were not paid or tendered.

Two questions are thus presented for our consideration. One as to the duty of the clerk to record and journalize the proceedings of the court above mentioned, and the other as to his duty to make a complete record without the payment of his fees in advance where they are demanded by him. It was held in *Wallace v. Sheldon,* 56 Neb. 55, that the court has no inherent power to award costs to a litigant, and that the right to costs is a purely statutory one. Therefore the questions above stated must be determined by our statutes on the subject of fees and costs. Section 887 of the code provides that the clerk shall keep the records, books and papers appertaining to the court and record its proceedings. Section 9464, Ann. St. 1907, reads as follows: "The clerks of the supreme court and of each district court, the register in chancery, probate judge, sheriff, justice of the peace, constable, or register of deeds may in all cases require the party for whom any service is to be rendered to pay the fees in advance of the rendition of such service or give security for the same to be approved by the officer." By section 9434 it is provided, among other things, that the clerk of the district court shall keep a docket in which he shall enter the costs chargeable and taxable against each party in any suit pending in said court, and he is empowered at any time to make out a statement of such fees, specifying each item of the fees so charged and

taxed, under seal of the court, which fee bill so made shall have the same force and effect as an execution, and the sheriff to whom said fee bill shall be issued shall execute the same as an execution. It is further provided in said section that in counties having more than 50,000 inhabitants and less than 100,000, or if the fees shall exceed $4,000 per annum in counties having more than 100,000 inhabitants, the clerk shall pay such excess into the treasury of the county in which he holds his office; that the clerk of the district court of each county shall on the first Tuesday of January, April, July and October of each year make report to the board of county commissioners or board of supervisors, under oath, showing the different items of fees received, from whom, at what time, and for what service, and the total amount of fees received by such officer since the last report, and also the amount received for the current year. The foregoing provisions relating to amount of salary apply particularly to Douglas county. In addition to the salary or compensation provided by section 9434, the clerk of the district court of that county is by section 9435 allowed an additonal salary of $1,000 to be paid out of the general fund of the county, which is to be entered on his fee book and accounted for in the same manner and subject to the same limitation as other fees. Section 9434, *supra,* provides for and describes the fees, together with the amounts thereof which may be charged by the clerk of the district court. Construing the provisions of that section, it was said in *Boettcher v. Lancaster County,* 74 Neb. 148, that the clerk of the district court must account for the fees earned in performing the duties of his office, and pay the same over to the county treasurer, whether collected by him or not, and that ordinarily the clerk extends credit at his peril. The same rule was announced in *State v. Hazlett,* 41 Neb. 257, and in *Sheibley v. Dixon County,* 61 Neb. 409. Construing all of the provisions of the statutes on this subject together, and considering them in the light of the foregoing decisions,

we are constrained to hold that it is the duty of the clerk of the district court, where the statute provides a fee for any service required of him, to collect the same in advance. This duty he owes to the county, which has an interest therein, and to himself as a protection against enforced payment to the county treasurer of fees earned by him, but not collected; for it is well settled that ordinarily he is responsible for such payment. It has been suggested by appellees that the measure of the clerk's responsibility is only due diligence; that he is not an insurer of the collection of his fees; and that, in case he fails to make such collection, he is not accountable to the county therefor. We are not required to determine this question in any of these cases, and we therefore decline to do so. It is possible, as suggested in *Boettcher v. Lancaster County, supra,* that special circumstances may excuse the clerk for a failure to collect his fees, but no such circumstances are shown, and, in fact, no excuse is presented in any of these cases for a failure of the party requesting the services to pay, and the appellant to collect the fees in question.

This brings us to the consideration of the nature of the services required in each case. It is conceded by all parties to this controversy that there are certain services which the appellant is required to perform for the court for which no fee is provided by law, and this must be so in the very nature of things. Recognizing this fact, and in order to pay for such services, the legislature has provided a salary in all counties of the state having a population of 8,000 and over in addition to the fees provided for his office, which salary is to be "entered upon his fee book and accounted for in the same manner and subject to the same limitation as other fees." This seems to indicate that in such counties the legislature was inclined to think the receipts from fees alone might not be sufficient to produce the amount which the clerk is entitled to retain out of the receipts of his office annually in payment for his services. After a careful examination

of the statutes, we are of the opinion that no fee is provided, fixed or allowed for keeping the records of the proceedings of the court, such as its formal opening and adjournment and its ordinary interlocutory orders made necessary by the proper conduct of its business, of which the order in the *Pollack* case made upon the court's own motion for the purpose of correcting its records is one. For such service the appellant was not required or authorized to charge and collect a fee. The order of the district court, therefore, in that case should be affirmed.

We come now to consider the question involved in the *Alfalfa Meal Company* case, No. 15,641. As above stated, the service there required was the making of a complete record. Section 9434 provides that for making such record the clerk shall receive one cent for each ten words thereof, and he is by law required to make a complete record in each case, unless the same is duly waived by all the interested parties. It is clear, therefore, that it is his duty not only to make the record, but also to collect his fees therefor. This he could lawfully do by requiring the successful party to pay them in advance of the rendition of the service. In such cases the successful party is ordinarily the one to be benefited thereby, and he is therefore required to pay for the service in the first instance. This imposes no serious burden on him, for he may have judgment over against the loser for the costs so advanced by him, and may have execution awarded therefor. We are therefore of opinion that the order of the district court requiring appellant to make a complete record in that case, without the payment of his fees, should be reversed.

Considering the question presented in the *Roy* case, No. 15,642, we find that it is provided by section 9434 that the clerk of the district court is allowed for entering a judgment on the journal 25 cents, and for each 10 words after the first 100 words thereof the sum of 1 cent. It therefore follows that it was the right and the duty of

the appellant to demand and collect his fee for that service in advance of its performance.

It is suggested, however, that this rule is calculated to hinder and impede the administration of justice, and render it impossible for the court to keep an accurate and complete record of its proceedings, orders, judgments and decrees; that its judgments and decrees (which under our practice are one and the same) are a part of its records, and have no force or effect until entered and recorded in the court journal. We think these objections are more fanciful than real, and present no substantial objection to the foregoing rule. It has often been held that the rendition of a judgment or decree is an act distinct and separate from its journalization. It is true that it should be recorded in order to preserve the evidence of what was in fact decided by the court, but this is not done in the interest of the court. It is, in fact, required for the benefit of the parties, and is more directly or especially for the interest of the prevailing party, who is the one usually requesting the service. He is primarily liable to pay for such service, and we are therefore constrained to hold that the appellant was entitled to payment, in advance, of the fees demanded by him for journalizing the decree in question; and the order of the district court requiring him to enter it in the court journal without such payment should be reversed.

The foregoing discussion applies with full force to the question involved in the *Taminosien* case, No. 15,643, and the order therein should also be reversed.

It is urged by counsel for appellees that permitting the clerk to refuse to perform the services required of him by law, unless his fees therefor are paid in advance, will result in much delay and confusion, will deprive the court of the power to conduct its business in an orderly and dignified manner, and will result in some cases in a denial of justice. We think these objections are without substantial merit. It is clearly within the power of the court to require the plaintiff in a civil action be-

fore commencing his suit to make a deposit of a reasonable and substantial sum of money with the clerk, sufficient, at least, to insure the payment of the fees for which he may be primarily liable. It is also true that the clerk, in the absence of such rule, may require a party for whom he may be requested to perform services to pay the fees therefor in advance or secure their payment. It is a well-known rule of our federal courts to require the plaintiff at the commencement of his action to make a substantial deposit to secure the payment of his costs, and upon the appearance of a defendant he is also required to advance a sum sufficient to cover the costs which it is estimated will be incurred by him during the progress of the litigation; and this rule is strictly enforced. No complaint appears to have ever been made of the rule, and it has never been suggested that its enforcement has in any way delayed, hindered or impeded the administration of justice. It would seem to be the duty of our district courts to protect their officers, and assist them in collecting or securing the collection of their fees; and it may not be out of place for us to suggest that it would be for the best interests of all concerned for those courts to adopt a rule requiring the plaintiff in all civil cases, at the commencement of his action, to deposit with the clerk a sufficient sum of money to secure the payment of his costs therein. In answer to the contention that such a course might, in certain cases, amount to a denial of justice, it may be suggested that in case a litigant should be unable to pay or secure the payment of his costs in advance, or make such a deposit on account of poverty, or other reasonable cause, he should be held to be within an exception to such rule. In any event, however, it is our opinion that the district court is not authorized to compel the clerk to perform services for which he is entitled to charge and collect his fees in advance, and for which he must account to the county, without such fees are thus paid or their payment is secured.

For the foregoing reasons, the order of the district court in No. 15,640 is affirmed; and the orders of said court in Nos. 15,641, 15,642 and 15,643 are reversed and said causes are remanded for further proceedings in accordance with this opinion. A judgment in each of the several cases is rendered accordingly.

JUDGMENT ACCORDINGLY.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V. CITY OF LINCOLN, APPELLEE.*

FILED JUNE 26, 1908. No. 15,586.

1. **Telegraphs and Telephones: FRANCHISES.** The franchise or right to occupy the streets of a city by a telephone company is not identical with the business or occupation of the company.
2. **Double Taxation.** An occupation tax measured by a percentage of the gross earnings of a telephone company, whose franchise is also taxed in connection with its tangible property according to its value as a going concern, does not tax the same property twice.
3. **Telegraphs and Telephones: OCCUPATION TAX.** The provision for an annual payment of $500 to the city of Lincoln in the respective franchise ordinances of two telephone companies "in consideration of the rights and privileges granted" is a sum exacted by the city for the privilege of using the streets under its proprietorship of the streets, and, while termed a "privilege tax," is in the nature of a rental charge or compensation for the use of the streets.
4. ———: ———. The exaction of a percentage of the gross earnings of its business in the ordinance granting a franchise to the Western Union Independent Telephone Company is an exercise of the taxing power of the city, and is a tax upon the business or occupation of conducting a telephone business within the city.
5. ———: ———: REPEAL. Such provision is also legislative in its character, and subject to repeal.
6. **Taxation: UNIFORMITY.** A provision in an ordinance imposing an occupation tax that "the sum and amount of the occupation tax

* Rehearing denied. See opinion, 84 Neb. ——.

or taxes on the gross receipts required to be paid under existing ordinances" may be deducted from the amount of the tax is not void because not uniform as to persons or property, since by its operation all persons engaged in the same occupation are taxed upon the same basis and in the same manner.

7. Telegraphs and Telephones: OCCUPATION TAX. Under its charter, the city of Lincoln may lawfully enact an ordinance imposing upon telephone companies a business or occupation tax measured by the gross receipts within the city, and the fact that tolls and rentals collected within the city are in part for messages over lines lying in part beyond the city limits does not invalidate the tax. *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692.

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

H. F. Rose and *W. W. Morsman*, for appellant.

John M. Stewart and *T. F. A. Williams, contra.*

LETTON, J.

The Nebraska Telephone Company is a corporation operating a telephone system in the city of Lincoln with local and long-distance connections. In 1885 it obtained a franchise to transact business within the city. No provision was made in the ordinance for the payment of any consideration for the privilege. In 1894 an ordinance was passed giving it the right for a term of 50 years to construct and maintain subsurface conduits for carrying its wires and cables under ground. This ordinance provided for the payment of $500 annually to the city "as a privilege tax" in consideration of the rights and privileges thereby granted. In 1903 the city granted to the Western Union Independent Telephone Company a like franchise to operate a telephone system. This ordinance provided that the grantee should pay the city $500 annually "in accordance with the terms and conditions of the existing ordinances fixing the occupation tax upon telephone companies." The grantee was also required to

pay a further sum annually equal to 1 per cent. of its gross earnings during the first term of five years after the commencement of its business, and 2 per cent. for the next five years, and 3 per cent. annually thereafter during the term of the grant, which was for 50 years. The grantee transferred its rights under this ordinance to the Lincoln Telephone Company, which constructed and has operated a telephone system in Lincoln for several years. In 1907 ordinance No. 448 was passed, providing that all telephone companies doing business in the city should pay an occupation tax "equal to 2 per cent. of the gross receipts of such companies from exchange rentals and tolls taken within the city, not including any interstate service or services for the United States government"; and, after providing for penalties for delinquencies and for the filing of proper statements, the ordinance further provided that in the payment of said occupation tax any such company shall have the right to deduct therefrom "the sum and amount of the occupation tax or taxes on the gross receipts required to be paid by such company or companies to the city of Lincoln under existing ordinances." The Nebraska Telephone Company began this action, praying that the latter ordinance be declared void, and praying for an injunction to restrain the city of Lincoln from attempting to enforce the same or collect the tax imposed thereby. As grounds for the action, it alleged in the petition that the two telephone companies named are the only companies doing business in said city and that there is no probability there will ever be more; that the ordinance was framed and passed with reference to these companies; that there was not at that time any ordinance imposing any occupation tax or taxes on the gross receipts of telephone companies or any other ordinance imposing obligations upon such companies, except those named, and that the purpose and object of the provision permitting the companies to deduct from the amount of the tax "the sum and amount of the occupation tax or taxes on the gross

receipts required to be paid by such companies to the city of Lincoln under existing ordinances" was to permit each company to deduct the sum which they had severally agreed to pay by the respective franchise ordinances, and was a device, under the pretense of taxation, to impose an unequal burden on the plaintiff by permitting the Lincoln Telephone Company to subtract payments made in performance of its contractual obligations from the amount of the occupation tax ostensibly imposed upon it by the ordinance. The plaintiff alleges, further, that the tax imposed by the ordinance is not uniform in its operation and imposes unequal taxation, and is in violation of the charter of the city, the constitution of Nebraska and of the United States.

The city answered, admitting the passage of the ordinance, but denying the other facts alleged, and praying for an accounting of the amount of taxes due under the ordinance from the plaintiff, and a decree for their payment. The district court found the ordinance to be legal and valid, refused an injunction, and ordered the plaintiff to file a statement and pay the tax as required by the ordinance. From this judgment the Nebraska Telephone Company has appealed.

1. The plaintiff first contends that the ordinance creating the occupation tax is void because it imposes double taxation upon it by taxing the same thing for the same purpose twice, but under different names. The argument is that, because under the law in this state with reference to taxation of public service corporations their tangible property and their franchises, including all intangible rights and interests, are to be taken together, and the value of the whole be taken as a going concern, the right or privilege of doing business or carrying on the occupation is therefore taxed, and cannot be again taxed by virtue of an impost laid upon the right to carry on the occupation within the city; citing *Western Union Telegraph Co. v. City of Omaha*, 73 Neb. 527; *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405; *State v. Savage*,

65 Neb. 714. The plaintiff in its brief says: "We fully concede that the fact that the property employed in a business is taxed as property and *ad valorem* is no objection to a separate tax upon the business in which the property is employed; provided, the business or occupation has not in fact been, or is not required by the law to be, taxed in taxing the property and franchises 'by valuation.'" So that the whole argument of the plaintiff on this point is based upon the proposition that the franchise and the business or occupation of the telephone company are identical.

But there is a distinction between the right or privilege to transact or carry on business within the corporate limits of a city and the actual operation of the business itself. It is the franchise, the grant of the right to do business, which must be taxed according to value, the same as other property. It is property and is susceptible of valuation. It is well known that the right to occupy the streets of a city by a corporation, either for gas, water, lighting, street railway, telegraph or telephone purposes, often constitutes an exceedingly valuable property, even before the construction of the operating plant or the doing of any business whatsoever. Such unavailed of franchises, as a matter of common knowledge, have in some instances been valued and sold at many thousands of dollars before one cent has been realized from the enterprise. On the other hand, the corporation owning a franchise and carrying on a business might be conducting its operations at an actual loss, its earnings being insufficient to pay running expenses, with no better prospects in the future, and, therefore, its franchise of little or no value, while its gross earnings might amount to a large sum of money; yet a tax upon the business, measured by the gross earnings, would be upheld as a business tax. A business tax measured by gross earnings is a tax upon the business which is actually performed, and is not a tax upon property in any sense, while a tax levied by valuation on the right to do business is a tax

upon property, irrespective of whether or not any business or occupation has been actually carried on. It seems clear that a property tax based upon the value of the franchise and a business or occupation tax based upon the gross earnings of a public service corporation are in nowise identical as to the subject of taxation, and do not constitute double taxation in any sense. On the contrary, it requires no argument to show that the exaction of a heavy business tax upon the gross revenues of a corporation would inevitably have the effect to lower the value of a franchise and to reduce its assessed value for the purpose of taxation as property. *People v. New York State Board*, 199 U. S. 48; *Wiggins v. City of Chicago*, 68 Ill. 372; *Goldsmith v. Mayor and Aldermen*, 120 Ala. 182; *City of St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558; *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572; *Producers Oil Co. v. Stephens*, 44 Tex. Civ. App. 327, 99 S. W. 157; *State v. Galveston, H. & S. A. R. Co.*, 100 Tex. 153, 97 S. W. 71; *Browne v. City of Mobile*, 122 Ala. 159; *South Covington & C. Street R. Co. v. Town of Bellevue*, 105 Ky. 283, 49 S. W. 23, 57 L. R. A. 50, and note. Gray, Limitations of Taxing Power and Public Indebtedness, sec. 1373. We think there is no merit in the plaintiff's contention.

2. The plaintiff next contends that the tax imposed is not equal and uniform, as required by the constitution of the state and by the charter of the city. The constitutional provision involved is contained in section 6, art. IX of the constitution, vesting municipal corporations with authority to assess and collect taxes, and providing that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The ordinances granting the franchise to the Nebraska Telephone Company (aside from the requirements of a $500 privilege tax) contain no provision for the payment of any portion of its gross earnings to the city, while the ordinance granting the franchise under which the Lincoln Telephone Company operates provides

for a payment annually of a portion of its gross earnings. The plaintiff's argument is that, though upon its face the taxing ordinance No. 448 seems to be uniform in respect to the telephone companies within the city, yet in reality it is a gross discrimination against it, for the reason that its effect is to deprive it of the advantage of its contract with the city; that by a contractual relation of the Lincoln Telephone Company it is compelled to pay the city a definite amount each year, and that by this ordinance it is allowed to deduct the amount of this contractual obligation from the tax, thus creating a gross lack of uniformity; that, since by virtue of its franchise obligation the Lincoln Telephone Company must for the greater portion of its franchise term pay 2 or 3 per cent. of its gross receipts to the city, if it is permitted to deduct these annual payments from the amount of the tax imposed by this ordinance, it will pay no occupation tax whatever, since the amount of its contract obligation will equal or exceed the tax. On the other hand, the city contends that the annual payments required to be made by the Lincoln Telephone Company by the terms of the franchise ordinance are in the nature of an occupation tax, and that the ordinance under consideration, instead of being subject to the objection of lack of uniformity, does, in fact, make that uniform which was not so before, since it requires each telephone company to pay an equal tax to the city upon the same occupation.

The difference seems to be in the view taken as to the obligations imposed upon the Lincoln Telephone Company by the franchise ordinance. If they are mere payments under contract in return for the privilege of using the streets, we would be inclined to hold with the plaintiff. To determine this question requires us to set out and examine the various provisions of the ordinances referred to bearing upon the payment of money to the city by each of these companies and by telephone companies generally. The ordinance granting the Nebraska Telephone Company

the right to lay underground conduits provides that, "in consideration of the rights and privileges granted to the Nebraska Telephone Company by this and prior ordinances, the said Nebraska Telephone Company shall, so long as it exercises such rights and privileges, pay into the city treasury of the city of Lincoln annually as a privilege tax the sum of $500, said sum to be paid on or before the first day of April in each year." The ordinance granting the franchise to the grantor of the Lincoln Telephone Company provides: "In consideration of the rights, privileges and franchise hereby granted, the Western Union Independent Telephone Company * * * shall pay into the city treasury of the city of Lincoln annually the sum of $500, said sum to be paid on or before the first day of April in each year * * * under and in accordance with the terms and provisions of the existing ordinance fixing an occupation tax upon telephone companies." The only "existing ordinance fixing an occupation tax upon telephone companies" was that granting the Nebraska Telephone Company the right to lay subsurface conduits, a portion of which is quoted. After this provision referring to the previously existing ordinance, it is provided: "And said Western Union Independent Telephone Company shall pay annually into the treasury of the city of Lincoln on the first day of April in each year a per cent. of its gross annual earnings from its plant in the city of Lincoln, as follows: One per cent. of its said gross earnings each year for the first five years, two per cent. of its said gross annual earnings each year for the next five years, and three per cent. of its gross annual earnings annually thereafter during the remaining period granted by this ordinance." The ordinance granting to the Nebraska Telephone Company the right to place subsurface conduits was the only prior ordinance which could be referred to, and the fact that the tax is named therein as a privilege tax," and not as "an occupation tax," as is stated in the later ordinance, does not, we think, change the legal effect or meaning of the latter. The $500 was

exacted each year from both companies in compensation for the privilege of using the streets. It is not, strictly speaking, an exercise of the taxing power, but is exacted by virtue of the right of proprietorship in the public streets possessed by the city, and, as provided in the first of these two ordinances, is to be paid "in consideration of the rights and privileges granted." The exaction is not a tax upon the property of the corporations nor upon their business, but is in the nature of a rental charge or recompense for the use of the streets. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92. In that case a charge of $5 per annum for each telegraph pole placed in the city of St. Louis was held to be of the nature of a rental charge, and not a tax, and was upheld as to the right of the city to impose a reasonable charge for such use.

The provision of the ordinance which follows requiring a percentage of the gross earnings of the company to be paid to the city is apparently an exercise of the taxing power pure and simple, and is clearly a business or occupation tax. No part of it became due or payable until the business of receiving and transmitting messages had actually been transacted. The $500 privilege tax is payable as long as the respective companies exercise the rights and privileges in the public streets granted to them by the ordinances, and not exceeding 50 years, while the tax upon the business does not begin to operate until business is transacted. The tax is similar in its operation to a tax upon the business of an auctioneer based upon his gross annual sales, or one estimated by the number of passengers carried by a street car company, or the number of messages delivered by a telegraph company. The privilege to use the streets might have been granted gratuitously or in return for a lump sum, or, possibly, it might have been sold to the highest bidder, but the exaction of a tax upon the business of the corporation stands upon the same footing as a tax upon other occupations. It was within the power of the city to impose the burden

upon the corporation in the same ordinance that granted the franchise, and, though ineffective as an occupation tax against other telephone companies, in all probability the grantee, having accepted the benefits of the ordinance, would be estopped to repudiate its burdens. But that company is not here complaining. There can be no doubt that the city has the power to repeal that portion of the ordinance imposing this obligation, and, if it had done so before it enacted ordinance No. 448, no objections on the score of lack of uniformity could possibly arise. The fact that a contract was embraced in the ordinance does not make it any less legislative in character, nor less subject to repeal, so far as the imposition of the tax is concerned. *Des Moines Gas Co. v. City of Des Moines,* 44 Ia. 505; *New Orleans C. & L. R. Co. v. City of New Orleans,* 143 U. S. 192; *Stanislaus County v. San Joaquin & K. R. C. & I. Co.,* 192 U. S. 201.

Moreover, the Nebraska Telephone Company accepted its franchise subject to the exercise of the taxing power of the city, which was liable to be used at any time. It has no standing in court to complain of the fact that an occupation tax is imposed upon it. It has always been subject to this contingency. Neither has it any right to object to the repeal of an ordinance imposing a tax upon its rival and competitor, or to the enactment of one that may have the same effect, even though the result may be to equalize the burdens of taxation, and thus deprive it of an advantage it possessed over the competing company. The fact that in these ordinances the payments are variously denominated privilege tax or occupation tax does not change their nature, nor does the fact that the payment required by the franchise ordinance is not dignified with any title whatever change its character. The tax upon gross receipts imposed upon the Lincoln Telephone Company is nothing more or less than a tax upon the business transacted by the company, although it is embraced within the terms of an ordinance which grants a franchise. The exaction is one made under the taxing

power of the city for revenue purposes, and not under the proprietary interest in the streets, and this fact in nowise interferes with the power of the city to impose an equal tax upon the Nebraska Telephone Company. The purpose of the present ordinance is to impose a uniform business or occupation tax upon both telephone companies, and, while a better or less cumbersome method might have been chosen to effectuate the purpose, the law will look to the substance of things rather than to their appearance.

It is probable that the tax may also be upheld upon the principle of classification. We see no reason why telephone companies may not be placed in classes depending upon whether they are required by the term of their franchise to pay a percentage of their gross receipts to the city or not, and requiring a lesser payment from those in the former class than from those in the latter. In the New York franchise tax law such a distinction is made, and those corporations which are required to pay any amount for a special franchise to a municipality are allowed to deduct that amount from the franchise tax levied by the state. These provisions were upheld both by the court of appeals of New York and by the supreme court of the United States (*People v. New York State Board,* 174 N. Y. 417; 199 U. S. 1); both courts holding that they did not deny the holders of some franchises the equal protection of the law or deprive them of their property without due process of law. These are not the specific objections made in this case, but the rulings are worthy of mention, and the opinions are enlightening.

3. The plaintiff's last contention is that this is an occupation tax upon business conducted beyond the corporate limits of the city, and that the city has no power to levy an occupation tax upon a business partially conducted beyond its corporate limits. The tax provided for by the ordinance is "the sum and amount of two per cent. of the gross receipts resulting from rentals and tolls of such company or companies on the business of such company or companies in the city of Lincoln, including the

rental charges resulting from business in the city of Lincoln, and all toll service and charges resulting from toll service from persons within this city to persons within this state, and all toll service paid at the office of any such company or companies in the city of Lincoln for toll service between the persons within this state and persons within this city. There shall be excepted from the provisions of this ordinance all toll service between persons in this city and persons outside of this state and all toll service interstate, and all interstate business and all toll service or rental charges on account of the United States government service or any of its departments, or state service or any of its departments, and no part or portion of the tax provided for in this ordinance shall be levied upon or assessed against or taken from any such business so excepted from the provisions hereof."

The plaintiff argues that in the transmission of messages from the city of Lincoln to points outside of the city a portion of the business transacted must necessarily be beyond the limits of the city, and that the city, therefore, has no power to tax the same, relying upon certain language in the opinion in the case of *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692, and on the dissenting opinion of IRVINE, C., in that case. Whatever language might have been used in the argument in the opinion in that case, the law is squarely laid down by the decision that the license tax imposed upon the telegraph company is not invalidated by the fact that the telegrams received and delivered within the city were transmitted over the lines of the telegraph company from other points within the state, or that the messages received by it at its office or place of business in the city were transmitted to various other places in the state. It may be observed in this connection that the tax is not a tax upon the gross receipts, but it is a tax upon the occupation or business, the volume of which is measured by the gross amount of money received in the city of Lincoln for all business transacted, except United States,

state and interstate. The principles involved are discussed in the City of *Sacramento v. California Stage Co.*, 12 Cal. 134; *City of Los Angeles v. Southern P. R. Co.*, 61 Cal. 59. Moreover, the argument of the plaintiff carried to its ultimate conclusion would result in making it impossible to collect any occupation tax whatever based upon the receipts of telephone companies engaged in long distance business within the limits of the state. To illustrate, if the city of Lincoln may not base an occupation tax upon the receipts in this city of tolls paid for the use of the telephone company's instruments and wires from Lincoln to Omaha, on account of a portion of the business being transacted without the limits of the city, neither could the city of Omaha collect or impose such a tax upon the same messages for the same reason, and so with every other connection over long distance lines radiating from the city in every direction. It would be equally impossible to impose or collect such a tax upon the receipts from rural telephones, whose principal value depends upon their connection with the city exchange. It is evident that a large portion of the business of the telephone companies in the city is concerned with the transmission of long-distance messages and the collection of the tolls therefor, and the switchboard connections furnished rural subscribers and the collection of the rentals for their connection with the exchange. Since the volume of the business transacted in Lincoln is increased by the rural and long-distance lines, we see no reason why the amount of the occupation tax should not be increased in proportion to such volume, as measured and ascertained by a percentage of the gross receipts. There is no levy on the receipts themselves, but they are considered merely as a means of ascertaining the volume of the business transacted. Such a tax has been supported in *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692; *State v. Hayne*, 4 S. Car. 403; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572; *Horn Silver Mining Co. v. People*, 143 U. S. 305.

In conclusion, the new ordinance deprives the plaintiff of none of its rights under its grant. It neither takes away nor changes any part of its several franchises. It is true it imposes a tax upon its business, but it does the same upon all other telephone companies. The provision for deduction is of the amount of a like imposition, and is made to secure uniformity and equality of burden, which is what just taxation requires.

We conclude, therefore, that the judgment of the district court was correct, and the same is

AFFIRMED.

RICHARD B. HOWELL, APPELLEE, V. GEORGE L. SHELDON, GOVERNOR, ET AL., APPELLANTS.

FILED JUNE 26, 1908. No. 15,619.

Soldiers' Homes: GOVERNMENT. Under the statute providing that the "Soldiers and Sailors Home shall be under the charge of the board of public lands and buildings"; that such board "shall adopt such regulations as they may deem expedient for the proper management of said home, and the said board may change such regulations from time to time as they may deem best"; that the management of the home shall be vested in said board, and that "they shall prescribe rules of admission to said home in accordance with the provisions and objects of this act," the enactment of a rule which requires all present or future members of the home who receive pensions in excess of $12 a month to pay a percentage of the pension money for the benefit of the home is within the discretionary power of the board in the management of the institution, and is not such an abuse of official discretion as would warrant a court in interfering with the legally constituted authorities in charge of the home.

APPEAL from the district court for Hall county: JAMES R. HANNA and JAMES N. PAUL, JUDGES. *Reversed.*

William T. Thompson, Attorney General, and *William B. Rose,* for appellants.

W. H. Thompson and *O. A. Abbott, Sr., contra.*

LETTON, J.

The plaintiff is an inmate of the Nebraska Soldiers and Sailors Home, situated at Grand Island, and brings this action for himself and all others similarly situated. He alleges: That he was duly admitted to the home, and has complied with all the rules and regulations of the board of public lands and buildings of the state and the orders of the commandant, except certain ones which are complained of; that he is entitled to a pension at the rate of $20 a month from the United States government; that the board of public lands and buildings has adopted the following rule: "All who are members of the home at the time of adoption of these rules or who may hereafter become such, who are receiving or who may hereafter receive a pension in excess of $12 a month and not more than $19 a month, shall pay into the cash fund of the home 10 per cent. of the amount. Those receiving or who may hereafter receive $20 and not more than $23 shall pay into the cash fund of the home 20 per cent. Those who are receiving or who may hereafter receive $24 and not more than $29 a month, 30 per cent. In case where any member is receiving $30 or more he shall pay such amount as the commandant and the board may deem just. Provided, further, that where a man on application is helpless or afterwards becomes helpless so that he requires consideration and special attention, he shall be required to pay any portion that the commandant and the board may deem equitable, except in case of dependent wife and children." He complains that the rule and order is unconstitutional and void, and seeks to deprive him of his property without due process of law, and takes property without compensation for public use; that under said rule the commandant has taken from him 20 per cent. of the said $60, and has threatened to oust him from the institution unless he pays the same; that the cash fund mentioned in the order belongs to the state of Nebraska, and that if the money is paid by him it will immediately be placed in said fund

and converted to the use of the state; that the payment of the amount required was not a condition of his right to enter the institution, and could not legally have been made such condition. He prays for an injunction to restrain the enforcement of said rule, and that the board be restrained from promulgating any rule or order interfering with the pensions of the inmates or compelling the payment of any money into the treasury of the state or the home by the inmates, and that the rule may be declared unconstitutional, null and void. A demurrer was filed to this petition, which was overruled. The defendants electing to stand upon the demurrer, the district court found that the facts contained in the petition were true, and rendered a judgment perpetually enjoining the defendants from enforcing rule 17 or any other like rule.

The act establishing a Soldiers and Sailors Home in Grand Island was passed in 1887. Since its enactment the act has been amended no less than six times. The amendments, however, with one exception, are not material in determining the question under consideration. This amendment, made in 1891, provides that "nothing in this act shall be construed to deny any old soldier or sailor, who is properly a subject to be admitted to the home, the privilege of paying his board or any part thereof if he so desires." Laws 1891, ch. 49, sec. 7. The law as it now stands with reference to the management and control of the soldiers home and the admittance and support of inmates is as follows: "Section 4. That such Soldiers and Sailors Home shall be under the charge of the board of public lands and buildings, and the governor shall appoint for said home such officers as may be required in said home. It is further provided that the board of public lands and buildings shall adopt such regulations as they may deem expedient for the proper management of said home, and the said board may change such regulations from time to time as they may deem best, and they shall make such publications of these regulations as they deem necessary for the information of those interested.

"Section 5. The management of the home shall be vested in the board of public lands and buildings, said board shall * * * make such rules and regulations as are prescribed by section 4 of this act. They shall prescribe rules of admission to said home in accordance with the provisions and objects of this act. * * * They shall assign tracts of land and cottages to such of the inmates as may be able to partially support themselves by manual labor.

"Section 6. That all laws, rules and regulations as enacted and passed by the board of public lands and buildings for the control and government of the officers, employees and inmates of the institution shall be approved by the governor." Comp. St. 1907, ch. 82*a*.

There is no provision in the statute governing or controlling in any manner the disposition of pension money received by or due to the inmates of the institution, and it is insisted by the plaintiffs that, since there is no express provision of the statute conferring the power upon the board of public lands to make a rule requiring the application of a portion of the pension money of the inmates to support the institution, the board is entirely without authority to establish rule 17 or any other rule of like nature or effect. It is apparent from the general power conferred by the statute upon the board that it has the authority to establish such rules and regulations with reference to the conduct of the affairs of the home as are reasonable when considered in connection with the object and purposes of the institution, and which are not inconsistent with the law establishing the same. The question presented then is whether the rule in question is such a gross abuse of the discretion reposed by the legislature in the board that it cannot be upheld as a reasonable exercise of the governing and administrative power. Similar questions have arisen in other states which have established like institutions. The decisions of the courts thereon will be considered later in this opinion, but it may be of some value in determining whether the rule is reasonable or

not to consider the manner of treating pensions belonging to the inmates of the national soldiers homes and of the soldiers homes maintained by other states by the authorities of such institutions and by the several legislatures. In determining a question of this nature, we believe we are entitled to take judicial notice of a fact of such public notoriety as the establishment of similar homes by the United States and by other states, and of the authorized public reports of the United States and state officers charged with the administration and inspection of the same. From this source it appears that 27 states maintain such homes, and that in four states, aside from Nebraska, the inmates are required to pay a portion of their pension to a fund for the benefit of the home, or for hospital or other beneficent purposes connected with the institution. In two of these states there are express statutory provisions permitting the board of management to make it a condition of admission to the home that a specified portion of the pension money, if there are no persons dependent upon the inmate, shall be paid toward defraying the expenses of the institution; but in other states where the practice is followed no specific statute with reference to pensions has been enacted. In Illinois the statute provides that, when deemed necessary by the superintendent, the pensions shall be deposited and sent to the dependent relatives, or kept in trust for the pensioner at his discharge. In eight other states, by the rules of the board of management, the inmates are required to deposit their pensions with the officers of the home, who are empowered to hold the same in trust for the benefit of the pensioners or his dependent relatives, and to pay the same in accordance with varying rules; no part of the pension being taken for the support of the home. Under the provisions of the federal statutes with reference to soldiers homes, the pensions to be paid to the inmates are required to be paid to the treasurer of the home for the benefit of the pensioner, under rules and regulations established by the managers of the home. From an examination of the sev-

eral statutes, in connection with these facts, it appears that in many of the states having such homes it has been considered that the board of management, under its general powers for the care, control and discipline of the institution, has the right to make rules which take away from the inmate of the home the unrestricted use of pension money, and require its deposit by him to be controlled for his benefit, or for that of his dependent relatives, or which require the payment by him of a portion of the same to help defray the expense of the institution. While in a few states there are special statutory provisions regarding the control of pensions, in the main the statutes in nearly all the states seem to be of the same general tenor, largely omitting the minor details of rules and management, and leaving these to be determined upon by the Board to whose care the institution is committed. It may be said, however, that the tendency of the governing body in some of the states seems to be to control the expenditure of the pension for the sole benefit of the pensioner or his family, and to supply the support of the inmates from the funds of the state without requiring any contribution from him either as a condition of entrance or as an exaction after being admitted, and, under the acts of congress making appropriations to aid in the support of state soldiers homes, the practice of requiring the inmates to pay a part of their pensions for the support of the home is recognized and discouraged by providing that the appropriation to each state is to be reduced to an extent equal to one-half of the amount of the pension so retained.

We will now examine the opinions of those courts which have considered this subject. The board of management of the Michigan Soldiers Home adopted rules requiring every pensioner inmate to turn over to the commandant any sum in excess of $5 a month received in pensions, to be held subject to the disposal of the board, and providing that no applicant who receives over $12 a month pension shall be admitted to the home unless he needs hospital treatment. By a resolution of the board the money de-

posited was to be sent to the dependents of the pensioner, or kept on deposit to be paid to him upon his final discharge from the home. The court said, in an action to compel the abrogation of this rule: "A large discretion was by this act lodged in the board. * * * A very clear case of the abuse of this discretion must exist to entitle the courts to interfere. We think it is within the power of the board to require the pension money of the inmates to be deposited, if, in the words of the statute, they deem it necessary to preserve order, enforce discipline, or preserve the health of the inmates." The court vacated that portion of the rule which conferred upon the board the right to determine what relatives are dependent upon the pensioner for support, but held the other provisions were reasonable exercise of the power to make rules. *Loser v. Board,* 92 Mich. 633. In Iowa the board of managers of the soldiers home adopted a rule with reference to pensioners, which, among other things, provided that "any person entering the home having a pension exceeding $6 a month shall surrender all of said pension in excess of $6 a month to the commandant, and, if the person so surrendering his pension has dependent relatives, the money so surrendered shall be paid to said relatives by the commandant, and, in case such persons shall have no dependent relatives, the excess of his pension over $6 a month shall be credited to the contingent fund." It was complained that the rules were unauthorized. The statute of Iowa provided that the board should determine the eligibility of applicants for admission to the home, and should have power to make rules and regulations for its management and government. The court said, in substance, that courts should not interfere with the action of the board unless it is plainly manifest that the board has abused the discretion with which it is vested; and further said: "The support offered by the state, and given at the home, is a gratuity, and not based upon any legal duty or contractual relations between the state, on the one hand, and the inmates of this home, on the other; hence, it fol-

lows that the power which confers the benefaction may, by itself or its agents, determine what the benefaction shall be, and the circumstances which must exist in order to entitle one to share the state's bounty. It has said that if you enter the home, and if you have an income, from pension or otherwise, which will in part support you, you shall agree to and shall contribute from it towards your support. This deprives the soldier of no rights. When he makes his application for admission to the home, he knows what the rules require. He then understands the conditions under which he may be a sharer in the bounty of the state. The support in the home being a gift upon the part of the state, it or its agents may make the enjoyment of the benefaction dependent upon any reasonable conditions. No one is compelled to accept the conditions and become an inmate of the home. One may decline and remain outside. If, however, he sees fit, after knowing of the conditions and agreeing to them, to become an inmate of the home, he is in duty bound to obey the rules; and, if he fails or refuses so to do, he is in no situation to complain if he be honorably discharged from the home." *Ball v. Evans,* 98 Ia. 708. It was said upon the argument of the instant case that at the next session of the Iowa legislature following this decision the power to take a portion of the pension to aid in defraying the expenses of the home was taken away from the board; but this, if it proves anything, merely goes to show that legislative action was necessary to change the previous law. A few years later, in the case of *Brooks v. Hastings,* 192 Pa. St. 378, the supreme court of that state held that, under a statute giving the board power to adopt rules and regulations for the management, government and admission of soldiers to the soldiers home of that state, the board is authorized to make it a condition of admission that the applicant shall pay a part of his pension to the home, and that the rule did not contravene the constitutional prohibitions against taking the property of citizens without due process of law, and without just compensation. The action

was to recover money already paid, and to enjoin the defendants from discharging the inmate from the home for refusing to make further payments. The court was of the opinion that the rule was not unreasonable in any degree, and said: "If there were no power able to contract with applicants who draw pensions as to the surrender of some portion of their pensions to the support of the homes, it would follow that such applicants could get all the support of the homes, and keep the whole of their pensions also, a result which does not seem fair either to the state or the taxpayers who provide the means for supporting the homes. The contention that the requirement in question is contrary to that provision of the state and federal constitutions which prohibits the taking of property of the citizen without due process of law, and without making just compensation, has no application. This is not the taking of property in any conceivable sense. It is the creation of a condition upon which charitable support may be obtained under a contract which is voluntarily made, providing for the contribution of something toward the maintenance of the institution which furnishes the support. The applicant is under no obligation to make such a contract, but, if he does make it and gets the benefit, he must take it as it is given, and keep his contract like all other good citizens are obliged to do."

It is insisted, however, that, because the Nebraska statute provides that nothing in the act shall prevent any soldier from paying his board or any part thereof if he so desires, this must be taken as indicating that the legislature intended that no money should be taken from an inmate for his support unless voluntarily given; but this we think does not follow. There may be old soldiers or sailors who are not "dependent upon public or private charities" who desire to be admitted to the home for the advantages of companionship and comfort thereby provided, and who from laudable motives are unwilling to accept as a free gift the bounty of the state, having suffi-

cient property or means to support themselves. Apparently it was to provide for such cases that this amendment was adopted. A strict construction of the requirements as to being dependent upon charity might exclude many an old soldier who would much rather support himself than be dependent upon the public, and who might scruple to accept the benefits of the home unless he could in some part defray its expenses.

It is also contended that the rule of uniformity in taxation is violated by the order. We think there is no question of taxation involved. The plaintiff does not allege that he is a taxpayer, and the detailed and specific allegations in the petition of his inability to support himself and of his dependency upon public or private charity of themselves are enough to negative such an assumption, even if we were justified in making it.

It is argued that the payment of a portion of a pension to help support the home cannot be made a condition of the right to enter; that the requirements for admission are fixed by the statute, and cannot be changed by the board. It is true that the county board must ascertain and report their finding to the managing board as to certain facts as to residence, disability and dependency, but this finding alone does not confer the right of admission. The statute is that the board "shall prescribe rules of admission to said home in accordance with the provisions and object of this act." The rule complained of is made under the power thus granted, and the reasoning of the opinions quoted as to the right to impose conditions upon the right to enter is fully applicable.

The question is asked: Why draw the line at $12 a month? Is there such a difference between the conditions of the pensioner drawing $12 a month and the one drawing $13 that one may reasonably be required to contribute to his own support and the other be relieved from that burden? But this query might equally well be directed to all cases of classification by numbers, and yet they are

generally upheld. The distinction must necessarily be more or less arbitrary, but it increases in degree as we recede from the meeting point. A city of 9,999 inhabitants differs infinitesimally in conditions from one of 10,000, yet a different rule may be applied in its government, and so in other matters the difference of a day in the age of a boy or a girl may make changes in their legal rights and duties of vast importance, and yet the line established is an arbitrary one. The general principle is plain that a pensioner receiving more than $12 a month is better able to contribute to his own support than one receiving that sum only, and in a greater ratio as his pension exceeds that sum, which seems to be taken as the amount of a reasonable expenditure for such luxuries and relaxations as each inmate may consider best adapted to promote his comfort and happiness.

Upon the whole matter, we hold the same views as to the relation between the inmates of the home and the state as expressed by the courts in the cited cases. While we are of the opinion that the enactment of the rule was not such an abuse of discretion as to make it beyond the power of the board to enact, whether or not it is expedient is a matter as to which we express no opinion. The body to whom the law has committed the management of the institution is presumably much better qualified to determine this than the court is, even though it had the right to do so, which it has not. If the legislature believes the rule to be harsh, unnecessary or inexpedient, it can limit the power of the board as to the right to require the payment of any part of the pensions of the inmates for the support of the institution, and thus conform the rule in this state to that in the majority of those states maintaining like institutions.

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

REVERSED.

REEVES & COMPANY, APPELLANT, V. J. HARPER DEETS ET AL., APPELLEES.

FILED JUNE 26, 1908. No. 15,221.

Notes: DEFENSES. In a suit on the promissory notes of the defendants, the defense was made that the notes were given for machinery sold under a warranty that had failed, and that a controversy thereon arose, in settlement of which the defendants agreed to pay certain of the notes, and the plaintiff agreed to repair the machinery and make it conform to the warranty. When the plaintiff offered to repair the machinery, defendants refused the offer on the ground that the repairs proposed would be ineffectual, but on the trial they were allowed to show as a reason for refusing the repairs that the offer came too late in the season. *Held*, That the court erred in allowing the defendants to show another and a different reason for refusing repairs than that made to the plaintiff when the offer to repair was made and before suit was commenced.

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

Warren Pratt, for appellant.

C. A. Robinson, contra.

DUFFIE, C.

The action is replevin to recover possession of an alfalfa huller, a feeder and a wind-stacker sold by plaintiff to the defendants, who executed a mortgage thereon to secure the notes given for the purchase price. The jury returned a verdict for the defendants, upon which the court entered judgment, and the plaintiff has appealed.

The answer of the defendants was a general denial, but their real defense to the action was the alleged failure of the huller to properly do the work for which it was intended. The contract of sale was in writing, and contained a warranty that the machinery was well made, of good material, and that with proper use and manage-

ment would do as good work as any other machine of the same size manufactured for a like purpose. This warranty was hedged about with conditions and limitations relating to giving notice, the time and manner in which notice should be given, and many other matters which if strictly observed would render it of little use to the purchaser. The contract, however, is one which the parties voluntarily made, and the court had no discretion but to enforce it. This was evidently the view taken by the trial court, as in his fifth instruction he told the jury that the contract of sale and the warranty therein contained was binding on the parties to the suit, unless they believed from the evidence that, after making said contract, a new or different or modified contract was entered into, in which case the right of the parties must be determined from the terms of the new contract. The only evidence upon which this instruction could be based was the testimony of one of the defendants to the effect that in the fall of 1904, and after complaint had been made by the defendants of the working of the machinery, they had agreed with one of defendants' agents to pay such of their notes as matured during the year 1904, in consideration of which the plaintiff agreed to remedy the defects in the machine and to place the same in good order.

We presume that had a controversy existed between the two parties relating to the failure of the machine to meet the warranty made by the plaintiff (which does not clearly appear), and that on account of such controversy defendants refused to pay the notes maturing during the year 1904, and for the purpose of inducing them to make payment of such notes plaintiff agreed to put the machine in good order, such settlement of the controversy would be a sufficient consideration for a new contract between the parties, or a modification of the terms of the original contract. We must say, however, that the testimony offered in support of this contention, while it may have been sufficient to submit to the jury, is, in our judgment, very slight upon which to base a verdict. But, assuming

that such new contract was made and that there was a sufficient consideration to support it, the evidence is clear, coming from the defendants themselves, that, when plaintiff offered to repair the machine, defendants refused and would not allow the repairs to be made.

It is now insisted that the threshing season of 1905 was nearly over when plaintiff offered to repair the machine, and that the offer to repair came too late. This was not the reason advanced by the defendants at the time; their objection then being that the repairs proposed were not of a kind that would remedy the defects complained of. The defendants cannot, after litigation has commenced, advance another and different reason for their refusal to allow the repairs which plaintiff offered to be made. They cannot thus mend their hold. *Ballou v. Sherwood*, 32 Neb. 666. For this reason, we think the court erred in submitting to the jury the question whether a new or modified contract had been made between the parties and whether the plaintiff had refused to fulfil the new agreement.

We recommend a reversal of the judgment and remanding the cause for further proceedings according to law.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

THOMAS CLARKE ET AL., APPELLANTS, V. SISTERS OF SOCIETY OF THE HOLY CHILD JESUS ET AL., APPELLEES.

FILED JUNE 26, 1908. No. 15,635.

1. **Trusts:** CONVEYANCE: CONSTRUCTION. It is a general rule that, where property is conveyed directly to a corporation to hold for use in the purpose for which the corporation was created, no trust for the benefit of others arises, even though the conveyance

contains a condition directing the use of the property in a certain manner from which third parties may be benefited. One cannot be a trustee of property and a beneficiary at the same time.

2. Deeds: CONSTRUCTION: REVERSION. F. conveyed certain real property to one of the defendants, a religious society incorporated for the purpose of establishing and conducting a convent school. The deed contained a condition "that the grantee herein hereby agrees to teach the parochial school children (whose parents are known to be unable to pay) free of charge." There was a further condition that in case of failure to teach the children above referred to free of charge, or to use the property for convent school purposes, or in case the property should be diverted to any other use, then the property should revert to and be the property of the grantor, if living, and, if dead, to his heirs. *Held*, That said conveyance did not create a trust for the benefit of third parties, but was a gift of the property to the corporation for use in the purposes for which it was created upon conditions subsequent, and that upon the abandonment of the property by the grantee it reverted to the heirs of F.; he having died in the meantime.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Morning & Ledwith, for appellants.

T. J. Doyle and *G. L. De Lacy, contra.*

DUFFIE, C.

This case was submitted to the district court on an agreed statement of facts. Judgment went in favor of the defendants, and the plaintiffs have taken an appeal to this court.

The facts appearing from the stipulation are as follows: November 29, 1884, John Fitzgerald conveyed to the Sisters of the Society of the Holy Child Jesus, a Nebraska corporation, a block of land located at Fourteenth and U streets, in the city of Lincoln. The granting part of the deed is in the following language: "Know all men by these presents, that John Fitzgerald and Mary Fitzgerald, his wife, of the county of Lancaster, and state

of Nebraska, for and in consideration of the establishment and maintenance of a convent school on the property herein, do hereby grant, bargain, sell, convey and confirm unto the Sisters of the Society of the Holy Child Jesus, of the county of Lancaster, and state of Nebraska, the following described real estate situated in Lincoln, in Lancaster county, and state of Nebraska, to wit." Here follows a description of the land conveyed. The deed contains the following condition: "One of the conditions upon which this property is conveyed is that the grantee herein hereby agrees to teach the parochial school children (whose parents are known to be unable to pay) free of charge, and if the grantee herein should fail to use the said property for convent school purposes, or refuse to teach the parochial school children as agreed above, or shall divert said property to any other use, then the said property herein conveyed shall revert to and be the property of the grantor, if living, and, if dead, to his heirs." The grantee established a convent school upon the premises and maintained the same until June, 1907. In October, 1907, the grantee abandoned the property and declined to maintain a school upon the same in the future. The grantor, John Fitzgerald, departed this life intestate in 1894. The defendants, other than the grantee named in said deed, are heirs of the deceased, and they reentered the property soon after the same was abandoned by the grantee. November 8, 1907, the grantee conveyed the premises to the heirs of John Fitzgerald, deceased; said deed reciting the permanent abandonment of the property. After the establishment of the convent school on the property in dispute, another society, the Sisters of Charity, established a parochial school at Thirteenth and M streets, in the city of Lincoln, known as "St. Theresa's Parochial School." The establishment of the last named school removed the necessity for the education of the poor in the convent school free of charge; such children being taken care of by St. Theresa's Parochial School. Under these circumstances, Fitzgerald and his grantee entered

into a contract in June, 1888, modifying the terms of the deed by which the premises were conveyed to the Sisters of the Society of the Holy Child Jesus. By this last contract the clause in the deed, by which the grantee agreed to teach the parochial children whose parents were known to be unable to pay free of charge, was changed so that it was relieved of that duty; the contract reciting the following: "The grantee herein and hereby agrees to teach the parochial school children whose parents are unable to pay in St. Theresa's Parochial School upon the usual terms." The contract provided for a further modification of the deed as follows: "If the property described in said deed shall ever, in the judgment of the grantors or grantees, become inadequate or unsuited for the purposes for which the said property is deeded, then the grantees shall have power and authority to sell, pass title and execute deeds of conveyance thereto, upon condition, however, that the proceeds arising from said sale shall be reinvested in other property, which shall be used for the purposes known in said deed of conveyance. The said deed as thus modified shall be and remain in full force as though these changes had never been made." On the abandonment of the property by the Sisters, and after reentry by the heirs of John Fitzgerald, the heirs instituted partition proceedings, which resulted in a judgment of partition and an order for the sale of the property. On the day of the sale, on January, 1908, the plaintiffs instituted this action for themselves, and others similiarly situated, insisting that the conveyance by Fitzgerald and the conditions contained in the deed providing for the teaching of poor catholic children without charge was a conveyance in trust for the perpetual benefit of all parents of the catholic faith having children of school age.

The petition alleges that plaintiffs belong to the class specified in the deed, and they pray a cancelation of the reconveyance by the grantee to the heirs of John Fitzgerald; that the sale be enjoined and a trustee appointed for the purpose, and with power under the direction and

supervision of the court to arrange for the permanent reopening and establishment of said convent school, and for the education or free instruction of the poor children of the city of Lincoln in harmony with the terms and conditions of the trust.

On the part of the plaintiffs, it is claimed: First, that the deed from Fitzgerald, together with the modifications thereafter made in its terms, created a charitable trust; second, that any person having children eligible to attend the schools is a beneficiary of the trust who may maintain an action for its enforcement; third, that the last-executed instrument, spoken of as the modification, giving the grantee in the deed power to sell and convey, destroyed the provision in the original deed providing for a reversion; and, finally, that a charitable trust will not be permitted to fail for want of a trustee, nor because of the failure or refusal of the trustee to carry out the object of the trust.

If we concede the first proposition, that the conveyance made by Fitzgerald created a charitable trust, the other contentions of the plaintiffs may be conceded. The material question for our consideration, therefore, arises upon the construction to be given the conditions in the deed. It will be borne in mind that the conveyance was made to a corporation. The general purposes of the corporation, as set forth in the second paragraph of its charter, were "To promote education among all classes of females, and to acquire by purchase, gift, grant or devise, and hold, use and convey any real estate or personal property whatever, and lease or mortgage the same, or use the same in any manner considered by the corporation most conducive to its interest and property." The general rule appears to be that, where property is conveyed directly to a corporation to hold for purposes for which the corporation was created, no trust for the benefit of others arises. There are no apt words in the deed to create a trust, or making the grantee a trustee of the property. On the contrary, it is evident that the grantor intended to vest the legal title absolutely in the corporation for use in its cor-

porate business, subject to the conditions named. The recited consideration of the deed is: "The establishment and maintenance of a convent school on the property herein." The purpose of the corporation was to conduct an educational institution, and, as a condition of the gift, the donor required that the parochial school children should be taught free of charge, in case the parents were unable to pay. In order to secure the performance of this condition and the use of the property for school purposes, the grantor provided that the title should revert to him or his heirs on condition broken. There was no attempt to make the grantee a trustee of this property for the benefit of other parties. The property was to be used in the business of the corporation for its own purpose and for its own benefit.

The same question was before the supreme court of Maryland, in *Bennett v. Baltimore Humane Impartial Society,* 91 Md. 10, 45 Atl. 888. In that case one Turbutt devised to the society certain of his estate, conditioned that the trustees or managers should admit one aged man or woman each and every year during its continuance for every $400 of the income derived from the property, and that such aged person should not be required to pay any fee for admission or outfit. The regular admission fee ranged from $200 to $700, according to age and residence. The thorough consideration given the case by the court is epitomized in the syllabus as follows: "A charitable corporation was named as devisee and legatee in a will, providing that it admit one aged man or woman each year for each $400 of income derived from the property bequeathed, and that the person shall be admitted without cost, and shall through life have maintained a good character, and shall not have been reduced to penury through immoral conduct. *Held,* That the will did not create a trust in favor of indefinite beneficiaries, but the whole beneficial interest in the property vested in the corporation, for corporate purposes on a condition subsequent, which did not prevent the vesting of the estate." In

Woman's Foreign Missionary Society v. Mitchell, 93 Md. 199, 53 L. R. A. 711, a Mrs. Sherman bequeathed to the society certain property in trust to educate six girls in India, and to purchase a building to be used for the education of girls therein. While the will in terms declared a trust, the court held that, as the legacy left to the society was to be used for the purpose and in the very business in which the society was engaged, no trust was created, and the society took absolute title for the prosecution of its work upon the condition annexed to the gift. In *Erwin v. Hurd,* 13 Abb. N. C. (N. Y.) 91, land was conveyed to a religious society upon conditions subsequent to use only for the purpose of public worship. The grantor brought an action to restrain the alienation of the property by the church society. The court at special term refused to interfere by injunction, holding that the plaintiff's remedy was at law by reentry or ejectment for conditions broken; but, in deciding the case, it was said: "I do not think that the deed from plaintiff to the trustees of the church created any trust. The purposes specified in the deed were those for which the society was authorized to take title to lands, and the grant was directly to the corporation to hold for those purposes, which were largely for its own benefit. Hence, it was at the same time trustee and *cestui que trust,* if the deed created a trust." *Bird v. Merklee,* 144 N. Y. 544, 27 L. R. A. 423, is also a case in point. The action was to construe item 20 in the will of George F. Merklee, deceased, which read as follows: "Item 20.—If after all the legacies are paid in full there should be anything left of my estate, the same shall be divided and paid to the Methodist Episcopal churches, in the ninth ward of the city of New York, according to the number of members, to buy coal for the poor of said churches." The general term held that a trust was created by the terms of the will, which was void under the holdings in New York on account of the beneficiaries being unascertained and indefinite. In reversing the judgment of the general term, the court said: "We are unable to

agree with the learned general term, and are of opinion that the testator contemplated no trust, but made a valid bequest to the churches." In support of this view, the language of Church, C. J., in *Wetmore v. Parker,* 52 N. Y. 450, was quoted as follows: "It does not create a trust in any such sense, as that term is applied to property. The corporation uses the property, in accordance with the law of its creation, for its own purposes; and the dictation of the manner of its use, within the law, by the donor, does not affect its ownership or make it a trustee. A person may transform himself into a trustee for another, but he cannot be a trustee for himself."

Fitzgerald desired to aid the society in the establishment of a school, and for that purpose he conveyed to it the tract in question. Conveyance was made directly to the society without any reservation or provision, except that it should be used in the work in which the grantee was engaged. There was a condition attached that poor children should be educated without the usual charge made by the society for tuition; in other words, he required, in order that the society might retain title to the property that certain of the scholars attending the school should not be charged for tuition; but no trust in the property was sought to be created for the benefit of this class of children. The property was to be owned absolutely by the society and used for promoting the very purpose for which it was organized. We are unable to see any legal principle upon which a charitable trust in this property can be established, and, if no trust was created by the deed of conveyance, the plaintiffs in this action have no interest to protect, and no interest which qualifies them to maintain the action.

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

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

OLIVER JACOBSON, APPELLEE, V. LEOPOLD DOLL, APPELLANT.

FILED JUNE 26, 1908. No. 15,225.

1. **Malicious Prosecution: EVIDENCE.** In an action for malicious prosecution upon a complaint to prevent crime, it is not error to admit in evidence the finding of the magistrate that there was no just cause for complaint. *Obernalte v. Johnson*, 36 Neb. 772, distinguished.
2. ———: JUSTIFICATION. A threat to inflict personal violence upon a trespasser if he persisted in his wrongdoing will not justify him in prosecuting the author of the threats upon a complaint to prevent such personal violence.

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

John D. Ware and *J. J. O'Connor,* for appellant.

B. N. Robertson, contra.

EPPERSON, C.

The plaintiff was arrested, detained and tried upon the complaint of the defendant, who alleged that "he has just cause to fear and does fear that Oliver Jacobson will * * * unlawfully kill complainant." Upon the trial the magistrate dismissed the complaint and discharged the plaintiff from custody. Plaintiff brought this action to recover damages, alleging that the prosecution was malicious and without probable cause. Upon trial the plaintiff introduced in evidence a transcript of the proceedings had before the magistrate, which contained a finding that "there is no just cause for complaint." The admission of this finding is assigned as error.

Defendant cites us to *Obernalte v. Johnson,* 36 Neb. 772. That action was for the malicious prosecution of the plaintiff therein for an alleged crime. It was held that the admission in evidence of the jury's finding that the complaint was without probable cause was error. We

find, however, that in the trial of a complaint for the prevention of crime the magistrate is required to ascertain whether or not there is just cause for the complaint. Criminal code, sec. 270. If there is no just cause for the complaint, it is expressly made his duty to discharge the accused. The finding that there is no just cause is not equivalent to a finding that the prosecution was malicious or that it was without probable cause. It is equivalent to a finding of not guilty in the trial of a criminal case. In *Obernalte v. Johnson, supra,* it was held that such a finding was competent evidence.

The defendant further contends that the verdict is not sustained by sufficient evidence. The verdict was for $1,291. The plaintiff filed a remittitur of $1,000, and judgment was rendered for $291. We have examined the record, and find that there is a conflict in the evidence which goes to prove or disprove malice and the want of probable cause. There is no doubt but that the plaintiff herein, prior to the criminal prosecution, had made threats of personal violence against the defendant. Their difficulties arose from a dispute over a tract of land. Both parties apparently in good faith claimed the ownership thereof. The threats depended upon by defendant when he filed the complaint were, in effect, that plaintiff would do him physical injury if he trespassed upon the disputed land, of which plaintiff was in possession, occupying it as his home. Defendant knew that plaintiff claimed title thereto. The civil courts were open to hear whatever title the defendant might assert and to give him whatever relief he was entitled to. He attempted to forcibly enter and dispossess the plaintiff. We do not know to whom this land belonged, but it is apparent that plaintiff had obtained peaceable possession thereof, and had peaceably occupied the same for a number of years. At the time of the conditional threats, above mentioned, the defendant himself was threatening to forcibly enter the land, and for the purposes of this suit he must be considered a trespasser. The evidence fails to disclose that the defendant

had any reason whatever to believe that he would have been in danger of personal violence so long as he would abide the law. Immediately upon the arrest of the plaintiff, the defendant took possession of the property. The evidence is strongly suggestive that the arrest was occasioned for the purpose of permitting the defendant to obtain the possession of the property, and not for the purpose of protecting his life against the threatened violence of the plaintiff.

The judgment is not excessive. It is supported by the evidence, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CORNELIUS J. O'CONNOR, APPELLANT, V. A. W. PADGET ET AL., APPELLEES.

FILED JUNE 26, 1908. No. 15,314.

1. **Appeal:** INSTRUCTIONS. Error in the admission of incompetent evidence may be cured by an instruction which directs the jury to consider as an established fact the transaction sought to be impeached by the incompetent evidence.

2. **Witnesses:** PRIVILEGED COMMUNICATIONS. A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed in some other capacity.

3. **Evidence:** ADMISSIONS AGAINST INTEREST. The fact that a witness has testified to a conversation with a party, in which the latter made admissions against interest, will not permit the party to testify to statements made by him in another conversation consistent with his theory of the case.

4. **Trial:** INSTRUCTIONS. Generally a party cannot complain of the court's nondirection of the jury, unless he has moved the submission of an instruction in point.

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

R. E. Evans and *M. McLaughlin,* for appellant.

McNish & Graham and *Anderson & Keefe, contra.*

EPPERSON, C.

Plaintiff, claiming to be the *bona fide* owner of two promissory notes, instituted this action to recover thereon. The notes were given as a part of the consideration for a stock of liquors, saloon fixtures, and an unexpired liquor license. A part of the consideration was paid in cash and the notes were given for the remainder. Defendant Padget purchased the liquor business from E. E. Sullivan, but the notes were made payable to his brother, John C. Sullivan, who later indorsed and delivered them to the plaintiff. Defendants recovered below.

The evidence is undisputed that a part of the consideration for which the notes were given was the liquor license which had been issued to E. E. Sullivan. This was held by this court to be an illegal consideration which tainted the whole transaction. *Padget v. O'Connor,* 71 Neb. 314. It appears that plaintiff herein gave to the Sullivans $160 in cash, and, in addition thereto, canceled an indebtedness owing by the Sullivans to him upon a sublease of certain allotted Indian lands in the Winnebago reservation. In his direct examination plaintiff testified to these facts. For the purpose of showing that a part of the consideration paid by plaintiff for the notes was illegal, defendants questioned the plaintiff's right to sublease the lands to the Sullivans. On cross-examination of the plaintiff, a stipulation of fact was interposed in which the parties agreed that the sublease made to the Sullivans was not approved. Plaintiff acknowledged the fact, but objected to its admission in evidence as immaterial and irrelevant. It is unnecessary to discuss the objection. The error was

cured by an instruction of the court, as follows: "Such a consideration would be valid and sufficient to convey title of said notes to said O'Connor as fully as though the full face of said notes had been paid in cash by said O'Connor." The notes were prepared for signature by Mr. Keefe, an attorney at law, who was permitted to testify as to the consideration. Objection was made, claiming that the communications made to him, of which he testified, were privileged. It does not appear, however, that the relation existing between the witness and the payee was that of attorney and client. The witness was simply employed to write out the notes. There was also other undisputed evidence that the assignment of the liquor license was a part of the consideration.

Keefe also testified to a conversation over the telephone with the plaintiff subsequent to the time which the plaintiff now claims to have purchased the notes, in which conversation plaintiff stated that he knew a part of the consideration was for the unexpired license. Plaintiff denied ever having had such a conversation, but testified that he had another, as to the nature of which he was not permitted to testify. He offered to prove that he told Keefe in that conversation that he was the owner of the notes; that he had paid a valuable consideration for them and that they were still his property; that he had bought them before maturity, and that he had no notice of any defense to them. This was a distinct conversation from that testified to by the witness Keefe, and the rule permitting a party to prove all of a conversation, relative to which the adverse party has proved part, does not apply. It is apparent that the statements offered would be but self-serving evidence. In Keefe's examination, however, he denied the conversation which plaintiff sought to prove, and it is contended that a litigant is entitled to show that any witness had made statements out of court contrary to his testimony. There is such a rule, but it was satisfied when the plaintiff testified that such a conversation took

place. Plaintiff could not go further and testify to statements made by himself in such conversation consistent with his theory of the case.

The answer alleges that the notes in controversy were given in part consideration for the stock of liquors, fixtures, and license, and, further, for the purpose of defrauding his creditors E. E. Sullivan procured the notes to be payable to John C. Sullivan, his brother. These defenses were revealed to the jury by an instruction. In another instruction the jury were told, in effect, that plaintiff, if a *bona fide* holder, could recover although the consideration was in part illegal and the notes taken in the name of John C. Sullivan for the purpose of defrauding the creditors of E. E. Sullivan. It is objected to because it presented to the jury the motive which prompted the giving of the note to John C. Sullivan instead of E. E. Sullivan. As between the parties, it is no defense that the note was made payable to another for the purpose of defrauding the creditors of the real party in interest, and it appears that the court should have instructed the jury that the defendants were not entitled to prevail by reason of this defense. The error of the court was a non-direction only. Plaintiff should have asked for the desired instruction.

We have considered all of the other assignments, which are numerous, and find no error therein. In view of the conflict of evidence, and the absence of prejudicial error, the verdict of the jury is conclusive, and we recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

NELS SHOLD, ADMINISTRATOR, APPELLEE, V. PETER H. VAN TREECK ET AL., APPELLEES; STATE OF NEBRASKA, APPELLANT.

FILED JUNE 26, 1908. No. 15,064.

1. Appeal. Where a party seeks to intervene in an action after the entry of a void judgment, and his petition for intervention is dismissed, the time for appealing to this court dates from the dismissal of his petition, and not from the date of the void judgment.

2. ———: NOTICE: JURISDICTION. The failure to serve notice of appeal on appellees, as prescribed by rule 36 of this court, does not affect the jurisdiction of this court over the action, and this court will, for good cause shown, permit the issuance and service of an alias notice of appeal.

3. Mortgages: FORECLOSURE: JURISDICTION AT CHAMBERS. The district court is without jurisdiction to hear and determine at chambers an action to foreclose a mortgage. Where the hearing was had and decree entered at chambers, they are void.

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

William T. Thompson, Attorney General, W. B. Rose and *A. W. Crites,* for appellant.

D. B. Jenckes and *Allen G. Fisher, contra.*

GOOD, C.

In 1903, Charles Jansen, a resident of Dawes county, Nebraska, departed this life, leaving no heirs or next of kin to inherit his estate. He left personal property consisting of notes secured by real estate mortgages. Nels Shold was duly appointed as administrator of his estate in July, 1903. In August, 1905, the administrator commenced two actions in the district court for said county to foreclose two mortgages given by Peter H. Van Treeck and Josephine Van Treeck to said Jansen in his lifetime. Said mortgages were for $300 and $800, respectively, each

dated May 15, 1903, and bearing interest at the rate of 7 per cent. from date. On motion of the Van Treecks the two actions were consolidated as one action. They then filed answers to the petition, in which they admitted all the allegations of the petition, and as an affirmative defense alleged that Jansen in his lifetime had agreed with the defendants that, in the event of Jansen's death, upon their paying the debts of the decedent and his funeral expenses, the notes and mortgages were to become the property of the defendants, and that said mortgages should be canceled and surrendered to the defendants, and alleged their offer and willingness to perform the conditions agreed upon. Replies were filed by the administrator to the answers. Some time previous to the bringing of these actions the state of Nebraska had appeared in the probate proceedings in the county court, and filed a petition asking that the property of said Jansen, after paying the debts and funeral expenses, should escheat to the state. Shortly after commencing the foreclosure actions, the administrator filed in the county court a petition for final settlement as administrator. On the 28th day of March, 1906, the parties to the foreclosure action, with the assent of the court, procured a hearing of the said cause at the private rooms of the presiding judge in the hotel at which he was staying at Chadron. That hearing resulted in a decree in favor of the plaintiff on the two causes of action for $515, being about one-third of the amount due upon the notes and mortgages, unless the defense tendered by the defendants in their answers was valid. On the 23d day of May, 1906, and during the same term of court, the state of Nebraska filed in the office of the clerk of the district court for said county a statement under oath, suggesting that Jansen had died intestate, a resident of said county, and had left no heirs or next of kin who could inherit his estate, and that the estate would escheat to and belong to the state of Nebraska. On the following day the state of Nebraska filed in the said cause a petition of intervention, setting forth the above facts con-

tained in the sworn statement above referred to, and averred that the defense set up by the defendants in said foreclosure action was fictitious, and constituted no ground of defense, and alleged that the amount due on the notes and mortgages being foreclosed was the sum of $1,100, with interest at the rate of 7 per cent. from the 15th day of May, 1903. It was also alleged that, through fraud and collusion between the administrator and the defendants in the action, a decree of foreclosure had been entered for a sum greatly less than the amount actually due, and that the judgment and decree were void, because the court had no jurisdiction to hear and enter a decree at the rooms of the judge at the hotel, and alleged that the said cause was then pending and undetermined. On the 30th day of July, 1906, the attorney for the defendants in said foreclosure action appeared as *amicus curiæ,* and on his motion said sworn statement was stricken from the files, and a hearing was had upon the application for intervention, and the petition was dismissed. From this order the state of Nebraska, as intervener, has appealed.

The appellees, who are the plaintiffs and the defendants in the original foreclosure actions, have filed no brief, but have appeared specially to challenge the jurisdiction of this court. Two objections are urged: First, that the cause was not docketed in this court within six months after the rendition of the judgment in the foreclosure action; second, that no notice of appeal was served upon appellees within the time prescribed by rule 36 of this court. The final order dismissing the petition of intervention was made on the 30th day of July, 1906. The transcript of the proceedings was filed in this court on the 23d day of January, 1907, and within six months from the date of the order dismissing the petition of intervention. Section 675 of the code relating to appeals, provides, among other things, that the filing of the transcript, containing the judgment, decree or final order sought to be reversed, within six months after the rendi-

tion of such judgment, decree or final order, shall confer jurisdiction on this court. It is clear that the appeal prosecuted by the state is from the order dismissing its petition of intervention, and not from the decree of foreclosure. The appeal was, therefore, perfected within time, and this court became vested with jurisdiction of the cause.

The second objection, relating to the giving of notice of appeal, is based upon a failure to comply with rule 36 of this court. Rule 36 provides for the issuance of a notice of appeal by the clerk of this court upon the filing of the precipe prescribed by rule 33. The precipe was duly filed within the time prescribed, and the clerk issued the notice of appeal, but there is no return showing that the notice was served as required by the rule. Upon discovery of this fact, the state of Nebraska, the appellant, made application to this court for leave to have an alias notice of appeal issued and served. This application was granted, and the notice issued and served. The appellees contend that this was insufficient to confer jurisdiction upon this court. It is apparent that the question of the jurisdiction of this court is not involved, because the statute confers jurisdiction upon this court by the filing of the transcript. The object of the rule requiring the issuance and service of a notice of appeal was for the convenience of litigants, to promptly notify them that the appeal had been lodged in this court, and to enable them to prepare for a hearing of the cause in this court. The failure to issue or serve the notice of appeal could not divest this court of jurisdiction. It might prevent the appealing party from having a hearing in this court until he had complied with the rules and given proper notice to the other party, and it was within the province of this court, upon a proper showing, to permit an alias notice of appeal to be served. The failure of the clerk to send the notice to the sheriff for service, or the failure of the sheriff to make service and return, could not deprive this court of jurisdiction, and would not deprive

the appellant of the right of a hearing in this court upon giving such notice as the court prescribed. The objections to the jurisdiction do not appear to be well founded, and should be overruled.

This brings us to the questions presented by the appeal. The right to intervene is conferred by statute. Under the statute, intervention may be had in a cause pending, but it must be previous to the commencement of the trial, and subject to the authority of the court to control its records and acts during the term. The petition of the state shows that it is interested in this litigation, and that it has rights that may be lost if it is not made a party to the action. It had a right, therefore, to intervene and to be made a party plaintiff for the purpose of protecting its rights, provided the application for intervention was made while the cause was pending and before the trial commenced. It is apparent, therefore, that the state can have no standing in this action unless the judgment or decree entered on the 28th day of March, 1906, is absolutely void. If the judgment was not void, then the application to intervene was not made until after trial. If the judgment was absolutely void, then the cause was still pending, and the application was made in due time.

Section 4753, Ann. St. 1903, provides that all terms of the district court shall be held at the county seat at the court house or other place provided by the county board. Sections 4749 and 4751 provide what business may be transacted by the judges of the courts at chambers. It is unnecessary to enumerate what things may be done at chambers, but it is sufficient to say that they do not cover the trial of an action to foreclose mortgages. The precise question, so far as we are aware, has not been before this court, but similar questions have been, and the decisions of the court upon these allied questions are useful in determining the conclusion that should be reached in this case. Section 11 of the act concerning counties and county officers, approved February 27, 1873 (laws 1873, p. 735), provides that the county commissioners shall meet

for the transaction of business for the county at the court house in their respective counties, or at the usual place of holding sessions of the district court. In *Merrick County v. Batty,* 10 Neb. 176, this court held that, under said section, the county commissioners were required by law to hold their sessions at the county seat, and that they had no authority to enter into a contract in relation to county business at any other place. A contract entered into at another place than the county seat was held void. In *Conover v. Wright,* 3 Neb. (Unof.) 211, it was held that a judgment rendered by a district judge at chambers in a mechanic's lien foreclosure was null and void. In *Hodgin v. Whitcomb,* 51 Neb. 617, it was held that a judge of the district court was without authority in vacation and out of term to hear and pass upon a motion for a new trial, or to render a money judgment in an action. It was further held in that case that the district court was clothed with no judicial authority in vacation to rule upon a motion for a new trial and render judgment. The cause was reversed and remanded, with directions to proceed with the cause as though the decision and journal entry of the district court had not been made. In *Kime v. Fenner,* 54 Neb. 476, it was held that a judge at chambers possesses no jurisdiction to vacate or modify an order or judgment of the district court. In *Johnson v. Bouton,* 56 Neb. 626, it was held that a judge at chambers had no power to determine finally an action for injunction, or to enter an order out of term dismissing the cause. It was there held that the fact that the parties to the injunction suit stipulated that the decision on the merits should be entered by the judge in vacation did not affect the validity of the judgment, for the reason that consent of the parties could not confer jurisdiction, and it was held that the order of dismissal made by the judge at chambers was void, and that there was no final disposition of the case in which the injunction was granted. In *Gamble v. Buffalo County,* 57 Neb. 163, it was held that the district court was without authority in vacation to render a money judgment,

and that the consent of the parties could not confer such authority.

The supreme court of Iowa, in *Funk v. Carroll County*, 96 Ia. 158, reversed and remanded a judgment because the court, during the progress of the trial, had adjourned to the residence of a witness and there taken the evidence of the witness. It was there held that, in a county where there is a regular courthouse provided and used for holding court, the court had no authority to adjourn to a private house for a trial or a portion of a trial, and that the court so sitting was without jurisdiction. However, we are not prepared to hold to this extent. The law of this state has fixed the place where the court shall be held. It determined what business may be transacted at chambers, and this court cannot change the law, and has no power to change the time or place at which the court may be held. The district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become *coram non judice*. When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity. It follows, therefore, that the decree rendered in the foreclosure case at the hotel in Chadron was absolutely void, and the foreclosure case is, therefore, properly pending in the court and undisposed of, and the state had a right to intervene and to be made a party to that action for the purpose of protecting its rights in the cause. The judgment of the district court in dismissing the petition of the state to intervene is erroneous, and should be reversed.

We recommend that the judgment of the district court be reversed and the cause remanded with directions to permit the state of Nebraska to intervene and to be made a party to the action, and to treat the judgment or decree rendered on the 28th day of March, 1906, as a nullity.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to permit the state of Nebraska to intervene and to be made a party to the action, and to treat the judgment or decree rendered on the 28th day of March, 1906, as a nullity.

JUDGMENT ACCORDINGLY.

MARGARET L. SABIN, APPELLEE, V. JOSEPH J. CAMERON, APPELLANT.

FILED JUNE 26, 1908. No. 15,250.

1. **Mechanics' Liens: RECORD AS EVIDENCE.** The record of a mechanic's lien is not competent evidence either of the time when the material and labor therein mentioned were furnished, or that such labor and material were furnished and used upon the building therein described.

2. **Trial: INSTRUCTIONS.** It is reversible error to instruct the jury upon a question not raised by the pleadings nor applicable to the evidence, when such instructions have a tendency to mislead the jury or have a prejudicial effect upon the party complaining.

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

Wilson & Brown, for appellant.

Billingsley & Greene, contra.

GOOD, C.

Margaret L. Sabin, the plaintiff, brought this action in the district court against Joseph J. Cameron, the defendant, to recover the sum of $224.90. For her cause of action she alleged that in October, 1904, she entered into a contract, chiefly in writing, with the defendant, whereby he was to furnish all the material, and build and con-

struct certain improvements and to make certain repairs to the two-story frame residence of the plaintiff, situated on the east half of lot 8 and the west 45 feet of lot 9, in block 127, in the city of Lincoln, for the consideration of $1,080; that the defendant immediately entered upon the performance of his contract, furnished the material and performed the work, and that from time to time she had made payments to him until she had paid the entire consideration agreed upon; that defendant, in the performance of the work and furnishing the material called for by the contract, purchased certain material and obtained certain labor and contracted to pay for the same in the sum of $224.90, the reasonable value of said labor and material, but failed to pay for the same, and concealed from the plaintiff the fact that he had not paid for said material and labor, which consisted of plumbing material and work; and that, by reason of the failure to pay for said material and labor, he had wrongfully permitted a mechanic's lien to be filed by a subcontractor, who had furnished such material and labor, in the sum of $224.90. She further averred that, when she discovered the existence of the lien, the defendant promised that, if she would pay off the lien, he would pay her therefor, and averred that said Cameron had not paid the said lien, and that she had been compelled to pay the said lien to her damage in the amount thereof. To this petition the defendant filed an answer and cross-petition, in which he admitted the making of the contract, and that he had entered upon the work and performed his part of the contract, and denied all the other allegations of the petition; alleged that the contract was in writing, and set out a copy thereof, and averred that after the signing and delivery of the contract, and while he was performing the work thereunder, and at the special instance and request of the plaintiff, he furnished labor and material for improvements and changes upon the residence property of the plaintiff other and different from those specified in the written contract, and set out a list of the extras

furnished, and alleged their value to be $353.34, and prayed for judgment for that amount. Plaintiff replied, first, with a general denial, and further specifically denied that defendant furnished any labor or material not contemplated by and included in the contract between the parties, and alleged that the instrument set out in the answer was but a partial memorandum of the contract. The trial was had upon the issues thus joined, which resulted in a verdict and judgment for the plaintiff in the sum of $21.56. The defendant has appealed.

We will first consider the errors alleged that relate to the claim of the plaintiff. It developed during the trial that plaintiff had not paid the entire amount of the alleged lien, but had paid only $20 thereon previous to the commencement of the action. The court, by instructions, limited the amount that plaintiff was entitled to recover to this sum, with interest. The defendant complains because the verdict and judgment are not supported by sufficient evidence. There is no evidence in the record to show that defendant ever promised plaintiff that he would reimburse her if she would pay the alleged lien, and there is no evidence as to when any of the material or labor, for which the lien was claimed, was furnished or performed, save that furnished by the record of the alleged mechanic's lien. This court has held that the verified account of the items, with proof of the amount of the claim, is not sufficient to support a decree of foreclosure upon a mechanic's lien. *Urlau v. Ruhe,* 63 Neb. 883. This court has also held that the verified account of a mechanic's lien proves nothing except the filing thereof and the making of the oath thereto. *Wakefield v. Latey,* 39 Neb. 285. It is evident that the record of the lien could prove no more than the verified account itself. There was, therefore, no competent evidence to show that the material was furnished within the time, or that it went into the premises described, so as to entitle the claimant to a lien. There is no evidence from which it can be said that a valid lien existed against the

plaintiff's property. She did not pay out any sum in response to any request of the defendant, nor, so far as the record discloses, was there any necessity for her to pay out any sum to protect her property, and the judgment in favor of the plaintiff is not sustained by any competent evidence. The proof is insufficient also in that there is no evidence in the record to show that the house on which the improvements and repairs were made was located upon the lots described in the petition.

The defendant complains of several instructions given by the court, which, in effect, submitted to the jury the question as to whether or not the extras were furnished gratuitously. It appears clear from an examination of the pleadings that the question of whether or not the extras were furnished gratuitously was not an issue. Plaintiff, by her reply, denied that any extras were furnished, or that any material or labor was furnished, other than those contemplated by the contract. An inspection of the contract discloses that most of the extras furnished, for which claim was made by the defendant, were not mentioned or referred to in the contract. The evidence also disclosed that the improvements made outside of the contract were substantial and of considerable value, and there is no competent evidence in the record from which it could be inferred that there was any intention to furnish the same gratuitously, except that it was claimed by the plaintiff that defendant had not, previous to the bringing of the action, made any demand against her for or on account of the extras. This, however, is denied by the defendant. We do not think the fact alone, even if it be true, as contended by the plaintiff, that he made no previous demand, would be sufficient to justify a finding that the alleged extras were furnished gratuitously. Besides, the question of whether or not they were furnished gratuitously was not made an issue by the pleadings. It is evident that the trial court, by these instructions, submitted to the jury for its determination an issue not warranted by the pleadings or the evidence. The rule is

well established in this court that it is prejudicial error to submit to the jury an issue not raised by the pleadings or evidence. *Esterly & Son v. Van Slyke,* 21 Neb. 611; *Walker v. Haggerty,* 30 Neb. 120; *Farmers & Merchants Bank v. Upham,* 37 Neb. 417; *Roberts v. Drehmer,* 41 Neb. 306; *McCready v. Phillips,* 44 Neb. 790; *Kansas City & O. R. Co. v. Rogers,* 48 Neb. 653; *Swift & Co. v. Holoubek,* 60 Neb. 784. As the jury disallowed the defendant's entire claim, it is apparent that these instructions were prejudicial to him.

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

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

JOSEPH A. BLUM, APPELLEE, V. NEBRASKA-IOWA CREAMERY COMPANY, APPELLANT.

FILED JUNE 26, 1908. No. 15,224.

1. **Appeal:** VERDICT: EVIDENCE: SUFFICIENCY. "This court will not set aside the verdict of a jury for want of evidence to support it, if there is sufficient evidence in the record, taken by itself, to have supported a judgment by default unless the preponderance of the evidence against the verdict is so strong as to indicate that the verdict must have been predicated upon something other than the evidence." *Union P. R. Co. v. Fickenscher,* 74 Neb. 507.

2. **Master and Servant:** CONTRACT: PLEADING: ISSUES. The pleadings in the case examined, and *held* not to tender an issue as to whether or not plaintiff was a stockholder in defendant company.

3. ———: ———: RESIGNATION: CONDITIONS: WAIVER. Where an employee of a corporation under a contract of employment for a

stated period, on being requested to resign his position and surrender his contract, delivers to the secretary, for submission to the board of directors of such corporation, a written resignation, containing certain conditions, subsequent oral statements made by him to individual members of the board that he is willing, if necessary for certain purposes of the board of directors, to waive the conditions inserted in said written resignation are not, alone, sufficient to constitute such waiver.

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

Brome & Burnett, for appellant.

F. T. Ransom and *Joel W. West, contra.*

FAWCETT, C.

Plaintiff sued in the district court for Douglas county to recover a balance alleged to be due upon a contract of employment which he alleges was entered into October 16, 1903, the employment to begin November 1, 1903, and to continue for a period of one year at an agreed salary of $250 a month. The contract was in writing, and contained the following clause: "In case of the refusal of the company at any time during said year to keep said Joseph A. Blum in said employment, the salary above provided for is to be paid to him at the times stated, the same as if (he) should be retained in said employment as the general manager aforesaid, it being understood and agreed that the amount of said salary is the damage that will ensue to said Joseph A. Blum in case of such refusal, and that the same shall not be mitigated or decreased by reason of any failure of said Joseph A. Blum to make any effort to obtain other employment, or by reason of his obtaining other employment during the period covered by said contract, the consideration of this covenant as to damages being the fact that Joseph A. Blum has quit a lucrative position to accept this contract and employment, and that should the said Nebraska-Iowa Creamery Company fail to continue Blum in its

employment for the period of one year the damage that would result to him would be the balance of the year's salary without regard to any other employment said Blum might or should obtain elsewhere or any money he might make during the balance of said period for which he is hereby employed." Plaintiff further alleges that, at the end of two and one-half months after entering upon the performance of his contract, the defendant refused to permit him to proceed further, and transferred all of its property, by lease, to the Beatrice Creamery Company for a term of years; that defendant had paid him $625, leaving a balance due of $2,375, for which amount, with interest on the several monthly payments from the time they should have been paid, he prays judgment. The defendant admits the execution of the contract, and that it contained the clause above set out, but alleges that, at the time plaintiff ceased to perform the services called for by his contract, he voluntarily resigned his said office, and of his own volition terminated and wholly ended his said contract of employment, and thereafter did not perform, seek to perform, or in anywise claim that he was authorized to perform any duties for the defendant of any nature whatsoever. The reply was a general denial. While other matters are set out in the petition and answer, it is unnecessary to refer to them, for the reason that the case was tried in the court below and is presented here upon the issues as above set out. The jury returned their verdict in favor of the plaintiff for the full amount claimed, with interest. A motion for new trial was duly filed and overruled, and judgment entered on the verdict, from which judgment this appeal is prosecuted.

Defendant assigns three reasons why the judgment should be reversed, which we will consider in the order in which they appear in defendant's brief.

1. "The court erred in receiving, over the objection and exception of appellant the evidence of the plaintiff, Joseph A. Blum, respecting his employment by the

Cudahy Packing Company of South Omaha, prior to the making of his contract of employment with appellant herein, the nature of his service for that corporation, the salary he obtained from them, and the length of time he had been their employee." The evidence covered by the above assignment is as follows: "Q. In whose employment were you in the fall, we will say, prior to October 16, 1903? A. The Cudahy Packing Company, South Omaha, Nebraska. Q. What salary did you get from the Cudahy Packing Company? A. Three thousand dollars a year, or $250 a month. Q. What position did you have with the Cudahy Packing Company? A. Manager of their produce department. Q. How long had you been in the employ of the Cudahy Packing Company? A. About 13 years." It is argued that this testimony did not bear the remotest relation to the issue of fact being tried, and that it was reversible error to receive it. While we are inclined to agree with counsel that this testimony was not necessary, we cannot say that its admission constituted reversible error. In his petition plaintiff alleged that, "in consideration of plaintiff relinquishing a lucrative situation which he then held with a large and extensive packing company, defendant agreed and promised," etc. This allegation of the petition, not having been met by any of the special allegations in defendant's answer, must be considered as standing denied by the general denial contained in the second paragraph of the answer; and that part of the contract which calls for the payment to plaintiff of his full salary for the full period of one year, notwithstanding a prior dismissal, and regardless of any other employment he might obtain or business in which he might engage, being quite unusual in its character, we do not think the court erred in permitting the introduction of the testimony objected to. As we have said, we think possibly it was unnecessary for plaintiff to introduce it, for the reason that the contract recites that "the consideration of this covenant as to dam-

ages being the fact that Joseph A. Blum has quit a lucrative position to accept this contract and employment." The simple fact that plaintiff was not required to introduce the testimony in order to explain the unusual conditions in his contract does not, in our opinion, make the action of the court in admitting it erroneous.

2. "The court erred in refusing to permit appellant to show that, at the time it was claimed appellee resigned from the service of the appellant, appellee was a stockholder of the Nebraska-Iowa Creamery Company." In the opinion of the writer this fact was material, and, if competent proof of the fact had been offered by defendant, it would have been error to reject it; but in this opinion my associates do not concur. We therefore hold that the testimony offered by defendant in support of this contention was immaterial, and that the trial court did not err in excluding it on that ground.

3. "The court erred in overruling the motion for a new trial for the reason that the verdict of the jury is contrary to and not supported by the evidence given and adduced upon the trial, and is contrary to law." No fault is found with any of the instructions given or refused. It is apparent, therefore, that the case was fairly submitted to the jury. The evidence discloses that on December 14, 1903, a number of the directors of defendant company were assembled in the Millard Hotel, in Omaha, considering the affairs of the company, which the evidence shows was then in rather hard lines financially. Defendant's contention is that they were at that time considering the advisability of making a lease of their property and business to the Beatrice Creamery Company; that in order to carry out that project it would be necessary to obtain the resignation of all of the officials of the defendant, and that such resignations were at that time requested. Mr. Stewart, the secretary and treasurer, on that date, wrote out the following resignation: "December 14, 1903, we, the undersigned, hereby tender our resignations irrevocably, to take effect at the pleasure of

the board of directors of the Nebraska-Iowa Creamery Company," which was signed, "R. A. Stewart, Tr. John J. King, Pt." Below this resignation, in the handwriting of plaintiff, we find the following: "I resign on same conditions, except on 30 days' notice after annual meeting in February, 1904. J. A. Blum."

Defendant's witnesses, five in number, testified that, when that paper was shown to the directors at that time, they were not satisfied with it, and stated that nothing but an unconditional resignation would answer the purpose, and that plaintiff then said to them, in substance: "Well, all right, then; go ahead; I won't stand in the way." Plaintiff denies having made such a statement, and insists that he, at all times, stood upon his contract, and insisted upon his rights thereunder. Defendant argues that the testimony upon this point is so overwhelmingly in favor of defendant that the verdict of the jury should not be permitted to stand. There are some circumstances, however, which seem to corroborate the plaintiff, and to indicate that there was a general scheme on foot that day to get him, alone, out of the company. The evidence shows that after that date, and after the property and business of defendant had been leased to the Beatrice Creamery Company, King and Stewart both remained in the employ of the company, continuing to represent either the defendant company or the Beatrice Creamery Company, while plaintiff alone was dropped. In addition to that, what purported to be the minutes of the meeting of the directors at the Millard Hotel, December 14, 1903, were introduced in evidence, and no reference whatever appears in those minutes to the so-called oral resignation of plaintiff; on the contrary, the minutes recite that the board of directors adjourned to the next day for want of a quorum. Mr. Stewart, it is true, says he thinks there was a quorum present that day. We think the evidence fairly shows that at least five of the nine directors of the defendant company were at the Millard Hotel at different times on that day; but we do not think

there is any competent testimony showing that there were five directors present at any one point of time during the deliberations of the directors, which extended from about 10 o'clock in the forenoon until 6 or 7 o'clock in the afternoon, with an intermission of a couple of hours at noon. It would seem, therefore, that there could not have been any oral resignation to the board of directors that day, for the reason that there never was a meeting of the board, in the true sense, at that time. Another fact we think is quite significant, viz., the directors present on that day, whatever their motive may have been, claimed to be desirous of obtaining unconditional resignations from their three principal officers, and in furtherance of that desire a resignation was drawn up and signed by the president and treasurer, tendering their resignations unconditionally. This was not signed by plaintiff, and, if plaintiff subsequently orally consented to their request for an unconditional resignation, why was he not asked to modify or strike out the written conditions in the resignation which he had signed, or, at least, why was it not so recited in the minutes? We think these circumstances furnish sufficient corroboration of plaintiff to warrant the jury, who saw all the witnesses upon the stand and had full opportunity to note their demeanor while giving their testimony, in returning the verdict complained of. While we might have reached a different conclusion ourselves from that reached by the jury, we cannot say that there is not "sufficient evidence in the record, taken by itself, to have supported a judgment by default," nor that "the preponderance of the evidence against the verdict is so strong as to indicate that the verdict must have been predicated upon something other than the evidence." Such being the fact, we cannot disturb the verdict which was returned. *Union P. R. Co. v. Fickenscher*, 74 Neb. 507.

In concluding their argument, counsel for defendant say: "There is another consideration equally fatal to the recovery in this case. Suppose it were true that the writ-

ten resignation (Exhibit 2) was the only evidence of Blum's voluntary termination of his contract of employment, and nothing else had occurred at the time the resignation was submitted to the board of directors of the Nebraska-Iowa Creamery Company, no voluntary agreement to resign unconditionally as testified to by the five witnesses above named. But the lease to the Beatrice Creamery Company having been made on the 1st of January, 1904, Blum was notified, as he says he was, by Stewart and King, that his services were no longer required and his contract of employment terminated. As a matter of law this would mean that the notice referred to in his resignation had been given, and that his contract of employment would terminate on February 4, 1904." We are unable to concur in this contention. The resignation, signed by plaintiff, reads: "I resign on same conditions, except on 30 days' notice after annual meeting in February, 1904." This condition of plaintiff's resignation called for a notice after the annual meeting in February, 1904, and when given called for 30 days' notice. We do not think the wording used by plaintiff can be given any other construction than that it required a 30 days' notice to be given after the annual meeting in February. If we are right in this, then clearly the leasing of the property and business of defendant to the Beatrice Creamery Company on January 1, 1904, and notice of that fact, cannot be held to be a compliance with the condition imposed by plaintiff.

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

CALKINS, C., concurs in the conclusion.

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

AFFIRMED.

G. SAM ROGERS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 26, 1908. No. 15,244.

1. Cities: WARRANTS: VALIDITY. "A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city." *Abrahams v. City of Omaha*, 80 Neb. 271.

2. Limitation of Actions: CITY WARRANTS. The statute of limitations does not commence to run against warrants issued by a municipal corporation, payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to pay the warrants.

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

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

W. A. Saunders, contra.

FAWCETT, C.

Plaintiff sued in the district court for Douglas county to recover a balance alleged to be due for the construction of artificial stone sidewalks in the city of Omaha, such balance being represented by what is termed "special fund warrants" issued by the city to the contractors who laid the walks. The walks were laid under three semi-annual contracts, covering the periods of time from January 1 to June 1, 1893, from June 1, 1893, to January 1, 1894, and from June 1 to January 1, 1895, and one annual contract running from December 31, 1896, to December 31, 1897. Plaintiff had judgment in the court below, and from that judgment this appeal is prosecuted. The only assignments of error here, sufficiently definite to entitle them to

consideration, are: (3) The findings and judgment of the court are not supported by sufficient evidence. (5) That plaintiff's action was barred by the statute of limitations. We will consider these assignments in the order named.

1. There are practically no disputed facts in the record. At the times specified in the contracts above referred to, defendant entered into contracts with the several contractors named in said contracts for the construction of permanent sidewalks. The contracts are all four identical in their terms. It is provided in each of the contracts as follows: "All materials furnished, or work performed, under this contract, is to be to the satisfaction of the board of public works and city engineer, and, when completed, the sidewalk shall be measured and estimated by the city engineer, and reported for approval of the board of public works, the mayor and city council. Upon approval of such estimates by the mayor and city council, the said party of the first part (the city) will issue to the said party of the second part (the contractor) its warrants upon the city treasurer, drawn against the special fund to be created by assessments upon the lots and real estate adjacent to and abutting upon the portion of the street along which sidewalks may, under the provisions hereof, be constructed, which warrants the said party of the second part agrees to receive in full satisfaction and payment for all work done and all material furnished by him under this contract." The work was faithfully performed in each instance by the contractor, and, when completed, was duly measured and estimated and reported to and confirmed by the mayor and city council, and the warrants in controversy were issued to the contractors in accordance with the terms of the contracts. All of the warrants in controversy subsequently passed by due assignment to the plaintiff in this action. For the purpose of creating a fund to pay these warrants, the mayor and council passed certain ordinances levying special assessments against the abutting property owners. A considerable number of the abutting property owners

recognized the validity of such special assessments and, from time to time, paid to the treasurer the amounts of their special assessments, all of which were applied, as fast as received, to the payment of the warrants which were prior in date of registry to the warrants in suit here. The validity of the special assessments was not questioned until December 28, 1903, April 21, 1904, and July 27, 1904, when, as appears from the stipulation of the parties, the special taxes provided for by said special assessments were, by the district court for Douglas county, canceled; the ground of such cancelation, as appears from the pleadings, being that the mayor and city council had not complied with the law in making such assessments. On March 16, 1905, the defendant having taken no steps to make a relevy for the purpose of paying the warrants in controversy, this action was brought.

It appears, therefore, from the uncontradicted evidence, that the defendant, by its mayor and council, entered into contracts for the laying of the sidewalks referred to; that plaintiff's assignors duly performed their part of the contracts; that the work when finished was approved by the engineer, confirmed by the city council, and the amount due the contractors ascertained and set forth in the warrants now before us; that the warrants have never been paid; that the defendant has never taken any proper and legal steps to create a fund out of which the warrants could be paid. It is clear, therefore, that, if defendant, through its mayor and council, had authority to make the contracts referred to, defendant's contention that the judgment is not sustained by the evidence must fail. The provisions of chapter 12*a*, Comp. St. 1895, so far as they relate to the matters in controversy, are identical with the provisions of the statute during each of the years in controversy. Section 6 of that chapter provides: "Each city governed by the provisions of this act shall be a body corporate and politic, and shall have powers: Fourth. To make all contracts and do all other acts in relation to the property and concerns of the city, necessary to the exer-

cise of its corporate or administrative powers. Fifth. To exercise such other and further powers as may be conferred by law. The powers hereby granted shall be exercised by the mayor and council of such city as hereinafter set forth, except when otherwise specially provided." Section 69 reads: "The mayor and council shall have power to open, extend, widen, narrow, grade, curb, and gutter, park, beautify, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city, and may grade partially or to the established grade, or park or otherwise improve any width or part of any such street, avenue or alley, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary." These provisions give the mayor and city council full and absolute authority to do any of the things above stated. If the city desires to reimburse itself for any portion of the moneys expended for any of the above purposes then the section provides: "And to defray the cost and expense of improvements or any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed, and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements." In considering a similar statute in *Rogers v. City of Omaha,* 76 Neb. 187, we held that all of the limitations in this section of the statute, outside of the portion above quoted, are to be regarded as safeguards to property owners from special burdens, rather than as an attempted limitation of the general powers of the mayor and council over the streets and alleys of the city. We think the construction then placed upon this statute was correct, and therefore adhere to it. We also held in that case that,

"where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received."

It is insisted by defendant that, the warrants in question having been issued against a fund which never was in fact created, the warrants themselves were void and of no force or effect whatever. This contention has already been decided adversely to defendant in *Abrahams v. City of Omaha*, 80 Neb. 271, where we held: "A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city. A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and promise to pay it."

That the defendant, through its mayor and council, had full power and authority to enter into the contracts for the sidewalks cannot be seriously questioned, but the defendant contends that, inasmuch as the contract itself provides that the work done by the contractor shall be paid for in warrants drawn against a special fund to be created by an assessment upon the lots, and that the contractor agreed to receive such warrants in full satisfaction and payment for all work done and all material furnished by him under his contract, and no fund ever having been created, the city is relieved from all liability. This will not do. The law is well settled that, when a municipal corporation enters into a contract of this character, it thereby agrees to create the special fund, by valid assessments, and that, failing so to do, it is liable generally. It will not do to say that a city may contract for the ex-

penditure of large sums of money and material and a large amount of labor in constructing valuable improvements for the city, and agree to pay for such improvements out of a fund to be created by a special assessment, and then escape all liability by never creating the fund, or, if it attempts to create such a fund, by proceeding so irregularly that the assessments when levied cannot be enforced. No such dishonesty would be tolerated in an individual, and we see no reason why it should be in the case of a municipal corporation. As said by the supreme court of California, in *Pimental v. City of San Francisco,* 21 Cal. 351, 361: "The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco,* 16 Cal. 255, 282. The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

In *Pine Tree Lumber Co. v. City of Fargo,* 12 N. Dak. 360, 373, it is said: "The city, as we have seen, is provided with the means of fully protecting itself against expense in the making of special improvements. Any payments made upon its contracts for paving should be paid for out of the funds realized from the special assessments; and, if the city exercise the powers given it, the general taxpayer cannot be burdened at all with the cost of the improvement. If, however, the city council fails to take advantage of the means provided to realize upon special assessments the cost of the improvement, as between the

city it represents and the contractor, the consequences of the neglect should fall upon the city."

In *Moore v. Mayor,* 73 N. Y. 238, the court say: "While courts have been vigilant in their scrutiny of corporate action, and have zealously striven to keep corporations and their agents within the limits of granted powers; they have not favored defenses to honest demands, based upon mere irregularities and informalities."

In *Second Congregational Church Society v. City of Omaha,* 35 Neb. 103, we said: "To us it appears unjust, inequitable, and contrary to every principal of right to permit the city, after it has damaged property by changing the grade of the street upon which it abuts, to urge defects in its proceedings to defeat an appeal taken by the landowner to recover a fair compensation for the damages sustained. To do so would be to allow the city to take advantage of its own wrong after it had accomplished that which it undertook to do—the change of the street grade. Such a rule courts should not sanction."

In *Rogers v. City of Omaha,* 76 Neb. 187, we said: "The defense of payment by the delivery of the void warrants is not strongly urged in this court, nor would it profit much to urge it here. Had valid warrants been delivered against a fund created, a different proposition would be presented."

In *Commercial Nat. Bank. v. City of Portland,* 33 Pac. (Or.) 532, it is held: "A stipulation in a contract by a city for a public improvement, that the contractor shall look for payment to a particular fund to be raised by assessment, does not relieve the city from liability for negligently delaying to raise such fund." In the opinion, 24 Or. 188, the court say: "The stipulation provides that the contractor shall look for payment to the special fund, and that 'he will not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund,' and the defendant contends, if any force or effect is to be given to such stipulation, that it is liable to pay the warrants in question only when such special fund is raised

and collected, and consequently that the defendant is not liable generally in an action for damages upon them. This view would relieve the city of any liability to pay such warrants until such special fund is raised and collected by assessments, although its failure to realize such fund may be due to its own neglect or unreasonable delay. Under its charter the city is invested with the power to order local improvements, and afforded the means to raise the necessary funds to pay for them by assessments upon the property benefited thereby. * * * There is no pretense but that the obligation resting upon the contractor to perform the work and furnish the materials required has been satisfactorily performed, and the improvement accepted. Having performed his obligation, the duty rested upon the city to discharge its obligation."

In *Iowa Pipe & Tile Co. v. Callanan,* 101 N. W. (Ia.) 141, it is held: "The ordinance under which work was done on a street improvement provided that the cost might be taxed against private property abutting on the street, and for collecting assessments and issuing certificates in payment thereof; and the contract provided that the assessment certificates should be received by the contractor in full payment for the work. Held, That the city was liable to the contractor for the amount of a certificate where the assessment against the property in question was entirely invalid." In the opinion, 125 Ia. 358, the court say: "While we do not understand from the appellee's argument that it seriously denies the liability of the city in case the assessment is held invalid, there is a suggestion therein that the stipulation that the assessment certificates shall be received in full payment for all work done without recourse on the city relieves the city from all liability on account of its invalid assessment. This position is not tenable, however. The ordinance under which the work was done provided that the cost thereof might be taxed against the private property abutting on the street, and for making and collecting assessments, and for issuing certificates in payment therefor. The contract provided

that the cost was to be assessed and paid as provided in the ordinance, but it was not contemplated by either party thereto that the city would make an assessment against abutting property which could not be enforced, and we think it must be held that the latter clause of the contract means nothing more than the acceptance of certificates which are legal, and representing an assessment valid and enforceable." In speaking on this subject, the supreme court of Iowa on another occasion, in *Ft. Dodge Electric L. & P. Co. v. City of Ft. Dodge,* 115 Ia. 568, in the fourth paragraph of the syllabus, say: "Where a municipal paving contract stipulated that the contractor should receive the special assessment certificates in full payment, but such assessment was illegally and without authority levied on the property of a street railway not liable therefor, the city was liable to the contractor for the amount of the void certificates, since, had the entire amount been assessed against abutting property, it would have been valid, and it therefore lay within the power of the city to fulfil its agreement by making a valid assessment."

In *City of Chicago v. People,* 56 Ill. 327, the court say: "An individual entered into a contract with the city of Chicago to execute certain public improvements in the way of curbing, filling and macadamizing a street, the city agreeing to pay for the same when the work was completed and accepted; and when the special assessment, levied or to be levied for the same, should be collected. A part of the assessment could not be collected, for the reason that the city had, by contract with the owner of the property upon which it was levied, expressly exempted it from such assessments, and the assessment was, therefore, to that extent void. Held, The condition of the contract to pay when the assessment should be collected being impossible and void, the promise, to that extent, was single and absolute, and the contractor having no notice of such void assessment at the time he assented to such condition would have his remedy against the city to recover what he would have been entitled to had the entire assessment

been valid. * * * Section 17 of chapter 6 of the charter provides that 'any persons taking any contracts with the city, and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collections of the special assessments made for the work contracted for.' But this does not preclude the courts from determining the legal effect of a contract to be that, where the city has no such assessments as it purports to have, the party is to be deemed as not so agreeing."

In *Morgan v. City of Dubuque,* 28 Ia. 575, it is said: "Where the plaintiff built a sidewalk for the defendant—a municipal corporation—for which he was to receive pay when the city collected the costs thereof by assessments made upon the adjacent lot owners, it was held that the city was bound to collect the assessments, or to make an effort so to do, within a reasonable time after the performance of the work, and that its failure so to do rendered it liable to pay the stipulated price of the work. The burden of proof in such case is upon the city to show diligence in endeavoring to collect."

In *Hitchcock v. Galveston,* 96 U. S. 341, it is said: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires,* it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law."

Defendant's contention that it is not liable generally upon the warrants in controversy because the agreement was to pay out of a special fund when collected from the abutting property owners, and that fund was not collected because it never was validly created, or, in other words, because the defendant never had such a fund, would bring the defendant within another familiar rule, viz.: "If a person promise to pay a sum of money when he shall collect his demands of another, then, if it appear that he had no demands, or if he have, and fail to use due diligence to collect them, in either case the promise may be enforced

as absolute." *City of Chicago v. People, supra.* In the light of the above authorities, as applied to the undisputed evidence in the record before us, the contention of defendant that the judgment of the court below is not sustained by sufficient evidence must fail.

Defendant insists that plaintiff ought not to recover because of his failure to proceed by mandamus to compel the defendant to make a new and valid levy. In other words, that the defendant may refuse to perform a plain duty, and then, when called into court to answer for its neglect, say it cannot be held liable because the plaintiff did not take the initiative, and by legal proceedings compel it to perform the duty which not only the law but its contract with the party imposed upon it.

In *Denny v. City of Spokane,* 79 Fed. 719, the court quotes with approval from *McEwan v. City of Spokane,* 16 Wash. 212, 47 Pac. 433, as follows: "Under the special contract in this case and under the law it was not the duty of the contractors to look after the assessment; that was a duty which not only the law imposed upon the city, but which the special conditions of its contract imposed upon it, and, if the city was mistaken in regard to its construction of the law, the city must be responsible for such mistake, and not the contractors, who were not authorized to construe or enforce the law."

In *Commercial Nat. Bank v. City of Portland,* 24 Or. 188, the court say: "When the city orders a local improvement, the duty devolves upon it to put the necessary machinery in motion to raise the funds to pay for it by assessments upon the property affected."

In *Ft. Dodge Electric L. & P. Co. v. City of Ft. Dodge,* 115 Ia. 568, the court say: "This is not a case where the city undertook to do something which it could not do, and which the party contracting with it was bound, as matter of law, to know it could not do. Here the city could have done what it agreed to do (that is, have made a valid assessment on abutting property for the entire cost of the improvement not directly assumed by the city), and it

failed to do so. The party contracting with the city had no control over the method of determining the part of the cost which should be assessed to each property owner, nor over the method of issuing certificates. If, by the wrongful action of the city, he is unable to realize on any of the certificates issued to him, by reason of the wrongful action of the city council in carrying out the contract between him and the city, then we think he has a right to recover from the city. It has been frequently decided that where a city issues obligations payable out of a special fund, which it has authority to raise, but fails to take the steps necessary to bring such fund into existence, the holder of the obligations may recover against the city. In *Reilly v. City of Albany,* 112 N. Y. 30, the following language is used which seems pertinent in the case we have before us: 'When the contractor had performed his work according to his contract, he had no duty remaining to discharge, and then he had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty.' And see, as supporting the same proposition" (citing a large number of cases).

While defendant has cited authorities to sustain its contention that plaintiff should have proceeded by mandamus, we must decline to follow them. To our minds it is unreasonable to say that a city may deliberately fail to perform

a plain statutory and contractual duty, and then escape responsibility by saying that the contractor should have, by mandamus, compelled it to perform that duty.

2. Defendant's second contention is that the plaintiff's action was barred by the statute of limitations, for the reason that more than five years had elapsed from the date of the issuance and delivery of the warrants to the time of the commencement of the present action. And it is insisted that, if the special assessment was void, plaintiff was bound to know that fact, and that the action should have been brought within five years thereafter. It is also insisted that this court, in *Rogers v. City of Omaha,* 75 Neb. 318, has held that the statute commences to run at the expiration of a reasonable time within which the mayor and council should have created the fund and issued the warrants. In this counsel are in error. While we held in that case that the statute did not commence to run "until the lapse of a time reasonably sufficient for the creation of a special fund for the payment of such damages," we also distinctly said: "What degree of wilful delinquency or delay, if any, in this respect, would amount to a default of payment entitling a property owner to sue on the award is not now necessary to be determined, because it does not appear that any such occurred until well within the five-year period of limitations. Nor is it necessary to determine what was the effect, if any, upon the operation of the statute of limitations, of the taking possession of the land by the city without having in fact provided a fund for the payment of damages." We also said: "But we think the decision in *City of Omaha v. Clarke,* 66 Neb. 33, is distinguishable from the case at bar. In that case it was contended that the cause of action accrued at some earlier date than that of the order confirming the award, and apparently it was also contended that the order did not constitute an obligation in writing. The court overruled both these contentions, but they did not determine, and seemingly their minds did not advert to, the question, when does a cause of action upon the award arise? It may not

be necessary definitely to decide that question now." And in *Abrahams v. City of Omaha*, 80 Neb. 271, we said: "This action was begun November 23, 1898, so that the five years' interval began between the time of the completion of the work and the issuance of the warrants. We think the warrants executed and delivered by the competent city authority are a written acknowledgment of the claim and a promise to pay it which is obligatory upon the city, and arrested the running of the statute of limitations, if the running of the latter had previously begun, which we do not decide."

It will be seen from this that we have not decided the question as to when the statute of limations begins to run in a case of this character. All that we have decided in the cases referred to is that, under the facts appearing in each of those cases, the statute had not run against plaintiff's cause of action. A careful consideration of this question leads us to the conclusion that the statute of limitations does not commence to run against warrants issued by a municipal corporation, payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to pay the warrants. *Robertson v. Blaine County*, 90 Fed. 63; *Wetmore v. Monona County*, 73 Ia. 88; *Board of County Commissioners v. Clarke & Courts*, 12 Okla. 197, 70 Pac. 206; *Hubbell v. City of South Hutchinson*, 64 Kan. 645, 68 Pac. 52; *Barnes v. Turner*, 14 Okla. 284, 78 Pac. 108; *Potter v. New Whatcom*, 20 Wash. 589. In the light of these authorities, defendant's plea of the statute of limitations must fail.

The judgment of the district court is right, and should be affirmed.

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

DANIEL RICE, APPELLANT, V. THEODORE SHARP ET AL., APPELLEES.

FILED JUNE 26, 1908. No. 15,247.

Appeal: REVIEW: BILL OF EXCEPTIONS: AUTHENTICATION. Where the pleadings support the judgment rendered, and the correctness of the court's finding depends upon the evidence adduced on the trial, the judgment will be affirmed, unless the bill of exceptions is certified by the clerk of the district court as being either the original or a copy of the one allowed and ordered made a part of the record of the case.

APPEAL from the district court court for Thurston county: ANSON A. WELCH, JUDGE. *Affirmed.*

T. L. Sloan, E. C. Strode and *W. S. Summers,* for appellant.

Singhaus & Clark and *F. S. Howell, contra.*

FAWCETT, C.

The allegations in plaintiff's petition are to the effect that plaintiff is a Winnebago Indian of what is known as the Winnebago tribe of Indians; that defendant Sharp was chief clerk in the office of the superintendent and acting agent of the Winnebago agency; that plaintiff, acting under the direction and advice of the superintendent and his employees, made application to the secretary of the interior to have issued to him a patent in fee simple for for his allotment, viz., the E. ½ of the SW. ¼ of section 1, township 25 north, range 7 east (no county and state given); that upon the same day that he finally received his patent defendant Sharp represented to him that he (Sharp) was familiar with the land and the prices therefor; that he was experienced in the value of Indian lands on the Winnebago reservation; that he would find plaintiff a purchaser who would pay the highest price therefor; that the plaintiff, relying upon the representations made

by said Sharp, executed a deed to one J. L. Kuhns for a consideration of $1,600; that the said Sharp represented to plaintiff that the price named was the highest price obtainable, and that said Kuhns had deposited money for the payment of the full sum, which could be paid at once; that, relying upon such representations, plaintiff executed a deed to said Kuhns for the land above described; that the deed was acknowledged before the said Sharp as notary public, and that said Sharp was the sole witness of plaintiff's signature; that the transaction "is an unconscionable contract, and the consideration wholly inadequate, or about one-half the actual value of the land; that the said Theodore Sharp sustained confidential and fiduciary and trust relations to this plaintiff. Plaintiff further alleges that the consideration paid was the money, fund or property of the said Theodore Sharp, and that said Theodore Sharp made the said deed for his own benefit without disclosing to the plaintiff his interest therein, and that he is now and has been from the beginning the sole party interested in said transaction or a partial owner thereof, and that, in all the misrepresentations made by said Theodore Sharp to the plaintiff, plaintiff relied thereon, and did not know that said Theodore Sharp was making said deed for his own benefit. Plaintiff further alleges that the said John L. Kuhns, named in the deed, has no interest therein, and that he furnished no funds for the purchase of said land, and that the representations made by said Theodore Sharp that said John L. Kuhns had funds on deposit for the purpose of buying land were false and untrue; that, because of the false and untrue representations made by defendant Theodore Sharp and relied on by plaintiff, he was damaged in the sum of $1,600." The prayer is for a cancelation of the deed, and for an injunction restraining defendants from conveying the lands to other parties.

The amended answer admits that defendant Sharp is chief clerk of the Indian office at the Winnebago agency; that plaintiff upon December 12, 1906, received from de-

fendant Sharp as purchase price of the premises the sum of $1,600; and alleges that the plaintiff executed and delivered a deed to said premises to defendant Kuhns, conveying to him the title thereto in trust for defendant Sharp; alleges that said conveyance was subject to a valid lease of said premises to one Olson for the term of three years from March 1, 1906, at an annual rental of $65 for the first and second years, and $80 for the third year; the lessee, in addition, to break out 10 acres at a cost of not less than $20, and erect a wire fence at a cost of not less than $35, which was to remain upon the premises at the termination of the lease; "and denies each and every other allegation in plaintiff's petition contained." In an amendment to the amended answer, filed by leave of court, defendants allege that, after discovering and having full knowledge of the fact that defendant Sharp furnished the money for the payment of the land in question, plaintiff knowingly and purposely used and appropriated to his own use the consideration money received by plaintiff for said land, and, after the commencement of this suit, with full knowledge of the allegations set forth in his petition, plaintiff used and appropriated to his own use several hundred dollars of the consideration money so received by him. No reply was filed to the amended answer, but for reply to the amendment to the amended answer plaintiff admits that, after the filing of the petition in this action, and with the belief that the money consideration given for the land in controversy was the money of the defendant Sharp, "but which fact was not brought to the full knowledge of plaintiff until the admission was made by defendant in his answer," he did use and expend for his own use some money deposited with John Alam; "the same being a part of the consideration paid by said Sharp for the land." Upon these issues the case proceeded to trial. When plaintiff rested, defendants demanded judgment, and, from a decree dismissing plaintiff's petition and awarding defendants their costs, plaintiff has prosecuted this appeal.

A reversal is sought on the following grounds: "(1) Appellant alleges and claims that the sustaining of the defendants' motion to dismiss the action made at the close of the plaintiff's evidence is contrary to the law and the evidence. (2) That the judgment of dismissal and for costs and the findings upon which the same are based are contrary to the law and the evidence."

The assignment that the judgment of the court is not sustained by the evidence cannot be considered by this court, for the reason that the bill of exceptions purporting to contain the evidence adduced on the trial is not authenticated. The transcript of the pleadings and judgment of the district court were filed in this court June 7, 1907. What purports to be the bill of exceptions was not filed until June 19, 1907. This so-called bill of exceptions is not in any manner certified by the clerk of the district court, either that it is the original bill of exceptions settled and allowed in the case, or a copy thereof, as required by law; and, under the well-settled practice in this court, as well as under the requirements of the statute, it cannot be considered for any purpose. *Romberg v. Fokken,* 47 Neb. 198. This being the condition of the record, the only question we can consider is whether the pleadings in the case support the judgment rendered. *Crawford v. Smith,* 57 Neb. 503.

Looking to the pleadings only, it is apparent that the judgment of the district court is fully sustained thereby, and must be affirmed. Under the allegations and admissions in the pleadings, it appears that plaintiff is in this court seeking equity, without making any offer whatever to do equity. Giving the pleadings the construction most beneficial to plaintiff, it appears that he was induced to convey his 80 acres of land for a cash consideration of $1,600, paid to him by defendant, the land being worth $3,200, but incumbered with a three years' lease at what would seem to be a nominal rental. He admits having received the $1,600, and that he appropriated it to his own use; several hundred dollars of the money having been ap-

propriated and used by him after the commencement of this suit, and after he had sufficient information to lead him to believe that the money was the money of the defendant Sharp, and not of the defendant Kuhns. In short, plaintiff admits having received $1,600 for his 80 acres of land, and now asks a court of equity to permit him to keep the money and give him back the land. A court of equity will, in a proper case, relieve a party from a contract which he has been induced to enter into through fraud and misrepresentation, but it will not grant relief from one fraud by assisting the party to perpetrate another just as great. Under the above state of the pleadings, even if plaintiff's proposed bill of exceptions could be considered, we do not see how he could obtain any relief in this action.

The judgment of the district court should be affirmed.

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

GRAVENOR STANSER, APPELLANT, V. CHARLES F. CATHER ET AL., APELLEES.

FILED JUNE 26, 1908. No. 15,207.

1. **Pleading.** Where a plaintiff in an action to enjoin trespass claims under a lease, an allegation in an answer to such petition, that such lease has been canceled and terminated, is new matter which must be taken as true if not denied by a reply.
2. **Appeal: WITHDRAWAL OF RECORD.** The disposition of a case will not be delayed to permit an appellant to make a showing for leave to withdraw a purported bill of exceptions attached to the record, to the end that it may be authenticated, when under the pleadings no judgment could be rendered in favor of such appellant.

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

E. U. Overman, for appellant.

Bernard McNeny, contra.

CALKINS, C.

This was an action to enjoin an alleged trespass upon farming lands. The petition alleged that the plaintiff was in possession of such land "as the tenant of John B. Stanser, who is the owner of said land by virtue of a state school land lease issued by the state of Nebraska for said land"; and that the defendant, "claiming to have purchased the lease to said lands from the state of Nebraska," while plaintiff was peaceably engaged in farming said lands, wrongfully came upon the same, took down a portion of plaintiff's fences, and undertook to unlawfully stay and trespass thereon and to plow up said land and destroy plaintiff's crops. The defendant answered, alleging that the state of Nebraska was the owner of the land in question, and on the 8th day of July, 1884, leased the same to John B. Stanser for the term of 25 years from the date of such lease; that the said Stanser failed, neglected and refused to pay the rental due the state of Nebraska on said land, and that the said state of Nebraska, as by the terms of said lease it was provided it could do, by and through its proper officers, on the 12th day of January, 1905, canceled and annulled said lease and all the rights of the said John B. Stanser in and to said lease and the premises described in the plaintiff's petition; that afterwards, and on the 25th day of May, 1906, the state of Nebraska, by and through its proper officers, leased said premises to the defendant for the term of 25 years; and that the defendant had, since the making of said lease, been entitled to the possession of the said premises. There was no reply, and at the close of the plaintiff's testimony the district court rendered judgment dismissing the plaintiff's petition, from which judgment the plaintiff appeals.

1. The plaintiff is in the position of claiming under John B. Stanser, and at the same time admitting, by his failure to reply to the answer of the defendant, that the title or right of John B. Stanser in the land in question has been canceled and determined. There is no claim made that the case was tried as if a reply had been filed. The only consideration urged by plaintiff to avoid the above conclusion is that the defendant's answer is no more than a denial to the affirmative matter in the petition. The only allegation in the petition concerning the right of John B. Stanser to the land is that he claims by virtue of a school land lease issued by the state; while the allegation as to the nature of the defendant's claim is that he claims to have "purchased the lease to said lands from the state of Nebraska." This allegation might be construed to mean that the defendant had purchased the lease from Stanser; but, so construed, it would mean nothing, and it was probably intended to allege that the defendant had leased the land from the state. Given such construction, which is the most favorable to plaintiff's claim, there is an entire failure to mention the essential and fundamental fact contained in defendant's answer that this lease had been canceled for nonpayment of rent. The plea of these facts in the answer was not, therefore, a denial of any fact pleaded in the plaintiff's petition, but such facts were material allegations of new matter, which, not being controverted by a reply, must for the purposes of the action be taken as true. Section 134 of the code; *Stewart v. American Exchange Nat. Bank,* 54 Neb. 461; *Davis v. First Nat. Bank,* 57 Neb. 373; *Equitable Trust Co. v. O'Brien,* 55 Neb. 735.

2. Attached to the transcript is a document which purports to be a bill of exceptions settled in this cause. There is nothing to show that it was filed in the office of the clerk of the district court, and it lacks a certificate of authentication from such clerk. Since the case of *Aultman & Co. v. Patterson,* 14 Neb. 57, the general rule has been that the requirements of section 587*b* of the code

cannot be dispensed with. In *Yates v. Kinney,* 23 Neb. 648, it was held that failure to object to a purported bill of exceptions on the ground that it was not properly certified waived such objection; but this doctrine was denied in *Romberg v. Folken,* 47 Neb. 198, and in *Union P. R. Co. v. Kinney,* 47 Neb. 393, since which it has been held, in cases too numerous to cite, that a purported bill of exceptions lacking such identification must be disregarded. No motion was made against this document, but at the close of the oral argument the defendant called our attention to its condition. Thereupon the plaintiff in error orally asked leave to withdraw this document, to the end that it might be certified by the clerk of the district court and refiled. No showing was made that it was in truth what it purported to be, nor any reason given for the plaintiff's failure to make his application at an earlier date. Such application, made at a time which would delay the submission of the case, should not be granted except upon a showing of merit. Treating the plaintiff's request for leave to withdraw as a request for permission to make such showing, it should still be denied. Under the state of the pleadings, no judgment could have been properly rendered for the plaintiff, and nothing contained in the alleged bill of exceptions could change the result.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

OMAHA & NORTH PLATTE RAILROAD COMPANY ET AL., APPELLANTS, V. SARPY COUNTY ET AL., APPELLEES.

FILED JUNE 26, 1908. No. 15,230.

1. **Drains: LATERALS: PETITION.** The power given by section 2, art. I, ch. 89, Comp. St. 1881, to include a branch ditch, drain or watercourse necessary to secure the object of the improvement, whether mentioned in the petition or not, is not confined to such branches, ditches or drains as are wholly designed to drain the land lateral to the line of the main ditch.
2. ———: ———: **ASSESSMENTS: INJUNCTION: REVIEW.** The county board, in fixing assessments for benefits conferred by the construction of a branch ditch under the provisions of article I, ch. 89, Comp. St. 1881, acts judicially, and its judgment and findings will not be reviewed for error in an injunction suit brought to restrain the execution thereof.
3. ———: **INJUNCTION: NOTICE.** Where three railroad companies, being owner, lessee and sublessee, respectively, of a railroad, join in an action to restrain proceedings under the drainage act of 1881 (laws 1881, ch. 51), on the ground that due notice of such proceedings was not given, it is incumbent upon such plaintiffs to show want of knowledge of the existence of such proceedings in time to appear and contest the same.
4. ———: **DAMAGES: COLLATERAL ATTACK.** Where three companies are interested in a railroad which is claimed to be damaged by the improvement of a branch ditch which was constructed prior to the building of the road, the question of such damages is properly disposed of in the original proceedings; and the mere fact that no damages were allowed one of the companies does not make such proceedings void and subject to collateral attack.
5. **Constitutional Law: TITLES OF ACTS.** While by its title the drainage act of 1881 (Comp. St., ch. 89, art. I) is restricted to the purpose of draining swamp and marsh lands only, it is not void as in contravention of section 11, art. III of the constitution.

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

Greene, Breckenridge & Matters and *W. H. Hatteroth*, for appellants.

A. E. Langdon, William R. Patrick and *E. R. Ringo, contra.*

CALKINS, C.

This was an action brought to enjoin proceedings under the drainage act of 1881. From a point north of its confluence with the Elkhorn, the Platte river runs in a southerly direction, forming the western boundary of Sarpy county. Between the river on the west and the bluffs on the east is a low-lying, swampy tract of bottom land, from one and a half to two and a half miles wide, which is subject to inundation from the overflow of both the Elkhorn and the Platte, as well as surface waters from the bluffs. Instead of descending from the bluffs to the river, this bottom slopes slightly to the east to a point where there is a depression running in a southerly direction; and following this depression a ditch had been constructed by the county authorities of Sarpy county in 1885. This ditch ran in a southerly direction, and discharged its waters into the river where it ran in an easterly course along the southern boundary of Sarpy county. In 1886 the plaintiff, the Omaha & North Platte Railroad Company, built what is commonly known as the "Burlington cut-off" between Ashland and Omaha. The road traversed this bottom in a northeasterly direction upon an earthen embankment, except at the point where it crossed the ditch in question. At this place a bridge was constructed. In 1903 a petition was filed with the county board of Sarpy county under the provisions of article I, ch. 89, Comp. St. 1881, praying said board to widen, deepen and alter such ditch; and such proceedings were had that such petition was granted, and the plaintiffs, the Omaha & North Platte Railroad Company and the Chicago, Burlington & Quincy Railroad Company, were assessed as benefits from such improvement the sum of $448.86. The plaintiffs thereupon brought this suit in the district court for Sarpy county to enjoin the collection of such tax and the construction of such improved ditch. A temporary injunction was allowed the plaintiff, the Chicago, Burlington & Quincy Railroad Company;

but upon the final hearing this was dissolved, and the district court entered a decree dismissing plaintiffs' petition, from which the plaintiffs appeal.

1. The county surveyor reported that to attain the object of the petition it would be necessary to construct a spur or branch ditch, commencing about half a mile northeast of the starting point of the main ditch, and intersecting it at a point about 100 feet from this said starting point. It is contended by the plaintiffs that intersecting the main ditch so near its commencement, such spur or branch ditch was really an extension of the main ditch, and not a spur or lateral, and that, since it was not described in the original petition, such petition failed to comply with the requirement of the statute that it should describe the route and termini of the same with reasonable certainty, and therefore conferred no jurisdiction upon the county board. Section 2 (ch. 89, art. I, *supra*) of the statute provides: "The petition for any such improvement shall be held to include any side lateral spur or branch ditch, drain or water course necessary to secure the object of the improvement, whether the same is mentioned therein or not." The plaintiffs place much stress upon the word lateral, and argue as if it qualified the words branch ditch, drain or watercourse, which it plainly does not. We think the inclusion of a ditch half a mile long, designed to drain the territory lying north and east of the initial point of the main ditch, is clearly within the provisions of the statute above quoted.

2. It seems that in the first report of the county surveyor he did not include the roadbed of the plaintiffs as part of the property to be benefited, and that at the suggestion or by the direction of the county board it was by him inserted in an amended report. It is also claimed that one of the benefits considered by the board was the increased tonnage that the road would receive from such improvement; and this is sought to be established by the testimony of one of the members of the county board. So far as the first part of this contention is concerned, if the

plaintiffs' property was in fact benefited, it should have been included, and the action of the county board in that regard was proper. That it was improper for it to consider such indirect or consequential benefit as the increase of tonnage is equally clear. But in determining this question the county board acted judicially. *Dodge County v. Acom,* 72 Neb. 71. If it erred in determining the question of benefits, its judgment was subject to revision and correction in a direct proceeding. To entitle the plaintiffs to enjoin the execution of such judgment they must show: first, that they have a meritorious defense; second, that they have no adequate remedy at law; and, third, that their plight is in no way attributable to their own neglect. *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Cleland v. Hamilton Loan & Trust Co.,* 55 Neb. 13; *Kaufmann v. Drexel,* 56 Neb. 229. There is a total want of any reason for not raising these questions in a direct proceeding to correct any errors committed by the county board. To grant an injunction herein would simply be to use that remedy as a writ of error.

3. The plaintiff, the Omaha & North Platte Railroad Company, on the 1st day of December, 1886, leased the said road to the Chicago, Burlington & Quincy Railroad Company, and in the latter part of the year 1901 the plaintiff, the Chicago, Burlington & Quincy Railroad Company, leased the same to the plaintiff, the Chicago, Burlington & Quincy Railway Company, which was operating the road at the time of the proceedings in question. Notice was served upon the Omaha & North Platte Railroad Company and upon the Chicago, Burlington & Quincy Railway Company. No notice appears to have been served upon the plaintiff, the Chicago, Burlington & Quincy Railroad Company. It is contended that the notice to the Omaha & North Platte Railroad Company was insufficient because such notice described this plaintiff as the Omaha & North Platte Railway Company, and was given more than 40 days after the filing of the surveyor's report; but this report was

amended, and the notice was given within 40 days after filing the amended report; besides, this plaintiff appeared before said board and contested said proceeding. The proceedings were adjourned, and the notice given to the plaintiff, the Chicago, Burlington & Quincy Railway Company, was of this adjourned meeting.

It is contended by the defendant that because of their contractual relations there existed such a privity of interest among the three plaintiffs that all were bound by notice to one; but whether this is so, or whether the notice would be sufficient if questioned on appeal or error, we deem it unnecessary to consider. This is a suit in equity, and the plaintiffs must, as we have already seen, show that their failure to appear and defend their interests was not due to their own neglect. The burden is upon them to show that they had no actual notice in time to appear and raise the questions which they seek to present here. Had the plaintiffs been natural persons, their ignorance of the existence of these proceedings could have been established by their own evidence. Being corporations, and acting only through agents and officers, it was incumbent upon them to show upon what officer rested the duty of defending their rights in judicial proceedings, and by the testimony of such officer to establish the fact that he had no knowledge of the proceedings in question. One of the plaintiff's attorneys was sworn and testified that the firm of which he was a member had been attorneys for all the plaintiffs for years; that no notice was served upon any of the plaintiffs, and that no notice could have been served upon any plaintiff without his knowledge; that he appeared before the county board for the plaintiff, the Omaha & North Platte Railroad Company, to contest these proceedings. If this did not prove knowledge of the existence of the proceedings before the county board on the part of all the plaintiffs, it at least failed to prove want of such knowledge, which it was incumbent upon the plaintiffs to establish.

4. Damages were allowed the Omaha & North Platte

Railroad Company and the Chicago, Burlington & Quincy Railway Company for injuries they were supposed to have sustained by reason of the deepening and widening of the ditch; but none were allowed the plaintiff, the Chicago, Burlington & Quincy Railroad Company. It is contended that the failure to allow damages to the last named plaintiff avoids and makes void the whole proceeding. The question whether any of the plaintiffs were entitled to damages was a disputed one, the evidence on the part of the defendants showing that the ditch where it passed under the railroad was already as wide and deep as it was proposed to make it, and that the bridge over the same was of ample dimensions to safely accommodate it; while the witnesses on the other side were of the opinion that the additional amount of water proposed to be turned into the ditch was likely to cut its banks where it passed under the railroad, and require a lengthening of the bridge. This being a disputed question was one of the questions to be settled in the original proceeding, and cannot be raised collaterally.

In addition to this, there is no showing that the plaintiff, the Chicago, Burlington & Quincy Railroad Company, would have to bear any part of the expense of lengthening the bridge, if such action became necessary. Under a railroad lease the operating company usually bears such burdens, and, in the absence of any testimony to show that such expense would be, as among the plaintiffs themselves, chargeable to the Chicago, Burlington & Quincy Railroad Company, there is no merit in this objection.

5. Finally, the plaintiffs claim that article I, ch. 89, Comp. St. 1881 (laws 1881, ch. 51) is void as contravening the provisions of section 11, art. III of the constitution. The constitutionality of this act has been frequently assailed upon various grounds, but has always been upheld. *Darst v. Griffin*, 31 Neb. 668; *Dodge County v. Acom*, 61 Neb. 376, 72 Neb. 71; *Morris v. Washington*

County, 72 Neb. 174; *Tyson v. Washington County,* 78 Neb. 211. Now it is argued that it must be declared invalid because in the title it is described as an act to provide for the drainage of marsh and swamp lands, while in the body of the act the description of the lands to be drained is not so restricted. It is the rule that a statute in conflict with the constitution yields only to the extent of its repugnancy, and that where the provisions of an act are broader than the title it is still valid as to such provisions as are within the scope of its title. *Messenger v. State,* 25 Neb. 674; *Union P. R. Co. v. Sprague,* 69 Neb. 48. It follows that the objection now raised applies only in cases where the lands sought to be drained are not properly embraced in the description "swamp or marsh lands." This court has lately had occasion to consider this question, and has held that the term "marsh" or "swamp lands" has a wider significance than the terms "marsh or swamp," and that the provisions of the act may properly apply to land which from its low and level character may, from excessive rainfall, retain at some seasons of the year sufficient water so that it is rendered incapable of cultivation. *Campbell v. Youngson,* 80 Neb. 322. It is there expressly said that power is conferred by this act "to drain lands which are not, strictly speaking, 'marshes' or 'swamps,' but which are 'marsh or swamp lands,' meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general." The above is an accurate description of the character and condition of the lands in question. The circumstance that they are occasionally inundated by overflows from the Platte and Elkhorn, or that the plaintiff's embankment has aggravated their swampy condition, does not change their essential character, which is shown to have existed

before the construction of the railroad, and independently of any overflow from either river.

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

FAWCETT, C., concurs.

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

AFFIRMED.

ROSE OLMSTED ET AL., APPELLEES, V. SAMUEL G. NOLL ET AL., APPELLANTS.

FILED JUNE 26, 1908. No. 15,249.

1. Jury: CHALLENGES. It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges.

2. Trial: VERDICT. Where the court directs a verdict in favor of one defendant, and submits the cause to the jury as to the other defendants, and the jury returns two verdicts, one for the defendant in whose favor the court directed a verdict, and another against the other defendants, such verdicts will be considered as one, where no objection is made to their form at the time of their rendition nor until after the discharge of the jury.

3. Appeal: VERDICT: JUDGMENT. Where a verdict is rendered in favor of one defendant and against the others, but the judgment entered thereon fails to mention the defendant in whose favor the verdict finds, such error does not prejudice the other defendants, and is not ground for reversing a judgment as to them.

4. ———: OBJECTIONS TO EVIDENCE. Where there has been no offer of proof of the facts sought to be elicited by a question excluded, the ruling of the court in sustaining the objection is not properly presented for review.

5. ———: INSTRUCTIONS: REVIEW. A party cannot predicate error in the giving of an instruction upon the ground that the same is not sufficiently explicit, unless he has first called the attention of the court to such defect, and the court has refused to correct the same.

6. ———: VERDICT: REVIEW. In an action brought by a wife against liquor dealers for loss of support, although the evidence fails to show the actual cost of such support, a verdict will not be set aside, unless the amount is so large as to clearly indicate passion or prejudice in the minds of the jury.

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

J. H. Grimm & Son and *Strode & Strode,* for appellants.

R. J. Abbott and *R. D. Brown, contra.*

CALKINS, C.

This was an action by a wife on behalf of herself and minor children against two firms of liquor dealers and their bondsmen for loss of support caused by the sale of liquor to her husband. There was a verdict against the liquor dealers and the American Bonding & Trust Company of Baltimore, one of the sureties, for $1,000, and a separate verdict in favor of the other surety, the Metropolitan Mutual Bond & Surety Company of Omaha. Upon the verdict against the dealers and the American Bonding & Trust Company there was a judgment, from which these defendants separately appeal.

1. The defendants complain that the court erred in overruling a challenge to the favor made to one of the jurors. An examination of the record fails to disclose that the defendants exhausted their peremptory challenges, and we cannot, therefore, review the decision of the district court in that regard. *Curran v. Percival,* 21 Neb. 434; *Jenkins v. Mitchell,* 40 Neb. 664; *Brumback v. German Nat. Bank,* 46 Neb. 540.

2. It appears that the American Bonding & Trust Company was surety for the defendant dealers for the years 1901 and 1902, while the Metropolitan Mutual Bond & Surety Company was surety for the same defendants for the year beginning May, 1903. There being no evidence of sales to plaintiff's husband after May 1, 1903, the dis-

trict court directed the jury to find in favor of the latter defendant. The jury returned two verdicts, one in favor of the plaintiff and against the defendant liquor dealers and the American Bonding & Trust Company of Baltimore, the other in favor of the defendant the Metropolitan Mutual Bond & Surety Company. It is argued that each of these is a specific and separate verdict, and that each is bad because, taken alone, it finds upon only a part of the issues. We think the two verdicts, rendered on the same submission and at the same time, should, in the absence of any objection made at the time they were returned and before the jury was discharged, be considered as one, and, so considered, the verdict responds to all the issues.

3. When the formal judgment was entered, no mention was made of the defendant, the Metropolitan Mutual Bond & Surety Company. This was an error of which the last-named defendant could complain; but we fail to see how the other defendants are in any manner prejudiced thereby. If error, it was error which does not affect any substantial right of the defendants appealing, and must therefore be disregarded under section 145 of the code, which provides that no judgment shall be reversed by reason of any error which does not affect the substantial rights of the adverse party.

4. The plaintiff testified concerning the period embraced in her complaint that she and her children had not clothing to keep them decent, and that her husband did not furnish anything toward the table. The defendants called one Goodwin as a witness, and upon the examination in chief elicited testimony which tended to show that Mr. Olmsted was a drunkard before his marriage to the plaintiff, and that his habits in that respect were not materially different during the period in which the defendants were charged with selling him liquor. After a somewhat extended cross-examination, it was shown on the redirect examination that the witness during the last two years in question was in the drug busi-

ness part of the time and part of the time in the bakery business. Thereupon the witness was questioned, and testified as follows: "Q. And he would buy goods of you, would he, necessaries for the family? A. Yes, sir. Q. And pay for them? A. Yes, sir; I wouldn't trust him. He had to pay for them. Q. Could you tell us what amount he would pay to you for necessaries? (The plaintiff objects as incompetent, irrelevant, immaterial, not redirect. Sustained. Defendant excepts.)" It is now claimed by defendant that, if the witness had been permitted to answer this question, his testimony would have tended to contradict that of the plaintiff, when she testified that her husband furnished nothing for the table. If the witness would have testified that the husband bought any considerable amount of necessaries for his family, the same would have been highly material; but there was no offer on the part of the defendant to show what he expected to prove by this witness. The subject was not broached upon the principal examination of the witness, and the question referred to was asked upon his redirect examination, and went to the witness' knowledge of the amount that plaintiff's husband paid to him for necessaries. We think the court's attention and the nature of the proof offered should have been challenged by an offer setting forth what the defendant expected to establish by this witness; and, in the absence of such offer, we are unable to say that any error was committed in excluding this testimony of the witness. It has long been the rule in this state that, where there has been no offer of proof of the facts sought to be elicited by a question excluded, the ruling of the court in sustaining the objection is not properly presented for review. *Green v. Tierney,* 62 Neb. 561, and cases there cited.

5. The ninth instruction given by the court reads as follows: "You should decide this case on the evidence and that alone, and disregard any statements of counsel, if any such are made in the course of the trial, which are not justified by the evidence offered before you. It is

your office, having seen and heard the witnesses upon the stand, to carefully weigh the testimony as produced in evidence before you, and from that alone arrive at a verdict." This instruction is criticised because it fails to tell the jury that it is to decide the case upon the evidence and the law as given by the court. The instruction is right as far as it goes; but it is not as explicit as could be desired. It falls into that class of instructions where the charge does not necessarily mislead the jury, but where from want of particularity there is danger that it may do so. In such case there is no ground of error unless the complementary instruction is requested and refused. 2 Thompson, Trials, sec. 2345; *Republican V. R. Co. v. Fellers,* 16 Neb. 169; *Sioux City R. Co. v. Brown,* 13 Neb. 317; *Henry v. Omaha Packing Co.,* 81 Neb. 237.

6. Finally, it is urged that the verdict is excessive, and indicates that the jury were governed by passion and prejudice. The period for which the plaintiff claims to have suffered the loss of support for herself and children is about two years. There is a lack of any direct evidence as to the amount necessary for the proper support of such a family according to its condition and situation in life, and the amount awarded is not so large that we can from our own knowledge say that it is excessive. In the absence of proof of the actual cost of such support, an appellate court should not disturb the verdict, unless the amount is so large as to clearly indicate passion and prejudice in the minds of the jury.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

R. MEAD SHUMWAY V. STATE OF NEBRASKA.*

FILED JULY 17, 1908. No. 15,605.

1. **Criminal Law:** CONTINUANCE. Where the adverse party admits that the witnesses, if present, would testify as stated in an affidavit for a continuance, and the party presenting such affidavit afterwards reads the statement contained therein as evidence to the jury, there is presented no ground for a reversal of the final judgment of the trial court because of its refusal to grant the continuance asked.

2. ———: ———. Only that part of the affidavit for a continuance which sets forth the evidence of the absent witnesses should be read to the jury, and it is proper for the court to exclude the other matters contained therein.

3. ———: SELECTING JURY. Rulings of the district court in overruling challenges for cause are not prejudicial to the defendant, unless it is shown that he was compelled to accept one or more objectionable jurors for want of peremptory challenge.

4. ———: ———. The true object of challenges, peremptory and for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury, and, when it appears that this end is accomplished, there can be no just ground of complaint against the ruling of the court as to the competency of the jurors.

5. ———: INSTRUCTIONS. An instruction tendered by a party may be properly refused, if the proposition contained therein has been fully covered by the instructions given on the court's own motion.

6. ———: ———. It is proper for the trial judge, in instructing the jury in a criminal case, to quote so much of the statutes as is necessary to define the crime charged against the defendant, and ordinarily it is not prejudicial error to include in the quotation the punishment provided therefor.

7. ———: ———. It is not necessary for the trial court to cover all of the elements of the crime charged against the defendant in a criminal prosecution by a single paragraph of the instructions. It is sufficient if the instructions as a whole cover all of the elements of the offense and correctly state the law to be applied thereto.

8. ———: ———. An instruction treating the evidence as both direct and circumstantial *held*, in this case, to correctly reflect the state of the record.

* Rehearing denied. See opinion, p. 165, *post*.

9. ———: ———. The following instruction: "And you are further instructed that, if you believe, after considering all the evidence in the case, that any witness or witnesses have wilfully and knowingly testified falsely to any fact material to the issue in this case, you have the right to entirely disregard the testimony of such witness or witnesses"—is not vulnerable to the objection that its language is especially directed against the defendant, who was a witness in his own behalf.

10. ———: ———. It is not error to instruct the jury, in substance, that, if, after a careful comparison and candid consideration of all the evidence in the case, they have a doubt of the defendant's guilt, it will then be their duty to determine whether such doubt is reasonable and sufficient in law to acquit him, and, if they find the doubt in question is not a reasonable one, it will not be sufficient to acquit the defendant.

11. **Homicide:** EVIDENCE. On the trial of one charged with murder in the perpetration of a robbery, the state may be permitted to introduce evidence to show that the person murdered and her husband were in possession of a certain sum of money which they put away in the home for safe-keeping shortly before the commission of the crime, and that such money was missing when the criminal act was discovered, notwithstanding the defendant was not present when the money was put in the supposed place of safety.

12. **Criminal Law:** EVIDENCE: HARMLESS ERROR. The admission of incompetent evidence does not always require the reversal of the judgment of the trial court, and, where it clearly appears that the evidence complained of is so immaterial that its reception could not have influenced the jury in arriving at their verdict, its admission is error without prejudice.

13. ———: ———. In a criminal prosecution, evidence of the defendant's flight from the scene of the tragedy, his arrest and escape to an adjoining state, where he obtained employment distant from any railroad or highway, and in a place where he was likely to escape detection and avoid arrest, may be introduced by the state as tending, when considered with all of the other evidence in the case, to establish his guilt.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Fulton Jack and *R. W. Sabin*, for plaintiff in error.

William T. Thompson, Attorney General, Grant G.

Martin, M. W. Terry, Fred O. McGirr and *Samuel Rinaker, contra.*

BARNES, C. J.

R. Mead Shumway, who, for convenience, will hereafter be called the defendant, was tried in the district court for Gage county on an information containing two counts. The first count charged him with the crime of murder in the first degree for the killing of one Sarah Martin with deliberate and premeditated malice, and by the second count he was charged with murder in the same degree for killing the said Sarah Martin in the perpetration of a robbery. His trial resulted in a verdict of guilty as charged in the second count of the information, and the jury imposed upon him the death penalty. From a judgment and sentence upon the verdict, he has brought the case here for review.

Defendant's first contention is that the district court erred in overruling his motion for a continuance. It appears that he was informed against on the 31st day of October, 1907, and on the 4th day of November following he pleaded not guilty to the charges contained in the information. At that time he asked for and obtained a continuance until the 18th day of that month, in order to procure the depositions of Frank Johnson and John Gilbert, at Lewiston, in the state of Idaho, who, he alleged in his affidavit for a continuance, if he had an opportunity to take their depositions, would testify that prior to his leaving Idaho in the month of August, 1907, he had earned and received in the neighborhood of $200. It further appears that on the 18th day of November, when the case came on for trial, the depositions of the witnesses above named had not been taken, for the reason that defendant's counsel had been unable to find them, and thereupon a motion for a second continuance was filed, based on the original and additional affidavits of defendant and his attorneys, showing their inability to locate the witnesses and

secure their depositions. Strictly construed, it is somewhat doubtful if the showing was sufficient to require the court to grant a continuance. But to obviate any question of that kind, and avoid any necessity therefor, the state admitted that the witnesses, if present, would testify as stated in the defendant's affidavits, and afterwards so much of said affidavits as were material were admitted in evidence. The court overruled the motion, and this ruling is assigned as error. In *Catron v. State,* 52 Neb. 389, it was said: "Where the adverse party admits that witnesses, if present, would testify as stated in an affidavit for a continuance, and the party presenting such affidavit afterwards reads such statement in his affidavit as evidence to the jury, there is presented no ground for a reversal of the final judgment of the trial court because of its refusal to grant the continuance asked." The same question was again before this court in *Foster v. State,* 79 Neb. 259. There the defendant made an application for a continuance, setting forth fully what he believed the absent witnesses would swear to, if present. The state offered to admit that the witnesses, if present, would testify as stated in the affidavit. Under the circumstances of the case it was held that there was no abuse of discretion on the part of the court in overruling the motion for a continuance. Indeed, this rule is so well settled, not only in this court, but in other jurisdictions, that it is unnecessary to cite authorities in support of it.

It is contended, however, that the court erred in excluding certain parts of the affidavits, to wit, the statements showing the efforts of counsel to ascertain the whereabouts of the witnesses and procure their depositions, and that the defendant, after his arrest, was confined in the penitentiary for safe-keeping, and was thereby to some extent deprived of free opportunity to consult with his counsel and prepare for trial. That those matters were properly excluded there can be no doubt. The testimony of the absent witnesses, which was sought to be secured, was the only material part of the affidavits.

The efforts of counsel to obtain the depositions and the alleged insufficient opportunity afforded the defendant for consultation with counsel could throw no light upon the question of his guilt or innocence. They were matters with which the jury had no concern, and were therefore properly excluded.

Defendant's second assignment of error, the one upon which he appears to place the greatest reliance, is that the court erred in overruling his challenge for cause to certain persons called as jurors, and our attention is directed to the *voir dire* examination of John Clark, James Coon, W. B. Pittman, W. P. Carrithers, O. L. Beesom, Sanford Ritter and John Busboom. It appears from the record that Busboom was a qualified person to serve as a juror, so he may be dismissed from further consideration. As we read the record, five of the persons above named may have been to some extent objectionable. It may be conceded that the district court ought to have excluded them on the defendant's challenge for cause, and, if it were at all probable that the defendant's rights were prejudiced thereby, we would grant him a new trial, as a matter of course; but it appears that the defendant exercised his first peremptory challenge on juror Pittman, his second on Beesom, his third on Clark, his eleventh on Carrithers, and his twelfth on Coon, and the remainder of his 16 peremptory challenges were exercised upon persons who, so far as the record shows, were legally competent jurors and were not challenged for cause. Again, it affirmatively appears that no person served on the jury that tried the defendant who was challenged for cause by either party, and the *voir dire* examination of eight of the jurors is not contained in the record at all. It also appears that the juror, who was selected after the defendant had exhausted his last peremptory challenge, was accepted by him without objection. So we may say, without fear of successful contradiction, that not only has the defendant failed to show any prejudicial error in the court's refusal to sustain his challenges to the per-

sons above named, but it is affirmatively shown that he was tried by an entirely fair and impartial jury.

We come now to apply the law to the facts above stated. We find, from an examination of the authorities, that in a few jurisdictions it is held that the error is material if the challenge for cause is wrongfully overruled, and the juror is afterwards excused on peremptory challenge. There is also another line of authorities which hold that errors in overruling challenges for cause are not material, unless it is affirmatively shown that the defendant exhausted all of his peremptory challenges before the trial jury was secured. A third rule, which we believe to be the most reasonable one, and which is supported by the great weight of modern authority, is that errors in overruling challenges for cause are not prejudicial to the defendant, unless it be affirmatively shown that he was compelled to accept one or more objectionable jurors for want of peremptory challenge. This rule is recognized and approved by Judge Thompson, in his work on Trials, where it is said: "Finally, it is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal unless it be shown an objectionable juror was forced upon the challenging party after he had *exhausted his peremptory challenges;* if his peremptory challenges remained unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint." 1 Thompson, Trials, sec. 120. In *Wooten v. State,* 99 Tenn. 189, certain persons were summoned as jurors, and answered on their preliminary examination that they had read newspaper accounts of the homicide, and from those accounts had formed an opinion touching the guilt or innocence of the defendant. By reason of those opinions they were challenged by the defendant for cause; but the court ruled that they were competent, and thereupon the defendant challenged them peremptorily, and they were excused from service. Before the jury was completed, and while eleven jurors were being selected, the defend-

ant exhausted all of his peremptory challenges. Afterwards a juror was called and accepted by the state, and by the defendant, and became the twelfth member of the jury without objection or challenge. The court, basing its opinion on the foregoing facts, made use of the following language: "The true object of challenges, peremptory and for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When this end is accomplished, there can be no just ground of complaint against the ruling of the court as to the competency of jurors. In the present case, all of those alleged to be incompetent were rejected upon peremptory challenges, and, therefore, did not participate in the trial; and no objection, peremptory or for cause, was made to any jury selected. Dunning, the only one selected after the defendant had exhausted his peremptory challenges, was 'accepted' by both sides, without objection from either. No one of the jurors actually trying the case appears to have been objectionable or disqualified, consequently, all of them are presumed to have been unobjectionable and qualified." In *Freeman v. People,* 4 Denio (N. Y.), 9, 31, speaking of the defendant's use of his peremptory challenges, the court said: "He was free to use or not use them, as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them." In Texas it has been held in at least five cases that, unless objection is shown to one or more of the jurors who tried the case, the ruling of the trial court upon the competency or incompetency of jurors will not be inquired into, even though the defendant had exhausted his peremptory challenges. *Holt v. State,* 9 Tex. App. 571; *Loggins v.*

State, 12 Tex. App. 65, *Blackwell v. State,* 29 Tex. App. 194; *Holland v. State,* 31 Tex. Cr. Rep. 345; *Cotton v. State,* 32 Tex. 614. The fact that the defendants in a criminal case were obliged to challenge disqualified jurors peremptorily was held, in *Carthaus v. State,* 78 Wis. 560, not to be prejudicial error. In that case it was said: "A fair and impartial jury was impaneled, and what more could the defendant ask for?" In *State v. Raymond,* 11 Nev. 98, it was held: "If a juror is challenged for cause, the challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for the want of another challenge." See, also, *Johns v. State,* 55 Md. 350; *Spies v. People,* 122 Ill. 1. In *Northern P. R. Co. v. Herbert,* 116 U. S. 642, the supreme court of the United States held: The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained. In that case, as in the case at bar, it is not even suggested that the jury by which the defendant was tried was not a competent and impartial one. It was said in *Bohanan v. State,* 15 Neb. 209: "Although there may be error in overruling a challenge to a juror for cause, yet, if the prisoner be not compelled to exhaust his peremptory challenges to exclude him from the panel, it is error without prejudice." And in *Blenkiron v. State,* 40 Neb. 11, where the trial court overruled defendant's challenge to a juror for cause, and the record was silent as to the manner in which the juror was dismissed, and did not show that the defendant was compelled to exhaust his peremptory challenges to exclude him from the jury, and did disclose that the party challenged was not one of the jurors who tried the case, it was held that, so far as indicated by the record, there was no prejudicial error in overruling the challenge to the juror.

Finally, we have repeatedly held that error cannot be predicated upon the overruling of a challenge for cause, when the record does not disclose that the defendant has exhausted all of his peremptory challenges. In this case, as above stated, the record shows that the defendant exercised all of his peremptory challenges; but it does not show that they were all exercised upon persons whom he contends were disqualified to serve as jurors, and he has failed to show affirmatively that he was prejudiced by the rulings complained of. No showing of any kind whatever was made which would even remotely indicate that the defendant was in anywise prejudiced by the action of the trial court in overruling his challenges for cause. In order to render errors in overruling such challenges prejudicial to the defendant, it must be affirmatively shown that he was compelled to accept one or more objectionable jurors whom he would not otherwise have been compelled to allow to remain upon the jury. The constitution of our state requires that the defendant be tried by an impartial jury. The twelve men who tried the defendant in the case at bar, so far as the record shows, were entirely fair and impartial, and no objection was urged as to their qualifications by either party. This was all the defendant was entitled to, and the errors, if any, in overruling his challenges for cause were without prejudice to any of his substantial rights.

Defendant's next contention is that the district court erred in giving and refusing to give certain instructions to the jury. He first complains of the refusal of the court to give the fifth paragraph of the instructions which he tendered. This request related to the presumption of innocence, and, while it was not objectionable in form, yet the court gave defendant's fourth request, which covered the same ground, and also gave an instruction on his own motion, on that subject, which was approved in *Herold v. State,* 21 Neb. 50. The matter was thus correctly disposed of, and the request in question was properly refused.

Defendant also assigns error for the court's failure to give his fourteenth, fifteenth, and sixteenth requests. His fourteenth instruction, among other things, contained the following: "The evidence in behalf of the state is all circumstantial, and under these circumstances if any part of the evidence is such as to indicate that the clothing or any part of it, claimed by the state to have blood stains upon it, is not the property of the defendant, or even to cause you to have a reasonable doubt as to whether it is the property of the defendant, or if it is of a different kind than that claimed by the state to have been owned by him to such an extent as to cause you to have a reasonable doubt of his guilt, it is your duty to acquit him." There was no error in refusing this instruction. It is true that, in cases depending upon circumstantial evidence, each necessary link in the chain of circumstances must be established to the satisfaction of the jury beyond a reasonable doubt; but it is not every fact which the state seeks to prove that must, of necessity, be so established. It is true that, if the clothing "claimed by the state to have blood stains upon it was not the property of the defendant," the jury might properly have been instructed to eliminate that fact from their consideration, but, if it were his property, and the blood stains were present, it would be a proper subject for them to consider as bearing on the question of his innocence or guilt; but it would scarcely have been proper for the court to tell the jury that it would be their duty to acquit him if they had a reasonable doubt as to the identity of the clothing referred to. The court could not assume that that fact should be decisive of the main question, and thus attach to it an importance to which it might not be entitled. The fifteenth and sixteenth instructions were of the same tenor and effect as the fourteenth, above quoted, except that other articles of clothing were referred to. The whole subject of the identity of the clothing and the force or effect of a finding either way, as bearing upon the question of the

guilt or innocence of the defendant, was for the consideration of the jury, and the jury alone. Had they discarded the subject of the clothing and found defendant guilty upon the other evidence adduced, we cannot see that the verdict would have been rendered any the less conclusive.

The tenth instruction, given by the court on his own motion, is criticised because it contains a part of the statute which defines the crime of robbery and provides a punishment therefor. The criticism is not well founded. It is proper for a trial judge in instructing the jury to quote so much of the statute as is necessary to define the crime charged against a defendant, and the fact that robbery is punishable by imprisonment in the penitentiary is one of such common knowledge that its recital in an instruction can in nowise prejudice the defendant or deprive him of any constitutional right.

It is contended that the eleventh instruction, given by the court on his own motion, is erroneous, because it does not contain all of the elements of the second count of the information upon which the defendant was convicted, and did not refer to the venue, to the weapons used, or state that the killing must be done purposely. An examination of the instructions discloses that no attempt was made to cover all of the elements of the crime charged against the defendant by the instruction criticised, and we find it stated in the second paragraph of the first instruction that the defendant was charged in the second count of the information with purposely murdering Sarah Martin as alleged in the first count on the 3d of September, 1907, in Gage county, Nebraska, by the use of a knife and wrench; that the counts of the information and the plea of not guilty thereto formed the issues which were submitted to the jury for their determination. It is an elementary proposition that all of the instructions should be considered together, and we find in this case that the charge, when so considered, fully and fairly covers all of the elements of the crime set forth in both counts of the infor-

mation upon which the defendant was tried. His contention, therefore, is not well founded.

Instruction number 13 is assailed because it contains the following words: "Or if such facts and circumstances, together with the direct evidence in this case, do not satisfy you"—and it is insisted that the words "direct evidence" should not have been used, for the reason that all of the evidence was circumstantial. We think the court was justified in giving this instruction. It appears that certain facts in connection with the murder were proved by direct evidence, such as the defendant's conduct, his flight, his arrest in Kansas, and his escape and flight to the state of Missouri. The language complained of was therefore properly used.

Counsel assert that instructions 17 and 18, given by the court on his own motion, were prejudicial to the defendant, because the jury were thereby told that they had a right to disregard the testimony of any witness if they believed he had knowingly testified falsely. It is insisted that the language thus criticised was directed against the defendant. This contention is not sustained by the record. The instruction was the usual one given in such cases, and related to all of the witnesses. It was one which has long received the sanction of this court.

Instruction numbered 20 given by the court on his own motion, is complained of, because it told the jury that a doubt, to justify an acquittal, must be a reasonable doubt, and they must determine, if they had any doubt whatever, that such doubt was a reasonable one, in order to authorize an acquittal. The substance of this instruction was approved in *Barney v. State,* 49 Neb. 515, *Polin v. State,* 14 Neb. 540, *Foley v. State,* 42 Neb. 233, and *Maxfield v. State,* 54 Neb. 45, and we are satisfied, after an examination of all of the instructions given and those refused, that the jury were properly instructed upon the law of the case.

Finally, it is claimed that the court erred in the admission of certain evidence over the defendant's objections.

Under this assignment, it is first contended that the evidence of Mr. Martin, describing the disposition which he and his wife made of certain money on the day preceding the murder, should have been excluded. It is urged that this evidence was incompetent, because the defendant was not present at that time. Conceding this to be true, the state certainly had the right to show that Martin and his wife had the money in question at their home and put it away, in what they considered to be a place of safety. This is especially true, because the charge contained in the second count of the information was one of murder while perpetrating a robbery. Evidence that the deceased had the money in her house at the time the murder was committed, and that it was missing when the act was discovered, was clearly competent to sustain the charge upon which the defendant was convicted.

Counsel also objected to Martin's statement of the amount of money which he and his wife brought with them when they came to Gage county. It is probable that this objection should have been sustained, but we fail to see in what way the reception of this evidence was prejudicial to the defendant. It was not the purpose of the prosecution to show any connection between the money referred to by that question and the money alleged to have been taken by the defendant. The purpose was to show that the defendant knew Martin had considerable money in the house, that he ascertained that fact when Martin let him have $5 on Saturday before the crime was committed, that Martin had turned this money over to his wife, and that she had such an interest therein as would sustain the charge of ownership contained in the information.

Complaint is made of the admission of the evidence of the persons who arrested Shumway at Seneca, Kansas. And the statement particularly challenged was that they had made an effort to find the defendant the next day after he had escaped from their custody. Evidence of his

flight, his arrest, and of his escape was certainly competent, and the objection thereto was properly overruled.

Complaint is further made because the court overruled defendant's objection to the evidence of one Charles Markt, of Holt county, Missouri, who had known him six or seven years, and to whose place he went soon after the crime in question was committed. By this evidence the state sought to show the fact that Oregon, the town in Missouri near where the defendant was arrested, was an inland town, several miles distant from any railroad, and that the location of the farm where he was found was not upon the public highway. These questions were certainly proper and competent, for the purpose of showing that the defendant, after his flight from the scene of the tragedy, had selected an isolated place in which to immure himself, and one where he was likely to avoid arrest.

In conclusion, we desire to say that, owing to the great importance of the case, and the fact that the jury have imposed upon the defendant the death penalty, we have carefully read all of the evidence and reviewed the whole record, and to us it seems that the jury made no mistake in their verdict. The evidence is of a most convincing character. It appears that the defendant had a fair trial, by an impartial jury, and the record fails to show any reversible error.

The judgment of the district court is in all things affirmed, and it is ordered that Friday, the 30th day of October, A. D. 1908, be, and the same is, hereby fixed and appointed as the date for carrying into execution the judgment and sentence of the district court.

AFFIRMED.

The following opinion on motion for rehearing was filed January 23, 1909. *Rehearing denied. Former opinion modified:*

1. Appeal: RECORD. A paper, not properly a part of the record of the case, nor made so by statute, does not become a part of the record by being attached to or made a part of the transcript.

2. Exceptions, Bill of: REVIEW. In order to review the proceedings of the district court upon the impaneling of a jury, all matters with respect thereto which it is desired to present to the supreme court should be preserved by bill of exceptions.

3. Syllabus Vacated. The portion of the former opinion and syllabus in this case which treats of the errors assigned with reference to the impaneling of the jury vacated and set aside.

LETTON, J.

A motion for rehearing has been filed in this case supported by two printed briefs, and an exhaustive oral argument has been made. The principal complaint is that the court erred in its conclusion upon the question whether there was prejudicial error in the overruling of certain challenges for cause made by the defendant upon the *voir dire* examination of certain jurors. This has required a reexamination of the record with respect to the proceedings upon the impaneling of the jury. The bill of exceptions contains the *voir dire* examination of 49 persons. It further shows that 13 of these were excused upon the court's own motion, they being clearly disqualified; that 11 jurors were excused for cause upon the challenge of the state, and that 6 were excused upon the defendant's challenge for cause. The bill of exceptions further shows that 12 jurors, none of whom were challenged for cause, sat upon the trial, leaving 7 jurors unaccounted for. The bill of exceptions does not disclose whether these jurors or any of them were challenged peremptorily by either the state or the defendant, and, hence, fails to show that the defendant exhausted his peremptory challenges in order to oust the jurors whom he claims were erroneously retained. The transcript of the record, so far as it relates to the impaneling of the jury, shows that the impaneling began upon the 18th day of November, 1907, at 1:30 o'clock P. M.; that the impaneling continued during the remainder of that day and during the 19th, and was completed on the 20th; that upon the 21st day of November the jurors were duly impaneled and sworn, the state be-

gan the offer of its evidence, and at 6 o'clock P. M. an adjournment was taken until the next morning. Following these entries, the record recites that on the 21st of November there was filed in the office of the clerk of the district court the "jury list." This paper contains a list of names of 75 persons arranged in vertical column. Opposite the names of many of these persons are the words "Challenged for cause"; but there is nothing to show by whom these persons were challenged, for what reason they were challenged, or what disposition was made of the challenge. Opposite the names of others is the abbreviation "Deft." or the word "State" followed by a number, for example: "Deft. 4, Deft. 9," and so on; but there is nothing but inference from marks to show that these persons were challenged for cause or peremptorily or were excused or discharged from the panel. The paper is entirely typewritten, and is evidently not an original, but a copy, though certified to be the original list. In this condition of the record, the questions attempted to be raised upon the motion for rehearing as to error in sustaining challenges for cause cannot be considered, since there is no proof of the facts upon which the argument is predicated. A paper not made a part of the record by statute must be embodied in the bill of exceptions and made a part of the record by the trial court under its certificate; otherwise its insertion in the transcript is unauthorized and of no effect, and it is no evidence of the proceedings taken in the lower court. The clerk's certificate could not make this paper a part of the record. *Jordan & Miller v. Quick,* 11 Ia. 9; *State v. Jones,* 11 Ia. 11. This rule is founded on sound reason, for it would be grossly unfair to a trial judge if a recital of the proceedings taken and a history of his rulings made during the trial should be made a part of the record to be considered by a reviewing court, without allowing him the opportunity to determine the truth or falsity of such recitals before it became crystallized into the record. This is the very reason for the law as to presentation and allowance of bills of excep-

tions. To hold otherwise would, in all probability, give rise to unnumbered evils, and the only safe rule is to adhere to that course which both law and reason dictate.

A long time after the submission of the case, and four months after the opinion was handed down, the plaintiff in error filed a motion for leave to withdraw the bill of exceptions for the purpose of applying to the trial judge for leave to make the paper referred to a part of the bill of exceptions. We are inclined to think that the power of the district judge to allow an amendment to the bill of exceptions expired with the time allowed by statute in which to allow and settle the bill, but, if he still has the power to allow an amendment to the bill, the addition to the bill of exceptions of the paper marked "Jury list" would still fail to supply the necessary evidence of what took place during the impaneling of the jury. A motion asking leave to withdraw a record for the purpose of attempting to amend a bill of exceptions in the respect prayed in this case comes too late when it is not presented until long after the time for settling the bill has expired, nine months after the docketing of the error proceedings in this court, five months after the filing of an opinion in the case, and four months after the filing of the motion for rehearing. But, as we have said, even if attached to the bill of exceptions, the paper would not supply the necessary proof.

We do not wish to be understood as holding that it is necessary to preserve the *voir dire* examination of each and every juror, whether challenged or not, in order to review such alleged errors and thus unnecessarily encumber the record, but the bill of exceptions, if a party intends to predicate error upon the sustaining or overruling of challenges for cause, should, at least, contain the full examination of each juror whose qualifications are in question, and the action taken as to peremptory challenges. It is elementary that, when an appellant asks the reversal of a judgment on account of an alleged error assigned, the record of the cause filed in this court must

affirmatively show the existence of error without the aid of any matter or statement not properly a part of the record. *Hudson v. Densmore,* 68 Ind. 391; *Burt v. Panjaud,* 99 U. S. 180; *Hauser v. Roth,* 37 Ind. 89; *Organ v. State,* 26 Miss. 78; *State v. Chee Gong,* 17 Or. 635; *Morrill v. Taylor,* 6 Neb. 236; *McClure v. Lavender,* 21 Neb. 181.

When the case was submitted, our attention was not called to this condition of the record, and the opinion dealt with the questions presented by the plaintiff in error in his argument and brief; the court assuming from the points raised that the record contained the necessary proof. In the brief filed in support of the motion for rehearing our attention was called for the first time to the case of *Thurman v. State,* 27 Neb. 628, in which a conclusion the reverse of that announced in the opinion upon this point had been reached. If the record had contained evidence supporting the argument made, it then would have been necessary and proper to consider the points raised in the light of this case, but, under the well established and necessary rules of practice, we are satisfied that all that portion of the syllabus and of the opinion dealing with the impaneling of the jury should be vacated and set aside, the question not being presented by the record in the case, and this is accordingly done.

It is said that, since we inadvisedly treated this matter as being in the record, we should continue to do so, so that the plaintiff may have a new trial, and that this is a capital case; but, as was pointed out in the opinion, the defendant was tried by 12 men to each of whom he made no objection at the time of the trial. It was, apparently, a jury of fair and impartial men. Did the record indicate otherwise, it would be our duty in such a case as this to overlook technical rules in order to secure him a trial before a fair and impartial jury, but in our judgment it does not so indicate. It is equally our duty not to set aside or disregard settled principles in order to raise technical difficulties or obstructions to the due course of

justice, even though the penalty is such as is commensurate with the awful crime.

We fully indorse the statements in the opinion of Judge BARNES as to the proofs of guilt and absence of evidence that the accused was deprived of a fair trial. Though the evidence was circumstantial in so far that no witness saw the actual death blows struck, yet the overwhelming mass of incriminating circumstances fully justifies and sustains the verdict.

A number of other points are presented in the briefs and at the argument upon the motion, but we think none are of such merit as to warrant a rehearing.

For these reasons, the former opinion and syllabus are modified so as to vacate that portion treating of the impaneling of the jury, and the motion for a rehearing is

OVERRULED.

BARNES, J., and ROOT, J., concur.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

The defendant is under sentence of death upon a conviction resting on circumstantial evidence. We will concede that the crime committed was a most atrocious murder, and that the evidence against the defendant is very strong, yet there is a possibility that his story may be true and he be innocent. Whenever there is any room for doubt, the law should not take a human life until the accused has been given the benefit of every safeguard which its procedure throws around him.

On the trial of this case it is clear that the district court erred in overruling the challenge for cause by defendant's counsel to at least four jurors on their *voire dire* examination. Under the rule in such a case, clearly announced by this court in *Thurman v. State,* 27 Neb. 628, the fact that neither of these four jurors finally sat on the trial of the case is immaterial if the defendant had used all his

peremptory challenges before the final twelve were sworn to try the case. The statute of this state gives the defendant in a capital case sixteen peremptory challenges of jurors tendered, and defendant is not required to assign any reason for the exercise of such challenges. When these challenges are exhausted, he is at the mercy of any juror tendered, who by his answers upon his *voir dire* legally qualifies himself, and defendant is compelled to risk his life upon the verdict of such juror, even though he and his counsel may know to a moral certainty that the juror is greatly biased against him. In such a case we ought not to apply any technical rule to prevent a new trial. On the first hearing no claim was made by the state that the "jury list," filed immediately after the jury was impaneled, was not properly before this court in the bill of exceptions, nor that it did not establish the fact that the defendant had exhausted his peremptory challenges. On the contrary, the latter fact was conceded by the state, and the opinion of BARNES, C. J., was written upon that theory. I think the state should be held to that admission. If I am right in this, then a rehearing should be granted, and the defendant given another trial, before a jury selected under the established rules of procedure in this state. While I concur in the conclusion reached by my associates which vacates a portion of the opinion and syllabus in the former opinion, I am, for the reasons hereinbefore stated, unwilling to hold that the record is insufficient to bring this case within the rule announced in *Thurman v. State, supra,* and am unable to concur in overruling defendant's motion for rehearing.

REESE, C. J., and DEAN, J., concur in the foregoing dissent.

IN RE LEONARD B. ROBINSON.

FILED JULY 17, 1908. No. 1,075.

Attorneys: ADMISSION TO PRACTICE. "No one but a citizen of the United States and a resident of the state of Nebraska can be admitted to practice generally in the courts of said state." *In re Admission to the Bar*, 61 Neb. 58.

APPLICATION of Leonard B. Robinson for admission to the bar. *Motion for admission denied.*

W. E. Gantt, for appellant.

W. L. Anderson and *H. P. Leavitt, contra.*

REESE, J.

Leonard B. Robinson, Esq., is a resident and citizen of the state of Iowa, having his home and office at Sioux City, in that state. He is a reputable member of the bar thereof. The city of his residence being adjoining the line between the two states, his acquaintance and reputation as a lawyer extends into this state, and his professional business in this state has grown until it is quite inconvenient for him to be admitted to practice in our courts at each time and place when and where his profession calls him. He has, therefore, applied for admission generally as an attorney of this court with authority to practice in all the courts of the state. Under the rules of the court, his application was made through the bar commission, and upon an investigation thereof the commission has reported that, under the law of this state, the applicant is not entitled to admission. It is conceded that, if a nonresident of the state can be admitted at all, Mr. Robinson is entitled to the favor asked, as he is a gentleman and lawyer against whom no personal objection exists. Briefs have been furnished by the commission and by W. E. Gantt, who represents the applicant, and the whole ques-

tion of the relation of the members of the bar to the state and to its courts have been thoroughly presented. *In re Admission to the Bar,* 61 Neb. 58, the question was fully considered, and we held: "A necessary qualification for admission to practice generally is that the applicant must be a citizen of the United States and a resident of this state. An alien cannot well take the oath required of attorneys and counselors by section 4 of said chapter 7 (Comp. St. 1899). Furthermore, such persons and practicing attorneys who reside in other states or any of the territories are, as a rule, out of the jurisdiction of the courts of this state, and beyond the reach of its process in case their professional action is called in question and the disciplinary power of the court is invoked against them. Such alien or nonresident attorney may, however, as a matter of comity, be permitted, by any court of record in which there is pending any cause in which he may be interested, to appear for some of the purposes of said cause, upon being fully satisfied as to his professional character and standing at the bar of the place of his residence. Of course, it is not permitted to such an attorney to commence actions or sign pleadings or papers on behalf of any litigant. Such powers are expressly reserved to the duly admitted attorneys and counselors of the state."

This must be held to have been the law of this state upon the subject before the amendment of 1903, by which the words "for the purpose of said business only" were incorporated into section 3602, Ann. St. 1903. The section, as amended, is as follows: "Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts, may, on motion, be admitted to practice (for the purpose of said business only), in either of said courts, upon taking the oath as aforesaid." This section must be held to be a prohibition of the admission of nonresident attorneys to general practice. They may be admitted "for the purpose of said business *only,*" which is the transaction of such professional business as they may have in the

courts of the state. For this purpose, either the supreme or district court has authority to administer the required oath. Aside from the provisions of our statute and the decisions of this court, we are of the opinion that the reasoning of the supreme court of Wisconsin in *In re Mosness,* 39 Wis. 509, is correct, and the proper rule is recognized.

For the reason only that the gentleman whose admission is moved is not a resident of this state, the motion must be denied. This, however, does not deprive him from appearing in the courts of this state under the provisions of the statute above quoted.

Motion for admission to the bar generally

DENIED.

BARBARA SCHNEIDER, APPELLEE, V. CHARLES S. LOBINGIER, APPELLANT; H. E. CARTER ET AL., APPELLEES.

FILED JULY 17, 1908. No. 15,189.

1. **Judgment:** SUIT TO VACATE. An attorney, C., was employed to prosecute an action in partition for a stipulated fee. He employed L., another attorney, residing at the place of the trial, to assist him. L. took the active management of the case, and, proceeding on information received from C., prepared a report for the referee appointed to make partition of the property involved, showing that the plaintiff had conveyed to C. and himself a two-fifths interest in her share of the property, and, on representations made to the referee and to the court that such report was agreeable to all parties, the referee filed the report and the court entered an order confirming the same. The plaintiff had no knowledge that the attorneys were awarded a part of the land out of her share, and did not discover the same until about two years after the entry of the decree. Within a short time thereafter, but more than two years after the filing of the decree, she commenced an action in equity to vacate the decree and to have a proper decree entered. *Held,* That an action on the equity side of the docket was a proper proceeding in which to obtain the relief demanded.

2. ———: VACATING. Whether proceedings under sections 602-609 of the code are applicable in a case of this character, where the relief sought is not against any of the parties to the action, but against strangers to the record, *quære.*

3. ———: SUIT TO VACATE: DECREE. A party applying to a court of equity for relief should be required to do what justice and equity requires. The decree entered should protect the interest of the defendant, as well as that of the plaintiff.

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

H. P. Leavitt and *C. S. Lobingier,* for appellant.

John D. Ware and *Thomas E. Neary, contra.*

DUFFIE, C.

Barbara Schneider, the plaintiff and appellee, claimed an interest in three lots in the city of Omaha, Nebraska, and a quarter section of land in Washington county, Nebraska, as one of the heirs of Mary Thomas, deceased. Some time about the year 1900 she employed H. E. Carter, an attorney at law residing in Tekamah, Burt county, to obtain partition of said real estate. The terms of Carter's employment are not clearly shown, but the plaintiff testified that she offered him 10 per cent. of the amount realized from her share of the property. One of her sons testified that Carter informed him that he would have to investigate the facts of the case before fixing the amount of his fee, but there is no evidence tending to show that any offer was made him in excess of 10 per cent., and, as he afterwards commenced an action for the plaintiff, the presumption must obtain that he accepted her offer and proceeded with the understanding that 10 per cent. of the amount recovered was the amount of his fee. This presumption obtains only for the purpose of the present hearing. Evidence in further proceedings may overcome it.

In August, 1900, Carter filed a petition in Douglas county district court, asking a partition of the real estate,

and in December of the same year he wrote to Mr. Lobingier, an attorney residing in the city of Omaha, stating that he had filed a petition in a partition action, and asked him to ascertain what answer had been filed, and saying that he wished to have his assistance in the case. Some further correspondence took place between them, and Lobingier engaged earnestly in the case, and after prolonged and earnest efforts obtained a ruling of the court in favor of Mrs. Schneider as against a claim of adverse possession asserted by the other heirs of Mrs. Thomas, and by which they expected to defeat her claim to any share of the property. On the 28th of June, 1901, a decree was entered by the district court finding that Mrs. Schneider was entitled to 3-28 of the real estate described in her petition, and that Chas. T. Dickinson, to whom she had previously conveyed a quarter of her interest (and who was a party defendant), was entitled to 1-28 thereof. Harry Fisher, an attorney of Douglas county bar, was appointed referee to make partition between the parties, and on December 6, 1901, he made his report, stating, among other things, the following: "I find that since the commencement of this action the plaintiff Barbara Schneider has disposed of a portion of her interest in said real estate to said H. E. Carter, Esq., of Burt county, Nebraska, and that she has disposed of another portion of her said interest to Charles S. Lobingier, Esq., of Douglas county, Nebraska, each of the interests so disposed of being equal to 1-5 of the joint share of the plaintiff and of the defendant, Chas. T. Dickinson, in said real estate. I further find that it was agreeable and satisfactory to all parties, and is an equitable division of said property to allot to the plaintiff and her said grantees and the defendant Chas. T. Dickinson, jointly, the east 58 feet of lot 2, in block 211½, in the city of Omaha, Douglas county, Nebraska." January 3, 1902, the district court entered a decree confirming the report of the referee, the order of confirmation stating that partition had been made in accordance with the report, by consent of all the parties

to the action, and awarding the plaintiff 7-20 of the east 58 feet of lot 2, in block 211½; Chas. T. Dickinson an undivided ¼ of said 58 feet; H. E. Carter and Charles S. Lobingier, each, an undivided 1-5 of the east 58 feet of said lot 2.

Afterwards, and on the 5th day of February, 1904, the plaintiff filed her petition in this action, alleging that in the year 1900 she employed H. E. Carter as her attorney to prosecute an action in the district court for Douglas county, Nebraska, against Julia Thomas, George F. Thomas and Chas. T. Dickinson, to recover her share of the estate of Mary Thomas, deceased, under an oral contract by which he was to receive for his services 10 per cent. of the value of the property recovered; that Carter commenced the action and employed Charles S. Lobingier to assist him in prosecuting the same; that a decree was entered awarding her a certain interest in the property; that defendants, unmindful of their duty as attorneys, fraudulently represented to Fisher, the referee appointed to make partition, that by agreement with the plaintiff they were entitled, each, to an undivided 1-5 of the east 58 feet of lot 2, in block 211½, in the city of Omaha, and persuaded him to so report to the court; and that they fraudulently obtained a decree from the court confirming in them a 1-5 interest in the east 58 feet of said lot 2. She further alleges that she did not agree or consent to said report or decree, or know of the entering of the same until about the last day of December, 1903, when she learned the fact at her home in Burt county, about 70 miles from Omaha. She asked that the referee's report and the decree based thereon be set aside and a new decree entered, in which she would be awarded the interests given to Carter and Lobingier by the decree which she asked to have vacated. The defendant Carter filed an answer in which he admits that he is not now, and never was, entitled to a decree in the case referred to giving him an undivided 1-5 of the east 58 feet of lot 2.

The answer of defendant Lobingier is quite lengthy, but his defense, in brief, is the following: That plaintiff employed Carter as her attorney, and also employed him through Carter acting for and on her behalf; that he was to receive a share in the property recovered for his services; that he undertook the main work of prosecuting the action, made all the examination of the legal questions involved, and prepared for and conducted the trial; that the case was one of great difficulty and doubt, was stubbornly resisted, and, except for defendant's efforts, plaintiff would have failed in her action; that plaintiff counseled with him, was in attendance at the trial, and knew of his work in her behalf; that after the trial he secured from the other defendants in the action an agreement by which the plaintiff, instead of taking a share in each of the four pieces of property involved, secured the east 58 feet of lot 2, in block 211½, in the city of Omaha, thus giving her the advantage of having her whole interest located in one lot; that he submitted said compromise to the plaintiff through her attorney Carter, who reported that plaintiff desired to accept the same, and that Carter requested him to draft a final decree embodying said compromise, and also securing the compensation due said Carter and Lobingier as attorneys in the case; that thereupon he drafted the decree as finally entered, submitted it to the other attorneys, who indicated their approval thereon, and then sent the draft of the decree to the plaintiff through said Carter, who returned it with a report that it was satisfactory to the plaintiff; that the decree was thereupon presented to the court, signed by the judge, and entered of record. The answer denies any fraudulent statements made to the referee or the judge hearing the case. It is further alleged that plaintiff had notice of the decree, accepted the benefits thereof, and made no objections thereto until an unreasonable time after the same was recorded. His answer contains a cross-petition, asking to be awarded the sum of $600 for services in the case and for costs expended therein.

The district court vacated the decree in accordance with the prayer of plaintiff's petition, and directed the referee to make a new report awarding to the plaintiff and to Chas. T. Dickinson the east 58 feet of lot 2, of block 211½, and, further, entered a decree confirming said report. The defendant Lobingier has appealed.

It is earnestly argued that the plaintiff should have taken advantage of the provisions of section 602 of the code to have the decree of which she complains vacated, and that, having neglected to proceed under the statutes, equity will afford her no relief. To the writer it is a question of great doubt whether the provisions of sections 602-609 of the code have reference to cases of this character. These provisions of the code undoubtedly apply to parties to the action, and are intended for the relief of a plaintiff or defendant who has suffered from the mistake, neglect or omission of the clerk, from the fraud of the opposing party, for casualty or misfortune which prevent him from prosecuting or defending, and for other matters within their provisions. But we are not certain that they offer a remedy, where one not a party to the record, and without knowledge on the part of one of the parties, obtains from the court a provision in the judgment finally rendered, taking from that party a substantial right for the benefit of such stranger to the record. But, even if the plaintiff might have the benefit of these provisions of our code in obtaining relief from the unauthorized acts of her attorneys, the cases, while not numerous, are all to the effect that these provisions of our code create no new rights, but are merely declaratory of the equity doctrine that a judgment clearly shown to be obtained by fraud, and which it would be against conscience to enforce, may be set aside in an equitable action brought for that purpose. *Secord v. Powers,* 61 Neb. 615; *Barr v. Post,* 59 Neb. 361.

The district court was undoubtedly right in vacating the decree as entered, but it erred in dismissing Lobingier's cross-bill. We think it should have recognized the equi-

ties of Mr. Lobingier and made provision for his remuneration. The plaintiff herself conceded that Carter was to have 10 per cent. of the value of the property recovered for her, which he was to get out of the property; and, while she insists that she did not employ or authorize the employment of Lobingier, she knew of his assistance in the case and did not object thereto, and she cannot now, after his work has been performed, deny his right to whatever interest in the property the arrangements between him and Carter entitles him to. The plaintiff testifies that "Carter told us that he cannot go down there every time, and that he hire a man down there to help him. He says that he give him half of what he gets." It is evident from the record that nothing has been paid by plaintiff, either to Carter or to Lobingier, not even the necessary costs advanced in the case; nor is there any tender or offer to pay or reimburse them. While the amount of the fee which Carter was to receive is not clearly shown, and his evidence in the case would be of the utmost importance to the parties, it is not denied that it should be at least 10 per cent. of the value of the property recovered, and was to be made out of that property. We think, under the circumstances, the plaintiff, having appealed to the equity side of the court, should herself be held to do what is equitable, and that her property recovered in the action should be made subject to a lien for whatever amount it may be shown Carter was entitled to receive under his contract of employment, as well also as for any costs advanced in the case.

We recommend, therefore, that the decree be modified, with permission to the parties to amend their pleadings, if they so elect, and that upon a second trial of the case the amount due Carter under his contract with the plaintiff be ascertained; that the same be made a lien upon the property awarded the plaintiff; that the terms of Lobingier's employment be ascertained, and he be awarded an interest in the lien established against the property in favor of Carter for the amount of his fee, if the same was

agreed upon between Carter and himself; and, if not agreed upon, that the amount of the fee due Carter from the plaintiff be divided between them in the proportion to the services rendered by each.

By the Court: For the reasons above given, the judgment of the district court dismissing the counterclaim of the defendant Lobingier is reversed and the cause remanded, with directions to proceed therein as indicated in the above opinion.

REVERSED.

WILLIAM E. BARKLEY, JR., ADMINISTRATOR, ET AL., APPELLEES, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED JULY 17, 1908. No. 15,111.

1. Cities: VOID ASSESSMENTS: REASSESSMENT. Section 7792, Ann. St. 1903, providing for the reassessment of property by the city council in all cases where special assessments have or may be declared void or invalid, does not authorize a reassessment of property for the benefit of a purchaser at tax sale, who fails to recover the amount of such special taxes from the property on account of the illegality of the assessment.
2. ———: ———: INJUNCTION. An injunction will lie to restrain the city council from proceeding under color of right to reassess special taxes and relevy the same upon property when they have no authority to do so.

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

E. C. Strode, T. J. Doyle and *D. J. Flaherty,* for appellants.

E. F. Pettis, contra.

EPPERSON, C.

In 1892 a special assessment was levied against lots 7, 8 and 9, in block 21, of Lavender's addition to the city of

Lincoln, then owned by Helena Knight, to defray the expenses of paving the streets upon which they abutted. The special assessment was payable one-tenth annually. Default was made in the payment of all taxes levied upon said lots in 1899, including the fifth payment of the said special taxes. One Lessenhop, or his grantor, purchased the premises at tax sale in November, 1900, and paid the subsequent general and special taxes; and later instituted proceedings in the district court to foreclose the same. The court awarded him a foreclosure of the general taxes, but adjudged the special tax void because of irregularities in the assessment and levy thereof. Thereafter the city council took initiative steps toward the reassessment of said property under the provisions of section 7792, Ann. St. 1903, which provides in part: "The council shall have power in all cases where special assessments heretofore made or which may hereafter be made, for any purpose, have or may be declared void or invalid, for want of jurisdiction, in making or levying such special assessments or on account of any defect or irregularity in the manner of levying the same, or for any cause whatever, to reassess and relevy a new assessment equal to the special benefits or not to exceed the cost of the improvement for which the assessment was made upon the property originally assessed, and such assessment so made shall constitute a lien upon the property prior and superior to all other liens except liens for taxes or other special assessments." After having given notice of their intended proceeding, the plaintiffs herein instituted this action to restrain defendants from reassessing and relevying taxes for such improvement. Upon trial in the district court, the temporary order of injunction previously issued was made perpetual, and the defendants enjoined from reassessing or relevying the special pavement taxes, and defendants appealed. At the time the taxes were paid by the purchaser, the proceeds thereof were distributed and the amount levied by the city was delivered to it, and was used for the purpose of paying

bonds issued by the city to raise funds to pay for the improvement in controversy.

Defendants contend that, upon the failure of the purchaser to recover upon his tax sale certificate because of illegality of the taxes, he is subrogated to all the rights of the city, including the right to reassess the property, and that it is the duty of the city council to proceed to relevy the special taxes for his benefit. We are cited to no case which is directly in point, but it is contended that *Grant v. Bartholomew,* 57 Neb. 673, lays down a rule broad enough to support the defendants' contention in this case. It is there said, in reference to a void sale for taxes, that the sale will be held "effective as an assignment and transfer of the liens of the public to the tax purchaser, and invests him with all liens and rights which the public had against said real estate by reason of the taxes assessed and delinquent thereon," and "the uniform holding has been that, if the sale was void, no matter for what reason, it was still effective as an assignment of the public's interest." *Grant v. Bartholomew* did not determine the right of a city to reassess property liable to taxation for improvements, nor did the language quoted refer to irregular or illegal taxes, but had reference to an irregular sale for legal taxes, and must be taken to refer only to the lien which the law imposes upon property for and by reason of taxes regularly assessed and levied. That the language quoted did not intend in any way to refer to taxes illegally levied may be seen by referring to the opinion on rehearing (58 Neb. 839), wherein it appears that the purchaser in that case was denied a lien for the amount paid as special taxes which were irregularly levied. It was for the general taxes only which were regularly levied that the decision of the court relied upon by the appellants herein applied. It is a well-established rule in this state that, in the absence of a statute, the purchaser at a tax sale cannot upon the failure of his lien recover the amount he expended for taxes from the city levying the same. *Pennock v. Douglas County,* 39

Neb. 293; *Merrill v. City of Omaha*, 39 Neb. 304; *Norris v. Burt County*, 56 Neb. 295; *Adams v. Osgood*, 42 Neb. 450; *McCague v. City of Omaha*, 58 Neb. 37; *Martin v. Kearney County*, 62 Neb. 538. It would seem, therefore, that no occasion would exist for a reassessment and relevy of the property, inasmuch as the taxes have been paid by the purchaser. The city not being required by law to refund the same, it would necessarily follow that it could not voluntarily reimburse him. It is a rule, requiring the citation of no authorities to support it, that a municipal corporation can levy taxes only for the purposes authorized by statute. There is not now, and never has been, in this state a statute making a city liable to the purchaser at tax sale for the repayment to him of the amount he expended in the payment of taxes upon his failure to collect the same from the property. Defendants argue, notwithstanding the rule so firmly established by the cases cited above, that the reassessment and relevy may be made by the city council for the benefit of the purchaser on account of his right to subrogation. The doctrine of subrogation can hardly be carried to this length. It contemplates the existence of a lien to which some other person succeeds by reason of having procured an interest in the property. The lien must be an existing one, which the holder thereof could have enforced at the time of the transfer of interests. At no time has the city of Lincoln had a lien upon the property here in controversy. From the time of the attempted levy of the special taxes until such levy was declared void by the district court, the city of Lincoln and the holder of the tax sale certificate had but an apparent lien. Had the sale only been illegal, that is to say, had there been an illegal or insufficient sale of the premises by the county treasurer for the satisfaction of taxes legally levied, there might be some reason to extend to the purchaser the right of subrogation to the lien of the city for such taxes. We do not know of any case, and are cited to none, which gives to the purchaser the right to have the city create a lien to be substituted

for the one which he supposed that he was acquiring at the time of the purchase. In *Merriam v. Hemple,* 17 Neb. 345, the right to subrogation by the purchaser at a void sale of real estate for taxes is expressly limited to the legal taxes so paid by him, with legal interest. The facts relative to the taxation of property in *John v. Connell,* 61 Neb. 267, are very similar to the case at bar. That was an action to foreclose a tax sale certificate. A part of the taxes in controversy was a special assessment made to defray the expenses of grading an avenue abutting the lots in controversy. Regular taxes and other special taxes had also been paid by the purchaser. The court found that the special taxes for grading were absolutely null and void, but held that the purchaser was subrogated to the lien of the public only to the extent of the taxes legally levied. The court held: "A tax sale certificate based upon a void levy or assessment gives to the person to whom it is issued no lien upon the property described therein."

It is true that section 7792, *supra,* provides that the council shall have power in all cases where special assessments have or may be declared void or invalid for want of jurisdiction in the first instance to assess, etc., but this must be read with reference to the object of the statute; and proceedings thereunder may be had only for the purpose of exercising such authority as is within legitimate scope of the act. It is apparent that the section was intended to provide public revenue, and for this purpose only can proceedings be had thereunder. Such was not the purpose of the defendants herein in their contemplated proceedings which were restrained by the order of the lower court; instead, they were seeking to raise funds for the benefit of an individual who, as above shown, has no claim upon the city. It is perhaps unfortunate that the purchaser cannot recover from a city the amount of the municipal tax he has paid whenever his tax certificate is declared void because of irregularity in the assessment; but we take the law as we find it, and not as we would have it. Could the purchaser recover from the city, there

would be little or no doubt but that the authorities could relevy the taxes. But to hold that the city could refund the purchase price would be to overrule a line of decisions above cited, and, moreover, to create an exception to the well-established and wise rule limiting municipalities to the exercise of such powers as are conferred by statute. To permit a relevy in the case at bar would be to create a fund, which, under the law, could not be repaid to the purchaser. The improvements have been paid for, and the levy under these circumstances would be for personal and not public interests. The purchaser paid the amount of the tax voluntarily. The city did not guarantee the legality of the tax. It is true that he received nothing of value. But he had an opportunity to inquire and ascertain what he was buying before he parted with his money. At that time the statute did not provide for the reassessment of the property. He had no right to expect that in the event the levy was avoided the city would relevy the taxes for his benefit.

In *Budge v. City of Grand Forks*, 1 N. Dak. 309, in a case wherein both the facts and the statute authorizing reassessments were similar to the case at bar, it was held: "That a subsequent statute, authorizing municipalities to reassess, * * * was intended for the benefit of the taxing municipalities only, and that, where such municipality had received the amount of the former assessment by the sale of the assessed property, the right of such municipality to assess such property for such improvement was extinguished, and could not be reasserted, and no power of reassessment as to such property was given by the statute." This case was criticised in *Schintgen v. City of La Crosse*, 117 Wis. 158. The two cases can well be distinguished, for both the facts and the laws construed were different; and the Wisconsin case may for the same reasons be distinguished from the case at bar. The assessment there involved was made, but the taxes were not paid. The city authorities then issued improvement bonds therefor. "The improvement bond is practi-

cally but another form of a special assessment certificate which gives the property owner an opportunity to pay his assessment in instalments running through a period of years, instead of paying the whole amount of the assessment at once." The reassessment statute construed expressly provided for the issuance of new improvement bonds in the place of those previously issued. Thus we see that by the statute authorizing reassessment the payment of improvement bonds was provided for by the legislature. From a consideration of the above case, it is apparent that the person for whose benefit the reassessment was made advanced the money upon the improvement bond, and that his money was used for the construction of the improvement. The reassessment statute was enacted in part to save him harmless in the event that the assessment should be declared illegal. In the case at bar, the purchaser at the tax sale did not pay his money for the purpose of constructing the improvement for which the special assessment was made. His venture was a speculation, and not for the purpose of assisting the city officials in the improvement of the streets. And, again, as to the Wisconsin case, the right to reassessment existed when the improvement bonds were issued, and under the statute the holder of such bonds was given all the right, title and interest of such city in and to the assessment on which it is based, including, it appears from the opinion, the right to reassessment. It has been held in this state that, although a tax sale is void, yet it will be effective as an assignment and a transfer of the rights of the public to the purchaser and subrogate him to all the liens against the real estate which the public had by reason of the taxes levied. *Grant v. Bartholomew,* 57 Neb. 676. The purchase was made in November, 1890, at which time the city of Lincoln had no authority to reassess property. The statute above quoted was enacted in 1901. This statute was not intended for the benefit of the purchasers at tax sales, and did not give to the purchaser any greater rights than he had prior thereto. The

statute may be retroactive in so far as it affects the right of the municipality to raise revenue which otherwise would be lost to it and for whose benefit it was enacted, but it cannot be construed as extending to the purchaser any rights whatever.

It is suggested by the defendants that an injunction suit will not lie. It appears that the notice served by them upon the plaintiffs gave notice that they would meet at a certain time for the purpose of reassessing taxes against the property in controversy to pay for the improvement, requiring the plaintiffs to appear at the time named and show cause why said property should not be so assessed. The defendants, contending at all times since the institution of this suit that they have the legal right to reassess the property, are hardly in a position to urge that the object of their meeting was for the purpose of considering only whether or not the property should be reassessed. It is apparent that an attempted reassessment would cast a cloud upon the plaintiff's title, and interfere with and delay a sale of said property, a license for which had been granted to one of the plaintiffs as administrator. We think there is no doubt but that injunction is a proper remedy in this case to prevent the defendants, the city council, from proceeding under color of right to do a thing which is not authorized by law, and which will be, as above shown, a great injury to the plaintiffs.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JULIA C. BENSON, APPELLEE, V. HERMAN B. PETERS, APPELLANT.

FILED JULY 17, 1908. No. 15,173.

Master and Servant: ACTION FOR INJURIES: DIRECTING VERDICT. In an action to recover damages for a personal injury, the defendant is entitled to a directed verdict when the evidence is insufficient to show that the alleged negligence was the proximate cause of the injury.

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

Greene, Breckenridge & Matters, for appellant.

Weaver & Giller, contra.

EPPERSON, C.

The plaintiff was a chambermaid in the employ of the defendant, who was the owner and proprietor of a hotel. Plaintiff and other employees were required to take their meals in the kitchen, which they reached by taking the elevator to the basement, thence walking up a flight of stairs. The elevator had two compartments; one used for passengers, and below that was a cage used for freight. By reason of the peculiar construction of the elevator and shaft, the passenger compartment did not reach the floor of the basement, so that plaintiff and her fellow servants would ride in the freight cage. The floor of this did not go to a level with the basement floor, but reached within 22 inches of the same. In leaving this freight elevator, the employees would step first upon a substantial board step 15 inches wide and 8 inches below the floor of the elevator, thence to the floor of the basement. Plaintiff charges defendant with carelessness on account of his failure to provide a sufficient light in the basement, on account of which negligence she slipped and sprained her ankle, and was otherwise severely injured. There was an

electric light bulb in the basement, which was sufficient to furnish light, but at the time of the accident it was not lighted. She sued to recover damages, and obtained judgment in the court below, from which defendant appeals.

On direct examination the plaintiff testified, substantially, that, when she stepped from the elevator upon the board step, she slipped and sprained her ankle. On cross-examination she described the event in detail as follows: "Q. You were in a hurry to get out? A. We were in a hurry. Q. You slipped on this board that is 15 inches wide? A. Yes, sir. Q. Did you slip off of the board onto the floor? A. No; I slipped on the board. Q. You did not slip from the board onto the floor? A. No; I came near falling. Q. You did not fall? A. No; I didn't fall, but I came near falling." There is no evidence in the record that there were any obstructions in the elevator or upon the step on which the plaintiff slipped, nor that the step was out of repair or that any unusual conditions whatever prevailed. Plaintiff had been in the habit of going to the basement in this manner at least three times a day for ten months, and frequently she would find the basement dark. The usual conditions were not such that a light was required for the safe passage of one familiar with the premises. The plaintiff's injury was received when she stepped down but eight inches upon a step with which she was familiar. The sum of the evidence intended to connect the alleged carelessness with the injury is that the basement was dark, and that the plaintiff slipped and sprained her ankle. There is no evidence indicating that the darkness was responsible for the injury. The alleged carelessness has not been shown to be the proximate cause of the injury sustained. Upon the conclusion of plaintiff's evidence, the defendant moved the court for a directed verdict. The court erred in refusing this instruction, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

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

REVERSED.

REESE, J., dissenting.

It is not necessary that I enter upon a full discussion of the evidence in this case. The verdict was for $250, which clearly indicates that it was not the result of sympathy, passion or prejudice. No objection is found to the rulings of the court during the introduction of the evidence, nor to any of the instructions given to the jury for their guidance in their deliberations. In addition to the oral evidence introduced upon the trial the jury were sent to the place where the alleged accident occurred and an examination of the premises was made by them. It was shown and conceded that there had been no change in conditions at and surrounding the elevator, but that they were the same in all respects as when plaintiff alleges that she received the injury complained of. The investigations and observations of the jury constituted a part of the evidence in the case. I am wholly unable to see why the verdict should be molested.

FRANK J. EVERITT, APPELLANT, V. FARMERS & MERCHANTS BANK ET AL., APPELLEES.*

FILED JULY 17, 1908. No. 15,220.

1. **Corporations:** TRANSFER OF STOCK: RECORDING ASSIGNMENT. In the absence of controlling statutes, a purchaser of the capital stock of a corporation for a valuable consideration, in the absence of fraud, is protected against subsequent attachment or execution issued against his grantor, although he failed to have his assignment recorded upon the books of the corporation.

*Rehearing denied. See opinion, p. 198, *post*.

2. ———: ———: BONA FIDE PURCHASER. The rule that a vendee is not a *bona fide* purchaser for value until he has actually paid the purchase price or become irrevocably bound for its payment cannot be invoked against one who has promised to give a consideration for the transfer assailed, unless it appears that the transfer will hinder or delay the vendor's creditors.

3. **Fraudulent Conveyances:** BURDEN OF PROOF. Where a transfer of property between persons not related is assailed as fraudulent, the fact that the consideration was paid to the grantor's near relative upon assignment thereof does not change the rule imposing upon the party assailing the transaction the burden of proving it fraudulent.

4. **Corporations:** TRANSFER OF STOCK: SUIT TO ENFORCE. A *bona fide* purchaser of the capital stock of a corporation may sue in equity to compel the corporation to enter the assignment upon its books, and to issue a new certificate therefor, and to restrain the sheriff from selling said stock upon an execution against the vendor, the corporation and sheriff being parties to the action.

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

N. P. McDonald and *George W. Wertz,* for appellant.

H. M. Sinclair and *C. A. Robinson, contra.*

EPPERSON, C.

The plaintiff, claiming to be the owner of certain shares of the capital stock of the Farmers & Merchants Bank of Elm Creek, instituted this action in equity to confirm his title thereto, and to procure possession of the certificates representing the same, to enjoin a threatened sale of said stock upon an execution issued against his grantor, and to compel the bank to enter the transfer of said stock upon its books and issue to him a new certificate therefor. The sheriff, who held the execution, and the judgment creditor, Beecroft, and the bank were made defendants. The sheriff filed an answer, alleging that he levied upon the shares of stock as the property of Spencer, and he further alleged, as did Beecroft in a separate answer by

him filed, that the pretended sale and transfer of stock by Spencer to the plaintiff was made by Spencer for the purpose of hindering, delaying and defrauding his creditors, of which the plaintiff had full knowledge, and, further, that the plaintiff paid no consideration for the stock. The bank filed a disclaimer. There is little or no dispute as to the facts. On July 16, 1906, the plaintiff herein negotiated with T. G. Spencer for 6¾ shares of the capital stock of said bank, and received therefor an assignment in form as follows: "Kearney, Neb., July 16, 1906. For value received, I hereby assign and transfer to F. J. Everitt all my interest in 6¾ shares of the capital stock of the Farmers & Merchants Bank of Elm Creek, Nebraska, standing in my name on the books of the bank, and the proper officers of said bank are authorized and directed to transfer said shares to said F. J. Everitt on the books of the bank and issue to him a certificate therefor. T. G. Spencer." This stock was represented by two certificates, each of which provided that the stock it represented was transferable only on the books of the bank on the surrender of the certificate properly indorsed. Spencer did not have possession of, and was unable to deliver, said certificates to the plaintiff, for the reason that the same were in the possession of the bank, where they had remained from the time they were issued, although they had been demanded by Spencer. At the time of the purchase by plaintiff, he was preparing to go on a business or pleasure trip, and did not have the time to present his assignment to the bank, nor did he take the time to give Spencer his note for $675, the consideration agreed upon. It was the understanding that he would give the same upon his return home. When he returned, he further delayed because of a restraining order procured by Spencer's judgment creditor, Beecroft. By the same restraining order the bank was enjoined from transferring said bank stock on its books, or from disposing of or delivering the same from its possession. Bee-

croft had a judgment against Spencer for $1,348, dated September 14, 1901. On September 4, 1906, an execution was sued out by Beecroft and levied by the sheriff upon the said shares of stock. It also appears that some sort of a notice was served by plaintiff upon the officers of the bank on the day the execution was levied, notifying the bank formally of his assignment, and demanding a transfer of said stock to him. Although the record is not clear as to this notice, it is evident that the bank and the other defendants were fully conversant with the plaintiff's claim and his alleged right to have an assignment of said shares of stock indorsed upon the books of the bank. Later plaintiff presented his assignment to the bank, and requested that a certificate therefor be issued to him. This request was refused by the officer in charge, who said he could not issue the same because Spencer owned the stock, and a new certificate could not be issued until the old certificates had been surrendered. The evidence shows that the original certificates had been negligently, or otherwise wrongfully, withheld from Spencer by the bank, but that upon the levy of the execution had been delivered to the sheriff. Four and one-half shares of this stock had belonged to Spencer since 1898, and 2¼ shares since 1904. After the levy of the execution plaintiff executed and delivered his non-negotiable promissory note for $675 to Spencer's mother, to whom Spencer had assigned his claim against plaintiff for the consideration agreed upon.

The general rule seems to be that, in the absence of a controlling statute, a purchaser for a valuable consideration is protected against subsequent attachment or execution against his grantor, although he failed to have his assignment recorded upon the books of the corporation. There is a vast difference between the decisions of the different courts, which is attributed in part to the various statutory provisions and the constructions placed thereon. But, where there is no express statutory provision requiring that an assignment be entered upon the books of the company to effect a sale, it is held that the purchaser, in

the absence of fraud, takes the legal title upon an assignment of the stock. Our own statutes failing to provide the manner of bringing about a transfer of capital stock, and failing to prescribe the rights of the parties when there is a failure to indorse the assignment upon the books of the company, we need only to consider those decisions treating of similar cases and conditions, and to determine the priority of the parties as it exists in the absence of legislation. In *Herrick v. Humphrey Hardware Co.,* 73 Neb. 809, it is said: "The object of having transfers of stock recorded upon the books of the company is to give the company notice of whom its stockholders are." In *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130, it was held: "The real and not the apparent interest of a stockholder in the property of the corporation represented by shares of stock registered in his name may be reached by garnishee process served on the corporation." The same rule, of course, would necessarily apply to the levy of an execution. It is the consensus of opinion, and apparently the universal rule, that a transfer by an assignment of the certificates leaves nothing in the assignor which can be reached by subsquent attachment or levy of execution, although the stock remains in his name upon the books of the corporation, and that it is immaterial that the by-laws or rules of the corporation require the transfer to be made upon its books. *Finney's Appeal,* 59 Pa. St. 398; *Beckwith v. Burrough,* 13 R. I. 294; *Baldwin v. Canfield,* 26 Minn. 43; *Prince Investment Co. v. St. Paul & S. C. Land Co.,* 68 Minn. 121; *State Ins. Co. v. Gennett,* 2 Tenn. Ch. 100; *Gilbert v. Manchester Iron Mfg. Co.,* 11 Wend. (N. Y.) 628; *Goyer Cold Storage Co. v. Wildberger,* 71 Miss. 438, 15 So. 235; *Blouin v. Liquidators of Hart & Hebert,* 30 La. Ann. 714; *Sargent v. Essex Marine R. Corporation,* 9 Pick. (Mass.) 202; *Bushnell v. Hall,* 9 Ky. Law Rep. 684; *Lipscomb v. Condon,* 56 W. Va. 416, 67 L. R. A. 670; *Mapleton Bank v. Standrod,* 8 Idaho, 740, 67 L. R. A. 656. In *Lipscomb v. Condon, supra,* and the notes of the publisher in the book cited,

there is a review of many cases dealing with this subject. That case holds: "An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferrer." This rule is well supported by the cases reviewed in the notes, some of which are above cited.

The supreme court of Minnesota in *Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36, held that a sale and transfer of corporate stock, although not entered on the books of the corporation, is effectual as between the parties, and takes precedence of a subsequent attachment in behalf of a creditor of the vendor. The statutes considered by the court in that case provided: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company. * * * The stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation, in such form as the directors prescribe." The reason for the decision was, as we understand it, that the provisions of the statutes were held as intended solely for the protection and benefit of the corporation, and do not incapacitate a shareholder from transferring his stock. Because of the fact that the bank whose capital stock is in controversy herein had the actual possession of the certificates of stock, a delivery thereof by Spencer to the plaintiff was impossible. The assignment made by him, of date September 14, 1906, in the absence of fraud, was sufficient to convey the stock to the plaintiff.

Defendants seek to invoke the rule of *Hedrick v. Strauss*, 42 Neb. 485, and *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246, which in the case last cited is given as follows: "One is not a *bona fide* purchaser for value until he has actually paid the purchase price or become irrevocably bound for its payment." It is true that in the case at bar the plaintiff had not become irrevocably bound to the extent that he would have been required

to give the promised note upon a failure of the consideration; but the rule invoked is not applicable to this case, for the reason that it is not shown that Spencer was insolvent, or that the transfer of the stock to the plaintiff herein and the giving of the note to Spencer's mother will operate to deprive Beecroft from the collection of his judgment. This brings us to the consideration of another and the controlling issue.

Each party contends that the burden of proof is upon the other. There is no contention that there was any fraudulent intention on the part of the plaintiff, but that before he gave the note to Spencer's mother he had notice of such facts as would put a man of ordinary prudence on inquiry. There is nothing in the record to indicate that an inquiry made by a prudent man would lead him to the conclusion that Spencer's transfer of the stock in controversy was made fraudulently. It does not appear that the consideration was inadequate, nor that Spencer was insolvent. It does not appear that he owed any person other than Beecroft and his own mother. His property may be sufficient to meet all of his obligations. Plaintiff is not related to Spencer; but defendants contend that, as Spencer's mother received the consideration for the shares of stock, the rule as to alleged fraudulent conveyances between relatives, casting the burden of proof upon the grantor, should be followed here. Spencer's mother's connection with this litigation is not directly involved. The real question to determine is where was the title to the shares of stock at the time of the levy. Had the transaction with Spencer's mother never entered into this case, defendants could not then recover. It is apparent that defendants have no greater rights than they would had the promissory note never been given. In such case the plaintiff would be entitled to the fruits of his contract, unless defendants could establish that such transaction was fraudulent. The burden of proof was upon the defendants. They introduced no evidence to prove that the transfer

was fraudulent, nor that it hindered or delayed the collection of their judgment.

It is contended by the defendants that different causes of action are improperly joined in the petition, and that an injunction would not lie to restrain the sale of the stock. It cannot be successfully contended but that the assignee of the shares of stock of a corporation is entitled to maintain an action in equity to require an obstinate corporation to enter his assignment upon the books of the corporation and issue to him a new certificate representing the same. 10 Cyc. 605. The officers of the defendant bank refuse to recognize plaintiff's assignment, and apparently co-operate with Beecroft to defeat the plaintiff's title. Beecroft is a nonresident of the state. Plaintiff is entitled to have his stock preserved to him, and to prevent its incumbrance by execution sale. For these purposes he has no adequate remedy at law.

We recommend that the judgment of the district court be reversed and the cause remanded, with instructions to the lower court to enter a judgment for plaintiff consistent with this opinion.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and this cause remanded, with instructions to the lower court to enter judgment for plaintiff consistent with the opinion.

REVERSED.

The following opinion on motion for rehearing was filed December 5, 1908. *Former judgment modified. Rehearing denied:*

GOOD, C.

This cause is now before us upon an application for a rehearing, and has been orally argued. The opinion is reported, *ante,* p. 191. In the body of the opinion it was

stated: "It is not shown that Spencer was insolvent," and the cause was reversed and remanded, with instructions to enter a judgment for plaintiff consistent with the opinion.

The principles of law announced in the case are not seriously assailed upon this application, but it is urged that there was sufficient evidence in the record to show the insolvency of Spencer. We have reexamined the record and find that there is some evidence tending to show Spencer's insolvency. The trial court evidently considered this evidence sufficient to warrant such a finding. We do not consider it necessary to discuss the sufficiency of the evidence to support such a finding. In view of the fact that the trial court deemed the evidence sufficient, and the fact of the insolvency of Spencer, if proved, would materially affect the ultimate disposition of the case, we think the cause should be remanded generally, so that appellees may have an opportunity to introduce further evidence if they so desire.

We recommend that the opinion be modified so as to direct a reversal and remanding of the cause for further proceedings according to law, and that as so modified the opinion be adhered to.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given, the opinion is modified as above recommended, and as modified is adhered to, and the cause is reversed and remanded for further proceedings according to law.

JUDGMENT ACCORDINGLY.

STATE, EX REL. OTTO J. KING, APPELLANT, V. EDWARD J. SOLOMON ET AL., APPELLEES.

FILED JULY 17, 1908. No. 15,280.

Elections: DECIDING TIE VOTE. In case of a tie vote at an election of village trustees, the candidates cannot determine the result by lot; there being no statute authorizing it.

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

Thomas Darnall, for appellant.

Bernard McNeny, contra.

EPPERSON, C.

The relator was a candidate for the office of village trustee of the village of Bladen at the election held April 2, 1907. He and one other candidate received an equal number of votes, whereupon by agreement they cast lots to determine which of the two should hold the office. The result was favorable to relator. He now seeks a peremptory order to compel the village board to issue to him a certificate of election. Our statutes nowhere provide for the selection by lot of a village trustee when two candidates receive an equal number of votes. It was incompetent, therefore, for the relator and his adversary by agreement between themselves, or otherwise, to determine which one should hold the office. Neither was elected. Under these circumstances, relator was not entitled to the writ. Such has been the decision in each case we have been able to find where this question was before the court. *Beck v. Board of Election Commissioners,* 103 Mich. 192; *State v. Adams,* 2 Stew. (Ala.) 231; *Hammock v. Barnes,* 4 Bush (Ky.), 390; *Reed v. Cosden,* 1 Clarke & Hall Elec. Cas. (Md.) 353.

The judgment of the district court refusing the peremp-

tory order and dismissing relator's case was right, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CHARLES J. JOHNSON, APPELLEE, V. MARGARET E. SAMUELSON, APPELLANT.

FILED JULY 17, 1908. No. 15,254.

1. Judgment: LIEN: ORDER ON GARNISHEE. An unconditional order, made under the provisions of section 249 of the code, that a garnishee pay money into court, is a judgment within the meaning of the statutes making judgments, when docketed in the office of the clerk of the district court, a lien upon the lands of the debtor situated within the county.
2. Quieting Title: VENUE. The venue of an action to quiet title to real estate as against the apparent lien of a void judgment is governed by the provisions of section 51 of the code, and must be laid in the county in which such real estate is situated.
3. Justice of the Peace: GARNISHMENT: JURISDICTION. Where a garnishee, summoned by a justice of the peace under the provisions of section 249 of the code, makes a disclosure denying any indebtedness or liability to the judgment debtor, and the justice, without announcing any decision or any adjournment of the hearing, informs the garnishee that he is excused, said justice thereby loses jurisdiction of the case; and an order afterwards entered requiring the garnishee to pay the amount of the judgment into court is constructively fraudulent.

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

John Tongue and *France & France,* for appellant.

Power & Meeker, contra.

CALKINS, C.

This was an action to quiet title as against the alleged lien of a judgment or order in garnishment. On the 4th

day of April, 1900, the defendant, Mrs. Samuelson, in an action before a justice of the peace, recovered a judgment against one Anderson. Execution being issued on this judgment and returned unsatisfied, the plaintiff, Johnson, was summoned as garnishee, and such proceedings had that the justice entered an order requiring the plaintiff to pay the amount of such judgment into court. Afterwards a transcript of the proceedings before the justice was filed in the office of the clerk of the district court for York county. The plaintiff owning land in said county, claiming that such judgment constituted a cloud upon his title, brought this action upon the ground that the judgment was fraudulently obtained, and that the justice was without jurisdiction to make the order. Neither of the defendants resided or were summoned in York county; but summons was issued to the counties where they respectively resided, and was there served upon them. There was a judgment for the plaintiff below, and the defendant appeals.

1. The defendant contends that the order made by the justice requiring the plaintiff to pay the amount of the judgment against Anderson into court was not a judgment within the meaning of the statute (code, secs. 477, 561, 562) making judgments a lien upon the real estate of the judgment debtor. The provisions of the code regulating proceedings against garnishees after judgment and execution returned unsatisfied provide that, in all cases where the garnishee in answering the interrogatories propounded to him shall disclose that he is indebted to the defendant in execution, the court shall order the garnishee to pay over the amount found to be due from the said garnishee to the defendant in execution, which amount shall be collected by execution as in other cases, as near as may be. Code, sec. 249. No proceeding other or further than the entry of the order is provided for or indicated in the statute, and it is plainly the order to pay over the amount found due that is to be enforced by execution. Section 428 of the code provides that "a judgment is the final de-

termination of the rights of the parties in an action." Orders made in pursuance of section 249 are final (*Schlueter v. Raymond Bros. & Co.*, 7 Neb. 281), and may not be collaterally attacked. *Wilson v. Burney*, 8 Neb. 39; *Union Nat. Bank v. Hickey*, 34 Neb. 300.

The defendant relies upon the case of *Clark v. Foxworthy*, 14 Neb. 241, to sustain her position that such order does not amount to a judgment; but we do not think that case supports her contention. It is there held that an order for the payment of money under section 249 of the code can be rightly made and enforced by execution only upon an unqualified admission by the garnishee of a present indebtedness which the execution debtor would be entitled to but for the garnishment. This is a correct statement of the law which should govern the courts in acting upon the disclosure of a garnishee; but it expressly recognizes the power of a court in a proper case to make an order which can be enforced by execution, and has therefore the quality of a judgment. *Hollingsworth v. Fitzgerald*, 16 Neb. 492; *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 18 Neb. 303. And in *Cobbey v. Wright*, 34 Neb. 771, it was held that such a judgment, void for facts extrinsic the record, would be set aside and the apparent lien declared of no effect. We are therefore of the opinion that such an order, when made by the district court or docketed in the office of the clerk of the district court upon a transcript from a justice of the peace, creates an apparent lien upon the real estate of the garnishee in the county in which the same is docketed.

2. Under the provisions of our statute (Comp. St. 1907, ch. 73, sec. 57), "an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." That an apparent judgment lien is an interest within the meaning of the word as used in

such statute has been recognized in *Cobbey v. Wright, supra; Corey v. Schuster,* 44 Neb. 269; *Smith v. Neufeld,* 57 Neb. 660. The question was fully and ably discussed by Sanborn, C. J., in *Ormsby v. Ottman,* 85 Fed. 492; and the conclusion was reached that the word "interest" is used in the statute in its ordinary signification of including any right, title or estate in or lien upon real estate. We are satisfied that the statute should be so construed. Section 51 of the code provides that actions to recover for any trespass upon or any injury to real estate, and for the recovery of real property or of an estate or interest therein, shall be brought only in the county where such real estate is situated. We think the language of the statute broad enough to include an action to quiet title. Recovery is the obtaining of a thing by the judgment of a court as the result of an action brought for the purpose. *Keiny v. Ingraham,* 66 Barb. (N. Y.) 250. What a party recovers in an action *quia timet* is the integrity of his title. Such actions may therefore be properly considered as brought for the recovery of an estate or interest in real property. This question was before this court in *Cobbey v. Wright, supra.* This case, first reported in 23 Neb. 250 was a personal action brought in Lancaster county against Cobbey, the judgment creditor, and the sheriff of Lancaster county, to enjoin the enforcement of a judgment rendered in Gage county against Wright as garnishee, a transcript of which judgment had been filed and such judgment docketed in Lancaster county. Service of summons was had upon the sheriff in Lancaster county, and upon Cobbey in Gage county, and the action was then voluntarily dismissed as to the sheriff. For the reason that the action was personal, no real estate being mentioned in the petition, this court reversed the judgment of the district court, which had granted an injunction, and remanded the case, with instructions to permit the plaintiff to amend his petition. This the plaintiff attempted to do, but failed to describe the real estate upon which it was claimed the judgment appeared to be a lien, and for that

reason the judgment was again reversed and the action dismissed. *Cobbey v. Wright,* 29 Neb. 274. The plaintiff then brought an action in Lancaster county, describing land owned by him situate therein, upon which such judgment appeared to be a lien. To this action the defendant Cobbey made a special appearance objecting to the jurisdiction of the court. This special appearance being overruled, he made no further defense. A judgment being rendered against him, the same was affirmed by this court. *Cobbey v. Wright,* 34 Neb. 771. The opinion fails to show where Cobbey was summoned or the grounds of his special appearance; but, taking the history of the litigation as it may be gathered from the three opinions referred to, the inference is plain that Cobbey was not served in Lancaster county, and that that fact was probably the ground of his special appearance. But whether this case is to be determined as one of first impression, or is settled by the decision of *Cobbey v. Wright,* the result must be the same. It is always competent to consider the consequences of a statute in order to arrive at the intention of its framers. To give this statute any other construction would leave the owner of real estate whose title is clouded by apparent liens without remedy in those cases in which the person claiming to own the apparent lien is a nonresident, and, if the language of the statute were less plain than it is, we should still be constrained to hold that the action to quiet title is one *in rem,* which should be brought in the county in which the land is situated.

3. This brings us to the consideration of the objections which are urged against the validity of the judgment. It appears that the garnishee was first summoned in 1901, and answered concerning his indebtedness, after which disclosure he was told that that was all, and that he could go. No order was entered against him upon this proceeding. He was again summoned in May, 1904, and examined concerning his supposed indebtedness to the judgment debtor, especially upon two notes which he had given to the judgment debtor, or to the judgment debtor's sister-

in-law. He denied any indebtedness, and testified that he had paid the notes, producing them canceled to corroborate his statement in that regard. He was then told that he could go, "unless something more came up." The justice himself testified that he told the plaintiff "that he could go now—be excused; and we would call him if any further examination was wanted." It is agreed by all parties that the plaintiff emphatically denied any indebtedness to the judgment debtor, and there does not appear to have been the slightest ground for the rendition of any order against him. Nothing was said to him to indicate that the making of such order was in contemplation. It was just about noon when the garnishee was excused, and the justice testified that he transacted other business that afternoon, and about 4 or 5 o'clock in the evening he decided to, and did, enter the order in question. This was on the 24th day of May, 1904, and the plaintiff Johnson testified that he had no knowledge of the entering of such order until about election time, November, 1905. The justice undertakes to deny this, but his testimony is not convincing, and we are satisfied with the finding of the district court that the plaintiff had no knowledge of the entry of this order until about November, 1905, when it was too late for him to prosecute any direct proceeding to set the same aside. It was shown that the plaintiff was the owner of a large amount of unincumbered real estate, and in possession of ample personal property, yet no effort appears to have been made to enforce this order until after the plaintiff had discovered the existence thereof in November, 1905, and complained to the justice about the making thereof. We are satisfied that the plaintiff understood, and had a right to understand, when he was excused by the justice from further attendance unless he should be notified to again appear, that the proceedings were ended, and that by the justice's failure to either announce his decision or an adjournment of the hearing he lost his jurisdiction. The making of the order afterwards was a constructive fraud, which avoids the judgment. It

is not necessary that there should be actual fraud, *i. e.*, that the justice and the attorney for the judgment creditor should have intended to deceive the plaintiff and to keep him in ignorance of the fact of the rendition of such order until it was too late for him to prosecute error or appeal therefrom. It is enough that by their conduct he was lulled into a feeling of ease and safety, and led to understand that the proceeding was ended. *Klabunde v. Byron Reed Co.*, 69 Neb. 126; *Arnout v. Chadwick*, 74 Neb. 620.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

FRED MATHEWS, APPELLEE, V. WILHELMINA GLOCKEL ET AL., APPELLANTS.

FILED JULY 17, 1908. No. 15,264.

1. **Curtesy: SUSPENSION OF RIGHT.** Where a wife, owning as tenant in common with her brothers and sisters an undivided share of lands subject to the dower and homestead right of their mother, together with such brothers and sisters and upon a sufficient consideration, enters into an agreement with the mother not to partition said lands during the lifetime of the mother, such agreement is binding upon her husband when claiming as tenant by the curtesy after the death of the wife and during the lifetime of the mother.

2. **Tenancy in Common: PARTITION.** An action by a tenant in common to have his undivided share set apart to him is in effect an action in partition, and may not be maintained unless the tenant in common is entitled to the present possession of such share.

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

John C. Watson, for appellants.

W. W. Wilson, contra.

CALKINS, C.

This is an action by a husband ostensibly for the recovery of an estate by the curtesy in lands in which his deceased wife was seized of an undivided share. The defendant Wilhelmina Glockel was the widow of Johann G. Glockel, who died in 1901 intestate, leaving him surviving the said widow, a daughter, Rose Mathews, wife of the plaintiff, and four other children. At the time of his death he was the owner of a farm in Otoe county containing about 100 acres, upon which his widow, the defendant, continued to reside. In 1905 Rose Mathews filed a petition in the district court for Otoe county for partition of said property; but the summons in said action was returned not served at the direction of the plaintiff, and the said Rose Mathews, together with the four other heirs of Johann G. Glockel, on the 19th day of May, 1905, entered into a written agreement whereby they agreed to and with each other and with Wilhelmina Glockel, widow of the said Johann G. Glockel, that they would not during the lifetime of the said Wilhelmina Glockel partition, divide, nor ask for a partition or division of the lands of which the said Johann G. Glockel died seized. The said agreement was expressed to be in consideration of the love and affection of the children for their said mother; and it also appears that the mother paid Rose Mathews the sum of $100 either for the dismissal of said partition suit or for the signing of said agreement, or both. In August, 1905, the said Rose Mathews died without issue. This suit was brought by the plaintiff, her husband, to, in the language of the prayer of his petition, recover and hold a one-fifth interest in said premises for and during his natural life as tenant by the curtesy. There was a trial to the court, who found substantially the foregoing facts. The court further found as conclusions of law: (1) That the said agree-

ment of Rose Mathews was binding upon the plaintiff; (2) that upon the death of the said Rose Mathews the plaintiff became vested in an estate by the curtesy in an undivided one-fifth interest in the land mentioned in the pleadings for and during his life, subject, however, to the homestead and dower right of the defendant Wilhelmina Glockel; and (3) that, by reason of the said agreement made by the said Rose Mathews, the said estate cannot be set off to the plaintiff during the lifetime of the said Wilhelmina Glockel. Upon this finding the district court decreed that the plaintiff have as tenant by the curtesy an undivided one-fifth of the real estate mentioned, subject to the homestead and dower right of the said Wilhelmina Glockel, and that the said estate be confirmed and perfected in him, but that the actual setting off of said estate or the partition or division of said land be and is postponed until after the death of the said Wilhelmina Glockel. From this decree the defendants appeal.

1. It is clear that Rose Mathews, but for the making of the agreement referred to, might have maintained partition; and it follows that her husband, upon her death without issue, under the statute in force at that time, would have been entitled to the possession of her share as tenant by the curtesy, and might himself have maintained partition had she been entitled to do so. But, by the agreement referred to, Rose Mathews covenanted with her mother and her brothers and sisters that she would not during the lifetime of her mother partition or divide nor ask for a partition of these lands. No reason is suggested why this was not a valid agreement, binding upon Rose Mathews during her lifetime. It was evidently entered into by the children with the laudable intention of making suitable provision for their mother. Their love and filial affection was a sufficient consideration therefor; but it appears that Rose Mathews received as an additional inducement the pecuniary consideration of $100 paid by her mother.

The plaintiff does not argue that Rose Mathews, notwithstanding the making of the agreement, might have maintained partition during her life; but that the agreement should not affect the husband's right of curtesy. No case is cited nor principle referred to to support this position. In this state the husband's right during coverture to the use, care or control of his wife's estate has entirely ceased to exist. She may exercise the same control over her estate after as before marriage, and she may by a conveyance of her estate entirely defeat his right to an estate by the curtesy. *Forbes v. Sweesy,* 8 Neb. 520. In the case above cited the wife had during her life made a lease of the property, but died before the expiration of its term; and it was held that the husband, who claimed as tenant by the curtesy, had no right to the possession of the property until the expiration of the lease. This principle applies to the case we are now considering; and we conclude that the plaintiff had no right to the possession of the property in question during the life of Wilhelmina Glockel.

2. The plaintiff contends that his action is not for partition. He argues: "The plaintiff is not seeking to partition the land, but only to have his right of curtesy therein as provided by law, and the fact that his interest in the land might have to be set off or apart to him does not make the action one in partition." The answer to this proposition is that, if to give the plaintiff the relief he demands it would be necessary to partition the land, then the action is one for partition. He fails to point out any relief to which he claims to be entitled that is not a part of the relief in partition. The ordinary judgment of partition confirms the title of the respective parties and orders that a division be made among them accordingly. Unless this or some part of this relief is awarded to the plaintiff, it is impossible to give him anything in this action. It is the general rule that the present right of possession is a prerequisite to the right to maintain partition. *Wicker v. Moore,* 79 Neb. 755. Even in those states where this rule

does not prevail, the principle is recognized that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one from whom he claims. *Hill v. Reno,* 112 Ill. 154, 54 Am. Rep. 222. The judgment of the court below confirmed the right of the plaintiff to a one-fifth interest in this land during his life, but postponed the division of the same. This relief was part of the relief which would have been awarded the plaintiff if he had been entitled to partition, and we can see no reason for its being granted him now. His right to the possession of this property is contingent upon his surviving Wilhelmina Glockel, and might never become consummate.

We therefore recommend that the judgment of the district court be reversed and the plaintiff's action dismissed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, with instructions to dismiss plaintiff's action.

REVERSED.

FRANCIS T. WALKER, APPELLANT, V. LAVILLA J. BURTLESS, ET AL., APPELLEES.*

FILED JULY 17, 1908. No. 15,199.

1. **Exceptions, Bill of: MOTION TO QUASH.** The trial judge is not authorized to settle a bill of exceptions more than 100 days from the adjournment of the term at which the cause was tried, decree entered, and motion for a new trial overruled. A bill allowed in violation of the statute will be quashed upon motion duly made in this court. *Stock v. Luebben,* 72 Neb. 254, approved and followed.
2. **Forfeitures** are not favored either in law or equity and, if the intent is doubtful, will receive a strict construction against those for whose benefit they were introduced.

*Rehearing denied. See opinion, p. 214, *post.*

3. **Vendor and Purchaser: CONTRACTS: FORFEITURE.** A contract for the sale of real estate provided that, upon the vendee's failure to execute notes and a mortgage and to make a second cash payment, the money theretofore paid thereon "is to be declared forfeited to the said party of the first part" (vendor). *Held*, That it was incumbent on the vendor, upon vendee's default, to declare a forfeiture to entitle her to retain said money.

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

Perry & Lambe, for appellant.

Morlan, Ritchie & Wolff, contra.

ROOT, C.

Plaintiff alleges that he entered into a written contract with defendant for the purchase of land and paid her $200 thereon. A copy of the contract is incorporated into the petition. It provides: "It is understood between the parties hereto that should the said party of the second part fail to make the payment of $500 and execute said mortgage for $500 on or before the 10th day of March, 1906, the $200 cash payment herein made is to be declared forfeited to the said party of the first part." Plaintiff alleges that he tendered the money, note and mortgage to defendant, that she refused to perform, but, on the contrary, caused deeds to be recorded which clouded the title to said land; that he has been damaged in the premises and is without adequate remedy at law; that he is willing to perform upon defendant furnishing him a good title to said land, and offers so to do. Defendant admitted executing the contract and the receipt of the $200, denied that plaintiff had offered to perform the contract, but alleged that she had duly tendered performance, and that plaintiff refused to pay the money or to execute the notes and mortgage; "thereby said plaintiff has forfeited said $200 cash payment." She asked judgment that she be entitled to the $200 and that her title to the land be quieted. The

court found generally for defendant, and plaintiff appeals.

1. Defendant has moved to quash plaintiff's bill of exceptions, and said motion was submitted with the argument on the merits. The decree was rendered February 4, 1907, and the draft of the proposed bill was duly submitted to defendant's attorney, and by him returned February 27, without suggestions of amendment. March 4 plaintiff's attorney sent the draft of the bill to the clerk of the district court in McCook, the county seat where the case was tried, with a request that the clerk secure the trial judge's signature thereto and then to file it. The document was not settled or signed by the judge, but was filed by the clerk in his office and certified to by him as a record in the case, and in that condition filed in this court on the 16th of May, 1907. In September, 1907, defendant's counsel moved to quash the bill and strike it from the files. Upon a showing of the facts by plaintiff's counsel, and without any proof to this court that the February, 1907, of the district court for Red Willow county had adjourned without day, we permitted the document to be withdrawn from our files. November 26, 1907, Judge Orr settled and signed the bill, and immediately thereafter defendant's counsel moved a diminution of the record to show the date that said term did adjourn *sine die*. It now appears that said term so adjourned February 16, 1907. The motion must be sustained. The bill was not allowed by the trial judge for more than nine months subsequent to the adjournment of the term at which the decree was rendered, and his acts in that regard are null and void. *Stock v. Luebben*, 72 Neb. 254.

2. In the motion for a new trial and in the assignments of error it is claimed that the pleadings do not support the decree, and we are of opinion that, to a degree, the contention is sound. It is admitted that defendant still retains the $200. The contract is admitted, and time is not of the essence thereof. Defendant does not plead that she has ever declared the money forfeit. By the terms of the

agreement a forfeiture is to be declared under certain conditions. The forfeiture clause must be construed strictly against defendant, and if she did not declare a forfeiture she was not, and is not, entitled to retain said money, nor ought the court to have so decreed. We cannot assume, in the absence of a bill of exceptions, that the parties tried any issues not made up by the pleadings. *Murphy v. McIntyre,* 152 Mich. 591; *Sornberger v. Berggren,* 20 Neb. 399.

We therefore recommend that the bill of exceptions be quashed, and 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 bill of exceptions is quashed, the judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on motion for rehearing was filed November 6, 1908. *Former judgment of this court vacated and judgment of district court modified. Rehearing denied:*

Appeal: MOTION FOR NEW TRIAL. If the consideration of a record of the district court does not require the examination of any issue of fact or error of law occurring at the trial, which could only be preserved by a bill of exceptions, a motion for a new trial is not a condition precedent to a review of that record in this court.

FAWCETT, C.

Our former opinion, *ante,* p. 211, contains a correct statement of the facts. The defendant urges that a rehearing should be granted for two reasons: (1) That a motion for a new trial was not filed in the district court within three days of the entry of the decree; (2) that plaintiff is not entitled to recover the $200 paid by him, but that defendant is entitled to retain the same as liquidated damages.

The first point above urged is without merit. The bill

of exceptions having been quashed, nothing remains for consideration except the pleadings and decree. In such a case a motion for a new trial is not a condition precedent to the right of review. *Bannard v. Duncan*, 65 Neb. 179; *First Nat. Bank v. Sutton Mercantile Co.*, 77 Neb. 596.

Further consideration of the second point above urged leads us to the conclusion that we were in error in reversing the judgment of the district court, instead of merely modifying it. The contract set out in the pleadings does not provide for liquidated damages unless and until defendant has declared a forfeiture, and that declaration is not pleaded in the answer. Under the pleadings in this case, we do not think the district court could determine the question as to whether or not plaintiff is entitled to recover back the $200 he had previously paid upon the execution of the contract, nor should the district court have adjudged that defendant was entitled to retain said money. Defendant's allegation that the money was to be retained as liquidated damages in case plaintiff failed to perform is a mere conclusion, not based upon the written contract which is set out at length in the petition. The suggestion that plaintiff may have been in possession of the property and that the rents and profits thereof were set off against the $200 is without merit, because the court found generally for defendant, and necessarily that she was in possession of the land. Plaintiff might not have been entitled to a specific performance, and yet may have a cause of action to recover back the $200. These questions the trial court could not determine upon the pleadings before it, nor can we do so.

It is therefore recommended that the motion for rehearing be overruled, that the last subdivision of our former opinion and our judgment of reversal be vacated, that the judgment of the district court be modified so as not to purport to adjudicate defendant's right to retain the $200 paid her by plaintiff, and, as thus modified, that it be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the motion for rehearing is overruled, the last subdivision of our former opinion and our judgment of reversal are vacated, the judgment of the district court is modified so as not to purport to adjudicate the defendant's right to retain the $200 paid her by plaintiff, and, as thus modified, the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

JOHN F. KOLTERMAN, APPELLANT, V. WILLIAM B. CHILVERS ET AL., APPELLEES.

FILED JULY 17, 1908. No. 15,202.

1. **Wills: PROBATE: CERTIFICATE: EVIDENCE.** "The certificate to be indorsed on a will, required by section 160 of the decedent act, is not essential to the validity of the probate thereof, but merely provides that a will so certified, and the record thereof, or a transcript of such record, duly certified, may be read in evidence in all courts within this state, without further proof." *Roberts v. Flanagan*, 21 Neb. 503, approved and followed.
2. **Judgment: PRESUMPTIONS: COLLATERAL ATTACK.** "Where a probate court has jurisdiction in admitting a will to probate, all presumptions are in favor of the regularity of its proceedings, and in a collateral attack upon such probate the court will not inquire into the degree of proof required by the probate court." *Roberts v. Flanagan*, 21 Neb. 503, approved and followed.
3. ———: ———: **COUNTY COURTS.** In probate proceedings the county court is a court of record and of exclusive original jurisdiction, and in such actions its judgments and the recitals therein are entitled to the presumptions that attach to the records of other courts of that character.
4. **Wills: PROBATE: CURATIVE STATUTE.** Chapter 31, laws 1895 (Ann. St. 1907, sec. 4815), cures any defects that may theretofore have been created by county judges entering their judgments of the probate of wills in records other than the record book referred to in subdivision 1, sec. 32, ch. 20, Comp. St. 1885.
5. **Evidence: PROBATE RECORDS: CERTIFICATE.** Where a county judge appears as a witness and identifies the entries in the records of his office, the fact that said entries do not have attached thereto a certificate conformable to section 4817, Ann. St. 1907, does not render them inadmissible in evidence.

6. **Ejectment:** EVIDENCE. One Henry Upton died the owner of a tract of land in Nebraska. Plaintiff in ejectment claimed title thereto by virtue of a conveyance from Susan C. Upton. The county judge identified two records of his office, in one whereof appeared the copy of a purported will of Henry Upton, and in the other a judgment admitting the will of Henry Upton to probate. Neither record in terms referred to the other. The deed whereby Henry Upton received title recited that the grantee was a resident of Decatur, Michigan. The attesting clause to the purported copy of said will recited that the witnesses resided in "Decator," Michigan. Said copy describes Susan C. Upton as wife and devisee of the testator, and executrix of said will. The order admitting the will to probate appointed Susan C. Upton as such executrix. Susan C. Upton conveyed said land subsequently to said proceedings in 1893, and her grantee has occupied and enjoyed his farm ever since. The original will could not be found, nor was any one produced to show its contents from personal knowledge thereof. *Held*, There was sufficient internal and corroborating evidence of the identity of said will and its probate to permit the case to go to the jury.

7. **Adverse Possession:** EVIDENCE: QUESTION FOR JURY. Where a party claims title to real estate by adverse possession and the evidence is conflicting upon said point, the issue should be submitted to the jury.

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

Fred H. Free and *H. F. Barnhart,* for appellant.

W. W. Quivey and *Jackson & Kelsey, contra.*

ROOT, C.

Ejectment to recover possession of a tract of land in Pierce county. The court directed a verdict for defendants, and plaintiff appeals.

An essential link in plaintiff's chain of title is a will executed by Henry Upton and duly probated. Plaintiff called the county judge, and proved by him that he had made search in his office for said document, but could not find it. Thereupon the court received, over defendants' objections, an entry in probate record "A." This entry

purports to be the record of the last will and testament of Henry Upton, but does not have appended thereto a certificate of the county judge. Thereafter the witness identified a record as "Entry Book 1" of his office, and plaintiff offered therefrom the following:

"Order admitting will to probate. In the matter of the estate of Henry Upton, deceased. Now on this 3d day of September, 1887, this cause came up for hearing, and it appearing to me from the proof now on file that all proper parties to this proceeding have been properly notified; on consideration whereof I find that said will was duly executed by said Henry Upton as required by law; that the said testator at the time of making said will was of full age, of sound mind and memory and not under restraint, and was in all respects competent to devise real and personal estate. It is therefore considered by me that said last will and testament was duly executed, and that the same is genuine and valid, and that the said last will and testament be admitted to probate and established as a will of real and personal estate. And it is further ordered that letters testamentary issue thereon to Susan C. Upton upon her taking the oath required by law. Wm. H. McDonald, Co. Judge."

The court excluded this record, and the question is whether it should have been admitted as evidence of the probate of said will. This record was made in 1887, and under section 32, ch. 20, Comp. St. 1885, the will and the record of its probate should have appeared in the record book. The amendment of 1895 to said section (laws 1895, ch. 31) provides: "That all records heretofore made under the authority of this section (Comp. St. 1885, ch. 20, sec. 32), and which have been made in any one of the books heretofore provided for by said section, but not in the proper book, shall be as legal and valid and shall have the same force and effect as if made in the proper book." Section 4817, Ann. St. 1907, provides: "Every record made in any probate court, excepting original orders, judgments, and decrees thereof, shall have attached thereto a

certificate signed by the judge of such court, showing the date of such record and the county in which the same is made, and it shall not be necessary to call such judge or his successor in office to prove such record so certified. And in any cause, matter, or proceeding in which the probate court or probate judge has jurisdiction, and is required to make a record not provided for in this chapter, such record shall be certified in the same way and with like effect as aforesaid." Section 5008, Ann. St. 1903, further provides: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court, as provided in this chapter, or on appeal in the district court; and the probate of the will of real or personal estate as above mentioned shall be conclusive as to its due execution." Sections 5025, 5026, said statutes, also provide: "Every will, when proved as provided in this subdivision, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of probate and attested by his seal; and every will so certified, and the record thereof, or a transcript of such record, certified by the judge of probate and attested by his seal, may be read in evidence in all courts within this state, without further proof." "An attested copy of every will devising lands or any interest in lands, and of the probate thereof, shall be recorded in the registry of deeds of the county in which the lands thereby devised are situated; provided, that all conveyances of lands or any interest in lands within this state, which have been heretofore made by any executor prior to the filing of such attested copy, shall be as legal and valid and shall have the same force and effect as if such attested copy had been duly filed prior to the making of such conveyance."

Defendants contend that, unless the county judge attaches to a will his certificate of its probate, and a copy thereof be recorded by the registrar of deeds, record proof of the will and of its probate cannot be furnished; that the records in evidence and those offered and excluded are

without probative value. In this learned counsel err. The indorsement of the judge's certificate on a will is not a part of the probate, but only one of the methods by which that probate may be established. *Roberts v. Flanagan,* 21 Neb. 503. The recitals in the order admitting the will to probate are not as complete as one might wish, but they are sufficient upon collateral attack to demonstrate that due notice was given, a hearing had, evidence considered, and the will adjudged to have been lawfully executed. *Kirk v. Bowling,* 20 Neb. 260; *Beer v. Plant,* 1 Neb. (Unof.) 372.

There was sufficient corroborating evidence offered to support the presumption that the will recorded in probate record "A" was the instrument admitted to probate by the order of September 3, 1887, found on page 160 of "Entry Book 1." It will be noticed that Upton's residence is stated in the deed to him as Decatur, Michigan. The attesting clause to the will gives the residence of the witnesses thereto as "Decator," Michigan. The will devises all of the testator's property to Susan C. Upton, his wife, and names her as executrix. The order admitting Henry Upton's will to probate appoints Susan C. Upton as executrix. She thereafter conveyed the land owned by her husband at his death, and her grantees have held undisputed possession of the greater part thereof for the past 15 years. It is plain that a will of Henry Upton was admitted to probate by the county court of Pierce county. Whether the record in evidence was a copy of that will was a question of fact, to be established in any legitimate manner. The identity of things may be presumed from circumstances, and the circumstances heretofore referred to, without any rebutting proof, raise the presumption that said judgment of probate referred to a will of which the entry in probate record "A" is a copy. *Rupert v. Penner,* 35 Neb. 587; *Howard v. Rockwell,* 1 Doug. (Mich.) 315.

There is considerable evidence in the record tending to prove that defendants have acquired title by adverse pos-

session to the land in dispute, but there was some evidence to the contrary, so that the jury, and not the court, should have determined that issue.

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

FAWCETT and CALKINS, CC., concur.

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

REVERSED.

A. R. HONNOLD, APPELLEE, V. VALLEY COUNTY, APPELLANT.

FILED JULY 17, 1908. No. 15,540.

Tax Sale: REDEMPTION: INTEREST. One who purchases lots or lands at a state tax sale, for less than the amount of the decree against said property is entitled upon redemption from said sale to receive 6 per cent. interest on his bid if redemption is made within six months, and for every additional month over six, or for a fraction thereof, 1 per cent. in addition, plus all taxes and subsequent assessments paid by said purchaser, with the same rate of interest thereon.

APPEAL from the district court for Valley county: JAMES N. PAUL, JUDGE. *Reversed.*

H. E. Oleson, for appellant.

A. R. Honnold, pro se.

ROOT, C.

November 7, 1906, plaintiff purchased for $21 several lots in Arcadia at the treasurer's sale under a decree rendered in the state tax suit for 1905, in the county of Valley; he being the highest bidder therefor. May 9,

1907, the lot owners paid to the county treasurer the amount of said decree, with interest and costs of said suit, in all the sum of $116.76. A redemption certificate was issued to the owner, and the treasurer offered to pay plaintiff the sum of his bid, with interest thereon at 6 per cent., and no more, and the remainder of said redemption money was distributed among the various county funds. Plaintiff filed his claim with the county commissioners for all of said redemption money. The claim was disallowed, and he appealed to the district court. Defendant demurred generally. The demurrer was overruled. Defendant elected to stand on its demurrer, and judgment was rendered in favor of plaintiff for $94.50. Defendant appeals.

1. The parties address themselves to but one point, conceding that its decision should determine this case, and that is whether the purchaser at a sale under the scavenger act is entitled to all redemption money paid to redeem from said sale regardless of the amount of his bid. We are of opinion that the statute is reasonably plain in its provisions. We have summarized its features so many times that we shall not undertake to repeat much that has heretofore been said. Section 11165, Ann. St. 1907, directs the treasurer to issue his certificate of tax sale substantially in form as therein set forth, and that, whenever any parcel of land shall be sold for less than the sum of the taxes, as evidenced by the decree against said land, the treasurer shall insert in the certificate a statement that the owner thereof will hold his investment for 18 months subject to a premium bid. Section 11166 of said statute provides that within 18 months of said sale any person may file with the treasurer an offer in writing to pay the amount of such sale with 18 per cent. interest thereon, and, in addition, at least 10 per cent. of the original purchase price, and in like manner he may be overbid. At the end of 18 months the first purchaser has 5 days to decide whether he will pay 5 per cent. more than the highest bid offered by any other person, and, if he is

willing to do so, may deposit the excess between his first bid and his last one and retain his investment, but, if he fails to do so, the highest bidder, by paying in his offer with interest on the first bidder's deposit, receives a certificate, and the first purchaser is paid his money with 18 per cent, interest thereon. It is further provided in said section that "the offer of any premium on any sale shall be deemed to relate back to the date of sale, but upon redemption the holder of the second certificate shall be entitled to interest only upon the amount actually paid by him at the rate of 1 per cent. a month from the date of payment, which shall be noted on his certificate and upon the tax record." Section 11170 of said statute further provides for redemption from any sales made in said suit and before confirmation, and therein we find the following: "Provided, no redemption from premium sales shall be allowed for less than the amount of the decree, interest and costs and subsequent taxes paid." Section 11173 commands the county treasurer upon redemption to mail to the owner of the tax certificate notice of said redemption, and "redemption money in the hands of the treasurer shall be held subject to the order of the person owning the certificate of tax sale upon the property redeemed."

We are of opinion that the legislature intended by said act to divide the sales in the state tax suit into two classes, and that any purchase for less than the decree against a particular parcel of land should be designated a "premium sale." If it were the intention of the legislature to permit the bidder to receive all of the redemption money in every case, there would not have been any occasion to limit the premium bidder to interest on his payment from the date it is received by the treasurer. Sections 11166 and 11170 are more definite and specific upon the point considered in the instant case than is section 11173 thereof, and, in so far as there may seem to be any repugnancy between them, the former will prevail. *Richards v. County Commissioners,* 40 Neb. 45.

Two great objects are to be considered in construing revenue laws: First, to provide a public income; and, second, to secure individuals from extortion and plunder under a pretext of levying and collecting that revenue. 1 Cooley, Taxation (2d ed.), p. 452. To adopt the rule contended for by plaintiff would be to ignore the interest of the public and transfer its funds to speculators without in any manner aiding the property owner. The speculator in tax titles is not a favorite of the courts. He is a valuable element in the economy of taxation, and has existed in many climes and through long generations. Individuals look with equanimity upon his unprofitable ventures, and courts, as a rule, do no more than to see that he receives back his investment with the excessive interest allowed by law. Under the scavenger act the speculator is given many advantages. He purchases after an adjudication that disposes of all mere irregularities from assessment to said sale. The procedure for perfecting title is inexpensive, and a writ of possession may be awarded him upon confirmation. He is given 6 per cent. interest even if redemption is made the day succeeding the sale, and after six months 1 per cent. a month additional interest is allowed him. We do not believe that the legislature intended to do more for him. Disposing of the single point presented in the briefs of the litigants, we conclude that the learned district judge improperly construed the law, and we therefore recommend that the judgment of the district court be reversed and this cause be remanded for further proceedings not inconsistent with this opinion.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1908.

STATE OF NEBRASKA, APPELLANT, V. DAVID T. MARTYN, SR., APPELLEE.

FILED SEPTEMBER 16, 1908. No. 15,620.

1. Carriers: REGULATION OF TRANSPORTATION. A contract between a railroad company and a physician, by the terms of which he is to receive for professional services to be rendered by him for the company, at its request, the sum of $25 a month and an annual pass over its lines of road, where the physician does not spend a major portion of his time in the employment of the company, is prohibited by the provisions of sections 10664, 10665, Ann. St. 1907, and the acceptance and use of such a pass by the physician renders him guilty of a violation of those sections.
2. Constitutional Law: CARRIERS: POLICE POWER. The provisions of ch. 93, laws 1907, commonly called the "Anti-Pass Law," prohibiting the issuance, acceptance and use of free transportation, are a proper and reasonable exercise of the police power of the state, and the power of the legislature to regulate the business of common carriers by preventing unjust discriminations, and are not unconstitutional.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Exceptions sustained.*

William T. Thompson, Attorney General, John J. Sullivan and *W. N. Hensley,* for appellant.

Edson Rich, W. M. Cornelius and *J. E. Rait, contra.*

BARNES, C. J.

At the March, A. D. 1908, term of the district court for Platte county, an information was filed against the defendant, David T. Martyn, Sr., which, omitting the title and formal parts, was, in substance, as follows: That on or about the 15th day of January, 1908, David T. Martyn, Sr., then and there being, did unlawfully accept from the Union Pacific Railroad Company, a corporation owning and operating lines of railroad in the state of Nebraska, a free pass for travel on and over all the lines of railroad owned and operated by the said Union Pacific Railroad Company in said state; and did then and there unlawfully use said pass for the free transportation of himself as a passenger on and over the said lines of railroad in said county and state; the said David T. Martyn, Sr., not being then and there an officer, agent or *bona fide* employee, the major portion of whose time is or was devoted to the service of said railroad company. The information in conclusion also stated facts sufficient to show that the defendant was not included within any of the exceptions contained in chapter 93 of the laws of 1907, commonly called the "Anti-Pass Law."

To this information the defendant entered a plea of not guilty. In due time he was placed on trial, and the cause was finally submitted on the contract under which the pass in question was issued and an agreed statement of facts. It was provided, among other things, by said contract that the defendant should furnish all necessary surgical and medical treatment to the sick and injured employees of the Union Pacific Railroad Company free of charge to said employees, and also render such services to passengers and others, for whom the company should request the same, between Schuyler and Silver Creek, Nebraska, for which he was to receive an annual pass on the Nebraska division of said railroad, together with trip passes upon other divisions thereof, and $25 a month during his employment, which it was provided could be can-

celed and terminated at any time for cause by the said company. By the agreed statement of facts it was conceded, among other things, that the defendant was and is not employed a major portion of his time in the service of the said railroad company. On motion of the defendant's counsel the court directed the jury to return a verdict of not guilty, which was accordingly done, the defendant was discharged, and the cause was thereupon dismissed. To all of which the state entered its exceptions, and has brought the case here for review under the provisions of sections 483 and 515 of the criminal code.

It is contended by the state that the record shows beyond any question or chance of reasonable contention that defendant was guilty of a plain violation of our statutes prohibiting the acceptance and use of free transportation. On the other hand, defendant contends first, that a pass issued in good faith to a regular practicing physician in return for services performed and to be performed by him in the treatment of persons injured on or about the railroad issuing it is not a free pass within the meaning of the act of March 30, 1907, prohibiting the giving, acceptance and use of passes, or free transportation of passengers over any and all lines of railroad within this state; second, that the act violates section 3, art. I of the constitution of this state, which provides that "no person shall be deprived of life, liberty or property, without due process of law"; and, third, that the act violates section 16, art. I of the constitution, which provides that "no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

To determine these questions it is not only proper, but necessary, for us to consider all of the several provisions of our statutes relating to, or in any manner regulating, the business of common carriers within this state; and we should also take into consideration the evil sought to be corrected by the several legislative acts on that subject, together with the means adopted to accomplish that

purpose. It is a matter of common knowledge that free passes first originated in favors granted to personal friends of railroad officials, and that this courtesy was gradually extended to public officers. This in itself, and in its inception, was not considered harmful or detrimental to the public welfare; but long prior to the passage of the act in question the giving, acceptance and use of the free pass had become an intolerable evil, a menace to good government, and a stumbling block in the way of securing needed legislation, as well as a burden to the railroad companies themselves. With this situation confronting the legislative assembly of 1907, that body wisely determined to put an end to the whole matter, and so it first enacted chapter 90, laws 1907, commonly called the "Railway Commission Act," which was approved by the governor, and became a law on the 27th day of March of that year. By section 14 of the act, it was provided: "If any railway company or common carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers or employees, by any special rate, rebate, drawback, or other device, shall charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful." It seems perfectly clear that the giving of free transportation to any person whomsoever was thereby made unlawful; and, while it was not made a penal offense by that section to receive such transportation, yet the giving of it was made a crime punishable by a fine of not less than $500, nor more than $1,000. That the provisions of that section are broad enough to cover the transaction in question in this case, and render it at least unlawful, there can be no doubt, for the transportation of a passenger by a railroad company over its line of road is a service performed by it

for such passenger; and the Union Pacific Railroad Company by giving the defendant the pass in question thus charged, demanded, collected and received a different charge from the defendant than it charged, demanded, collected or received from other persons or passengers for a like service. That this rendered the transaction unlawful there can be no question. To the operation of this law there was no exception, and the servants and employees of the railroad company could not be transported free even while carrying out the terms of their employment. It was therefore apparent that the law, as it then stood, was too drastic in its provisions, and that there should be enacted some needed exceptions to its operation, and so the anti-pass law above mentioned was passed, approved by the governor, and took effect on the 30th day of March, 1907 (Ann. St. 1907, secs. 10664, 10665). By this act it was made a penal offense, not only for a railroad company to give, but for any person to receive and use free transportation who was not especially excepted from its operation by the language of the act itself. As we understand the question before us, it is not claimed by the defendant that he falls within any of those exceptions, and, while the defendant was an employee of the Union Pacific Railroad Company, yet it is frankly conceded that he did not, and does not, spend a major portion of his time in the service of that company. With the facts above stated before us, we come now to determine the foregoing questions.

The defendant's first contention is that his pass is not a free pass within the meaning of the statutes above referred to. To support this proposition his counsel cite *Dempsey v. New York C. & H. R. R. Co.*, 146 N. Y. 290. In that case one Dempsey, a railroad policeman appointed by the governor of the state of New York pursuant to statute, had entered into a contract with the defendant railroad to protect its property, and be ready for such service at all times on demand; and it was also agreed that, if he would procure his appointment to the office of

railroad policeman, the company would give him $75 a month for performing the duties of that office, together with an annual pass, which was required to enable him to perform his official duties. Upon these facts it was held that the pass contracted for was not a free pass within the meaning of the constitution of New York, which prohibited the issuance of free passes to the public officers of that state. It thus appears that the rule announced therein has no application to the case at bar.

Our attention is next directed to the opinion of the attorney general of the state of Wisconsin, wherein he decided that a contract between the assistant attorney general and a railway company, by which that officer was to act as attorney for the company in consideration of an annual pass, was not a violation of the anti-pass law of that state. An examination of that opinion, however, discloses that it was based on *Dempsey v. New York C. & H. R. R. Co., supra,* and therefore has no application to the facts here in question, or the law by which our decision must be governed. Again, the obvious impropriety of the employment of the assistant law officer of the state by a railroad company, and the inconsistency of his petition in accepting such employment, affords sufficient reason to justify us in declining to follow that opinion.

Finally, on this branch of the case, counsel present *Smith v. New York C. & H. R. R. Co.,* 24 N. Y. 222, and *New York C. R. Co. v. Lockwood,* 84 U. S. 357. We find, upon an examination of those cases, that the point decided by each of them was that a shipper, traveling on a drover's pass issued to enable him to take care of his live stock *en route,* was not a gratuitous passenger in such a sense as to relieve the carrier from liability for negligently causing his death. Just how those cases can aid us in determining the questions under consideration we are not now advised, and so far have been unable to ascertain. On the other hand, we find that in *Marshall v. Nashville R. & L. Co.,* 118 Tenn. 254, 9 L. R. A. (N. S.) 1249, the nature of a free pass issued by a railroad com-

pany to the chief of police of the city of Nashville was determined, and it was there said: "One of the assignments of error in this case is that the pass was not a mere gratuity, but that it was given for a valuable consideration; and in this connection it is said that the deceased was a member of the police force of Nashville, being chief of detectives, and that to this class of persons the company, as a rule, issued passes, which were based upon a valuable consideration. In other words, this pass was given, like others of its class, to encourage and to induce members of the police force, like the intestate, to ride upon the cars, and to be frequently about them, because their presence tended to preserve peace and good order for the passengers and to protect the interest and operation of the road. We are of opinion that such a motive on the part of the road cannot be considered a valuable consideration, because the expected benefits are too remote, contingent and uncertain to be so classed; and the pass must, therefore, be considered and treated, as it purports to be, a mere gratuity or compliment."

An examination of the contract under which the pass in question was issued to the defendant discloses, as above stated, that it could be abrogated or annulled at any time for cause, and the impression is created thereby and by the whole record that for the contingent services which the defendant was to render to the Union Pacific Railroad Company, if requested, he was to receive and accept $25 a month, and that the pass in question by which he was permitted to ride upon the trains of that company over its Nebraska division, free of charge, was a mere gratuity, and was so considered by both the defendant and the railroad company until after the passage of the act in question herein. It seems quite evident that any expected benefits by reason thereof which might be received by the railroad company were so remote and contingent as to constitute no consideration therefor. If the defendant's pass is not a free pass within the meaning of the act, which is the basis of this prosecution, then the statute itself is as use-

less as the vermiform appendix. If a free pass can be lawfully issued by a railroad company and used by any person as an employee who does not spend a major portion of his time in the service of the company, the whole purpose of the law is thwarted and destroyed, for under the pretext of employment any service performed for the company, however slight and trifling, would entitle the one performing it to free transportation, and the law would thus be rendered wholly nugatory. We therefore decline to adopt the construction contended for, and are of the opinion that the defendant's pass is just what it purports to be, a free pass, and its issuance, acceptance and use was a plain violation of the statute, which is the basis of this prosecution.

We come now to dispose of the defendant's second and third contentions, which strike at the constitutionality of the law involved in this controversy. These questions will be considered together, for what may be said as to one of them applies with equal force to the other. It is asserted that the anti-pass law is unconstitutional because it impairs the obligations of the contract existing between the defendant and the railroad company, and deprives defendant of his property without due process of law. To correctly decide this question, we should construe all of the provisions of our constitution and statutes which relate to or have any bearing thereon together. By section 7, art. XI of the constitution, it is provided: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties." It thus appears that the power to regulate intrastate commerce and prevent unjust discriminations is not only granted to the legislative assembly by the constitution, but it is thereby made a duty which the law making body is commanded to perform. It is also well settled that the internal commerce of a state, that is, the commerce wholly confined to and carried on within the limits of a single

state, is as much under state control as foreign or interstate commerce is under the control of the general government. *Sands v. Manistee River Improvement Co.,* 123 U. S. 288; *Gibbons v. Ogden,* 9 Wheat. (U. S.) 1; *Moore v. American Transportation Co.,* 24 How. (U. S.) 1; *Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U. S. 204; *Geer v. Connecticut,* 161 U. S. 519. The exercise of this power necessarily includes the right to interfere with contract and property rights, so far, at least, as may be necessary to prevent extortion and discrimination. From even a cursory examination of the several acts of our legislature on this subject, it is quite apparent that the contract under consideration was and is discriminatory in its nature. We find that like contracts have been frequently declared to be so. The statutes of North Carolina upon this subject are the same as our own, and in *M'Neill v. Durham & C. R. Co.,* 132 N. Car. 510, it was held that a contract between a railroad company and the publisher of a newspaper by which he was to publish the timetables of the company and receive a pass over its line of railroad, as compensation therefor, was invalid and was an illegal discrimination. In the opinion in that case we find the following: "Subject to the liberal exceptions just recited, the general assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine 'not less than one thousand dollars and not exceeding five thousand dollars' for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit: That for the year previous he had advertised the schedule of the defendant company in his paper and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others, but, let it be what it may, it could not

amount exactly, 'neither more nor less,' to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money." This decision not only meets with our approval, but we find that the federal courts in construing like provisions of the interstate commerce law have reached a similar conclusion. *United States v. Wells-Fargo Express Co.*, 161 Fed. 606.

Again, it may be said, if the contract for the pass in the case at bar ever had any validity, the provisions of our constitution above quoted entered into and became a part of it at its inception. And its terms and obligations were at all times subject to the power of the legislature to pass laws "to correct abuses and prevent unjust discriminations." Therefore, when the law in question took effect, the contract became illegal, and its obligations gave way and were suspended, for it cannot be said that it was of such a character as to suspend the provisions of the constitution, and the statute passed in response to the command of that instrument.

It may be further stated that our antipass law is simply a police regulation, adopted in pursuance to the mandates of the supreme law, and therefore cannot be said to be unconstitutional. In Tiedeman, Limitations of Police Power, sec. 93, it is well said: "Whenever the business is itself a privilege or franchise, not enjoyed by all alike, or the business is materially benefited by the gift by the state of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a *quasi* public business, and to that extent may be subjected to police regulation." That such is the nature of the business of a common carrier there can be no doubt. In *Bullard v. Northern P. R. Co.*, 11 L. R. A. 246, (10 Mont. 168), it was held, that "existing contracts for special freight rates or rebates from regular tariff rates, which had been made with railroad companies subject to the interstate commerce act, became illegal when that

act took effect, and were after that time incapable of enforcement." The contract in question herein is without doubt subject to the same rule. We are therefore of opinion that the issuance of the defendant's annual pass and its acceptance and use by him was a plain violation of the statute.

We are therefore constrained to hold that the district court erred in directing the jury to find the defendant not guilty and discharging him from further prosecution. For the foregoing reasons, the exceptions of the state are

SUSTAINED.

IN RE WILLIAM L. NEWBY.

FILED SEPTEMBER 16, 1908. No. 14,175.

Attorneys: DISBARMENT: EVIDENCE. In proceedings for disbarment, the presumption of innocence applies, and the culpability of the respondent must be established by a clear preponderance of the evidence.

ORIGINAL application for disbarment of William L. Newby. *Dismissed.*

W. T. Thompson, Attorney General, Grant G. Martin and *W. B. Rose,* for informant.

William L. Newby, W. G. Hastings and *A. G. Wolfenbarger, contra.*

LETTON, J.

This is an original proceeding in disbarment upon an information filed by the attorney general under the direction of the court. In order to understand the peculiar condition of the record, it will be necessary to give a history of the proceedings in this and other cases based upon the same facts. This proceeding had its inception in this court on March 10, 1905, when the attorney general filed

a somewhat informal motion for an order to confirm a judgment of the district court for Saline county disbarring William L. Newby from the practice of law, and for an order revoking and canceling the certificate of Newby to practice law in the several courts of this state. The motion set forth that it was based upon a transcript of the proceedings of the district court for Saline county in the matter of the disbarment of Newby filed therewith. Pending proceedings upon this motion, on June 10, 1905, the respondent filed a petition in error seeking a review of the judgment of the district court for Saline county referred to in the motion. The error case was duly argued and submitted, and on May 3, 1906, in an opinion by SEDGWICK, C. J. (76 Neb. 482), the judgment of the district court was affirmed so far as it disbarred Newby from practice in the courts of the Seventh judicial district, but reversed as to the order of disbarment generally; it being held that, since this court was the only court in the state which could admit to practice in all the courts of the state, it alone had the power to enter an order annulling such admission. Pending the hearing of the error case, the proceedings in this case were suspended. Following the disbarment proceeding in the district court, respondent was prosecuted criminally in that court upon a criminal charge growing out of the same transaction. The criminal action was still pending at the time of the filing of the opinion referred to, which was made to appear to this court, and it was ordered: "Further proceedings in this court upon the main charge against the defendant are continued until the final determination of the criminal proceeding now pending in the district court for Saline county. When those proceedings are finally disposed of, it will be the duty of the attorney general to so inform this court, and further proceedings will then be taken thereon."

In December, 1907, a motion was made to dismiss the proceedings on the ground that the criminal charge had been dismissed and the defendant discharged. This mo-

tion was overruled, and the attorney general was directed to file a formal complaint for disbarment in this court. In compliance with this direction, a formal information was filed, charging that in practicing his profession the respondent "has been wanting in good moral character, has been guilty of deceit and collusion with intent to deceive a court, and has also been guilty of irregular, unlawful and unprofessional conduct in the following particulars." Then followed a copy of the information filed in the district court for Saline county, which charges, in substance, that Newby had impersonated a deceased person before a notary public in Oklahoma, had forged the name of such deceased person to a warranty deed conveying certain premises then in litigation in the district court for Saline county, had assumed to appear for said deceased person as an attorney at law in that court, knowing at the time that his purported client was dead, and had thereby knowingly and wilfully deceived the court and the parties to the action. The information filed by the attorney general further charges that upon a trial in the district court Newby was found guilty and disbarred, and that the conviction was affirmed in this court so far as it disbarred the respondent from practicing in the courts of the Seventh judicial district. To this information the defendant filed an answer, admitting the disbarment proceedings in Saline county, and denying specifically every other allegation of misconduct, deceit or collusion contained in the information. Upon these issues the attorney general introduced in evidence the bill of exceptions containing the evidence taken upon the disbarment proceedings in Saline county, and the bill of exceptions containing the evidence taken in the criminal trial in the same court. Original evidence was taken by the respondent in the form of depositions. The case was argued and submitted upon the issues raised by the information and answer, and upon the evidence thus produced.

The peculiar and unusual condition of the evidence re-

quires that it be distinctly borne in mind that there are three distinct masses of testimony before us, each taken at different times and in different proceedings. The first is the evidence in the disbarment proceedings before the district court, which was taken in the latter part of March and early in April, 1904. The second is the evidence taken upon the criminal trial, which was held in December of the same year; and the third consists of the depositions taken directly in this proceeding in June, 1908. An interval of between two and three years intervened between the taking of the first and last of this testimony. It may be noted also that different attorneys represented Mr. Newby in the different proceedings, as this has some bearing upon the final determination of the case. The most important testimony in the disbarment procedings in the district court was given by one E. J. Garner, a notary public, residing in Coyle, Logan county, Oklahoma. He testified that on the 15th day of June, 1903, which was several months after the death of Charles E. Jennings, the true owner of the property in question, a man who was a stranger to him came into his office in Coyle, and there signed and acknowledged in the name of Charles E. Jennings a warranty deed to the property in question; that he fixed the date by a record which he kept of his notarial work (this record was introduced in evidence); that he afterwards recognized Newby in Friend, Nebraska, as the man who signed and acknowledged the deed. He testified that at the time of the execution of the deed Newby had no beard other than a mustache, and that the deed was acknowledged in the afternoon of that day. The deed itself was not in evidence, but the record of it which was introduced showed the date of acknowledgment to be June 5.

Other evidence showed that early in 1903 Newby went to one A. D. Jennings, a resident of Lincoln, Nebraska, who had formerly lived in Friend, and asked him if he did not have a son by the name of Charles E. Jennings, and said that if the son owned this property there would

be a consideration in it for him. Lafe Burnett, an attorney who resided at Wilber, the county seat of Saline county, testified that at the opening of the March term of court, 1904, and before the hearing in the disbarment proceedings, Newby showed him the forged deed, and told him he could prove he was not in Oklahoma at the time the deed was dated; that Charles E. Jennings was a traveling salesman, and that he had been at Newby's house in Friend two weeks before. He also testified that in February, 1903, he, Burnett, received a letter from Guthrie, Oklahoma, written in script, signed by Charles E. Jennings, asking him to appear in the tax foreclosure proceedings, and inclosing a copy of the publication notice of the beginning of the suit; that after he had done so, and had obtained leave to answer in 30 days, he wrote Jennings to that effect, and that he received another letter with a draft of an answer and a check for $40 in June or July, 1903, and that he then filed an answer as attorney for Charles E. Jennings; that he replied to these letters, using a return card upon the envelope, and that the letters were not returned to him; that the draft was made payable to Joseph W. Shabata, clerk of the district court, and that he had never written Jennings the name of the clerk. He further testified that he examined the deed and acknowledgment at the first of the term, and that he did not notice anything that indicated an erasure or change in the date, or anything scratched or rubbed out. It was also shown that in February, 1904, Newby filed the forged deed for record with the county clerk of Saline county. A number of other circumstances were in evidence which tended to support the conclusion of the committee that Newby was guilty as charged. On the other hand, a number of witnesses testified positively that Newby left Friend, Nebraska, for Oklahoma on June 7 or 8, that at that time he had a full beard and mustache, and that he returned to Friend upon the 6th of July still wearing a full beard. H. W. Newby of Guthrie, Oklahoma, his elder brother testified that on June 15 Newby worked

with him and other men laying a lateral sewer to his house in Guthrie, that Coyle is 18 miles northeast of Guthrie, and that communication was such that it would have been impossible for W. L. Newby to have been in Coyle upon that day without his knowledge. He testified, also, that W. L. Newby wore a full beard and mustache at that time. In rebuttal a number of witnesses who lived at Friend or its vicinity testified that at and before the time that Newby started for Oklahoma in June, 1903, they saw him, and that his face was shaved clean except for a mustache. As the evidence then stood, while it was contradictory, it seemed to be sufficient to sustain the findings of the bar commission and the order of the district court. Following these proceedings, Newby was prosecuted and convicted upon the charge of uttering a forged deed, but the judgment of conviction was reversed by this court on account of a defect in the indictment. No new trial was had, and in November, 1906, upon a showing made of inability to prosecute the action, leave was given the county attorney to enter a *nolle prosequi,* and the defendant was discharged. The testimony taken in the criminal proceeding, while in the main identical with that taken before the bar commission, shows the following additional facts: Several witnesses testified that at the time the forged deed was in the office of the register of deeds to be recorded their attention was called to the deed and to the acknowledgment, that there appeared to be a blot or blur before the figure 5 in the date June 15, and that it appeared as if something had been erased and blurred or blotted over before the figure 5. None of the witnesses testified, however, to seeing anything more than a blot or blur. The witness Vandine testified that he took the deed and held it up to the light, but could not discover any figure under the blur. The testimony at this time was also in direct conflict with reference to whether or not Newby had only a mustache or had a full beard when he went to Oklahoma in June, 1903. There was additional testimony given by several witnesses, who say

they worked upon the sewer with him, to the effect that Newby worked all day in Guthrie on June 15, 1903, the day that Garner testified he signed the deed in Coyle. At this trial Newby testified that he received the forged deed by mail from Guthrie on June 8, 1903, at the railroad station in Friend; that he sent it to his mother, the grantee, Malinda Smiley, after he showed it to Burnett on the first day of the March, 1904, term of the district court, on the advice of counsel; and that he procured it back from his mother in May, 1904; and his wife testifies that it was burned with his house at the time the house was destroyed by fire in November, 1904. Part of this evidence is corroborated by the testimony of Paul Newby, the son of respondent, who says that on June 8 he procured from the post office in Friend a long envelope containing a paper, that he handed the same to his father at the railroad station in Friend, who opened it and took therefrom the deed in question. A long envelope is also in evidence which is postmarked "Coyle, Oklahoma, June 5, 1903," and "Friend, Neb., June 8, 1903," and which is addressed to "W. L. Newby." Two witnesses who managed the Occidental Hotel in Guthrie, Oklahoma, at different periods in 1903, testified that a man registering as Charles E. Jennings lodged at this hotel in January, 1903, and on June 21, 1903, describing him as not as large a man as Newby, with dark hair and mustache. The hotel register, or that portion of it containing entries showing registry by Charles E. Jennings on June 9, 1902, October 11, 1902, July 23, 1903, and June 21, 1903, was introduced in evidence, but is not with the bill of exceptions. There is further testimony from a carpenter that a man of like description came to a house in Guthrie where Newby was working with him in June, 1903, and had a conversation with Newby. The city engineer of Guthrie, Oklahoma, testified that the sewer upon which a number of witnesses swear Newby was working on June 15, was finished a day or so prior to June 16. There is

also in evidence a bank draft issued by a bank at Coyle, dated "Coyle, Oklahoma, June 15, 1903," for the sum of $40, payable to J. W. Shabata, clerk of the district court, which draft Lafe Burnett testifies he received by mail inclosed with a letter signed "Charles E. Jennings," as a tender to be made to redeem from taxes in the tax foreclosure case, and which was delivered by him to Mr. Shabata for that purpose.

The substance of the evidence taken directly in the present proceedings in this court is about as follows: William L. Newby testifies that he did not sign the forged deed; that the first time he saw Charles E. Jennings was in Guthrie, Oklahoma, in June, 1903; that he had considerable correspondence with Jennings before that time, and that Jennings came to where he (Newby) was working with some carpenters erecting a house for his brother, H. W. Newby, to get the balance of the purchase price of the lots he had sold to Newby; that he inquired for Mr. Newby and introduced himself as the man with whom he had been corresponding, and that he had Newby's letters; that in January, 1903 he first received a letter through the mail from Charles E. Jennings. The letter and the envelope in which he testifies it was inclosed are in evidence. This envelope is postmarked "Guthrie, Oklahoma, Jan. 29, 1903," is addressed "William L. Newby, Atty., Friend, Neb.," with the request: "After 10 days return to Charles E. Jennings, Guthrie, Oklahoma." A clipping of the publication notice was inclosed notifying Charles E. Jennings of the beginning of the tax foreclosure suit. The letter is as follows: "Guthrie, Okla., 1-28, 1903. William L. Newby, Attorney, Friend, Nebraska. Dear Sir: I inclose a notice which you will doubtless understand. I left Friend some years ago. Then this property was considered worthless. I intended to return at that time when things were looking up some but failed to do so. I left my property in charge of a man there and I guess he has not looked after it very well. His name was George Long. I want you to appear for me and save it if

it is not too late and is worth it. I wish you would look up and see what it has been renting for and who has been renting it; if it has been rented try and get some of the rent. I write you because I heard you try a case against one Riley Cron and afterwards you preferred charges of gross immorality and wife desertion against him in the Woodmen camp of which he was a member. You may remember the fellow that defended Cron in the M. W. A. Let me hear from you as soon as you can. Respectfully, (Signature in script.) Charles E. Jennings." Newby testified that he remembered the incident as to the case against Cron. Reading from the letter-press copy in his letter book, he testifies that on the 2d of February, 1903, he answered that letter as follows: "2-2-'03. Mr. Charles E. Jennings, Guthrie, O. T. Dear Sir: Your favor of recent date is at hand. It with inclosed copy of publication has had my careful attention. While I thank you for the letter and the offer of the case I have promised George A. Taylor, the husband of the plaintiff, that I would not appear in the case against his wife. Mr. Taylor has been collecting the rent of Mr. Smith, who is joined with you, for over a year. The property is worth I understand about $200, although I have never seen it. Am not able to say what condition it is in. There are plenty of attorneys at Wilber, the county seat, that can and will handle your case for you. You will find the following all square fellows: Lafe Burnett, Frank Bartos, Will McGintie, Grimm & Son. There are others, but I think that their charges would be higher than you would want to pay. It is quite a while till court meets. I remember the case you refer to, I felt quite warm at you for defending Cron, but the boys said that you were a stranger and did not know who you were. Thanking you for the offer of your case and hoping to be able to serve you some other way, I inclose our card and close. I am earnestly yours, William L. Newby." That he received the following letter in reply (the letter itself being introduced in evidence): "Guthrie, Okla., Feb. 7, 1903. W. L. Newby, Attorney,

Friend, Nebraska. Dear Sir: Your letter is at hand. I am sorry that you cannot look after that matter in court. I will write to the party that you speak of at Wilber. I never had the man Taylor to rent my property, as I see you say that he has collected rent for over a year. See that man Smith that you say was renting of him and write me how much rent he has paid him. Can you find a buyer for this place at what you wrote me it is worth. I don't suppose that you agreed not to sell it. I will pay you a good commission if it can be sold for cash. I am going down in Caddo county for a few days. I will write you from there if I am gone long. Respectfully, (Signature in script.) Charles E. Jennings."

That in reply to this he wrote the following: "2-16-'03. Mr. Charles E. Jennings, Guthrie, O. T. Dear Sir: Your favor of the 2-7-'03, was duly received and contents noted. No; I did not agree not to sell the place or not to buy the place, I only agreed not to take the other side of the case in court against the foreclosure proceeding. Yes; I think that we can find you a buyer if you will pay us a good commission. Say what we could get above $200 you to redeem from the tax sale. I saw Mr. Smith and find that he paid over $52 as rent to Taylor. That he told him it was his wife's property. That his wife needed the money. That being the case Taylor can be made to account for all of the rent which will more than reimburse them for what they paid out for taxes. I think you can get enough out of them so that the $200 will be clear to you. If this suits you you can write me as to whether you have an abstract to this property or not and what terms you will sell it on. With best wishes, I am earnestly yours, William L. Newby." That he received another letter, which he has lost and cannot find, though he made careful and diligent search for it. He says that in that letter Jennings wrote: "He would take $200 for the place; that his abstract was misplaced, and if I could to find a buyer."

That in reply to this he wrote the following letter: "3-18-'03. Mr. Charles E. Jennings, Guthrie, O. T. Dear

Sir: Your favor of recent date received and noted. I am sorry to hear that your abstract is misplaced. I will, however make inquiries as to the title being in you and clear of incumbrances and can so satisfy any inquiries on that point, in the meantime you may find it. If so you will please to forward the same to me. I think that I can find you a buyer at your price on monthly payments of about $10 each, with 7% interest and a payment to start with of say $50. Would these terms be satisfactory to you? The costs in the tax foreclosure cannot be very much, as the law only gives them $1 for giving the notice of time for redemption from tax sale, with a tender in court for what is due them and a development of what they had collected in rents before bringing their suit they would have to pay all costs subsequent to the giving of the notice of time to redeem. You would then receive enough from Taylors to pay your attorney fees and all back taxes. Wishing you success and asking an early reply, I am earnestly yours, William L. Newby."

That a letter was received in reply to this, which he is unable to find, but the substance of it was "that he would take the $200, but wanted to get it nearly all cash, as nearly all cash as possible."

That in answer to that he wrote the following letter: "5-1-'03. Mr. Charles E. Jennings, Guthrie, O. T. Dear Sir: I have a buyer for your house and two lots here at the price of $200 net to you. Payable as follows: One hundred and fifty dollars on receipt of a proper warranty deed the remaining fifty dollars to be paid on your making the proper tender in court to redeem from the tax suit of Ella A. Taylor. I do not think that there is any question as to your getting back the money that you would have to send Mr. Shabata the clerk of our district court to make this tender which should be made with your answer in that case. You would simply have to be out of the use of about $40 for a little while. There is several defenses that should be set up in your answer any of which will defeat them. Our laws require the follow-

ing things done before one can successfully foreclose a tax lien in this state. A duplicate certificate should be issued at the time of the tax sale by the county treasurer showing to whom the sale was made, the amount sold for, and which should be filed with the county clerk. The county clerk for the county should issue a list of the lands to be sold for taxes which should be properly signed up. The county clerk should also issue his warrant to the county treasurer to collect the delinquent taxes and turn over to the treasurer a tax list under the seal of his office authorizing the county treasurer to proceed to collect the delinquent taxes. I know that none of the above things have been done for the years 1894, '95, '96, '97, '98 or '99 because I have been interested in other cases and had occasion to look it up. I have made some inquiries as to the ability of Mr. Burnett to draw pleadings and I think it best for you to go to some lawyer there and have an answer drawn such as you want filed and send to Mr. Burnett. I would draw it were it not for my promise. Of course if you sell to our buyer I will expect you to give me authority then if necessary to protect the title to appear in the case so that the buyer would not suffer. Kindly let me hear from you at an early date as to whether you will sell as above spoken of, I am going away as soon as our next term of court is over and will want to get this arranged before then if possible. I expect to make your country a visit as I have a brother living in your town. I am earnestly yours, William L. Newby."

That the next communication was the letter which accompanied the deed, and which he received on June 8 at the station in Friend. This letter is as follows: "Coyle, Okla., June 5, 1903. W. L. Newby, Friend, Neb., Dear Sir: I am sending you with this letter the deed to lots 144 and 145 Bentleys addition to Friend, Neb. You will please to deliver the same to Mrs. Smiley and send the amount I was to have $200 to me, or if you are coming to Guthrie soon, as you spoke of in your letter you can bring

the money with you. I will see that the tax suit is redeemed from, but you must look after it some too so that it is properly taken care of. Respectfully, (Typewritten signature.) Charles E. Jennings."

That the next communication he had was the following letter, which was mailed to him at Friend, but was forwarded to him at Guthrie, and that in reply thereto he wrote Jennings, telling him where he was, and requested him to come and see him at his brother's home in Guthrie: "Coyle, Okla., June 12, 1903. Mr. W. L. Newby, Friend, Neb. Dear Sir: Inclosed you will find an answer that I have drawn from the information that I have in regard to the law and the matters about the suit of Ella A. Taylor against Jennings. I want you to look this answer over and if there is anything that needs changing or adding to make it all do so and return to me and I will then send it to the attorney that I have employed to defend this case. I will also send a draft to the attorney of $40 to redeem lots 144 and 145 in Bentleys addition to Friend, Saline county, Nebraska. I have looked over the copy of the bill or petition sent me and the law and I see that they are not entitled to interest, as you have said in your former letters the clerk must sign the certificate and a duplicate must be filed with the clerk. As there is only $1 allowed for giving notice of the time redemption is to expire, I think what I have sent draft for sufficient for all purposes of redemption. I desire that an accounting be had at the hands of Mr. Taylor, the husband of Ella Taylor, I want that if it is needed for to protect this suit that you appear in the case and help the attorney that I employed on your suggestion. Asking an early reply, I am respectfully, (Typewritten signature.) Charles E. Jennings."

That Jennings came to see him at Guthrie, and that he there paid him $200 for the property. That just after his answer to the last letter he (Newby) wrote to the clerk of the district court for Saline county, and asked him whether there had been a tender made to redeem,

and received a letter that there had been. That he told Jennings that, if it was necessary, he would appear in the case, but he did not want to do so unless it was necessary, as he did not want the enmity of Taylor, the plaintiff in the case. That he left Guthrie for Friend upon the 4th day of July, got home upon the 6th, was only home 24 hours when he came back to Guthrie, and did not return to Friend again until the 6th of November of that year. That he took no action in the foreclosure case until the March following, because he found on investigation that Mr. Lafe Burnett had filed an answer practically setting up everything he had suggested to Jennings in the correspondence. That in March, 1904, he was told that one Charles E. Jennings, who lived in Lincoln, had made a deed to the property, and was going to withdraw the tender in the district court. That he then immediately placed the deed upon record, and filed a petition in intervention on behalf of Mrs. Smiley, the grantee in the deed. That he did not then or afterwards represent Mr. Jennings in the litigation, and only appeared for Mrs. Smiley. That as soon as the question was raised as to whether the man with whom he dealt was the real owner of the property he wrote Jennings that it was claimed the deed was a forgery, and that he wanted him to come immediately and defend it. That he addressed the letter to Guthrie, but received no answer. That later, in June, he wrote a letter to Jennings, and sent it to his sister at Mounds, I. T., asking her to mail it from there, which letter was returned to her (the letter and envelope are in evidence addressed "Charles E. Jennings, Guthrie, Oklahoma," with request for return, if not delivered). That after this he went to Guthrie, and endeavored to find Jennings, but could find no trace of him until he went to the Occidental Hotel, where he found a man had been registered by that name. That from there he went to other points in Oklahoma endeavoring to find Jennings, and that until he received a letter from Dr. Gooch at Lawton, informing him that Jennings died on October

13, 1902, he had no knowledge of the death or of the existence of the man who is now claimed to be the genuine Charles E. Jennings, and that after he received this letter he made a trip to Lawton, and ascertained the facts as to the true owner.

He further testifies that he never saw the notary, E. J. Garner, of Coyle, Oklahoma, until he saw him in the streets of Friend, and that he never appeared before him to acknowledge an instrument of any kind. That shortly after the filing of the complaint in disbarment Mr. Ellsworth came past him on the streets of Friend accompanied by a stranger, and that just as they passed him Ellsworth remarked to the stranger, "That's him." That he afterwards learned that the stranger was E. J. Garner. He also introduced in evidence a copy of an answer and a cross-petition filed in the divorce case of *Cron v. Cron* in an Oklahoma court, which he testified is the case referred to in Jennings' first letter. He testified, further, that Malinda H. Smiley is his mother, and that she had no money with which to buy this property; that he bought it for her with his own means, and without consulting her, and for the purpose of furnishing his mother a home. On cross-examination he testifies that he did not offer any of these letters in evidence in the disbarment proceedings or in the criminal case; that he showed them to his counsel in these cases, and was advised not to use them; that he saw the man who defended Cron before the Woodman lodge, but did not know at the time that his name was Jennings; that Jennings sent him a draft of the answer to be made in the case; that he made some corrections in it, and returned it to him; that this was afterwards sent to Mr. Burnett at Wilber by Jennings; that the answer filed by Burnett was substantially a copy of this, and that in his petition in intervention he used much of the same matter contained in the answer filed by Burnett; that he paid the $200 to Jennings in cash; that Jennings claimed to be selling musical instruments; that he, Newby, arrived in Guthrie on the 10th of June, 1903, and

left on Saturday evening the 3d or 4th of July, and that he was in the city of Guthrie during all the intervening time; that before receiving the letter from Jennings he had not inspected the property; that immediately after the filing of the disbarment proceedings he went to Mr. Burnett, and requested him to show him the letter that he had from Jennings, so that he could compare the signature with that upon the deed; that upon the suggestion of one Elias Baker, he sent the deed to his mother; that the deed was returned to him by the post office department on account of misdirection, and that he kept it until his house burned; that he had no knowledge the disbarment proceedings would be begun until the morning he appeared in court, and that the next day he came to Lincoln and employed counsel; that his counsel advised him to produce the deed; that he said he could not, but would send for it, and that he immediately sent for its return, but the hearing was over and the report filed before it came back; that he directed Jennings to make the deed to Mrs. Smiley on a separate memorandum, and not in the letter, which was a practice of his in like matters. He also testifies that after he investigated and found that the man who made the deed had no right to make it he had nothing to do with the property afterwards. Among other matters, he denies that he told Burnett he knew Jennings personally, but says he told him he was a man who sold musical instruments.

A witness who testified in both of the former trials as to seeing Newby at the station in Friend on the morning of June 8 now adds the further testimony that at this time he saw Paul Newby bring his father a long envelope, from which Newby "took out a paper, and, holding it up before him, said: 'There is the deed for those Jennings lots. That ends that controversy.'" The witness further identifies the envelope in evidence. On cross-examination he testified he did not see a letter in the envelope, but saw the indorsement on the back of the deed, and, as a reason for not mentioning the matter when giving tes-

timony before, stated that he was not asked any questions in regard to this.

A number of witnesses residing at Friend and vicinity testify that Newby's reputation for honorable professional conduct was good, except in the matter growing out of the Jennings deed, and that his reputation for honesty and truthfulness was good. Messrs. R. D. Stearns and A. G. Wolfenbarger, of Lincoln, Nebraska, testify that they were Newby's counsel in the disbarment proceedings; that demands were made for documents and for the testimony of Newby, which they advised him not to give at that time; that their recollection is that the deed itself was not in Newby's possession at that time; that they saw the deed after the disbarment proceedings, and that it was their opinion that it was not Newby's handwriting, and that in their opinion whoever wrote the body of the deed, wrote also the acknowledgment; that they were in the same identical handwriting, and were written, in all probability, at the same time, as the same kind of ink was used; that at the time of the disbarment Newby told them that he had sent the deed to his mother. Mr. Wolfenbarger also testifies that the signature to the deed was much coarser than the writing in the body of it, and in his opinion was not made by the same man. He also testifies that about the time of the disbarment proceedings he saw the several letters now introduced in evidence for the first time, and that it was not deemed wise by counsel at that time that the letters should be used in the defense; that without the deed they thought they were of small consequence; that they were anxious to secure the original deed and expected to get it. He further testifies that he was unable to attend the latter part of the hearing on account of ill health, and that several matters were not presented in Mr. Newby's behalf that might have been; that one of the reasons for keeping the testimony from the bar committee was the fact that it was known that a criminal charge was to be filed at the close of the disbarment proceedings, and it was thought

unwise to anticipate the defense. The evidence further shows that in the case of *Taylor v. Jennings* no pleadings of any kind were filed by Newby as attorney for Charles E. Jennings; that the only paper filed by him in which that name appears at all was in a claim for an attorney's lien which he signed as attorney for Charles E. Jennings and Malinda H. Smiley. The pleadings filed by him were as attorney for Malinda H. Smiley, and the evidence is that Mr. Lafe Burnett appeared as attorney for Charles E. Jennings in all pleadings filed for him.

A multitude of facts more or less collateral to the main issue and throwing light upon the same in greater or less degree are to be found in the record, which consists of over 800 pages of typewritten matter. From such a mass of testimony we have been able to do no more than to give a few of the most salient points, and many circumstances related are not mentioned in this resume. In an experience extending over many years the writer has never encountered such a mass of improbable, contradictory, and unusual evidence, and it is impossible to doubt that a number of wilful misstatements have been made by some of the witnesses.

While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession and his reputation as an honest and honorable man, the presumption of innocence applies, and his culpability must be established by at least a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true. *State v. Wines*, 21 Mont. 464; *In re Parsons*, 35 Mont. 478; *In re Smith*, 73 Kan. 743. In fact, a New York court held that "the deprivation for life of a man's vocation should only result from grave malpractice established beyond a reasonable doubt." *Matter of Mashbir*, 44 N. Y. App. Div. 632, 60 N. Y. Supp. 451. Upon the crucial fact in this case, whether or not the respondent appeared before Garner in Coyle, Okla-

homa, on the 15th day of June, 1903, on the one hand, there is the positive evidence of Garner, and in addition many circumstances which, taken together with Garner's evidence, lead to the conclusion that Newby then and there personated Jennings, while, on the other hand, there is the positive testimony of five or six individuals having no apparent interest in the matter, as well as that of Newby himself and his brother, H. W. Newby, to the effect that he was present at his brother's home in Guthrie, Oklahoma, all that day. Again it is established that Charles E. Jennings, the owner of the property, died in October, 1902, and yet several individuals testify to the presence of a man calling himself Charles E. Jennings in Guthrie, Oklahoma, at various times after that up to June 21, 1903, and the hotel register shows that some one registered under that name after Jenning's death, and at a time when there is no evidence that Newby was in Oklahoma. Again, the evidence furnished by the letters, envelopes and postmarks tends to corroborate Newby's story, improbable though it seems to be. Newby's explanations and accounts of his sending the forged deed to his mother and its return to him are self-contradictory and most improbable, but yet the attorneys who represented him in the disbarment proceedings, men of high character and standing, testify in a manner somewhat corroborative of him, and further say they saw the deed, and give reasons why they advised the withholding of the documentary evidence presented now for the first time. In fact, whichever theory of the case we adopt, it seems full of difficulties and improbabilities. Considering the whole of the testimony in all its bearings, we cannot say that we are satisfied to a reasonable certainty that Newby actually personated Jennings before the notary, and that he afterwards wilfully attempted to deceive the court by asserting that Malinda H. Smiley was the owner of the property in litigation, when, as a matter of fact, he knew that the heirs of Charles E. Jen-

nings were the true owners, and that the deed was a forgery.

We cannot say that we are satisfied from the evidence that he is innocent of the charges made against him, nor can we say that we are satisfied to a reasonable certainty of his guilt. The mind of the court being in this condition, it is our duty to give Mr. Newby the benefit of the doubt, and to hold that the charges have not been sustained by the evidence to such an extent as to warrant the infliction of the severe penalty that must inevitably have followed had we been fully satisfied of his guilt.

The proceedings, therefore, are

DISMISSED.

STATE OF NEBRASKA V. ROBERT L. DRAYTON.

FILED SEPTEMBER 16, 1908. No. 15,534.

1. **Constitutional Law: UNFAIR COMPETITION.** The act of the legislature entitled "An act to prohibit unfair commercial discrimination between different sections, communities, or localities, or unfair competition, and providing penalties therefor," approved April 3, 1907 (laws 1907, ch. 157), *held* not to be in violation of the constitution.

2. ———: **CLASS LEGISLATION.** The said act does not prevent persons and corporations dealing in commodities in general use from selling them at such price as such person or corporation may see proper to demand, nor is it class legislation within the constitutional prohibition.

3. ———: **POLICE POWER.** The prevention of discrimination in particular localities, in prices of commodities in general use, "for the purpose of destroying the business of a competitor," by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the state.

4. ———: ———: **POWERS OF LEGISLATURE.** Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised.

ERROR to the district court for Antelope county: ANSON A. WELCH, JUDGE. *Exceptions sustained.*

William T. Thompson, Attorney General, W. B. Rose and *S. D. Thornton,* for plaintiff in error.

W. D. McHugh, Jackson & Kelsey and *Isaac E. Congdon, contra.*

REESE, J.

An information was filed in the district court for Antelope county, in which it was charged that the defendant, the agent of the Atlas Elevator Company, a corporation incorporated under the laws of the state of West Virginia, and doing business in this state and engaged in the sale and distribution of lumber, lime, plaster, cement and brick, commodities in general use in the village of Orchard, in Antelope county, and in the village of Brunswick, in the same county, on the 20th day of August, 1907, in the county and state aforesaid, "did unlawfully, maliciously and intentionally, for the purpose of destroying the business of a competitor in the village of Orchard, in Antelope county, in the state of Nebraska, discriminate between different sections of the state of Nebraska, to wit, the village of Brunswick, in Antelope county, in the state of Nebraska, and the village of Orchard, in Antelope county, in the state of Nebraska, by selling such lumber, lime, plaster, cement and brick at a lower rate in the village of Orchard, in said county and state, than is charged by the Atlas Elevator Company for lumber, lime, plaster, cement and brick in the village of Brunswick, in said county and state, after making due allowance for the difference in the grade quality and the actual cost of transportation from the point of production of said lumber, lime, plaster, cement and brick, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

The defendant filed his motion to quash the information

alleging the following reasons and grounds therefor: "First. Because the legislative enactment by the legislature of the state of Nebraska, under which the said information was filed, contravenes the provisions of the constitution of the United States of America. Second. Because the legislative enactment contravenes the provisions of the constitution of the state of Nebraska, and that such enactment is unconstitutional and void. Third. Because the facts stated in the information are not sufficient to constitute an offense under the laws of the state of Nebraska."

The district court sustained the motion, following the order with the recital: "It appearing to the court that no valid information can be filed against the defendant under the statute and laws of the state, under which the information was filed, it is ordered that the defendant be discharged and his bail released." The county attorney excepted to the ruling and order of the court, and brings the case to this court for review under the provisions of sections 483 and 515 of the criminal code.

There is no attack made upon the form of the information in the briefs of contending parties, and nothing was said upon the subject in the oral arguments; hence no reference will here be made to it. The whole contention is as to the constitutionality of the act of April 3, 1907, published as chapter 157, laws 1907. The act is too long to be copied here in full, and we must be content with a reproduction of the first section, which is as follows: "Section 1. (Local Unfair Discriminations.) Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in

another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful." The other sections prescribe the penalties for a violation of the law and the methods of its enforcement, but which we need not here notice. We have been favored with able oral arguments at the bar of the court, as well as very elaborate briefs in which a multitude of cases are cited, and with a full discussion of the legal principles contended for, but which it will be impossible for us to refer to in detail without extending this opinion to an unreasonable length. As we understand the contention of counsel for defendant, it may be fairly summarized by the following extract from their brief: "A careful examination of the act reveals that it is directed against persons or corporations doing business in the state and engaged in the production, manufacture, or distribution of 'any commodity in general use'; against persons or corporations dealing in commodities which, until the passage of the act, had universally, and ever since mankind began to trade, been regarded as subjects of legitimate and unrestrained commerce and private enterprise. The act is not directed against dangers to the public health or morals. The act is not directed against so-called natural monopolies or business affected with a public interest. The act attacks trading in commodities in general use. It is the converse of an anti-trust law in being an anti-competition law." The argument is that the object and purpose of the act are not within the police power of the state; that its effect would be to stifle competition and thus foster monopolies; that it takes from the citizen the right to contract and to control his property, destroys freedom in trade, and practically compels the merchant and tradesman to conduct and carry on his

business at one place only; that it is class legislation, and "operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." It is said: "The fundamental error in the act is that it attempts to inquire into a man's intentions with reference to something that is his own private concern, just as much as his religion or politics. Dealing in commodities in general use is something with which the police power of the state has nothing whatever to do. The citizen is a free man, and is the keeper of his own heart and mind." It is contended that the act is violative of the fourteenth amendment to the constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, and that no person shall be denied the equal protection of the laws, and that the similar provision in the constitution of this state is also violated by this act. Many cases are cited by which it is sought to maintain this contention; but, in the view which we take of the law, we are not able to see that they can be applied. They refer, in the main, to the statutes which seek to control and limit transactions in the ordinary and lawful commerce of the country, such as the issuance of trading stamps, the conferring of presents or gratuities out of one's own property for the purpose of drawing custom, the right of the individual to engage in any line of lawful business he may see proper to follow; that acts which discriminate in favor of one as against another class of persons engaged in the same lawful business are infractions of the constitution, and therefore void, as well as acts declaring specified transactions unlawful, but exempting from their provisions certain named classes of persons and lines of business; the maintaining by mining or manufacturing companies of stores, truck shops, etc., by which they sell their goods and wares to their employees on credit at a higher price than is charged other customers who buy for cash; that classifications of persons or things must be general and apply to all similarly situated; acts

which seek to destroy the right of every competitor to fix his own price upon commodities which he may lawfully sell, or money which he may lawfully loan (subject, of course, to usury laws), and, in general, such acts as seek to invade the reserved right of every individual to transact and carry on his lawful business according to his own judgment, in his own way, untrammeled by discriminatory laws, by which others similarly situated are given preferences over him. In the foregoing we have sought to fairly outline the contention of the defendant, giving in this limited way the substance of the holdings of the cases cited without further reference to them.

At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations; that unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject, the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised.

From a careful reading and study of the act in question, we are driven to the conclusion that it is not subject to attack upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of any one's business, nor

prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social and commercial life, and the enjoyment of liberty and ownership of property, are based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense. As claimed by counsel for the state, the statute under consideration was enacted for the purpose of supplying a defect in the anti-trust laws of the state. It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality, where there was competition, and increased them in others, where there was none, thus avoiding loss, until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent, and the people of the district or community sup-

plied from that point would be the sufferers. It was evidently the intention of the legislature to prevent that course of conduct if resorted to for that purpose. The law afforded no protection from the injurious effects of such predatory course. If no protection could be furnished to the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors. It is within the knowledge of all of mature years that within the last quarter or half century the meats furnished the people of our cities and towns were supplied by local dealers who purchased their live stock from the nearby farmer or stock grower, slaughtered the animals, and supplied wholesome meats at reasonable prices, and yet paid remunerative prices for the live animals, saving the cost of transportation to and from what are now the exclusive points of manufacture and production. That both the producers and consumers are losers is known to all. That this condition has been brought about by a system of coercion and underselling "for the purpose of destroying the business" of local competitors is also known to all. Is there no power anywhere lodged in the state to prevent this or remedy the evil? If there is, it is with the law-making power. If that department of government has the power, it must be by the exercise of the right of police regulation. Has the legislature that power?

Many writers have sought to define and prescribe the true extent and limitations of the police power, but none has succeeded to the approval and satisfaction of all. It must be conceded that in its operation there is no distinction between persons natural or corporate. *Northwestern Fertilizing Co. v. Hyde Park,* 70 Ill. 635. In Tiedeman, Limitations of Police Power, 1, it is said: "The object of government is to impose that degree of restraint upon

human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. It involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *sic utere tuo, ut alienum non lædas.* The power of the government to impose this restraint is called 'Police Power.' By this 'general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state, of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' "

In 22 Am. & Eng. Ency. Law, 915, it is said: "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto. There have been, however, many attempts to define this power in a general way, and the sum of these definitions amounts to this: That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest." At page 918: "The police power is an attribute of sovereignty, and exists without any reservation in the constitution, being founded

upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. Upon it depend the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property, and it has been said to be the very foundation upon which our social system rests. It is founded largely on the maxim *sic utere tuo, ut alienum non lædas,* and also to some extent upon that other maxim of public policy, *salus populi suprema lex.*"

It is true that the ultimate question of the validity of a statutory enactment, by which this power is sought to be exercised, is with the courts, and they will not hesitate to discharge the duty of declaring an act void if clearly so convinced, but subject to the presumptions and limitations herein referred to. The rule upon this subject can, perhaps, be no more clearly expressed by us than by the following: "Under the police power the state can interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. But the character of police regulations, whether reasonable, impartial, and consistent with the constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and, when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's

right, for to hold that every act of the general assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground was beyond judicial control would render every guaranty of personal right found in the constitution of little or no value." 22 Am. & Eng. Ency. Law, 936. The legislature, as we must conclusively presume, acted upon the fullest investigation, and upon what appeared to it to be reasonable grounds, and, as must be also assumed, has determined that the prohibition of the reduction of the price of commodities in general use in any particular locality "for the purpose of destroying the business of a competitor in such locality" and discriminating "between different sections, communities or cities" by underselling at the point of competition for the purpose named would be conducive to "the general welfare" of the people compelled to purchase such commodities, and by the act in question has sought to remedy the evil. Has it not the power to do so? As said in *Yick Wo v. Hopkins,* 118 U. S. 356, and quoted in *Powell v. Pennsylvania,* 127 U. S. 678: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." If the state has not the power to protect its people from the acts of those who have for their "purpose" the destruction of the business of a competitor, in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed. In *Powell v. Pennsylvania, supra,* the court, quoting from the *Sinking Fund* cases, 99 U. S. 700, said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. * * * The power which the legislature has to promote the gen-

eral welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large." *Waters-Pierce Oil Co. v. State,* 19 Tex. Civ. App. 1, is an instructive and well-considered case upon the general subject involved in this case. When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared to be criminal, we find but little trouble in arriving at the conclusion that the statute is within the power of the legislature, and is therefore valid.

It is contended by counsel for defendant that "the act interferes with freedom of contract," and is therefore violative of the constitutions of both the federal and state governments. As we have already indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose and motives of the party in connection with his acts which brings him within the prohibitions of the law.

It is also contended that the act is void by reason of its classifications, and must therefore be held invalid on the ground of "class legislation." It is said that "the act operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place"; that "keepers of but one store may compete, intend to build themselves upon the ruins of their fellows who maintain single stores or stores in several places, and to ruin their fellows in order to build themselves up, and the law applauds; but keepers of more than one store doing the very things and with like intentions as single store keepers are frowned upon, fined and imprisoned." To this we must be permitted to say that we are unable to find any provision in the act which is susceptible of the construction contended for. An individual or corporation may have but one place where the commodity dealt in may be stored or kept in stock, and yet in the "distribu-

tion" of that stock may seek to destroy the business of a competitor in another locality, and thus violate the law. There are many cities and villages in this state which are adjacent to each other, sometimes so near as to cause a stranger, unacquainted with their superficial boundaries, to be unable to say where one leaves off and another begins. A dealer in one may, for the purpose of destroying the business of a competitor in the other, so discriminate as between the two places as to violate the statute. Common experience and observation, within the knowledge of all, is to the effect that many of the strongest and most grasping monopolies of the state have their place of business, their business homes, in but one place, and yet they are "distributing" and "selling" their commodities in practically every city and village within the state. They do not desire competition. They do not hesitate to destroy the business of local dealers, wherever found, by unjust discriminations. If prompted by that "purpose," the law is violated, and it is within the power of the legislature to prevent the discrimination. Again, it is said that by the provisions of the law an act which is of itself lawful may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental condition or purpose would be impossible of proof. This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but with that we now have nothing to do. Each prosecution under the act will have to depend upon its own proved facts. The existence or nonexistence of what is known in criminal law as the criminal mind would be a question for a trial jury under the facts established by the evidence submitted.

Questions are discussed in the brief of defendant which we have incidentally referred to, but without special attention, and which we scarcely think merit a further extension of this opinion.

We find nothing in the act under consideration requiring us to hold it unconstitutional. The district court

erred in holding the act of the legislature invalid. The exceptions of the state are therefore

SUSTAINED.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. JOHN L. NEBLE, RESPONDENT.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. JOHN LATENSER, RESPONDENT.

FILED SEPTEMBER 16, 1908. Nos. 15,715, 15,716.

Constitutional Law: CITIES: PARK COMMISSIONERS: APPOINTMENT. Section 1, art. II of the constitution of the state, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The charter of cities of the metropolitan class (Comp. St. 1907, ch. 12*a*) provides that the mayor shall be the chief executive officer of the city; shall have power, by and with the consent of the city council, to appoint all officers deemed necessary for the good government of the city, unless otherwise provided in the charter, and that he shall have the superintending of all officers and affairs of the city, except when otherwise provided. The charter also provides for a board of five park commissioners, whose duties are wholly executive and administrative, and who are responsible alone to the city, and whose reports and recommendations are made to the mayor and council exclusively. They perform no judicial functions or duties; have no connection with, and are in no sense responsible to, the district court or any of the judges thereof. *Held*, That that part of section 55 of the charter which provides for their appointment by the judges of the district court of the judicial district in which such cities shall be situated is unconstitutional and void, and that the appointing power is with the mayor and council.

ORIGINAL application for writs of *quo warranto* to determine the rights of respondents to the office of park commissioner of the city of Omaha. *Judgment for respondent Neble and against respondent Latenser.*

H. E. Burnam and *John A. Rine,* for respondent Neble.

Francis A. Brogan, for respondent Latenser.

REESE, J.

These two actions arise out of the following facts: In the charter of cities of the metropolitan class (Comp. St. 1907, ch. 12*a*) the authority is conferred upon the mayor of such cities, "by and with the consent of a majority of the entire council to appoint all officers that may be deemed necessary for the good government of the city, unless otherwise provided for in this act." Section 26. By section 54 it is provided: "In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and * * * from time to time to devise, suggest and recommend to the mayor and council a system of public parks, parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose." Section 55 is as follows: "Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city and who shall be appointed by the judges of the district court of the judicial district in which such city shall be situated. It shall be the duty of said judges, a majority concurring, to appoint or reappoint one of said board each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum." This section was enacted in 1889, and, in accordance with its provisions, the judges of the district court appointed the park commissioners, and continued to do so until the decision of this court of the case of *State v. Moores,* 55 Neb. 480, which occurred June

23, 1898, and by which it was held that the law authorizing the governor to appoint the members of the board of fire and police commissioners was unconstitutional and void. The judges then declined to make further appointments, as it would naturally follow that the same rule would have to be applied in the matter of the appointment of park commissioners. On December 4, 1901, the case of *Redell v. Moores,* 63 Neb. 219, was decided, by which the conclusion reached in the former case was not sustained, and the holding was set aside and the decision overruled. For reasons which were no doubt well founded, the judges made no further appointments until May, 1908, when they made the appointment of defendant Latenser, as required by the section above copied. In November, 1898, the city council of Omaha passed an ordinance No. 4,530, which authorized the mayor to appoint the park commissioners by and with the consent and approval of the council, and the membership of said commission has been supplied by his appointments until the present time; the defendant Neble being one of the mayor's appointees. These actions are brought in the name of the state upon the relation of the attorney general for the purpose of procuring an adjudication of the question as to who has the power of appointment under the constitution and law of this state.

It is the contention of counsel for defendant Neble that that part of section 55, above quoted, which authorizes the judges of the district court to appoint the park commissioners, is unconstitutional and void as violative of section 1, art. II of the constitution of this state, for the reason that it imposes the duty of appointment upon the judicial department of the state, while the duty of appointment calls into action an executive or administrative function, which can, under the constitution, be exercised only by executive or administrative officers. It is the contention of counsel for defendant Latenser that the provision objected to is valid for the reason, first, that the section of the constitution can refer only to the de-

partments of the state government, and has no reference or application to the government of municipalities and the subordinate departments, or local government; and, second, that, if the constitution were to be so applied, the appointment by the judges would still be valid, as the mere act of appointment is neither an executive, administrative or judicial act, or in any degree subject to the usual classification of those functions. The two cases have been consolidated here, and are to be disposed of as one, each involving identically the same question, and are submitted on oral argument and exhaustive printed briefs. We may say at the outset that the principle of local self-government has not been invoked or discussed by counsel in this case, and the only question presented for our determination is the one first above stated.

In the investigation of this question we are confronted with the unusual and anomalous condition of meeting with many apparently well-considered cases sustaining every contention of either side, and it will be absolutely impossible for us to follow any line of decisions which will not be antagonized by holdings in many other cases, for there is a sharp conflict of authority upon every conceivable feature and phase of the case. It could serve no good purpose for us to discuss and attempt to harmonize the views of Montesquieu, Jefferson, Madison, Hamilton, Stevens, Wilson, Goodnow and others upon the question here involved, for the reasons that it would be impossible to bring harmony out of the chaos produced by their divergent opinions, and that such discussion would extend this opinion to an unreasonable length, ending where we begin, and for the further reason that the time at our disposal is not adequate to the task. We will, therefore, be content with a brief reference to some of the later decisions, and an effort to arrive at the spirit and meaning of our own constitution as interpreted by the courts, the legislature and the judicial and administrative history of the state.

The provision of the constitution (art. II, sec. 1) that

"the powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted," is not a new one in the constitutions of this country. It has been handed down from the best thinkers and greatest statesmen of the nation to nearly all state constitutions in one form or another, and, even where not adopted in terms, it has been almost uniformly recognized as a part of our governmental system (*State v. Brill,* 100 Minn. 499), but has never been strictly applied, and indeed could not be, to all the ramifications of state or national government. The duties of the officers of the several departments have, to some extent at least, overlapped and interlaced until it is hard to say in some cases where the one leaves off and the other begins. Many times the courts have defined certain duties of the executive or administrative officers as *quasi* judicial, and recognized and confirmed the validity of the acts of such officers. While this definition has been approved and sanctioned by all, yet the fact remains that the *function* of the act itself is *either* administrative or judicial, and there can in reality be no middle or half way ground between them. This being true, we are brought to the conclusion that many executive or administrative acts performed by judicial officers, and many judicial acts performed by ministerial officers, are and must be held valid, notwithstanding the section of the constitution above quoted. Thus, it often becomes necessary to the full and proper discharge of the duties imposed upon an official belonging to one class to perform an act the function of which, strictly speaking, belongs to another. The performance of such duties being, to some degree at least, essential to the full discharge of the duties imposed and properly within the power of the actor, the power conferred must be held to be valid; otherwise a condition of chaos would arise. We therefore conclude, as all have

done, that the constitution must receive a liberal and general, rather than a strict, construction and application, and that every case must stand or fall relying upon its own merits. In theory the constitution is accepted as stating the one inflexible and unbending rule; yet in practice it is found impossible to obey its every mandate.

It is unnecessary to cite the statutory provisions conferring this *"quasi"* authority, which is, strictly speaking, an evasion of the rule, and which are sustained, for the statutes of all the states, as well as of the general government, are full of them. An apt illustration of this may be found in the office of the state superintendent of public instruction. By section 1, art. V of the constitution, it is declared: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings"; thus clearly classing the superintendent of public instruction with the officers of the executive department. Yet it is within common knowledge that he is clothed not only with executive, but judicial, and to some extent with legislative powers, the judicial to perhaps as full extent as the executive. His decisions (judicial) upon all subjects determinable by him within his department are binding upon county superintendents, teachers and school boards, unless reversed or overruled by a court having the required jurisdiction. Many other executive officers possess these same judicial powers, but in a less degree perhaps, among which might be mentioned the auditor of public accounts, sheriffs, coroners, county superintendents, and the various state, county and other boards. The conferring and exercising of the powers prescribed are seldom, if ever, questioned, and are recognized as legal. Were such not the case, it would be practically impossible to execute and enforce the laws applicable to the various departments. If there is a limitation upon the authority of the legislature to confer these powers, it must be found in the well-known

rule that an authority conferred carries with it all other powers necessary to the discharge of the general duty imposed, and that the power is limited to that extent; in other words, that the conferring of judicial powers upon an executive or administrative officer can extend to such acts as may be necessary to enable the proper discharge of the duty, or to set in motion such other agencies as may be necessary to the complete discharge of the duty required to be performed. The appointment of an officer might properly, we think, be classed as the exercise of an executive or administrative function, at least not judicial. Yet courts and judges frequently find it necessary to make such appointments in order that the judicial functions of the courts may be freely exercised. It often happens that courts or judges are clothed with this appointing power where the appointee may not be required to discharge any duty which could be in any way ancillary to the exercise of the judicial functions of the court or judge making the appointment, and yet the validity of the appointment could not be successfully questioned, for the reason that the person appointed would exercise judicial functions in the discharge of the duties imposed under the appointment. We think, however, that we may safely say that the appointment of park commissioners for cities of the metropolitan class is not the exercise of a judicial function. It may not belong to either class, but it is clearly not judicial. We think also that the duties imposed upon the park commissioners cannot be said to call for the exercise of judicial functions. Section 54, ch. 14, laws 1905, provides that such commissioners "shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and council a system of public parks, parkways and boulevards or additions thereto within the city, or within

three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose." By section 56 it is further declared that they shall "lay out, improve and beautify all lands, lots, or grounds now owned, or hereafter acquired for parks, parkways, or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants or laborers, as may be necessary for the proper care and maintenance of such parks, parkways or boulevards, or the improvement or beautifying thereof, to the extent that funds may be provided for such purpose." These duties are in the main, if not exclusively, administrative. We find nothing in the act conferring any power or jurisdiction over the board by the judges, whether advisory or otherwise; nor is the board required to report to them upon any part or in any particular as to any action proposed or performed by it. In so far as advice, recommendations, suggestions, or consultations go, they are with the mayor and council exclusively.

The question then arises: Is it competent for the legislature under the limitations of the constitution to confer the power of appointment alone upon the judges of the district court of the judicial district in which cities of the class named are located, some of whom reside within the city, and some who do not? It is contended by counsel representing the appointee of the judges that the appointment by them is not the exercise of a judicial function; that no action is taken or to be taken as a court, but that a majority of the persons who are holding the offices join together in selecting the commissioners. There is nothing requiring any court record of the appointment to be made, and we think, if it be said that the term "judges" is nothing more than a description or method of designation of the persons who are to discharge that duty, it might occur that a majority or possibly all the persons designated might be not only nonresidents of the city, but of the county in which the city is situated; and a serious ques-

tion might then arise as to the power of the legislature to transfer the government of the city in whole or in part to nonresident private citizens, if they are to be so treated, having no interest whatever in the care or management of city affairs. The adoption of the view that the judges would not act as judges by virtue of their several offices would lead us into devious paths, from which it would be hard to find a way of escape. The mayor of a city of the class named is usually considered as the chief executive officer of such city, and the administration of the municipal affairs thereof is committed to him and the city council. The park commissioners become a part of this administrative force, and they are responsible to the city alone. As we have said, the duties to be discharged by them are in no sense judicial, and do not call into action any judicial function. They do not render any service which would assist the judges in the discharge of any judicial duties imposed upon them by law. They are clearly executive or administrative officers, owing no duty whatever to the judges from whom they receive their appointment. The naked power of appointment is the sole duty devolving upon the judges in connection with the commissioners, or the offices which they fill.

As we view the case, the first question demanding our attention is: "Is this power of appointment under these circumstances the exercise of a judicial function?" From the examination of the cases cited and others to which we have had access, we are led to the belief that it is not, but that it is executive or administrative in its essence. In the investigation of this question, as in all others arising in this case, we encounter a sharp conflict in the authorities, although it is claimed by some writers that the weight of authority is in favor of the negative of the proposition. In *State v. Brill,* 100 Minn. 499, it is said: "Although there are some decisions to the contrary, it is generally conceded that the power to appoint to a public office is in its nature an executive function." In *State v. Washburn,* 167 Mo. 680, 67 S. W. 592, it is said:

"To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive. * * * The act of filling a public office by appointment is essentially an administrative or executive act, and, under the constitution, can be exercised only by an officer charged with the duty of executing the laws."

In *In re Supervisors of Election*, 114 Mass. 247, the statute provided that, "whenever, prior to an election, five legal voters of any ward of a city shall make known in writing to a justice of the supreme judicial court, in term time or vacation, their desire to have such election guarded and scrutinized, it shall be the duty of such justice * * * to appoint and commission two legal voters of such ward, who shall be of different political parties, and who shall be known and designated as supervisors of election." A petition was duly presented to Chief Justice Gray, asking that the appointments be made for a certain ward in the city of Boston. Instead of taking action upon the petition, the chief justice gave notice of a hearing, and assembled four of the seven members of the court, when the subject was presented by able counsel. The result of the hearing was a unanimous opinion that the law imposing the duty of appointment upon the judges was unconstitutional and void. In the opinion it is said: "These supervisors, although entrusted with certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justice of this court without violating the constitution of the commonwealth. We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the constitution does not allow us to hold any such office."

The petition was denied. In Mechem, Public Offices and Officers, sec. 104, it is said: "So it is said that appointments to office, whether made by judicial, legislative or executive officers or bodies, are in their nature intrinsically executive acts."

This being true, we next inquire whether under the constitution, it is competent for the legislature to impose the burden of appointing executive officers upon judicial officers. Our attention has been called to a number of cases, which are thought to be in point upon the question, and which we will briefly notice. It is insisted by counsel for the mayor's appointee that the case of *Tyson v. Washington County,* 78 Neb. 211, is directly in point as sustaining the contention that the provision requiring the judges to make the appointment is violative of the constitution. We cannot see that such is the case, as the question there was whether the district court could take jurisdiction of and entertain an appeal from the action of the county board in directing the construction of a drainage ditch. It was held that, as the order of the board was purely administrative in its character, the power to review their action could not be conferred upon the courts. While the logic and argument of the writer of the opinion seems to sustain the contention, yet the case itself is not similar to this, nor are the principles to be applied applicable to the question here. *State v. Barker,* 116 Ia. 96, is more clearly in line with this case, but in that case the act under consideration required the appointment of waterworks trustees by the *district court,* instead of the judges thereof. The holding was that such power could not be conferred upon the courts. The logic of the case is in support of the contention here that the power cannot be conferred upon officers of the judicial department of the government. But, in view of the contention of the state, the case is to some extent dissimilar. In *State v. Brill, supra,* the legislature of Minnesota passed an act requiring the judges of the district court, or a majority of them, to appoint the members of the board of control of the

county of Ramsey. After making a number of successive appointments, the judges became convinced that the act imposing the duty upon them was unconstitutional, and refused to make other appointments. The attorney general sought a writ of mandamus from the supreme court to compel action. The writ was denied; the court holding, after an exhaustive examination, that the part of the act which required the judges to make the appointment was unconstitutional and void because it assumed to impose upon the members of the judiciary powers and functions which by the constitution were assigned to another department of the government.

The constitution of the state of Ohio contains no provision similar to that contained in the constitution of this state, dividing the powers of government into three distinct departments, and prohibiting persons of one of the departments from exercising the powers properly belonging to either of the others. The case of *Village of Fairview v. Giffee,* 73 Ohio St. 183, was where an act authorizing the court of common pleas to detach unplatted farm lands from the corporate limits of cities or villages was called in question as being unconstitutional, for the reason that it imposed legislative power upon the judiciary. The court held that, as the powers were not divided and distributed by the constitution, it was left for the legislature to do so, and for that and other reasons the act was held valid. We cannot see that that case is to be considered as authority in this one. It was also held that the act called into action no other than judicial functions and powers. The case of *People v. Morgan,* 90 Ill. 558, is in many respects similar to the one under consideration, and in which an act authorized the judge of the circuit court to appoint the south park commissioners was held valid. This is perhaps one of the leading cases in support of the constitutionality of the law, and yet it is based to a considerable extent upon the legislative and judicial history of the state on the subject of appointments of subordinate officers or agencies. It is cited and followed, generally

with aproval, but with some limitations, in *Cornell v. People,* 107 Ill. 372; *People v. Hoffman,* 116 Ill. 587; *Wilson v. Board of Trustees,* 133 Ill. 443; *People v. Nelson,* 133 Ill. 565; *Ritchie v. People,* 155 Ill. 98; *People v. Onahan,* 170 Ill. 449; *People v. Kipley,* 171 Ill. 44; *People v. Knopf,* 171 Ill. 191; *People v. Hutchinson,* 172 Ill. 486; *People v. Loeffler,* 175 Ill. 585; *Lasher v. People,* 183 Ill. 226; *People v. Raymond,* 186 Ill. 407; *Morrison v. People,* 196 Ill. 454; *Sherman v. People,* 210 Ill. 552; *People v. Board of Supervisors,* 223 Ill. 187; *City of Aurora v. Schoeberlein,* 230 Ill. 496. We therefore conclude that the question is finally settled in that state. But it will also appear from an examination of these cases that the particular question involved in this was not considered in all the cases as a very material inquiry. Thus, in *Cornell v. People,* 107 Ill. 372, it is shown that the charter conferring the power of appointment upon the judge of the circuit court was submitted to the people of the municipality at an election and adopted by them. The court say: "By the vote adopting the provisions of the act the people of the park district gave their assent that the first board of corporate authorities should be appointed by the governor of the state, and that their successors should thereafter, as often as a vacancy occurred, be appointed by the judge of the circuit court of Cook county. This was the mode provided by the act. To this the people of the district gave their assent, and upon no other terms or conditions did they agree to assume the burden of taxation which the corporate authorities, under the act, had the power to impose. It may be that the governor is quite as competent to select honest and capable commissioners as the circuit judge of Cook county; but that does not affect the question. Had the people of the district seen proper to reject the act when it was submitted for their adoption or rejection, the act could not have been imposed upon them. They saw proper to adopt it as it was, with the plain provision that the corporate authorities should be appointed by the circuit judge of Cook county." It is

not entirely clear to the mind of the writer just how a grave, fundamental, constitutional question can be disposed of by the submission of what is considered by many as an invalid law to the popular vote, but with that we now have nothing to do. In *People v. Hoffman,* 116 Ill. 587, the decision in *People v. Morgan,* 90 Ill. 558, is followed, but the court seem to have placed considerable stress upon the clause of the constitution which confers upon county courts, in addition to powers specifically named, "such other jurisdiction as may be provided by general law." Substantially the same provision is found in section 9, art. VI of the constitution of this state, with reference to the jurisdiction of the district court, but it is our opinion that this provision refers to the judicial powers of the court, rather than to duties which may be imposed upon the judges when not acting as courts or the making of such orders as may be necessary to enable the courts, as such, to exercise all the functions imposed by law or usage upon them. We cannot see that the clause quoted furnishes any aid in the solution of the question now in hand. In *Lasher v. People,* 183 Ill. 226, the cases of *People v. Morgan,* 90 Ill. 558, and *People v. Hoffman,* 116 Ill. 587, are referred to, and it is said: "The question mainly discussed in those cases was whether the power of appointment could be exercised by the judicial branch of the government, and in each case the law providing for the appointment was adopted by a vote of the municipality affected"—and we may safely conclude that that fact had some influence upon the decision in those cases.

It is contended that the separation of the powers of government into the three departments, as provided for in the constitution, relates to the state government alone, and is not applicable to municipal or other local bodies whose governments are created and whose offices are established by the legislature, and a number of cases are cited in support of the contention. This is undoubtedly true in theory, and in many cases in practice, and such is the real purpose of state constitutions. But there is no

limitation, aside from that imposed by federal law or constitution, upon the power of the people to include in that instrument provisions which may control the lesser divisions and subdivisions of the state, as in our present constitution. Any of such provisions may be incorporated into the fundamental law, and, when this is done, they are as binding upon the courts and legislatures as any other portion of the constitution. It therefore follows that to that extent, at least, the constitution cannot be limited exclusively to the state government. The provision above quoted extends to all courts from that of justice of the peace and police judge to the supreme court, and applies to all judicial officers, as well as courts. We have cited but few of the many cases referred to in the briefs. As we have already said, almost every state in the Union has by its court of last resort, passed upon this identical question, and they are practically evenly divided. It is impossible for us to divest our minds of doubt as to which side belongs the weight of reason and authority. We are met by the constitutional provision, which, literally applied, would render effective government impossible, and which yet must be observed in order to maintain the liberties of the people. It is impossible to distinguish the cases for they are directly in point and upon similar facts and constitutional provisions. Much appears to have depended upon the prior training and views of the writers of the various opinions. In view of this irreconcilable conflict and for the foregoing reasons, we are impelled, but not without some hesitation, to adopt the view that so much of section 55 of the charter of metropolitan cities as requires the judges of the district court, some of whom reside in counties other than the one in which the city in question is situated, to appoint park commissioners, whose duties are wholly administrative and executive, and over whom the judges are given no supervision or control, such supervision and control being expressly and exclusively delegated to the mayor and city council, is violative of the constitution, and is therefore void. A con-

sideration of the ability and standing of the district judiciary of the Fourth judicial district, and of the fact that the judges have long declined to make these appointments, is persuasive to us that their hesitation has been prompted by doubt as to the validity of the provision of the section under consideration.

The judgment will be in favor of the defendant Neble in case No. 15,715, and in favor of the state in No. 15,716.

JUDGMENT ACCORDINGLY.

STATE, EX REL. JAMES Q. KEEFE, RELATOR, V. GUY T. GRAVES, JUDGE, RESPONDENT.

FILED SEPTEMBER 16, 1908. No. 15,722.

1. **Injunction: VACATING.** On the 18th day of May, 1908, the defendant, the judge of the district court, granted a temporary injunction enjoining a defendant from entering upon and interfering with the possession of the plaintiff in the action, of a certain tract of land. On the 23d day of the same month, and while the injunction was in full force, he granted a counter injunction restraining the plaintiff from interfering with the possession of defendant. On the 1st day of June he modified the first injunction to the extent of permitting the defendant in the action to enter upon the land and cultivate and care for the growing crops planted by him. On the 4th day of June the order allowing the first injunction was vacated and set aside, but a supersedeas was granted and the required undertaking was given. *Held*, That the second injunction, being in contravention of the one then in force, was improvidently issued, and should be vacated.

2. ———: SUPERSEDEAS. The first order issued, set out in the opinion, *held* to be a temporary order of injunction, and not a mere restraining order, and one which could be continued in force, after dissolution, by a supersedeas.

3. ———: RESTRAINING ORDER. "A restraining order is in aid only, and not a part of the main action. Its office is only to hold matters *in statu quo* for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction." *Trester v. Pike*, 60 Neb. 510.

4. ———: DISSOLUTION: SUPERSEDEAS. An injunctional order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction, and must be so treated. An order dissolving such injunction may be superseded.

ORIGINAL application for writ of mandamus to compel respondent, as judge of the district court, to vacate an order of injunction. *Writ allowed.*

Herman Frees and *Hiram Chase,* for relator.

Curtis L. Day, contra.

REESE, J.

This is an application to this court in the exercise of its original jurisdiction for a mandamus to the defendant, the judge of the district court of the Eighth judicial district of this state. The facts, as shown by the pleadings and proofs, may be briefly stated to be that the relator, James Q. Keefe, is the holder of the title to the southeast quarter of the southeast quarter of section 25, in township 25 north, of range 6 east, in Thurston county; that he became the owner of the land by proper conveyances after the first day of January, 1908; that prior and up to about the 10th day of January the property was owned by George Lieb, an Omaha Indian, he having received a patent therefor on the 19th day of December, 1907, but by later conveyances relator became the owner; that for several years Silas Lieb had cultivated the land as a tenant, and during the month of September, 1907, and while George Lieb was the owner, he leased the land from George for the year 1908, paying a portion of the rent, and prepared the ground for the crops of 1908 by plowing it, and in the spring of 1908 began the cultivation by putting it in corn, and was proceeding to cultivate the crops thus planted. On the 18th day of May, 1908, Keefe commenced an action in the district court for Thurston county against Silas Lieb, the purpose of which was to

enjoin him from entering upon the land or in any manner interfering or molesting Keefe in the quiet enjoyment of the possession of the premises. Application was made to defendant for the allowance of an injunction, which was granted, and an order in the following form issued: "Upon reading the petition of plaintiff, duly verified, and for good cause shown, a temporary restraining order is granted herein restraining and enjoining the defendant, his attorneys, agents, servants and employees from entering upon the southeast quarter of the southeast quarter (S. E. ¼ of S. E. ¼) of section twenty-five (25), of township twenty-five (25) north, and of range six (6) east of the 6th P. M., in Thurston county, Nebraska, and from in any manner interfering with or molesting the plaintiff in the quiet enjoyment of the possession of said premises until further order of this court, upon the plaintiff executing and delivering to the clerk of the court an undertaking to the defendant in the sum of $200 with approved sureties conditioned as required by law." The required undertaking was given and a summons was issued in the usual form, upon which was indorsed, "Injunction allowed," by the clerk. On the 23d of May, Silas Lieb, the defendant in the action, filed his cross-petition, in which he set up the facts of his tenancy, as above stated, including the lease from George Lieb, the preparation of the land for the crop of 1908 and the planting of the crop, and prayed for an order of injunction against Keefe restraining him from entering upon the land or disturbing the crop growing thereon, and from molesting the cross-petitioner in the quiet enjoyment of the possession of the property. The cross-petition also alleged that the plaintiff Keefe was a nonresident of the state; that, if he had become the owner of the land, his title and ownership was subject to the rights of the cross-petitioner as tenant in possession, and he was charged with notice of such rights; that one William A. Mutz was the agent or tenant of the plaintiff, or by some other claim, and, with the plaintiff, was threatening to enter upon the land and destroy the crops growing

thereon, and that he was a necessary party to the litigation.

We find nothing to show that any notice was given to either party of the application for these injunctions. Why defendant did not take this precaution in either case we need not now inquire. On the same day of the filing of the cross-petition a temporary order of injunction was granted against the plaintiff Keefe, and Mutz, enjoining them from entering upon the land and destroying the growing crops by planting other crops or otherwise until the further order of the court, upon the execution of an undertaking in the sum of $100. On the 25th day of May, Lieb, the defendant in the action, served notice on the plaintiff Keefe of an application to be made on May 30, to the defendant herein, to "vacate the temporary order of injunction heretofore allowed in this case," upon the ground of the insufficiency of the petition upon which the same was allowed, that the court had no jurisdiction to issue the order, and that it was an attempt to deprive defendant of the possession of his property by the injunction in violation of law. On the 4th day of June the following order was signed by defendant: "Now, on this 4th day of June, 1908, at chambers, this cause came on for hearing upon the motion of the defendant, heretofore filed, to vacate the temporary restraining order heretofore granted in this case, and was submitted to the court upon the petition, affidavits, and the testimony of sundry witnesses offered in evidence, and the argument of counsel, plaintiff appearing by his attorneys, H. Chase, Esq., and H. Freese, Esq., and the defendant by his attorneys, C. L. Day, Esq., and P. W. Cain, Esq., and the court, being fully advised in the premises, doth find: That the defendant, Silas Lieb, at and long prior to the commencement of this action was and now is in possession of the premises described in plaintiff's petition, had plowed the same and planted it to corn, and had a growing crop upon said premises at the time of the bringing of this action, and the court finds it is without

jurisdiction to grant an injunction herein. On consideration whereof, it is ordered that the said motion be and the same is hereby sustained, and the injunction heretofore granted is hereby vacated, set aside and dissolved. To all of which findings and order plaintiff duly excepts. Supersedeas bond fixed at three hundred dollars. To the order fixing supersedeas bond, defendant excepts." A supersedeas bond was given which was approved by the clerk. It is shown that the defendant herein, at the time of entering the order last above copied, informed the defendant in that suit that he could safely reenter the land and cultivate the crops, so far as any danger from contempt proceedings might be concerned. By this application for a mandamus, the relator, who was plaintiff in the injunction proceedings, seeks an order to the defendant requiring him to abide by the injunction first issued, and to vacate the second order of injunction and vacate the order modifying relator's injunction.

The defendant in his answer and return contends that the first order of injunction was only a restraining order and was never intended as or for a temporary injunction. This contention is fully met and disposed of in *State v. Baker,* 62 Neb. 840, where it is held that the question must be determined by a construction of the character, scope and effect of the writ. The order issued fixed upon no time for further hearing, as required by section 253 of the code in a restraining order, but to all intents and purposes was a temporary injunction. In the case above cited it is said: "The order does not by its terms indicate or contemplate that a further hearing on the application was to be had before the application was finally acted upon; and herein, in our judgment, lies the chief distinguishing characteristics between a 'temporary order of injunction' and a mere 'restraining order' until the application is fully heard. There is nothing to indicate that he deemed it proper that the defendants should be heard before granting the injunction; no order or direction that any notice be given to such party to attend for the pur-

pose of hearing the application; no time or place mentioned for such hearing; nor does the wording of the order itself indicate that it was to operate as a restraint on the defendants 'in the meantime,' and only until such hearing should be had." A restraining order continues in force only until such fixed time as is ordered for the hearing, unless extended by further order to some later date. It is allowed only for the purpose of maintaining the status until notice may be given and a hearing had upon the application for the temporary order. With the exception of the erasure of the words "it is ordered that," and the interlineation of the words "a temporary restraining order of," so as to make it read, "for good cause shown a temporary restraining order of injunction is granted herein restraining the defendants," etc., the order possesses all the elements necessary to a temporary injunction. That such was considered as the case is shown by all the actions of defendant and the attorneys for the parties to the suit. Notice was given the plaintiff's counsel that on a day named the attorneys for the defendant would apply to the judge of the district court at the courthouse "to vacate the temporary order of injunction heretofore allowed in this case," etc., and in the order made by the judge at chambers it is ordered that the motion be sustained, "and the injunction heretofore granted is hereby vacated, set aside and dissolved," and the supersedeas bond was fixed at $300, and on the same day the bond was given and approved. It would be a serious reflection upon the intelligence of defendant to say that he did not know that the dissolution of a restraining order, or rather the refusal to continue it, could not be superseded. We must therefore conclude that his action in granting the supersedeas was taken with knowledge of the effect of the first order made. As we have seen, while the temporary order of injunction, enjoining the then defendant Lieb from entering upon the land was in force, another injunction was issued upon behalf of the defendant Lieb, enjoining the then plaintiff Keefe from doing

the same thing, thus effectually preventing the cultivation of the crop then growing. If it could have any effect, it would be to nullify the former order, but as that order could not be modified in that way we cannot see but that the second injunction was improvidently and, to say the least, irregularly issued. We can see no other solution of this question, and the order will have to be that that injunction must be vacated. The writ will therefore issue for that purpose.

It appears that on the 1st day of June the original injunction was modified by providing that "the defendant be permitted to enter upon the premises and cultivate the crops which have been planted by him upon said lands, and to give same all proper attention, and prevent the loss of the crops so planted by him," etc. This order prevents the loss of the crops, and will leave the question of ownership for adjudication upon the trial of the principal cause, which should be disposed of at an early date. It is contended that the decision in the case of *State v. Graves*, 66 Neb. 17, is decisive of this case, and that the first injunction issued was void. Were it not for the modification of the order of injunction above referred to, there might be substantial ground for holding that case to be in point here, but in that case the legal effect of the order of injunction was the practical transfer of property in possession of the defendant to the possession of the plaintiff, thus depriving the defendant of crops which he had planted. As modified, the injunction in this case cannot have that effect. The defendant in the suit is permitted to properly till and care for the crops, thus preserving them, but in no sense adjudicating the rights of the parties.

It is argued that the proof shows beyond question that, when plaintiff Keefe purchased the land, Lieb had previously leased it of the then owner, paid the rent for the year 1908, had continued his previous possession, and plowed the ground preparatory to the 1908 crop; that in the spring of that year he had planted the land in

corn, and was cultivating the same at the time of the commencement of the suit and issuance of the injunction, and that Keefe had at least constructive, if not actual, notice of Lieb's rights. Such would seem to be the case, and, if so, it must be conceded that Keefe cannot maintain his action. But that question must be adjudicated in the forum to which it belongs. The injunction was judicially, if not judiciously, issued, and, as we are not now exercising appellate jurisdiction, we cannot interfere with that proceeding. If insisted upon by Keefe, it must take its course in the district court.

The conclusion is that the order of injunction in favor of Lieb and against Keefe and Mutz, issued May 23, 1908, was improvidently and illegally issued, and a peremptory order of mandamus, commanding defendant to vacate the same, is granted.

WRIT ALLOWED.

HENRY J. BACKES, APPELLANT, V. FRANK H. SCHLICK, APPELLEE.

FILED SEPTEMBER 16, 1908. No. 15,184.

1. Executory Contract: BREACH: DAMAGES. Where a contract is executory, one party has the legal right to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damage as will compensate the other party for being stopped in the performance of his part at that stage in the execution of the contract. The party thus forbidden to proceed cannot afterwards go on, complete the contract, and recover the contract price as such; his only remedy being for damages for breach of contract.

2. ———: ———: REMEDY. Where the vendor in an executory contract for the sale of goods receives notice from the vendee that he will not accept delivery of the goods or pay for the same, and the vendor, notwithstanding such notice, leaves the goods at the place of delivery named in the contract, and brings suit against the vendee as for goods sold and delivered, he cannot recover in such action either the purchase price of the goods or the

damage sustained in consequence of the vendee's breach of the contract.

3. Appeal: RECORD. A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions.

4. ———: PRESUMPTIONS. In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined.

APPEAL from the district court for Platte county: JAMES G. REEDER, JUDGE. *Affirmed.*

A. M. Post and *R. P. Drake,* for appellant.

John J. Sullivan and *Louis Lightner, contra.*

DUFFIE, C.

December 10, 1904, the defendant, Schlick, agreed in writing to purchase from the plaintiff certain fruit trees, for which he agreed to pay $135 upon delivery of the same at Humphrey, Nebraska, on April 9, 1905. The agreement contains the following provisions: "I hereby agree to come or send for the goods purchased on the day set for delivery. * * * Parties not calling for them on that day will be charged livery hire and other expenses for delivering at their premises the following day." The plaintiff's petition sets out the contract; the failure of the defendant to call for the goods at Humphrey; and that upon such failure plaintiff, in compliance with the contract, delivered the goods to the defendant at his place of residence at an expense of $3. The petition further alleges that plaintiff has complied with each and all of the terms of said contract, but that defendant has refused to pay for the goods or any part thereof, and that there is now due the plaintiff the sum of $138, with interest from April 9, 1905, the date of delivery, for which judgment is demanded.

In his answer the defendant admits the making of the contract, and that he was notified of the time and place

of the delivery of the goods, and denied the further allegations of the petition. Further answering, he states: "That, within a few days after he gave the order or contract, he found that on account of a change of circumstances he could not use the goods, and thereupon, on the 12th of December, 1904, he so notified plaintiff and countermanded said order or contract, and again on March 2, 1905, he notified plaintiff that he would not accept or receive the goods, but plaintiff, regardless of said countermand and notification and of defendant's express refusal to take and pay for said goods, drove with them to the farm where defendant was boarding, and, in the absence of defendant, or of any one acting on his behalf, left said goods at the farm; that thereafter plaintiff drove to where defendant was working and informed him of what he had done, and defendant then refused to accept, receive or pay for said goods, and the owner of the farm where said goods were left also informed plaintiff that he should not leave said goods on said farm, and that he would not be responsible for them; that plaintiff, nevertheless, left them there, but defendant at no time accepted them nor exercised any act of ownership over them." He admits that the expense of hauling them to the farm where left was $3, admits that he did not call for or receive the goods at Humphrey, or elsewhere, and that he has not paid anything for or on account of them. He further alleges that at the time he countermanded his order or contract the nursery trees had not yet been selected or set apart as the property to be delivered to him under the contract, but were then standing and growing in plaintiff's nursery, an unidentified part of a great mass of like trees in plaintiff's possession and ownership.

A demurrer to this answer was overruled by the court, whereupon the plaintiff filed a reply, denying the facts set out in the answer by way of defense. The record recites that a stipulation of facts was filed by the parties, and the case submitted to the court for its decision. The court entered judgment dismissing plaintiff's petition and

taxing him with the costs. From this judgment he has appealed.

No bill of exceptions was allowed and signed by the judge trying the case, and, while the record contains a paper designated "Stipulation," we cannot consider the facts therein recited, in the absence of the certificate of the trial court, that it sets forth the evidence upon which the case was tried and determined. "A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions." *State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1, and cases cited.

There being no bill of exceptions, the case will have to be determined upon the pleadings of the parties supported by the presumption in favor of the findings of the trial court. It is now well settled, where a contract is executory, that one party has power to stop performance on the other side by explicit directions to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance of his part at that stage in the execution of the contract. The party thus forbidden to proceed cannot afterwards go on, complete the contract, and recover the contract price as such; his only remedy being for damages for breach of contract. *Murphy Co. v. Exchange Nat. Bank*, 76 Neb. 573; *Hixon Map Co. v. Nebraska Post Co.*, 5 Neb. (Unof.) 388. It is quite clear, under our former holdings, that the defendant was privileged to refuse acceptance of the goods from the plaintiff, and that the plaintiff's action for such refusal was not for the amount due upon the completed or executed contract, but for damages for breach of an executory contract which the defendant refused to perform. The answer set up facts constituting a defense to the plaintiff's action, and, in the absence of a bill of exceptions, we must presume that its statements were supported by the evidence and the issues made by the pleadings correctly decided. *Sutton v. Sutton*, 60 Neb. 400.

It is earnestly insisted that defendant's own pleading

shows a breach of the contract on his part, and that plaintiff is entitled to nominal damages. It is true that the law presumes that one has suffered damage by a breach of the contract by the other contracting party, and, if the breach shown by the defendant's answer was of the character alleged by the plaintiff in his petition, then this rule would be applicable. The trouble is, however, that the plaintiff seeks to recover on a completed contract as upon a sale and delivery of the goods, and not for a breach of contract. The plaintiff must recover, if at all, on some cause of action alleged in his petition. As said in 1 Black, Judgments (2d ed.), sec. 183: "A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. A judgment not supported by the pleadings is as fatally defective as one not sustained by the verdict or finding. Hence, the code, although it abolishes the forms of actions as they existed at common law, does not authorize a recovery where the complaint alleges facts showing a cause of action in tort by proving upon the trial a cause of action in contract." In 11 Ency. Pl. & Pr., 868, it is said: "A recovery must be had, if at all, upon the facts alleged, and facts proved, but not pleaded, will not support the judgment." The precise point was before the supreme court of Wisconsin in *Ward v. American Health Food Co.*, 96 N. W. 388 (119 Wis. 12). The fifth paragraph of the syllabus is in the following language: "Defendants contracted with plaintiffs for certain advertising to be placed by plaintiffs in certain railroad cars for a period of 12 months. On the expiration of 2 months and 17 days defendants directed plaintiffs to remove the cards, which they failed to do, and after the expiration of the 12 months brought suit to recover the contract price, alleging full performance. *Held*, That defendants' notification constituted a breach of the contract, and, hence, under the complaint, plaintiffs were not entitled to recover damages accruing therefrom, but could only recover the contract price for the 2

months and 17 days during which the contract was performed prior to the breach."

The record does not show any error in the disposition of the case made by the trial court, and we recommend an affirmance of the judgment.

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

AFFIRMED.

GUSTAF A. BLID, APPELLEE, V. LENA BLID, APPELLANT.

FILED SEPTEMBER 16, 1908. No. 15,282.

1. **Divorce: EVIDENCE: ESTOPPEL.** In an action brought by the husband against his wife for divorce on the grounds of desertion, letters in the handwriting of the wife, addressed to the husband, and asking for a reconciliation of their differences and to be taken back, were received in evidence, but their authorship was denied by the wife, who testified she could not write the English language. *Held*, That the wife, after her denial of writing the letters, could not rely on their contents to establish that her desertion was not wilful in its inception and during its continuance to the trial.

2. ———: **CUSTODY OF CHILDREN.** In the action above referred to, the husband was awarded the custody of the child of the parties, a girl about five years' old. The evidence disclosed that the wife, on separating from her husband, took her child to the home of her parents, where she continued to live most of the time up to the trial. The home of the parents was in what was known as the "red light" portion of the town, in near proximity to a number of houses of prostitution. *Held*, That the court did not err in giving to the father the custody of the child and removing it from the evil influences of the neighborhood, even though the good character of the wife and her father was not questioned.

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

Albert W. Crites and *Ernest M. Slattery*, for appellant.

Justin E. Porter, contra.

DUFFIE, C.

The district court for Dawes county entered a decree granting a divorce to the plaintiff and giving him absolute custody of Jennie Blid, the five-year-old child of the parties. The decree contains a provision allowing the defendant to visit her child at such times as she may desire during the daytime, and so long as she shall conduct herself in the presence and home of said child in a becoming manner. The court refused to supersede the decree so far as it relates to the custody of the child. Defendant has appealed from this decree, and from a judgment dismissing her cross-bill, in which she asked a divorce and alimony.

The parties were married in Dawes county, Nebraska, in July, 1901. They lived together on plaintiff's farm until about Christmas of that year, when defendant left the plaintiff and commenced an action for divorce. We gather from the evidence that this action was instigated by defendant's parents; that her attorney, becoming acquainted with the facts, sent for the husband, and at a meeting between them in the office of the attorney they became reconciled, and again commenced living together. In order to place defendant beyond the reach and influence of her parents, plaintiff removed to Lead, South Dakota, where he was employed by the Homestake Mining Company. They lived there until December, 1903. On the 16th of that month the plaintiff, on his return from work to his home, found the house deserted. He afterwards ascertained that the defendant's father and brother-in-law had come to Lead, taken the defendant, her child, and some articles of furniture, and returned with them to their home in Crawford, Dawes county, Nebraska, where defendant commenced a second action for divorce. This action being resisted, defendant abandoned it, when plaintiff commenced an action for divorce in South Dakoto; but, on learning that the court there had no jurisdiction over the child, who was in Nebraska with its

mother, he dismissed that action, returned to his old home in Dawes county, where he commenced and prosecuted the present action. Prior to returning to Dawes county he had received several letters, signed by his wife, and, as he testifies, in her handwriting, in which she complained bitterly of her parents and their treatment, and from the statements of which, if true, he was justified in believing that they were seeking to obtain his property, or a judgment against him for the payment of alimony. These letters sought a reconciliation with the plaintiff. In her last letter, of June 29, 1904, she made an appointment to meet the plaintiff at Chadron with her child on a certain Friday night. Plaintiff went to Chadron to keep this appointment, and, failing to find her there, went to Crawford the next day, where he met her on the street, when she explained that she could not keep the Chadron appointment because of her mother's actions. After some conversation they agreed to meet again the next day, but defendant failed to keep her appointment, when plaintiff returned to Lead, giving up further efforts to arrange matters between them.

The evidence is undisputed that defendant's parents, with whom she has been living most of the time since deserting plaintiff, resided in what is known as the "red-light" district in the town of Crawford. It is true that they built their residence when the town was new and before that locality had been surrendered to bawdy houses; and, while they are not responsible for the bad condition of their surroundings, it is nevertheless evident that it is not the proper place in which to bring up the young child of the parties, and this was evidently one of the reasons which prompted the district court to place the child in the custody of the plaintiff. The moral character of the defendant and her father is not seriously questioned, and the attorney for appellant is urgent in his demand that the decree, in so far as it takes from her the custody of her five-year-old child, should be reversed. It is earnestly insisted that the letters purporting to be written

by the defendant to her husband, which we must confess are pathetic in terms seeking for a reconciliation with him, should have moved the court to deny the divorce sought by the plaintiff on the ground that no real desertion by the defendant was established; that the desertion was not wilful; that she had repented and asked to be taken back. Had the defendant acknowledged the authorship of the letters there would be great force in this argument, but she went on the stand and denied writing them. She testified that she could not write in the English language; that she could only sign her name in Norwegian. She denied her signature to her petition for a divorce and to affidavits that had been filed in the action. She refused to write her name, and her parents, her sister and her brother-in-law all testified that she was unable to write English, in which language the letters referred to were written. That this evidence was false is conclusively shown by the young lady with whom she corresponded while living in Lead, and by testimony of the mother of this young lady, and by other evidence which is undisputed and indisputable. The charges made by the defendant against the plaintiff are wholly unsupported, except by her own evidence and the evidence of these relatives, whose testimony, we are sorry to say, should receive but little credence. The defendant's letters to her husband, upon which we are asked to say that she did not wilfully desert him and desired to return to his home, are the letters which the defendant herself denies, which she says she did not write, and which she solemnly declares she was unable to write. The most charitable view that can be taken of the case is that the defendant is so fully under the influence of her parents and relatives that she follows their advice and direction, rather than her own better judgment. While she is to be pitied for this, the husband is not to blame, and cannot be charged with her want of firmness to resist advice or dictation, which leaves him without a wife and homeless, although a married man.

The evidence fully supports the decree entered, and we recommend its affirmance.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

MARTHA A. CRITES, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.*

FILED SEPTEMBER 16, 1908. No. 15,284.

1. **Insurance:** BENEFICIAL ASSOCIATIONS: HAZARDOUS OCCUPATIONS: ESTOPPEL. A life insurance certificate issued by a fraternal benefit society provided that the insured should observe the by-laws of the order adopted from time to time, and also that the certificate should be void if the insured engaged in certain named hazardous occupations. Another provision of the certificate allowed the insured to engage in such hazardous occupations on filing a waiver of liability of the order on account of death arising from accident occurring in such occupation. Afterwards by an amendment to the by-laws no waiver of liability was required from the insured on his engaging in the prohibited occupation, but the certificate became void as to any claim on account of the death of the insured traceable directly to employment in such hazardous occupation, but remaining in force and collectable on account of death from other causes. *Held*, That the order is not estopped from pleading its exemption from liability for the death of the insured, due to his engaging in a prohibited occupation, by accepting his dues and assessments, with knowledge that he was so engaged.

2. **Trial:** EVIDENCE: WAIVER. On cross-examination of the defendant's head clerk, the plaintiff asked him to produce and have attached to his deposition a copy of the by-laws of the order in force in 1903. A copy of the by-laws of that year was produced by the witness and attached to his deposition as an exhibit. *Held*, That the plaintiff could not object to the by-laws on the ground that no showing had been made of their legal adoption by the order.

* Rehearing allowed. See opinion, 84 Neb. —.

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

Benjamin D. Smith and *Talbot & Allen,* for appellant.

Martin & Ayres, contra.

DUFFIE, C.

June 16, 1907, the Modern Woodmen of America issued to C. H. Crites a benefit certificate containing a contract for life insurance payable to Martha A. Crites, his wife. One of the conditions of the certificate was: "If after a person has become a member of this fraternity he engages in any of the employments and occupations enumerated in section A, division 10 of the by-laws of this order, the certificate thereupon shall be null and void." Following this was a proviso allowing the insured to engage in the business of railway brakeman on freight trains and other hazardous occupations mentioned in section A, division 10 of the by-laws, on filing with the head clerk a written waiver of any liability of the order in case of death as a result of accident occurring in, or disease directly traceable to, his employment in such prohibited occupation. The certificate contained further conditions of forfeiture if the insured should not comply with the conditions of the certificate and such by-laws and rules of the order as might be adopted by the head camp from time to time, or the local camp of which the insured was a member. The insured came to his death by being run over by a freight car while engaged as a brakeman on the Burlington & Missouri River Railway. It is conceded that the insured was engaged as brakeman on a mixed train for about two years previous to the accident which caused his death October 6, 1905, and it is admitted that he paid all sums due under the terms of his policy up to the time of his death. It is established that the clerk of the local camp, who collected and receipted for the dues paid by the insured, had knowledge of the defendant's employment as

brakeman during the time of such employment, and that he filed no waiver with the head clerk on entering such employment. Suit was instituted by the plaintiff as beneficiary under the certificate to recover $1,000, the amount of the insurance, and the defense interposed was that the insured did not comply with a by-law of the order enacted after the issuance of the certificate. At the conclusion of the evidence the court directed a verdict for the plaintiff, and, judgment having been entered on the verdict, the defendant has appealed.

An examination of the defendant's answer discloses that it relies on an amendment made to its by-laws in 1903 to defeat the plaintiff's claim. By this amended by-law railroad brakemen on all trains except passenger trains using air brakes only, and numerous other persons engaged in various employments, were refused beneficial membership in the order. By section 15 of the by-laws of 1903 a member's certificate was forfeited by engaging in, entering on, or continuing in any of the prohibited occupations or employments on account of death from accident occurring from the employment, or from disease traceable directly thereto. This amendment contained no provision for filing a waiver by the insured on entering such hazardous employment, as did the certificate issued to the deceased, and on which suit is brought. The effect of this amendment was to avoid the policy in case of death arising from accident occurring in the prohibited employment, or on account of disease directly traceable thereto. In case of the death of the insured arising from any cause other than accident or disease directly traceable to the prohibited employment, the certificate was in full force and effect. This being the case, the receipt of the dues by the order does not create an estoppel to deny liability, the action being ruled by *Modern Woodmen of America v. Talbot*, 76 Neb. 621. In that case we held, under circumstances similar to those in this case: "The society is not estopped from insisting upon its exemption from liability for the death of the member, due to his

engaging in a prohibited occupation, by accepting his dues and assessments, with knowledge that he had entered upon such occupation."

It is urged by the defendant that the record does not contain any competent evidence of the 1903 amendment to its by-laws. We cannot agree with this contention. The defendant took the deposition of C. W. Hawes, the head clerk of the defendant, and keeper and custodian of its records and files. The plaintiff filed cross-interrogatories, one of which, the twelfth, is as follows: "Have you a copy of the head and local camp by-laws of the Modern Woodmen of America revision of 1903? If you answer that you have, the plaintiff asks that the notary identify it as an exhibit, and attach it and make it a part of this deposition upon being identified by the witness." In reply to this question, the witness produced "exhibit E" as the by-laws of the order adopted in 1903, and attached the same to his deposition. Sections 14 and 15 of these by-laws relating to prohibited employment are as above set out, and were before the court and jury for consideration. We cannot hold that the plaintiff may object to the competency of evidence placed in the record on her own motion. Weeks, Law of Depositions, sec. 480.

We recommend a reversal of the judgment of the district court and remanding the cause for further proceedings.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

CHARLES N. OGDEN ET AL., APPELLANTS, V. ARTHUR GARRISON, APPELLEE.

FILED SEPTEMBER 16, 1908. No. 15,252.

1. **Appeal in Equity.** To secure a review of an equity case in this court, the filing of a motion for a new trial in the court below is not required.
2. **Vendor and Purchaser: NOTICE.** A purchaser is chargeable with notice of a tenant's rights, when the latter is in the actual possession of the real estate at the time it is sold.
3. **Landlord and Tenant: REMOVAL OF FIXTURES.** The execution of a new lease, in which the tenant does not expressly reserve fixtures or improvements erected by him under a preceding lease, does not deprive him of the right to remove them.

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

John Everson, for appellants.

J. G. Thompson and *Keester & Myers, contra.*

EPPERSON, C.

The defendant objects to the jurisdiction of this court for the reason that the plaintiff filed no motion for a new trial in the court below. This was a proceeding in equity, and to obtain a review of the case in this court it was unnecessary that a motion for a new trial be filed in the court below. Under the provisions of the code relative to the review of equity cases prior to the amendment of 1905, it was unnecessary to file a motion for a new trial in order to review the case submitted to the lower court. The amendment of 1905 did not change this rule.

In 1898 the defendant obtained possession of certain farm land in Harlan county under a written lease for one year. He remained in possession as a tenant from year to year until March 1, 1906. His landlord a few months previous had sold the land to Danskin & Googins, who on

March 21, 1906, by their written contract, demised the land to the defendant from the 1st of March, 1906, to the 1st of March, 1907. About the first of July, 1906, Danskin & Googins sold the land to the plaintiffs herein. Prior to the purchase of the land by Danskin & Googins, the defendant, with the consent of his landlord, placed upon said land for his own convenience and benefit two granaries, 8 feet by 16 feet; a chicken house, 8 feet by 12 feet; a blacksmith shop, 12 feet by 14 feet; and about 40 rods of fence. A roof was placed over the granaries in such a way as to form a machine shop. The fixtures were so constructed that they could be removed without injury to the demised premises. The buildings had no foundations. Such improvements were termed "fixtures" in *Lanphere v. Lowe,* 3 Neb. 131. Defendant contended that he had a right to remove them, and this action was brought before the expiration of the lease last above described to restrain him from so doing. Upon trial the district court dismissed the action, and plaintiff appeals.

When each sale was made, defendant was in the actual possession of the land as a tenant. It is the rule that a purchaser is chargeable with notice of a tenant's rights when the latter is in the actual possession of real estate at the time it is sold. *Friedlander v. Ryder,* 30 Neb. 783. This rule is not assailed here. It is plaintiffs' theory that the defendant is estopped from asserting title by reason of a stipulation contained in the renewal lease made with Danskin & Googins after the fixtures were placed upon the land. The stipulation is as follows: "The party of the second part (defendant) will carefully protect all buildings, fences and improvements of every kind that are now on said premises, or that may be erected thereon during the continuance of this lease; that he will promptly at the expiration of the term herein granted yield up possession of said premises in as good repair as they now are or may be at any time during the continuance of this lease, ordinary wear and loss by fire excepted." Plaintiffs contend for the rule announced in Taylor, Landlord

and Tenant (9th ed.), sec. 552, as follows: "If a tenant, at the close of his term, renews his lease, or surrenders it for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to remove such fixtures, as he had a right to sever under the old tenancy; for, where his continuance in possession is under a new lease or agreement (it is held that) his right to remove fixtures is determined, and that he is in the same situation as if the landlord, being seized of the land together with the fixtures, had demised both to him." This rule has been followed in many cases, some of which will be referred to hereafter. It has never been adopted by this court, although in *Bowman v. Wright,* 65 Neb. 661, cited by plaintiffs, it was held: "Making and accepting a new lease during the term of an existing one operates as a surrender and abandonment of the prior lease." This is hardly in point, and cannot possibly be construed as adopting the rule quoted from Taylor.

There is a conflict of authorities as to the effect of a renewal lease in which no reservation is made by the tenant of fixtures reserved to him by a former lease. The weight of authority appears to be against the conclusion we have reached, but a number of excellent courts have held that such a renewal lease will not estop him from claiming title to improvements previously made. In *Kerr v. Kingsbury,* 39 Mich. 150, 33 Am. Rep. 362, Judge Cooley, in delivering the opinion of the court, said in reference to the tenant's right to remove trade fixtures during the term, or while he still has a right to regard himself as the occupant of the premises: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should

in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

In *Bergh v. Herring-Hall-Marvin Safe Co.*, 70 L. R. A. 756 (136 Fed. 368), it was held: "Entering under a renewal lease, which does not reserve the right to remove trade fixtures consisting of chattels which may be removed without injury to the building, does not destroy that right." Coxe, circuit judge, in delivering the opinion of the court, spoke as follows regarding the numerous cases holding to the contrary: "The rule is of ancient origin and has grown up step by step, the common law accepting some of the harsh analogies of the civil law, until, as trade and commerce expanded, it was found that a harsh application of it to the new relations was producing inequitable results never contemplated at the time the rule had its origin. The trend of recent authority is toward a restricted application of the rule to trade fixtures, so as to prevent manifest injustice. Regarding the rationale of the rule, it is difficult to discover any principle of logic or equity which can be invoked in its support. * * * At the end of the term the lease is renewed in the identical language of the first lease. If the defendants' contention be correct the moment the tenant goes into possession under the new lease the title to this exceedingly valuable property passes to his landlord. Such a rule must yield to modern conditions and modern progress. Our views in this regard cannot be better expressed than by quoting from *Devin v. Dougherty*, 27 How. Pr. (N. Y.) 455, where the tenant for business purposes had built an awning over the sidewalk in front of his shop during the time of the original lease, which was renewed without reservation as to the awning. The court said: 'As the new lease was intended merely to provide for a

further occupancy of the premises, and that for the same purposes, I see not why it was necessary for the tenant to reserve in it any rights in regard to a thing which was his, and which it must have been understood he was to continue to use as his own during his new term. He hired, for a second time, his landlord's premises; but how can that be said to be also a hiring of property, upon these premises, which belonged to himself and which, as yet, he had a right to use upon those premises under a lease still in force? What need was there of any agreement as to what he then had a right to remove, and an equal right to continue to use upon the premises as long as he secured the right to the occupancy of such premises?'" 136 Fed. 368.

Daly v. Simonson, 126 Ia. 716, is very similar to the case at bar. The tenant had been in possession under a lease which provided for the removal of the improvements made by him. The landlord sold the premises, and the purchaser at the expiration of the lease renewed the same, omitting provisions for the removal of the fixtures in question, but did agree to protect the buildings, fences and improvements. In the opinion it is said: "True, this last lease did not contain any reservations or exceptions; but it did not cover anything aside from the land and its proper fixtures. It surely did not deprive defendant of his property. Of course, a tenant must ordinarily remove fixtures and improvements, at least within a reasonable time after the expiration of his lease. * * * There are some cases which seem to hold that, if a tenant takes a renewal lease which contains no reservations, he by that act surrenders his right to removal of the fixtures placed by him upon the land during the term created by the prior lease. But we have not followed that rule. * * * When the improvements were erected in this case, they, by express agreement between landlord and tenant, were personal property; and by taking the lease from plaintiff defendant did not surender his claim thereto. * * * So that, even if the lease from plaintiff and Butler to

defendant be not reformed, we do not think defendant lost his title to the personal property." In *McCarthy v. Trumacher,* 78 N. W. 1104 (108 Ia. 284), the lease construed contained a provision almost identical with that in controversy here. It is there held that it "does not deprive him of a right granted under a prior lease to remove improvements erected by him; the occupancy being continuous under both leases." See, also, *Union Terminal Co. v. Wilmar & S. F. R. Co.,* 116 Ia. 392.

In *Hedderich v. Smith,* 103 Ind. 203, the conclusion is contrary to that reached by us as to the waiver by the tenant of his rights to remove the improvements by entering into a new lease of the premises. At the expiration of the old lease, under which the improvements were made, a new lease was entered into providing for the payment of stipulated rent. The rent reserved for the new term was different from the old. In the opinion it is said: "Without question, if there had been nothing more than an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease upon different terms was, however, the creation of a new tenancy." Wood, Landlord and Tenant (2d ed.), sec. 529, also seems to recognize as one of the conditions for operating an estoppel by the making of a new lease that it should contain different provisions, and that a mere renewal of the former lease is insufficient to operate an estoppel. He says: "But, while a tenant may remove a trade fixture at any time during his original term, or any renewal thereof, yet, although he continues in possession after the expiration of his original term, *if he holds under a new lease, in which no provision for the removal of the fixtures is made,* he is treated as having abandoned his right thereto." See, also, *Radey v. McCurdy,* 209 Pa. St. 306, 67 L. R. A. 359. In *Sanitary District of Chicago v. Cook,* 169 Ill. 184, 39 L. R. A. 369, it was held that trade fixtures erected by a tenant during the term of the original lease cannot be removed after the expiration of a new lease

which contains no reservation of any right or claim of the tenant to the fixtures, and does not recognize his right to remove them. This, also, was the holding in *Carlin v. Ritter,* 68 Md. 478, 6 Am. St. Rep. 467, wherein a review of many decisions is given, and wherein Judge Cooley's opinion in *Kerr v. Kingsbury, supra,* is criticised. The reasons for the rule imposing an estoppel upon the execution of a new lease, stated briefly, seem to be upon the theory that the fixtures on the premises at the time of the renewal lease have become a part of the thing demised, and the tenant by accepting a lease of this kind, without reserving the fixtures, has acknowledged the right of his landlord to them. This, it occurs to us, means that by a failure to reserve his own property upon a renewal of the lease the tenant is conclusively presumed to have presented them to his landlord.

We find in many decisions holding that the creation of a new lease may operate as an estoppel that the rule is not carried to the extent of holding that a renewal, which, in fact, continues the former tenancy, will operate as an estoppel. And in the case at bar it appears that the renewal lease was but a continuation of his tenancy. It does not appear that it provided for the payment of less rent, nor that it lengthened the tenancy. Under the law he was, in the absence of such renewal lease, entitled to possession of the land until the end of the period fixed by it. He was a tenant from year to year. We presume, in the absence of evidence, that such tenancy had not been terminated when the renewal lease was made. It covered a period of one year only. It is quite apparent that it was executed for the purpose of terminating the defendant's existing tenancy, and that it did not create a new one. Defendant had not yielded possession. Nothing appears in the renewal lease indicating an intention to give the buildings in controversy to the landlord. The buildings referred to in the lease were the other buildings upon the land, which were in fact a part of the realty, and placed there before defendant's tenancy commenced or

thereafter by the landlord. It is not sound reasoning to hold, under the evidence of this case, that the defendant intended to make a present to the landlord. He erected the buildings. They were his property. He never received anything for them. It is difficult to see how the renewal lease, which may better be termed an extension lease, in which defendant agreed to protect the plaintiffs' buildings, can operate as a transfer of the defendant's chattels to plaintiffs' grantor. It would seem better reasoning to hold that the renewal lease was intended by the landlord as an extension of the time in which the defendant was privileged to avail himself of all the rights secured to him by the tenancy. Again, the buildings in controversy never became fixtures in the sense that they were affixed to the freehold. In *Carlin v. Ritter, supra,* the rule there announced, and above referred to, was applied to a bakehouse and oven, an awning attached to the house, a furnace, window shutters, counters, shelving, etc. But it was there also held that "wooden structures or buildings resting by their own weight on flat stones laid upon the surface of the ground, without any other foundation, are not fixtures." Although we have in this opinion for convenience referred to the buildings in controversy as "fixtures" and "improvements," yet in the law controlling landlords and tenants they are in fact not such, but are chattels.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

AUGUSTUS L. MOYER, APPELLANT, V. ANDREW J. LEAVITT, APPELLEE.

FILED SEPTEMBER 16, 1908. No. 15,277.

1. **Pledges: TENDER: RELEASE OF LIEN.** A tender of the amount secured by pledge of personal property made upon the maturity of the debt, although not accepted nor kept good, will release the property from the lien of the pledge.
2. ———. *Wilkins v. Redding*, 70 Neb. 182, criticised
3. ———: **FRAUD: INTEREST.** The pledgee of personal property fraudulently represented that he had sold the property pledged and sent $20 to the pledger as a part of the purchase price, which the latter, relying upon the fraudulent representations, retained until he discovered the fraud. *Held*, That the pledger was not liable for interest on the $20.

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

Allen G. Fisher and *Justin E. Porter*, for appellant.

Albert W. Crites, contra.

EPPERSON, C.

This is a replevin action, and presents to the court a controversy between the parties as to the title and the right to the possession of a certain gold ring with a diamond setting, valued at $200. The facts out of which the trouble arises were related by defendant substantially as follows: April 3, 1902, the defendant found himself in the city of Crawford without money, but with the diamond here in controversy. He met the plaintiff, and, after verbal negotiations, borrowed from him $50, payable in three months, and pledged the diamond ring as security therefor. Defendant agreed to pay, and plaintiff agreed to accept, $5 as interest for the loan. At the same time the defendant gave plaintiff authority to sell the ring for $150. On June 14 following, the defendant sent to the

plaintiff from Sturgis, South Dakota, a money order for $55, and requested plaintiff to send him the ring. Plaintiff answered, stating that he had sold the ring for $75, returned the money order and his personal check for $20. Defendant cashed the money order and the check. Early in January, 1906, the defendant, who had returned to Crawford, saw the ring in the possession of the plaintiff, visited him at his place of business, and, pretending that he only wished to examine the diamond, obtained possession thereof. This he was enabled to do because the plaintiff did not recognize him as the pledger. Once in possession of the ring, he made his identity known, and tendered to the plaintiff $70 in currency, representing the $50 loaned and the $20 received by check. This the plaintiff refused to accept; whereupon defendant, with notice to plaintiff, deposited the money for the plaintiff with a business man in Crawford. The plaintiff then instituted this action, alleging that he was the owner of the property. Upon trial defendant obtained judgment, and plaintiff has appealed.

Plaintiff testified that the $50 advanced by him was a loan, but he says that he was authorized to sell the ring for $75; that the $5 to be retained was not interest, but was an agreed compensation for his trouble in making the sale. He testified further that he actually sold the ring to a traveling man, and later repurchased. He further testified that no particular time was mentioned for the payment of the loan, but that it was to run a month or two. From the evidence we are convinced that default had not been made in the payment of the loan at the time defendant remitted to the plaintiff the sum of $55 on June 14, 1902. If plaintiff had made a sale, as he claimed and testified, it was ratified by the defendant. Plaintiff's evidence as to this transaction is not convincing. The jury found against him, and we accept their verdict as final upon this proposition. The conduct of the defendant did not amount to a ratification of a sale by the plaintiff as pledgee to himself. The plaintiff was required to return

the diamond to the defendant at any time it was called for, if within his power to do so and the amount it secured was tendered to him, unless, of course, there had been a change of title from the defendant to the plaintiff, or an unauthorized transfer had been ratified by the defendant. The plaintiff acquired no rights whatever by the pretended change in his holding from that of bailee to that of owner. It being established that plaintiff had not in fact sold the pledged property, defendant was entitled to possession when he detected the plaintiff's deceit. About one month after the money tendered had been deposited, the depositary refused to hold it longer, and it was taken up by the defendant. The controlling question in the case is thus presented. Can the defendant recover in this action without making his tender good?

It is the general rule that an unaccepted tender of the amount due after maturity of the debt, although not kept good, discharges the lien. As to chattel mortgages, it is the rule in this state that, if the tender be made after default of the payment at the stipulated time, it must be kept good, or it will be entirely unavailing, but that a tender of the amount secured on the day fixed for payment, although not accepted and not kept good, will release the property from the lien. In *Wilkins v. Redding,* 70 Neb. 182, it was held: "Where personal property is pledged to secure the payment of a debt, the pledger cannot recover the property in a replevin action without paying or tendering the whole amount of the debt and keeping good the tender." The learned commissioner, writing the opinion in that case, failed to distinguish between tenders made upon the maturity of the debt and those made after default, and failed to distinguish between a tender necessary to release the lien of a chattel mortgage and that of a pledge. We find that the reasoning of that case was founded in part on *Tompkins v. Batie,* 11 Neb. 147, wherein it was held that an unconditional tender kept good is necessary to defeat the mortgagee's action, but the commissioner overlooked the fact that the rule he quoted from

Tompkins v. Batie was expressly applied to a tender made after the maturity of the note. There was another rule announced in *Tompkins v. Batie* relative to the effect of a tender made by the mortgagor of chattels, which clearly distinguishes *Wilkins v. Redding* from the case at bar, for it is there also held: "A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted, nor kept good, has the effect to release the property from the lien of the mortgage." This rule was reaffirmed in *Musser & Co. v. King,* 40 Neb. 892, and *Gould v. Armagost,* 46 Neb. 897. In *Wilkins v. Redding* the court seemed to consider that the same rule which controls the lien of a chattel mortgage applies to the lien of a pledge. But, if the same rule controls in both classes of cases, it may be seen that *Wilkins v. Redding* does not control the case at bar, inasmuch as the tender of $55 was made by the defendant herein upon the maturity of the debt which the property was pledged to secure. The remittance made by defendant to the plaintiff prior to the defendant's default in paying the loan was a tender of the amount due, as no objection was made to the form of that tender. The money order was returned by plaintiff, not because he was dissatisfied with the manner of payment, but because he had converted the diamond to his own use, and he returned the money order and his own check for $20 apparently for the purpose of deceiving the defendant. After the defendant had learned that the plaintiff had not in fact sold the diamond, he again tendered the amount of the loan. If the defendant's right to possession depended upon this tender, we think that it would be sufficient. In view of the deceit practiced by the plaintiff, he can hardly be heard to say that the loan, even at this late date, had matured, and that this tender which was not kept good was insufficient. If the defendant was then in default, it was because of the plaintiff's fraud. Defendant had not paid the loan sooner because he believed that his debt was paid by the sale of the property.

It is argued by the plaintiff that the tender of $70 was insufficient because plaintiff was entitled to interest upon the $20 and the interest was not included in the tender. Three reasons oppose this theory. The repayment of the $20 was not secured by the pledge. No tender of that sum was necessary in order to enable the defendant to recover. Although the defendant had the use of the $20, it is apparent from the evidence that the plaintiff had use of defendant's property worth at the time of the trial $200. The author of this opinion does not know the value of the use of diamonds; but, in the absence of enlightenment, we take it that the plaintiff was benefited by the use of the diamond to an extent at least equal to the benefits resulting from defendant's use of the $20. And, again, there was no express or implied agreement to pay interest on the $20; nor did the defendant even wrongfully detain it, nor damage the plaintiff by not repaying it to him. The law will not charge defendant with interest. We find therefore that at the maturity of the loan defendant had tendered the amount due, and that, when he discovered the deceit practiced by the plaintiff, he again tendered the amount due upon the loan and kept that tender good until after the institution of this suit. He later deposited the amount with the clerk of the lower court. Under the circumstances in this case, the plaintiff having through deceit converted the property to his own use, and having twice without good reason rejected the amount due to him when tendered, and claiming to be the owner of the property in controversy, we think that he has abandoned his lien, or at least cannot insist that the defendant has failed to make his tender good.

There is no prejudicial error in the record, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CHARLES A. CURRIER, APPELLANT, V. SETTY SCHMIDEKE TESKE ET AL., APPELLEES.*

FILED SEPTEMBER 16, 1908. No. 15,245.

Mortgages: VOID DECREE: EJECTMENT: EQUITY. Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor any one claiming under him will be permitted to assail the title acquired through the foreclosure proceedings without paying or tendering the amount of the decree and interest. *Stull v. Masilonka*, 74 Neb. 309, followed.

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

Willam V. Allen and *Willis E. Reed*, for appellant.

J. J. Sullivan and *M. D. Tyler, contra.*

GOOD, C.

This is an action in ejectment. The land in controversy originally belonged to Eugene R. Currier. In 1873 Currier conveyed the land by warranty deed directly to his wife, Mary J. Currier, for the nominal consideration of $1. Mrs. Currier and her husband then mortgaged the land to John Campbell. Shortly afterwards Mrs. Currier died intestate, leaving surviving her her husband and a son, Charles A. Currier, then about four years old, who is the plaintiff in this action. In 1881 the Campbell mortgage was foreclosed. In the foreclosure action Eugene R. Currier was made a defendant, but the son, Charles A. Currier, was not. A decree of foreclosure was entered,

*Rehearing allowed. See opinion, 84 Neb. ——.

and was followed by a sale of the mortgaged premises to John Campbell. The court entered an order confirming the sale, and ordered a deed to be issued to the purchaser. The sheriff, however, executed the deed to Herman Schmideke. This appears to have been done pursuant to an arrangement made between Schmideke and Campbell, the purchaser at the sale. The amount found due by the court in the decree of foreclosure was $367.87. The amount bid at the judicial sale was $500. Schmideke paid to Campbell, or his representative, the $500, received a sheriff's deed, and immediately went into possession of the premises, claiming title thereto. From that time down to the present Schmideke and his heirs and devisees have been in continuous possession, claiming as owners. Herman Schmideke died in 1891 testate, leaving surviving him his widow, Setty Schmideke, and three minor sons. He devised one-half of his real estate to his wife and the remainder in equal shares to his children. Later Mrs. Schmideke was remarried to Gustav Teske. This action was brought by Charles A. Currier, claiming title through his mother. Mrs. Teske, formerly Mrs. Schmideke, and the three minor sons of Herman Schmideke, and others were made defendants. The answers of all the defendants contained a general denial, together with a plea of the statute of limitations. Certain other issues not necessary to be noticed were contained in the answers of the minors. At the conclusion of the evidence, the plaintiff moved the court to direct a verdict in his favor. Defendants made a like motion on their behalf. The court overruled the plaintiff's motion and sustained the defendants' motion, and directed a verdict for the defendants. From the judgment entered upon this verdict the plaintiff has appealed.

The plaintiff claims to be the owner of the premises in controversy as the heir of his mother, Mary J. Currier, and that the foreclosure proceedings were absolutely void as to him, because he was not made a party, and that the sheriff's deed made to Herman Schmideke without any

order of court was void and conveyed no title whatever to Schmideke. It should also be noted that Eugene R. Currier died shortly after the commencement of this action. It is apparent that, if Mrs. Currier was the legal owner of the land at the time of her death, the plaintiff as her only heir at law became the owner thereof, subject only to the life estate of his father and to the lien of the mortgage. The conclusion reached, and hereinafter stated, renders it unnecessary to consider or discuss more than one of the numerous questions which have been ably argued and briefed on either side.

The defendants urge that they are mortgagees in possession, and that plaintiff cannot maintain this action until he has first paid or tendered the amount due upon the mortgage. The plaintiff in this action was not made a party in the foreclosure proceeding, and, if the title to the premises in controversy descended to the plaintiff as the heir of his mother (which we do not at this time decide), it would necessarily follow that the decree of foreclosure did not divest him of his title. Mr. Campbell was the purchaser at the sale had under the foreclosure proceedings. The sale to him was reported to the court; and an order of confirmation entered thereon and a deed ordered to the purchaser; that is, to Campbell. The sheriff did not make a deed to Campbell, but, instead, made and delivered one to Schmideke. It is elemental that a sheriff has no power or authority to convey premises in a foreclosure sale, except pursuant to an order of the court. The court made no order directing the sheriff to make a deed to Schmideke. The sheriff's action in making the deed to Schmideke was unauthorized, and was absolutely void, and the deed conveyed no title to Mr. Schmideke. The net result of the foreclosure proceeding was that Schmideke paid and Campbell received the full amount of the mortgage, and in equity Schmideke would become the owner of the Campbell mortgage. His position, therefore, after he had obtained possession of the land, was that of an equitable mortgagee in possession.

It is conceded that the mortgage was a valid one. In *Stull v. Masilonka,* 74 Neb. 309, it is said: "Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceedings without offering to pay the amount of the decree and interest." To the same effect are *Loney v. Courtnay,* 24 Neb. 580, and *Hall v. Hooper,* 47 Neb. 111. Other authorities in point upon this question are *Backus v. Burke,* 63 Minn. 272; *Cooke v. Cooper,* 18 Or. 142, 17 Am. St. Rep. 709; *Rogers v. Benton,* 39 Minn. 39.

In the case at bar the plaintiff did not pay or offer to pay the amount of the decree of foreclosure, nor to discharge the mortgage lien. The defense here urged was absolutely good if the action brought had been one in equity to determine the title and recover the possession of the premises. We think the same defense must be held good in the legal action of ejectment, and that plaintiff was not in position to bring or maintain this action until he had first paid or tendered the amount that was due under the decree of foreclosure. In view of the conclusion reached, it is unnecessary to consider any of the other questions raised by the appeal. It is apparent that no other judgment could have been rendered than that entered by the district court, and we recommend that it be affirmed.

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

AFFIRMED.

JOHN RILEY, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED SEPTEMBER 16, 1908. No. 15,278.

1. **Master and Servant: APPLIANCES: DUTY OF MASTER.** It is the duty of a master to exercise reasonable care to provide a reasonably safe place for his servant to work, and to exercise the same degree of care to keep it reasonably safe, and to that end it is his duty to make seasonable and timely inspection of the premises.

2. ———: NEGLIGENCE: QUESTION FOR JURY. In a passageway frequently used by his servants in the performance of their duties, a master permitted for a year or more a steel plate two inches thick and nine feet square to stand on edge in such a position that it was nearly balanced, and slight force was sufficient to cause it to topple over, and it fell across the passageway and injured one of his servants. *Held* to be a question of fact for the jury whether the master was guilty of negligence.

3. ———: INJURY: EVIDENCE. Where a large steel plate toppled over and injured an employee, it is not necessary that any witness should testify directly as to the cause of its falling. It is sufficient if the jury may from the facts and circumstances proved ascertain the cause with reasonable certainty.

4. ———: CONTINUANCE OF RELATION. In a manufacturing establishment, where on account of the nature of their work it was impracticable for the employees to leave the building for their noonday meal, and the master allowed but 30 minutes for their lunch, and it was contemplated by their contract of employment that they should remain in the building where they worked to eat their lunch, *held*, that the relation of master and servant continued during the 30 minutes allowed for lunch.

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

Greene, Breckenridge & Matters, for appellant.

Smyth & Smith, contra.

GOOD, C.

John Riley, the plaintiff, brought this action in the district court against the Cudahy Packing Company to

recover for personal injuries sustained by the plaintiff while in the employ of the defendant. Plaintiff alleged that the injuries were caused by the negligence of the defendant in the performance of its duties as master. Plaintiff had judgment, and the defendant has appealed.

The defendant in its packing plant, in South Omaha, operates what is known as the "fertilizer department." Two large rooms on the ground floor are devoted to this department. In one of these rooms are situated three ovens or dryers, and a brick chimney about 10 feet square. The dryers are about 10 feet wide, 25 feet long, and 8 feet high, and are incased with brick and arched over the top. These ovens, or dryers, contain large cylinders in which the fertilizer material is crushed and dried. When the machinery is in operation, it causes the dryers to vibrate considerably, and has the effect of making the floor and the building tremble to some extent. It is not shown, however, that the vibration affected the chimney. One of these dryers was situated near the brick chimney, leaving a passageway from four to six feet wide between the dryer and the chimney. A year or more previous to the injury a steel plate, about two inches thick and nine feet square, and weighing several thousand pounds, was stood on edge in said passageway and leaned against the chimney. It was placed close to the chimney in nearly a perpendicular position. This plate had formerly formed the base of a chimney, but was no longer used for any purpose, and was stood against the chimney apparently for no other purpose than to get it out of the way. It appears that the odors from the manufacture of the fertilizer are very offensive, and the employees in this department require two suits of clothes. On going to their work in the morning they change their usual clothes for the ones they wear while at work, and on leaving their work in the evening they change their work clothes for their usual clothes. It also appears that the defendant allowed but 30 minutes for the employees to eat their noonday meal. On account of the offensive odors with which their work

clothes were reeking, it was not desirable for the workmen to leave the building in their work clothes for their lunch, nor was it practicable in the short time allowed to change their clothing and go elsewhere for lunch. Under these circumstances, the workmen were practically required to bring their lunches with them and eat them in the building. The defendant had constructed metal lockers for the use of its employees, in which they stored their usual clothing and their dinner pails. These lockers were constructed on either side of the chimney. It was necessary for the workmen to traverse the passageway between the chimney and the dryer in going to and from these lockers, and in doing so they passed by and saw the steel plate several times a day. No particular place was set apart or assigned in which the workmen might eat their lunches, but it had long been a custom in cold weather for the men while eating their lunches to sit either at the base or on top of the dryer near the chimney. The men ascended to the top of the dryer by means of a short stepladder. On the 13th day of March, 1905, the plaintiff and other workmen sat on top of this dryer and ate their lunches. About the time they had finished their meal a whistle was blown, which was a signal for them to resume their labor. The men on top of the dryer descended; the plaintiff being the last one. As he was descending the stepladder the steel plate above referred to toppled over and fell upon him, crushing him against the stepladder and the dryer and inflicting severe injuries. The evidence shows that up to and at the time of the accident the steel plate appeared to be in the same position and condition that it had been for more than a year. Some of the witnesses testified that it stood close against the chimney in an upright position. Others testified that the bottom of the plate was some 12 inches from the base of the chimney, and the top of the plate leaned against the chimney. No one testified directly as to what caused the steel plate to fall. It appears that the plate was never braced nor

in any way secured to the chimney. While the evidence shows that the vibration of the machinery affected the dryers and the floor and caused them to tremble, no one testified directly that any vibration of the chimney or of the steel plate leaning against it was ever observed. The plaintiff charges that the defendant was negligent, first, in placing the steel plate in a position where, if it fell, it was likely to injure some of the employees in that department; second, in failing to brace the plate or so secure it as to prevent it from falling; third, in failing to make seasonable examination and inspection of the premises, so as to ascertain whether there was danger of the plate falling. On the other hand, the defendant insists that the evidence does not show how or why the accident happened, and that plaintiff has, therefore, failed to make a case, and that the evidence does not show that the defendant was negligent.

This court has frequently held that it is the duty of a master to use reasonable care to provide a reasonably safe place for his servant to work. In *Rombold v. New Omaha T.-H. E. L. Co.*, 68 Neb. 71, it was held: "Ordinarily, in providing his employees with a place to work, or tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees. The foregoing duty is a continuing one, and the employer is also bound to keep such place, tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view." With respect to the duty of the master to make inspection, Labatt, in his work on Master and Servant, sec. 155, says: "The master's liability depends upon the answer to the following questions: (1) Whether the conditions which caused the injury were discoverable by an examination of a reasonably careful character. (2) Whether any examination of the instrumentality had ever been made. (3) Whether the examinations which were actually made were made as frequently as was proper. (4) Whether there were any circumstances which would have suggested to

a prudent man the advisability of making a special examination during the interval between two of the regular examinations. (5) Whether the regular or special examinations which were actually made were as thorough as the circumstances demanded." In *Brann v. Chicago, R. I. & P. R. Co.*, 53 Ia., 595, it is said: "Negligence on the part of the corporation may consist of acts of omission or commission, and it necessarily follows that the continuing duty of supervision and inspection rests on the corporation; for it will not do to say that, having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed. In ascertaining whether this has been done or not the character of the business should be considered, and anything short of this would not be ordinary care." Both upon reason and authority it is clearly the duty of the master to exercise reasonable care to provide a reasonably safe place for his servant, and to exercise reasonable care to keep it reasonably safe, and to that end it is his duty to make seasonable and timely inspection. The master's obligation does not cease when he has provided a safe place, but he is still required to use reasonable care to keep the place reasonably safe.

Defendant insists that, as no witness directly testified as to what caused the plate to topple over, there is no evidence that would warrant submitting the case to the jury. The evidence tends to show that the plate was in nearly a perpendicular position, and that it was not braced or in any way fastened. There was no evidence of any unusual or extraneous force being applied to the plate to make it fall, but it fell without the application of any such force. That such a plate leaning in a slanting position against a stable brick wall would not topple over without the application of considerable force is too plain to admit of argument. That it fell without the application of any force or power exerted against it is evidence tending very strongly to show that the plate was not in

a slanting position leaning against the chimney, but rather that it was in a state of unstable equilibrium, and that it was so nearly balanced on its base as to be easily toppled over. It was shown that there was considerable vibration at times, and that it made the large dryers shake violently, and that the vibration was sufficient to affect the floor upon which the plate stood. This evidence, we think, was clearly sufficient to warrant the jury in finding that the vibration of the machinery caused the plate to topple over and fall upon the plaintiff.

The question of whether defendant was negligent in so placing the plate that it might fall, or in permitting it to stand for a long time in a position where it might fall, and thereby injure its employees, was one of fact. The evidence shows that defendant had permitted the plate to stand for a long time in such a position that it might fall, and that it had been a source of danger for a year or more. While in this position the plate toppled over and inflicted the injuries complained of. From the evidence we think it is apparent that proper inspection would have disclosed the liability of the plate to fall. We think it must be conceded that it is negligence to knowingly permit a large plate weighing several thousand pounds to remain standing by the side of a much used and frequented passageway, in such a position that it was likely to fall on or across the passageway, or that it might be caused to fall by the vibration of the machinery. The evidence warranted the finding that seasonable inspection would have disclosed the danger, and that the defendant was negligent in failing to make such inspection.

Defendant insists that negligence may not be proved by the fact of the accident alone. Such is undoubtedly the rule. But the negligence may be inferred from the surrounding facts and circumstances. In *Union P. R. Co. v. Erickson*, 41 Neb. 1, 10, plaintiff was injured by a lump of coal falling from the tender of a passing locomotive. The coal had been loaded on the tender many miles distant from the injury. In that case this court said:

"Facts may be established by circumstances as well as by direct testimony, and the same facts which prove the accident may, in some cases, be circumstances which establish the facts justifying an inference of negligence. So in this case. Neither fireman nor engineer saw the coal fall. It was certainly not dislodged from a place of safety by any act of theirs at the time. Erickson and the section boss did see it fall as the train passed. It is not merely a conjecture, it is a plain inference, from the fact that it fell under the circumstances, that it had been so placed upon the tender that it was in a position from which it was liable to be dislodged by the motion of the train." See, also, *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138, and *Choctaw, O. & G. R. Co. v. McDade,* 191 U. S. 64.

Defendant argues that, if the dangerous condition of the plate was open and obvious, then the plaintiff must have known of it, and by not complaining assumed any risk of danger. It was not the duty of the servant to inspect. That duty belonged to the master. The servant had a right to assume that the place afforded by the master for the performance of his duties was reasonably safe. He was not required to look for danger, and we cannot say, as a matter of law, that the liability of the plate to fall was so apparent that one who had no duty to inspect was bound to discover it. That was a question of fact to be determined by the jury from the evidence. The jury having found against the defendant upon that proposition, the defendant is concluded by its finding.

The defendant further contends that the relation of master and servant did not exist at the time of the accident, and, therefore, the rule requiring the master to furnish a reasonably safe place and appliances for his servant had no application. In this view we can not concur. It appears that the defendant was desirous of having its plant operated with the smallest loss of time possible for lunch, and that it allowed but 30 minutes for lunch. It also knew that, because of the offensive odors, the workmen could not be expected to go to their homes or outside

of the building to take their noonday meals without changing their clothing. It was not practicable for the workmen within the time allowed to change their clothing and go elsewhere for their meals. The defendant provided lockers, safe receptacles in which the workmen placed their clothing and lunch pails. We think it was fairly contemplated by their employment that the workmen should remain in the building and eat their lunches there. No particular place was provided wherein they should eat their lunches, but the defendant knew by long custom that the workmen ate their lunches in this particular place. It knew or should have known of the dangerous condition of the steel plate, and that it was liable to fall upon and injure them. We do not think it can be said that the workmen were mere licensees, as contended for by the defendant, but they were there as a matter of right and by the invitation of the master. It was necessary that the workmen should eat in order that they should have strength to labor, and we think that the workmen were entitled to the same protection and the same care of the master during the time they were taking their lunches upon the premises as they were while they were actually at their labor.

Some complaint is made by the defendant with reference to the admission and rejection of certain testimony. Defendant has not pointed out wherein it was in anywise prejudiced by such rulings, and we are unable from an examination to detect any prejudice or any error in the rulings complained of. We find no error in the record, and recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

SAMUEL J. COWPERTHWAIT, APPELLEE, V. ISRAEL W. BROWN, APPELLANT.

FILED SEPTEMBER 16, 1908. No. 15,271.

1. **New Trial:** INSTRUCTIONS: ASSIGNMENT OF ERRORS. "An assignment in a motion for a new trial that a group of instructions is erroneous is bad if any one of them was properly given." *City of South Omaha v. Powell*, 50 Neb. 798.

2. **Appeal:** VERDICT: ASSIGNMENT OF ERRORS. An assignment of error that "the verdict is contrary to law" raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury, but nothing more. *Drexel v. Daniels*, 49 Neb. 99.

3. **Assault and Battery:** JUSTIFICATION. A father who owns land upon which is situated a dwelling house, which, with his permission, is occupied by a married son and his family as a residence, is without right to enter upon the premises so occupied by the son for the purpose of ejecting a third person, objectionable to the father, who is there on the invitation of the son.

4. ———: ———. The fact that the son is in poor health, and that the father is contributing to his support, is immaterial.

5. ———: LIABILITY. If the father in attempting to eject such third person commits an assault upon him, he is liable in an action for the damages resulting therefrom.

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

Francis Martin and *J. C. Dort*, for appellant.

Story & Story, contra.

FAWCETT, C.

This action was brought in the district court for Pawnee county to recover damages for an assault. The petition is in the usual form. The answer is a general denial, coupled with an allegation that "the plaintiff unlawfully and against the will and wishes, and against the protest of this defendant, entered upon the premises of this de-

fendant, and was in the act of trespassing thereon, and this defendant, finding the plaintiff in the act of trespassing upon defendant's premises, ordered plaintiff to depart therefrom, but the plaintiff, being of a pugnacious and quarrelsome disposition, which was well known to this defendant, refused to depart, and assumed a defiant and hostile attitude toward this defendant, and made a demonstration with his clenched fists as if about to assault this defendant, and thereupon this defendant, in self-defense, and to enforce his authority over his own premises, and for no other reason, removed said plaintiff from the premises of defendant, where the plaintiff was then trespassing, and in the removal of said plaintiff from said premises this defendant used no more force than was actually and reasonably necessary." The reply is a general denial. There was a trial to the court and a jury, which resulted in a verdict in favor of the plaintiff for $150. From the judgment thereon this appeal is prosecuted.

Defendant assigns 38 errors. The first 22 refer entirely to the sustaining and overruling of objections to the admission of evidence. We have read the record, and have been unable to find any prejudicial error in any of the rulings complained of in these 22 assignments.

Assignments 23 to 26, inclusive, relate to instructions given by the court on its own motion, and 27 to 31, inclusive, to instructions asked for by plaintiff, and given. The four instructions given by the trial court on its own motion are excepted to in the motion for new trial in one paragraph as follows: "(9) The court erred in giving the first, second, third and fourth paragraphs of the instructions given by the court on its own motion." The five instructions asked by plaintiff, and given, are excepted to in the motion for new trial in one paragraph as follows: "(7) The court erred in giving the first, second, third, fourth and fifth paragraphs of the instructions asked for by the plaintiff." These assignments in the motion for new trial were not sufficient to lay the foundation for a

consideration of the instructions here further than to ascertain whether any one of the instructions in either group correctly stated the law. *City of South Omaha v. Powell,* 50 Neb. 798, is exactly in point, and states the well-settled rule in this state. In that opinion, speaking through Mr. Justice NORVAL, we said: "Similar assignments in motions for new trial have been held insufficient repeatedly, and that they would be considered by the appellate court to the extent alone of ascertaining if any one of the instructions was correct in each group given." We have examined the instructions in each of the groups in the case before us sufficiently to know that they were not all erroneous in either group, and, hence, these assignments must be held to be unavailing.

The 34th assignment is: "The verdict is contrary to law." Such assignment raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury, but nothing more. *Drexel v. Daniels,* 49 Neb. 99. In the present case we think the verdict is clearly within the law as contained in the charge given by the court. Assignments 32, 36 and 37 are formal only. This leaves the only questions for consideration on this appeal the thirty-third, thirty-fifth and thirty-eighth assignments, that "the verdict is not sustained by the evidence," that "the damages awarded are excessive," and "the verdict was the result of bias and prejudice."

The evidence discloses the following facts: Plaintiff is engaged in the livery business in Pawnee City, while defendant is living on a farm some six or seven miles in the country. Prior to engaging in the livery business in Pawnee City, plaintiff was also engaged in farming, and was a near neighbor to defendant. Some 10 or 12 years prior to the date of the assault, defendant's son married plaintiff's stepdaughter, Nancy. Plaintiff and his wife, Nancy's mother, have been living together as husband and wife for 27 years. Prior to her marriage, Nancy lived with plaintiff and her mother as their child. About 10

years prior to the assault, defendant sold his son Charles some land near defendant's home, upon which Charles built a dwelling by reconstructing and adding an addition to an old building which stood upon the land, and also built a new barn; at least $300 of Nancy's money going into the construction of those buildings. The land was sold to Charles under a written contract. Charles seems to have been an industrious and successful farmer, doing business with his father and a brother; the bank account being in the name of the three, against which each checked without restraint. Some years prior to the time of the assault, Charles became afflicted with rheumatism. He seems to have suffered greatly from this affliction. His father was faithful to him, and manifested a father's affection by sending him to Sycamore Springs on two different occasions for treatment. This treatment producing no favorable results, it was decided to send him to the Hot Springs for prolonged treatment. Prior to going to the Hot Springs, Charles stated to his father that he would be unable to keep up the payments on the land, would be unable to carry through the deal, and delivered up his contract to his father and turned over the possession of the land. He then went to Hot Springs and remained there for two years. During all of the time he was at the Hot Springs, his wife, Nancy, worked in a restaurant and took in sewing to help support herself and husband; the defendant supplying whatever additional funds were necessary for that purpose. When Charles and his wife went to Hot Springs, they left all of their furniture in the house on the farm, left one key with the defendant and another with the plaintiff. Defendant and his wife stored the furniture, carpets and other household effects in one room of the house. The house remained in that condition until the return of Charles and his wife from the Hot Springs a few days prior to the assault. When it was decided that Charles was to return defendant's wife went to the house formerly occupied by Charles and Nancy, cleaned the house

thoroughly, relaid the carpets, put the furniture all in order; in fact, thoroughly prepared the house for the return of their son and his wife. On the day when Charles and his wife returned to Pawnee City, defendant was in town, expecting to meet them and take them out to their home. He found that Charles and his wife were stopping at the home of plaintiff. Charles informed his father that they were not ready to go out that day; that his wife wanted to have some dental work done first. Some two or three days later defendant again went to Pawnee City for the purpose, as he states, of taking his son home. Not finding Charles in town, he telephoned plaintiff's residence, and was informed by a daughter of plaintiff that Charles and Nancy were out in the country visiting some relatives; and here the first conflict in the testimony arises. Plaintiff's wife and daughter both testify that, when the daughter informed defendant that Charles and his wife were in the country, defendant stated to them that they, the members of plaintiff's family, would have to take them out home when they returned to town, as he could not go in again for them. They also testified that defendant's wife visited at the plaintiff's house that day, and was there a good part of the afternoon; that, when defendant got ready to go home, he drove that way to get his wife; that the matter was talked over then; and that defendant again requested them to take Charles and his wife out when they returned from the country. Defendant and his wife both deny the making of any such request, and testify that defendant's wife did not remain at plaintiff's house more than ten minutes. A day or two later plaintiff and his wife took Charles and Nancy and their two trunks out to Charles' home. As they passed defendant's house, they met defendant's wife, who gave them the key which Charles had left with them. Plaintiff then drove up to Charles' house, the women alighted, and, together with Charles, immediately went and unlocked the house, and the ladies entered. Plaintiff then unloaded the larger of the two

trunks, and was rolling it up a board walk leading from the lane to the porch of the house, when defendant appeared upon the scene. Defendant stepped to a wood pile nearby, picked up a length of stove wood about an inch and a half or two inches in diameter, and stepped up to plaintiff, who by that time had rolled the trunk up to the well platform by the porch of the house, and ordered him to leave the premises at once, stating that he did not want him there, that he, plaintiff, knew he did not want him there. Here again there is a conflict in the testimony. Plaintiff testifies that, immediately upon ordering him to leave the premises, defendant struck him a blow with the stick, and at once followed that with a second blow; that he made no offensive demonstration himself, but after the assault at once left the premises. Defendant and his son Charles, who was the only witness of the affray, testify that the defendant repeated his order for plaintiff to leave the premises a number of times; that plaintiff raised up, and asked the defendant "if he knew who he was talking to"; that defendant answered, "'Yes; Mr. Cowperthwait, I know who I am talking to'; and, as I raised my hand, his went up. We were both in a striking attitude. I think I struck him just as he was making a pass at me. With my right hand I struck him a little glancing blow here, not very hard, not hard enough to break the skin. He rushed on me, still rushed ahead, and struck at me with all his might, and it became necessary for me to brace myself or give my ground. I didn't propose to do that on my doorstep, and I put my foot back that way with my hands up, and we passed blows probably, I think, a minute. My son didn't think it afterwards, but we passed several blows, and I was keeping him off. I watched my chance, and I reached up there. I am a little taller than he is. I reached up that way, and struck him on the right side of the head, right up in there, another light tap. I said, 'Mr. Cowperthwait, won't you go out of my ground'; and he said, 'Yes, I guess I will go.'" They also testified that as plaintiff went away he

used a great deal of profanity, and threatened to send a sheriff and to find a place for defendant to stay. Plaintiff's wife, hearing the disturbance, came out, and, after asking defendant why he had treated her husband so, picked up her husband's hat, joined him in the lane, and together they got into their wagon and drove home. As an attempted justification of his conduct in going upon those premises and forcibly ejecting plaintiff, defendant and his witnesses testified to certain circumstances which defendant claims were suspicious and tended to show that plaintiff was holding improper relations with Charles' wife. This testimony, when first offered by defendant, was objected to by counsel for plaintiff, and the objection promptly sustained by the trial court; but, after counsel for defendant had persisted in their attempt to get the matter before the jury, counsel for plaintiff withdrew their objection, and the court then permitted the introduction of the testimony. This evidence was not at all within the issues, was clearly improper, and should have been excluded. But it was received, went to the jury, and is in the record before us. Defendant insists that he was the owner and in possession of the premises, and that in driving plaintiff from the premises that day he was defending the reputation of his family. He testifies that he had warned plaintiff that he must not come upon his premises, and had told him the reason why. This plaintiff denies. He also testifies that on one occasion he told plaintiff's wife that plaintiff must not come upon his premises, and told her the reason why. In this he is corroborated by his wife, but is flatly contradicted by plaintiff's wife. This notice which he claims to have given to plaintiff and to plaintiff's wife was before Charles and Nancy had gone to Hot Springs; in fact, was some three or four years prior to the time of the assault. It seems that plaintiff's wife did not lose confidence in her husband, nor did Charles lose confidence in his wife, by reason of the attitude of defendant, or by reason of any rumors which may have been in circulation in the neighborhood.

We have carefully examined the evidence in the record before us, which defendant claims shows improper relations between plaintiff and his stepdaughter, and find it to be of the most flimsy character. Not a single incident is testified to which to our minds fastens any guilt upon either the plaintiff or Nancy. No witness testifies to ever having seen them in a compromising situation or under compromising circumstances. The only facts shown are that they had been seen on several occasions either going into or coming out of the barn when Charles was away from home; and that, during the times that Charles was at Sycamore Springs for treatment, plaintiff frequently accompanied Nancy to her home in the evenings, and assisted her in doing the farm chores. On some of these occasions they would go into the house and shut the door. To our minds the evidence establishes nothing more than that friendly relations existed between plaintiff and his stepdaughter, but relations which, so far as the evidence discloses, were entirely compatible with the relationship existing between them as stepfather and stepdaughter. It is unfortunate that this assault was made on the character of Nancy, and the jury did right in disregarding it. They undoubtedly felt that a woman's reputation for chastity does not hang by so slender a thread. Defendant is evidently a worthy man, and ordinarily a good citizen; but in this instance he was unfortunate in giving way to what appears to us to have been groundless suspicions, and wicked and senseless neighborhood gossip.

The contention of defendant that he was in possession of the premises is not well grounded. We do not deem it necessary to discuss the question of title, or whether or not the surrender of the contract by Charles, without the written concurrence of his wife, could divest him of his homestead right in the premises. Under the undisputed evidence in the case, defendant was not in possession of the house and the walk leading thereto at the time of the assault. The furniture of Charles and Nancy had at all

times remained in the house. The house had been prepared for their reoccupancy by defendant and his wife. The key had been delivered to Charles. Charles and his wife had gone upon the premises and taken possession, and plaintiff being there at their instance and request was lawfully there; and whether defendant was supporting Charles or not is immaterial. Charles and his family were in the actual possession of the premises, and plaintiff was there partly, no doubt, as his guest, and partly in his capacity as a liveryman who had hauled Charles and his wife and their baggage from Pawnee City; and he had a perfect right to unload the baggage and to remain there until Charles ordered him to leave. The trespasser upon those premises on that occasion was the defendant, and not the plaintiff.

The contention that the verdict is excessive, and the result of bias and prejudice, must also fail. Plaintiff received two severe blows upon the head, one of which laid open the scalp for several inches, rolling it up, as testified to by Dr. Johnson, "like a bruise will cause the bark to pull from a tree." Plaintiff was confined to the house for at least 10 days, was unable to do any work for 30 days, and, according to the testimony of the witnesses, had been more or less affected by the injury down to the time of the trial. We do not think the verdict was excessive.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

ST. PAUL HARVESTER COMPANY, APPELLANT, V. EMMA MAHS, EXECUTRIX, APPELLEE.

FILED SEPTEMBER 16, 1908. No. 15,627.

1. **Dormant Judgment:** REVIVOR. While a proceeding to revive a dormant judgment is not the commencement of a new action, it is the commencement of new and different proceedings under the provisions of the statutes permitting such revivor. *Eaton v. Hasty*, 6 Neb. 419, and *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, distinguished.

2. ———: ———: DEFENSES: SPECIAL APPEARANCE. While a judgment debtor who has been served with notice of an application to revive a dormant judgment cannot interpose any objections which seek to go behind the original judgment, he may appear and interpose any and all suitable defenses which he may have to the revivor, such as payment, that such judgment is void for the reason that the court which entered it had no jurisdiction over his person, and the like, and may make all proper motions in reference thereto, without being held to have appeared generally in the action so as to render valid a judgment which was void for want of jurisdiction over his person.

3. **Process:** RETURN: IMPEACHMENT. Evidence examined and set out in the opinion *held* sufficient to meet the requirement that the return of an officer can only be overcome by evidence that is clear and convincing.

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

B. F. Johnson, for appellant.

Talbot & Allen, contra.

FAWCETT, C.

On May 9, 1890, plaintiff obtained a judgment in the district court for Lancaster county against Louis Faulhaber, Sr., and his sons, Louis, Henry and John. The return of the sheriff, by C. A. Hoxie, deputy, certifies that he served the summons upon Louis Faulhaber, Sr., Louis Faulhaber and John J. Faulhaber. None of the defend-

ants named appearing, judgment was rendered by default. No execution was ever issued upon the judgment, or any attempt made to enforce payment of it, until October 20, 1904, when plaintiff filed a motion, supported by affidavit, to revive the judgment; the affidavit and notice being in the usual form. Notice of the motion to revive was served upon the defendant Louis Faulhaber, Sr., October 21, 1904. Mr. Faulhaber appeared by counsel, and moved the court for a continuance for 30 days to make a showing against revivor, and on December 6, 1904, filed his separate answer to the motion, in which he alleged that no summons had ever been served upon him or left at his usual place of residence; that he knew nothing about the pendency of any purported action against him until long after said purported judgment was rendered; that the court had no jurisdiction over his person to enter judgment against him; and that the judgment sought to be revived was void. A hearing was had, and judgment of revivor entered, from which Mr. Faulhaber, Sr., appealed to this court. His appeal was successful, and the cause was reversed and remanded. *St. Paul Harvester Co. v. Faulhaber,* 77 Neb. 477. After the case was remanded to the district court, Mr. Faulhaber, Sr., filed a motion to require plaintiff to give security for costs, and later, on April 16, 1907, by leave of court, filed an amended answer containing the same averments as appeared in his original answer, and in addition thereto that the plaintiff is no longer in existence, it having gone into liquidation a long time before the action to revive was instituted; that the court has no jurisdiction for the reason that the affairs of the plaintiff were settled by an assignee, and said plaintiff is not now, and has not been for a number of years, doing business as a corporation; and that plaintiff has no legal capacity to revive said purported judgment. Subsequently, the death of Louis Faulhaber, Sr., was suggested, and defendant, Emma Mahs, executrix "of the estate of Louis Faulhaber, Sr., deceased," was sub-

stituted as defendant. No reply was filed, and the case proceeded to trial upon the motion and affidavit for revivor and the amended answer. The court found generally in favor of the defendant executrix, and dismissed the revivor proceedings at plaintiff's costs. A motion for new trial was overruled, and plaintiff prosecutes this appeal.

Plaintiff insists that by moving for a continuance and for security for costs, and by alleging in his amended answer that the court had no jurisdiction to enter the judgment, and by denying the legal capacity of plaintiff to prosecute the action, the defendant, Faulhaber, Sr., entered a general appearance in the action, which would relate back to the time of the entry of the original judgment, and thus render the question as to whether or not there had been a service of the summons immaterial; that "a revivor proceeding is not the commencement of a new action, but the continuation of an action previously commenced," and that "a general appearance may be made after judgment." In support of his contention he cites *Eaton v. Hasty,* 6 Neb. 419; *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170; *Franse v. Armbuster,* 28 Neb. 467, and *Dryfus v. Moline, Milburn & Stoddard Co.,* 43 Neb. 233. We do not think the cases cited by counsel bear out his contention. While a revivor proceeding is not in one sense the commencement of a new action, it is the commencement of new and different proceedings under the provisions of our statute for the revivor of a dormant judgment. The proceedings to revive a dormant judgment are instituted by the filing of a motion and the service of notice upon the judgment debtor. After service the debtor has the right to appear and "interpose any suitable defense thereto." *Farak v. First Nat. Bank,* 67 Neb. 463. The term "suitable defense" does not mean the trial of the merits of the original suit, but it does include any defense which will show that the judgment was void, subsequent payment, etc. In *Enewold v. Olsen,* 39 Neb. 59, we quote from *Wright v. Sweet,* 10 Neb. 190: "Upon proceedings to revive a judgment which has become dormant,

* * * no objections will be heard which seek to go behind the original judgment"; and then say: "But this case does not decide, nor was it intended to decide, that a person against whom it was sought to revive a judgment might not make the objection that such judgment was void; that is to say, that there was no such judgment." *Haynes v. Aultman, Miller & Co.*, 36 Neb. 257, was an action to revive a dormant judgment. The defendant set up certain defenses which tended to show that the court, when it rendered the judgment, had no jurisdiction of the defendant, and that he had a defense to the action. A demurrer to the answer was sustained, whereupon defendant brought a suit in equity to enjoin the judgment. A demurrer to the petition in the injunction suit was sustained. In affirming that judgment we said: "It appears from the exhibits attached to the petition, and made a part of it, that in the action to revive the judgments the plaintiff herein filed an answer in which he alleged, in substance, that the judgments were void for want of a finding that Haynes had removed from Holt county when the summons was left at his late residence therein, and that he had no notice of said summons or action until it was too late to appear in the action either by appeal or to open the judgment; that the notes in question were given for a combined reaping and mowing machine, which was of no account or value, and the consideration therefor failed. It also appears that a demurrer was filed by Aultman, Miller & Co. to said answer, which demurrer was sustained, and the actions revived for the amounts of the original judgments, interest, and costs. It is probable that the court erred in sustaining the demurrer in those cases, and if the ruling upon the demurrer was before us for review that it would be reversed." In concluding the opinion in the case we said: "The theory of our law is that the debtor shall have personal service, or its equivalent, notice left at his actual residence, otherwise it would be possible to perpetrate gross frauds upon the party sued. None of these matters can be considered in

this case. This is an attack upon the judgment as revived, and if the court had jurisdiction which rendered the same, and there was an opportunity to defend, this action cannot be sustained." The effect of that decision is to hold that, if the defendant in the revivor proceeding had appealed from the judgment of revivor instead of bringing an independent suit for an injunction, his appeal would have been successful, for the reason that he was entitled to make the defense of which the trial court, by sustaining the demurrer, deprived him. In *Wittstruck v. Temple,* 58 Neb. 16, we held: "In a proceeding to revive a dormant judgment the defendant may interpose as a defense that such judgment is void on the ground that the court entering it had no jurisdiction over his person." In the opinion we said: "Had the payment of the judgment been pleaded, then, under the foregoing authorities, the presumption of payment arising from the lapse of time would have defeated the proceeding to revive, unless the judgment creditor had overcome such presumption by proof that the judgment had never been paid. It devolved upon those resisting the order of revivor to tender the issue of payment by proper plea." Without pursuing the matter further, we think it is clear that a defendant upon whom notice has been served for the revivor of a judgment may appear and file any and all defenses which he may have to the revivor of such judgment, and may make all proper motions in reference thereto, without being held to have appeared generally in the action so as to render valid a judgment which was void for want of jurisdiction over his person.

Plaintiff's further contention is that the judgment of the district court is not sustained by the evidence. In his deposition, taken prior to his death, Mr. Faulhaber, Sr., who was a farmer living in the country, testified that no summons was ever served upon him in the case or left at his place of residence; that he never had been sued in his life; that he did not learn of the entry of the judgment until September following its entry; that, when he

learned of it, he consulted Mr. Stearns, and, in company with Mr. Stearns, went to see the deputy who had made the return on the summons; that the deputy then told them that he had not served the summons upon him, and stated that he served it on Ninth street, where the boys had their place of business. Mr. Stearns also testifies that the deputy said the only service he made on anybody was made down on Ninth street, at the place of business. One of the sons, who was conducting the business at Ninth street, was named after his father, "Louis," and it is possible that the officer did not discriminate between the two names of Louis Faulhaber, Sr., and Louis Faulhaber, appearing in his summons. However that may be, plaintiff placed Mr. Hoxie, the deputy, upon the witness stand, but did not attempt to contradict the testimony of Mr. Faulhaber and Mr. Stearns as to his statements on that occasion. Mr. Hoxie testifies that he does not recall any visit by Mr. Stearns or any one else in relation to the summons; that he has no recollection as to the service of the summons beyond what appears in his return; and that he must have served the summons upon Mr. Faulhaber, or he would not have so stated in his return. He further testifies that about that time the sheriff's office was very busy, and they were serving a great many papers, sometimes as many as 50 in one day. His testimony upon the witness stand that he had no recollection as to what had taken place 17 years prior thereto is undoubtedly true, as he could not be expected, with the large number of papers he was serving during those years, to remember such transactions for so long a period of time. But it is also true that in September, immediately following the service of the summons in March, he might, and probably would, have some recollection of what had taken place at that time; and we must assume that he made the statements to Mr. Faulhaber and Mr. Stearns to which they have testified. That he did not serve the summons upon Mr. Faulhaber, Sr., is further corroborated by the affidavit of Fred Faulhaber, which was received in evidence, in

which he says that Mr. Stewart, attorney for plaintiff, told him that there was no judgment against his father; that he, Stewart, had found out that the old man, meaning affiant's father, had no interest in the business, and that the sheriff did not serve him with a summons; and that it was not necessary for Mr. Stearns, to whom Mr. Faulhaber had gone for advice, to go ahead with an injunction suit, as it would only make expense. This statement is not disputed by Mr. Stewart. On the contrary, Mr. Stewart himself testifies that, when Mr. Stearns told him that if he undertook to enforce the judgment against Mr. Faulhaber, Sr., he, Stearns, would have to begin an injunction suit, he told Mr. Stearns, after he had made an investigation and had talked with Hoxie, that he did not think, under the circumstances, that he would put Stearns to the trouble of commencing an injunction suit. When asked if he ever stated to anybody that they had no judgment against Mr. Faulhaber, he says: "I don't remember of ever making a statement of that kind. I possibly told the people what the facts in controversy were." Mr. Stewart also testifies: "Well, I went and saw Mr. Hoxie, deputy sheriff, and talked with him about it. Q. What did he say? A. Mr. Hoxie said he didn't know whether he served it or not, I think was about the substance of what he said, he wasn't sure. He kind of thought he hadn't served it; that that was a mistake." That after he had had the talk with Mr. Hoxie he told Mr. Stearns: "Of course, if Mr. Hoxie would not stand by his return, there would not be any use of his trying to enforce the judgment. Q. And did you ever try to collect the judgment from the old man? A. No; never did that I have any recollection of. Q. Well, if you had thought you had a judgment, you would have made an effort to collect it? A. Yes; if I had thought we had a judgment or could enforce it, we would certainly have enforced it; but, of course, we had to depend on Hoxie's return and the testimony in regard to it, and we thought there was no use trying to enforce it since he took the position that he did.

Q. Did you form any belief in your talk with Mr. Hoxie as to whether or not he had served it? A. No; I don't know as I did form any belief on the subject. I was a little suspicious of Hoxie at that time on account of some other matters, and, as I say, I never knew whether he served it or not. I just simply know he would not stand by his return at that time." Mr. H. F. Rose was called as a witness, and testified that at the time the judgment was obtained in 1890 he was associated with Mr. Stewart. On cross-examination we have the following: "Q. And you never made any effort after that or any attempt to collect the judgment? A. I don't think we ever sued out execution. Q. You knew that Faulhaber was good, and owned a farm out east of town, didn't you? A. That was our understanding before we commenced the suit. We really expected to collect off of him. Q. Did you talk with Hoxie yourself? A. Yes; I think I talked with Hoxie on that same trip, and then Mr. Stewart and I conferred about it, and held a little indignation meeting, but we never concluded to press the thing to an actual test at that time. Q. And never after that either? A. No; we separated soon after that, and those old matters, my recollection is, were retained by Mr. Stewart. I retained no interest in those."

The point is made by counsel for plaintiff that the testimony by which it is sought to impeach the return of an officer must be clear and convincing. In this we concur; but in our opinion the evidence produced upon the hearing of this case meets that requirement. We think it is clearly and convincingly established by the record before us that no summons was ever served upon Louis Faulhaber, Sr. It follows that the judgment of the district court is right, and should be affirmed.

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

CALVIN S. BLAIR, APPELLEE, V. KINGMAN IMPLEMENT COMPANY, APPELLANT.

FILED SEPTEMBER 16, 1908. No. 15,285.

1. **Appeal:** CONTRACT: REFORMATION: HARMLESS ERROR. Where an employer admits that an employee named in a written contract was employed in the capacity of general manager, he cannot complain of a judgment reforming such written contract so as to express the character of such employment, on the ground that it was not intended to designate the capacity in the written contract. Such action, if erroneous, was error without prejudice.
2. **Reformation of Instruments:** CONTRACT OF EMPLOYMENT: EVIDENCE. Where a person who is president and manager of several allied corporations makes a contract employing a general manager for one of such corporations, but the written contract of employment is made in the name of another one of such corporations, the undisputed fact that said general manager rendered his services to and was paid by the former will support a finding of the district court reforming such writing so as to make it the contract of the former.
3. **Action:** STIPULATION: ESTOPPEL. Where a person who is the president and manager of several allied corporations makes a contract employing a general manager for one of such corporations, but the written contract of employment is made in the name of another one of such corporations, and the general manager brings a suit for wages against both corporations, a stipulation in such suit that such writing is the contract of the corporation for which the services were rendered, upon which stipulation the general manager dismisses the suit against the other corporation, estops the corporation for which the services were rendered from afterwards denying the same as against the said general manager.
4. **Appeal:** WITNESSES: VERACITY. Where no fact is disclosed inconsistent with the truth of the testimony of a witness, and there is nothing improbable nor unreasonable in his story, the question of his veracity is peculiarly one for the trial court, and its finding thereon is entitled to favorable consideration.
5. **Reformation of Instruments:** EVIDENCE. Where it is clearly established that in the negotiation of a contract between the plaintiff and the defendant's president, a clause of such proposed contract being under consideration, the said president assured the plaintiff that he understood it to have a specified meaning favorable to the plaintiff's claim, such contract will be reformed to express the meaning so given it.

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

Smyth & Smith, for appellant.

T. J. Mahoney and *J. A. C. Kennedy, contra.*

CALKINS, C.

This was an action in equity to reform a written contract of employment. The defendant, the Kingman Implement Company of Omaha, was one of several corporations whose names commenced with the name "Kingman," and whose headquarters were in Peoria, Illinois. Among the others were Kingman & Company and the Kingman Plow Company. Martin Kingman was the founder of these corporations and the president of each of them. The several corporations were in law distinct, but the general management was in the hands of Mr. Martin Kingman, and they were treated as if they were all branches of one house located at Peoria. In April, 1900, the plaintiff came to Omaha as manager of the defendant company. His contract of employment was in writing, for the making of which a printed blank prepared for the use of Kingman & Company was used, and it seems to have been made in the name of the latter company, although plaintiff was thereby employed to manage the business of the Kingman Implement Company of Omaha. The printed blank contained the following clause: "It is fully understood and agreed that if the said party of the second part is unable to do the work assigned to him in a manner satisfactory to said Kingman & Company, *or should there be a failure or partial failure or destruction of crops, financial disturbance, fires, strikes or otherwise that would disarrange the business of the party of the first part,* they have option at any time of terminating this agreement." In November, 1902, the term of the above contract having expired, a new contract was negotiated between the plaintiff and Mr. Kingman acting

for the defendant, by which the plaintiff was employed for three years from the 1st day of November, 1902, at a salary of $2,600 for the first year, $2,800 for the second year, and $3,000 for the third year. The new contract was thereafter prepared upon the same printed blank, and signed by Mr. Kingman as president and by the plaintiff. The words in italics were erased from the clause above quoted in both contracts, and the words "by giving the party of the second part ten days' notice" were inserted at the end thereof.

On December 1, 1903, Mr. Kingman as president, and in the name of the Kingman Plow Company wrote a letter to the plaintiff, whom he addressed as manager of the Kingman Implement Company, discharging him, and this letter was on December 3 delivered to the plaintiff by a Mr. Hatfield, who had been employed by the defendant to succeed the plaintiff. On January 6, 1904, the plaintiff began an action in the county court to recover an instalment of salary which was due him if the contract was still in force, and this action was appealed to the district court in November, 1904. The district court having held that the contract gave to the employer the absolute right of discharge, and that the plaintiff was not entitled in that suit to any reformation of the contract, said court, upon the application of the plaintiff, stayed proceedings in said suit to enable the plaintiff to bring an action for the reformation of the contract, and this action was thereupon begun. A trial being had to the court, it was found that the contract in question did not correctly state the real contract between the parties in three particulars: First, in failing to state the capacity in which the plaintiff was employed; second, in failing to state the name of the defendant as the employing party; and, third, in failing to state the true agreement in respect to the right of the defendant to terminate the contract. Judgment was accordingly rendered reforming said contract so as to make the defendant party of the first part thereto, and to show that the plaintiff was employed as general man-

ager; while the clause of the contract heretofore quoted was made to read as follows: "It is fully understood and agreed that, if through sickness or accident the party of the second part is disabled from attending to the discharge of the duties of this employment, the said Kingman Implement Company have the option at any time to terminate this agreement by giving the said party of the second part ten days' notice." From this judgment the defendant appeals.

1. The defendant complains of that part of the decree which reforms the contract so as to describe the plaintiff as general manager, upon the ground, not that plaintiff was not in fact to be such general manager, for that is admitted, but that such portion of the agreement was not intended to be expressed in the written contract, and that therefore there was no mistake made in leaving it out. Admitting this argument to be valid, and that the facts did not present a case calling for a reformation of the contract in this particular, we cannot see how the defendant is in any manner prejudiced thereby. Should the capacity in which the plaintiff was employed become material in the action now pending or any other action brought upon the contract as reformed, such capacity will, it is true, appear from the contract; but it will appear just as the defendant now admits and would then be compelled to concede the fact to be. The principle that this court will not reverse a judgment of the court below for errors not prejudicial to the party complaining is too well settled to need the citation of authorities.

2. While characterizing the matter as unimportant, the defendant insists that there is no evidence that the contract was really intended to be in the name of the defendant, the Kingman Implement Company of Omaha, and that the use of the name of Kingman & Company was a mistake. It is argued that, when the bargain was made, nothing was said about the name of the company. The proof is that Mr. Kingman said to the plaintiff: "We want you to stay with us." By the use of the words "we"

and "us" Kingman meant some one of the corporations which he represented. As the plaintiff had been for two years past and thereafter continued for more than one year to work for and receive his compensation from the defendant company, there is no other conclusion possible than that such company was meant. Shortly after the making of the contract, in a letter addressed to the plaintiff in relation thereto, he was described as manager of the Kingman Implement Company; the letter being signed Kingman & Company, by Mr. Schimpff, who seems to have been secretary, as Mr. Kingman was president, of all the companies. The letter discharging the plaintiff was addressed to him as manager of the Kingman Implement Company, and signed Kingman Plow Company by Martin Kingman, president. The names of the allied corporations seem to have been used indiscriminately and without much reference to which corporation the business in hand concerned. We think the evidence amply sufficient to support the finding of the district court that the contract was really intended to be that of the defendant company, and that the use of the name of Kingman & Company instead was a mistake.

3. This is not the only reason for sustaining this finding of the district court. When the plaintiff brought his action in the county court, it was against both Kingman & Company and this defendant, and it was there stipulated that the contract was that of this defendant. Upon that stipulation the action was dismissed as to Kingman & Company. There were in these facts all the elements of an estoppel; the deliberate act of the defendant stipulating that it was a party, and the act of the plaintiff in dismissing his action against the other defendant made in reliance thereupon and to his prejudice. These facts were pleaded, and the district court rightly held that they estopped the defendant from denying that it was a proper party to such contract.

4. Martin Kingman died in December, 1904, before this action was begun, and without the taking of his testimony

as to what was said between him and the plaintiff at the time the contract in question was negotiated. The plaintiff's claim for relief, therefore, rests upon his own statement as to what occurred at that time. The defendant seeks to discredit the plaintiff's testimony by the facts, first, that he signed the contract in the condition in which it existed at the time of the commencement of the action; second, that when discharged he did not mention to his successor the fact that he had such a contract as he now claims; third, that he did not set up its existence in his letter answering the letter of Mr. Kingman discharging him; fourth, that he did not discuss the matter in an interview afterwards had between him and Mr. Kingman in the presence of a Mr. Taylor; and, fifth, that he did not set forth the facts in his first petition as they were afterwards testified to by him. To give even an abstract of the testimony on these several points would unduly extend this opinion. It is sufficient to say that none of the objections is conclusive, and none of the circumstances referred to necessarily inconsistent with the existence of the facts as testified to by the plaintiff. The first objection, that he signed the contract, would be fatal in most actions for a reformation; the second, that he did not explain to his successor, has no weight; while the fact that he did not go into the details in his letter to Mr. Kingman regarding his discharge does not seem to us important. In such letter he certainly does not admit that Mr. Kingman had a right to discharge him, for he says: "Your proposition is simply absurd. I will insist on a square deal and hope it will be granted without unnecessary delay." It does not appear that at the interview at which Mr. Taylor was present the subject of the terms of their contract was discussed, and the failure of the plaintiff to mention the details thereof does not tend to contradict his evidence. The discrepancy in his petitions is sufficiently explained by the testimony of his attorney, and the question of his veracity was therefore peculiarly one for the trial judge, who saw and heard him

testify, and had an opportunity to observe his appearance and demeanor, which is denied to us. There is nothing in the case which marks his story as improbable or unreasonable, and we are not inclined to disturb the finding of the district court upon the question of his veracity.

5. This brings us to the question whether, assuming the plaintiff's testimony to be true, it clearly and satisfactorily established his right to a reformation of the contract. The negotiations for a contract seem to have been had in Mr. Kingman's room at the Paxton hotel in Omaha. At that time the plaintiff had been acting as manager for the defendant for some two years under a contract containing identically the same clause as did the one we are considering. Mr. Kingman asked the plaintiff if he intended to stay with the company, told him that he wished him to do so, and that he wanted to make a contract for five years. The plaintiff objected to this, and said he preferred to make a contract for one year. After a discussion of the reasons pro and con, Mr. Kingman proposed to make a contract for three years, $2,600 for the first, $2,800 for the second, and $3,000 for the third. The plaintiff assented to this, and Mr. Kingman said: "I have not any contracts with me, I will prepare one and send it to you." The plaintiff then told Mr. Kingman that he wanted a straight contract, and Mr. Kingman asking him, "What do you mean by a straight contract?" he replied, "I mean an unqualified contract for three years." Mr. Kingman said: "That is what we shall have. That is what we have." This the plaintiff did not agree to, and he told Mr. Kingman that his understanding was, under the existing contract, that he was on trial; that, if he succeeded, all right, and, if he did not, Mr. Kingman was at liberty to terminate the contract. But Mr. Kingman demurred that this was not the meaning of the contract, and, in substance, said that his understanding of the meaning was that, if the plaintiff became unable on account of sickness or injury to do the business of the defendant to their satisfaction, he was to have

the right to discharge him. Upon this understanding the contract was signed, containing the stipulation that, if "the said party of the second part is unable to do the work assigned to him in a manner satisfactory to Kingman & Company, they have the option at any time to terminate this agreement by giving the party of the second part ten days' notice."

This presents the question whether a party to a contract who signs the same upon the assurance of the other party that he understands the provisions of the contract to have a certain specified meaning may, in case the contract cannot be so construed, have an action in equity to reform the same so that it shall clearly express the meaning specified. It is said by Mr. Pomeroy: "If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, *by means of a mistake of law,* fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancelation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by mistake of fact. In this instance there is no mistake as to the legal import of *the contract actually made,* but the mistake of law prevents the real contract from being embodied in the written instrument." 2 Pomeroy, Equity Jurisprudence (3d ed.), sec. 845. The same author (sec. 847), in discussing a mistake of law accompanied with inequitable conduct of the other party says: "Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconcep-

tion of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party." This principle is recognized by section 341 of the code, which provides that, "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." In this case the language of the contract was not that, if the company should become dissatisfied with the services rendered by the plaintiff, they might terminate the contract. The language was that, if he was unable to perform the duties to their satisfaction, they might so terminate the contract. It might be argued that this implied a change in his ability to perform rather than in the disposition of the company to be satisfied, and there might easily have existed a different understanding as to what was actually meant. If Mr. Kingman believed the contract meant if the plaintiff became unable from illness or accident, then there was, assuming the construction of the contract by the district court in the law action to have been correct, a mutual mistake. If, on the other hand, he did not so understand the contract, but induced the plaintiff to sign it by the assurance that that was his construction thereof, then he was guilty of inequitable conduct, which should give the plaintiff the right to his relief. We do not think the case would be altered if the plaintiff believed that the clause gave the company the right to discharge him at its own option, if he was induced to sign the same, by the assurance of Mr. Kingman that he did not so construe it. The case of *Cathcart v. Robinson,* 5 Pet. (U. S.) *264, *276, is, we think, in point. There an action was brought to enforce specific performance of a contract in the form of a bond for the conveyance of real estate. The defendant sought reformation, alleging that at the time of the execution of the contract he was under the impression, sanctioned by the conduct of the plaintiff, that at any time before its completion he might release himself by paying a penalty

of $1,000. In that case it appears that Mr. Cathcart at the time of the execution of the bond insisted on reducing the penalty to $1,000, giving as a reason therefor that he might be enabled to relieve himself from it by the payment of a sum he thought within his resources. The obligee, without hinting that the object would not be obtained by the condition, assented to it, and the agreement was signed. The court, by Marshall, C. J., say: "If this be a correct view of the transaction, it is not simply an instrument executed by a person who mistakes its legal effect, as it would have been, had it been prepared with a penalty of $1,000, and silently executed by Cathcart in the full conviction that it left him the option to perform the contract or to pay the penalty; it is something more. The assent of Robinson to this reduction of the penalty, when demanded, avowedly for the purpose of enabling Cathcart to terminate his obligation by paying it, is doing something active on his part to give effect to the mistake, and turn it to his advantage. It is, in some measure, co-operating with Cathcart in the imposition he was practicing on himself."

We think the above principle should govern the disposition of this case, and that the contract should be reformed to express the meaning which Mr. Kingman assured the plaintiff he placed upon it. We therefore recommend that the judgment of the district court be affirmed.

FAWCETT, C., concurs.

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

AFFIRMED.

DANIEL HERBAGE, ADMINISTRATOR, ET AL., APPELLANTS, V. HORACE N. MCKEE ET AL., APPELLEES.

FILED SEPTEMBER 16, 1908. No. 15,273.

1. **Process**: CONSTRUCTIVE SERVICE: DECREE: VALIDITY. A defendant in a foreclosure proceeding sued by the initial letters of his name, who does not appear in the action, and upon whom personal service of a summons is not made, is not bound by the decree rendered therein.
2. **Mortgages**: LIEN: LIMITATIONS. A mortgage on real estate continues as a lien thereon for only ten years from the maturity of the debt secured, unless in the meantime a payment has been made thereon, or the statute of limitations is otherwise tolled.
3. **Adverse Possession**: UNIMPROVED LAND. "When land is unimproved and unoccupied, the person holding the legal title is deemed to be in possession thereof." *Yorgensen v. Yorgensen*, 6 Neb. 383, and *Troxell v. Johnson*, 52 Neb. 46, approved and followed.
4. ———: CONSTRUCTIVE POSSESSION. Naked color of title derived through a sheriff's void sale does not draw to it constructive possession of the property, where actual possession is not taken of any part of the premises, so as to confer any estate by mere lapse of time.
5. **Mortgages**: AFFIRMATIVE RELIEF: DEFENSE OF LIMITATIONS: EQUITY. If the owner of a mortgage which is barred by the statute of limitations asks affirmative relief, the court upon a plea of said statute and proof adduced in support thereof may dismiss the action without compelling the defendant to pay any part of the outlawed claim.

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

R. R. Dickson, for appellants.

M. F. Harrington and *W. R. Butler, contra.*

ROOT, C.

The facts in this case, although somewhat complicated, are practically undisputed. In 1889 Stillman B. Morrill owned the fee title to the land in controversy, and executed

his mortgage thereon payable April 1, 1894. Said mortgage was duly recorded, and thereafter Henry Herbage became the owner thereof. By mesne conveyances duly recorded Edward W. Moffitt, Jr., became the owner of said land. In 1890, the date not being established, Moffitt conveyed the land to Horace N. McKee, but this deed was never recorded. February 22, 1890, McKee, in the name of H. N. McKee, mortgaged said land to Toncray, and the mortgage was duly recorded March 8, 1890. In 1891 Edward W. Moffitt, Jr., died, unmarried and without issue, leaving his father, Edward W. Moffitt, and his mother, Ann Moffitt, him surviving, both residents of Holt county, Nebraska. October 31, 1892, Henry Herbage commenced his action to foreclose the Morrill mortgage, making Morrill and wife, Edward W. Moffitt, Jr., J. H. Alling, an assignee of a subsequent mortgage, H. N. McKee, C. H. Toncray and Schneider & Loomis, defendants. A summons was issued against and served on Edward W. Moffitt, Sr., who was not a party to the action. Schneider & Loomis made voluntary appearance. An affidavit for constructive service as to the other defendants was filed, and notice by publication given to them. The affidavit to the petition did not state that plaintiff did not know and could not discover the true name of said defendants, and the notice described them by initials only. January 27, 1893, default was entered in said action against all of the defendants, and a decree of foreclosure entered. April 3 the land was sold under the decree to Henry Herbage, and on the 6th day of May, 1893, the first order in confirmation was entered. The second order was not made in the lifetime of Herbage, who died testate, a resident of New York, on the 8th day of December, 1893. March 24, 1894, without any revivor of the action or decree, the court confirmed said sale, and ordered the then sheriff to make a deed to Herbage. The deed was evidently not made, and March 4, 1901, one Mackie, the executor of the Herbage will, made application for a deed for the real estate, and in the said foreclosure proceedings an order

was entered that the then sheriff execute a deed to said executor, which was done, and the deed duly recorded. Sarah Shimmons was named as the residuary legatee and devisee in the Herbage will. All the other legacies having been satisfied and the costs of administration paid, the said executor, for the purpose of transferring the testator's interest in said land, on the 6th day of April, 1901, executed to said Shimmons a quitclaim deed for said land, which was recorded April 15, 1901. The Herbage will does not seem to have been admitted to probate in Nebraska.

In the meantime Edward W. Moffitt, Sr., departed this life, and thereafter, the date not being shown, Mary Butler, defendant herein, secured a deed for the land from Ann Moffitt, the widow, and thereafter said grantor died. On the 23d day of April, 1904, Sarah Shimmons filed her petition against the unknown heirs of Edward W. Moffitt, Jr., all of the defendants in the Herbage foreclosure suit, and Mary Butler and husband, wherein she claimed that, by reason of the aforesaid facts, she became and continued to be the owner in fee simple of said premises, and asked that the court decree that the deed to her from Mackie, executor of the Herbage estate, conveyed a good title, and that said title be quieted and confirmed against all of said defendants. Mary Butler on the 23d day of May, 1904, procured a deed to herself for said land from Horace N. McKee and wife, and had it recorded on the 31st day of said month. She immediately took possession of the land, and has occupied it ever since. Prior to said date no one seems to have occupied the land. Butler paid the taxes for 1903, 1904 and 1905. Sarah Shimmons paid taxes for 1900, 1901 and 1902, and for the preceding years the record is silent as to such payment. Butler answered in said action, claiming to own the land in fee, challenged the jurisdiction of the court in the foreclosure proceedings as to McKee, the owner of said land, set up the statute of limitations, and asked that the petition be dismissed. In September, 1904, Sarah Shimmons departed

this life, and her action was revived in the name of her administrator and heirs. November 15, 1904, the said representatives of Sarah Shimmons filed a petition in the foreclosure suit, reciting in detail most of the foregoing facts, but claiming that all proceedings taken in the said suit subsequent to the death of Herbage were null and void. Butler was named as a party, and, whether summoned or not, she appeared therein. Said petitioners asked that the court hold that all of said proceedings subsequent to Herbage's death were null and void, and that Butler and all other persons named be required to redeem from the decree, or, in default thereof, be foreclosed of all equity of redemption in said land, and for equitable relief. Butler answered practically as in the suit to quiet title, and asked that the application be denied. Replies were filed. The court consolidated the two actions for trial, and found for Butler and dismissed the petitions. The Shimmons representatives appeal.

1. It is conceded by counsel that the foreclosure decree was void as to the defendants described by initial, and such is the law. *Encwold v. Olsen,* 39 Neb. 59; *Gillian v. McDowall,* 66 Neb. 814. It is also conceded that the judgment and proceedings did not bind the heirs of Edward W. Moffitt, Jr., because Moffitt was dead when said suit was instituted. Counsel also agree that the orders made in the foreclosure suit subsequent to January 27, 1893, the day Herbage died, are invalid, and for the purposes of this case we adopt their conclusion. Ten years and 23 days had passed subsequent to the maturity of the Morrill mortgage and prior to the commencement of the action by Shimmons to quiet her title, and 10 years, 7 months and 14 days elapsed subsequent to the maturity of said debt and before the institution of any proceedings in the foreclosure suit so as to bind the owner of the equity of redemption of said land; therefore the statute of limitations was a perfect defense. Section 6 of the code; *Merriam v. Goodlett,* 36 Neb. 384; *Nares v. Bell,* 66 Neb. 606.

2. Counsel insist that Sarah Shimmons and her representatives must be considered as mortgagees in possession and that the statute will not run against them, but that they must be paid the mortgage debt before they can be dispossessed. Unfortunately for plaintiffs neither they nor their predecessors have occupied the land. It seems to have been wild, unimproved and unoccupied, and, prior to Mrs. Butler taking actual possession thereof, the possession in law was in McKee, the owner of the equity of redemption. *Yorgensen v. Yorgensen,* 6 Neb. 383; *Troxell v. Johnson,* 52 Neb. 46. Nor did the sheriff's void deed to the executor and the executor's conveyance to Sarah Shimmons give her a constructive possession of the premises so as to entitle her to the benefit of the statute of limitations. *Bull v. Beiseker,* 16 N. Dak. 290; *Hoffine v. Ewings,* 60 Neb. 729.

3. Finally, it is urged that as a condition to equitable relief Mrs. Butler should be compelled to pay the mortgage. Mrs. Butler did not ask for or receive affirmative relief. She did not commence the action, and when brought into court defended, as she had a right to do. Whatever cloud was created on the title to the land by virtue of the transactions herein related still remains, and must continue, but Mrs. Butler was entitled to a dismissal of the actions. *Peterson v. Ramsey,* 78 Neb. 235.

We do not find any error in the record, and recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

LANDIS & SCHICK, APPELLANTS, V. GEORGE WATTS, APPELLEE.*

FILED SEPTEMBER 16, 1908. No. 15,281.

1. **Evidence: ADMISSIBILITY.** If the evidence relative to a material fact is conflicting, any collateral fact or circumstance tending in a reasonable degree to establish the probability or improbability of the disputed fact is relevant and properly admitted, although it may not tend directly to prove any issue in the case.
2. **———: EXPERTS.** Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.
3. **Appeal: CONFLICTING EVIDENCE.** In law cases the verdict of a jury will not be set aside if based upon conflicting evidence, unless that verdict is clearly wrong.

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

T. L. Norval, Ray J. Abbott and *C. A. Robbins,* for appellants.

M. D. Carey, contra.

ROOT, C.

Action on an alleged account stated in settlement for attorney fees. Defendant prevailed, and plaintiffs appeal. Shortly after the termination of the litigation wherein plaintiffs appeared for defendant, he paid them $100, and they claim that he then agreed to pay $125 additional in settlement of their account. Defendant denies making the promise, and says that he paid plaintiffs more than their services were worth, and all that he intends to pay.

1. Error is predicated on the admission of testimony tending to prove the value of plaintiffs' services. The court instructed the jury that said testimony should be

* Rehearing allowed, reversed. See opinion, 84 Neb. ——.

considered solely for the purpose of determining whether an account was stated between the parties, and that, if such a settlement had been made, it was immaterial whether or not their services were worth the sum claimed. We are of opinion that the testimony was admissible. The testimony concerning the settlement was conflicting, and any evidence that would reasonably tend to establish the probability or improbability of the fact in issue was properly admitted. *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834; *Farmers State Bank v. Yenney*, 73 Neb. 338; *Blomgren v. Anderson*, 48 Neb. 240; *Lincoln Vitrified Paving & Pressed Brick Co. v. Buckner*, 39 Neb. 83. If the jurors believed that the services rendered were not worth more than $50 to $100, they would be justified in considering that an agreement to pay more than twice that sum was unreasonable and improbable.

2. That the hypothetical questions do not fairly reflect the evidence. The questions are not models, but they present generally defendant's testimony as to the scope of the services to be performed and actually rendered by plaintiffs, and we are of opinion that the answers thereto did not mislead the jury. Moreover, two at least of the witnesses had actual knowledge of the greater part of the work performed by plaintiffs for defendant, and the court did not commit reversible error in admitting the testimony. *Morrill v. Tegarden*, 19 Neb. 534; Code, sec. 145.

3. That the verdict is contrary to the evidence. The evidence is conflicting, and there are many circumstances tending to corroborate plaintiffs and discredit defendant, but if the jurors believed defendant's testimony, and rejected that of plaintiffs, they were justified in finding as they did, and we cannot lawfully disturb the verdict.

The record does not exhibit prejudicial error, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. ALLEN G. FISHER, DEFENDANT.*

FILED OCTOBER 8, 1908. No. 15,152.

1. Evidence examined, and found sufficient to sustain the findings against respondent.
2. Attorneys: UNPROFESSIONAL CONDUCT. Where an attorney in presenting a claim against the state to the legislature knowingly supports the same by a false, forged and fraudulent appraisement as evidence of its validity and of the amount he is entitled to recover thereon, he is guilty of gross, unprofessional conduct, and a breach of sound professional ethics, and should receive suitable punishment therefor.
3. Costs: DISBARMENT PROCEEDINGS. In the absence of any statute providing for the taxation of costs in proceedings for disbarment, it is proper for the court to require each party to pay his own costs.

PROCEEDINGS in disbarment. *Respondent disbarred.*

William T. Thompson, Attorney General, and *W. B. Rose,* for the state.

Halleck F. Rose and *Charles A. Robbins, contra.*

BARNES, C. J.

This is a proceeding to disbar the respondent, Allen G. Fisher, who is an attorney at law, duly licensed to practice his profession in all of the courts of this state. It was instituted by the attorney general in response to a resolution of the house of representatives of the legislative assembly of 1907.

*Rehearing denied. See opinion, p. 367, *post.*

It appears that some time prior to the year 1901 one Herman Goedde, a subject of the kingdom of Prussia, departed this life in Sioux county, Nebraska, seized of a section of land situated in said county; that he left him surviving as his heirs certain brothers and sisters residing in his native country; that the respondent was professionally employed by them to look after their interests in their deceased brother's estate; that he entered into a contract by which he was to procure for them the sum of $1,000, and was to have and reserve to himself whatever he might secure therefor or therefrom over and above that amount. Acting under the belief that the land in question would escheat to the state, the respondent procured the county attorney of Sioux county to prosecute an action in the district court to that end, and in which respondent appeared as attorney for said heirs, and admitted the facts alleged in their petition; and, further, by way of an admission stated that the land in question was worth the sum of $8,000. A decree was thus obtained declaring said lands escheated to the state. It appears, however, that the value of the land was not fixed by the decree, but an appraisal thereof was ordered, which was had accordingly, and its value was fixed by said appraisement at $1,500.

Taking the proceedings above described as a basis therefor, the respondent filed with the auditor of public accounts, and presented to the legislative assembly of 1901, a claim for payment for said land, in which he alleged that its value was $8,000, and as proof thereof referred to said decree and a copy of the appraisement, which respondent stated was attached to and made a part of his claim. No copy of the appraisement was in fact attached to the claim, and for that reason it was disallowed and rejected. It further appears that, after the appraisement was made, its amount was fraudulently changed and altered from $1,500 to $11,500; that respondent again presented the claim to the legislative assembly of 1903, and attached thereto a copy of said changed,

fraudulent and altered appraisement, and said claim was again rejected and disallowed. It also appears that the respondent again presented his claim to the legislature of 1905, together with said fraudulent, false and altered appraisement, and pressed the same for allowance, and for a third time it was disallowed and rejected. The matter remained in that condition until the meeting of the legislature of 1907, when certain other persons, claiming to act for the Goedde heirs, presented a claim to that body for compensation for said land on the supposition that it was escheated to the state. The respondent was thereupon called before the claims committee of the house, and disclosed the fact that he had recently purchased the land in question from his clients for the sum of $1,000, less a commission of $50, and was then the owner thereof. His disclosures resulted in the resolution above mentioned.

On the 16th day of April, 1907, the attorney general filed the information contained in the record herein, which which need not be set forth, and to which the respondent filed his answer, denying the charges therein contained. Thereupon the matter was referred to a committee of attorneys of this court, consisting of Honorable Charles H. Sloan of Fillmore county; Honorable Walter L. Anderson of Lancaster county, and Honorable H. P. Leavitt of Douglas county, who are also members of the state bar commission, with directions to hear the testimony, and to find and report their conclusions of fact and law. In obedience to this order, the committee has taken the testimony and filed its report. We do not deem it necessary or expedient to set forth the report in full in this opinion, and it is sufficient to say that, so far as it was adverse to respondent, it set forth that by the aid and connivance of the county attorney of Sioux county respondent procured the decree above mentioned; that the land in question was appraised and valued at $1,500; that some one unknown to the committee fraudulently changed and altered the same after it was filed in the office of the clerk

of the district court for said county by inserting a figure "1" before the figure "5" therein, thus making it appear that the value of the land was $11,500, instead of $1,500, the true amount at which it was appraised; that respondent verified and filed a claim against the state for the sum of $8,000, which he presented to the legislative assembly of 1901, and attempted to procure the allowance and payment of the same; that he again presented said claim to the legislative assembly of 1903, and after having increased the amount thereof from $8,000 to $11,500 presented a copy of said false, fraudulent, forged and altered appraisement in support thereof; that he presented said claim to the legislative assembly of 1905, and at that time he knew or was charged with knowledge of the false, fraudulent and altered condition of the appraisement, and used a copy thereof as evidence and proof of the value of said lands; that he thus attempted to wrong, cheat and defraud the state to his advantage. The respondent has filed his exceptions to said report, and a motion for judgment in his favor dismissing the proceedings; and the attorney general has also filed a motion for a judgment disbarring respondent, and the case has been argued and submitted on the record and the motions above mentioned.

That the procedure adopted in this case is the proper one there can be no doubt, for that matter was fully and finally settled by our decision in *State v. Burr*, 19 Neb. 593, and so the first question to be determined is the one raised by respondent's exceptions to the report of the committee. Upon this branch of the case, we can say that we have carefully read all of the evidence, and find that it fully and amply sustains the findings of the committee, and defendant's exceptions are therefore overruled.

We come now to consider respondent's motion to dismiss this proceeding nothwithstanding the findings. It is strenuously contended that the facts found by the committee, as above stated, do not constitute the offense or any part of it charged in the information, and are not

sufficient to sustain a judgment of disbarment against the respondent. From an examination of the many authorities cited on both sides of this controversy, we are impressed with the thought that, in proceedings for disbarment on account of unprofessional conduct, the findings and judgment, as well as the degree of punishment inflicted by the court therefor, have depended largely on the individual temperament, beliefs and feelings of the judges before whom such proceedings have been conducted, and so no hard and fast rule for the determination of cases like the one at bar can be invoked. In *State v. Finley,* 30 Fla. 325, 18 L. R. A. 401, the respondent was found to have inserted in a decree, after it was signed by the chancellor, certain immaterial words, and the court, among other things, said in that case: "We do not wish it to be understood that we are inclined to condone, palliate, countenance or excuse any manner of tampering with the decree of a court after it obtains the sanction of the judge's signature, even to the crossing of a T or dotting of an I therein; on the contrary, we think that such a practice is highly reprehensible, and deserves severe punishment, no matter how innocent or immaterial the alteration or change may be." But it was held in that case that disbarment was too severe a sentence, and that a reprimand or suspension for a time was a more suitable punishment.

Now, in the case at bar, the respondent was acquitted of changing or altering the appraisement, and it is quite probable that he did not know of its alteration until after he presented his claim to the legislature at its session of 1903. But it appears that during that year his attention was directed to the matter, and he must have known that fact when he again presented the claim in 1905. There is no escape from this conclusion, and so when he used the fraudulent appraisement to support his claim, after having knowledge of its condition, he was guilty of gross, unprofessional conduct, and a breach of sound professional ethics. His conduct having been brought to our

attention by this proceeding, we are not at liberty to overlook or condone it. Such conduct in an officer of this court not only merits, but actually requires, discipline therefor. The committee has by its report recommended leniency in this case, and, in view of all the circumstances disclosed by the record, we are disposed to adopt the recommendation. The respondent is a man past middle life, with a family dependent upon him for support and education, and, so far as we are advised, has no other means than his professional earnings by which he can maintain and educate them. The end to be attained in proceedings of this nature is protection to the public and to the good name of the profession, and not severe punishment. Respondent's expulsion from the bar will blast all his hopes of prosperity to come, mar the fruits expected by him from the training of a lifetime, and deprive his family of their maintenance and education. We are, therefore, of opinion that the punishment of removal from office would be unreasonably severe in this case; that suspension more nearly accords with the offense of which respondent has been convicted. His motion is therefore overruled; the motion of the state is sustained in part, and to the extent only that the report of the committee is adopted, and its findings are hereby approved; and it is further ordered that respondent be, and he is, hereby suspended from the practice of his profession of attorney and counselor at law in this and the district courts of this state for the period of one year; but, in order to protect the interests of his clients, the suspension shall not take effect until January 1, 1909.

The state has also asked that all of the costs of this proceeding be taxed against the respondent. In determining that matter, we find that in *Morton v. Watson,* 60 Neb. 672, it was held: "In disbarment proceedings costs cannot be taxed against the informers, at least where the informers acted in good faith in bringing the alleged misconduct of the attorney to the attention of the court." The ruling there announced was based on the proposition

that at law costs are mere creatures of the statute, and as there is no statute specifically providing for the taxation of costs in proceedings of this nature, and as the awarding of costs depends thereon, we are of opinion that we should overrule the application of the attorney general, and such ruling will accord with the great weight of authority on this question. We deem it proper, however, in this case to require each party to pay his own costs, and it is so ordered; and judgment will be entered herein in accordance with this opinion.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed January 9, 1909. *Rehearing denied:*

FAWCETT, J.

In the opinion by BARNES, C. J., in this case, it is said: "It further appears that, after the appraisement was made, its amount was fraudulently changed and altered from $1,500 to $11,500; that respondent again presented the claim to the legislative assembly of 1903, and attached thereto a copy of said changed, fraudulent and altered appraisement, and said claim was again rejected and disallowed. It also appears that the respondent again presented his claim to the legislature of 1905, *together with said fraudulent, false and altered appraisement,* and pressed the same for allowance, and for a third time it was disallowed and rejected." Respondent's application for rehearing is based almost entirely upon the words quoted from the opinion of BARNES, C. J., which we have italicized. Respondent says that "the commission did not find that defendant, in presenting a claim to the legislature in 1905, 'knowingly supported it with a false, forged and fraudulent appraisement as evidence of its value.'" Respondent's argument is to the effect that the commission did not make any such finding, and that there was no evidence in the record to that effect. Tech-

nically speaking, respondent is right in this contention. The commissioners did not find that the fraudulent appraisement was attached to the claim when it was presented to the legislature of 1905; but it appears from the record that between the sessions of 1903 and 1905 the appraisement had disappeared. The statement by the chief justice that respondent presented the fraudulent appraisement with his claim in 1903 is supported both by the evidence and the findings of the commission. If we eliminate the italicized words above referred to, so as to make the opinion of the chief justice read: "It also appears that the respondent again presented his claim to the legislature of 1905, and pressed the same for allowance, and for a third time it was disallowed and rejected," the opinion would be literally correct. The criticism of the opinion as written, however, is technical, and not real. If he presented his claim to the legislature of 1903 with the fraudulent appraisement attached, and pressed the claim for allowance, he was guilty of everything charged against him; and, if he then presented the same claim to the legislature of 1905, he would be guilty of a repetition of the offense of 1903, even though the fraudulent appraisement had been abstracted in the meantime. If the chief justice cares to correct his opinion by striking out the italicized words, all right; although we do not see any necessity for so doing.

In his typewritten brief, filed December 15, 1905, calling attention to the bunch of papers marked "Showing in support of petition for rehearing," respondent says: "This claim was not supported by any certified copy or any appraisal in 1903. In proof of this, defendant asks an examination of the report and opinions of Attorney General Prout, 1903, 1904, wherein, at page 35, is said relative to this claim then before the committee: 'The transcript at the present time is in the same condition it then (1901) was, except that a new voucher has been attached, which is filed simply as an amendment and supplement to the proof on said original claim No. 55,846. On the back of

which voucher is a typewritten statement, purporting to show an appraisement of these lands by the county judge, county clerk and county treasurer of Sioux county at $11,500, which purports to have been sworn to October 10, 1900. To this appraisement there is no valid authentication, the purported certificate of the district court being signed by a typewriter, and not authenticated by the seal of the court.' Here, then, is an official report by the legal department of the state that no appraisal was then presented to the committee, which had asked this information, upon the actual papers by the defendant in 1903." In other words, respondent insists that no appraisal was attached to his amended claim in 1903, because the purported certificate of the district court was signed by a typewriter, and not authenticated by the seal of the court. In his testimony, however, given before the legislative committee, attached to his "showing in support of petition for rehearing," we have the following: By Mr. Casebeer: "Q. You may state, if you know, the amount of the appraisement of this land? A. The amount that is contained in the original appraisement? Q. There is only (one) appraisement, as I understand it. A. You asked about an affidavit. Q. But you failed to answer directly. What I wanted to know was what was that land appraised at? A. If you will let me look at the second claim, I will tell you. Q. Is that what you mean (showing witness a paper)? A. Yes; on the 31st of January, 1903, I prepared, and on the 3d of February, 1903, I filed, an amended claim, *and that has written on the back of it a certified copy of the appraisal.* Q. Will you state to this committee why there is a difference of $10,000 between the affidavit that is furnished this committee by the clerk of the district court and this claim that is filed by you? A. The difference is because the clerk made this affidavit, sir. That is all the difference. The original paper on file says $11,500 in the clerk's office. Q. In your amended voucher you swear that the appraised valuation of the land in

evidence was $11,500. On what facts do you base such a statement? A. Let me see the paper, and I will see whether I swore to that or not (handing witness a paper). I do not know whether I swore that that was correct or not. It don't make any difference, the basis for it is this copy on the back of there, *which is a true copy of the certified copy of that appraisal which was in my office at the time.* Q. If this is a certified copy of it, then why did you, four years ago, file this as a true copy? This is, as I understand, the original claim filed by yourself? A. Yes; before the legislature of 1901, marked claim No. 203. At the time I got the transcript I did not know that any appraisal had been made, or I certainly would have attached it, and the claim would have been for $11,500 instead of $8,000. Q. Then you base the claim of $11,500, do you, upon the fact that you did not know what the appraisement was? A. No, sir. Q. Then will you state why? A. Why, I base the claim for $11,500 *that I swore to* there on the fact *that I knew that the appraisement was $11,500 and had a certified copy in my possession in February, 1903.* In February, 1901, I filed for $8,000. I did not know that it was for $11,500, or I would have filed for $11,500." It will be seen from the above testimony that his statement in his typewritten brief that the claim was not supported by any certified copy or any appraisal in 1903 is puerile. So far as his offense is concerned, it matters not that that appraisement was not properly authenticated, when he states in his own examination that, when he swore to the claim for $11,500, he based his statement on the fact that he knew the appraisement was for $11,500, "and had a certified copy in my possession in February, 1903."

The motion for rehearing is without merit, and should be

OVERRULED.

RED LINE MUTUAL TELEPHONE COMPANY, APPELLEE, V. HENRY L. PHARRIS, APPELLANT.

FILED OCTOBER 8, 1908. No. 15,289.

1. Contracts: EVIDENCE. Evidence of a conversation in which one party states mere conclusions as to a contract is not evidence of the contract.
2. Telephones: REGULATION. The courts will not interfere with the proper administration of the business affairs of a litigant, but, when necessary, will render assistance therein.

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

F. H. Stubbs, for appellant.

W. F. Buck, contra.

EPPERSON, C.

The plaintiff is a Kansas corporation, a mutual tele phone company, with its principal place of business at Burr Oak, Kansas, and authorized to transact business in Nebraska. Burr Oak is about 24 miles from Superior, Nebraska. In May, 1905, the plaintiff extended its line to Superior, coming past the home of the defendant, six miles west of Superior. Prior to the construction of this extension, the defendant and others residing along the line subscribed for shares of stock in the plaintiff company. Before the line was completed, it became apparent that one wire would be inadequate for the service, and, as a result, another wire was placed along the same route from Superior to the defendant's home. The short wire is known as line 224, while the wire from Burr Oak to Superior is known as line 225. When the line was constructed, both wires were run to the defendant's telephone, where a switch belonging to defendant was installed by which the defendant was enabled to use either wire. It is the defendant's contention that the subscrip-

tion for his share of stock, and a verbal agreement made at the time it was given, amounted to a contract whereby he was to be connected with line 225; that thereafter the plaintiff company proposed to attach only the wire known as line 224 to his telephone; that, upon his insistence that he be connected directly with line 225, the plaintiff, acting through its president, agreed to and did install the switch, and connected it with both the lines; that this was done by agreement which was substituted for the original contract. Relative to the switch, Mr. Wilsman, the then president of the plaintiff company, testified: "So far as the line switch was concerned, I agreed to put it in on my own responsibility, put it in with the understanding that I would report it to the board of directors. * * * That if they disapproved of it he, Mr. Pharris, should take it out. He said he would, or agreed to take it out, if the board disapproved." The president reported the installing of the switch to the board of directors, who disapproved of the same, and ordered it disconnected. Defendant disregarded this order, and several months later the plaintiff disconnected the wire leading from line 225 to defendant's switch. Defendant reconnected the same, and threatened to do so as often as the plaintiff would disconnect. Plaintiff thereupon instituted this action to enjoin the defendant from thus interfering with plaintiff's line. Upon trial, the district court found for the plaintiff and rendered the judgment prayed for.

The evidence shows that without defendant's connection with line 225 it is burdened to its full capacity by other telephone connections. It is also apparent that the defendant through line 224, and a switch board in Superior, is connected with all the patrons on line 225, and with other lines belonging to the plaintiff company and with the telephone exchange in the city of Superior. It is but little inconvenience to the defendant to communicate with the patrons on line 225 by calling the central office at Superior. The only difference seems to be that, if line 224 was out of order, it would be sometimes diffi-

cult or impossible to get the central office; and, further, having the switch, he could call directly to the patrons on line 225. We cannot see any particular reason why special privilege, if it may be called such, should be given to the defendant. The other patrons of the plaintiff pay the same amount as does the defendant and are connected directly with but one line.

When defendant subscribed for his share of stock, he and the officers of the plaintiff contemplated that but one wire would be run along the route. But thereafter so many persons took stock and desired connection that the other wire was necessary. The defendant's evidence is not sufficient to prove the contract he relies upon. Defendant subscribed in writing for his share of stock early in May, 1905. This contains no provision that there should be but one wire along the route, nor that he should not be required to use a central office to make connections. The evidence of the contract relied on by the defendant appears in his testimony substantially as follows: About three weeks after the stock was subscribed for, Wilsman told defendant that the line was going to be heavily loaded, and that they proposed to run another line from Superior out to the defendant's home; that defendant's neighbors east of him will go on that line, and the other people will go on the Superior-Burr Oak line. Defendant told Wilsman that that was not what he bought, and was not according to the contract; that all were to be on one wire. This is evidence of a conversation presenting defendant's conclusion as to what the contract was, but it is not evidence of the contract itself. After further talk, unnecessary to repeat, Wilsman told defendant, if he would go over on line 224, that he would put in a switch which he could use when he wanted to communicate with those connected with line 225, and that there would be no objections to the switch. Thereupon, defendant consented to the arrangement, the switch was installed, and used until about September 1, 1906. At most, the contract between the parties was that adequate means of communica-

tion with the patrons of the plaintiff company should be given to the defendant. When the switch was installed, no other satisfactory means existed which would enable him to communicate with the patrons on line 225 on account of a defective or insufficient switchboard in the central office at Superior; but thereafter a new switchboard was installed, by the use of which the defendant was given satisfactory service, and the necessity for the switch upon his own telephone is now unnecessary. The contract will not permit the defendant perpetually to maintain his switch. Conceding that the contract contemplated but one line, it is not violated by the construction of two wires along the line, even though for convenience the wires were given different names, and are connected at a central office when desired.

The demoralizing effect of the defendant's maintenance of the switch is not a matter of conjecture, but is apparent from the evidence in this case, and is stated by the witness, Mr. Keifer, now president of the company, as follows: "Tends to make the line inefficient, made hard feelings, made trouble and discord on the line. They think the defendant gets more service for his money than he is entitled to. He has the only switch on the line. Other people would clamor for switches, and destroy the whole line, if they all got switches where two lines passed their place. Other people are, in fact, waiting for switches if this switch is allowed to be maintained." The proper and businesslike affairs of the plaintiff seem to demand that defendant's switch be removed, and with plaintiff's purpose to remove it the courts will not interfere, but, necessity demanding it, will render assistance.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOSEPH WIRUTH, APPELLANT, V. WILLIAM D. LASHMETT ET AL., APPELLEES.*

FILED OCTOBER 8, 1908. No. 15,291.

1. **Principal and Agent: FRAUD.** The exalting of value by an agent employed to purchase real estate for his principal beyond what he believes it to be is not permitted, and, if the principal relies upon the representations of the agent, the latter and his co-conspirator are liable in damages.
2. **Trial: VERDICT.** In an action for the recovery of money only, a verdict of the jury which finds that the plaintiff is entitled to recover a certain amount in cash and also three notes, described in the verdict, is erroneous.

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

B. F. Hastings, Bartos & Bartos and *Hall, Woods & Pound,* for appellant.

W. L. Rutledge and *E. J. Clements, contra.*

EPPERSON, C.

Plaintiff alleged in detail facts which may be stated substantially as follows: April 16, 1904, plaintiff was the owner of 560 acres of land in Perkins county, Nebraska, of the value of $4,400, and also owned considerable personal property; that plaintiff employed defendant Lashmett to negotiate an exchange of this property for farm lands in Butler county; that Lashmett and the defendant Fritzinger entered into a conspiracy to cheat and defraud plaintiff, in pursuance of which the defendant Fritzinger purchased of one Voss school land leases of 160 acres of land in Butler county, and that said defendants procured plaintiff to exchange his land, with all the improvements thereon, and personal property to the value of $2,200 for the said school land leases and im-

*Rehearing allowed.

provements upon the school land, and in addition thereto, as a part of the consideration for said school land leases, plaintiff gave to the defendant Fritzinger his two promissory notes for $1,400, bearing 8 per cent. interest per annum, and secured by a chattel mortgage on 50 head of horses. It is further alleged that, in order to procure the plaintiff to make such exchange of property, the defendants falsely and fraudulently represented that the said school land was of the rental value of $4.50 an acre; that, exclusive of improvements, the land was worth $65 an acre; that they were appraised and valued by the state of Nebraska for the purpose of fixing the rental thereof at the sum of $25 an acre, and that said $25 an acre valuation by the state of Nebraska was in the nature of a first mortgage to the state for said sum, and that the land, exclusive of improvements, was of the value of $40 an acre, or $6,400 to the holder and owner of the lease, over and above the interests of the state of Nebraska; that the improvements thereon were of the value of $1,500. Plaintiff alleges that he relied upon the representation of the defendants, but that said school land was of the reasonable value of $4,000 only, and that the leases were of the value of but $1,000, including the buildings. He sues to recover damages, alleged at the sum of $6,972. By separate answer, each defendant admits that plaintiff was the owner of property described in his petition, and hired the defendant Lashmett to obtain an exchange of the same; that plaintiff did trade said property to defendant Fritzinger for the school land described in the petition, and that plaintiff gave the notes and mortgage as alleged, and, as a defense to the action, defendants each allege that the parties themselves had made a full and complete settlement of the matters in dispute. Plaintiff recovered in the court below, but, being dissatisfied with the amount, has appealed.

Upon the trial, the court gave instructions numbered 5 and 6, requested by the defendants, which are as follows: "(5) You are instructed that a purchaser who had an opportunity to see and who did see and examine the prop-

erty before he traded for it cannot maintain an action against the party of whom he bought, solely on the ground that the vendor made false statements in regard to the value of the property or its rental value, as such purchaser is bound to rely on his own judgment in regard to such matters, and not on the statements of the vendor. (6) You are instructed that, when parties are negotiating a trade for property, which there is an opportunity to examine, and which they do examine, each has the right to exalt the value of his property to the highest point the other party's credulity will bear, and depreciate the value of the other's property. Such assertions as to value do not amount to fraudulent misrepresentations or deceit. In such cases the parties are upon equal grounds, and each one's judgment must be his guide in coming to conclusions." As abstract propositions of law, we cannot see that these instructions are erroneous. The rules therein contained would apply in an action by the vendee against the vendor of real estate for the fraudulent representation as to the value of real estate. The rules are inapplicable to the case at bar. The distinction is obvious. In an action by the vendee against the vendor where the vendee has an opportunity to exercise his own judgment regarding the value of the property, he must exercise the same. He is dealing with his vendor at arms' length. He is not justified in taking as true the representations of his vendor as to value. On the other hand, where a vendor is not dealing with his agent in matters falling within the scope of the agency at arms' length, he has the right to the utmost good faith on the part of his agent. He has a right to believe that the agent is acting for his best interest. The exalting of value by an agent employed to purchase for his principal beyond what he knows it to be is not permitted, and, if the principal relies upon the representations of his agent, the latter and his co-conspirator must be held responsive. The parties are not upon equal grounds. The principal is not required to rely upon his own judgment. He employed

the agent instead that he might have the benefit of the agent's judgment.

It is the defendant's contention that an erroneous instruction as to the right to recover is without prejudice, if the jury find for the party against whom the error was committed. But we find three issues in this case which affect the right of recovery. They are: Fraudulent representations of the value of the land; the value of the leases; and the value of the improvements. Therefore, the objectionable instructions pertain not only to the right of recovery, but also to the amount. A finding for the plaintiff under these circumstances does not indicate that the jury were not influenced by the erroneous instructions. If the jury applied the instructions to any one of the elements of damages, and it may have done so for aught that appears in the record, the error was prejudicial. By the verdict, the jury found that plaintiff was entitled to recover $250 in cash, and also three notes, one of which did not relate to the transaction complained of. This was erroneous, but as it will not probably be repeated upon a new trial we need not determine whether or not it was prejudicial.

We recommend that the judgment be reversed and the cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

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

REVERSED.

SAMUEL Z. BATTEN ET AL., APPELLANTS, V. JACOB KLAMM, APPELLEE.

FILED OCTOBER 8, 1908. No. 15,313.

1. Intoxicating Liquors: LICENSE: DUTY OF BOARD. In the matter of granting a license for the sale of intoxicating liquors, it is the duty of the licensing board to see to it that the licensee is a man of respectable standing and character. It is not permitted them to indulge the presumption that an applicant is of good standing and character, when it is denied by remonstrance.

2. ———: ———: PETITION: AFFIDAVITS AS EVIDENCE. Affidavits are incompetent to prove that the petitioners for a liquor license are freeholders when that question is properly placed in issue by remonstrance.

3. ———: ———: EVIDENCE. Upon the hearing before the excise board, a witness testified to circumstances which, if true, would establish sales of liquor by applicant to a minor during the preceding year. The board refused either to require the witness to disclose the name of the minor or to strike out his testimony. *Held*, Error.

4. ———: ———: APPEAL. Cities having excise boards who by statute are given exclusive power to license and regulate the sale of intoxicating liquors cannot appeal from an order denying or granting a license.

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

John M. Stewart, T. F. A. Williams and *J. M. Guile*, for appellants.

E. F. Pettis, contra.

EPPERSON, C.

Jacob Klamm, the appellee, made application to the excise board of the city of Lincoln for a liquor license for the year beginning May 1, 1907. A remonstrance was filed, in which, among other things, it was specifically denied that the petitioners are resident freeholders, remonstrators demanding strict proof as to each and every

one of them; and it was denied that the applicant was a man of respectable character and standing. It was alleged that during the preceding year the applicant, who then held a liquor license, had been guilty of selling liquor to habitual drunkards. There was also a general allegation that he had violated the law regarding the sale of liquor in the conduct of his business during the past year. The board denied the petition, but on appeal the district court overruled the remonstrance and directed the issuance of the license. Some of the remonstrators and the city of Lincoln appeal.

No evidence whatever was introduced for the purpose of showing that the applicant was a man of respectable character and standing. It is the policy of our liquor law that no liquor license shall be issued to any person, except the licensing board is satisfied that such person is a man of respectable standing and character. It is the duty of the board to see to it that each applicant is qualified, and so strict is the law in this respect that it is not permitted to indulge the usual legal presumption that a person is of good character and standing. We are cited to cases in other states holding that it is unnecessary for an applicant to prove his good moral character in the absence of evidence tending to impeach the same; in other words, that the usual presumption as to good moral character should prevail. But such is not the rule adopted by this court. See *In re Krug*, 72 Neb. 576; *In re Tierney*, 71 Neb. 704; *Brinkworth v. Shembeck*, 77 Neb. 71.

No sufficient evidence was introduced to prove that 33 of the 36 petitioners were freeholders within the ward, unless their affidavits are to be considered. It has been repeatedly held that, where remonstrators deny that the petitioners are freeholders, competent evidence must be introduced by the applicant to prove this fact. We are now called upon to determine whether or not affidavits are competent as evidence. It is the general rule that litigated issues of fact cannot be tried upon affidavits. We see no reason why there should be an exception in cases

of this nature. One reason for the rule is that by the use of affidavits the adverse party has no opportunity to cross-examine the witnesses. This alone, we think, should be a sufficient reason for holding that the affidavits were incompetent. The remonstrators are as much entitled to examine the witnesses upon this question as upon any other issue which may be presented.

One witness called by the remonstrators was permitted to testify to circumstances which, if true, would establish sales of liquor by applicant to a minor during the preceding year. The witness refused to disclose the name of the minor, and upon motion of the applicant the board refused to strike out his direct examination. This was clearly error. The board should either have required the witness to disclose the name of the minor or should have stricken his evidence. It is not sufficient to prove an illicit sale of liquor by such evidence as this. The applicant should have been given an opportunity to refute the evidence by calling any witness available who was acquainted with the facts. This was denied him because the name of the supposed minor was withheld. If the case depended upon this point, we would surely sustain the action of the district court in reversing the decision of the excise board.

We held recently that the excise board could prosecute an appeal to this court from the judgment of the district court. This decision was reached partly because by the statute the excise board is given the exclusive control of licensing and regulating the sale of intoxicating liquor in the city. The board is composed of public officers whose duty it is to look after the interests of the city in all matters pertaining to the licensing of liquor dealers. So long as this special function is entrusted solely to this board, we are of the opinion that other officers of the city and the city itself have no legal power to prosecute an appeal. We would not entertain this case were it not for the appeal herein by remonstrators.

Because the applicant failed to prove that the petition-

ers were freeholders, and that he himself was of good character and standing, the judgment of the district court should be reversed and the order of the excise board confirmed.

DUFFIE and GOOD, CC., concur.

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

REVERSED.

NELS P. NORTNASS ET AL., APPELLANTS, V. PIONEER TOWNSITE COMPANY ET AL., APPELLEES.

FILED OCTOBER 8, 1908. No. 15,294.

1. **Dower: LAND CONTRACT.** A married woman has no inchoate right of dower in real estate which her husband holds under a contract of purchase, having paid only a part of the purchase price. An assignment of such a contract of purchase duly signed and acknowledged by the husband alone is sufficient to transfer to his assignee all his interest in the land so held.

2. **Courts: RULE OF PROPERTY.** When a former decision of this court has established a rule of property, which has been relied upon for many years as the foundation of real estate titles, the court will not overturn such rule, although it cannot assent to the reasoning upon which it is based. *Grandjean v. Beyl*, 78 Neb. 354, followed and approved.

3. **Vendor and Purchaser: CONTRACT: VALIDITY: INTENT OF VENDEE.** A contract between a vendor and vendee of real estate is not affected by any secret intention of the vendee to use the premises for an immoral or unlawful purpose.

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

Albert W. Crites, for appellants.

B. T. White, Allen G. Fisher and *Justin E. Porter, contra.*

GOOD, C.

This action was brought by Nels P. Nortnass and wife against the Pioneer Townsite Company, Paris G. Cooper and O. R. Ivins to compel the last named defendants to convey to the first named plaintiff outlot "C" in the city of Crawford, Nebraska. On the trial of the cause defendants had judgment, and plaintiffs appeal.

In 1902 plaintiff Nels P. Nortnass entered into a written contract with the Pioneer Townsite Company for the purchase of said outlot on stated annual payments. All of the payments except one were made by him. In 1906 the defendants Cooper and Ivins entered into negotiations with Nortnass for the purchase of the lot. The price agreed upon was $600, out of which the remainder due to the townsite company and taxes due were to be paid, the remainder of the $600 to be paid to Nortnass. Nortnass and Cooper and Ivins went to the First National Bank of Crawford, where Cooper and Ivins procured the $600, which was deposited in the bank until the amount of the indebtedness against the land was ascertained and paid, and a deed was procured from the townsite company, when the remainder was to be paid to Nortnass. At the time the money was deposited, or immediately thereafter, Nortnass signed and acknowledged an assignment of his contract to Cooper and Ivins. A question was raised as to whether or not it was necessary for Nortnass' wife to join in the assignment. An effort was made to obtain legal advice, but the attorney desired was out of town. The matter was left to be closed up when the attorney returned; and, if he advised that the signature of the wife was necessary, then the signature of the wife was to be procured. A few days later the attorney advised that the wife's signature was not necessary, but that it would be better to have her join in the assignment. An effort was made to have her join in the assignment, but she refused. Thereupon the defendants Cooper and Ivins caused the remainder due the townsite company to be paid, and

accepted a deed from the townsite company. Nortnass and wife brought this action on the theory that the assignment was void without the wife's signature, and also that the assignment was not to be effective unless the wife consented to join in the assignment. Plaintiffs also seek to avoid the effect of the assignment on the ground that the defendants Cooper and Ivins contemplated the erection of buildings upon the premises to be used for purposes of prostitution.

Plaintiffs contend that the wife, Anna Nortnass, has an inchoate dower estate in the outlot, which she has never agreed to convey, and which was sufficient to enable the parties to join in maintaining the suit for the recovery of the title of the husband. In *Cutler v. Meeker,* 71 Neb. 732, it was held that the interest of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator; that it is alienable, descendible and devisable in like manner as if it were real estate held by a legal title. In *Crawl v. Harrington,* 33 Neb. 107, it was held that, where one had purchased school land from the state and paid a part of the purchase price, receiving a contract of sale, and thereafter assigned to another, the wife of the first purchaser had no dower interest in such land. The holdings of this court in these two cases are clearly inconsistent. The inconsistency is pointed out and discussed at length in *Grandjean v. Beyl,* 78 Neb. 354. In the last mentioned case the rule announced in *Crawl v. Harrington* was adhered to by a divided court upon the ground that the rule there laid down had become a rule of property. Regardless of the unsatisfactory reason, or, rather, want of reason upon which the rule was founded in *Crawl v. Harrington* and adhered to in *Grandjean v. Beyl,* we are of the opinion that it is too late for this court to recede from the rule there adopted. Where a rule of law has been long established, upon which property rights have been founded, and where property has been acquired and

transferred in reliance thereon, the court should adhere to such rule regardless of the reason or want of reason upon which it was founded. If the rule is to be changed, it should be by legislative action, and not by the courts. But, even if the rule were otherwise, we do not see how it could help the plaintiffs in this action. The mere inchoate right of dower would not be sufficient to compel a conveyance of title to the property to the husband.

Plaintiffs' contention that the assignment was not to be effective until Mrs. Nortnass should assent to and join in the making of the assignment, is not sustained by the evidence. The only evidence tending to sustain this contention is that of Mr. Nortnass, while there are several witnesses who testified to the contrary, and the clear weight of the evidence is against the plaintiffs on this proposition.

With reference to the claim that the assignment was void because the defendants intended to erect upon the premises buildings to be used for prostitution, it appears to be entirely without merit. There is no claim or pretense that any arrangement or agreement was made between the plaintiff and the defendants or any of them with reference to such use of the premises. The contract between Mr. Nortnass and the defendants Cooper and Ivins was for the sale of Nortnass' interest in the land for a sufficient and valid consideration. This contract had no reference to the use of the premises by the vendees for an immoral purpose. If there was any purpose on the part of the vendees to use the premises for any immoral purpose, it was unknown to Mr. Nortnass at the time of the assignment. It is clear that any secret intention on the part of the vendees to use the premises for an unlawful purpose could not affect the contract of purchase between them and their vendor.

The judgment of the district court is sustained by the evidence and is in accordance with law, and we recommend that it be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

STATE, EX REL. JAMES WOODS ET AL., RELATORS, V. WILLIAM RATHSACK, MAYOR, ET AL., RESPONDENTS.

FILED OCTOBER 8, 1908. NOS. 15,709, 15,710, 15,711, 15,712, 15,713.

Intoxicating Liquors: LICENSE: REVOCATION: MANDAMUS. Where a hearing has been had upon an application for a license to sell intoxicating liquors and a remonstrance thereto, and such remonstrance has been overruled and the license issued, and an appeal has been taken to the district court within a reasonable time, the license so issued should be recalled and revoked pending the appeal in the district court, and mandamus will issue to compel the recall and revocation of the license.

ORIGINAL applications for writs of mandamus to compel respondents to revoke liquor licenses. *Writs allowed.*

C. J. Phelps, for relators.

H. P. Peterson and *W. M. Cain, contra.*

GOOD, C.

These five cases are original applications in this court for writs of mandamus to compel the mayor and council of the city of Schuyler to recall and revoke five separate licenses to sell intoxicating liquors in said city. All of the cases present identical issues.

The relators objected to and remonstrated against the issuance of the licenses. Hearings were had upon the applications for licenses and the remonstrances thereto, which resulted in the overruling of the remonstrances and an order for the licenses to issue as prayed. The remonstrators at once gave notice of appeal, and immediately ordered transcripts of the proceedings and the evi-

dence, and perfected their appeals to the district court in each of the cases as speedily as they could. The mayor and council ignored the notices of appeal, and forthwith issued the licenses. The remonstrators requested the mayor and council to recall and revoke the licenses, but their requests were denied. Respondents in their answers and returns to the alternative writs admit all the material allegations of the several applications for writs of mandamus. They seek to justify their refusal to recall and revoke the licenses by averring that said appeals are now pending in the district court, and have been submitted to that court for determination, and that said appeals will be speedily determined in said court. They aver, as a reason for their refusal, that there were still other applications for liquor licenses against which the remonstrators in these cases made no objections, and allege that no useful or beneficial purpose will be subserved by granting the writs prayed for, and that no injury or annoyance either public or private will result from denying the writs.

To our minds all these cases present no new question of law. The law applicable to these cases is fully and clearly settled by the former decisions of this court. In *State v. Bonsfield,* 24 Neb. 517, it was held: "Where an application is made to the city council for a license to sell intoxicating liquors, to the issuance of which a remonstrance is filed, and upon a hearing a license is ordered to issue, it is the duty of the council, upon notice of appeal being given, to withhold the license until the expiration of a sufficient time within which an appeal may be taken to the district court by the remonstrants. Where a license is issued and the appeal is taken, it is the duty of the council to recall such license, until the appeal is decided by the district court, and in case of their refusal mandamus will issue to compel action." The same rule has been adhered to by this court in *State v. Bays,* 31 Neb. 514, and was again reaffirmed in *Byrum v. Peterson,* 34 Neb. 237. Under the rules laid down in these cases, the matter set up by the respondents constitutes no defense to

the applications for the writs. It was clearly the duty of the respondents to withhold the licenses, when the notice of appeal was given, for a reasonable time, within which the remonstrators might perfect their appeals. Having issued the licenses, it was respondents' legal duty, when the appeals were perfected in a reasonable time, to recall and revoke the licenses. No valid reason appears for their refusal to so do.

We therefore recommend that the peremptory writ be issued as prayed for.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the peremptory writs of mandamus be issued as prayed for.

WRITS ALLOWED.

PATRICK FAGAN, APPELLEE, V. KATE FAGAN, APPELLANT.

FILED OCTOBER 8, 1908. No. 15,297

1. **Divorce: PLEADING.** The allegations contained in the eighth paragraph of the petition set out in the opinion, when considered in connection with preceding paragraphs of the petition which allege specific acts of personal violence and cruel treatment, *held* a sufficient statement of a cause of action for extreme cruelty, and sufficient to overcome any previous condonement.

2. **Evidence** examined and set out in the opinion, *held* sufficient to sustain the findings and judgment of the district court.

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

John J. Sullivan, Louis Lightner and *C. J. Phelps*, for appellant.

W. T. Critchfield and *Rose & Shields, contra.*

FAWCETT, C.

Plaintiff's petition alleges extreme cruelty, and prays for an absolute divorce. Defendant's answer denies the allegations of plaintiff's petition, alleges extreme cruelty on plaintiff's part, and prays for a divorce *a mensa et thoro,* and for separate maintenance. The reply denies all of defendant's allegations of cruelty, alleges that plaintiff is possessed of property and money to the amount of about $5,000, and that he has already paid plaintiff $4,200 in money. The trial below resulted in a general finding in favor of plaintiff on the question of extreme cruelty, and that defendant had received her just proportion of plaintiff's property, and was not entitled to any further sum as alimony. A decree was entered upon the findings, divorcing the parties absolutely, quieting the title in the respective parties to the property held by each, and denying defendant any alimony. From the decree thus entered, this appeal is prosecuted.

Defendant contends that plaintiff's petition does not state a cause of action, and that the decree of the district court is not sustained by sufficient evidence. In support of her first contention, defendant argues that the specific acts of cruelty set out in the fourth, fifth, sixth and seventh paragraphs of plaintiff's petition were all condoned by plaintiff, and that the petition must therefore stand or fall upon the eighth paragraph thereof. There is no plea of condonment in the answer, but, even if there were, we think defendant's contention must fail. The eighth paragraph is as follows: "On or about May 1, 1906, the said defendant called plaintiff 'an old gray-headed devil' and 'blind fool,' and applied to plaintiff other vulgar and profane language too indecent to be here set forth, and at the same time told plaintiff she would not cook for him any longer, and drove plaintiff from his home." We think that, taken in connection with the other allegations in the petition, the acts of defendant set out in the eighth paragraph were sufficient to overcome

any condonement contended for by defendant, and to reinstate and make effective all the other allegations of extreme cruelty.

There is no corroboration in the record of defendant's allegations and testimony as to plaintiff's cruelty beyond the fact that two or three witnesses testify to having seen defendant working in the field shocking grain, helping to load hay, and other similar work, and assisting in taking care of the stock and doing chores around the house and barn, and that plaintiff had told two or three of her neighbors that defendant was lazy. This testimony was clearly insufficient to support the allegations of defendant's cross-petition. The evidence introduced by plaintiff shows that the defendant is a very passionate woman; that on one occasion she struck him in the face with a fork; on another she assaulted him with a chair; on another she made an assault upon him in the public street in the presence of other people; that she was habitually calling him "a gray-haired old devil," "blind fool," and "dirty bastard," and other names of a similar character; that, when she was angry, she would break up the dishes and other household utensils. The fork episode is explained by defendant by her testimony that on one occasion she was carrying some dishes from the kitchen to the dining room, and also had a fork in her hand; that plaintiff said something which angered her, and she threw the dishes upon the floor; that plaintiff took hold of her and swung her around, and that in swinging her around the fork struck him in the face, but that she had no intention of inflicting such injury upon him. Plaintiff is corroborated as to the chair episode by a young man who was working for him and living in the family at the time. He is also corroborated by this young man as to the ugly names applied to him by the defendant, above set out. One witness testifies that one Sunday morning, after a tilt between plaintiff and defendant, defendant refused to ride to church in plaintiff's buggy, and got into the buggy in which the witness and his mother

were going to the same church; that during the trip his mother asked defendant why she married the plaintiff, and her answer was that she married him for a home; that there was another man she thought more of than she did of him, but that he had property, and she married him for a home, or words to that effect. Defendant admits talking with the mother of the witness on that occasion about their former beaux, but claims they were doing so simply in a joking way. On one occasion, a number of years prior to the final separation, plaintiff applied for a divorce, but friends intervened, and a mutual friend told him that he thought if he would give his wife some of the property in her own name everything would be all right. Plaintiff testifies that defendant promised him that, if he would deed her part of the property, she would do better, and would make him a good wife; that he thereupon deeded her one-half of all the land he at that time owned. They went together again, but things were no better. Subsequently another separation occurred, and defendant filed an application for divorce. Plaintiff again, in his endeavor to adjust matters so that they might live together, paid defendant $600 in money, and gave her his promissory note for $600, which note he subsequently paid, and they resumed their former relations; but their cat-and-dog life seems to have continued down to the time of the final separation. At or shortly after their final separation they sold the land, of which they each owned half, for $7,000; defendant receiving $3,600 of the money, and plaintiff $3,400. It appears, therefore, that defendant received $3,600 from the sale of the land, and $600 in cash at the time of the settlement of her divorce proceedings; making the $4,200 set out in plaintiff's reply. In addition to that, the note for $600 was subsequently paid, so that, as a matter of fact, defendant has received from plaintiff $4,800. At the time the parties were married plaintiff was worth about $3,000 all told, while defendant was penniless. We think in the light of all of the facts, as shown by the record, the judgment of the district court

was right, both in granting the plaintiff a divorce, and in refusing the defendant alimony.

If there seemed to be any possibility of these people living together again as husband and wife, we might be disposed to take a different view of the case; but defendant admitted upon the stand that she has no desire to live with plaintiff, and plaintiff testifies that it is impossible for them to live together again. There seems to be much force in the contention of plaintiff's counsel that defendant's chief desire is to get as much money as possible out of plaintiff without performing the duties of a wife in return therefor. We think she has had all that she is entitled to, and that plaintiff ought not to be required to support her any longer.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

HARRY W. LEMAN, TRUSTEE, APPELLANT, V. JESSE P. CHIPMAN ET AL., APPELLEES.

FILED OCTOBER 8, 1908. No. 15,270.

Creditors' Suit: TIMBER CULTURE LANDS: EXEMPTIONS. A judgment against a surety upon a supersedeas bond is a debt contracted at the date of the approval of such bond, within the meaning of that clause of the timber culture law which provides that land acquired under such law shall not in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

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

Benjamin F. Johnson, for appellant.

R. M. Proudfit and *Hastings & Ireland, contra.*

CALKINS, C.

This is a creditor's suit to set aside a conveyance of an 80-acre tract of land made by the defendant Jesse P. Chipman to his wife, the defendant Mary L. Chipman, and to subject the same to the payment of a judgment against the first named defendant. The land was entered by Jesse P. Chipman under the provisions of the several acts of congress to encourage the growth of timber on the western prairies, commonly known as the "timber culture law." The final certificate was dated March 7, 1893. The plaintiff's judgment was recovered upon an appeal bond which Jesse P. Chipman signed as surety for one Morrissey to enable the latter to review in this court a judgment rendered against him in the district court. The bond was dated November 13, and approved November 16, 1891. There is no evidence as to the date upon which default in the condition of the bond occurred, but judgment was rendered thereon May 22, 1895. The bond having been signed prior to the issuance of the final certificate, the defendants pleaded that fact, and claimed that the land could not be held liable for the satisfaction of the plaintiff's judgment under the provision of the timber culture act, which provides: "That no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor." Act March 3, 1891, 26 U. S. St. at Large, ch. 561, p. 1096. This defense was sustained by the court below, which rendered judgment for the defendant; and from this judgment the plaintiff appeals.

The plaintiff argues that the liability assumed by the signing of the bond was not at that time a debt, because it was not a direct promise for the payment of money, but

an undertaking to pay upon the contingency that the judgment against Morrissey should be affirmed, and that he should himself fail to discharge it. Blackstone (book 3, p. *154) defines the word "debt" as "a sum of money due by a certain and express agreement; as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease, where the quantity recoverable is fixed and specified, and does not depend upon any subsequent valuation to settle it." A debt, according to Webster, is "that which is due from one person to another, whether money, goods or services; that which one person is bound to pay another or to perform for his benefit; that for which payment is liable to be exacted; due; obligation; liability." It will thus be seen that the interpretation put upon the word varies from the narrow legal definition which distinguishes it from other contractual obligations, and liabilities growing out of torts, to the broad and comprehensive sense which includes all legal duty. The question here presented is whether in the statute referred to congress intended to use it in its narrow legal sense, or in its more popular and broader meaning of that which one person is bound by law to pay to, or to perform for, another. The provision we are considering was first inserted in the homestead law of 1862; and, when the timber culture law was enacted, the same provision was inserted therein, except that the period of contracting debts for the payment of which the land entered should be exempt ended under the timber culture law with the issue of the final certificate, and under the homestead law extended to the issuance of the patent. The reason for the provision was the same in both cases, and is easily discerned. Congress was about to prescribe conditions under which homes for the homeless might be secured upon the public domain. If they were granted under conditions which enabled creditors to seize the land as soon as title was granted by the government, it would offer no opportunity for those burdened with debts which they were unable to pay, a class which it was especially

desired to reach and benefit. That the land might not be taken from the entryman as soon as acquired, but that he might have a new start in life, was the object to be gained by this provision. There is no reason why the land so granted should not be taken for a debt arising upon an unconditional agreement to pay that does not apply to debts growing out of liabilities that were, when contracted, contingent; and, if a statute is to be construed with reference to the object to be attained, it would seem as if the broader signification should be given to the word under consideration.

The question whether this liability applies to wrongs has frequently been considered, and the weight of authority seems to be that the word debt in exemption statutes includes all kinds of claims, not only on contract, but also in torts. *Mertz v. Berry,* 101 Mich. 32, 24 L. R. A. 789; *Dellinger v. Tweed,* 66 N. Car 206; *State v. O'Neil,* 7 Or. 141; *Flanagan v. Forsythe,* 6 Okla. 225, 50 Pac. 152; *Warner v. Cammack,* 37 Ia. 642; *Conroy v. Sullivan,* 44 Ill. 451; *Loomis v. Gerson,* 62 Ill. 11; *Smith v. Omans,* 17 Wis. *395. This conclusion is vigorously assailed by Sanborn, C. J., in *Brun v. Mann,* 151 Fed. 145, where the opposing authorities are collected. It is there argued that there should be a marked distinction between the policy of releasing debtors from their honest obligations, and that of discharging them from liabilities for frauds and malicious injuries; but no such distinction exists between fixed and contingent liabilities, both arising out of contract. However, we do not need, and do not intend, to undertake to decide whether the language under consideration includes liabilities arising out of torts. We have already decided that liability of the signer of an appeal undertaking is, as between him and the judgment creditor, that of prinicipal debtor (*Flannagan v. Cleveland,* 44 Neb. 58); and we think a literal interpretation of the language used includes such liabilities as are sought to be enforced in this action. It is admitted by the plaintiff that the liability he is seeking to enforce is now a debt

within the meaning of that word contended for by him. To subject the land in question to the payment of his judgment is therefore to make it liable for the payment of a debt; and the sole remaining question is when was the debt contracted.

The verb "contract" means to make an agreement. The defendant Jesse P. Chipman signed the bond on the 13th day of November, 1891. When it was approved November 16, 1891, his promise had been given beyond his power to recall. After that date no act of his was performed, or necessary to be performed to fix his liability. Whatever difference there might be in opinion as to what the liability incurred by him should be called, there is no doubt about when it was contracted. We are therefore of the opinion that the case falls not only within the reason of the law, but within its very letter. The opinion was expressed by COBB, J., in *Smith v. Schmitz,* 10 Neb. 600, that the liability of a stockholder for the obligations of a corporation imposed for failure to give notice of its debts was contracted at the time the act was performed which made him a stockholder, although the case does not appear to have been disposed of solely upon that ground. The only case cited which is not in harmony with this view is that of *Leonard v. Ross,* 23 Kan. 292; but the argument in that case is vitiated by the false assumption that the word "contract," as used in the statute, has the same meaning as "accrue." The court say: "But we cannot give our assent to the doctrine that such debt accrued when said bond was executed. The claim evidently did not have any existence at that time, and probably did not have any existence for several months afterwards. A penal bond (such as a county treasurer's official bond is) does not of itself create a debt. * * * In our opinion, then, no debt accrued against Monger or his sureties until some breach of the official bond occurred. And an argument might even be made that no debt accrued against the surety Ross until judgment was rendered against him for the breach of the bond; but we have assumed other-

wise, and probably correctly, that for the purposes of this case, and of this class of cases, the debt accrued when the breach of the bond occurred." There is no warrant for the use of the word "accrued" as synonymous with "contracted." Webster defines the word "accrued" as "(1) to increase; to augment; (2) to come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit, or damage, especially as the produce of money lent." If the statute had provided that the land should not be subject to any debt which shall have accrued before the issue of the final certificate, the argument of this opinion would have been consistent and logical; but the word used in the statute is "contracted," which has an entirely different meaning. The assumption by the court that the two words have the same meaning destroys the value of its conclusion. The word "contract" cannot be used in the place of the word "accrue" in the opinion without a contradiction of terms. A reading of the opinion above quoted with the word "contracted" substituted where the word "accrued" occurs will demonstrate the extent of the error committed by the confusion of these two terms.

We are therefore of the opinion that the judgment of the district court was right, and recommend that it be affirmed.

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

WILLIAM P. MOHR, APPELLANT, V. HENRY RICKGAUER, APPELLEE.

FILED OCTOBER 8, 1908. No. 15,293.

Notes: CONSIDERATION. While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of 1897 (laws 1897, ch. 57), so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission.

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

N. D. Burch and *E. J. Clements,* for appellant.

W. T. Wills, contra.

CALKINS, C.

This was an action upon a promissory note. The evidence tended to show that the defendant employed the plaintiff as broker to sell 480 acres of land, and orally agreed to pay him as commission for such services the sum of $1 an acre; that, after plaintiff performed such contract on his part, a dispute arose as to the amount which the plaintiff was entitled to receive, and to settle such controversy the defendant executed the note in question for the sum of $200. The court below took the view that an oral contract to pay plaintiff a commission being unenforceable because of the provisions of the act of 1897 (laws 1897, ch. 57; Comp. St. 1897; ch. 73, sec. 74), such services did not constitute a sufficient consideration to support the note, and directed a verdict for the defendant. From a judgment entered upon this verdict, the plaintiff appeals.

The statute in question has been sustained, and it has been frequently held that, where the employment is oral, there can be no recovery upon the contract (*Allen v. Hall,* 64 Neb. 256; *Baker v. Gillan,* 68 Neb. 368; *Covey*

v. Henry, 71 Neb. 118; *Danielson v. Goebel,* 71 Neb. 300); nor upon a *quantum meruit* for services performed (*Blair v. Austin,* 71 Neb. 401; *Rodenbrock v. Gress,* 74 Neb. 409; *Barney v. Lasbury,* 76 Neb. 701). Now, we have presented the question whether such services constitute a sufficient consideration for a written promise to pay. Like the statute of frauds, of which it is a virtual extension and enlargement, it was designed to exclude oral testimony as a means by which the rights of litigants could be determined in certain cases where experience has shown that it was particularly liable to abuse. *Baker v. Gillan, supra.* To make a concrete application of the reason for the law, the legislature, premising that a liability might be wrongfully imposed upon a defendant by false testimony if it were permitted to be established by oral evidence, has provided that he shall not be charged except upon a written contract subscribed by himself. When, however, the defendant, after receiving the benefit of services, executes a written promissory note in payment thereof, it would seem that the reason of the law was fulfilled. The contract is then established by his own signature.

The object of the statute is, as we have seen, to prevent frauds and perjuries; and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable. *Riley v. Bancroft's Estate,* 51 Neb. 864. It is within the principle laid down by Baron Parke in *Earle v. Oliver,* 2 Exch. (Eng.) *71, that, "where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." This doctrine has been applied to cases where the consideration of a contract made by a *feme sole* was an unenforceable contract made by her while *covert,* as well as to cases where the consideration was

an oral promise to answer for the debt of a third person unenforceable by reason of the statute of frauds. *Goulding v. Davidson,* 26 N. Y. 604; *Rogers v. Stevenson,* 16 Minn. 56; *Wills v. Ross,* 77 Ind. 1.

We are satisfied that the principle referred to applies to the case we are considering, and that the obligation of the defendant, while unenforceable so long as it remained in parol, was a sufficient consideration for his written promise to pay the same.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in conformity with this opinion.

FAWCETT and ROOT, CC., concur.

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

REVERSED.

W. F. PROWETT, APPELLANT, V. NANCE COUNTY, APPELLEE.

FILED OCTOBER 8, 1908. No. 15,305.

1. **Statutes:** AMENDMENTS. The act of April 1, 1901, entitled "An act to amend section 19, chapter 10, Compiled Statutes, 1899, and to repeal said section as now existing" (laws 1901, ch. 11), is void, because the matter sought to be added by the amendment is not germane to the subject of the section as enacted. *Knight v. Lancaster County,* 74 Neb. 82, followed.

2. **Constitutional Law:** ESTOPPEL. Where, in reliance upon the proviso attempted to be added to section 19, ch. 10, Comp. St. 1899, by the act of 1901 (laws 1901, ch. 11), a county treasurer brings suit to recover the amount paid by him as compensation to a surety company upon an official bond given by him and approved by the county board, the county is not estopped in such suit to assert the invalidity of such statute.

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

W. F. Critchfield, for appellant.

Albert Thompson, contra.

CALKINS, C.

The plaintiff was twice elected treasurer of Nance county; his official terms covering a period beginning January, 1902, and ending January, 1906. For each of said terms he gave a bond, signed by himself as principal, and by the American Bonding Company of Baltimore, Maryland, as surety, which bonds were in each instance duly approved by the county board of Nance county. On the 19th day of January, 1906, the plaintiff filed a claim against Nance county for the sum of $680, being the amount paid by him to said surety company. This claim was rejected by the county board on the same day, and the plaintiff appealed from such decision to the district court, which afterwards rendered judgment dismissing plaintiff's action. From this judgment the plaintiff appeals.

1. The plaintiff bases his claim for reimbursement of the amount paid by him to the surety company upon the proviso attempted to be added by the act of April 1, 1901 (laws 1901, ch. 11), to section 19, ch. 10, Comp. St. 1899. Section 19, as it existed prior to that time, consisted solely of a list of state, county, precinct and township officials, and specified the amount of penalties in the bonds required of them, respectively; the list being preceded by the language: "The following named officers shall give bonds with penalties in the following amounts, to wit: The governor $50,000," etc. The proviso attempted to be added by the act of 1901 was: "Provided, that the authorities whose duty it is to approve bonds of the county officials may dispense with such bonds if in their judgment they shall deem it best so to do; provided, further, that if bonds are accepted by such officials from surety or indemnity companies the cost of such bonds may be paid by the

county where such bonds are required." The case of *Knight v. Lancaster County,* 74 Neb. 82, is decisive of the instant case. There the treasurer of Lancaster county, for a term of two years beginning in January, 1904, tendered to the county board an instrument in the form of an official bond, signed by himself as principal, and by a corporation described as a surety or indemnity company as surety, which was accepted and approved by the county board. Afterwards he presented a claim against the county for the money paid by him to said corporation as compensation for having signed such instrument as his surety. The board rejected the claim, and he appealed to the district court, where a judgment was rendered against him, from which he appealed to this court. It will be seen that the facts there presented to the court, so far as they are material, are precisely the same as those we are now considering. In that case the court by AMES, C., said: "The district court was correctly of the opinion that the attempted amendment is void. The title of the amendatory act is 'An act to amend section 19, chapter 10, Compiled Statutes, 1899, and to repeal said section as now existing.' This title indicates as the subject of legislation changes in the lists of officials and penalties, with which alone the section deals, but does not suggest a purpose to change the form, or the character of the sureties, of official bonds, or to impose upon counties any pecuniary burden with reference to the same, nor to enlarge the discretion or powers of county boards with respect thereto, but it is with reference to these latter matters alone that the attempted amendment deals." We are satisfied with the reasoning and conclusion in the above case, and that the act of 1901 is void and of no effect.

2. The case of *Knight v. Lancaster County, supra,* was not cited nor referred to upon the argument; but that of the *Fidelity & Deposit Co. v. Libby,* 72 Neb. 850, holding the act of 1895 ineffectual to dispense with personal surety upon official bonds, was discussed, and it was urged that, if the statute under consideration was void,

the parties having acted under it, the county was estopped to deny its validity. Without determining whether the provision in question, if valid, was mandatory, or merely permissive, or to what extent obligations may be imposed upon *quasi* municipal corporations by the law of estoppel, we are satisfied that the case presented lacks an element essential to the application of the doctrine of estoppel. Without the proviso in question, it was the duty of the plaintiff to furnish his bond and to bear any burden of trouble or expense involved therein. The county was entitled to the bond with a sufficient surety, without expense to it, and that is all it received. The county gained no advantage to which it was not entitled, and the plaintiff assumed no burden that would not have been his without the proviso in question. There was no act nor representation by the county by which the plaintiff was induced to act to his own disadvantage or to its advantage, and there can therefore be no estoppel.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

INTERNATIONAL TEXT-BOOK COMPANY, APPELLANT, V. WILLIAM H. MARTIN, APPELLEE.

FILED OCTOBER 8, 1908. No. 15,301.

1. **Contract: ACTION: PLEADING.** In an action by a correspondence school against its pupil for a breach of contract arising from the wrongful refusal of the latter to pay a remainder due for tuition, that plaintiff might have employed the time it would have devoted to defendant's instruction under the contract to the education of another scholar is a matter of defense, which plaintiff is not required to anticipate in its petition.

2. **Damages, Measure of.** The burden of proof is on the defendant to establish such defense, and on failure thereof, or to show other facts in mitigation of damages, the measure of recovery is the contract price.

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

David C. Harrington, R. H. Smith and *Hall, Woods & Pound,* for appellant.

J. A. McGraw, contra.

ROOT, C.

In 1900 defendant entered into a written contract with the Colliery Engineer Company for instruction by correspondence in a course of electrical engineering. He was to pay $78 in monthly payments of $2, less 10 per cent., and plus $1 for a transfer fee, and the course of instruction was to continue until he was qualified to receive a diploma or certificate of proficiency. The initial papers essential for said instruction were sent to, and received by, defendant, but for some reason he totally failed to answer the questions sent him or to pursue his said studies. He paid $50 according to contract, and then refused to make further payments, but in December, 1905, notified plaintiff that he did not intend to perform the contract. In the interim the Colliery Engineer Company changed its name to International Text-Book Company, and in that style brought this action to recover the remainder unpaid on said contract. At the close of the evidence the court instructed the jury, in effect, that, if plaintiff was entitled to a verdict, the measure of its recovery would be the loss of its profit on said contract plus the value of the services it had rendered defendant; that, as there was not any evidence before the court tending to show the cost to plaintiff of performing such services, the jury should bring a verdict for defendant, which was done. Plaintiff appeals.

We are convinced that the learned trial judge erred in presenting the law of the case to the jury. It will be observed that plaintiff has not been in default in any particular in performing, so far as defendant would permit it to perform, the contract; that its undertaking is to continue its course of instruction until it has educated defendant to such a degree of proficiency as to entitle him to a diploma. No one can logically establish the period during which its teachers must send out questions and correct answers given by defendant in response thereto. The evidence indicates that plaintiff employs nearly 400 teachers, and the addition or loss of one student would hardly increase or diminish plaintiff's expense to any perceptible degree. The contract is entire, and, upon defendant's refusal to perform, and subsequent to the maturity of all of the monthly payments, plaintiff ought to recover the consideration defendant agreed to pay it, unless defendant can show some facts that reasonably and definitely tend to mitigate plaintiff's damages. Those facts should be pleaded by defendant and proved by him. *Wirth v. Calhoun,* 64 Neb. 316; *School District of Omaha v. McDonald,* 68 Neb. 610. It would not serve any useful purpose to consider in detail the authorities cited by defendant. They are not in point in the instant case. They refer to the sale of goods and chattels, or to the performance of labor for the construction of improvements that could be definitely measured as to extent and cost, so that the jury could ascertain definitely the exact loss accruing to plaintiff by reason of defendant's default. The instant case comes more within the reasoning of, although it is not absolutely controlled by, *Ely v. Dumont,* 186 N. Y. 552; *Bingham v. Richardson,* 60 N. Car. 215; *Horner School v. Wescott,* 124 N. Car. 518; *Kabus v. Seftner,* 34 Misc. Rep. (N. Y.) 538, 69 N. Y. Supp. 983.

The criticism made by defendant, that plaintiff does not specifically use the word "damages" in his petition, is y met by the reasoning of Mr. Commissioner ALBERT

in *Wirth v. Calhoun, supra.* The facts are all stated in the petition, and the amount due from defendant by reason thereof is demanded.

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

FAWCETT and CALKINS, CC., concur.

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

REVERSED.

WILLIAM H. HOLMES V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1908. No. 15,651.

1. Information: STATUTORY CRIMES: EXCEPTIONS. In charging a statutory crime, where the statute contains an exception, the general rule is that the information should properly negative such exception; but, where the allegation covering the affirmative part of the statute clearly involves a negation of the other, no further negative need be added, and it is unnecessary for the pleader to refer to the exception.

2. Criminal Law: INSTRUCTIONS: PRESUMPTION OF INNOCENCE. An instruction as to the presumption of innocence, if otherwise correct, is not objectionable because it contains the words, "this presumption partakes of the nature of evidence," instead of "this presumption is evidence," and, when thus given, the court is not required to further instruct the jury on that point.

3. ———: ———: DEFINING THE CRIME. While it is proper in a criminal case to define the crime in the language of the statute describing the offense, still the court is not required to do so; and, if the import of the language employed is the same as that of the statute, it is sufficient.

4. ———: ———: REASONABLE DOUBT. An instruction on the question of reasonable doubt, if otherwise correct, is not to be condemned because it omits the clause: "You are not at liberty to disbelieve as jurors, if from all of 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." On the other hand, the trial court is to be commended for such omission.

5. ———: EVIDENCE: STIPULATION: NEW TRIAL. Counsel for the defendant in a criminal prosecution may stipulate with the prosecuting attorney for the introduction of competent evidence in the nature of letters, written by the accused, without calling the persons to whom they were written as witnesses; and, where there is no showing that either the defendant or his counsel was misled in entering into the stipulation, and no effort was made to have it set aside, such conduct on the part of counsel affords no ground for a new trial.

———: MISCONDUCT OF ATTORNEY. Where the question as to the alleged misconduct of the county attorney in conducting the prosecution has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony, and is clearly wrong.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed. Sentence reduced.*

W. W. Slabaugh, for plaintiff in error.

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

BARNES, C. J.

William H. Holmes, hereafter called the defendant, was prosecuted in the district court for Douglas county for a violation of section 121 of the criminal code, which defines the crime of embezzlement. The charging part of the information on which he was tried reads as follows: "That on the 27th day of February, in the year of our Lord, one thousand nine hundred and seven, William H. Holmes, late of the county of Douglas aforesaid, in the county of Douglas, and state of Nebraska, aforesaid, then and there being in said county, and then and there being a duly admitted attorney at law to practice in the various courts of the state of Nebraska, and the said Douglas county, and then and there being the attorney at law for

one Joseph Schwenk, a private person, and not being an apprentice or a person within the age of eighteen years, then and there by virtue of his employment as such attorney at law for the said Joseph Schwenk did secure and take into his possession $647 in money, of the value of $647, the personal property of the said Joseph Schwenk, and then and there unlawfully and feloniously did convert to his own use and embezzle said money without the assent of the said Joseph Schwenk, his principal, employer and client." His trial resulted in a conviction. On the 4th day of April, 1908, he was sentenced to be confined in the state penitentiary for a period of three years, and has prosecuted error to this court.

Defendant's principal contentions are that the district court erred in giving the first paragraph of his instructions to the jury because the exception found in the statute as to apprenticeship and age is not properly negatived thereby; that the clause of the information which relates to this exception is disjunctive, and is therefore wholly insufficient to charge the offense of which he was convicted; and that for this reason the district court erred in not quashing the information, and in overruling defendant's motions in arrest of judgment and for a new trial. We will dispose of these assignments of error together, for what may be said as to any one of them applies with equal force to all of the others.

The section of the statute on which this prosecution is founded reads in part as follows: "If any clerk, agent, attorney at law, servant, factor or commission agent of any private person or any copartnership, except apprentices and persons within the age of eighteen years, * * * shall embezzle or convert to his own use * * * any money," etc. Criminal code, sec. 121. The words of the charge first above quoted, so far as material to this inquiry, are as follows: "William H. Holmes, * * * being a duly admitted attorney at law to practice in the various courts of the state of Nebraska, and of said Douglas county, and then and there being the attorney

at law for one Joseph Schwenk, a private person, and not being an apprentice, *or* person within the age of eighteen years," and the defendant's contention is that the use of the word "or" instead of "and" renders the clause which negatives the exception ineffectual. It may be stated at the outset that the exception appears in that part of the statute which is descriptive of the person or class of persons to which the defendant belongs, and is not found in that part of the information which describes the act constituting the crime for which he was prosecuted. It seems clear that the exception was meant to exclude apprentices of whatsoever age, and all other persons within the age of 18 years. If this be so, the words of the information and of the instruction were sufficiently explicit. The information charges that the defendant was an attorney at law duly admitted to practice in the various courts of the state of Nebraska and of Douglas county; that he was at the time of the embezzlement acting as such attorney for one Joseph Schwenk, a private person. It follows that he was not, and could not have been, an apprentice within the meaning of the statute. The language of the charge makes it certain that the defendant was not a person within the age of 18 years, for our statutes relating to the admission of attorneys clearly provide that no person can be admitted to practice law in this state unless he shall be at least 21 years of age. The allegation that the defendant was an attorney at law duly admitted to practice in all of the courts of this state requires the court to take judicial notice of the fact that he was more than 18 years of age. Therefore the allegations which covered the affirmative part of the statute necessarily involved the negation of the exception. The rule in such cases is: "If the allegation on the affirmative part of the statute involves the negation of the other, no further negative need be added." 1 Bishop, New Criminal Procedure, sec. 641, subd. 6. Under this well-recognized rule it was unnecessary for the pleader to refer to the exception. We are therefore of opinion

that the information substantially follows the language of the statute, and is sufficient to charge the defendant with the crime of embezzlement. It follows that the description of the charge on which the defendant was prosecuted, as set forth in the instruction complained of, was correct, and that the court properly overruled defendant's motions.

It is also defendant's contention that the court erred in giving instruction No. 2, on his own motion, and the particular criticism of this instruction is that in speaking of the presumption of innocence it uses these words: "This presumption partakes of the nature of evidence," instead of "This presumption is evidence." The part of the instruction complained of reads as follows: "The law presumes the defendant innocent, and this presumption partakes of the nature of evidence, and so continues throughout the trial until said defendant has been proved guilty by the evidence, beyond a reasonable doubt." This instruction has our approval in *McVey v. State,* 55 Neb. 777, and is found in Good and Corcoran, Instructions to Juries, p. 260. To our minds the objection is too technical to merit serious consideration.

Defendant further insists that the court erred in giving instruction No. 3, on his own motion, because the statute on which the prosecution is based is not quoted in full. We find that the substance of the statute is stated in the instruction, and what was there said was sufficient to enable the jury to understand the nature of the charge against the defendant. This was all that was necessary. It was said in *Davis v. State,* 51 Neb. 301: "While it is proper in a criminal case in defining a crime in an instruction to use the language of the statute descriptive of such crime, yet, if the import of the language used in the instruction is the same as the statute, an instruction will not be held erroneous because the language employed by the court is different from the language of the statute." In *Mills v. State,* 53 Neb. 263, we held that "an instruction which consisted of quotation of the main

portions of the section of the criminal code under which the prosecution was instituted," was "not improper or misleading." It thus appears that the instruction complained of furnishes no ground for a reversal of the judgment in this case.

Instruction No. 12, given by the court on his own motion, is assailed as erroneous. This instruction defines a reasonable doubt, and is, in substance, the same as that given and approved in *Willis v. State,* 43 Neb. 102, *Barney v. State,* 49 Neb. 515, *Carrall v. State,* 53 Neb. 431, and in a long line of decisions ending with *Clements v. State,* 80 Neb. 313. The instruction as given in the foregoing cases has been often assailed because it contained the words: "You are not at liberty to disbelieve as jurors, if from all of 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." This clause has been frequently criticised by us, and for this reason it is apparent that it was left out of the instruction complained of, and now counsel complains because of such omission. We think the criticism without merit, and that the instruction affords no ground for a new trial. The defendant also contends that his motion for dismissal was improperly overruled, for the reason that no evidence was offered to show that he was not an apprentice, and not within the age of 18 years. As above stated, proof that the defendant was an attorney at law duly admitted to practice in all of the courts of this state, and was acting as such attorney for Joseph Schwenk at the time he secured the possession of the money, which it is alleged he embezzled, is sufficient proof that he was not an apprentice. As to the question of his age, it may be said that, in addition to the fact that our statutes provide that no person shall be admitted to practice law in the courts of this state who is not 21 years of age, it appears from the record that one of the witnesses for the state testified that the defendant had been continuously engaged in the practice of his profession for several years

in the city of Omaha; that he knew the defendant as a boy when he lived in Ellsworth, Maine; and that he, the witness, left there in 1886, and came to Omaha, where he had lived for 21 or 22 years at the time this prosecution was instituted. Therefore this assignment of error is without merit.

It is further contended that defendant's counsel were guilty of misconduct during the trial of the case, sufficient to entitle him to a new trial. The complaint is made that the attorneys who represented the defendant in the trial court stipulated that certain letters and correspondence should be admitted in evidence. This correspondence had to do largely with the collection of the money embezzled, and was carried on between the defendant and his associate counsel at Sioux Falls, South Dakota. It cannot be denied that this correspondence, which formed the basis for the collection of the money afterwards embezzled by the defendant, was competent and material evidence. It is true that it could have been brought out through the medium of witnesses instead of by stipulation, but we know of no rule which prohibits counsel for one accused of crime from stipulating for the introduction of competent evidence in this way. The record contains no showing that either the defendant or his counsel was misled in entering into the stipulation, and no reason is given why they should be released from its terms. Again, it is not shown that the substantial rights of the defendant were prejudiced thereby, and we are satisfied that this matter offers no substantial ground for a reversal of the judgment herein.

Finally, it is contended that the county attorney was guilty of misconduct in his address to the jury. It appears that no objections were made to the remarks of the prosecuting attorney or any portion of his argument. Hence, there was no ruling of the court had thereon. In *Reed v. State,* 66 Neb. 184, it was said: "A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to

the remarks complained of and then enter an exception if the court rule adversely or refuse to make a ruling."

It is further claimed that the language used by the county attorney was to the effect that, while a student at a university, defendant had learned to drink and live in a riotous manner; that two witnesses called by the defendant had testified of having had trouble with him, and insinuated that the nature of the trouble could be imagined as similar to the charge on which the defendant was on trial; and that he personally knew the defendant, and considered him a bright and capable young man, and perfectly sane. The county attorney filed an affidavit in which he disputed the truthfulness of these charges, and fully set forth the language which he used in his argument, and which showed that his remarks were based upon the evidence and the arguments of defendant's counsel. This was corroborated by the affidavit of the deputy county attorney. The matter was thus submitted to the trial court, and the finding thereon was against the contention of the defendant. It was ruled in *Cunningham v. State,* 56 Neb. 691, in *Clark v. State,* 79 Neb. 473, and in *Harris v. State,* 80 Neb. 195, that when such question is presented to the trial court by a motion for a new trial, and when upon affidavits and other evidence it is determined adversely to the defendant's contention, the judgment of the district court will not be disturbed unless it is unsupported by the evidence, and is clearly wrong.

We have thus disposed of all of the defendant's contentions, and, finding no error in the record, we are of opinion that the judgment of the district court should be affirmed.

We are asked, however, for the reason that the defendant has been unable to furnish bail, and has been confined in the jail in Douglas county since the time of his trial, to reduce or modify his sentence; and, being satisfied that the ends of justice will be attained thereby, it is ordered that the sentence and judgment of the trial court be modi-

fied to the extent that the defendant be confined in the penitentiary for the period of two years; and, as thus modified, the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

STATE, EX REL. THOMAS SULLIVAN ET AL., RELATORS, V. W. L. ROSS ET AL., RESPONDENTS.

FILED OCTOBER 22, 1908. No. 15,490.

1. **Drains: COUNTY BOARD: POWERS.** An order of a county board establishing a ditch and ordering the construction thereof is an exercise of legislative or administrative discretion, and is not judicial in its nature.

2. ———: ———: ———. Where no rights have accrued in consequence of such order, and no proceedings have been taken thereunder except the employment of an engineer and a portion of the preliminary work of surveying being done by him, it is within the power and discretion of the county board, upon a petition being presented to it for that purpose, to reconsider its former action, to find that the proposed ditch is not for the public welfare, and to revoke and set aside its former order establishing the ditch.

3. ———: **LIABILITY OF PETITIONERS.** The petitioners for the establishment of the ditch cannot be held liable upon their bond for an expense incurred by the employment of such engineer.

ORIGINAL application for a writ of mandamus to compel respondents to set a day and grant a hearing on the report of the engineer on the establishment of a drainage ditch, and to proceed with its construction. Demurrer to writ. *Sustained.*

R. E. Evans and *John V. Pearson,* for relators.

F. S. Berry, William P. Warner, Jepson & Jepson and *M. C. Tyler, contra.*

LETTON, J.

This is a mandamus proceeding brought to compel the county clerk and the board of county commissioners of Dakota county to set a day and to give a hearing on the report of the engineer on the establishment and construction of a drainage ditch in that county, and to proceed with the improvement. To the application for the writ a demurrer was filed, and the cause was argued and submitted upon the issue of law thereby raised.

A brief statement of the facts alleged in the petition is as follows: On the 5th day of August, 1905, a petition was filed with the board of county commissioners of Dakota county, praying for the establishment of a drainage ditch, accompanied by a proper bond which was duly approved by the county clerk. On the 7th of August, 1905, the county board proceeded to view the line of the proposed ditch, calling to their assistance a competent engineer. While so engaged, they and the engineer were enjoined by the district court for Dakota county from further proceeding. The injunction continued in force till October 23, 1905, when it was dissolved by the court. On the 9th of December, 1905, an entry was made upon the commissioner's record reciting the filing of the petition and bond, the view made of the premises, and the report made by the civil engineer; and the board found, in substance, that all the jurisdictional prerequisites had been complied with, and that the improvement was necessary, and "will be conducive to the public health, convenience and welfare." On the same day objections were filed to the proposed ditch, and at the regular session of the board the report of the engineer called to their assistance for a view was approved and adopted as the report of the board upon the matter. The objections of the remonstrators to the proceedings were overruled, one Martin Holmvig was appointed surveyor and engineer, and was ordered to go upon the line of the ditch and to make a report as required by the statute, and the ditch was or-

dered located and constructed. The remonstrators severally appealed from this order to the district court. On the 27th day of May, 1907, the last appeal was dismissed. The engineer went upon the line for the purpose of surveying and establishing the levels, but was delayed by the pendency of the appeals. A change in the personnel of the county board took place, and at a meeting of the board held upon March 2, 1907, a petition was presented to it setting forth that the proposed ditch will not be conducive to the public health, convenience or welfare, and that the route proposed and the proposed change in the channel of Elk creek is not the best route or the most practical, and praying that the board reconsider and rescind all action theretofore taken concerning the establishment of the ditch. On the same day, at a regular session of the board, a hearing was had upon the petition, the board set aside the orders and findings theretofore made, and, the original petition coming on again for consideration, the board disallowed and refused to grant the same, and the petition and application were dismissed. On August 20, 1907, Holmvig filed his report as engineer and surveyor substantially as required by the statute. It is further alleged that the larger part of the work incident to the location and surveying of the ditch had been completed at an expense approximating $1,200 prior to the date of the reconsideration and had become a charge upon the lands; that the county board refused to pay the same, and by the reconsideration are attempting to charge the relators on their bond therefor; that the county clerk refused to fix a day for a hearing of the report of the engineer or give notice according to the statute, and that the members of the board refuse to proceed with the improvement and to meet at the office of the county clerk at a time to be fixed by him and perform the duties required of them.

A number of questions were argued and are presented by the briefs, but the one that lies at the threshold of the inquiry and which must first be determined is as to the power of the board to reconsider and rescind the order

establishing and locating the ditch. It is the contention of the relator that the county board had no authority to reconsider or vacate this order; that the attempted vacation is a nullity, and that the duty to proceed with the construction of the ditch still continues; that the power to set aside orders or judgments does not inhere in courts or boards of limited jurisdiction, and such power is not incident to the jurisdiction of such tribunals or bodies; that, as a general principle, a board of supervisors has no power to reverse, vacate or modify its own judicial action; and, without reference to whether the board's act is judicial or otherwise, certain powers conferred upon such boards are not continuous in their nature, but are exhausted by a single exercise, and cannot therefore be rescinded in the absence of fraud or imposition.

It is further argued that the powers exercised by county boards are of two kinds or classes, general and special; that general powers are such as treat generally of the county board and their authority, or relating generally to the county, and that special powers are such as are given in a statute relating to particular subjects, and that, even where the right to reconsider has been conferred upon a board by statute, it has been held that it did not extend to the reconsideration of actions taken under a power specially conferred; that the county board being a creature of the statute can only exercise such powers as are conferred upon them, and since the legislature gave the power to establish drains, and did not expressly give the power to revoke, vacate or modify an order made in the exercise of such power, the authority to reconsider does not exist.

The respondents hold that the action of the board in ordering the establishment of the ditch was legislative and administrative in character, was not subject to appeal; that the order is subject to the discretion of the board to vacate or set the same aside at any time before the letting of the contract for the construction of the ditch or the assessment of lands to pay for the same; and that the action

of the board in setting aside the order was made with full authority, and is legal and binding in all respects.

Counsel have with commendable industry cited us to many cases bearing upon the question whether boards of like nature or powers to the board of county commissioners have power to reconsider and rescind their action taken at the same or at a former meeting. These questions have arisen in an almost inconceivable variety of circumstances, but the conclusion we draw from an examination of the authorities is that the determination of the question in each case has depended upon the view that the particular court takes as to the nature or function of the act performed by the board in making the order. Where the act of the board is held to be judicial in its nature or involving the exercise of a judicial function, such courts hold that the order made is final and conclusive, and is not subject to reconsideration or rescission by the board. On the other hand, where the courts hold such acts to be legislative or administrative in character, it is held that the discretion of the board to modify, vacate or set aside such orders continues until such time as the rights of third parties have intervened, when they become irrevocable.

Perhaps the supreme court of no other state occupies so decided a position in holding that many of the orders of county boards are judicial in their nature as does that of the state of Indiana. The following cases from that state clearly show the difference between the view that court entertains as to the nature of the acts of such boards in the establishment of highways and acts of like nature and the view heretofore taken by this court. In the case of *Plew v. Jones,* 165 Ind. 21, the facts were that within 30 days after a ditch had been ordered established and constructed certain parties appeared before the board and filed a motion to dismiss the proceedings, for the reason that the petition was not signed by freeholders as required by law. At the same time other parties appeared and represented to the board that they had originally

signed a paper which was annexed to the petition, but which was apparently lost, and asked leave to sign the original petition as a substitute or amended petition. The request was granted, and the objectors appealed. The court held that, when the board made the final order for the establishment and construction of the ditch, its jurisdiction over the matter was at an end, and it had no power at a subsequent term *"to vacate that judgment"* and annul the proceedings theretofore taken. In another case in that state the facts were that a county seat had been established and public buildings erected in compliance with law, but the board of county commissioners refused to cause the removal of the county officers and the courts to the new county seat. Mandamus proceedings were brought by a taxpayer of the county to compel the removal. The statute required such removal as soon as the buildings at the new site were completed. The court held that, under such a statute, there was an imperative duty resting upon the board concerning which they had no discretion, and there was a right vested in each citizen and taxpayer of the county to have the removal made. The court further held that although the board had, upon petition charging fraud in the petition for the original change of site, had a hearing upon a proper notice, and had found the charges to be true and thereupon set aside and vacated its previous order relocating the county seat, this was no defense; that the statute gave it power to make the order of relocation after notice and hearing, but conferred no power to set the same aside, and, therefore, its last order was a nullity. *Board of Commissioners v. State,* 61 Ind. 75. It is also held in Indiana that, where a board of county commissioners entered an order approving the report of highway viewers that a proposed highway should not be opened, it had no power to set the same aside and appoint other viewers in the same proceedings, that it had exhausted its jurisdiction in the matter, and that new proceedings must be begun in order to give them power to act; the court saying: "In rendering the judg-

ment, it exhausted the power with which the law had invested it, and it had no right to afterwards attempt to resume authority over the proceedings which the judgment had terminated." *Doctor v. Hartman*, 74 Ind. 221. A like view was taken in *Hanna v. Board of Commissioners*, 29 Ind. 170, with regard to an order establishing a poor farm where the land had been purchased. See, also, *Board of Commissioners v. Logansport & Rock Creek Gravel Road Co.*, 88 Ind. 199; *Kyle v. Board of Commissioners*, 94 Ind. 115. These cases show that in Indiana an order establishing a highway and an order establishing a ditch are both regarded as judicial acts and for that reason not subject to reconsideration, and that the act of the board in locating a county seat or establishing a poor farm is regarded as the exercise of a power specially granted, which, being once exercised, is exhausted. In that state if a party is aggrieved by a final judgment or order of a board of commissioners, if the judgment or order is of a judicial character, he is provided with a remedy by appeal. And, carrying out the idea of judicial action, in that state all such orders are appealable.

But in Indiana it is also held that, where a board of county commissioners has entered an order for the construction of a bridge which it is authorized by the statute to erect, it has the discretion to build it or not, as it may see fit, and cannot be compelled by mandamus to carry the order into effect. The petition alleged that upon a proper petition the board made an order that a bridge be erected; that it appointed engineers to make a survey and estimate on the location and bridge, and to prepare plans for the piers and abutments, and to file their report with the county auditor, all of which was done and the report accepted and adopted by the board; that it appointed a superintendent to advertise for bids and superintend the work; that after the contract had been let for the abutments and the contractors had performed work of the value of $60, the commissioners removed the superintendent, and refused to pay for the building of the bridge.

The court say: "If entering an order to construct a bridge across a stream at a particular place were confessedly a judicial proceeding, the case would be relieved of some of its difficulties, for it is settled that, when a board of commissioners, in such a proceeding, has once entered an order, it has no power to set such order aside. *Board of Commissioners v. State,* 61 Ind. 75; *Doctor v. Hartman,* 74 Ind. 221. But entering such order is not in the nature of a judicial proceeding. There are no adversary parties, and no notice is required. Until such bridge is constructed no one can be said to have any pecuniary interest in such order. It is a mere preliminary step, having in view a public improvement, which the board of commissioners may or may not in its discretion make. To hold that the board may not, after taking such preliminary step, recede from it, would be most disastrous to the public interest. * * * In our opinion the appellee had a discretion to build or not to build the bridge described in the complaint, and having such discretion it was not in the power of the courts to control the same. *State v. Board,* 119 Ind. 444." *State v. Board of Commissioners,* 125 Ind. 247. It will be seen that the supreme court of Indiana has taken a different view as to the nature of acts establishing a highway from that which this court has taken. We have repeatedly held that the act of a county board in locating or establishing a road is an exercise of its administrative or legislative power, and that from its discretion exercised in that behalf there is no appeal. *Howard v. Board of Supervisors,* 54 Neb. 443; *Otto v. Conroy,* 76 Neb. 517. We are inclined to think that the better reason and the greater weight of authority accords with the view that such acts are legislative in their character, and not judicial. The holdings in a few illustrative cases follow: In *State v. Board of Park Commissioners,* 100 Minn. 150, it was held that the power to lay out, open, vacate or abandon public highways is legislative, to be exercised by the legislature or by municipal boards to which it is delegated, and that a municipality has no

power to enter into contracts which curtail or prohibit an exercise of this power whenever public interests demand. This was a case where a strip of land along a street had been granted to the park commissioners of Minneapolis in consideration of the relief of the grantors from special assessments for the improvement of the avenue. Some years afterwards a resolution was passed by the board vacating the avenue as one of the parkways of the city, and this proceeding was brought to compel the board to resume control of the avenue and to maintain the same as a parkway. The court say that, if the relator has been damaged by reason of contractual rights by the vacation, an action for damages will afford him adequate relief, and this is the exclusive remedy; Judge Lewis dissenting.

In Kansas it is held that, after a city has constructed a sewer or drain for the purpose of carrying off surface water, it may in its discretion wholly abandon or discontinue the same and never make further use of it. The court say: "Cities may often make mistakes in the first instance, in constructing drains. And when they do, it would seem that they should have the power to correct their mistakes, and therefore that they should always have the power to change and alter drains; that they should always have the power of abandoning or discontinuing certain drains and building others." *City of Atchison v. Challiss,* 9 Kan. 603. See, also, *Higgins v. Curtis,* 39 Kan. 283.

In Maryland it is held that an ordinance giving a street railway company the right to lay double track upon certain streets may be repealed and the right limited to the use of a single track. In the opinion the court say: "It is perfectly well settled that a municipal corporation has a right to abandon any public improvement, and repeal at its pleasure any ordinance providing for the same; and property owners cannot compel it to take and pay for property condemned for such purpose. The right of repeal is unquestionable, but if in the exercise of this un-

doubted right injury is inflicted upon the property holder, he can recover damages by action at law. It has even been held that an unreasonable delay in repealing the ordinance will give a cause of action if injury ensue; or an unreasonable delay by the city in determining whether it would take the property condemned." *Lake Roland E. R. Co. v. Mayor,* 77 Md. 352, 20 L. R. A. 126.

In Vermont it is held that a town at one meeting may rescind its vote at a prior meeting to aid in the construction of a railroad by subscribing to its capital stock when no rights of third parties have vested and nothing has been done under the vote, citing two Vermont cases which held that a town may change its purpose, and, unless some right has been acquired or has vested under its action, no one may complain of the change. *Estey v. Starr,* 56 Vt. 690.

In Ohio, where the legislature by special act authorized county commissioners to levy a tax and build a bridge, and the commissioners levied a tax which produced a small portion of the money necessary, and the commissioners refused to make any further levy and abandoned the intention of building the bridge, a mandamus to compel further action was refused because "the law 'specially enjoins' no such duty upon the county commissioners—the duty to persist in a work deemed useless and injurious." *State v. Commissioners,* 31 Ohio St. 211.

The language of our statute is the same as that of Ohio, that the writ may be issued to any board "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Code, sec. 645.

In Iowa it is held that a county board has power to reconsider at a subsequent meeting its action at a former meeting, ordering the construction of a bridge; that the order was not judicial in its nature, though it required the exercise of a discretion, saying: "It was their duty as supervisors to act for the best interests of the people of the county, and they could acquire no rights as super-

visors which can defeat the performance of that duty." *Supervisors v. Horton,* 75 Ia. 271. *City Council of Augusta v. Sweeney,* 44 Ga. 463, 9 Am. Rep. 172; *Mayor v. State,* 30 N. J. Law, 521; *Stoddard v. Gilman,* 22 Vt. 568; *McConoughey v. Jackson,* 101 Cal. 265, 40 Am. St. Rep. 53; 1 Dillon, Municipal Corporations (4th ed.), secs. 290, 311, 314. Judge Dillon's language is as follows: "At any time before the *rights of third persons* have vested, a council or other corporate body may, if consistent with its charter and rules of action, *rescind previous votes and orders.*" See, also, 2 Abbott, Municipal Corporations, secs. 548-550; 1 Smith, Municipal Corporations, sec. 309, to the same effect.

In *Dodge County v. Acom,* 61 Neb. 376, it is said with regard to appeals from an order establishing a drainage ditch: "The exercise of this power is not judicial. The finding and conclusions of the board, to whom the legislature has given authority to act in the manner prescribed, are final and conclusive as to the necessity of the proposed ditch, and that the public health, convenience or welfare will be promoted thereby, and can not thereafter be made the subject of a controversy as to whether correct and well founded or not. It is the exercise of a delegated power, political or administrative in character, conferred upon the county board by the sovereign authority of the state acting through its legislative branch of government. *Lynch v. Forbes,* 161 Mass. 302; *In re Cooper,* 28 Hun (N. Y.), 515; *Chicago, R. I. & P. R. Co. v. Lake,* 71 Ill. 333; *Barrett v. Kemp,* 91 Ia. 296." This doctrine is again forcibly asserted in *Tyson v. Washington County,* 78 Neb. 211, and it is therein stated: "We think that no authority can be found holding that the policy or expediency of constructing any such public work, the exercise of discretion as to which is vested in any administrative board or official, can, in the absence of statutory permission, be interfered with or controlled by the courts; and, if it cannot be so, the reason must be that the exercise of such discretion and functions raises no question of judicial

cognizance, because the powers exerted are political and governmental in their nature."

Prior to 1879 a county board in this state had no authority to reconsider its action upon a claim against the county; this court holding that its action in the allowance or rejection of such a claim is a judicial act which the board had no power to reconsider or set aside. In 1879 the legislature expressly provided that a county board should not be prevented from once reconsidering their action upon a claim against the county. Laws 1879, p. 366, sec. 40, Ann. St. 1907, sec. 4458; *Stenberg v. State,* 48 Neb. 299; *Brown v. Otoe County,* 6 Neb. 111; *State v. Buffalo County,* 6 Neb. 454; *Kemerer v. State,* 7 Neb. 130. The view of the court as to the power to reconsider seems to have rested upon the proposition that, the act being judicial in its character, it could not be reconsidered. The implication is that, if the court had held the act to be discretionary or administrative in character, the board might, until the rights of third parties intervened, reconsider its former action. We have examined all the cases cited by the relator, and conclude that where, as in this state, an order of this kind is considered to be a legislative or administrative act, the county board has the right to rescind in the exercise of this discretion, unless such proceedings have been taken under the original order that rights of third parties have vested. The county board may have erred in its judgment, and upon further consideration should have the right to correct its error. The fact that the individual membership of the board may change should have no weight, in the absence of any injury or wrong to the public or to third parties. The board is a continuing body, and in the public interest it should have the right to reconsider its action if upon better information it concludes that it is inexpedient or disadvantageous to the public welfare. In Indiana, where the act is held to be judicial, a different principle applies; but in the cases from other states wherein the right to rescind was denied, intervening circumstances had made

it unjust to allow the right to be exercised. While in one sense the proceedings to establish the ditch are special in their nature, the moving cause for the action of the board was the public welfare, the good of the people of the county. We think the matter not different in principle from an order establishing a poor farm, or one locating a highway or ordering the construction of a bridge. In *McNair v. State,* 26 Neb. 257, the right of a county board, which had ordered a section line road established, to declare the road afterwards to be "no road" upon its own motion, and without a petition for its vacation, was denied. But the road had been opened and worked by the road overseer expending a large amount of labor thereon, and claims for damages had been filed and allowed. In the opinion by REESE, C. J., it is said: "The overseer of the road district was directed to open and work the road, and in pursuance of such direction he caused a portion of the road to be opened and worked. By this the section line was made as much a public highway as any established road in the county. It had passed beyond the jurisdiction of the county board, and was no more subject to their control than any other legally established public highway." In the present case, if the ditch had been opened and damages assessed, the case would fall within the rule of the *McNair* case; for, where rights of others have vested, there can be no reconsideration, and this was the essence of the holding in that case.

Have any rights accrued or vested in third persons which placed the order beyond the jurisdiction of the board to reconsider? Before the order was made establishing the ditch, the commissioners had gone upon the land and viewed the line of the proposed ditch with a surveyor. This it was their duty to do irrespective of whether the ditch was finally established or refused. The expense of the proceedings up to the time of the order, therefore, cannot be considered. The order establishing the ditch and appointing an engineer was made on December 9, 1905. Appeals were taken, and the petition recites that

"the said Martin Holmvig as such surveyor and engineer, in accordance with the directions and order of said county board, went upon the line of said improvement for the purpose of leveling and surveying the same, but was delayed and hindered in the completion of such work during the pendency of said appeals." The last appeal was dismissed on the 27th of May, 1907. The order establishing the ditch was rescinded on March 2, 1907, nearly three months before the appeal was dismissed. The engineer's report was filed upon August 20, which was six months after the rescission took place, and nearly three months after the dismissal of the last appeal. The petition alleges that the engineer went upon the line; that he was delayed and hindered during the pendency of the appeals, and yet that an expense of $1,200 was incurred between the time of establishing the ditch and the rescission of the order; that the expenses had become a charge upon the relators' lands; that the board refuses to pay the same and are attempting to charge the relators on their bond therefor, and that these facts will deprive relators of property rights already established. We are not able to perceive how this expense, whatever it may actually be, can be charged against the petitioners on their bond. Their liability ended when the order establishing the ditch was made, and if through erroneous judgment the county board incurred expenses thereafter, the petitioners should not be held liable therefor. If this is true, then they have not been injured, and no rights of theirs have been violated. We think the expense actually incurred for surveying before the reconsideration is of the same nature as incurred in the inception of a public improvement where the board found that it had made a mistake and afterwards reconsidered its action, and that it would not fall upon these individuals. The condition of the bond is "for the payment of all costs that may occur in case said board of county commissioners find against such improvement." This clearly means costs that occur up to the time that the county board established the ditch, and not costs that

occurred afterwards by reason of an error of judgment on the part of the board. No expenses have been incurred except those occasioned by the employment of the engineer, and as to these we must consider the allegations of the pleader most strongly against himself.

The only question remaining is whether the employment of the engineer and his partial performance of the work assigned him was such a vesting of a right in a third party that the order became irrevocable. We think the case is in this respect similar to one where a county board or a school board employ an architect to draw up plans for a building. The abandonment of the enterprise cannot deprive the architect of remuneration for his work, but the mere fact of his employment can in nowise have the effect to compel the board to erect the building if upon further consideration it deems its former action unwise and inexpedient. The engineer was an employee of the county board. He can only assert the rights given him by virtue of his employment, and his right to compensation for services rendered before rescission cannot operate to compel the board to incur an additional expense which they have determined, upon further reflection, to be against the public welfare.

It is argued that, if the board had the right to reconsider, succeeding boards also have the right, and great public injury might result if such a vacillating policy were permitted. But, if no other rights have intervened, who is harmed? These questions are committed to administrative boards to determine, and if, as has been suggested, the electors of the county might desire a change of policy as to such improvements, and change the personnel of the board for that reason, why should they not have it, if no one has acquired any vested rights which would render it unjust to set aside the former orders of the board.

Under the allegations of the petition, we are of the opinion that the board had the right to reconsider its former action, and reject the prayer of the petition. The demurrer to the petition is therefore

SUSTAINED.