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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1908—JANUARY TERM, 1909.

VOLUME LXXXIII.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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		John B. Raper.....	Pawnee City.
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Third.....	Lancaster.....	Albert J. Cornish	Lincoln.
		Lincoln Frost.....	Lincoln.
		Willard E. Stewart...	Lincoln.
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		Howard Kennedy....	Omaha.
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		Willis G. Sears	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
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		Benjamin F. Good...	Wahoo.
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		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
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Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
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UNITED STATES.

STATUTES AT LARGE.

March 3, 1875, vol. 18, p. 482, ch. 152 682

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1908.

NICHOLS & SHEPARD COMPANY, APPELLEE, V. FRANK STEINKRAUS, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,425.

1. **Trial: VERDICT: FAILURE TO OBJECT.** In an action upon a promissory note, the execution of which was admitted, and the defense was fraudulent misrepresentations of fact and breach of warranty as to the quality of the property for the purchase price of which the note was given in part, the court instructed the jury that their finding should be in favor of plaintiff upon its cause of action for a specified sum, being the principal and interest due upon the note. The jury returned a verdict finding the amount due plaintiff to be 10 cents less than the sum named by the court in the instruction. No objection was made to the verdict, and the erroneous computation was not called to the attention of the court until after judgment had been rendered. *Held*, That the objection came too late; that, if the jury made an error of 10 cents in computing the interest, the attention of the court and jury should have been called to the fact, if at all, before the discharge of the jury, in order that the verdict might be referred back and the proper computation made.

2. **Costs, Taxation of: FAILURE TO EXCEPT: REVIEW.** The action having been instituted in the district court, and the verdict and judgment having been found and entered for $200, which was within the jurisdiction of a justice of the peace, the defendant moved the court for a retaxation of the costs, taxing plaintiff's costs to it. The motion was sustained, and the costs so taxed, and to which no exception was taken. *Held*, No error, and that the action of the court was final and could not be reviewed in the supreme court.

3. Appeal: INSTRUCTIONS: HARMLESS ERROR. An instruction given by a court to the trial jury, which, if wrong, could not have been prejudicial to the party complaining, will not be examined upon a hearing on appeal.

4. Instructions based upon the issues and evidence, if reflecting them correctly, are not erroneous.

5. Appeal: VERDICT: EVIDENCE. The jury being the sole judges of the weight of the evidence, their verdict will not be set aside if sustained by any reasonable construction of the evidence.

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

Berge, Morning & Ledwith, for appellant.

Billingsley & Greene, contra.

REESE, C. J.

This is an action upon a promissory note for $200, bearing date March 10, 1904, with interest at 6 per cent. per annum from its date. The suit was instituted in the district court for Lancaster county, as the accumulation of interest, if computed, would render the action beyond the jurisdiction of a justice of the peace.

The defendant answered, admitting the execution of the note, but alleging as defenses: First. That the note was given as a part of $550 agreed to be paid as the difference between the price of two traction engines exchanged by the parties, and that at the time of the exchange plaintiff represented that the engine traded to him was sound and in good working order in every particular, fit and suitable for the purpose for which he desired to use it; that the representations were untrue and false, and known to be so when made, but unknown to defendant; and that defendant relied upon and believed the same, and would not have made the exchange but for the representations. Second. That at the time of the exchange and the execution of the notes plaintiff warranted said engine to be in good working order and in good con-

dition in every particular, and in all respects suitable and fit for good work as a traction engine, and defendant relied upon such warranty. Third. That the engine was not sound and suitable for the work intended, but was defective, specifying the particulars in which it was claimed the defects existed, and which were unknown to defendant at the time of the exchange, and that said engine was worth no more than the one given plaintiff in exchange; that as soon as defendant discovered the defects in said engine he notified and requested plaintiff "to make it right, but plaintiff denied that there was anything wrong with said engine, and refused to do anything in the matter of repairing and making the same according to representations"; that he had paid the sum of $50 on the note in suit, and at the time requested plaintiff to make good to him the damage he had sustained, but plaintiff had refused so to do, and refused to accept or receive said engine when its return was offered by defendant; and that defendant had been damaged by the fraudulent representations in the sum of $550.

To this answer plaintiff replied, first, by general denial; second, by setting up the contract entered into at the time of the exchange; third, that by reason of the terms of said contract defendant was estopped to avail himself of the matter alleged in the second defense set up in the answer.

A jury trial was had, which resulted in a verdict being returned finding for the plaintiff on its cause of action for $235.75, and in favor of defendant on his cause of action in the sum of $35.75, and assessing the amount of plaintiff's recovery at $200, an amount equal to the face of the note without the addition of interest. Defendant filed a motion for a new trial. Plaintiff filed a motion, moving the court "to enter judgment herein for the plaintiff for the sum of $235.75, or set aside the verdict of the jury in so far as the finding of $35.75 in favor of defendant is concerned, and grant plaintiff a new trial upon the cross-action of defendant," assigning a number of grounds

therefor. Both motions were overruled, and judgment was rendered upon the verdict, to which exceptions were entered. Plaintiff also filed a motion for judgment for the sum of $200.10 allowing the finding in defendant's favor for $35.75 to stand, and alleging that the true amount due on the note at the time of the return of the verdict was $235.85. This motion was overruled, and exception was duly taken.

In the instructions given to the jury, the court directed them to find that there was due plaintiff on its cause of action the sum of $235.85, and then determine the amount of damages due defendant, if anything, and find for plaintiff or defendant according as the balance might be. This the jury did not do, but found the amount due plaintiff to be $235.75, as above stated. If the true amount due upon the note was in fact $235.85, which we do not determine, the attention of the court should have been called to the error at the time of the return of the verdict, in order that the question might be referred back to the jury for the correct computation. A failure to do this must be considered as a waiver of the error, if one had been made. As the motion was not made until after judgment, and in view of the very slight error, if any was made, we must hold that it came too late, and that there was no error in the action of the court.

Defendant then filed a motion to retax plaintiff's costs, and require plaintiff to pay its own costs, amounting to $82.47, on the ground and for the reason that plaintiff did not recover more than $200. This motion was sustained, and the costs named were taxed to plaintiff. To this ruling no exception was taken, and under the well-recognized and established rules of practice we must treat the action of the district court as final. This leaves the case to be disposed of upon the appeal of defendant.

It is contended that the court erred in giving instruction numbered 6, given upon the court's own motion. The instruction is too long to be here copied. Defendant testified that, in order to induce him to sign the written order

or contract to which he placed his name at the time of the exchange of the engines, he accepted the statements of plaintiff's agents as to its contents, without reading it, giving as his reason therefor that there was not sufficient light, and that, had he read it, he would not have understood its terms; he being of foreign descent, and not sufficiently familiar with the English language to comprehend the meaning of parts of the instrument, and that the printing was made with very small type. The contract contained the provisions that "second-hand machinery, and machinery not built by Nichols & Shepard Company, is not warranted"; that "no representations or guarantees have been made by the salesman on behalf of Nichols & Shepard Company, which are not herein expressed"; also, that defendant would "not hold Nichols & Shepard Company responsible for any agreement not expressed in this order," and the further provision under the word *"Notice"* that "no general or special agent or local dealer is authorized to make any change in this warranty." He also testified that, not being able to read and understand the contract, he relied upon the warranty and representations made by plaintiff's agents, which were different from those contained in the written contract which he signed. The instruction complained of submitted the questions of fraud and warranty to the jury, also the condition as to light, the circumstances, etc., under which the contract was signed, and the contention of defendant that the representations and warranty alleged to have been made were made to him verbally, and that, if plaintiff practiced fraud upon defendant in the manner claimed by him, he would not be bound by the writing, but closing with the sentence: "In this particular you are instructed that a man before signing a paper should exercise reasonable care to learn what is contained in said paper by reading it himself, or, if he cannot read it understandingly, by having it read to him." This latter part of the instruction is objected to as being erroneous. As we view the case, the addition of the quoted words, whether correct or

incorrect, could work no prejudice to defendant. The verdict of the jury is in his favor for the amount of damages which they found he had sustained by reason of the failure of the engine to comply with the warranty and representations of plaintiff's agents. In order to do so, they must have adopted defendant's theory as to entering into the contract as disclosed by his evidence, and therefore the instruction, if erroneous, did him no harm. This being true, we do not deem it necessary to examine the instruction.

Objections are made to other instructions, given by the court, but we are unable to see that they are meritorious. They are governed by the pleadings and evidence, and fairly submitted the case to the jury. We have read the pleadings, evidence and instructions, and must be content with saying in this general way that we find no error in the proceedings. If there has been a miscarriage of justice, the fault must rest with the jury in not properly considering all the evidence and giving it the weight to which it may have been entitled. They being the sole judges in these particulars, we cannot molest their finding.

It follows that the judgment of the district court should be and is

AFFIRMED.

JAMES VERVERKA, APPELLEE, V. WILLIAM P. FULLMERS ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,377.

Appeal: DISMISSAL. Courts are not organized to determine mere abstractions, and will ordinarily refuse, on their own motion, to proceed in a case which involves only a right which has ceased to exist. In the instant case, in view of the fact that this court has heretofore entertained and determined appeals taken by the parties in interest from the judgment of a district court allowing or refusing a license for the sale of intoxicating liquor, we have ignored the rule above referred to, and examined the record and briefs of the several parties and the evidence

contained in the bill of exceptions, and find no legal questions presented not heretofore determined, and the judgment of the district court fully supported by the evidence.

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

W. J. Moss, for appellants.

John C. Hartigan and *W. H. Barnes, contra.*

DUFFIE, C.

This is an appeal from the judgment of the district court for Jefferson county, entered on the 16th day of July, 1907, affirming the action of the village board of the village of Daykin in granting a license to appellee to sell malt, spirituous and vinous liquors in said village for the remainder of the municipal year of 1907. The municipal year for which the license was granted expired on the first Tuesday of May, 1908. This being the case, any decision which we might render would not affect the parties. The appellee's license has expired, and no further rights under it can be claimed. Time has accomplished all that the remonstrator could ask of the court. It has canceled the appellee's license. In this condition of the case, we think the appeal should be dismissed. Courts are not organized to determine mere abstractions, and will refuse, on their own motion, to proceed in a case which involves only a right which has ceased to exist. *Cutcomp v. Utt,* 60 Ia. 156. As said by Judge Day in *State v. Porter,* 58 Ia. 19: "The court ought not to be required to spend its time in the accumulation of a bill of costs, for no other purpose than that of determining which party should pay them." Notwithstanding this view of the case, we have examined a voluminous record, and find no legal questions presented for our determination that have not already been decided in former cases. The rights of the parties depend wholly upon questions of

fact, which, we think, were correctly decided by the district court.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

IN RE ESTATE OF JENS ANDERSEN.

ANE MARIE ANDERSEN ET AL., APPELLANTS, V. CHRIS S. BORGAARD, EXECUTOR, ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,381.

Wills: DEVISE: CROPS. Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance, or to a party to whom the land is devised.

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

J. L. McPheely, for appellants.

Lewis J. Paulson, contra.

DUFFIE, C.

Does a crop of corn which has matured, but which remains ungathered upon the stalks, pass to a devisee of the land, or is it personal property in such a sense that it passes under a paragraph of the will devising personal property? The question arises in this way: Jens Andersen departed this life November 27, 1905, in Kearney county, Nebraska. His last will and testament, bearing date August 14, 1902, was duly admitted to probate December 27, 1905. He left surviving him three nephews and five nieces. The nephews resided in Kearney county, and his nieces resided in the kingdom of Denmark. To

each of his nephews he devised 80 acres of land, and the remainder of his estate he left to his nieces, the bequests being as follows: "I give, devise and bequeath unto my beloved nieces now living in Roskelda, Denmark, whose names are as follows: Karen Marie Andersen, Kestine Andersen, Ane Marie Andersen, Maren Andersen and Sise Marie Andersen, the remainder of all my property of whatever nature, share and share alike, to be divided after my death and sold and the proceeds to go to the aforesaid nieces, share and share alike." The three 80-acre tracts devised to the nephews were occupied by tenants, who had planted corn on a portion thereof, which at the time of the testator's death it is agreed had matured but which had not been gathered. The nieces made claim to the landlord's share of the crop, upon the theory that the same was personal property, and did not pass to the nephews, who took title to the land under the will of the testator. The probate court awarded the corn to the nephews, and on appeal the district court affirmed the holding. The nieces have appealed.

We may regard it as settled in this state that annual crops growing on the land do not pass to the purchaser at judicial sale. *Aldrich v. Bank of Ohiowa,* 64 Neb. 276; *Foss v. Marr,* 40 Neb. 559; *Monday v. O'Neil,* 44 Neb. 724. These cases appear to be based upon *Beggs v. Thompson,* 2 Ohio, 95, and *Cassilly v. Rhodes,* 12 Ohio, 88. That this rule does not obtain between grantor and grantee is evident from what is said by the court in *Cassilly v. Rhodes.* The first paragraph of the opinion is in the following words: "If the question were between the grantor and grantee, whether growing crops, annual or other, pass by a deed of sale, it would be of easy solution. They are not, technically, 'emblements' but 'issues' or 'profits,' and part of the land, while in the owner's hands, and, unless excepted, pass by the deed, because it is construed most strongly against him who makes it." That this is the rule of the common law is asserted by all textwriters. 1 Kerr, Real Property, sec. 50, says: "Growing crops planted by

the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance, even though reserved by parol by the grantor at the time of sale. And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past." Ohio and Pennsylvania are named by the author as two states where growing crops are held to be personal property to the extent that a parol reservation made by the grantor will be enforced, but even in these states, if no reservation of the crops are made either in the deed or by parol, the crop passes to the grantee. It is said in 4 Kent, Commentaries, p. *468: "If the land be sold without any reservation of the crops in the ground, the law is strict as between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else, and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor." In *Baker v. Jordan,* 3 Ohio St. 438, the vendor made parol reservation of a crop of corn upon the land. The court enforced the reservation in favor of the vendor. It said: "A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding, that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect." While holding that the reservation might be shown by parol, the court in opening its opinion said: "That growing corn will pass by common deed of the lands

whereon it grows, when no valid conversion of it into personalty is shown to have preceded the conveyance, cannot be doubted." In *Tripp v. Hasceig,* 20 Mich. 254, it is held: "Ripe crops, although no longer drawing nourishment from the ground, will, if still unsevered, pass by a conveyance of the land." In the body of the opinion it is said: "We concur in the suggestion of the circuit judge that whether the corn would pass or not could no more depend upon its maturity or immaturity than the passage of a standing forest tree by the conveyance of the land, would depend upon whether the tree was living or dead." Numerous authorities are cited in the opinion showing this to be the rule of the common law. To the same effect is *Damery v. Ferguson,* 48 Ill. App. 224.

We have no statute such as obtains in some of the states, notably New York and Ohio, making crops, growing on the land of a decedent at the time of his death, assets going to the executor or administrator to be applied and distributed as part of his personal estate. Even were such a statute in force in this state, we would have to hold, if we followed the court of appeals of New York, that growing crops passed to the devisee, if not necessary to pay debts existing against the estate or legacies under the will of the deceased. *Bradner v. Faulkner,* 34 N. Y. 347. In the body of the opinion it is said: "In this case there seems to have been no debts, and the sale of this wheat, it is not pretended or claimed, was necessary for the payment of legacies. When it legally appeared that this wheat was not necessary for the payment of debts or legacies, the executor should then dispose of it as directed by the will. To whom, then, did the wheat ultimately belong? * * * At common law, crops growing on land passed to the devisee of the land. This was conceded on the argument. They passed to the devisee upon the presumed intention of the testator, that he who took the land should take the crops which belong to it."

We think it is well settled that as between grantor and grantee, or devisee and the executor, or an heir of the

deceased, crops growing upon lands conveyed by deed or devised by will pass to the vendee or devisee. "Emblements are corn and other crops of the earth which are produced annually, not spontaneously, but by labor and industry, and for this reason are called *'fructus industriales.'* They are chattel interests, which go to the executor as against the heir of the testator, but not usually as against the devisee of the land on which they are growing at the death of the testator. As between the devisee of the land and the executor the matter is one wholly of intention. If there is no clear evidence of an intention in the will that the testator intended emblements to go to the executor, they will pass with the land devised, upon the theory that the testator would not have given land away from his heir without also giving those things which would make it more valuable to the devisee. This presumption in favor of the devisee is rebuttable by showing an express or implied specific gift of the emblements to some one else, though not by a mere residuary clause." Underhill, Law of Wills, sec. 306, and cases cited. Relating to the executor's right of possession of the land devised to the nephews, we do not think that it can change the right of the parties to this action.

We are urged to hold that a fully matured crop, although standing on the ground, is personal property, which does not pass with a conveyance or devise of the land. We do not think that this rule should obtain. If the grantor or testator intends to reserve a crop standing upon the land, it is easy to make such reservations; whereas, to hold that the question of whether the crop passed with a deed or devise of the land depended upon whether the crop had fully matured would raise numberless controversies as to the condition of the crop at the time of the conveyance. In adopting a rule it is always better that it should be such that no controversy is likely to arise over its application. We hold therefore that, until a crop is severed from the land upon which it is grown, it is such part of the real estate as will pass by a

deed of conveyance or by a devise of the land, unless reservation thereof is made in the deed, or there is evidence contained in the will of the testator that the devisee of the land should not be entitled to the crop.

In the present case there was a large amount of personal property left after paying all claims against the estate. This, together with 240 acres of land, was devised to the five nieces, share and share alike. We find nothing in the will that indicates any intention on the part of the testator to convert the corn crop growing upon the tracts devised to his nephews into personal property that it should pass to his nieces as such, and we hold therefore that the district court correctly held that it passed to the nephews as a part of the land devised to them.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND (WIMAN), APPELLANT.

FILED DECEMBER 17, 1908. No. 15,243.

1. **Statutes**: CONSTRUCTION: TAXATION: IRREGULARITIES. Statutory provisions with reference to special assessments are strictly enforced, but liberally construed with reference to general taxes, when an irregularity complained of has not been prejudicial.
2. **Constitutional Law**: TAXATION. Irregularity in the process of taxation can be said not to amount to due process of law, only when the proceedings are arbitrary, oppressive or unjust.
3. ———: ———: NOTICE. To constitute due process of law it is not necessary that notice be given of each step in the process of taxation. It is sufficient if the taxpayer has an opportunty to appear, at some time, before a tribunal having jurisdiction, and there procure an adjustment of his liabilities.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

W. H. Herdman and *W. A. Saunders,* for appellant.

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

EPPERSON, C.

The trial court ordered a sale of appellant's property under the provisions of the scavenger act, finding that the regular taxes for the years 1894, 1895, 1896 and 1897 of the city of Omaha were liens upon appellant's property. Before decree appellant answered, alleging that the taxes were illegal because of the insufficiency of the notices of the meetings of the board of equalization. There is no contention that the taxes were unjust or inequitable, or levied for an unlawful or unauthorized purpose, or exceeded the constitutional and statutory limitations. The question of due process of law is involved. The notices of the meetings of the board of equalization for the years 1895, 1896 and 1897 were each published in two papers printed in the English language, and one printed in the German language. This was an irregularity. Each notice should have been published in three English papers. The notice of equalization upon which the 1894 tax was levied was published six consecutive days, but the last publication was four days prior to the meeting of the board. Section 85, ch. 12*a*, Comp. St. 1893, which was in force at the times in controversy, provided in part: "The city clerk shall complete the assessment roll for the city on or before the second Monday in October of each year, unless otherwise ordered by the council, and when such roll is completed, the council shall hold a session of not less than five days, as a board of equalization, giving notice of said sitting for at least six days prior thereto in three daily papers of the city. The mayor and council shall make the annual levy at the first regular meeting of the city council in February of each year." It has been

held that the notice must be published six days immediately prior to the convening of the board. *Leavitt v. Bell,* 55 Neb. 57; *Medland v. Connell,* 57 Neb. 11; *Wakeley v. City of Omaha,* 58 Neb. 245. The above construction was placed on the statute in cases where special assessments were involved. It is not our purpose to reaffirm the above rule, but for the purposes of this opinion we assume that the rule was properly applied in the cases cited. There are reasons for holding that a strict adherence to the statutory provisions regarding notice is necessary in order to make valid a special assessment, equalization and levy, which cannot be said to apply to proceedings for the equalization and levy of regular or general taxes. Statutory provisions with reference to special assessments are usually strictly adhered to, but liberally construed as to regular taxes, unless an actual wrong is done. "Laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary." *Turpin v. Lemon,* 187 U. S. 51. In the case of special taxes, the amount thereof is based upon an assessment, not of the actual value, but of benefits to the property involved. The board of equalization assess the benefits upon the consideration of evidence adduced upon a hearing or trial. The value of the property is immaterial. The law imposes regular taxes annually upon all property according to the principles of equality and uniformity, in return for which the taxpayers all alike receive the protection of the law and other benefits of our government. In the case of regular or general taxes, the assessment is made by the assessor of the actual value of the property, and without notice to the taxpayer, and before the statutory notice of the meeting of the board of equalization is required. The assessment stands as the basis for the distribution of the burden of taxation, unless changed by the board of equalization, or otherwise, as provided by statute. In such cases the authority of the

board of equalization to act does not necessarily depend upon notice to be given to the taxpayer, unless it is sought to raise the assessed valuation of his property over that fixed by the assessor, and even then the general published notice would be insufficient. The valuation of the property had been previously fixed by proceedings which operated alike upon all property. The object of the statutory notice complained of in this case is to give an opportunity to the taxpayer to appear and show that his property was valued too high by the assessor, or that other property in the district has been valued too low. Relief asked of a board of equalization is in the nature of an appeal from the judgment of the assessor; and, unless it is pointed out that the assessor committed some prejudicial error, a denial of an appeal cannot be said to be a denial of due process of law. The case would be different if the appellant herein was contending that his property was assessed too high, or if he was in any way the victim of discrimination or irregularity; but no such complaint is made. He simply alleges that he was denied due process of law because the notice of the meeting of the board of equalization was not published strictly as required by statute, or, in other words, that he was denied an appeal from an assessment, which we must presume was legal. "It is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law." *Glidden v. Harrington,* 189 U. S. 255. At most, the defects in the notices, so far as they relate to the equalization of general taxes, must be considered as irregularities only, and insufficient alone to avoid the levy.

Again, it cannot be said that due process of law is lacking, in proceedings for taxation, although the statutory notice is omitted at some particular stage, if the maxims of the law provide an alternative remedy which is sufficient to correct any wrong done. As a safeguard for the protection of a taxpayer, our legislature made provisions, now appearing as section 11061, Ann. St. 1907, which

gives to a taxpayer the right to an injunction in the event that the objectionable tax, or some part thereof, be levied or assessed for an illegal or unauthorized purpose. It further provides that, if such person claims the tax, or some part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation or that such property had been twice assessed during the same year, he may pay the same under protest, and recover the amount from the municipality; or, if for any reason the taxes are invalid, he may obtain judgment in a court having jurisdiction, with interest, from the municipality making the invalid levy. Under these provisions an adequate remedy is awarded to whomsoever may be denied the right of appearing before the board of equalization, if he is injured thereby. It is not necessary to constitute due process of law that notice of each step of the process of taxation be given. It is sufficient that the taxpayer have an opportunity to appear, at some time, before a tribunal having jurisdiction, and there procure an adjustment of his liabilities.

In *Security Trust & Safety Vault Co. v. City of Lexington,* 203 U. S. 323, it was held that the failure of the city to require a notice of a special assessment for back taxes to the taxpayer does not deprive him of his property without due process of law, where the state court has afforded him an opportunity to be heard on the question of the validity and the amount of the taxes. In the opinion we find the following: "But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and after such opportunity has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court, the reduction amounting to over five thousand dollars. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? * * * The state court in this case has held the taxpayer entitled to a hearing and has granted and enforced such right, and

upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color at least of legislative authority." In *McMillen v. Anderson,* 95 U. S. 37, Mr. Justice Miller said with reference to a license tax levied by the state of Louisiana: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not and never has been, considered necessary to the validity of a tax. * * * Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal." The same jurist, in *Davidson v. New Orleans,* 96 U. S. 97, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." In *King v. Portland City,* 184 U. S. 61, it is said: "The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see *Towns v. Klamath County,* 33 Or. 225; *Weed v. Boston,* 172 Mass. 28), or the assessment is to be enforced by a suit to which he is to be made a party (*Hagar v. Reclamation District,* 111 U. S. 701; *Walston v. Nevin,* 128 U. S. 578), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. *McMillen v. Ander-*

son, 95 U. S. 37. In such case he cannot be heard to complain that his property is being taken without due process of law."

Under the doctrine of the United States supreme court, and consonant with sound reasoning, it would appear that a taxpayer, who has the opportunity, before the amount of general taxes was finally fixed and determined, to show to a board of equalization or to a court of competent jurisdiction, empowered to make an adjustment of the amounts equitably and legally due, that the assessment of his property was unjust or excessive or arbitrary, cannot complain that his property is being taken without due process of law.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

FAWCETT, J., dissents.

JAMES WOODS ET AL., APPELLANTS, V. PETER VARLEY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,823.

Intoxicating Liquors: LICENSE. A movable screen maintained in the front of a saloon sufficient to obstruct a view of the interior through the door or window is a violation of the screen law. Section 7179, Ann. St. 1907.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. M. Cain, Albert S. Ritchie and *Charles L. Fritscher, contra.*

EPPERSON, C.

In the spring of 1908 the appellee filed his application with the city council of Schuyler for a liquor license for the municipal year ending May 4, 1909. Appellants remonstrated, alleging that the applicant, as a licensee, during the preceding year had kept the doors and windows of his place of business obstructed, thereby preventing a clear and open view into his saloon; and, further, that during the preceding year the appellee had been guilty of selling intoxicating liquor to certain minors. Appellee maintained a movable screen in the front part of his saloon which was sufficient to obstruct a view of the interior through the door and window. Although at certain places substantially all the interior could be observed, yet the screen did furnish a hiding place, and could be moved to suit the convenience of the proprietor. Presumptively the screen was used to answer the purposes for which it was made. Its maintenance was a violation of the law.

We recommend that the judgment be reversed and the cause remanded, with instructions to the district court to enter a judgment canceling the license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with instructions to the lower court to enter an order canceling the license.

REVERSED.

HENRY BOLTON ET AL., APPELLANTS, V. MATHEW BECKER ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,826.

Intoxicating Liquors: LICENSE. Under the provisions of section 29 of the Slocumb law (Comp. St. 1907, ch. 50), it is a misdemeanor for a licensed vendor of intoxicating liquors to obstruct either his doors or windows by the use of screens, blinds, paint, or other articles; and one who during the previous year has been guilty of a violation of said section is not a proper person to receive a liquor license.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. I. Allen and *W. M. Cain, contra.*

EPPERSON, C.

By remonstrance the appellants objected to the issuance of a liquor license to the appellees because they, as former licensees, had violated section 29, ch. 50, Comp. St. 1907, by failing to keep the windows and doors of their place of business unobstructed by screens. The building where they had been doing business faced the north. On either side of the front door was a large glass window. The counter was near the east wall, and ran to within about 10 feet of the north window. Against the north end of the counter, and forming a right angle therewith, was a screen 32 or 48 inches wide. In the west wall of the building, and next to an alley, were two windows at which curtains were maintained, which were sometimes drawn and sometimes open. The evidence shows that one standing on the sidewalk at the north end of the building could look through the east window and see the bar, but could not see the space in front of the bar, except at the extreme south end thereof; that, looking through the

glass front door, one could not see the space in front of the bar. This difficulty would have been entirely obviated had it not been that the applicant permitted the pasting of advertising bills over the window west of the door. Such bills at times entirely obscured the view from without from that position. By reason of these bills and the screen set at the end of the bar, it was impossible to observe the interior of the saloon. Of course, one by going down the alley could look through the windows in the west wall, if the curtains were open. There was substantially no conflict in the testimony. It is true that one witness testified that he was able to see the entire interior of applicant's saloon. He had made an inspection, and at a time when, no doubt, the bills and the screen had been removed. The conduct of the applicant is clearly within the inhibition of the statute.

We recommend that the judgment of the district court affirming the order of the city council granting the license be reversed and this cause remanded, with directions to the lower court to enter judgment canceling said license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded to the lower court, with instructions to enter an order canceling the license granted by the city council.

REVERSED.

JAMES WOODS ET AL., APPELLANTS, V. JOSEPH KRIVOHLAVEK ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,827.

Intoxicating Liquors: LICENSE. A screen maintained in the front of a saloon sufficient to obstruct a view of the interior through the door or window is a violation of section 29 of the Slocumb law (Comp. St. 1907, ch. 50).

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. M. Cain, contra.

EPPERSON, C.

Appellants as remonstrators opposing appellee's application for liquor license, among other things, alleged a violation of section 29 of the Slocumb law (Comp. St. 1907, ch. 50). The evidence shows that applicant had during the previous year maintained a stationary screen four feet wide and six feet high, at right angles with the bar, near the front of his saloon. The evidence in this case as to the effect of this screen as an obstruction is similar to that in *Woods v. Varley, ante,* p. 19, and is governed by the same rule.

We recommend that the judgment be reversed and this cause be remanded, with instructions to the lower court to enter a judgment canceling the appellees' license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with instructions to the lower court to enter an order canceling the license.

REVERSED.

FRANK H. WOODS, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 14,584.

1. **Nuisance: INJUNCTION.** It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind,

and not merely of degree. *Ayers v. Citizens R. Co.*, p. 26, *post*, approved and followed.

2. **Costs**: INJUNCTION: REVIEW. This court will not reverse an order of the district court taxing the costs of an injunction suit to the defendant, if it appears that at the time suit was begun defendant's failure to comply with the terms and provisions of the city ordinance constituted valid ground for injunction, and that defendant after the action was begun removed the ground for injunction by complying with the terms and provisions of the ordinance.

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

Hall, Woods & Pound, for appellant.

Clark & Allen, contra.

GOOD, C.

Frank H. Woods, who owned certain lots located at the corner of and abutting on Ninth and Q streets in the city of Lincoln, brought this action to enjoin the Lincoln Traction Company from constructing a line of street railway in front of his said lots on said streets. The case was tried on its merits, and judgment entered dismissing plaintiff's cause of action and taxing the costs to defendant. Plaintiff and defendant have both appealed; the former from the order of dismissal, and the latter from the order taxing the costs to it.

The injunction was asked on the grounds, first, that defendant had no valid franchise or right to build and operate a street railway over said streets; and, secondly, because defendant had not complied with the provisions of an ordinance of said city which requires street railway companies to pay for the cost of paving destroyed in laying their street railway tracks, and to repave between its rails and for the space of one foot on the outside thereof. After the commencement of the action, and before trial, the defendant complied with the ordinance. The record shows that for a long time the defendant had owned and

operated a street railway in the city of Lincoln, and that it claimed to have acquired by purchase the franchise and rights originally granted to the Standard Street Railway Company, the Lincoln Street Railway Company, and the Lincoln Electric Railway Company. At the time this action was brought defendant was constructing a line of street railway along a portion of Ninth and Q streets, and was about to build its line of railway in front of plaintiff's property. The record discloses that defendant was and for a long time had been enjoying and exercising whatever rights it had acquired by purchase, and that it relied in good faith on the validity thereof. Defendant had at least a colorable right to construct its lines of street railway over the streets in question. The record does not show that plaintiff will suffer any injury different in kind from that suffered by the public generally. In *Ayers v. Citizens R. Co.*, p. 26, *post,* it is held: "It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree." So far as the questions presented by plaintiff's appeal are concerned, the case is in all respects similar to that presented in *Ayers v. Citizens R. Co.* The reasoning of that case is applicable to this, and the rules there announced are decisive of the questions presented by plaintiff's appeal. It follows that the judgment of the district court, in so far as it relates to the questions presented by plaintiff's appeal, is right, and should be affirmed.

The defendant's appeal raises the question as to whether the costs were properly taxed to the defendant. At the time the action was brought the defendant had not complied with the provisions of the ordinance, and was not entitled to go upon the streets and build its line of street railway. Plaintiff had a peculiar and personal interest in the paving, which would be destroyed by the building

of tracks, and was entitled to protect himself against the proposed invasion of his rights. The action was therefore properly instituted, because defendant had not provided for the payment of the cost of the paving it would destroy, and had not complied with the ordinance requiring it to provide for the repaving between its rails and for one foot on each side thereof. The fact that defendant afterwards complied with the terms of this ordinance removed any ground for injunction, but defendant was not entitled to escape the payment of the costs which were properly incurred on account of its own fault. It should have complied with the ordinance before first attempting to build its street railway. That it complied with the ordinance afterwards will not relieve it from the costs which were incurred. The costs, under the circumstances, were properly taxed to the defendant.

The judgment of the district court is right, 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.

BEATRICE GUILD AYERS, APPELLANT, V. CITIZENS RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,203.

Nuisance: INJUNCTION. It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree.

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

Flansburg & Williams, for appellant.

Hainer & Smith and *Hall, Woods & Pound, contra.*

GOOD, C.

This is an action to enjoin the construction of a street railway in front of plaintiff's residence property which abuts on south Twenty-Ninth street in the city of Lincoln. The injunction is demanded upon the ground that defendant had not obtained the consent of the electors of said city to lay its tracks and construct its lines of railway upon the streets of said city, and that without such consent the defendant was a trespasser. The cause was submitted to the district court upon an agreed statement of the facts. Defendant had judgment, and plaintiff has appealed.

From the agreed statement of facts it appears that the defendant owns and was operating a system of street railways in the city of Lincoln, and that it claimed to have acquired by purchase the rights and franchises originally granted to the Capitol Height Railway Company, the Lincoln Rapid Transit Company, and the Home Street Railway Company. At the time this action was begun defendant was constructing a line of street railway along and over said south Twenty-Ninth street, and was about to construct its line of railway in front of plaintiff's property. The defendant's right to construct and operate street railways over the streets in the city of Lincoln was before this court in *State v. Citizens Street R. Co.,* 80 Neb. 357. It was there said: "Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect." And in that case it was held that the defendant was entitled to the use of the streets it then occupied. It was recognized

that the defendant had at least a colorable right to go upon and use the streets for the construction of a street railway. Plaintiff's theory is that the occupation of the street by the defendant is without any right, and that the construction of its street railway, including its tracks and lines of poles and wires in the street, constitutes a nuisance. It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. The courts of this country generally hold that it is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and to the public must be one of kind, and not merely of degree. 29 Cyc. 1210-1212; *Placke v. Union Depot R. Co.*, 140 Mo. 534, 41 S. W. 915; *Bischof v. Merchants Nat. Bank*, 75 Neb. 838; *George v. Peckham*, 73 Neb. 794.

It is urged by the plaintiff that the laying of the track and the erection of the poles and wires for the carrying of the electric current will interfere with her ingress and egress to and from her property, and that the poles and wires will impede and obstruct the view from her premises; but the record does not show that a single pole will be placed in front of plaintiff's premises, nor that her ingress or egress to and from her property will in any degree be interfered with or impeded. Plaintiff asserts that she will be injured by reason of the noise incident to the operation of the street railway; but such injury would not be peculiar to the plaintiff, but would be suffered alike by all property owners residing anywhere along the lines of the street railway. It is not apparent from the record that plaintiff will suffer any injury different in kind from that suffered by the public generally. The lines of street railway and poles and wires may inconvenience the plaintiff to a greater degree than the public generally; but the mere fact that plaintiff uses that street

more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. Her injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind. The record does not disclose that plaintiff would suffer any such injury as would entitle her to an injunction.

It follows that plaintiff was not entitled to an injunction. The judgment of the district court is right, and should 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 right and is

AFFIRMED.

JOHN S. TALMAGE ET AL., APPELLEES, V. MINTON-WOODWARD COMPANY ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,339.

1. Assignments: VOID DEED. A voluntary assignment for benefit of creditors is void, if the deed of assignment is not witnessed and acknowledged.
2. ———: ———: ORDER OF DISTRIBUTION: VALIDITY. In proceedings in the county court taken under sections 3500-3545, Ann. St. 1907, relating to assignments for benefit of creditors, if the deed of assignment is void, the order of the county court allowing claims of creditors does not amount to a judgment, and the distribution of the assigned estate and the discharge of the assignee under the orders of the county court in such proceedings do not amount to a judicial exhaustion of the property of the assignor.

APPEAL from the district court for Hall county: JAMES G. REEDER, JUDGE. *Reversed.*

W. H. Thompson, R. R. Horth, W. A. Prince, Charles

G. Ryan, M. T. Garlow, B. H. Paine and *James H. Wooley*, for appellants.

T. O. C. Harrison and *O. A. Abbott, contra.*

GOOD, C.

This action was brought by creditors of the Minton-Woodward Company, a Nebraska corporation, against the stockholders of said corporation to enforce their statutory liability by reason of the corporation's failure to annually publish notice of its existing debts, as required by section 4128, Ann. St. 1907. The Minton-Woodward Company was organized for the purpose of carrying on a wholesale mercantile business, and had its principal place of business at Grand Island, in Hall county, Nebraska. During the years 1896 to 1899, inclusive, it published no notice of its existing debts, as required by said section 4128, and during the time that it was in default of notices it became indebted to a large number of creditors. On the 29th of April, 1899, the corporation attempted to execute and deliver to the sheriff of Hall county a deed of assignment for the benefit of its creditors. The corporation placed its property in the hands of the sheriff of said county, and thereafter filed in the county court of said county an inventory of its property with a schedule of its debtors and creditors containing the information required by section 3507, Ann. St. 1907. Thereafter the provisions of the assignment law were followed in all respects as though the deed of assignment had been valid. An assignee was chosen by the creditors of the corporation, to whom the sheriff transferred the property received from the corporation. Under orders of the county court, the property in the hands of the assignee was converted into cash, and the proceeds distributed to the creditors. The amount so distributed was 86 per cent. of the claims filed. Upon the assignee's final report, he was discharged by the county court. Thereafter John S. Talmage and other creditors of the corporation brought this action on

their own behalf and on behalf of all other creditors similarly situated who might choose to join in the action and contribute to the expense thereof. Several answers were filed by different defendants, setting up various defenses, but all of the defendants alleged that the purported deed of assignment was void because it was not witnessed, was not acknowledged before a notary public who was competent to take the acknowledgment, and was not executed by the proper officers of the corporation; and that, by reason of the fact that the assignment was invalid, all of the assignment proceedings in the county court were void, and that the plaintiffs' claims against the corporation had never been reduced to judgment, and that the assets of the corporation had never been judicially exhausted. A trial upon the issues joined resulted in a judgment in favor of the plaintiffs. The defendants against whom judgment was rendered have appealed.

On this appeal many interesting questions of law have been raised which have been ably presented both on the oral arguments and in the briefs, but the conclusion at which we have arrived renders it necessary to consider but one. Section 4128, Ann. St. 1907, requires every corporation created after the passage of said section to annually give notice in some newspaper of the amount of all the existing debts of the corporation, and further provides that, if any corporation shall fail to give notice as required, after its assets are first exhausted, then all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and to the amount of the capital stock owned by such stockholder. It has been held by this court that, before a cause of action under this section accrues against the stockholders for an amount equal to their stock, claims against the corporation must first be judicially ascertained, and the property of the corporation judicially ex-

hausted. This means, ordinarily, that judgment must be rendered against the corporation, and execution issued thereon and returned unsatisfied, before the right of action accrues. *Globe Publishing Co. v. State Bank,* 41 Neb. 175; *Ball v. Wicks,* 45 Neb. 367. No judgments in actions at law were obtained by the creditors against the Minton-Woodward Company. The only judgments ever obtained against the corporation were in the assignment proceedings wherein the court ascertained the amount of each claim filed. The only judicial exhaustion of the assets of the corporation was by the sale and distribution of the property of the corporation which had been placed in the hands of the assignee.

The plaintiffs contend that the allowance of the claims of the creditors by the county court in the assignment proceedings and the sale and distribution of the assets of the corporation were equivalent to the entry of judgment in an action at law, and the issue and return of executions unsatisfied. The defendants contend that the county court had no jurisdiction because there was never any valid assignment.

Section 3505, Ann. St. requires every assignment for the benefit of creditors to be in writing, and that it shall be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged in order to entitle the same to be recorded. In this state the law requires a deed of conveyance of real estate to be witnessed and acknowledged in order to be entitled to record. The deed of assignment was not witnessed. In *Sager v. Summers,* 49 Neb. 459, it was held that a deed of assignment, unless witnessed, is absolutely void. The deed of assignment was acknowledged before a notary public who was a stockholder of the corporation. Such an acknowledgment has been held invalid in *Horbach v. Tyrrell,* 48 Neb. 514; *Chadron L. & B. Ass'n v. O'Linn,* 2 Neb. (Unof.) 246. The first section of the act relating to the assignment for the benefit of creditors provides that no voluntary assignment for the

benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act. It is clear that the deed of assignment was not made in conformity with the act relating to assignments for the benefit of creditors. In *Miller v. Waite,* 60 Neb. 431, it was held that the provisions of the assignment law requiring the filing of a deed of assignment for record within 24 hours after its execution is mandatory, and a failure to file such instrument within the time limited by statute avoids the assignment, and renders it of no force and effect. In *Heelan v. Hoagland,* 10 Neb. 511, it was held that an unacknowledged deed of assignment, although recorded, was void. In the dissenting opinion of Judge REESE in *Bonns v. Carter,* 22 Neb. 495, 515, which was afterwards held in *Kilpatrick-Koch Dry Goods Co. v. Bremers,* 44 Neb. 863, to be the law, it was held, in substance, that, where one undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void. See, also, *Sloan v. Thomas Mfg. Co.,* 58 Neb. 713. It is clear that, under the statute and the rules announced in the authorities quoted from, the deed of assignment in the instant case was absolutely void.

It now becomes necessary to determine what force and effect shall be given to the assignment proceedings had in the county court which were based on the said assignment. Section 3538, Ann. St. 1907, confers full authority and jurisdiction upon the county courts to carry out the provisions of the assignment law. Section 3507 of the statute requires the assignor executing the deed of assignment to make and file within 10 days after such assignment, in the county judge's office, a verified inventory showing all the creditors of the assignor, the residence of each creditor, the sum owing to each creditor, the nature of each debt or liability, the consideration of the liability in each case, all of the property of the assignor at the date of the assignment, together with other detailed information. The following section makes it the duty of the county

judge, upon the filing of such inventory, to fix a date for the meeting of the creditors of the assignor, and to give notice of the time and place of such meeting. The subsequent sections contain provisions for the selection of an assignee and the administration of the assigned estate under the orders of the county court. Section 3516 requires the county judge to allow all claims filed that are uncontested, and upon all contested claims the county judge shall order pleadings to be filed, and contested claims shall be tried as in ordinary civil actions.

The plaintiffs contend that the filing of the inventory required by section 3507 vests the court with jurisdiction, and that a valid deed of assignment is not essential to give the county court jurisdiction. We are unable to assent to this view. The inventory is required to be filed only after the assignment has been made. Section 3508, making it the duty of the judge to take action, presupposes a valid deed of assignment. The object of the assignment law of this state is to permit a debtor to withdraw his property from the reach of his creditors and place it in custody of the law for ratable distribution among his creditors in the manner provided by the assignment law. It permits the debtor to impound his property, so that his creditors may not reach it by the ordinary process of law. The effect of a valid assignment is to place the property under the control of the county court. If the assignment is void, the right of the creditors of the assignor to reach his property by attachment, execution or garnishment is not taken from them. If the assignment is invalid, the property is not in the custody of the law, so as to withdraw it from the reach of creditors. Under a void assignment, the assignee acquires no title to the property conveyed by the assignment. The purpose of the law was to confer upon the county court jurisdiction to deal with the property of the assignor in the manner provided by the assignment law. If the assignment law is complied with, the result is that the county court has jurisdiction to deal with the assigned property and dis-

pose of it unhampered by the general creditors of the assignor. The intention of the law was to confer upon the county court jurisdiction to deal with assignments only when a valid assignment had been made, so that the court could deal with the assigned property in the manner contemplated by the assignment law. As the deed of assignment was void, the assignee took no title to the property, and he held it the same as an ordinary trustee would hold property for the assignor. It was subject to be levied upon by attachment or execution while in the hands of the assignee. After the property had been sold by the assignee, and before the funds had been distributed, they might have been reached in his hands by the process of garnishment. *Vernon v. Upson,* 60 Wis. 418; *Ogden Paint, Oil & Glass Co. v. Child,* 10 Utah, 475; *Heelan v. Hoagland,* 10 Neb. 511; *Ramsdell v. Sigerson,* 2 Gilm. (Ill.) 78; *Hardmann v. Bowen,* 39 N. Y. 196; Bishop, Insolvent Debtors (3d ed.), sec. 149; *Johnson v. Adams & Co.,* 92 Ga. 551; *Connor v. Omaha Nat. Bank,* 42 Neb. 602; *Bennett v. Knowles,* 66 Minn. 4.

We have been cited to the cases of *Farwell v. Crandall,* 120 Ill. 70, and *Farwell v. Cohen,* 138 Ill. 216. These cases hold that the jurisdiction of the county court in assignment proceedings does not depend upon the validity of the deed of assignment; that for the purpose of jurisdiction it is sufficient that there has been an assignment in fact for the benefit of creditors. An examination of the Illinois statute, however, shows that practically every attempt at an assignment should be construed as an assignment, while under our statute and the decisions of our court an assignment that does not comply with the statute with respect to being witnessed and acknowledged is absolutely void. The Illinois cases are therefore not in point. We are of the opinion that the county court was without jurisdiction, and that the assignment proceedings had there amounted to no more than would a sale and distribution of assets of the corporation by a trustee and the application of the proceeds to the claims of its

creditors. There was no judicial ascertainment of the claims of the plaintiffs, and there was no judicial exhaustion of the property of the corporation. Until these things occur, the plaintiffs are without right to maintain an action against the stockholders for their statutory liability.

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

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 according to law.

REVERSED.

PATRICK STANTON ET AL., APPELLEES, V. ALBERTINE DRIFFKORN ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,263.

1. **Specific Performance**: WHEN ENFORCED. "Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention." *Krum v. Chamberlain*, 57 Neb. 220.

2. ———: ———. Specific performance will not be enforced unless the contract has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression, unless it would be unjust and inequitable to refuse to enforce it. *Morgan v. Hardy*, 16 Neb. 427.

3. ———: EVIDENCE. Evidence examined and set out in the opinion, *held* insufficient to establish a claim for specific performance.

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

John C. Wharton and *M. D. Tyler,* for appellants.

M. F. Harrington and *S. D. Robertson, contra.*

FAWCETT, C.

On August 18, 1904, defendants executed and delivered to one F. A. Schmalle, a contract for the sale of the lands in controversy, and at the same time, and as a part of the same transaction, executed and delivered to Schmalle a bill of sale for certain articles of personal property. Subsequently, and prior to September 15, 1904, Schmalle assigned both the contract and bill of sale to plaintiffs. As a matter of fact, Schmalle had no interest in the transaction, but simply acted as a dummy for the plaintiffs, receiving a fee of $10 for his services. The contract called for the payment of $6,850, $1,000 of which was paid at the time of its execution, and the remainder was to be paid on or before September 15, when defendants were to convey the land by fee simple title, furnish an abstract, etc. At the time the contract was entered into there was pending in the district court for Madison county a suit by one Mahala Jane Volgamore to recover a dower interest in one of the quarter sections of land in controversy here, which suit had been tried and submitted, but not yet decided. On September 15 defendants, knowing nothing of the assignments from Schmalle to plaintiffs, executed a warranty deed to the lands in controversy to Schmalle, and tendered it to the plaintiffs, who they had been led to believe were acting for Schmalle. They were then informed by the plaintiff Luikart that the plaintiffs had obtained an assignment of the contracts and a quitclaim deed from Schmalle. Defendants thereupon, on the same day, prepared a new deed to plaintiffs, and tendered it to plaintiffs and demanded the payment of the remainder of the purchase price. Plaintiffs refused to accept the deed, on the ground that the Volgamore suit was still pending against the land, and that defendants could not make a clear title, and further stated that they were ready to pay the remainder of the money whenever defendants could make them a clear title. The defendants stated that they had done all they could, and, if

plaintiffs were not willing to accept the deed, the deal would have to be called off, and defendants then offered to return to plaintiffs the $1,000 which plaintiffs had paid at the time of the execution of the contract; which offer plaintiffs refused to accept. Nothing further was done by any of the parties until November 22, 1904. On that day plaintiffs commenced an action at law in the district court for Madison county against defendants, in which they set out the contract hereinbefore referred to, and alleged that defendants had refused to convey the lands in controversy, and prayed for a return of the $1,000 which they had paid at the time of the making of the contract, for $750 damages on account of the refusal of defendants to deliver the personal property, and $3,550 damages caused by the refusal of the defendants to convey the land. The defendants appeared in that action, and filed a demurrer to the petition. On December 15, 1904, the district court for Madison county decided the Volgamore case adversely to plaintiff therein, and entered a decree quieting and confirming the title of the defendants (defendants in this suit). That suit was not appealed, and the decree became final. On January 28, 1905, in vacation, plaintiffs filed a written dismissal without prejudice of the action at law which they had commenced on November 22, 1904, and on the same day brought the present suit, in which they pray for the specific performance of the contract of August 18, 1904, and for an accounting.

For answer defendants allege: (1) That plaintiffs, with full knowledge of all the facts and circumstances of the transactions, on the 22d day of November, 1904, commenced an action at law in the district court for Madison county for a return of the $1,000 which they had paid, and for other damages by reason of defendants' failure to convey, in the sum of $4,300, making an aggregate of $5,300; (2) that, in arranging the terms of the sale with Schmalle, defendants told Schmalle all about the Volgamore suit, and that, if they sold said farm to Schmalle, he must take the same subject to such suit, and that

Schmalle then and there stated to them that he knew all about the Volgamore suit, and was willing to purchase said land subject thereto; that, when the written contract for the sale was presented to defendants, defendants stated to the plaintiffs that there was to be no written contract, but that they were to make a deed for the land, and immediately receive their money; that plaintiffs thereupon stated that it was necessary to have a writing when real estate was sold, and that the contents of the purported contract were only the terms and agreement which they had made with Schmalle orally on the day previous; that defendants are not educated in the English language, and are unable to read the same readily, and that, owing to age and infirm eyesight, they could not see to read without glasses; that they thereupon requested plaintiffs to read such purported contract, so that they might be informed of its terms and conditions; that plaintiffs stated it was not necessary to read the contract, that there was nothing contained therein different from the contract already made and entered into between defendants and Schmalle; that defendants, relying upon said statements and representations of the plaintiffs, and believing the same to be true, and that they were selling the property subject to the said Volgamore suit and were to be paid in cash the whole amount of the purchase money above described, signed said contract; that the statements made by plaintiffs as to the contents of the contract were false and fraudulent, and that it was by reason of such false and fraudulent statements that defendants were induced to sign and execute said contract; that defendants have since learned that, while said Schmalle purported to be the purchaser of said property, he in fact was not purchasing the property, but was simply the instrument and tool used by plaintiffs to secure the execution of said contract; that thereafter plaintiffs demanded possession of the property upon the payment of $1,000, stating that there would be some little delay about getting some necessary papers from Madison, and that when they received

those papers they would forward the rest of the money to defendants; that defendants refused to deliver possession of the land until the entire amount of the purchase money was paid; that subsequently they executed a good and sufficient deed of conveyance to Schmalle, and tendered the same to plaintiffs; that plaintiffs then stated that they had procured an assignment of said contract from Schmalle, and requested defendants to make a deed for said property to them; that defendants immediately executed a deed running to the plaintiffs, and tendered the same, and demanded the immediate payment of the remainder of the purchase money; that plaintiffs refused to accept the deed or to pay the purchase money, giving as a reason that the Volgamore suit was still pending and undetermined; that immediately upon learning that said purported written contract contained other and different conditions than those contained in the oral contract between them and said Schmalle, defendants offered to return the said sum of $1,000 which had been paid as part of the purchase money, but the plaintiffs refused to receive the same; that immediately thereafter they left the said money in the Elkhorn Valley Bank at Tilden, instructing the officers of said bank to return the same to said Schmalle or the plaintiffs upon their request, and that said money has ever since remained in said bank, subject to the order of the said Schmalle or the plaintiffs; that defendants "now bring said money into court and tender the return of the same"; that since the time of the tender of the deed to said property the Volgamore suit has been finally adjudicated and determined in favor of defendants; that, by reason of the failure of plaintiffs to accept the deed tendered to them in accordance with the terms of their contract with Schmalle, defendants have been subjected to great inconvenience and expense, and have been prevented from consummating their plans, whereby all the members of their family could be united in their home at Omaha; that said written contract was never made and entered into by them with a knowledge of

its contents, but that their signature thereto was obtained by fraud, deceit and misrepresentation on the part of plaintiffs, and that the terms contained in said purported contract were never agreed to by the defendants nor acquiesced in; that the minds of the parties to said purported contract never met, and that said document is not binding upon defendants, and pray the court to find that the said alleged written contract was procured by fraud and deceit, and to adjudge that the same is void and of no force and effect, and that the bill of sale of the personal property executed by defendants to Schmalle be also found to have been procured by fraud, misrepresentation and deceit, and that the same is null and void, and that it be adjudged to be canceled and annulled; that plaintiffs' action be dismissed, and that defendants have and recover their costs herein expended, and for general and equitable relief.

For reply plaintiffs aver that at the time said action was commenced the Volgamore suit was pending, and that before the commencement of this action the said Volgamore suit was determined and adjudicated in favor of defendants, and thereupon said action for damages was dismissed by plaintiffs without prejudice, and this action commenced; that at the time this action was commenced defendants were able to comply with the terms of the contract, and deny all of the other allegations of plaintiffs' petition. Subsequently a supplemental petition and an answer thereto were filed; but, in the light of the disposition which must be made of the case, it is unnecessary to refer to them.

The district court found in favor of plaintiffs and against the defendants, and that the $1,000 of the agreed purchase price of $6,850 had been paid; that there still remained unpaid $5,850; that the value of the personal property referred to in the contract was $730, and the defendants had wrongfully converted the same to their own use; that said sum of $730, the value of the personal property, should be deducted from said $5,850, leaving a

remainder due from defendants to plaintiffs of $5,120; that plaintiffs had brought into court the full remainder of the purchase money, $5,850, and tendered the same to the defendants, and that plaintiffs stand ready and willing to pay and are prepared to pay said money; that said money so tendered by plaintiffs was not left with the clerk of the court nor deposited with him, but was retained by the plaintiffs, and has at all times been and still is retained by the plaintiffs, and that the value of the use of said money in the hands of the plaintiffs is equal to and offsets the value of the rents and profits of said lands; and decreed that within 20 days from the date thereof, upon plaintiffs paying to the defendants or to the clerk of the court, the remainder of the purchase price as found by the decree, the defendants should convey to the plaintiffs by good and sufficient deed the real estate in controversy. From that portion of the decree awarding specific performance, defendants appeal; and, from that part of the decree which adjudged that the value of the use of the money in the hands of the plaintiffs was equal to and offset the value of the rents and profits, plaintiffs prosecute a cross-appeal.

The evidence shows that Schmalle was a minister of the gospel; that, when he first called upon defendants to try and purchase their farm, he told them that he was tired of preaching, and wanted to go on a farm; that defendants first asked $10,000 for the farm, which amount Schmalle stated was entirely too much, that there were present at that interview Schmalle, Mr. and Mrs. Driffkorn, defendants, and their son; that Mrs. Driffkorn, in whom the title to the land stood, stated to Schmalle that she could not sell the farm because there was a suit against the land by Mrs. Volgamore for a dower; that Schmalle said he knew all about that suit, and that he would take the land subject to it, and for that reason he should have it at a less price. They failed to come together on the terms, and separated. The next day Schmalle and plaintiff Luikart again went to the farm,

at which time Schmalle had another interview with Mrs. Driffkorn, and again failed to come to terms. After Schmalle and Mr. Luikart left, Mrs. Driffkorn and her husband talked matters over; the husband urging that she consent to the sale, so that he could return to Omaha and the family all be together again. It seems that prior to this time Mrs. Driffkorn and some of the children had been living in Omaha, while Mr. Driffkorn was living upon the farm, and one of their main reasons for desiring to sell appears to have been that the family might all be together again at their Omaha home. As a result of that conversation, Mrs. Driffkorn finally yielded, and that evening Mr. Driffkorn went to Tilden, and told Schmalle that his wife had decided to sell. Thereupon the parties repaired to the bank of plaintiff Luikart, where the contract and bill of sale were drawn up, and signed by Mr. Driffkorn with the understanding that Mrs. Driffkorn would sign the next day, and on the next day Schmalle and Luikart appeared at the farm with the contract for the purpose of obtaining Mrs. Driffkorn's signature thereto. The evidence as to what transpired at that time is quite conflicting, the testimony in behalf of defendants showing that Mrs. Driffkorn objected to signing any paper, stating that there was not to be any written contract, but that they were to pay her the money in cash and receive their deed. She also testified that she had left her glasses in Omaha, and was unable to read, and requested them to read the contract to her, so that she might know what it contained; that plaintiff informed her that it was not necessary to read the contract, as it contained simply the terms she had talked over with Schmalle the day before; that, in reliance upon their assurance that there was nothing in the contract different from what she had talked with Schmalle, she signed the paper and received the $1,000 advance payment. Within a day or two after this plaintiffs endeavored to gain possession of the land, but to this Mrs. Driffkorn objected, stating that they could not have possession until they paid her the remainder of

the purchase money, and defendants continued to retain possession.

The question as to whether or not plaintiffs were justified in refusing to receive the deed tendered September 15 and pay the remainder of the purchase money, in our judgment, turns upon the question as to whether or not they purchased the land from Mrs. Driffkorn with full knowledge of the Volgamore suit, and subject thereto. Mr. Luikart testified that he never heard of the Volgamore suit until after the contract had been signed and he had ordered an abstract of the land. Plaintiff Stanton, however, admitted that he had heard of the Volgamore suit, but supposed that it had been settled. If he had heard of the Volgamore suit before the contract was entered into —a suit which involved a substantial interest in the lands he was purchasing—and then, on the strength of a mere rumor that that suit had been settled, joined with Mr. Luikart in paying a substantial sum of money as an advance payment on the purchase of such land, he certainly acted very differently from what prudent men ordinarily act under such circumstances. However that may be, it seems to us that it is unnecessary to consider what knowledge either Mr. Luikart or Mr. Stanton may have had of the Volgamore suit, if their agent, Schmalle, whom they had sent to make the purchase, was fully advised of that suit at the time he was conducting his negotiations with Mrs. Driffkorn, and agreed to purchase the farm subject thereto. On this branch of the case there is a conflict in the testimony. Schmalle says that no such statements were made or agreement had. Mrs. Driffkorn and her husband and their son all three testified unqualifiedly that Mrs. Driffkorn spoke about the Volgamore suit; that Schmalle said he knew all about it; and the testimony of at least one of these witnesses shows that he used the Volgamore suit as an argument for beating down the price. In the face of this testimony as applied to the law which we have laid down on the subject, we think the district court erred in granting plaintiffs specific perform-

ance. In *Krum v. Chamberlain,* 57 Neb. 220, we said: "Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention." It certainly cannot be contended under this evidence that the minds of the parties ever met in a common intention that plaintiffs were not to pay the remainder of the purchase money until defendants had relieved the land of the claim asserted in the Volgamore suit.

It is also well settled in this court that courts of equity will not always enforce a specific performance of a contract. In *Morgan v. Hardy,* 16 Neb. 427, we said: "Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case, as it is presented. * * * Specific performance will not be enforced unless the contract has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression," And in *Clarke v. Koenig,* 36 Neb. 572, we said: "Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. * * * A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain." In *Kofka v. Rosicky,* 41 Neb. 328, we said: "Specific performance is a matter of discretion in a court which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties." As early as *Morgan v. Bergen,* 3 Neb. 209, we said: "In an action for specific performance, the contract sought to be enforced must be clearly established, and the acts of part performance must unequivocally appear to relate to the identical contract upon which the action is brought." The above holdings of this court are eminently sound, and should be strictly adhered to. In the light of the law as

it is thus announced, can it be said that the plaintiffs, in obtaining the execution of the contract which they are seeking to enforce, acted with perfect fairness, and that defendants entered into the contract as made, without misapprehension or misrepresentation? We think not. A reading of the entire record impresses us that, all through the transactions referred to, defendants were acting openly and in good faith; that they were willing to sell their lands to the plaintiffs for $6,850, subject to the Volgamore suit; and also impresses us that the plaintiffs did not act openly and fairly and in good faith. We do not know what their purpose was in sending Mr. Schmalle to represent them in the attempted purchase of the land, nor why plaintiff Luikart so zealously concealed his connection with the transaction, even to the extent of acting as notary public in taking the acknowledgment of the Driffkorns to the contract, an act on his part which, in our judgment, rendered the acknowledgment absolutely void. We think that the evidence in this case falls far short of establishing a contract entered into with perfect fairness, and without misapprehension or misrepresentation.

There is another reason why we think the court in the exercise of its discretion should have denied specific performance in this case. When the defendants tendered the deed on September 15, and it was refused by plaintiffs, defendants immediately offered to return the $1,000 which had been paid. This plaintiffs refused, stating that they were ready to pay the remainder of the purchase price whenever defendants could give them a clear deed. If they had stood upon that ground, they would have occupied a more equitable position before the court, but they did not do so. On the contrary, on November 22 they commenced their action at law, hereinbefore referred to, in which they sought to recover back the $1,000, and damages for the failure of defendants to convey. Having commenced that action, we think defendants had a right to assume that plaintiffs no longer intended to insist upon

a performance of the terms of the written contract by defendants, and that defendants then had a right to make such disposition of the personal property set out in the bill of sale as they might deem proper. This defendants proceeded to do, and thereby materially changed their situation to their disadvantage if plaintiffs should subsequently attempt to specifically enforce the contract. Plaintiffs persisted in their law action until the Volgamore suit was decided in favor of the defendants. They then sought to change their ground by dismissing the action at law and commencing the present suit. We do not think a court of equity in the exercise of its sound discretion should sanction such a course. A party to a controversy should not "blow hot and blow cold." The defendants were entitled to know what course plaintiffs were going to take, and, having elected to proceed at law, they should not be permitted to subsequently abandon that proceeding and proceed in equity, simply because it then appeared that that would be more advantageous to them; this, too, regardless of the fact as to whether or not plaintiffs had two distinct remedies, the one inconsistent with the other.

Without pursuing the matter further, we think that the judgment of the district court should be reversed and the cause remanded, with instructions to the district court to dismiss plaintiffs' suit at plaintiffs' cost, upon the defendants paying into court the sum of $1,000 for plaintiffs' use, within a reasonable time to be fixed by the court, and we so recommend.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to the district court to dismiss plaintiffs' suit at plaintiffs' cost, upon the defendants paying into court the sum of $1,000 for plaintiffs' use, within a reasonable time to be fixed by the court.

JUDGMENT ACCORDINGLY.

CHARLES S. JOHNSON, APPELLEE, V. BANKERS UNION OF THE WORLD, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,356.

1. **Insurance:** BENEFICIAL ASSOCIATIONS: CHANGE IN LAWS. Where a fraternal benefit association has not complied with the provisions of section 1, ch. 47, laws 1897, and adopted a representative form of government, its governing body is without power to adopt a constitution or by-law, or to amend the same, changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members.

2. ———: BENEFIT CERTIFICATES: DEDUCTIONS. Where the constitution and by-laws of a beneficial society provide that on the death of a member the amount due on his certificate shall be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member at time of entry, with 4 per cent. interest thereon, and the constitution and by-laws are afterwards changed, increasing the monthly assessments to be collected, but such increased assessments are not demanded or collected from old members, but only from persons thereafter joining, and the old members continue to pay at the old rate until the death of a certificate holder, *held*, that the society, in settling with the beneficiaries of the deceased member, cannot decrease the amount of the recovery, but is entitled to deduct the difference between the rate of the monthly assessment in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, and not for the remainder of the life expectancy of such deceased member.

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

Matthew Gering, for appellant.

D. O. Dwyer, contra.

FAWCETT, J.

In October, 1901, defendant issued to plaintiff, Charles S. Johnson, and his wife, Clara B. Johnson, a joint policy of insurance, payable upon the death of either to the

survivor. On February 19, 1904, while the policy was still in full force and effect, Clara B. Johnson died, leaving plaintiff as her surving husband and beneficiary. This action is brought to recover the amount due under said policy. The face value of the policy was $1,000. At the time of the issuance of the policy the constitution and by-laws of the defendant provided: "For the purpose of creating a reserve fund, to guard against poor risks, protect healthy members, equalize the cost to all, and absolutely insure the perpetuity of the union, all insurance of the Bankers Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life, based on his age at entry according to the American Experience Table of Mortality, there shall be deducted from the death benefit payable under such policy held by said member, a sum equal to the amount of payment (at the rate paid by the member), for each month of the unexpired period of such life expectancy, with 4 per cent. on the unpaid balance of such sum." The rate of premium or assessment of Mrs. Johnson under the by-laws in force at the time the policy was issued was 81 cents a month, the joint rate of herself and husband being $1.24 a month. Her life expectancy according to the American Experience Table of Mortality at the time the policy was issued for her then age of 38 years was 29.6 years, of which 27.23 were remaining at the time of her death. It will be seen from this that, if plaintiff's recovery in this case is based upon the law in force at the time the policy was issued, it should be for the sum of $1,000, less 81 cents a month for 27.23 years, with 4 per cent. interest.

Subsequent to the issuance of the policy, in May, 1902, defendant attempted to amend its constitution and by-laws concerning joint policies so as to provide: "The amount of such policy to be paid to the survivor of such parties based upon the joint rate provided herein for the life expectancy of the deceased member." Defendant also

increased the monthly joint rate assessment of the plaintiff and his wife from $1.24 to $2.24 a month, but during the nearly two years which elapsed from the time of such attempted change until the death of Mrs. Johnson never demanded said increased rate, and the same never was paid; plaintiff and his wife continuing to pay the joint rate of $1.24 a month during all of that time just as they had done prior to the attempted change. At the same time defendants lowered the rate of interest upon the unpaid balance from 4 per cent. to 2½ per cent. Under this attempted change in the constitution and by-laws, it will be seen that plaintiff's recovery, if he is bound thereby, would be the sum of $1,000, less a monthly assessment of $2.24 for 27.23 years, with 2½ per cent. interest. By the former computation he would be entitled to receive upon the death of his wife $733.19, while under the latter computation he would be entitled to receive only $183.23. The defendant in its brief says: "The only controversy arises in the case as to which constitution governs in computing the amount due. Under the constitution in force at the time of the issuance of the policy, there would be due appellee the sum of $733.19. Under the constitution of 1901, as amended in May, 1902, computing at the increased rate, there would be due the sum of $183.23." This is a fair and frank admission of the only real controversy in the case. The law applicable to this question has been so definitely settled by the former adjudications of this court that we do not need to consider the many authorities cited from other courts. The case was tried to the court below without a jury. The court found that plaintiff was entitled to recover under the law in force at the time the policy was issued, and, following *Shepperd v. Bankers Union of the World,* 77 Neb. 85, entered judgment against the defendant for $866.14, being $1,000, less 81 cents a month for 27.23 years, and the difference between the monthly assessments of $1.24 and $2.24 a month from the date of the attempted change of the by-laws in May, 1902, to the death of Mrs. Johnson in February, 1904, with 4

per cent. on the unpaid balance. There are two reasons why the judgment of the district court was right and must be affirmed:

1. In *State v. Bankers Union of the World,* 71 Neb. 622, we held that prior thereto this defendant had failed to comply with the provisions of the statute governing such organizations by not having established and maintained a representative form of government, which required that the directors and other officers having general charge and control of the property and business of the society and the management of its affairs should be chosen by the membership thereof; and because of this failure of the defendant to comply with such statute we enjoined it from doing business until such error should be corrected; and in *Lange v. Royal Highlanders,* 75 Neb. 196, we held: "Where a fraternal benefit association has not complied with the provisions of section 1, ch. 47, of the act of 1897, and adopted a representative form of government, its governing body is without power to adopt an edict or by-law changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members." Under the law as thus announced by this court, it is clear that the defendant in May, 1902, was without power or authority to amend its constitution and by-laws so as to affect the rights of any policies then in force.

2. In *Shepperd v. Bankers Union of the World, supra,* we had under consideration the identical question here presented. In that case we held: "The constitution and by-laws of a beneficial society provided that on the death of a member the amount due on his certificate should be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member, with 4 per cent. interest thereon. The constitution and by-laws were afterwards changed, increasing the monthly assessments to be collected, but providing that such increased assessments should be collected only from members thereafter joining, the old members to continue to pay at the old

rate and on their death the increase over the old rate to be deducted from their certificate. *Held,* That the society had the right, in settling with the beneficiaries of a deceased member, to deduct from the certificate the difference between the rate of the monthly assessments in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, but not for the remainder of the life expectancy of such deceased member."

We are now asked to overrule, or at least to distinguish, the above case, but we are unconvinced by the able brief submitted by counsel for defendant. In the opinion in the *Sheppcrd* case, Mr. Commissioner DUFFIE exhaustively reviews the authorities, and very forcefully and, as we still think, correctly supports his reasoning and sustains the conclusion therein reached. In deciding the present case, the learned district court very properly followed the rule laid down in the *Shepperd* case. These questions having been so fully considered by us in *State v. Bankers Union of the World, Lange v. Royal Highlanders,* and *Shepperd v. Bankers Union of the World, supra,* we deem further discussion unnecessary.

Defendant's last contention is that there is error in the amount of plaintiff's recovery in that the court allowed interest upon the amount found due plaintiff from May 19, 1904, to the first day of the term of court at which the judgment was entered, basing its contention upon the clause in the policy which provides that it shall be payable "within 90 days after receipt and approval of said proof of death." Defendant is not entitled to have this assignment considered, for the reason that that matter was not called to the attention of the trial court in the motion for new trial. Not having been raised in the court below, it cannot be considered here; but, even if it were to be considered, we think defendant's contention would have to fail. Mrs. Johnson died February 19, 1904. In the petition plaintiff alleges that soon thereafter proof

of death was made and furnished defendant. In its answer defendant admits "that proof of death was duly furnished." It is not disclosed either by the pleadings or the evidence when it was furnished. Under plaintiff's allegation and defendant's admission, we think plaintiff is entitled to the presumption that the proof was furnished at once. If this is not so, that fact could easily have been shown by defendant. If furnished at once, then the district court was clearly right in allowing interest from 90 days thereafter.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

MARTIN HERPOLSHEIMER ET AL., APPELLEES, V. ACME HARVESTER COMPANY, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,404.

1. **Appearance.** Plaintiff obtained service on defendant by an affidavit in attachment and service on V. B. as garnishee. Defendant appeared specially and challenged the jurisdiction of the court. The special appearance was overruled. Defendant, not waiving, but still relying and insisting upon, its objections to the jurisdiction, answered to the merits. The trial resulted in judgment for plaintiff and an order on the garnishee to pay the money into court. Defendant appealed and filed a supersedeas bond, whereupon the parties entered into a stipulation and procured the entry of an order discharging the garnishee. *Held*, A general appearance by defendant.

2. **Judgment: RES JUDICATA.** The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned, but, where issue has not been joined nor any trial had on the merits, the doctrine of *res judicata* does not apply.

3. **Principal and Agent: AUTHORITY OF AGENT.** An agent for the sale of farm machinery and twine, who is clothed by his principal with power "to make contracts and settlements and collect balances, and the like," has full power to bind his principal by an agreement to relieve a customer to whom he has sold an amount of twine largely in excess of the demands of trade of such cus-

tomer by directing such customer to ship such excess to other parties named by said agent.

4. **Trial:** INSTRUCTIONS. Although an instruction given to the jury may be somewhat broader than the pleadings, it is not error to give it, if it be in harmony with the theory upon which both parties have tried the case.

5. **Sales:** EVIDENCE. Evidence examined and set out in the opinion *held* sufficient to sustain the verdict of the jury.

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

E. M. Bartlett and *Billingsley & Green,* for appellant.

Field, Ricketts & Ricketts, contra.

FAWCETT, J.

This action was brought in the district court for Lancaster county to recover a balance due for 6,000 pounds of twine. Plaintiffs are residents of Nebraska, and defendant an Illinois corporation. Service was obtained by an affidavit in attachment and service upon one A. E. VanBurg, a resident and citizen of Lancaster county, as garnishee. Defendant appeared specially and challenged the jurisdiction of the court upon the ground that the indebtedness due from the garnishee to defendant was payable at Peoria, in the state of Illinois. The objections to the jurisdiction were overruled, whereupon defendant filed its answer, in the first paragraph of which it again raised the question of jurisdiction. In the second paragraph defendant alleges that prior to the commencement of this action plaintiffs had filed a petition in the county court of Lancaster county, substantially in the same words and figures of the petition filed in this case, filed their affidavit for service by publication, substantially in the words and figures in the affidavit for publication in this case, and an affidavit in attachment and garnishment, substantially the same as in this case; "that issues were joined in said court between plaintiffs and the defendant,

to the end that the same matters at issue in this case were litigated in said county court of Lancaster county, Nebraska, and said court entered judgment determining the same, dismissing the cause of action of plaintiffs, and further holding that the court was without jurisdiction in the premises; that said judgment was duly entered by a court of competent jurisdiction in an action between these plaintiffs and this defendant, in which the subject matter at issue was identical with the subject matter at issue in this case, and that said judgment constitutes and is an adjudication of the matters sought to be put in issue herein; and that, although the plaintiffs herein prosecuted error proceedings from said judgment, and took an appeal from such judgment, both said error proceedings and said appeal have been dismissed by this court, and the judgments of this court in both of said cases dismissing said error proceedings and said appeal are in full force and effect, unappealed from, as is also the judgment of the county court of Lancaster county, Nebraska, as hereinbefore pleaded, of full force and effect." The third paragraph of the answer is prefaced as follows: "For further answer, the defendant, in no manner waiving, but at all times relying and insisting upon, its objections to the jurisdiction herein, says," and then specifically denies a number of allegations in plaintiffs' petition. The fourth paragraph is prefaced as above, and alleges a compromise settlement and adjustment of all matters between plaintiffs and defendant. The fifth paragraph is prefaced as above, and then denies each and every allegation in plaintiffs' petition not specifically admitted. The answer ends with this prayer: "Wherefore, having fully answered, defendant prays judgment against plaintiffs for costs." The reply, as it stood at the time of the trial, is a general denial. There was a trial to the court and a jury, which resulted in a verdict for plaintiffs, upon which judgment was duly entered, together with an order upon the garnishee to pay the money in his hands into court. Subsequently defendant filed a supersedeas bond to stay the ex-

ecution of said judgment pending the present appeal. After the giving of the supersedeas bond the following stipulation was entered into between the parties: "It is hereby stipulated that this cause having been appealed to the supreme court, and a supersedeas bond having been given, an order may be granted discharging the garnishee in this case." Whereupon the court made the following order: "On reading and filing stipulation herein, and this cause having been appealed to the supreme court by the defendant, and it appearing to this court that a supersedeas bond has been filed herein in the supreme court, and the parties having filed a stipulation by reason of such supersedeas bond, that the garnishee herein, A. E. Van Burg, be discharged. It is therefore ordered that the said garnishee A. E. Van Burg be, and he is, hereby discharged and entirely freed from said garnishment proceedings."

The defenses of want of jurisdiction and *res judicata* are again insisted upon in this court. The defense of want of jurisdiction must fail. The stipulation for the discharge of the garnishee, although made after judgment in the district court, clearly constituted a general appearance in the action. "A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *McKillip v. Harvey,* 80 Neb. 264. This has been the rule in this court ever since *Cropsey v. Wiggenhorn,* 3 Neb. 108. The record shows that in the action brought in the county court issue was never joined nor any trial had on the merits. The county court sustained defendant's special appearance, and dismissed the action for want of jurisdiction. Plaintiffs appealed, and also prosecuted proceedings in error to the district court from that judgment of dismissal; but in the district court, as stated by counsel for defendant in their brief, said proceedings were dismissed by attorneys for plaintiffs. In

the face of this record, it is very clear that the defense of *res judicata* must also fail. Where issue has not been joined nor any trial had on the merits, the doctrine of *res judicata* does not apply. The rule is well stated by SULLIVAN, C. J., in *State v. Savage,* 64 Neb. 684: "The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned." In Wells, Res Adjudicata, sec. 13, it is said: "It is an essential requisite of a conclusive judgment that it should go to the merits of the controversy in hand, and hence must not be based merely upon technical defects in the pleadings. Otherwise, as a general rule, it will not bar a subsequent action upon the same subject matter by the same parties. For example, if the foundation of a suit is the right of property, and the matter actually adjudicated relates only to a particular form of remedy, it is evident that the real question of the right of property is still *res integra,* not being adjudicated. The merits are not involved, for if a certain form of action be improper, there may be another one wholly unobjectionable." The same author (sec. 440) says: "Where a refusal to award a mandamus does not include an adjudication on the merits of a question of title, the refusal cannot conclude the question of title, or if the failure is because the court has no jurisdiction, nothing is conclusive, even if the evidence is heard." In *Waddle v. Ishe,* 12 Ala. 308, it is held: "Where evidence is heard by a justice of the peace upon the merits in a suit before him for a trespass, but the cause is eventually dismissed by him for want of jurisdiction, this not being a decision upon the merits, is no bar to a subsequent suit for the same cause of action."

While plaintiffs in their petition based their claim for a recovery upon a number of different items, when the case came on for trial, they abandoned all of those items except their claim for 6,000 pounds of twine, and the case was tried upon that claim only. The evidence shows substantially that in the spring of 1904 plaintiffs, who were

then engaged in the agricultural implement business in the city of Hastings, placed an order with one W. A. Howard, a representative of defendant, for 20,000 pounds of twine. Shortly after giving the order plaintiffs attempted to countermand the same to the extent of one-half thereof, but, the twine having been already shipped, they were advised by defendant's general agent at Omaha that it was too late to countermand. This letter was dated June 23, 1904. On the next day Mr. Howard wrote plaintiffs from Osceola, Nebraska, as follows: "In regard to twine we will ship extra 10,000 pounds elsewhere. Yours truly, W. A. Howard." The letterhead bears the card: "W. A. Howard, Traveler Acme Harvester Co., Phone 67." Mr. Rudolph Herpolsheimer, who was in charge of plaintiffs' business at Hastings, testified that at the time he gave the order for the 20,000 pounds of twine he supposed they were ordering it from the defendant; that they were local agents for defendant, and knew Mr. Howard as the representative of defendant in that district; and that, while he signed a written order for the twine, he did not read it. When they received the twine, they received it from Hooven & Allison Company, Xenia, Ohio. It appears that Hooven & Allison Company is a manufacturer of twine, and that defendant was their agent and distributor for the state of Nebraska. Subsequent to Mr. Howard's letter of June 24, stating that "we will ship extra 10,000 pounds of twine elsewhere," one O. P. Olson, who was the general agent of defendant in Nebraska, and, as appears from the evidence, had practically exclusive charge of defendant's business in this state, wrote plaintiffs the following letter: "Omaha, Neb., July 5, 1904. Herpolsheimer Implement Co., Hastings, Neb. Gentlemen: Saturday we asked you to ship twenty-five hundred pounds of twine to Trager & Stromquist, Bertrand, Neb., fifteen hundred pounds to John Atwood, Moorefield, Neb. We asked you to collect no advance freight. This was an error. If you have not already shipped the twine, collect $6.25 on the twenty-five hun-

dred pounds you shipped to Bertrand, and $3.75 on the fifteen hundred pounds you shipped to Moorefield. This is the amount of freight you have in the twine. Yours truly, Acme Harvester Company, by O. P. Olson, General Agent."

Prior to the writing of this letter, some time in June, 1904, plaintiffs were directed by Mr. Howard to ship 6,000 pounds of twine to Guick & Paulson at Trumbull, Nebraska, and to collect $25 or $26 advance freight charges. Plaintiffs complied with the request, and shipped the 6,000 pounds as directed. They also complied with the directions of Mr. Olson contained in his letter of July 5, and shipped 2,500 pounds to Trager & Stromquist, Bertrand, Nebraska, and 1,500 pounds to John Atwood, Moorefield, Nebraska. It will be seen that these amounts aggregate the quantity which Mr. Howard had stated they would ship elsewhere. Plaintiffs sold 2,000 of the remaining 10,000 pounds, and the remaining 8,000 pounds were destroyed by fire. For some reason not disclosed, the insurance companies declined to pay plaintiffs' loss, and suit was brought against the companies by Ricketts & Ricketts, as attorneys for plaintiffs. Plaintiffs subsequently made a settlement of their account with Hooven & Allison Company by giving them an order upon Ricketts & Ricketts to be paid when plaintiffs realized upon their insurance. Some point is attempted to be made by defendant on the fact that plaintiffs had not paid Hooven & Allison Company any money; but we think that is immaterial, as their adjustment of that matter seems to have been entirely satisfactory to Hooven & Allison Company. At any rate, they are not here objecting. Hooven & Allison Company collected for the 2,500 pounds from Trager & Stromquist, and for the 1,500 pounds from Atwood, but declined to recognize the transfer of the 6,000 pounds to Guick & Paulson. Mr. Herpolsheimer testifies that he shipped the 6,000 pounds of twine to Guick & Paulson on the order of Mr. Howard; that plaintiffs never opened any account with Guick & Paulson, and never had any deal-

ings or communication with them in relation to the twine; the effect of his testimony being that the plaintiffs considered the matter from that time forward as a matter purely between defendant and Guick & Paulson, and in this he is corroborated by the testimony of Mr. Guick. Mr. Howard testified that he was not acting for the defendant in that matter; that plaintiffs had stated to him that they were going to be "long on twine," and that he, learning that Guick & Paulson wanted to buy some 5,000 or 6,000 pounds, told plaintiffs that they could sell their twine to them; that he never knew until shortly before the trial that plaintiffs were claiming that their transfer of 6,000 pounds of twine to Guick & Paulson was in effect a sale thereof to defendant. Later on, and in the fall of that year, Mr. Howard collected $165 from Guick & Paulson on the twine account, but he says he made such collection at the request of plaintiffs. This Mr. Herpolsheimer denies. He testified that Howard and Mr. Olson came to him and wanted him to give them an order on Guick & Paulson for the money due on the twine; that he refused to do so, informing them that it was not his account, but theirs. Howard denies this, and testified that Mr. Herpolsheimer told him that he had been over to Guick & Paulson's to try to collect for the twine, and had been unable to do so. This Mr. Herpolsheimer denies positively, stating that he never went to see Guick & Paulson about it; and he is corroborated by Mr. Guick, who testified that they never had any dealings whatever or any communications with plaintiffs in relation to the twine. For some reason Mr. Olson, the general agent, was not called by defendant to corroborate Mr. Howard in this matter.

Both parties on the trial of the case seem to have treated the transaction in relation to the shipment of the 6,000 pounds of twine by plaintiffs to Guick & Paulson as a sale; and it is urged by defendant that Mr. Howard had no authority whatever to purchase twine for the defendant. We do not think the transaction was in the

strict sense of the term a sale. It was more in the nature of a taking back by defendant from plaintiffs of part of the twine which it had sold to them. They had sold plaintiffs 20,000 pounds of twine. It became apparent that by this sale it had overstocked its local agents, and so, in accordance with the letter of Mr. Howard to the plaintiffs, it directed the shipment of the extra 10,000 elsewhere, so that, to the extent of that 10,000 pounds, it treated plaintiffs as distributors, and, when it ordered the 10,000 pounds distributed by shipment to the three parties above named, it thereby canceled plaintiffs' order to the extent of the quantity so transferred, and we think was thereafter bound to look to the parties to whom it ordered it transferred, and not to plaintiffs. As to such matters we think Mr. Howard had full authority to represent the defendant. Defendant called Mr. Howard to the witness stand, and we have the following as a part of his direct examination: "Q. What is your business? A. I held a block out there for the Acme Harvester Company in 1904. Since that time I have been with the Acme Harvesting Machine Company in the same position. Q. As their agent? A. Yes, sir. Q. What are your duties as agent and blockman, and what were they in 1904 for the Acme Harvester Company? A. To make contracts and make settlements and collect balances, and such like as that. Q. Now, what did that territory embrace—how much of the state of Nebraska? A. Oh, from York county straight across to the Platte river, and all west on the south side of the Platte river; that would be 30 odd counties, or more." This testimony was offered by defendant itself, and to our minds it clearly shows that Mr. Howard had full authority, if he found he had made a contract with plaintiffs for more twine than they could handle, to agree with them that he would have any portion of such twine shipped to other points, and thereby relieve plaintiffs of their excessive order, and that such action on his part would bind the defendant. Whether

he in fact did so or not is a disputed fact in the case, and was for the jury.

Mr. Howard testified that the money which he collected from Guick & Paulson was credited to the plaintiffs upon their account for machinery which defendant had sold plaintiffs. We think that fact is immaterial, as plaintiffs are not now seeking to recover from defendant the amount so collected, but have accepted the credit so given by defendant, and are simply seeking to recover the remainder due for the 6,000 pounds delivered to Guick & Paulson. The question of ratification is discussed at some length in the brief, but, in the light of our holding that Howard had authority to represent defendant in the matters complained of, it is unnecessary to consider that question.

Complaint is made of certain instructions given by the court, particular objection being taken to instruction No. 2, or rather to that portion thereof which reads as follows: "The burden of proof is upon the plaintiffs to show these facts by a preponderance of the evidence. When the plaintiffs have so shown that the twine was so furnished the defendant upon the order of Howard, and have shown either that said Howard was at the time acting as the duly authorized agent of the defendant for that purpose, or have shown that such act upon his part, though not authorized at the time, was afterwards ratified by the defendant, such facts would constitute a sale of the twine so shipped, and in such case the plaintiffs would be entitled to a verdict at your hands against the defendant in a sum equal to the amount you find was the value of said 6,000 pounds of twine at the time it was furnished, less $165, with interest thereon at the rate of 7 per cent. per annum." The first part of instruction No. 2, which defendant admits was correct, reads as follows: "As the case is presented to you for your determination, it is claimed by the plaintiffs that W. A. Howard, acting as agent for the defendant, ordered the twine in question shipped to Guick & Paulson; that, in pursuance to said order, the plaintiffs shipped the twine to Guick & Paulson; that at the time

when said Howard so ordered the twine shipped, and, in pursuance thereof, the plaintiffs furnished the twine for shipment, the said Howard was acting as the duly authorized agent of the defendant for such purpose, or, if not so acting, that the defendant, the Acme Harvester Company, afterwards through its general agent having knowledge of the material facts touching the shipment ratified the acts of the said Howard." While this instruction is somewhat broader than the pleadings, it is clearly in line with the theory upon which both sides tried the case, and we think the court did not err in giving it. Counsel say this instruction was a direct and positive charge to find a verdict for the plaintiffs, leaving nothing whatever for the jury to find as to the facts or the weight of the testimony. In this we think counsel are in error.

It is claimed that instruction No. 3 is inconsistent with instruction No. 2, and does not state the contention of the defendant. Instruction No. 3 reads as follows: "It is the claim of the defendant that it did not purchase the twine in suit from the plaintiffs, and that its only connection with the transaction is that W. A. Howard, its agent with limited authority, acted in the matter of the sale by the Herpolsheimer Implement Company, its local agent at Hastings, to Guick & Paulson, its local agent at Trumbull, of the twine, and that later, when Howard called upon the plaintiffs for payment of the amount due upon their implement account to the defendant, plaintiffs instructed the said Howard to collect from Guick & Paulson the amount due from plaintiffs to defendant, and that the said Howard, as so instructed, collected such amount and remitted the same to defendant." We cannot agree with counsel that this does not state the contention of the defendant. On the contrary, we think it is a very clear statement of its contention.

In the concluding paragraph of their brief, counsel for defendant call attention to a number of the rulings of the trial court in the admission of testimony. We have

examined the record, and are unable to say that there is reversible error in any of the instances pointed out.

An examination of the entire record satisfies us that the case was fairly presented to the jury under proper instructions on conflicting evidence, and that there is ample evidence in the record to sustain the verdict. The judgment of the district court is therefore

AFFIRMED.

EDWARD L. GAUVREAU, APPELLANT, V. CHARLES I. VAN PATTEN, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,806.

1. **Elections: BALLOTS: MARKING.** The provision in section 155, art. I, ch. 26, Comp. St. 1907, that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him," and the instruction given in schedule B, sec. 159 of said chapter, "Do not make any mark on the ballot save as above directed," are directory only.

2. ———: ———: ———. Where an elector, who has already regularly and in due form voted for candidates for all of the offices designated on the official ballot, attempts to vote for a person for some office not designated on such official ballot by writing on another part of his ballot the name of such person and the office which he desires him to fill, such marking of said ballot will not avoid the ballot as to the candidates for whom he properly voted for such designated offices, unless it appears from an inspection of the ballot, aided by evidence *aliunde* if offered, that such marking was done for the purpose of distinguishing the ballot, or might be reasonably thought so to be intended.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John C. Stevens and *Walter M. Crow,* for appellant.

R. A. Batty and *J. W. James, contra.*

FAWCETT, J.

On April 7, 1908, a general city election was held in the city of Hastings for the election of one councilman from

each ward of the city. In the Second ward there were two candidates for election, each of whom had been nominated by petition, viz., E. L. Gauvreau, whom we will designate as plaintiff, and C. I. Van Patten, whom we will designate as defendant. The official ballot prepared by the city clerk was as follows:

"OFFICIAL BALLOT.
"SECOND WARD.
"FOR COUNCILMAN. Vote for ONE.
"E. L. GAUVREAU .....By petition ☐
"C. I. VAN PATTEN.....By petition ☐
"..... ☐"

The result of the election as found by the canvassing board gave defendant 294 votes and plaintiff 261. Plaintiff, in the county court of Adams county, instituted proceedings to contest said election, claiming that 87 illegal votes had been counted for defendant. There was a trial in the county court, which resulted in a finding that 47 votes had been counted for defendant which ought not to have been so counted, and judgment that plaintiff had been elected by a majority of 12. A writ of ouster was issued and plaintiff put in possession of the office. Defendant thereupon took an appeal to the district court. The district court found that there were cast and counted for defendant 294 votes, of which 238 were regular in all respects and had no marks thereon except the cross made within the square; that there were cast and counted for plaintiff 261 votes, 255 of which were regular in all respects and had no marks thereon except the cross in the square opposite the name of plaintiff, and further found that defendant had been elected councilman by a majority of 29 votes. A writ of ouster was issued and defendant put in possession of the office. From the judgment of the district court this appeal is prosecuted.

Upon 44 ballots which the district court found had markings on, but were still legal, the voters had regularly

and in due form made their X in the square opposite defendant's name. After doing so, they, for some reason not explained in the record, wrote upon their ballots, in some instances below and in others above the space designated for voting for councilman, one or the other of the following: "U. S. Rohrer for mayor [X];" "Rohrer for mayor [X];" "For mayor U. S. Rohrer [X];" "J. M. Daily for city treasurer [X];" "For city treasurer, J. M. Daily [X];" "U. S. Rohrer for mayor." Objections were made to some of the other ballots cast for each of the parties, but, as a determination of the legality of the 44 votes above referred to will determine which of the two candidates was elected as councilman, we deem it unnecessary to consider any of the other ballots. To the counting of the 44 ballots above referred to, plaintiff objected, basing his objection on the things written thereon. The above 44 ballots being conceded by both parties to be as above described, the only question for consideration is one of law.

Section 155, art. I, ch. 26, Comp. St. 1907, among other things, provides: "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him. * * * Whoever shall violate any of the provisions of this section shall, upon conviction thereof in any court of competent jurisdiction be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and adjudged to pay the costs of prosecution." In section 159, schedule B, entitled "Instructions to Voters," it is said: "Do not make any mark on the ballot save as above directed." Prior to 1899 there was added to this clause of schedule B the words "or the ballot will not be counted." In 1899 the legislature, evidently concluding that that penalty was too drastic, eliminated the words "or the ballot will not be counted," so that schedule B now stands simply as an admonition to the voter not to make any mark on the ballot save as above directed. The penalty provided, therefore, for marking a ballot other than as directed is a fine of not less than $25

nor more than $100; but the marking which would subject the voter to such penalty in our judgment is such a marking that the ballot could afterwards be identified as the one voted by him, and not any such marking as would not so identify the ballot; the purpose of the law being to preserve the secrecy of the ballot, and to prevent designing persons from corrupting a voter and arranging with him for a private marking which would enable him to prove that he had "delivered the goods." In *State v. Russell,* 34 Neb. 116, Mr. Justice POST quotes from the statute the paragraph, "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted," and then says: "It will be noticed that a ballot marked in violation of the foregoing provision is not declared to be void. The force of the objection is apparent, however, if the effect of our construction would be to defeat or interfere with the secrecy of the ballot, since that is one of the primary objects of the law. The construction which we have given the statute will not, however, be attended with any such effect. It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others of a designated class. * * * We are aware that our views on this branch of the subject are not in harmony with the recent cases in the supreme court of Connecticut, viz., *Talcott v. Philbrick,* 59 Conn. 472, and *Fields v. Osborne,* 60 Conn. 544. In the last case, under a statute substantially like ours, but which authorizes the printing of tickets by the respective political parties, it was held that the name on the tickets of one party, of a candidate for judge of probate when said office could not be filled at that election, and on the other of additional words descriptive of one of the offices, were distinguishing marks for which the ballots of both parties should be re-

jected. To our minds, however, the reasoning of the dissenting judges is the more satisfactory and convincing and certainly more in accord with the weight of authority. We think, too, that the construction given our statute is most promotive of fairness and purity in elections, and less liable to result in the disfranchising of honest voters through mere omissions or mistakes of their own or the negligence or design of public officers." A careful reconsideration of the above reasoning by Mr. Justice POST has confirmed us in our opinion of the soundness of his reasoning and the justness of his conclusions.

Section 151, art. I, ch. 26, provides: "In the canvass of the votes any ballot which is not indorsed as provided in this act by the signature of two (2) judges upon the back thereof, shall be void and shall not be counted, and any ballots or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted, provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." In commenting on that section in *State v. Russell, supra,* it is said: "It may be contended by respondent's counsel, that the proviso in the last section was intended to apply only to ballots otherwise regular, but on which the voter has failed through negligence, illiteracy, or other cause to clearly express his intention as to every office named thereon. The inference is strong, however, from the language of the several sections to which reference has been made, that the legislature, by declaring a limited number of provisions to be mandatory, and a compliance therewith essential to a legal ballot, intended the other provisions as directory only." Mr. Wigmore, in an appendix to the second edition of his treatise on the Australian Ballot System, p. 193, after examining all of the reported cases upon that branch of the subject, concludes in the following language: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their require-

ments as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means." To the same effect are *Bingham v. Broadwell,* 73 Neb. 605; *Griffith v. Bonawitz,* 73 Neb. 622.

In *Parker v. Hughes,* 64 Kan. 216, it is said: "Mr. Justice Ellis is of the opinion that not only must those ballots which are marked in the manner forbidden by section 25 be excluded, but also ballots marked in contravention of the terms of the penal section 27—that is, a ballot bearing a distinguishing mark purposely made should be rejected if the mark is of such nature, or is so placed on the ballot, that the judges or courts might find, in the absence of testimony, or upon testimony if offered, that there were reasonable grounds for believing that such mark was made by the voter with the intent that his ballot should be distinguished from others in the box; that, in determining what ballots should be counted, the court should look at the questioned one and from such inspection, aided by the notorious facts and circumstances of the election at which it was cast, determine whether the questioned mark was intended by the voter as a distinguishing mark or not, and if, upon such inspection and consideration, aided by evidence *aliunde* if offered, the court should conclude that the mark was made for the purpose of distinguishing the ballot, or might be reasonably thought so to be intended, the ballot should not be counted." In that case 176 ballots had been doubly marked by reason of the fact that the name of the candidate for whom the electors were voting appeared upon the ticket under the title "Democratic Party," and also under the title, "Citizens' Ticket." In commenting on that fact the Kansas court say: "It is not contended by the defendant that these double marked ballots, of which there are some 176, are in terms excluded from the count by the

statute, but only that they must be excluded because such double marking constitutes a distinguishing mark, by which it may be inferred that the voter sought to distinguish his ballot for the purpose of being able to assure a purchaser of votes that he had 'delivered the goods.' It must be admitted that these marks do not necessarily indicate a corrupt purpose. It is as reasonable, or more reasonable, to say that the voter so marked his ballot out of a superabundance of caution, or because he found Mr. Parker's name printed twice and supposed therefore that he was to put down two crosses, as to say that his act must be explained upon the hypothesis of a corrupt motive. This is made doubly forceful when we remember the large number of ballots so marked, coming from all parts of the city. It is the duty of the court to ascertain the intent of the voter, and, if it may fairly and reasonably deduce a motive consonant with honesty, rather than dishonesty, from his ballot, to count the same for the candidate of his choice, rather than to disfranchise him. A distinguishing mark, to warrant the rejection of the ballot, must be found to have been made for the purpose of identification."

In line with the reasoning of the Kansas court, the large number of ballots (44) marked as hereinbefore indicated, cast by that many different voters, negatives the idea that the ballots were so marked with the intention on the part of the voter to distinguish his ballot in such a manner that it might be identified as the one cast by him. So far as the office of councilman was concerned, the voters so marking their ballots could not have been actuated by corrupt or improper motives. They had already regularly and properly marked their ballots for the office of councilman, and the writing of the names of Mr. Rohrer for mayor or Mr. Daily for treasurer in no manner affected their votes for councilmen. What their motive may have been in attempting to vote for a mayor and treasurer in addition to the votes which they had cast for councilman is not explained in the record, and we cannot impute to

them any corrupt or improper motive. That they all intended to vote for the defendant for councilman is clear and unmistakable, and, in the absence of a statute avoiding their ballot for what they did in addition thereto, we think it would be doing violence to the spirit of our election law to refuse to count the 44 ballots in controversy for defendant. The district court therefore did not err in so counting them. With these 44 votes credited to defendant, he had a clear majority over the plaintiff for councilman, and was duly elected.

The judgment of the district court is therefore

AFFIRMED.

D. J. O'BRIEN COMPANY, APPELLEE, V. OMAHA WATER COMPANY, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,409.

1. **Waters:** DEFECTIVE HYDRANT: QUESTION FOR JURY. Where there was evidence to show that a fire hydrant which broke and flooded plaintiff's cellar was in a leaky condition for more than 48 hours before its collapse, the question whether the leaky condition indicated the defect which culminated in its bursting was one of fact, and for the jury.

2. **Instructions** examined, and found to be without error.

3. **Trial:** INSTRUCTIONS. It is not error to refuse an instruction, the substance of which is embraced in the charge given by the court on its own motion.

4. ———: ———: CONTRIBUTORY NEGLIGENCE. Where there is no evidence of plaintiff's contributory negligence, instructions submitting that question to the jury are properly refused.

5. **Contributory Negligence** is a matter of defense to be pleaded by defendant, and need not be negatived in the petition. First paragraph of syllabus in *Chicago B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, and *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, disapproved.

6. **Evidence of Value.** In an action to recover the value of goods negligently destroyed, the fact that a witness testifying to the

market value thereof has based his estimate upon the cost does not make his testimony incompetent when it further appears that said cost was less than the market value of such goods.

7. Appeal: PLEADING: AMENDMENT AFTER VERDICT. Where an application to amend a petition so as to demand interest on the value of goods destroyed is made after the coming in of the verdict, and no showing of facts excusing the delay appears, the judgment of the district court denying such application will not be disturbed.

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

Hall & Stout, for appellant.

McGilton & Gaines, contra.

CALKINS, C.

The defendant, under a contract with the city of Omaha, furnishes water to the city for fire purposes and to the public for private use. The plaintiff was a manufacturer of candy, occupying a building at the corner of Twelfth and Howard streets. A fire having broken out in the neighborhood on Saturday evening, January 28, 1905, a fire engine was attached to a hydrant which defendant had installed at the said corner, and it was used in extinguishing such fire until about 10 o'clock Sunday morning, when it was detached. Shortly afterwards the employees of the city, under direction of the foreman of the sewer department, attached hose to this hydrant, and used the same to syphon out the cellar of a neighboring building which had been flooded by the water used to extinguish the fire. This use was continued during the afternoon of Monday, January 30, when, while the said employees were endeavoring to close the hydrant, a large section of the bottom thereof broke out, releasing the water to practically the full capacity of the pipe connecting the hydrant with the main. This resulted in the flooding of plaintiff's cellar and the destruction of a large portion of the goods stored

therein. This action was brought to recover the value of the goods destroyed, on the grounds, first, that the hydrant was originally installed in a negligent manner; and, second, that defendant negligently failed to repair the same after it became in a leaky condition. There was a verdict for the plaintiff, and from the judgment rendered thereon the defendant appeals.

1. The defendant contends that there was not sufficient evidence to support a verdict for plaintiff, and that the court should have so directed the jury. An examination of the hydrant after its removal showed that a large piece was broken out of the bottom or heel thereof, which was constructed of cast iron. There was evidence tending to show that for from one-half to two-thirds of the way around the fracture the iron was rusted, while the remainder showed a freshly broken surface. There was evidence also tending to show that the hydrant was leaking from shortly after the time at which the engine was attached to it until its final collapse. It further appears that, following a custom of long standing, the fire department had notified the defendant that this hydrant had been used; and the defendant had, in accordance with its custom, sent an inspector to examine the same. The plaintiff contends that these facts tended to show first that the hydrant was cracked and in a defective condition; second, that this defective condition was indicated by the leakage of the hydrant during the time it was used in extinguishing the fire and syphoning out the said cellar; and, third, that the defendant was negligent in not ascertaining the cause of the leaky condition and repairing the defect.

If the testimony of the plaintiff's witnesses was true, and the court before it could direct a verdict against the plaintiff must so assume, the facts above stated were established, and there only remains to be considered the question whether negligence might be inferred from those facts. The defendant places much stress upon the testimony of its inspector, who says that he examined this hydrant after the fire and found it in good condition. The

flaw in defendant's argument consists in the assumption that this testimony must be true and that it conclusively establishes that the hydrant was not leaking. It is inconsistent with the testimony of the plaintiff's witnesses as to its leaky condition, and, it being a question for the jury to decide, they must be taken to have determined it against the defendant. Whether the leaking of the hydrant should have indicated to the defendant its defective condition is the crucial question in the case, and it was peculiarly one for the jury. As has been repeatedly said, the existence of negligence is generally a question of fact. It is for the jury to determine where the facts are disputed, or where from the undisputed facts different minds may reasonably draw different conclusions as to the existence of negligence.

2. The eighth instruction given by the court on its own motion is as follows: "The gist of this action is negligence, the plaintiff alleging as its claims of negligence (1) that the hydrant was originally installed in a negligent manner, and (2) that defendant negligently failed to repair the same after it became in a leaky condition; but you are instructed that there is no evidence which would warrant you in finding that defendant was negligent in placing or installing the hydrant in question, and your inquiry as to defendant's negligence will be confined to the second ground claimed by plaintiff, as above stated. And on this point you are instructed that it is not sufficient for plaintiff to establish merely that the hydrant was in a leaky condition, and that it finally burst and damaged its property, but it must further establish by a preponderance of the evidence that defendant knew, or by the exercise of ordinary care ought to have known, of its defective condition, and negligently failed to repair it; though you find the hydrant in question was leaky and out of repair, still, if defendant discovered its condition as promptly as ordinary care required, and repaired or replaced the same with reasonable despatch, it would not be liable." The defendant argues that the two paragraphs of instruction

No. 8 are inconsistent, and that the court by it told the jury that, if the hydrant was in a leaky condition, it was defective. The court in its instruction No. 4 had already told the jury that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that the hydrant in question was defective; and the effect of this instruction was merely to withdraw from the jury the question of negligence in its installation. We do not think the criticism is just. There was evidence upon which it could be fairly based, and it was quite as favorable to defendant as it was entitled to demand.

The defendant also criticizes the second paragraph of the ninth instruction, in which the jury were told: "Upon the other hand, if you find from a preponderance of the evidence that the hydrant was in a defective or leaky condition, and that the defendant negligently failed to discover such condition and repair it before the same was broken, and that without the existence of such negligence on the part of the defendant the hydrant would not have broken, then the defendant would be liable, even though the negligence of the employees of the sewer department may have concurred in producing the injury." It is argued that by this instruction the court told the jury that, if the hydrant was in a leaky condition, that was evidence of the defect in the heel. This criticism is apparently based upon the proposition that the court should have used the word "and" instead of the disjunctive "or." We think it is plain that the court used the two words as synonymous, and that the jury could not have been misled thereby. The only defect that was discovered in the hydrant upon its removal was the break in the heel, and no other cause for its leaky condition is suggested or proved.

3. The defendant complains of the refusal of the court to give two instructions tendered by it as follows: "(1) You are instructed that unless the plaintiff has satisfied you by a preponderance of the evidence that the hydrant which broke at Twelfth and Howard streets was in a de-

fective and leaky condition prior to the 28th day of January, 1905, and that said defendant knew of said defective and leaky condition or by ordinary care and diligence should have known of such defective and leaky condition, then your verdict should be for the defendant. (2) The jury are instructed that plaintiff cannot recover from said defendant any sum whatever unless it has satisfied you by a preponderance of the evidence that the broken condition at the foot of the hydrant, if such condition existed prior to the time of the actual breaking out at the foot of the hydrant, was in such condition as to have warned a reasonably prudent and careful person that said hydrant was defective at the bottom thereof, and it was defendant's duty to repair the same." The effect of the first instruction was to relieve the defendant of any care of said hydrant for the 28th, 29th and 30th days of January, while the principle embodied in the second had already been given to the jury in instruction No. 8 of the court. The court did not, therefore, err in refusing to give the first, and to repeat itself by giving the second.

4. The defendant also complains of the refusal of the court to give instructions numbered 5 and 6 requested by it, in each of which the question was whether the loss suffered by the plaintiff, or any portion thereof, was due to its contributory negligence. As there was no evidence of any contributory negligence on the part of the plaintiff, it would have been error to submit the question to the jury. *Clingan v. Dixon County*, 74 Neb. 807; *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Neb. 448.

5. It is further contended by the defendant that, because the plaintiff failed to formally allege in its petition that it was without fault, such petition does not state facts sufficient to constitute a cause of action. The great weight of authority is that contributory negligence is a matter of defense to be pleaded by defendant, and need not be negatived in the petition. The cases from other jurisdictions are too numerous to cite, but a reference to them will be found under the title "Negligence" in 37

American Digest, sec. 186. This court having adopted the rule that contributory negligence is an affirmative defense, the burden of proving which is upon the party pleading it (*Rapp v. Sarpy County,* 71 Neb. 382, 385), it logically follows that the plaintiff should not be required to negative such defense. This principle has been recognized in *Union Stock Yards Co. v. Conoyer,* 41 Neb. 617, and *Cook v. Chicago, R. I. & P. R. Co.,* 78 Neb. 64.

But a different rule seems to be announced in the first paragraph of the syllabus in *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Neb. 748. In that case the defendant was contending that the petition was insufficient because it contained no averment that the defendant knew, or ought to have known, of the defective appliance which was responsible for the accident. The petition appears to have contained the allegation that the plaintiff without fault on its part sustained an injury as the proximate consequence of the negligent acts charged against the defendant; and the question we have here presented was not before the court, and evidently not in the mind of the judge writing the opinion. There is a similar statement in the last clause of the first paragraph of the syllabus in *Chicago, St. P., M. & O. R. Co. v. Lagerkrans,* 65 Neb. 566. In this case the petition appears to have contained the allegation that the defendant "carelessly and wrongfully and negligently caused the death of said deceased, without any fault, carelessness or negligence of said deceased." Here again the question whether the petition would have been good without the allegation that the accident occurred without any fault upon the part of the injured person was not presented to the court. It is a fundamental principle that cases are only authority where the question to which they are applied was presented to the mind of, and necessarily decided by, the court; and the cases referred to are not, therefore, opposed to the conclusion we have reached. As the syllabi referred to, taken by themselves, would seem to enunciate a different rule, we have deemed it best to call attention to them, and to

say that, in so far as the same conflict with the conclusion we have here reached, they are disapproved.

6. Finally, the defendant insists that the case must be reversed for errors in proving the value of the goods destroyed. Mr. D. J. O'Brien, the president of the plaintiff, was the witness by whom the plaintiff proved the value of these goods. He testified that he had been engaged in the business of manufacturing candy for 30 years, and was familiar with the value of the articles destroyed. In response to the question as to what was the fair and reasonable market value of the goods before and after the damage, he testified, giving the value of each article item by item, and stating, in most instances at least, that the same was totally destroyed. Afterwards he was asked: "Q. Now, when you have given your testimony as to their value, state what value, Mr. O'Brien, you have given. A. The cost value to us. Q. The cost value to you? A. Yes, sir. Q. Is that more or less than their fair market value, selling at Omaha at that period? A. It is less than their selling price." The defendant claims that this admission of the witness made his testimony as to the market value incompetent, and cites in support of its position the case of *McCook v. McAdams,* 76 Neb. 1. In that case the plaintiff and another witness, after having testified that they had made an estimate of the damage to the goods, gave the amount in gross. It appeared that these estimates were based in part upon the original cost of the goods, and the court states that this is not a proper basis for the computation of damages, because it frequently happens that goods on the shelves of a merchant are worth but a fractional part of their cost. The most serious objection to the testimony in that case was the fact that the witness was allowed to estimate the damage in gross. In the instant case the witness gave the market value of the goods in detail item by item, and afterwards, upon being examined upon that point, stated that he had based his estimate upon the cost to the plaintiff. If he had stopped at this point, the argument that his estimate

was infected with one vice found in the estimate of the witnesses in *McCook v. McAdams, supra,* would have been plausible; but he was then asked whether their cost was more or less than their fair market value sold at Omaha at that period, and he answered that it was less than their selling price. The plaintiff was entitled to recover the market value of the goods at Omaha. It was engaged in the manufacture and jobbing of these goods in the Omaha market. The market value of goods in any particular market is determined by the price at which they are selling in such market. There is therefore no distinction between the market value and the selling price. In this case it appears that, in estimating the value of the goods, Mr. O'Brien gave the defendant the benefit of the plaintiff's profits as manufacturer and jobber, and of this the defendant should not complain.

7. The plaintiff did not in its petition demand interest upon the amount of the value of the damaged goods from the date of such damage to the time of the trial; but, after the coming in of the verdict, the plaintiff filed an application for leave to amend its petition to demand the same, and for an order of the court adding to the verdict interest from the date of the loss to the date of the verdict. This application was denied. There is nothing in the record to show what, if any, excuse was given to the court for the plaintiff's delay in asking this amendment, and, in the absence of such showing, we cannot say that the court abused its discretion in refusing the plaintiff permission to make such amendment. If the amendment had been permitted, the right of the court to add interest to the amount of the verdict would have been doubtful. The only case in point we have been able to find is that of *Hallum v. Dickinson,* 47 Ark. 120, 14 S. W. 477, which holds that a court cannot add interest to a verdict.

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.

JOSEPH W. DUNKIN, APPELLEE, V. E. B. BLUST ET AL., TRUSTEES, APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,555.

1. **Municipal Corporations:** IMPLIED POWERS: JAILS. The power of a village to build a jail is necessarily and fairly implied from and incident to the power expressly granted the village to enforce its ordinances by fine and imprisonment.
2. **Nuisance:** JAILS. A village jail properly constructed and suitably situated, is not *per se* a nuisance.
3. **Municipal Corporations:** UNAUTHORIZED EXPENDITURES: INJUNCTION. The making and publication of the estimate of expenses required by section 87, art. I, ch. 14, Comp. St. 1907, should precede the appropriation of money for village purposes; and the village board will be restrained from proceeding with an expenditure without such estimate upon the timely application of a taxpayer.

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

R. M. Thompson and *W. H. Thompson,* for appellants.

W. D. Oldham and *H. M. Sinclair, contra.*

CALKINS, C.

The plaintiff is a citizen and taxpayer, and the defendants are trustees of the village of Ravenna. This action was brought to restrain the defendants from constructing a village jail upon lots owned by said village, upon the grounds: First, that the village had no express or implied power to build a jail; second, that the lots upon which the defendants proposed to erect the jail had been set apart for a park and for that reason the village was without authority to build the jail at that place; third, that the

jail, when built, would be a nuisance, and an irreparable injury to the plaintiff, who owned an adjoining lot; fourth, that no appropriation of funds to defray the expense of constructing such jail had previously been made, and that no estimate of the expense thereof had been made and published as required by the charter act governing said village. There was a trial to the court, a general finding for the plaintiff, and a judgment perpetually enjoining the defendants from constructing said jail. The defendants appeal.

1. No specific power in the village to construct a jail is pointed out; but the charter imposes upon the board of trustees the duty of maintaining the peace, good government and welfare of the village, its trade, commerce and manufactures, and power to enforce its ordinances by fine and imprisonment. It is urged that the power to maintain a jail is necessary to the exercise of such specifically granted powers. It is a general principle that a municipal corporation possesses and can exercise, in addition to the powers expressly granted, such powers as are necessarily and fairly implied in or incident to powers expressly granted. The plaintiff, while conceding that it is necessary for a village to have some place for the confinement of such persons as may be liable to imprisonment under the ordinances thereof, points out section 73 of the charter (Comp. St. 1907, ch. 14, art. I) which provides that any city or village shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or village, and argues that this provision obviates the necessity for the construction of a jail by said village. Evidence in this case shows that this village is situated 30 miles by wagon road from the county seat, and with no direct communication by rail; that it is a division station of the Chicago, Burlington & Quincy Railway Company, and has a population of more than 800 people. It is plain that the necessity for a village jail is

not obviated by the right to use the county jail situated more than 30 miles away. We think, under the rule above quoted, the power in this village to erect a jail is necessarily and fairly implied from and incident to the power to enforce its ordinances by fine and imprisonment.

2. There was no evidence to support the allegation that the lots upon which it was proposed to erect the village jail had been set aside for a park. On the contrary, it appears that a building for the manufacture of gas by the village, and a building in which to store the hose for fire protection, had already been placed upon these lots, and that the site was not unsuitable for the erection of the proposed jail. We do not think that a village jail is *per se* a nuisance, and there was no evidence to show that it was likely to become such. *Wehn v. Commissioners of Gage County,* 5 Neb. 494.

3. We are satisfied that no estimate nor appropriation was made which complied with the provisions of sections 86, 87, art. I, ch. 14, Comp. St. 1907. The evidence shows that the estimate of expenditures thereof, and the ordinance appropriating money for the construction of such jail were both passed on the 3d day of June, 1907, and were not published the first time until the 7th of the same month. The petition in this action was filed on the 4th, and the summons served on the defendants the 5th of the same month. It will therefore be seen that at the time of the commencement of the action the trustees had not complied with section 87, *supra,* which provides that, before the annual appropriation bill shall be passed, the trustees shall prepare an estimate of the probable amount of money necessary for all purposes to be raised in said village, and enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city or village. The plaintiff cites the case of *City of Plattsmouth v. Murphy,* 74 Neb. 749, and this case, with the cases cited in the opinion, is authority for the doctrine that the provision for the appropriation is mandatory, and

therefore essential to the validity of contracts made or obligations entered into by the village involving the expenditure of funds so appropriated. The question whether the failure to make and publish the estimate before the appropriation invalidates the latter has not been determined in any of the cases brought to our attention. The purpose of the statute requiring such estimate to be made and published before the passage of the annual appropriation bill is to give publicity to the intention of the trustees concerning expenditures to be made for the coming year. It is not necessary to, and we do not, determine whether the failure to make such estimate prior to the passage of the appropriation ordinance, would invalidate executed contracts, or relieve the village of liability for expenditures of which it had received the benefit; but we think there can be no question that, where the trustees undertake to proceed without such estimate, and the taxpayer makes timely application for an injunction to prevent their so proceeding, they should be restrained. There is no other remedy, unless we say that the failure to make the estimate invalidates all expenditures made or contracted under the appropriation. It would then fall within the rule stated by Dillon, J., in 2 Dillon, Municipal Corporations (4th ed.), section 922, that "the proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires,* or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant." In either case injunction is the proper remedy. *Poppleton v. Moores,* 62 Neb. 851; 67 Neb. 388.

We therefore recommend that the judgment of the district court be modified so as to enjoin the defendants from constructing such jail, upon the ground that no proper estimate and appropriation had been made at the time of

the commencement of the action, and that, so modified, the judgment 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 modified so as to enjoin the defendants from constructing said jail, upon the ground that no proper estimate and appropriation had been made at the time of the commencement of this action, and, so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ROBERT J. GREENE V. STATE OF NEBRASKA.

FILED DECEMBER 17, 1908. No. 15,731.

1. **Constitutional Law**: SPECIAL LEGISLATION. Section 3 of the act of March 30, 1901 (laws 1901, ch. 93), contravenes section 15, art. III of the constitution of the state of Nebraska, which forbids special legislation, as well as section 1 of the fourteenth amendment to the constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, in that the acts thereby prohibited are made criminal only when committed against citizens or residents of the state of Nebraska.

2. ———: ———. The rule that a court will not listen to an objection made to the constitutionality of a law by a party whose rights it does not affect is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed and defendant discharged.*

Greene & Greene, L. C. Burr, H. F. Rose and *T. J. Doyle,* for plaintiff in error.

William T. Thompson, Attorney General, Grant G. Martin and *Frank M. Tyrrell, contra.*

CALKINS, C.

The plaintiff in error, hereinafter called the defendant, was indicted with his alleged partner for a violation of the provisions of section 3 of the act of 1901. Laws 1901, ch. 93; criminal code, sec. 46*d*. It was charged that the defendants, who were alleged to be attorneys at law, conspired together to sue a large number of saloon-keepers just prior to the time for the issuing of licenses; that the defendants would then threaten to file remonstrances against the issuing of such licenses, and by means of such threats obtain money from such saloon-keepers. This defendant demanded a separate trial, which was granted; and the state elected to proceed against him upon the charge of extorting $150 from one Clyde Lester. There was a verdict of guilty, and a judgment that the defendant pay a fine of $200 from which he prosecutes error to this court.

1. Section 3 of the act of 1901 is as follows: "Any person or persons who shall by threats, intimidation, coercion, extortion, injunction, conspiracy, deception or subterfuge, obtain, or seek to obtain, money or other valuable consideration, or shall cause the same to be done directly or indirectly, from any citizen or resident of this state, or compel them to perform any act not consistent with common law or equity, or who shall by such threats, coercion, intimidation, extortion, injunction, conspiracy, deception or subterfuge, induce any citizen or resident of the state of Nebraska to surrender anything of value or relinquish any right, guaranteed by the laws of Nebraska, in consideration of the withdrawal of said threats, coercion, intimidation, extortion, injunction, conspiracy, deception or subterfuge, shall be deemed guilty of blackmail, and upon conviction thereof shall be confined in the penitentiary for not more than three years nor less than one year, 'or be fined not less than two hundred ($200) dollars, nor more than five hundred ($500) dollars' for each and every offense." From a reading of this section it will

appear that its protection is confined to citizens or residents of the state of Nebraska. In this respect the statute appears to be *sui generis;* our attention not having been called to any similar enactment. We have, therefore, presented the question whether the legislature of a state may limit the protection of its criminal laws to its own citizens and persons resident within its boundaries. Giving to the term residents its widest possible construction, there must be constantly within the limits of the state a large number of persons who are neither citizens nor residents thereof. A just appreciation of the importance of the question involved will be best obtained by supposing the criminal code to be amended to conform to the policy adopted by the statute in question. The statute against homicide would then provide that if any person shall purposely and of premeditated malice kill a citizen or resident of the state of Nebraska, etc.; the statute against robbery, if any person shall forcibly or by violence and putting in fear take from the person of a citizen or resident of the state of Nebraska any money, etc.; the statute of arson, if any person shall wilfully and maliciously burn or cause to be burned any dwelling house, etc., the property of any citizen or resident of the state of Nebraska, etc. Such legislation we believe to be inhibited by section 15, art. III of our constitution, prohibiting special legislation, and clearly forbidden by section 1 of the fourteenth amendment to the constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. We are forced to conclude that the statute is void, and that no conviction can be had thereunder.

2. We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without any just reason for such discrimination, it is safe to

leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such case there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the legislature should enact a law amending our criminal code so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void, but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection of its invalidity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void.

We therefore recommend that the judgment of the district court be reversed and the defendant discharged.

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 defendant discharged.

REVERSED.

ROSE, J., not sitting.

JOHN CERNY, APPELLANT, V. PAXTON & GALLAGHER COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,862.

1. **Appeal:** REVERSAL. Where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand; but a new trial must be awarded upon all the issues of fact.
2. **Witnesses:** PRIVILEGED COMMUNICATIONS: WAIVER. Where a party voluntarily testifies in open court to conversations between himself and his attorney, he waives the right to have such communications considered as privileged, and the attorney thereupon becomes a competent witness to testify concerning the matters so disclosed by the client.
3. **Principal and Agent:** CREDITOR OF PARTNERSHIP. Where a creditor seeking to recover the payment of a debt from a partnership asks one partner to consult with his copartner, he does not thereby make the partner with whom he talks his agent, and, if such partner voluntarily makes false statements to his copartner, the creditor is not bound thereby, nor estopped to deny the same.
4. **Fraud:** INSTRUCTIONS. In an action to recover for fraud alleged to have been practiced by a promise made with the secret intention of not performing the same, an instruction that the plaintiff must establish not only that the promise was made, but that the same was made deceitfully with intention to defraud plaintiff, does not impose too great a burden of proof upon the plaintiff when the jury are at the same time told that, in order that the promise shall be deceitfully made, it must appear at the time of making such promise that the defendant had no intention of complying with the same.
5. ———: ———: DAMAGES. Where the mortgagee of a stock of goods sold the same in bulk, and the mortgagor brings an action against such mortgagee to recover the difference between the price at which the goods sold and their market value, on the ground that the mortgagee obtained the mortgage by fraudulent promises which he did not intend to perform, it is not error to instruct the jury upon the measure of damages that they should consider the value of the stock if sold in bulk, and not the price at which it might be sold at retail.

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

George W. Cooper and *Louis J. Piatti,* for appellant.

T. J. Mahoney and *J. A. C. Kennedy, contra.*

CALKINS, C.

This was an action to recover the value of a stock of goods mortgaged by plaintiff to defendant, on the ground that the mortgage was obtained by a promise that the defendant would see that the goods brought upon sale a certain price, which promise the defendant fraudulently and deceitfully made with the secret intention of not performing it. The first trial resulted in a verdict and judgment for the plaintiff, which was reversed by this court (78 Neb. 134). The opinion by ALBERT, C., contains a full statement of the facts, which it is unnecessary to repeat. The second trial upon the same issues resulted in a verdict for the defendant, and from a judgment rendered thereon the plaintiff now appeals.

1. A reference to the former opinion will disclose that, while the defendant urged numerous errors, the cause was reversed for an error of the trial judge in an instruction to the jury as to the measure of damages. The order made by this court was that the cause be remanded for further proceedings according to law. It is contended that a trial *de novo* was not necessary to correct said error, and that on the second trial the district court should have submitted to that jury only the question of damages, leaving the former verdict to stand in all other respects. Whatever may be the rule where a case is tried by a court which states its conclusions of law and of fact separately, or to a jury to whom is submitted special findings, the practice has been to regard the setting aside of a general verdict by a jury as necessitating a reexamination of all the questions submitted to the jury in the trial which resulted in such verdict. The statutes regulating the course of procedure do not specifically provide for setting aside a verdict in part. On the con-

trary, the remedy provided for errors committed during a trial, as prescribed by section 314 of the code, is a new trial. We think we may say it is the universal practice for a trial court, upon granting a new trial under said section, to examine all the issues of the case, and that such a practice as setting aside a verdict as to some part of the issues of fact, and submitting such part to another jury, is altogether unknown. When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial. Under section 594 of the code which provides that, when a judgment or final order shall be reversed either in whole or in part in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment, it logically follows that, since, when a cause is reversed for any of the errors specified in section 314, the court below should have rendered a judgment awarding a new trial, it is the duty of this court to either render the judgment granting a new trial, or remand the cause to the court below for such judgment.

The plaintiff cites the cases of the *Missouri, K. & T. T. Co. v. Clark,* 60 Neb. 406, and *Colby v. Foxworthy,* 78 Neb. 288, but in neither of the cases so cited was the precise question presented, nor does this case fall within the rule there laid down. Those cases and the cases cited in the majority opinion in *Missouri, K. & T. T. Co. v. Clark, supra,* are authority for the rule that after reversal of a judgment for error occurring subsequent to the trial, and where the findings or verdict were not disturbed, there is no necessity for a new trial; that in such a case the court should retrace its steps to the point where the first ma-

terial error occurred, and from that point the trial should progress anew. We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon all the issues of fact. The plaintiff cites, and quotes largely from the opinion in, the case of *Lisbon v. Lyman,* 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character and provide for specific findings of the different issues submitted to that body. They fail, however, to convince us that such is the law; and until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We therefore must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact.

2. The plaintiff Frank Cerny, being called as a witness, undertook to explain certain conduct with reference to attempting to borrow money to bid in the goods, which was supposed to be inconsistent with his reliance upon the promise alleged to have been made by the defendant, by saying that he had been told by Mr. John H. Lindale, an attorney at West Point, that the defendant and its attorney would not keep their promise. Lindale was called as a witness, and testified that his acquaintance with Frank Cerny began after the mortgage sale, and that he never told Frank Cerny that he could not rely upon any arrangement made with the defendant's attor-

ney. This evidence was received without objection until after the cross-examination, when the plaintiff moved to strike out the testimony on the ground that it appeared that the relation of attorney and client existed between Frank Cerny and the witness Lindale. The overruling of this motion is assigned as error. We think that, when the plaintiff testified to a conversation between himself and his attorney, he waived the privilege of such attorney, who thereupon became a competent witness to testify concerning the matters already disclosed in open court by his client. Any other rule would enable the client to use as a sword the protection which is awarded him as a shield. *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39; *Hunt v. Blackburn,* 131 U. S. 403.

3. The plaintiff Frank Cerny testified that, before the mortgages were made, he went to Omaha to see Mr. Pierce, the defendant's credit man, who substantially repeated the representations claimed to have been made by Mr. Rich on behalf of the defendant. The plaintiff was permitted to prove by another Cerny that, when Frank returned from Omaha, he talked with his father in the Bohemian language and told him that Mr. Pierce promised that, if the mortgages were given, the property would have to sell for not less than $3,800, and that, if it did not bring that amount, the defendant would bid it in and put the plaintiff in as agent to work out the amount of the mortgage indebtedness, and then turn the remainder over to them.

The plaintiff submitted an instruction to the effect that, if Mr. Pierce requested Frank Cerny, a member of the firm of John Cerny & Son, to return from Omaha to the village of Dodge with Mr. Rich, attorney for defendant, and come to an understanding with John Cerny and have the mortgages executed by him, and that Frank Cerny made these statements and thereby procured John Cerny to consent to the execution of the said mortgages, the defendant would be estopped to deny the authority of Frank Cerny to make such statements, and would be bound by

the same, whether Mr. Pierce had authorized the making of the same or not. This is upon the theory that, if a creditor in seeking to secure the payment of a debt owing by the partnership asks one partner to consult with his copartner, he thereby makes the partner with whom he talks his agent, so that, if such partner makes false statements to his copartner, the creditor is bound by such false statements. The plaintiff in support of this proposition cites the case of *Wise v. Newatney,* 26 Neb. 88. In that case the estoppel was against the party who made the false representations, and it was very properly held that, where one by his words or conduct wilfully causes another to believe in any state of things and induces him to act on that belief so as to alter his own previous condition, the former is concluded from averring against the latter a different state of things. To have given the instruction asked would have enunciated a new and dangerous innovation in the law, and we think the court rightly refused the same.

4. The court gave an instruction in which the jury were told that the plaintiff must establish not only that the alleged promise was made, but that the same was made deceitfully with intent to defraud the plaintiff, and that in this case, in order for the promise or representation to be deceitfully made, it must appear that at the time of making the promise the defendant had no intention of complying with the same. The plaintiff complains that this charge imposed upon him too great a burden, and that it required him not only to prove that the defendant had no intention to perform the promise, but, in addition thereto, that the promise was deceitfully made. Assuming, for the purpose of this case, that, where an intention not to perform a promise is shown, that is sufficient evidence from which the jury may infer that the promise was fraudulently and deceitfully made, there is no error in this instruction, for it informs the jury that a want of intention to comply with the same is evidence that it was deceitfully made. The plaintiff was therefore given the

advantage of the most favorable construction of the rule in that respect.

5. In its instruction concerning the measure of damages, the court told the jury that, "in determining the market value of the stock, you will consider its value if sold in a lump or bulk, and not the price for which it might be sold at retail, and in no event will you fix the market value as exceeding $3,800." One witness had testified that the market value of the goods at the village of Dodge was $4,000, another $4,500, while a third testified that he took an invoice, and that the market value of the goods in a going concern would be the invoice price, $3,912.50, while their value if sold in bulk would be $2,500. The plaintiff contends that the instruction referred to deprived him of all the above evidence except that of the witness who testified that the market value of the property if sold in bulk was $2,500; and that it is inconsistent with the rule laid down in *Maul v. Drexel*, 55 Neb. 446, to the effect that the market value is not what the property is worth solely for the purpose to which it is devoted, but the highest price it will bring for any and all uses to which it is adapted and for which it is available. The charge complained of did not condition the value of the stock of goods upon any particular use, but dealt altogether with the manner in which it was to be sold. The mortgages authorized the sale in bulk, and such would be the natural and ordinary course. It could not be expected that the mortgagees should sell the same at retail and incur the expense necessarily involved. If the conditions surrounding the sale of a stock of goods are such as to attract purchasers who desire to continue the business in that location, they may frequently be worth their invoice price, or even more; but where the conduct of the business has been a failure, and no purchasers can be found who wish the same for the purpose of carrying on the business in that location, it is common knowledge that such a stock is worth much less. In either case the goods may be sold in bulk or as a whole, but the

difference in their market value does not depend upon the manner of the sale. It is fixed by other and external conditions. We therefore conclude that the court did not err in instructing the jury that they were to consider what these goods were worth sold in bulk.

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.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, APPELLANT, V. HORATIO ENDELL ERSKINE, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,379.

Adverse Possession: EVIDENCE. Plaintiff and defendant in ejectment claimed title from a common source. Defendant secured his title subsequent to the conveyance to plaintiff, but prior to the date plaintiff's deed was recorded. Defendant did not prove that his deeds or any of the conveyances in his chain of title subsequent to the deed to plaintiff had been recorded, nor prove the consideration paid by him therefor. As to one tract, he proved that for ten years next preceding the commencement of this suit a corn-crib had been built and maintained on said block by his grantors and himself, but did not prove that any other part of the block had been occupied by them, nor that said crib had not been built with plaintiff's permission. As to the other tract involved in the suit, defendant proved that it had been inclosed for more than ten years before the commencement of the suit, and occupied and used by different individuals during that time, but did not prove that he had succeeded to the possession of all of said occupants. *Held*, That the evidence did not sustain a judgment for defendant.

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

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and *G. L. De Lacy,* for appellant.

Strode & Strode, contra.

ROOT, J.

Action in ejectment. Trial to the court, and judgment for defendant. Plaintiff appeals.

1. The land involved in this action is the greater part of block "A" and a strip 30 feet in width off of the north side of block "B," in Prairie Home. The parties claim title thereto from a common source, plaintiff by virtue of a deed executed in 1890 and recorded in 1904, and defendant by mesne conveyance to him, the earliest in his chain of title being dated 1891. So far as the record discloses, none of those conveyances were ever recorded, nor has defendant furnished any evidence concerning the consideration paid therefor or the circumstances under which any of them were executed. In addition to finding generally for defendant, the court found that he had been in the open, notorious and adverse possession of said real estate for more than ten years next preceding the commencement of this action. We do not think that the evidence sustains the finding of adverse possession. Block "A" is a triangular-shaped tract of land. The testimony tends to prove that defendant's grantor, a few weeks more than ten years preceding the commencement of this suit, constructed a corn-crib on said block and that said crib has been used as a store house for corn since that day. The evidence does not disclose what use was made of that part of the block not occupied by the crib, or who controlled it nor what claim of title, if any, was made thereto by defendant or his grantors. The entire tract has not been inclosed, and the evidence falls far short of proving adverse possession of the entire block. As to the 30-foot strip on the north side of block "B," the evidence is undisputed that this land has been inclosed since the fall of

1892 or 1893; that the land has been used as a pasture part of said time and cultivated in some years. Different individuals are named as having used the land for pasture or cultivation, but the evidence fails to connect the possession of the occupants, or to show such a condition as would warrant a court in tacking the possession of the prior occupants to the possession of defendant. The burden was upon defendant to establish the defense of adverse possession. *Weeping Water v. Reed,* 21 Neb. 261.

2. Counsel for defendant argues that there was a mistake in the deed from the Foxes to plaintiff, and that those grantors only sold 100 feet in width of the land south of the center line of said railway. There are some circumstances shown by the evidence tending to support that theory, but a consideration of the entire record satisfies us that no such mistake was made.

Defendant may have a perfect defense to this action, but he has failed to establish it by the proof adduced. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ROBERT A. STEWART, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,390.

1. **Street Railways: NEGLIGENCE.** A street railway company is guilty of negligence if it fails to give proper warning of the approach of its cars to a public crossing, or if it operates such cars at an unusual and excessive speed at said point.

2. ———: **STREET CROSSINGS: DUTY OF PEDESTRIANS.** A pedestrian about to cross the tracks of an electric street railway at a public crossing is not under a duty to observe the same degree of watchfulness and care as when attempting to cross an ordinary steam railway.

3. ———: **CONTRIBUTARY NEGLIGENCE: QUESTION FOR JURY.** Defendant

maintains a double-track street railway on Tenth street in Omaha. Cars north bound use the eastern track, and those south bound the western one. S., about 8 o'clock in the evening of a winter day, alighted west of the track from a south-bound car at a street crossing. S. was familiar with the manner in which defendant operated its cars on said streets. He waited for an instant, and glanced to the south, until said car had been propelled some 8 or 10 feet. Not seeing or hearing a north-bound car, he crossed the street without further looking or listening, and was run down on the eastern track by a north-bound car. The testimony tended to prove that said car was running at a speed of 20 miles an hour, and that no warning was given of its approach until within about 10 feet of Howard street, and almost at the instant of the collision with plaintiff. *Held*, That it was for the jury, and not the court, to determine whether plaintiff was guilty of contributory negligence.

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

Brome & Burnett, for appellant.

John L. Webster and *W. J. Connell, contra.*

ROOT, C.

Action for damages because of the alleged negligent operation of a street car whereby plaintiff was injured. The trial judge directed a verdict for defendant, and plaintiff appeals.

Plaintiff's place of business, in January, 1904, was located at the southeast corner of the intersection of Tenth and Howard streets in the city of Omaha. Howard street runs east and west, Tenth street north and south. Each street is 100 feet in width, and Tenth street is on an upgrade toward the north. The sidewalks on each side of said streets are 20 feet in width. Defendant maintains and operates a double track street railway on Tenth street. North-bound cars run over the eastern track, and south-bound cars over the western line. The evidence does not accurately show the distance between said tracks, but approximately they are from two to four feet apart. De-

fendant's cars stop at the far crossings for the purpose of receiving and discharging passengers. The Union passenger depot and the Burlington station are located on Tenth street, south of Howard. Several of defendant's car lines converge on Tenth street, and its cars pass to and fro thereon at frequent and irregular intervals, so that any one familiar with the situation at said intersection might reasonably expect a car to pass said point at any time during the day or early evening. Plaintiff had resided in Omaha for some two years preceding the accident, and was familiar with all of the aforementioned facts. It was cold, but clear, the night of the accident, with some snow on the ground, and, with the aid of the lights maintained on the streets and in the adjacent buildings, one could discern objects for a considerable distance. Plaintiff was then about 52 years of age, and in the possession of good eyesight and hearing. Plaintiff had occasion to go to his office about 8 o'clock in the evening, and rode south on defendant's car on Tenth street to said intersection, and got off the car on the west side of the western track and about 8 feet south of the Howard street curb line. Giving plaintiff's own testimony and that of his witnesses the most favorable construction, it appears that, as he stepped down to the street from the car, he placed his hands in his pockets, turned, facing southeast, and looked south to ascertain whether a north-bound car was near at hand; that he remained in that attitude for an instant, during which time the south-bound car had moved about 10 feet; that he did not hear any signal or noise to indicate that a car was coming north on the eastern track, nor did he see such a car. He then walked directly east across the first track, over the space between the two lines of railway, and across the west rail of the east track, at which point he noticed the headlight of a north-bound street car about 20 feet distant, and running at the rate of 20 miles an hour. At just that instant the motorman rang the gong, and the car collided with him. Plaintiff was caught on the car fender and carried or

shoved some distance, and finally thrown onto the street about the middle of Howard, and the car was stopped so that the rear platform was parallel with his body as it laid in the street. Plaintiff admitted that he did not look south after he started to cross defendant's railway. There is no testimony in the record to corroborate plaintiff concerning the speed of the car, nor any evidence to indicate the distance that a car would move before it could be stopped if it was running at the rate of 20 miles an hour at said point. The record does not disclose any evidence of municipal regulations or rules of the defendant concerning the speed and methods of control of its cars, and but little to show the precautions taken by defendant's employees to warn the public at crossings of the approach of such cars. Plaintiff testified that the motorman in charge of the north-bound car did not ring the gong until the car was very close to him, and in this there is some slight corroboration from one other witness. Plaintiff further appeared to have been somewhat preoccupied at the time with the consideration of business of importance to himself, which he expected to transact at his office that evening. If from the foregoing state of facts we can say, as matter of law, that plaintiff was guilty of contributory negligence, the direction of the learned district judge was right, otherwise the judgment must be reversed.

A pedestrian traveling the streets of a city is not held to the same degree of care and watchfulness in crossing an electric road operated for local passenger traffic as he would be if crossing an ordinary railroad. In a qualified sense the rights of the railway company and that of the footman are equal in the use of the street, but consideration must be given the fact that cars are confined to a track and cannot be turned to either side; that street railway companies are permitted to use the streets for rapid transit and for the purpose of facilitating public travel, and that the speed of their cars cannot be checked instantly or within the same space of time as can the individual control his movements. The persons in control

of those cars, however, must be charged with notice of the fact that vehicles and footmen, especially at crossings, are constantly crossing the railway, and that there is danger that accidents will occur unless reasonable prudence is exercised in controlling the speed and giving notice of the oncoming of a car, under circumstances like those in the instant case. *Hall v. Ogden City Street R. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726; *Marden v. Portsmouth, K. & Y. Street R. Co.*, 100 Me. 41, 109 Am. St. Rep. 476.

We are not oblivious to the fact that there is a tendency in the decisions of the courts of last resort in many of our sister states not to distinguish between the degree of care necessary to be observed by a footman in crossing the track of an electric street railway in the streets of a city and the caution he must exercise in walking over an ordinary steam railroad at a public crossing. A leading case sustaining that theory of the law, and one that has exerted as much influence as any decision upon said point is *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559. In *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37, that decision was cited by counsel for the defendant, and rejected as unsound in principle by Mr. Commissioner IRVINE, who wrote the opinion of this court therein. The *Loehneisen* case is relied on by plaintiff as ruling the instant one, but there is so much disparity between the facts in the two cases that we consider it important herein only to the extent that it announced the policy of this court not to follow the decisions in Massachusetts and Pennsylvania in cases like the one at bar. We think the better rule is that, although a pedestrian while about to cross a street railway track should generally look and listen for approaching cars, the rule is not inflexible, nor will the courts say as a matter of law that the footman is negligent under all circumstances if he fails to do so, nor ought any court to hold that such exercise of the traveler's faculties must be observed in every case at any particular point in his progress across the tracks. *Lincoln Traction Co. v. Brookover*, 77 Neb.

221, is cited as in point, but in that case plaintiff was driving a covered wagon, and attempted to cross the railway tracks, not at a street crossing, but midway of the block. There was nothing whatever, except the cover of his wagon, to obstruct his view, and it was apparent that he did not exercise the slightest caution for his own safety. In the instant case, giving plaintiff's testimony the utmost credence, he did stop and look and listen until the car upon which he had been riding had moved some distance from him. Ought a court to arbitrarily say just how long plaintiff should have remained in that attitude? We think not. If it can be said that a footman must stop and look and listen until all temporary obstructions between himself and an approaching car are removed, and then must profit by his senses so as to avoid impact with such car, then we can hardly imagine a case wherein defendant would be held liable for maiming a pedestrian. It would seem more consistent with that sound public policy which has regard for life and limb to hold that the foot traveler should be held only to such a degree of caution as may be reasonable under the circumstances of the particular case, and that, if he does thus exercise any care and caution, the sufficiency thereof should be left for the determination of the jury. There is some evidence in the record tending to prove that, at what is termed the Sixteenth street crossing, gongs on cars nearing that point are sounded continuously. Why not at the intersection of Howard and Tenth? The city of Omaha in the exercise of the police power delegated to it by the legislature might well have regulated the operation of street cars and have directed what signals and warnings shall be given as cars approach street intersections. If the city has not exercised this power, then the sufficiency of such warning and the speed at which a street car may be operated so as not to unnecessarily and negligently imperil pedestrians must be determined by the jury under proper instructions of the trial court in each case where those facts may be material and in issue.

We do not hold that, had this case been submitted to a jury and it had found for defendant, we would disturb such a verdict, because it is possible that fair-minded men might infer that plaintiff was guilty of contributory negligence in acting as he did. On the other hand, we further hold that said testimony, uncontradicted and unexplained, might support not only an inference that defendant was guilty of negligence in operating the car at a dangerous rate of speed that collided with plaintiff, and in failing to give sufficient notice of the approach thereof, but that plaintiff had exercised reasonable prudence in his conduct, and was not guilty of contributory negligence. In the state of the record, the issues should have been submitted for the consideration of the jury. *Chicago City R. Co. v. Robinson, Adm'x,* 127 Ill. 9, 11 Am. St. Rep. 87; *Chicago & J. E. R. Co. v. Wanic,* 230 Ill. 530; *Cincinnati Street R. Co. v. Snell,* 54 Ohio St. 197; *Driscoll v. Market Street C. R. Co.,* 97 Cal. 553, 33 Am. St. Rep. 203; *Bass v. Norfolk R. & L. Co.,* 100 Va. 1, 40 S. E. 100; *Spiking v. Consolidated R. & P. Co.,* 33 Utah, 313; *Nebraska Telephone Co. v. Joncs,* 60 Neb. 396; *Omaha Street R. Co. v. Mathiesen,* 73 Neb. 820.

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

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, APPELLANT, V. HORATIO N. LATTA, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,400.

Ejectment: EVIDENCE. Defendant in ejectment denied plaintiff's title and right of possession. On the trial plaintiff proved title to said land, and defendant failed in any manner to controvert the same. *Held*, That a judgment for defendant was not supported by the evidence.

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

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and *G. L. De Lacy,* for appellant.

Strode & Strode, contra.

ROOT, J.

Ejectment to recover possession of a strip of land 300 feet in width. Defendant denied plaintiff's title and right of possession. He thereby admitted that he was in possession of said premises. This case was tried with three other like cases, and the evidence concerning the various tracts of land claimed by the several defendants is commingled and somewhat confused. So far as the defendant herein is concerned, the evidence is unsatisfactory, but we judge from the record and the briefs that defendant only claims title to lots 4, 5 and 6, in block 2, Prairie Home. No part of any of said lots is within the strip of land referred to in plaintiff's petition. Defendant admitted during the trial that title to said strip of land was originally in Charles and Herman Fox. A deed from the Foxes to plaintiff for said land was received in evidence, and we find nothing to deraign said title further, or to estop plaintiff from reclaiming said land as against this defendant.

The judgment is not sustained by the evidence, and is therefore reversed, and the cause remanded for further proceedings.

REVERSED.

G. B. WILLIAMS ET AL., APPELLANTS, V. FRANK C. PHILLIPS, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,406.

Intoxicating Liquors: LICENSE: SALES TO MINORS. Where on the hearing of a remonstrance against the granting of a liquor license it is satisfactorily proved that the applicant has within a year sold or given to a minor malt or spirituous liquors, he is not entitled to a license, and his application should be denied.

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

R. D. Druliner and *Perry & Lambe,* for appellants.

Charles W. Meeker and *David G. Hines, contra.*

ROOT, C.

Appeal from a judgment of the district court for Dundy county affirming the action of the trustees of the village of Benkelman in granting a license to Frank C. Phillips to sell intoxicating liquors in said village. Remonstrants appeal.

The applicant, Phillips, filed his application for license in July, 1907. The remonstrants alleged that Phillips in the year preceding his application had violated the excise law in illegally selling intoxicating liquors, to wit, beer, to minors. The evidence discloses that in 1906 a license had been issued to one Palm to sell such liquors in Benkelman, and that Phillips had control of said business. It is undisputed that about the 21st day of August, 1906, two minors of the age of 17 years were sold or furnished beer in said saloon, and that Frank C. Phillips was present. On cross-examination the witness stated that the liquor was sold by a bartender; but even if that were material, there is nothing to show that Phillips was not that bartender. He testified in his own behalf, and did not give any testimony upon this point. We are of opinion that, in the state of the

record, Phillips is fairly chargeable with either selling the liquor or authorizing such sale. It is a misdemeanor for a licensed saloon-keeper to sell intoxicating liquors to a minor. Ann. St. 1907, sec. 7157. If the applicant has violated said section within the year preceding his application, he is not entitled to a license. *Livingston v. Corey,* 33 Neb. 366. All persons responsible for the commission of a misdemeanor are guilty as principals. *Wagner v. State,* 43 Neb. 1. Where intoxicating liquors are unlawfully sold by the agent of a saloon-keeper, the principal as well as the agent may be prosecuted. *Martin v. State,* 30 Neb. 507 The applicant had violated the liquor law, and the village trustees should not have issued a license to him. *In re Adamek,* 82 Neb. 448.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to reverse the findings of the village board.

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, with instructions to reverse the findings of the village board.

REVERSED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, APPELLANT, V. JAMES H. WELCH, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,429.

1. **Vendor and Purchaser: BONA FIDE PURCHASER: DEEDS: RECORDING.** In 1890 plaintiff purchased a tract of land 100 feet in width on the north side, and 200 feet on the south side, of the center line of its proposed railway, but did not record its deed until January, 1904. It constructed and operated said railway in 1890. Shortly subsequent to the making of said deed the grantors therein laid out a town site, and platted the land south of the tract thus sold to plaintiff, so as to overlap plaintiff's land 100 feet. This plat

was duly recorded in 1891. Plaintiff has operated a line of railway since 1890 over said tract of real estate. The land in dispute was sold to defendant in 1891, and is located more than 100, but less than 200, feet from the center line of plaintiff's railway. Defendant thereafter immediately constructed buildings upon the parcel of land purchased by him, and has had actual and continuous possession thereof ever since. Defendant recorded his deed in 1891. At no time preceding the service of notice on defendant to quit said land did plaintiff perform any visible act, other than to operate its railway, to indicate that it claimed any land south of a line 100 feet south of its railway. *Held*, That, under the recording act, defendant was protected in his title to said real estate.

2. **Ejectment:** DENIAL OF TITLE. In ejectment, if defendant denies plaintiff's title, he may prove any defense that will defeat the action.

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

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and *G. L. De Lacy,* for appellant.

Strode & Strode, contra.

ROOT, J.

In 1890 Charles and Herman Fox owned in fee simple a tract of land in Lancaster county, Nebraska, over which plaintiff had surveyed and staked the route for its railway. On the 23d day of September, 1890, said landowners sold and conveyed to plaintiff a strip of land of varying width along said route being 150 feet for a distance, 200 feet wide between other points, and 300 feet in width where the land in dispute herein is situated, of which 200 feet is south of the center of said railway. Said deed was not recorded until in January, 1904. In November, 1890, the said Herman and Charles Fox platted a village on the land owned by them south of said railway, and designated it "Prairie Home." This plat was filed February 21, 1891, and overlapped the description in the deed to the railway company so that a strip of land 100 feet in width sold by

the Foxes to plaintiff was also included in said plat. On the northern boundary of the land thus platted a highway was dedicated to the public, and next south thereof is the tier of blocks some part whereof is in dispute in this action. Defendant purchased lots 9 and 10, in block 2, Prairie Home, from Charles and Herman Fox on the 14th day of February, 1891, and his conveyance was duly recorded February 25, 1891. Welch constructed a building on said lots, and has occupied it thence hitherto. Welch paid the taxes on said lots since he acquired title thereto, and plaintiff has at all times paid taxes levied upon its right of way. Plaintiff has never taken actual possession of the said strip of land, but its fence on the south side of its railway, so far as built, and its use of the land at said point, has been confined to a strip of land 100 feet in width. In December, 1904, plaintiff brought this action to secure possession of so much of said land as is situated within defendant's inclosure. Defendant answered, denying plaintiff's title and right of possession. There was a trial to the court, and judgment for defendant. Plaintiff appeals.

The briefs of counsel contain a learned and instructive argument relative to the law of adverse possession as applied to a railroad right of way, but we do not consider that subject an important one in the instant case. Plaintiff did not acquire the land in dispute by condemnation proceedings, but by warranty deed. It thereby acquired a fee simple title thereto. *Hull v. Kansas City & O. R. Co.*, 70 Neb. 756. Part of the consideration for said deed was a promise that plaintiff should construct a depot within certain described bounds, and it was provided that, in case there should be a change in the use of said building or it should be removed or abandoned, the real estate should revert to the grantors. This condition did not limit the estate conveyed to a mere easement, although the condition may be enforced if circumstances warrant. *Jetter v. Lyon*, 70 Neb. 429. There is nothing in the record to suggest that defendant was not a *bona fide* purchaser, and

what little evidence there may be on this subject points to the conclusion that he comes within that designation.

Section 10816, Ann. St. 1907, provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; provided, that such deeds, mortgages, and instruments shall be valid between the parties." Defendant is plainly within the protection of this statute, unless plaintiff is correct in its argument that, as it appeared from the admission of defendant that plaintiff had operated a line of commercial railway continuously since in 1890 over its track on the 200-foot strip of land adjacent to the real estate in dispute, such possession was notice to the world of its rights to the limits of its grant. Many authorities may be cited to sustain the proposition that, where a railway by its charter or the law itself is limited to a certain width of right of way its possession of any part thereof for railway purposes will be notice to the world of its title to all of its right of way at said point but those authorities are not pertinent in the instant case. A railway in Nebraska is only permitted to condemn a right of way 100 feet in width on each side of the center of its track, except a greater amount may be needed for depot grounds, wood or water stations, or for embankments, excavations, or the depositing of waste earth excavated in the construction of the railway. The extra strip of land in the instant case was not needed for any of said purposes. The plaintiff did not at any time take actual possession of any part thereof or exercise any control over it, but its entire conduct was consistent with Foxes' ownership thereof and right to sell and convey the same. There was nothing to

indicate that plaintiff had acquired, by deed or condemnation, ownership to, or an easement in, more than 100 feet in width of the land south of its railway. The land in question was separated from this strip by a public highway, and the record fails to disclose any affirmative act of plaintiff, prior to service of notice just before this suit was commenced, that would suggest to any person that it had any interest in the land in litigation in this action. We think that this case comes within the reasoning of Mr. Justice SEDGWICK in *Millard v. Wegner,* 68 Neb. 574, and that, because of plaintiff's failure to record its deed or to perform any visible act to warn purchasers that it owned the land involved in this action, defendant should prevail.

The judgment of the district court is therefore

AFFIRMED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, APPELLANT, V. HARRIET WELCH, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,344.

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

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and *G. L. De Lacy,* for appellant.

Strode & Strode, contra.

ROOT, J.

The parties to this action claim title from a common grantor, and this controversy involves much the same facts as those recited in the case of *Chicago, R. I. & P. R. Co. v. Welch, ante,* p. 106. The only difference in the cases is that after the village of Prairie Home was platted, and in March, 1892, the Foxes agreed in writing to convey all of their title to the then unsold lots in said village and

the land adjacent thereto which they then owned, provided they were paid some $5,000 according to the terms of said contract. This contract was foreclosed, and by virtue of a sheriff's deed and mesne conveyances title to the land in dispute in this action vested in defendant Harriet Welch. The contract recited "subject, however, to the easement of said railroad in its right of way." Defendant's deed was executed June 16, 1900, and recorded June 23 of said year, and she has occupied said premises since that date.

It is suggested that the recital in the contract from the Foxes to Erskine was sufficient notice to defendant of plaintiff's unrecorded deed. Had the Foxes conveyed by quitclaim deed, the grantee would have been protected in the circumstances of this case if a *bona fide* purchaser. *Schott v. Dosh,* 49 Neb. 187, 195. Defendant's rights are as secure under the contract referred to. Defendant has not been diligent in disclosing the circumstances surrounding the making of the deed to herself nor the consideration paid, but, after an inspection of the entire record, we feel justified in dealing with this case as if said defendant was a *bona fide* purchaser of said lots.

For the reasons stated in *Chicago, R. I. & P. R. Co. v. Welch, ante,* p. 106, heretofore referred to, as well as for those herein stated, the judgment of the district court was right and will be

AFFIRMED.

W. S. ROHRER, APPELLANT, V. HASTINGS BREWING COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,704.

1. Cities: LIQUOR LICENSES: WHEN MAYOR MAY VOTE. The mayor in cities of the second class having more than 5,000 and less than 25,000 inhabitants has the right to cast a deciding vote in a contest over an application for a liquor license in case of a tie vote of the council.

2. **Statutes in Pari Materia.** Chapter 82, laws 1907, which prohibits corporations from being interested in any manner in the retail traffic in intoxicating liquors, is *in pari materia* with the Slocumb law (Comp. St. 1907, ch. 50).

3. ———. All statutes *in pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates.

4. **Statutes:** CONSTRUCTION. Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.

5. **Intoxicating Liquors:** LICENSE: CORPORATIONS. A corporation may lawfully receive a license to vend at wholesale intoxicating liquors in Nebraska, but no such authority exists for licensing a corporation to engage in the retail traffic in such liquors.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

J. W. James and *R. A. Batty*, for appellant.

Tibbets, Morey & Fuller and *W. F. Button, contra.*

John C. Cowin, L. D. Holmes, Isidor Ziegler and *Rich, O'Neill & Gilbert, amici curiæ.*

ROOT, C.

Hastings is a city of the second class having more than 5,000 and less than 25,000 inhabitants. The Hastings Brewing Company is a local corporation, and in April of this year it applied to the council of said city for license to vend intoxicating liquors. The petitioners alleged "that said company and its officers are all of respectable character and standing and *bona fide* residents of said city and state." Defendant filed objections to the granting of said license, but, upon the hearing before the council, stipulated with the applicant that all of the objections specified in the remonstrance should be waived, except the following: "Under the laws of the state and the ordinances of the city, can a liquor license be legally issued to a corporation?" Remonstrant also reserved the right to

deny the authority of the mayor to cast a deciding vote in case of a tie vote of the council in said proceedings. Four councilmen voted "aye" and four "nay" upon every motion relating to said remonstrance and application, and in each instance the mayor voted in favor of the applicant, and thereby a license was issued to it. Upon appeal to the district court the action of the excise board was affirmed, and remonstrant appeals.

1. If the mayor did not have authority to vote upon the remonstrance and the application the license issued is void. Section 7175, Ann. St. 1907, provides: "The corporate authorities of all cities and villages shall have power to license, regulate and prohibit the selling or giving away of any intoxicating, malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village," etc. In *State v. Andrews,* 11 Neb. 523, we held that "the corporate authorities" were the mayor and council, and that, until those officers, by ordinance duly passed, provided for the licensing of said traffic, a permit could not be issued to vend intoxicating liquors within the limits of any municipality. In *Martin v. State,* 23 Neb. 372, we further held that the statute would be satisfied by the enactment of a general ordinance concerning said traffic, and that thereafter the authorities might act by resolution. Section 8518, Ann. St. 1907, provides: "The mayor shall preside at all the meetings of the city council, and shall have a casting vote when the council is equally divided, except as otherwise herein provided, and none other." Section 8519 directs that "the mayor shall have the power to approve or veto any ordinance passed by the city council, and to approve or veto any order, by-law, resolution, award of or vote to enter into any contract, or the allowance of any claim," with the further provision that the council may pass by an affirmative vote of two-thirds of all the members elected to the council any of said measures thus vetoed. Section 8533 enacts: "On the passage or adoption of every resolution or order to enter

into a contract, or accepting of work done under contract, by the mayor or council, the yeas and nays shall be called and entered upon the record, and to pass, or adopt any by-laws, ordinance, or any such resolution, or order, a concurrence of a majority of the whole number of the members elected to the council shall be required." Section 8536 also provides that all ordinances or resolutions for the appropriation of money shall require for their passage or adoption the concurrence of a majority of all members elected to the council. It would seem from an inspection of the statutes cited that it requires an affirmative vote of a majority of all of the councilmen of the city of Hastings to appropriate or expend its money, or to execute a contract in the name of said municipality; that the mayor may veto any general ordinance passed by the council, or that he may veto any resolution, ordinance or by-law passed by the council to create a liability against said city or to expend its funds; and that in such cases two-thirds of all the members elected to said council may pass any such measures over the mayor's veto. As to every other act of the council, except the passage of ordinances, the mayor may vote in case of a tie vote of the councilmen. The passage of a resolution overruling a remonstrance to an application for a liquor license, or granting such license, does not come within any of the exceptions direct or implied in the statute, and therefore the mayor had authority to cast the deciding vote.

2. The next question is whether, under any circumstances, a corporation may be licensed to sell intoxicating liquors in Nebraska. This traffic is not a right or privilege guaranteed or protected under the constitution of the United States or the constitution of the state. *Bartemeyer v. Iowa,* 18 Wall. (U. S.) 129; *Beer Co. v. Massachusetts,* 97 U. S. 25; *Crowley v. Christensen,* 137 U. S. 86; *Mette v. McGuckin,* 18 Neb. 323. The legislature may, therefore, entirely prohibit that traffic, or select natural, to the exclusion of artificial, persons as licensees. We have repeatedly held that the Nebraska liquor law is prohibitive

as to all persons not within its exceptions. *Brown v. State,* 9 Neb. 189; *Pleuler v. State,* 11 Neb. 547; *State v. Cummings,* 17 Neb. 311; *Martin v. State,* 23 Neb. 371.

Is a corporation within those exceptions? The statutes now in force concerning said traffic are the result of evolution and slow growth. The territorial legislature in 1855 prohibited the manufacture or disposition of intoxicating liquors as a beverage (act March 16, 1855; laws 1855, p. 158), and the criminal code made it unlawful to furnish such liquors to Indians or intoxicated persons. The act of November 4, 1858 (laws 1858, pp. 256-260), clothed county commissioners and the authorities of incorporated towns and cities with power to license said commerce upon condition that the applicant for license comply with certain stipulations, one of which was that at least ten freeholders of the township wherein the applicant resided should file with the county clerk a petition to the effect that said applicant was "a man of respectable character and standing, and a resident of the territory." This act was included in the criminal code of the revised statutes of 1866 as chapter 29 thereof. A few sections were added in said revision; but, with one or two immaterial changes in composition, chapter 29 aforesaid is a copy of the act of November 4, 1858. In 1873 chapter 29, *supra,* was carried into the general statutes as chapter 58, secs. 572-590, thereof. The Slocumb law of 1881 (Comp. St. 1881, ch. 50) is a consolidation of the laws theretofore enacted, with some additions to meet possible deficiencies that may have developed in the administration of the law. Sections 7150, 7159, 7160, 7161, 7165, 7166, 7167, 7168, Ann. St. 1907, reproduce, in some instances in identical language, the text of sections 572, 574, 575, 576, 577, 578, 579, 581, ch. 58, Gen. St. 1873, being part of the criminal code thereof. Sections 7150, 7152, 7153, and 7156, Ann. St., 1907, are to all intents the same as sections 1, 2, 3 and 4, act February 25, 1875 (laws 1875, p. 24), relating to intoxicating liquors. Preceding the enactment of the Slocumb law the excise board might ac-

cept a bond of $500 and a license fee of $25. The vendor's liability and that of his bondsmen was to respond to the damages accruing because of his *retail* traffic. This distinction was eliminated in 1881, making the bondsmen liable for all damages growing out of said traffic. The penalty in the bond was fixed at $5,000, and the license fee at not less than $500. Thereby it seems to us that the legislature intended to restrict and safeguard the wholesale as well as the retail traffic in such liquors. In 1885, in *State v. Cummings,* 17 Neb. 311, we issued a writ to the city marshal of Omaha compelling him to enforce the Slocumb law against the wholesale liquor dealers in said city, some of whom, we are of opinion, appeared to have been corporations. We think that we may take judicial notice of the fact that at the time of the enactment of the Slocumb law corporations were, and continuously thereafter have been, engaged in the business of manufacturing malt and spirituous liquors in Nebraska, and selling the same at wholesale. So far as we are advised, the administrative officers and those officials in the state whose duty it has been to enforce the liquor laws have generally considered corporations eligible to engage in such wholesale business. The conduct of those officials is entitled to some consideration in interpreting the statute. *State v. Holcomb,* 46 Neb. 88; *State v. Sheldon,* 78 Neb. 552; *State v. Sheldon,* 79 Neb. 455. We do not believe that it was the policy or intention of the legislature to destroy the business of those corporations, while permitting individuals to engage therein; and if, considering all of the legislation upon this subject, there is a reasonable distinction between the retail and wholesale business of selling said liquors, and the various acts upon said subject warrant the conclusion that a corporation may lawfully receive a license to sell said liquors at wholesale, although not at retail, we ought not at this late day to reverse a construction given said statutes for almost a generation past.

In 1907 the legislature enacted the "Gibson Act" section 7194, Ann. St., which prohibits every person or "corpora-

tion" engaged in the manufacture of malt, spirituous or vinous liquors, or in the wholesale traffic thereof, from being in any manner interested in the business of retailing such liquors. This act is in terms supplemental to the Slocumb law, and receives its vitality from the title of the earlier act. While this statute does not specifically authorize a corporation to engage in the wholesale traffic in such liquors, it by implication recognizes that such business does exist. The Slocumb law and the Gibson act are clearly *in pari materia,* and they must be considered together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates. 2 Sutherland (Lewis), Statutory Construction (2d ed.), sec. 448; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689.

We must further presume that the legislature intended every provision of the statute to have a meaning. *Ford v. State,* 79 Neb. 309. To construe the statute as contended for by remonstrant we must eliminate the word "corporation" therefrom, and counsel recognize that fact by suggesting that the word was used inadvertently by the legislature; but we cannot so hold from an inspection thereof, or from any history within our knowledge of the various acts on the subject of intoxicating liquors. Counsel argue with great force that character is an attribute of a natural person, and that it cannot attach to an artificial one. We are of opinion that in a qualified sense aggregations of individuals may have a character; that the term may be applied intelligently to a community and to a corporation; that the specific acts of the individual members may be so identified with the greater whole as to give to the collection a character. It has been quite generally held that to rebut testimony to the effect that an applicant for a saloon license was a man of respectable character and standing, specific acts might be shown to prove his unfitness, as that he has violated the excise law, or maintained a gambling resort, or has committed any other act in violation of law, or repugnant to the moral sense of the community. *Stock-*

well v. Brant, 97 Ind. 474; *Hardesty v. Hine,* 135 Ind. 72; *Whissen v. Furth,* 73 Ark. 366, 84 S. W. 500; *Groscop v. Rainier,* 111 Ind. 361; *Watkins v. Grieser,* 11 Okla. 302, 66 Pac. 333. Corporations may be prosecuted under the criminal law in Nebraska, and, although the corporation cannot be confined within prison walls, it may be fined, and, as all of its acts must be performed by natural persons, those individuals would also be subject to prosecution for violations of the excise law, even though they acted in the name of the corporation. An opportunity, therefore, would be presented for double punishment, to fine both principal and agent, with the possibility of imprisonment for the latter. *Enterprise Brewing Co. v. Grime,* 173 Mass. 252; *Overland Cotton Mill Co. v. People,* 32 Colo. 263; 105 Am. St. Rep. 74; *Southern Express Co. v. State,* 1 Ga. App. 700, 58 S. E. 67; *Stewart v. Waterloo Turn Verein,* 71 Ia. 226, 60 Am. Rep. 786.

State Electro-Medical Institute v. State, 74 Neb. 40, is cited as sustaining the proposition that a corporation may not be licensed to transact business. It is true that we said in said case concerning a physician's license that the qualifications of a medical practitioner are personal to himself, and that a corporation could not possess them. But the wholesale traffic in intoxicating liquors is commercial in its nature. *Enterprise Brewing Co. v. Grime, supra; People v. Heidelberg Garden Co.,* 233 Ill. 290. The retailer of strong drinks occupies a different relation to the public and said traffic than does the wholesaler. He is presumed to exercise personal control, either by himself or that of his servants under his personal supervision, of the distribution of said liquors to the consumer. The temptation to sell his goods to minors, Indians or intoxicated individuals, to adulterate his liquors, and dispose of them on Sundays and on election days, is ever present. It was the purpose of the legislature to restrict that traffic to respectable men of good character, who would obey the law, rather than the promptings of avarice in conducting said business. We are of opinion that the

legislature did not intend that a corporation or joint association should be permitted to enjoy the privileges of a license to sell intoxicating liquors at retail in Nebraska.

The record in this case is meager, but we infer therefrom, and from the argument of counsel, that the brewing company was not licensed to engage in the retail traffic in intoxicating liquors. If we were not thus satisfied, we would reverse this case and instruct the district court to cancel said license. Nor would that license, if uncanceled, shield said corporation from prosecution if it attempted to engage in said retail traffic.

After a careful and deliberate consideration of all of the legislative acts concerning said traffic and the conduct of the various officers whose duty it has been for the past 20 years to enforce those laws, we conclude that a corporation may be licensed to sell intoxicating liquors at wholesale in Nebraska. 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.

LEWIS E. POWELL, APPELLEE, V. ALICE MORRILL ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,839.

1. **Intoxicating Liquors: PETITION FOR LICENSE: FREEHOLDERS.** Under section 25, ch. 50, Comp. St. 1907, the freeholders required as signers of the petition for a license to sell intoxicating liquors must be *bona fide* freeholders, and not such as were made freeholders merely for the purpose of enabling them to sign the petition.

2. ———: ———. The wife of an applicant for a liquor license, even though she may be a freeholder, is not a qualified petitioner within the meaning of the liquor law.

3. Witnesses: CROSS-EXAMINATION. Where a witness on his direct examination testifies that an applicant for a liquor license is a man of respectable character and standing in the community, it is competent to interrogate said witness on cross-examination concerning specific acts of the applicant, as that he has violated the excise law, or committed any other act in violation of law or repugnant to the moral sense of the community.

4. Appeal: OFFER OF PROOF. A formal offer to prove is not necessary to obtain a review of the ruling of the excise board in excluding an answer to a proper question propounded on the cross-examination of a witness.

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

Patterson & Patterson and *Martin & Ayres,* for appellants.

Harrison & Prince, contra.

ROOT, C.

Appeal from a judgment of the district court for Merrick county affirming an order of the village board of Chapman granting license to Lewis E. Powell to vend intoxicating liquors in said village. Remonstrants appeal.

1. Thirty-two individuals signed Powell's petition. It is not alleged in the petition or claimed by any party to this record that there are less than 60 resident freeholders in said village, and, therefore, if three or more of the said petitioners were not qualified to petition for said license, it should not have been issued. It is evident that there is a sharp division of sentiment in Chapman concerning the liquor traffic, and that applicants experience some difficulty in securing the 30 freeholders essential to vest the village trustees with power to issue such license. John Voberill and wife, Anna, are challenged as not qualified petitioners. About three days before they signed said petition the applicant procured a deed for one vacant lot for them from one Hugo Nissen. The lot had been deeded gratuitously to Nissen about a year preceding his convey-

ance to the Voberills, and he had thereupon signed a petition for a liquor license. Nissen testified that Powell came to him and requested a conveyance to the Voberills jointly so that he could secure two more signers upon his petition; that he received no consideration for the transaction or lot except that he was told to sign his name across the back of a note, but that he did not see the face thereof. The proof does not inform us what became of that document. Voberill claims to have purchased *bona fide,* and Powell denies Nissen's testimony, but there are many circumstances tending to corroborate Nissen, and the board refused to permit the notary who was present with Powell when the deed was made to answer questions concerning the transaction. Voberill claims to own other property in McCormick's addition to said village, but his testimony is too indefinite on this point to establish that fact. We held in *Dye v. Raser,* 79 Neb. 149, that said addition to Chapman was laid out and maintained in the interest of the liquor traffic and for the sole purpose of furnishing lots for colorable freeholders to sign petitions like the one in the instant case. Mrs. Voberill was not called as a witness, and there is nothing to show that she claims any interest under this deed or knows of its existence. The Voberills were not competent petitioners under the rule announced in *Bennett v. Otto,* 68 Neb. 652; *Colglazier v. McClary & Martin,* 5 Neb. (Unof.) 332; *Dye v. Raser, supra.*

2. Mrs. Minnie Powell, wife of the applicant, also signed his petition. Her freehold title is evidenced by a joint deed to herself and husband for a vacant lot. This conveyance was executed in 1906, and immediately thereafter she and her husband signed a brother-in-law's petition for a saloon license. She did not pay any consideration for the lot, nor did she testify as a witness. For all the record discloses she never claimed title to the real estate. It is not every resident freeholder that is qualified to sign a petition for a saloon license. The persons so authorized by statute are charged in a degree with a duty toward the

public. The signer is presumed to consult not only his individual inclination, but the rights and interests of third persons and of the general public in that community. We held in *Thompson v. Eagan,* 70 Neb. 169, that an infant could not sign such an application, and in *People v. Griesbach,* 211 Ill. 35, said case was approved. In *Doane v. Chicago City R. Co.,* 160 Ill. 22, it was held that abutting property owners who were paid to give their consent to the operation of a railway in the street adjacent to their property were incompetent to give that assent; that such owners occupied a position of trust toward the public; that sound public policy required them to exercise that trust with consideration for the public welfare, and that their interest, induced by the payment of money, disqualified them in that regard. In *Theurer v. People,* 211 Ill. 296, it was held that a lease for a building conditioned upon the lessee receiving a dram shop license disqualified the lessor from assenting to such license. Although the legislature has emancipated married women in many particulars, still there is, and from the nature of their relation must always be, a very considerable identity of interest between husband and wife regarding all the husband's business ventures. The wife in signing her husband's petition to engage in business would not consider public interests as against her husband's desire for gain and her desire for support for herself and family, nor could she be used as a witness against him. We are of opinion that Minnie Powell was disqualified to sign the petition under consideration.

3. Various witnesses testified to the respectable character and standing of the applicant. Counsel on cross-examination sought to prove by them that in 1906 and 1907 Powell as bartender had sold intoxicating liquors to an habitual drunkard. While a sale in 1906 might not have absolutely disqualified Powell from receiving a license in 1908, it was pertinent as tending to show that he was not of respectable character and standing. *Stockwell v. Brant,* 97 Ind. 474; *Hardesty v. Hine,* 135 Ind. 72; *Whissen v.*

Furth, 73 Ark. 366, 84 S. W. 500; *Watkins v. Grieser*, 11 Okla. 302, 66 Pac. 333. Learned counsel for the petitioner assert that, as no offer was made to prove, any error that was committed in refusing to permit the witness to answer was waived, and cite *Seele v. Phelps*, 81 Neb. 690. It will be noticed that in the cited case remonstrants' own witnesses were refused permission to give testimony on direct examination. The case is in harmony with the numerous decisions of this court. *Masters v. Marsh*, 19 Neb. 458; *Connelly v. Edgerton*, 22 Neb. 82; *Wittenberg v. Mollyneaux*, 60 Neb. 583. On cross-examination the rule is different, and to enforce the same rule as in the direct examination of a witness would often defeat the very end of cross-examination. *Burt v. State*, 23 Ohio St. 394; *Martin v. Elden*, 32 Ohio St. 282; *O'Donnell v. Segar*, 25 Mich. 367; *Harness v. State*, 57 Ind. 1; *Hyland v. Milner*, 99 Ind. 308; *Cunningham v. Austin N. W. R. Co.*, 88 Tex. 534, 31 S. W. 629. Although a court, and necessarily the village board, would have considerable discretion in limiting cross-examination, it was certainly error to exclude testimony which, if true, would destroy the conclusion of the witness that the applicant was of respectable character and standing. The case is within the reasoning in *Steinkraus v. Hurlbert*, 20 Neb. 519; *Hollembaek v. Drake*, 37 Neb. 680.

It is therefore recommended that the judgment of the district court be reversed, with directions to cancel the license issued by the village board.

FAWCETT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, with directions to cancel the license issued by the village board.

REVERSED.

F. W. FITCH, APPELLEE, V. EUCLID MARTIN, ADMINISTRATOR, APPELLANT.*

FILED DECEMBER 17, 1908. No. 15,865.

1. **Witnesses: EVIDENCE: TRANSACTIONS WITH A DECEDENT.** If a claimant in support of his account against the estate of a deceased person testifies concerning independent acts performed by him, and as to which the deceased did not personally participate, he must furnish other and competent evidence connecting those acts with the subject of his demand, or his evidence will be stricken from the case. And, in giving that testimony, it is not proper for his counsel to interrogate claimant on the assumption that such services were performed for the deceased.
2. ———: ———: ———. F., a claimant against the estate of M., testified to the examination of the records of title to real estate, and refreshed his memory by referring to diaries kept by himself. He was cross-examined concerning certain of those entries, whereupon the court over defendant's objections permitted plaintiff to introduce in evidence not only the entries referred to in his cross-examination, but also those parts of the diaries relating to other and distinct alleged transactions with M. *Held*, Error.
3. **Executors and Administrators: CLAIMS: APPEAL: PLEADING: CONSTRUCTION.** If objections are interposed in the county court to the allowance of a claim against the estate of a deceased person, the issues thus framed will be construed with great liberality in the district court.
4. **Pleading: CONSTRUCTION.** A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

McGilton & Gaines, for appellant.

A. S. Churchill and *Byron G. Burbank, contra.*

ROOT, J.

This is the third appearance of this case in our court. A sufficient statement of facts may be found in the opin-

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

ion of Judge LETTON, 74 Neb. 538. Upon the last trial some additional evidence was produced by both plaintiff and defendant. The jury returned a verdict in favor of plaintiff for $1,426.92, and defendant appeals. Plaintiff prosecutes a cross-appeal.

1. Defendant argues that the evidence is so overwhelming that plaintiff's claim is spurious that the judgment should be reversed and the cause ordered dismissed. While there is much that is unsatisfactory in the evidence adduced, there is also evidence to support plaintiff's claim. It would extend this opinion without profit to summarize the evidence pro and con, but we have considered it carefully, and remain of the opinion that a jury, and not the court, should say which of the many witnesses testifying are entitled to credit, and find accordingly.

2. Plaintiff as a witness in his own behalf was interrogated: "Q. You may state what services you rendered to Robert Major from October, 1893, down to the time of his death on September 13, 1902?" (Time covered by alleged contract for services.) Defendant objected as involving matters of personal transactions with the deceased, and the court ruled: "The witness may answer excluding all conversations and all transactions with Robert Major, the deceased." The witness then testified to numerous examinations of the records to ascertain titles to various tracts and lots of land and to performing other services. In some instances other evidence tended to support an inference that plaintiff probably was thus acting in the interests of Major, but many of the transactions, as we understand the record, were not thus connected with the deceased. At the close of the evidence defendant moved to strike out and exclude from the jury the greater part of plaintiff's testimony concerning the services performed, for the alleged reason that he had failed by evidence other than his own testimony to connect Major therewith. A separate motion was directed against each transaction testified to, and all the motions were overruled. We are of opinion that the learned district judge erred. All of said motions

should not have been sustained, but in many instances they should have been.

As to the admissibility of the testimony, plaintiff relies on our former opinion in 74 Neb. 538, but it does not support his contention. The question first asked, and quoted in full, is based on the assumption that the services inquired about were rendered for Major. By overruling the objection thereto, although the witness was cautioned that he must not relate conversations or personal transactions with Major, the court still permitted the answer, and those that followed, to go to the jury as referring to work performed for the deceased, and that was the very crux of the case. The opinion of Judge LETTON merely suggests that a plaintiff may testify to what he has done, providing it does not involve a personal transaction with the deceased, and then, if he can connect those services with the deceased by other and competent evidence, his testimony, if relevant and otherwise competent, may go to the jury. But he does not state, nor is it the law, that the question may be propounded in such form that an answer thereto, while ostensibly excluding the deceased therefrom, still carries with it the inference that the services were performed for the deceased. To so hold would emasculate section 329 of the code. There is no such exception in the statute, and we are not authorized to enlarge its scope. *Kroh v. Heins,* 48 Neb. 691. Independent of this vice, which tainted said testimony, the evidence should not have been retained in the record unless some other competent evidence, whether introduced by plaintiff or defendant, tended to connect Major with those transactions. Many were not thus connected and to that extent defendant's motion at the close of the evidence should have been sustained. 1 Elliott, Evidence, secs. 191, 192; *People v. Millard,* 53 Mich. 63; *Huckins v. Kapf,* 14 S. W. (Tex. App.) 1016.

3. Plaintiff in testifying to said transactions refreshed his memory by examining entries that he claims to have made in private diaries in the years 1893 to 1902. As to

many of those entries the witness was cross-examined, but not as to all of them. Over the objections of defendant all of said entries were admitted in evidence. Defendant's counsel stated specifically that no objections were made to those entries upon which plaintiff had been cross-examined. The entries objected to purported to recite personal transactions with Major concerning the matters in litigation here. They were incompetent and should have been excluded. *Pettis v. Green River Asphalt Co.*, 71 Neb. 513; *In re Estate of Neckel*, 80 Neb. 123.

4. In the county court the executor objected to the allowance of plaintiff's claim because, as he alleged, it was extortionate, fraudulent and without merit, because Major in his lifetime had paid plaintiff for all services rendered; that long before the decedent's death he had settled with and paid plaintiff for all matters between them; that the statute barred all services alleged to have been rendered before October, 1898; that all subsequent services referred to were never in fact performed, and that deceased was never indebted therefor. In the district court the administrator denied generally all allegations in the petition, alleged that whatever claim plaintiff may have had against Major for services was fully settled for and paid by deceased, and that all matters between them were fully settled and adjusted in Major's lifetime, pleaded the statute of limitations and a specific denial that any services had been performed for Major by plaintiff subsequent to October, 1898. After three trials in the district court defendant was permitted to withdraw so much of the answer as referred to payment. By proper motions, exceptions and a cross-appeal, this error, if one was committed, has been presented for our decision.

Defendant insists that the issues were framed in the county court on the theory of payment, and without a general denial; that thereby plaintiff's contract and Major's liability were admitted, subject only to be defeated upon proof of payment, and the burden was upon defendant; that the issues on appeal must remain identical with

those presented in the county court, and that the court erred in permitting defendant to withdraw the second paragraph of the answer. Claims against the estates of decedents in Nebraska are to be examined and adjusted either by the county judge or a commission of two or more persons appointed by the court for that purpose. The statute relative to the settlement of estates is silent concerning the filing of pleadings or the formation of issues in case a claim is resisted. Section 221, ch. 23, Comp. St. 1907, directs the executor or administrator to exhibit any offset in favor of the estate, and prohibits the allowance of any claim barred by the statute of limitations. Appeals may be prosecuted by the executor, administrator or claimant from any order of the court allowing or disallowing the claim in whole or in part. Section 238, ch. 23, *supra,* provides that the cause shall be tried in the district court in like manner as upon appeals from the judgments of justices of the peace, and authorizes the district court to direct that issues be made up between parties. The legislature did not contemplate that pleadings should be filed in the county court, nor that on appeal the representative of the estate should be held strictly to the theory upon which he made his defense in the county court. Attorneys are not always employed to counsel and direct the representatives of an estate. The administrator is often ignorant of the transaction involved, and frequently upon the hearing something may develop that upon inquiry will lead to knowledge of a defense to the claim. While mock trials ought not to be encouraged in the county court, yet justice will be subserved in a majority of the disputes that may arise in the matter of claims against estates by extreme liberality in the application of the rules of pleading.

In *Herman v. Beck,* 68 Neb. 566, it was held that an administrator could not be defaulted, but that if a claim was allowed in his absence, and it appeared from the record that such allowance was excessive, the judgment would be reversed in the district court. In *Stichter v. Cox,* 52 Neb. 532, Mr. Justice NORVAL reasoned that the statute

did not require the representative of the estate to plead to any claim in the county court. The fifth paragraph of the objections in county court averred that none of the services alleged to have been performed subsequent to October, 1898, were ever in fact rendered, and there is something of a negative pregnant lurking in this denial. However, the allegation in the first paragraph of the objections, that the claim was extortionate, fraudulent and without merit, may be construed as a general denial. We have not overlooked *Estate of Fitzgerald v. Union Savings Bank,* 65 Neb. 97, cited by plaintiff, but we there held that it must clearly appear that the issue tendered in the district court was not presented in the county court or the evidence submitted in the upper court will be received.

Counsel argue with great force that the objections contained a plea of payment, which thereby confessed the plaintiff's demand, and that the second paragraph in the answer should not have been withdrawn. The plea was one of general settlement. Parties often buy their peace and settle claims that are without merit and could not have been enforced in any court. Therefore a plea of a general settlement and payment of all claims and demands does not by implication admit the existence at any time of a specific cause of action against defendant. *Conway v. Wharton,* 13 Minn. 145. Two or more defenses may properly be interposed in an action, provided that they are not inconsistent with one another; and they are not inconsistent unless the proof of one necessarily disproves the other. *Blodgett v. McMurtry,* 39 Neb. 210; *Steenerson v. Waterbury,* 52 Minn. 211; *Rees v. Storms,* 101 Minn. 381; *Gates v. Avery,* 112 Wis. 271. We therefore conclude that the district court did not err in permitting defendant to withdraw said paragraph of his answer.

There are other assignments of error on both the appeal and cross-appeal, but we do not consider that their determination is essential for the future trial of this case.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES O. WHEDON ET AL., APPELLANTS, V. EDWARD P. BROWN ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,934.

Primary Elections: CONTESTS: JURISDICTION. The district courts are without power to consider and determine an original action instituted for the purpose of contesting the nomination of a legislative candidate at a primary election.

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

Edward F. Pettis, for appellants.

Field, Ricketts & Ricketts, contra.

ROOT, C.

Charles O. Whedon and Edward P. Brown were candidates at the recent primary election for the republican nomination for state senator in the Twentieth senatorial district in Nebraska. As a result of a canvass of the returns from the various voting precincts in said district, Brown was found to have received six more votes than Whedon, and the former's name was placed upon the official ballot as republican nominee for said office. On the 5th of October, 1908, said Whedon, with plaintiff Webster, both qualified electors resident in said district, commenced this action in the district court against Brown and defendant Dawson, the county clerk of Lancaster county, alleging that the election boards in said precincts prevented qualified electors who desired to vote for Whedon from voting at all; that in counting the ballots in many instances votes for Whedon were counted for Brown, and

that a considerable number of votes for Brown were evidenced by ballots indorsed by only one judge of election. If the statements in the petition are true, Whedon, and not Brown, was the republican nominee at said primary election. Plaintiffs prayed that the ballots cast at said election be recanvassed, and that defendant Dawson procure them for the court's inspection, etc. Defendants demurred on the ground that the court did not have jurisdiction of the subject matter of the action, and that the petition did not state a cause of action in plaintiffs' favor. The demurrer was sustained, and the petition dismissed. Plaintiffs appeal.

1. The primary election law may be found in chapter 52, laws 1907 (Ann. St. 1907, sec. 5862 *et seq.*). The evident purpose of this act is that candidates for legislative and other offices therein named shall be nominated at a primary election held under the secrecy of the Australian ballot law. The act is not more complex than the subject demands, and its provisions in most particulars are reasonably clear. The primaries are to be presided over by the same officers who would officiate if a special election were being held on said day. The ballots are to be counted and the results returned to the county clerk in manner and form provided by law relating to general elections. Ann. St. 1907, sec. 5877. The county clerk and two disinterested electors appointed by him are to commence the canvass of the returns on Friday succeeding the primary election, and the result thereof must be certified to the secretary of state. Sec. 5884. Section 5892, vests the county judge and the county court with power to hear on short notice and in a summary manner contests "as to county, city or precinct officers." By section 5898, the general election laws of the state are made applicable to the various provisions of the primary law, except as to contests. Section 5887, as originally prepared, related specifically to canvassing the returns from city primaries. The standing committee of the house amended said section by adding thereto the following:

"Whenever the candidate for any office under the primary law desires a recount of the votes he shall within three days after the canvassing board has completed its count file with the canvassing board an affidavit requesting and setting forth his reasons for requesting the same. He shall also state in said affidavit the names of the other candidates whose votes he desires recounted." There are further provisions that the vote shall not be recounted unless it shall appear that, conceding the allegations in the affidavit to be true, the result as found by the canvassing board would be changed.

It is argued with much plausibility that this proviso relates solely to securing a recount of the votes cast at city primaries, and, on the other hand, that, although the amendment is in the form of a proviso to the section relating specifically to city primaries, yet the language is so general that said statute comprehends every office voted for at any primary election. We do not deem it essential to decide the scope to be given this proviso. If it does relate to the election under consideration, then a plain statutory remedy for the correction of the principal errors complained of was afforded Mr. Whedon, which he has not pursued either by filing his affidavit within three days of the election or by requesting the canvassing board to recount the ballots. If the statute does not apply to the case at bar, then the primary act does not provide for contests by or against legislative candidates, and Mr. Whedon is without remedy, unless the district court in the exercise of its general jurisdiction may have cognizance of the case. It is apparent that an action in the district court would not furnish a contestant relief, as answer day would ordinarily be subsequent to the general election succeeding the primary, and the judgment of the district court overturning the result of the primary as announced by its officers would be a vain thing, and courts generally would refuse to try those cases. *Johnson v. Dosland,* 103 Minn. 147. In so far as the legislature has made provision, for contesting primary elections, it has

recognized the necessity for expedition and provided for summary and speedy action. The legislature may have been apprehensive of undue interference by the courts with the selection of party candidates for the legislature, and thereby indirectly influencing to some degree the membership of the house and senate. We are of opinion that the legislature, in providing for contesting primary nominations, might lawfully exclude legislative nominees, and that rival candidates for those nominations are bound by the action of the legislative branch of government. *Douglas v. Hutchinson,* 183 Ill. 323; *Hester v. Bourland,* 80 Ark. 145, 95 S. W. 992; *State v. Brown,* 90 Miss. 876, 44 So. 769; *Ramey v. Woodward,* 90 Miss. 777, 44 So. 769.

If legislative candidates were inadvertently omitted from the provisions of the primary law concerning contests, we cannot supply the deficiency. *In re Contest Proceedings,* 31 Neb. 262. Counsel for plaintiffs cite *State v. Van Camp,* 36 Neb. 91. That case was mandamus to compel a county clerk to perform a ministerial duty to wit, to compare and canvass an abstract of votes filed with him. It is apparent that the case does not support plaintiffs' contention. We do not deem it necessary to discuss the general election laws concerning contests, because, as heretofore demonstrated, the primary law specifically excludes the general election statute in the matter of primary election contests. Nor are the opinions, cited from states wherein the primary election law provides for contests, of value in deciding the instant case.

We are of opinion that the record is without 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.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1909.

PETER FREDERICK, APPELLANT, V. MARY ANN BUCKMINSTER ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,420.

1. **Pleading**: CONSTRUCTION ON APPEAL. Where a party fails to test the sufficiency of a pleading by demurrer or otherwise, and proceeds to trial on the merits on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleading can be construed to raise such issue, it will be held to do so.
2. **Answer** examined, its substance stated in the opinion, and *held* sufficient to sustain the verdict and judgment.
3. **Judgment**: INDEFINITENESS: REVIEW. Indefiniteness is not a ground for the reversal of a judgment. If it is too indefinite to be enforced, the party complaining is not affected thereby, and, if it is desired to make it more definite and certain, application should be made for that purpose to the court where it was rendered.

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

R. C. James and *Reavis & Reavis,* for appellant.

Edwin Falloon and C. Gillespie, contra.

BARNES, J.

The appellant, who will hereafter be called the plaintiff, commenced this action in the district court for Rich-

ardson county to restrain the defendants and appellees from opening, tearing down and leaving open the gates placed by him on what he alleges were certain private roads over and across his farm situated in said county. The petition is too voluminous to be set forth in this opinion. It is sufficient to say of it that although it is somewhat informal, and while perhaps it may have been open to attack by motion or demurrer, it was treated in the court below as sufficient to state a cause of action. Defendants' answer alleged, among other things, that in 1856 there was laid out and established the town site of St. Stephen situated upon the lands described in the plaintiff's petition; that defendant Mary Ann Buckminster bought certain lots in said town site, according to the plat thereof, which appear to be sufficient in number to comprise several acres of land; that some years thereafter the town site of St. Stephen was abandoned; but defendant alleged that she took possession of the land purchased by her, as aforesaid, made the same her permanent home, and that she now resides thereon. The answer admitted that the plaintiff purchased the land described in his petition, which surrounds the lots or tract of land now owned and occupied as a home by the above named defendant. It was further alleged in the answer that at the time the defendant purchased the lots in question, and made the same her permanent home and long prior to that time, there had existed a well-traveled road from her house across the premises of the plaintiff to, and connecting with, the public roads of said county; that said road had been used continuously and uninterruptedly by the public generally and the plaintiff since the year 1856, and has been so used by her for more than 20 years; that just before the commencement of this action the plaintiff erected and maintained certain gates, with locks thereon, across said last named public road, and attempted to permanently close the same and thus deprived the defendant of any means of ingress or egress from her home to the other public roads of said county; that the trespass complained

of in plaintiff's petition consisted of opening and removing the gates so erected by the plaintiff, which acts the defendants averred they had a good and perfect right to do. The answer concluded with a prayer that the said last named road be found and declared to be a public road, and that the plaintiff be forever enjoined from closing up said road or in any manner obstructing the same, together with a prayer for general affirmative relief. The pleading, although somewhat defective in form, was treated by plaintiff and his counsel as a sufficient answer to the petition, and as a defense thereto. It was so treated by the trial court; and the plaintiff during the progress of the litigation was required to file a reply thereto instanter. Whether such reply was filed or not we are unable to state, on account of the imperfect condition of the transcript which has been lodged in this court. It appears that, when the cause came on for trial, a jury was impaneled to determine the issue of fact thus presented. This procedure was not questioned, but was acquiesced in by all parties to the action. After a protracted trial, a verdict was returned for defendants by which it was found that the road described in defendants' answer was a public highway. Judgment was rendered on the verdict, and a journal entry thereof prepared, which was signed by the presiding judge, but for some reason was not filed and recorded for a considerable time thereafter. Within six months from and after the recording of the decree, plaintiff employed his present counsel, who filed a motion for judgment on the pleadings *non obstante veredicto*. The motion was overruled, and the plaintiff thereupon appealed from said ruling and the decree above mentioned to this court.

Appellant's main contention now is that the defendants' answer stated no defense to the cause of action set forth in his petition, and for that reason he was entitled to a judgment on the pleadings, notwithstanding the verdict and decree. In cases where the state of the pleadings and the previous conduct of the parties justifies it such a mo-

tion may be sustained; but, where a pleading has been treated as sufficient by the court and all of the parties to the action, and no objection has been made to it until after verdict and judgment, it will be liberally construed, and, if possible, will be held sufficient to sustain the judgment, as we shall presently see. It is true that the answer in this case contained no general denial, but its affirmative allegations were sufficient to charge that the *locus in quo* was a public highway or public road, and justify the defendants' acts in removing the plaintiff's gates therefrom. This was in effect a denial of the cause of action set forth in plaintiff's petition and such facts, if true, constituted a defense thereto. It was so treated by both parties to the action, as well as by the trial court, until after verdict and judgment.

In *Western Travelers Accident Ass'n v. Tomson,* 72 Neb. 674, it was said: "No attack was made upon the petition by motion or otherwise, and it is the settled rule of this court, sanctioned by decisions so numerous that citation of them is not requisite, that, after a verdict and judgment, pleadings will be liberally construed for the purpose of upholding the result reached by the court and jury." In *Parkins v. Missouri P. R. Co.,* 76 Neb. 242, it was held that "where a party fails to test the sufficiency of a petition by demurrer, but answers to the merits and proceeds to trial on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleadings can be construed to raise such issue, they will be held to do so." In *National Fire Ins. Co. v. Eastern Building & Loan Ass'n,* 63 Neb. 698, it was held that, where from the nature of the answer and testimony it appears that both parties have placed the same construction on a petition, the court should not ignore such construction in passing upon a demurrer *ore tenus,* even though the petition, standing alone, might not admit of such construction. In *Bennett v. Bennett,* 65 Neb. 432, where evidence had been adduced in support of the allegations of a petition without

objections, and judgment had been rendered thereon, it was held that the pleading would be liberally construed, and that indefiniteness would not be considered. In *Doering v. Kohout,* 2 Neb. (Unof.) 436, it was decided that, if the plaintiff accepts an answer as stating a defense, he cannot for the first time in the supreme court challenge its sufficiency. Indeed, this rule is so well established that no further citations are required to support it.

The plaintiff having treated the defendants' answer as sufficient and as stating a good defense to the matters set forth in his petition, until after verdict and judgment against him, he will not now be heard to question its sufficiency, if by any reasonable or liberal construction it can be held sufficient to support the judgment. For the reasons above stated, we think it sufficient for that purpose, and therefore the plaintiff's contention must fail.

The plaintiff's second assignment is that the judgment or decree is indefinite, and therefore must be reversed and set aside. We are not convinced that this objection is well founded. It is true that the plaintiff in his petition mentioned three private roads upon which he claimed he had erected gates or bars, and that the defendants had unlawfully opened, removed and destroyed the same. The defendants answered, justifying the removal of the plaintiff's gates upon one road only, which was described and alleged to be a public road leading from the defendants' place of residence to the other public roads of Richardson county. The verdict of the jury declared the road described in the defendants' answer to be a public highway, and the decree, responding to the terms of the verdict, granted the defendants affirmative relief in relation to that road. So we are unable to say that the decree is open to the objection of indefiniteness. If, however, plaintiff's contention be true, we are not certain that this is a sufficient ground for a reversal of the judgment. If the decree is so indefinite that it cannot be enforced, surely the plaintiff is not prejudiced thereby, because an attempt

to enforce it could be successfully resisted by him. If, on the other hand, it is desired by either party that the judgment should be more definite and certain in its terms, the the proper practice would be to file a motion in the district court to correct it in that respect.

For the foregoing reasons, we are of opinion that the record contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

DEAN, J., not sitting.

EMMA S. VANDEWEGE ET AL., APPELLANTS, V. WILLIAM E. PETER, APPELLEE.

FILED JANUARY 9, 1909. No. 15,433.

1. **Evidence at Former Trial:** DILIGENCE. To entitle a party to reproduce the testimony of a witness given on a former trial, he must show that, by exercising reasonable diligence, he has been unable to secure the attendance of such witness at the trial.
2. ———: ADMISSIBILITY. An attorney who took part in the former trial of a cause and heard the testimony of a witness given therein, but is unable to remember his evidence or the substance of all that the witness testified to, both on direct and cross-examination, is not competent to reproduce the evidence of such witness; and the fact that he made notes of a part of the evidence, from which he can only partially refresh his recollection, does not render him competent.

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

A. J. Sawyer and *W. E. Stewart,* for appellants.

Burkett, Wilson & Brown, contra.

BARNES, J.

This action was brought in the district court for Lancaster county by the appellants to recover on four prom-

issory notes executed and delivered by appellee to his grandmother, Sevilla Peter, on the 30th day of April, 1901, for $200 each, bearing interest at 5 per cent. from date. The notes were given for the purchase price of 40 acres of land sold by Sevilla Peter to the appellee. On July 8, 1901, Sevilla Peter died, leaving a will, which was duly admitted to probate, and by which the notes in controversy were bequeathed to the appellants, who are her grandchildren. The defendant by his answer admitted the giving of the notes, but says that on or about the 7th day of June, 1901, he paid them to Sevilla Peter, who was then the owner thereof. It was therefore incumbent upon him to prove such payment by a preponderance of the evidence. It appears that at the trial in the county court the defendant produced a witness named Rosa Bowling, an illiterate person, for the purpose of testifying to a conversation, which it is claimed she overheard, to what she had seen at the time of the alleged payment, and to identify a receipt which the defendant claims was given to him by Sevilla Peter on June 7, 1901. The testimony of this witness given in the county court, both on direct and cross-examination, seems to have been quite voluminous, and, as her testimony and the alleged receipt constituted the only evidence adduced by the defendant upon the question of the alleged payment, it was vital to the determination of this case. An appeal was taken from the judgment in the county court, and when the case came on for trial in the district court Rosa Bowling was not present. It appears that no subpœna had been issued to secure her attendance as a witness, and no attempt had ever been made to take her deposition. The defendant testified that she resided in Beatrice; that he saw her the morning before the trial, and left $2 with her to pay her fare to Lincoln, and that she promised she would be present to give her testimony. The witness however made affidavit that defendant gave her no money whatever with which to pay her way to Lincoln, and, as above stated, she was not present at the trial.

Without any other showing of an effort to obtain her testimony by deposition or have her present to testify, the defendant was permitted to call Judge Williard E. Stewart, who was counsel for two of the plaintiffs, and was present at the trial in the county court and heard her evidence on the former trial, as a witness to reproduce her former testimony before the jury. This was done over the plaintiffs' objections. For the purpose of laying a foundation for the introduction of this evidence, defendant's counsel propounded the following questions to Judge Stewart: "Q. Are you an attorney at law? A. I am. Q. You are one of the counsel engaged in the trial of this case both in the county court and in this court on behalf of the plaintiffs? A. Yes, sir. Q. Were you present, and did you hear the testimony of Mrs. Rosa Bowling in the county court on the trial of this cause? A. I was present and heard her testimony. Q. Did you cross-examine her upon the trial? A. Yes, sir. Q. Did you take notes of her testimony upon that trial? A. I made memoranda of a *portion* of her testimony. Q. Have you those memoranda now in your possession? A. Yes, sir. Q. You may take those memoranda and refresh your memory as to her testimony in order that you may answer my questions as to what she testified to." Over plaintiffs' protest the court compelled the witness to testify, and the defendant was thus permitted to reproduce the evidence of the absent witness. This the plaintiffs contend was prejudicial error. The principal objections to the reception of this evidence relied on by the plaintiffs are: First—The absence of the witness Rosa Bowling, whose testimony was attempted to be reproduced, was not satisfactorily accounted for; second, no reason was shown for not taking her deposition; and, third, the witness who attempted to reproduce her evidence was incompetent, for the reason that he did not remember all of her former testimony, and had no sufficient memoranda from which to refresh his recollection.

The rule as to the reproduction of the evidence of a

witness given upon a former trial may be stated as follows: First, that the party against whom the evidence is offered, or his privy, was a party on the former trial; second, that the issue is substantially the same in the two cases; third, that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; fourth, that a sufficient reason be shown why the original witness is not produced. The existence of the first two requirements must be admitted, but the sufficiency of the evidence necessary to establish the other two propositions is seriously questioned. The memorandum of the former testimony of the absent witness, from which Judge Stewart was compelled to refresh his recollection, was some notes taken by him while engaged as plaintiff's attorney in the former trial. It was not pretended that these notes were at all full or complete, and the witness frequently stated during his direct and cross-examination that he did not remember what the testimony of the absent witness was upon certain points, and that he was unable to recollect a considerable portion of her cross-examination. Originally it was required that the reporting witness should be able to state the language of the former witness, but the rigor of this requirement has been considerably relaxed, and it is now held that, whatever is the degree of strictness required by the law established in a particular jurisdiction, it must affirmatively appear to the satisfaction of the court that the reporting witness can give either the language of the original testimony or its substance, and, if it appears that the witness cannot give the entire examination with the required certainty, his evidence would be rejected. *Omaha Street R. Co. v. Elkins,* 39 Neb. 480; 16 Cyc. 1102; *Emery v. Fowler,* 39 Me. 326, 63 Am. Dec. 627.

Again, we are of opinion that the absence of the former witness was not sufficiently accounted for. The present tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to further require that the party offering the

evidence should show to the satisfaction of the court that he could not by the use of reasonable diligence, have procured the attendance of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence, and that, from ignorance of the witness' whereabouts or other reason, his presence could not have been secured. In this case the temporary residence of the absent witness was in an adjacent county in this state. This was at all times well known to the defendant, and yet he failed to exercise reasonable diligence to secure the presence of the witness or take her deposition. Even where the necessities of the case require the reproduction of the testimony of an absent witness, such evidence at best is but hearsay, and its worthiness only a matter of degree; and, if for reasons of economy and convenience only the testimony of an absent witness is to be received, what further need can there be for rejecting hearsay evidence; and why should litigants bother themselves to procure the attendance or the depositions of witnesses who have once testified in the case? We are not prepared to go to the extent that the rule contended for by the defendant would lead us. While the defendants' failure to exercise reasonable diligence, of itself, may not be sufficient to reverse the judgment of the trial court we think the incompetency of the witness called to reproduce the testimony of Rosa Bowling must have that result. He could neither give the language of her former evidence, nor all of its substance, and his notes, taken at the former trial, were not full enough to enable him to refresh his recollection as to all of her testimony given on her direct and cross-examination. We are therefore of opinion that it was reversible error to require him to attempt to reproduce the evidence of the absent witness.

The record contains several other assignments of error, but, as the questions to which they refer are not likely to arise again, it is not necessary for us to consider them.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

DEAN, J., not sitting.

IN RE ESTATE OF MATTEUS PANKO.
MINNIE HARMS ET AL., APPELLANTS, V. ESTATE OF MATTEUS PANKO ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,431.

1. **Specific performance** of a contract between the sole legatee and devisee in a will, who was an aged woman, and her children, the heirs of her deceased husband, by the terms of which the larger portion of the property left to the widow is to be surrendered by her and distributed among the children, upon the consideration that certain objections to the probate of the will filed by some of the heirs will be dismissed, will not be enforced, unless the proof that such a contract was entered into is clear and satisfactory.

2. **Specific Performance.** In such a case, the transaction will be closely scrutinized and the contract must be clearly proved. No presumptions will be indulged in its favor.

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

E. R. Hitchcock, George A. Adams and *S. P. Davidson,* for appellants.

Hugh La Master and *D. W. Livingston, contra.*

LETTON, J.

Matteus Panko, who was a resident of Otoe county, died leaving a last will, by which he gave to his wife, Maria Panko, absolutely, all of his property, both real and per-

sonal. The will recites that he gave it to her "because of the love and devotion I have for my said wife and my confidence in her that she will divide the balance of said property that may remain at her death share and share alike among our lawful children." His wife was named as executrix. The will was offered for probate, when objections were filed by Anna Lipps, Christina Straube, Minnie Harms and Paulina Harms, daughters of the deceased, alleging mental incapacity of the testator and undue influence on the part of their brothers. These objections were afterwards withdrawn, and the will admitted to probate. The executrix qualified, paid the debts and expenses, and made a final report asking for an order "that all the property be delivered to Maria Panko, the sole devisee and legatee under the will." An application was made for a different distribution of the estate by certain of the children of the decedent, alleging, in substance, that after the objections to the probating of the will had been filed by them, Maria Panko, their mother, the sole beneficiary under the will, and the others heirs of the deceased, Herman Panko, Matteus Panko and Godfrey Panko, agreed verbally with them upon a division of the assets of the estate, by which the widow was to have the sum of $7,000 in money or notes to be selected by her; that their sister, Anna Lipps, was to have $4,000 in money or notes to be selected by her, and the remainder of the estate was to be divided between all the other children and heirs equally, except that two grandchildren were to have the share of their mother; that the agreement was made between all the children and the widow in good faith and in order to prevent litigation, and that, relying on the agreement, the petitioners dismissed and withdrew the objections filed to the will; and praying that the property be distributed according to the alleged oral agreement. The allegations were denied by answer. A hearing was had in the county court, which found for the petitioners and ordered distribution accordingly. An appeal was taken to the district court, which found for the lega-

tee, Maria Panko, and rendered judgment dismissing the application. An appeal has been taken to this court from this judgment.

We have heretofore held that a mutual promise made between heirs to an estate, whereby the objections filed or made to the probate of a will are dismissed in consideration of an agreement by all of the parties concerned in the estate that the property is to be divided among them upon terms other than those provided in the will, will, if made in good faith, be enforced by a decree of court. *Grochowski v. Grochowski,* 77 Neb. 506, 510. In that case the agreement which it was sought to enforce was evidenced by a writing, and the defense was that such a contract was invalid, as being against public policy, and without consideration. The fact of the contract having been entered into was not questioned. In this case it is conceded that the law of the *Grochowski* case applies, and it is urged that the evidence is convincing that the contract was entered into, and that the findings and judgment are against the evidence. Before examining the evidence in detail, we deem it advisable to say that as a general rule the court will not enforce the specific performance of a contract of this nature, unless the proof is clear and satisfactory that the alleged contract was actually entered into. More especially is this the case where the contract which is the subject of inquiry has been entered into between an aged mother upon the one hand and her children or some of them upon the other, and where the result of the contract would be to deprive the aged parent of property or rights therein for the benefit of the children. In such a case the transaction will be closely scrutinized and must be clearly proved. No presumptions will be indulged in its favor.

The will was filed for probate on February 6, 1906, and on February 28 the objections were filed. Shortly after this Henry Harms, husband of one of the contestants, and Godfrey Panko met and a settlement was suggested. Another meeting was held at which Harm Harms, another

son-in-law, was also present. This meeting was at the home of the Rev. William Beckman, who was the pastor of the church to which the father, mother and some of the children belonged. He was a friend of all of the parties, and had been appointed special administrator of the estate pending the hearing upon the objections to admitting the will to probate. It seems that three meetings took place, at which the two Harms, Godfrey Panko and Mr. Beckman were present. On the 10th of March, 1906, at Mr. Beckman's house in Burr, he suggested that the matter might be settled by giving to Mrs. Lipps $4,000, the other property to be divided equally among the remaining heirs, the grandchildren to receive the share that their mother would have had, if alive; that each heir should pay to the mother $50 that year and on the 1st day of January, 1907, and every succeeding 1st day of January each heir should pay $100 to the mother. This was put in writing and agreed upon between the parties present. It was then arranged to meet at the house of Mrs. Panko to submit the proposition to her. On the morning of March 13 the parties met there, as agreed. Mr. Beckman produced the writing with this proposition, but the widow rejected it, and said she wanted the will to stand, but said further that, if she agreed to a settlement, she wanted a portion of the property at once. Beckman then proposed that she should receive $7,000 or its equivalent in notes to be selected by her; that Mrs. Lipps should receive $4,000 in like manner, and that the rest should be equally divided among the remaining heirs. Up to this point there is substantially no conflict in the testimony. Mr. Beckman testifies that he then requested every one of the persons interested who were present to state whether they were willing to enter into the agreement, and that the widow, Matteus Panko and Godfrey Panko, Straube and the two Harms all assented; that Matteus Panko was present when the agreement was consummated, and he thinks that Matteus was the first person who left. Beckman further testifies that the evening before they went to Mrs. Panko's

house a paper was drawn up and signed by Mrs. Lipps, in which she agreed that, if she received $4,000, she would make no further claim upon the property of her mother, and the payment of this sum was guaranteed to her in writing by the two Harms brothers; that this paper was read and explained to the mother at the time, and handed to Matteus Panko, who said he would take it to Sterling and have it properly executed by the notary. Mr. Beckman said he told the widow it might take years to settle the matter if it was in litigation. On cross-examination it developed that at the time this proposition was made the two daughters, Mrs. Lipps and Mrs. Eilers, knew nothing about it, nor did the two grandchildren. This was the first time that the matter of settlement had been spoken of to the widow by any of the parties so far as the testimony shows. Henry Harms testified substantially as did Mr. Beckman, and so also did Harm Harms and Herman Straube, who were both present at the time. Mr. Boatsman, a notary of Sterling, testified that Matteus Panko brought him the paper, signed by Mrs. Lipps, on the afternoon of March 13, and said that he wanted it stamped; that he called up Mrs. Lipps over the telephone, and, after speaking to her, put his jurat upon it and handed it back to Panko. Fred Moss, one of the witnesses to the will, says that he had some conversation with Matteus Panko and Godfrey Panko about the probating of the will soon after this, and that they told him that a settlement had been made. Charles Lipps, husband of Anna Lipps, also testified that Godfrey told him they had settled, and that some time afterwards the widow said to him that she was willing to make settlement, but that Matteus objected. Mrs. Lipps testified that she had a conversation with her mother after the alleged settlement, and asked her mother if she was going to pay her; that her mother said she could not because the law would not allow her to pay it.

For the defense Mrs. Panko denies that the agreement was made when all the parties were together. It appears that she does not understand English at all, nor German

very well, speaking only Wendish. She says that Matteus was not there at the time the talk was had with Mr. Beckman, but that he came in afterwards. Mrs. Eilers testifies she was not present, and that she never agreed to the settlement. Matteus Panko testifies that when he arrived all of the others were in the house, and that Mr. Beckman told him they had settled; that he was not asked to agree, and did not agree; that he was called to go then by telephone from a neighbor; that he did not inquire as to the terms of the settlement, and said nothing about it; that he was asked to take a paper to Mr. Boatsman at Sterling, and did so. He admits that he went to Nebraska City the next day to have the will probated, and that he owes his mother a large sum of money. His account of his actions at the meeting is vague and unsatisfactory, and in other respects it seems doubtful, but his brother, Herman Panko, corroborates him in saying that he came after the settlement was made. As to himself, Herman testifies that he agreed to the proposal made by Mr. Beckman the day before, but that, after he went to his mother's house and the arrangement was changed, he was not asked whether he agreed to the new proposal, and did not agree to it, but that afterwards he said that the settlement was made and he would stand to it if the others would. It will be seen from this resume of the evidence that, while Beckman, Harms and Straube agree as to what took place at the home of Mrs. Panko, they are contradicted as to the fact of Matteus Panko being present at the time of the proposed agreement being assented to by Herman Panko, Mrs. Panko and Matteus Panko. It is true that there are several circumstances, such as the immediate withdrawal of the objections to the probate of the will and the statements made afterwards by the sons, which tend to support the testimony of the plaintiffs as to what took place that morning, but there is a direct conflict in the testimony, and it is not clear to our minds that Mrs. Panko clearly understood the whole transaction and what her rights were in the premises. It also appears

that neither Mrs. Eilers nor the two grandchildren were present at the transaction, either in person or by representation and it does appear that they had no voice in it. The witnesses were all before the judge of the district court, who had opportunities of observing their demeanor and judging of the truth or falsity of their testimony which we do not have. His finding and judgment upon the matter are entitled to our consideration and in such a case as this we do not feel justified in substituting our judgment for his upon the facts, even if it were proper for us to do so.

Upon the whole case the evidence is not so clear, satisfactory and convincing that it would justify us in virtually setting aside the will of the deceased and depriving the aged widow of about $20,000 worth of property by reversing the judgment of the district court and compelling the performance of a contract such as the one sought to be established in this case.

The judgment of the district court is

AFFIRMED.

DEAN, J., not sitting.

ALMT ETMUND ET AL., APPELLEES, V. JOHN ETMUND, APPELLANT.

FILED JANUARY 9, 1909. No. 15,440.

1. **Executors and Administrators: APPEAL: FINAL ORDER.** The appellant, who was administrator of one estate and guardian of two others, in which the same persons were interested, intermingled the funds and accounts of said estates. He filed a final report applying to all three of the estates in the county court, which made findings and an informal order thereon. Afterwards, he filed a supplemental report in connection with and based upon his former report and upon the findings of the county court. Separate appeals were taken to this court from both orders. The appellant objected in the district court that the first order was not a final order and not appealable, and also that the second

order, which is set forth in the opinion, was not a final order. *Held*, (1) That, whether the first order was final or not, the adoption of the first report and findings in the supplemental report carried the whole accounting forward into the second order which terminated the matters in issue, and that an appeal from this order brought up the whole record; (2) that the second order was final and appealable.

2. ———: ———: TRANSCRIPT. Where a partial transcript on appeal from the county court was filed in the district court within the statutory time, it was not error for the district court to allow a portion of a transcript in the same case, which had formerly been filed in the district court, to be attached thereto and made a part thereof.

3. Costs: SEPARATE APPEALS. Where separate appeals are filed in the district court and the cases are consolidated, the costs of the several transcripts are properly taxed against the losing party, since each transcript is necessary to the appeal.

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

Billingsley & Greene, for appellant.

Berge, Morning & Ledwith, contra.

LETTON, J.

This is an appeal from a judgment of the district court for Lancaster county rendered on appeal from certain probate and guardianship proceedings in the county court of that county. The appellant, John Etmund, is administrator of the estate of Wiard Etmund, deceased. He is also the guardian of Wiard Etmund, Henry Etmund and Anna Etmund, minor heirs of Wiard Etmund, and is also guardian of Almt Etmund, insane, who is the widow of Wiard Etmund, deceased. The deceased, Wiard Etmund, was a brother of the appellant. The appellant was appointed in these several capacities at different times prior to 1886. During the 14 years next after his appointment the appellant filed a number of reports in the county court with reference to his administration of these trusts, but his reports were confused and indefinite, so much so that

it was almost impossible to tell to which account the various items belonged or in what capacity they were filed; some of these reports being filed by him as administrator, some as guardian of the minors, some in the insane guardianship matter. The disorderly, careless and involved nature of the accounts kept by the appellant was such that it required the service of an expert accountant to disentangle them before his final report was approved in the county court.

On the 8th day of November, 1901, a final report, apparently intended to apply to all three estates, was filed by the appellant. Objections were filed to this report by the minor heirs. A hearing was had upon the objections, and upon May 6, 1903, the county court entered its findings and decree in the three trusts. The court made full and specific findings as to certain items, and, after finding the sums with which the appellant should charge and credit himself, it was found that he "should pay over of the balance remaining in his hands 12-18 to the present legal authorities to receive the same for Almt Etmund, 2-18 to Anna Etmund, 2-18 to Henry Etmund and 2-18 to Wiard Etmund; * * * and that thereupon his resignation in his said several capacities shall be accepted, and he be discharged from all further duties and liabilities by reason of any matters and transactions covered in this decree. To all of which findings and judgment each and all of the parties interested herein except, including the guardian *ad litem,* T. M. Wimberley, and pray an appeal. Judgment accordingly." An appeal bond was filed on May 9, 1903, and the transcript was filed in the district court upon June 9, 1903. A supplemental report was afterwards filed in the county court, and objections thereto were filed by the minor heirs. A hearing was had upon the supplemental report and the objections, and on August 15, 1903, the following final judgment was entered: "It is therefore considered, adjudged and decreed by the court that the said report be, and the same is, in all things confirmed, and the said John Etmund, administrator of

the estate of Wiard Etmund, deceased, is discharged as such upon compliance with the decrees of this date made in the matter of the guardianship of Almt Etmund, insane, and of Anna Etmund, Henry and Wiard Etmund, his wards."

An appeal from this judgment was taken and filed in the district court September 8, 1903. In the district court a motion to dismiss the appeal filed June 9, 1903, was made on the ground that the order from which the appeal had been attempted was not final. The motion was overruled, which is assigned as error. This contention is earnestly argued, and a number of authorities are cited. In the view we take of the case, we think it is unnecessary to consider this assignment, since there is no question but that the order made upon August 15 was a final order of discharge. This was based upon the first report and the findings made and entered upon it on May 6. Conceding that the order of that date was merely interlocutory, its findings were adopted in the supplemental report of the appellant, which recited that it was made in connection therewith, and the first order was thus carried forward with and formed part of the supplementary findings and order of August 15. We think the appeal from the latter judgment, therefore, opens both reports.

When the transcript of the supplemental proceedings in the county court was filed in the district court, the transcript formerly filed was attached thereto without leave of court. A motion was then made by the appellant, asking that he be allowed to separate the transcript filed June 9, 1903, from the ten pages of supplementary transcript filed September 8, 1903, without leave of court. On the hearing of this motion, the court found that the first thirty-three pages of the transcript filed June 9 had attached to it without leave of the court at the time ten additional pages filed September 8, but at this hearing, on the motion of the minors, the court granted leave as of September 8, 1903, to attach the filings of June 9, 1903 to those of September 8, 1903, and to consolidate same. The

effect of this order was to make that portion of the transcript filed June 9 a part of the transcript filed upon September 8.

Following this order, the guardian moved the court to dismiss the appeal for the reason that the order and decree was not final, which was overruled. The certificate of the county judge to the transcript of September 8 shows that the transcript included "the final report, etc., objections to the final report, etc., objections to the final report, amended final report, findings, decree and judgment, order allowing appeal * * * objections to the supplementary report, decree, and appeal bond." The district court, therefore, had before it a duly authenticated transcript of all the proceedings that had been had upon the original final report, the amended final report, and upon the supplemental report, together with all the findings and the final decree. This was sufficient to confer jurisdiction. A motion was made in the district court to consolidate all three cases and transfer the case to the equity docket. This motion was overruled, but afterwards, by agreement of the parties, the cases were consolidated and the cause was tried to a jury. No bill of exceptions was preserved; hence, the only points which we can consider are those raised by the exceptions in the transcript and argued in the brief. We think the appellant is in no position to stand upon technical objections to the proceedings of the district court. The district court seems to have adopted a method for the disposition of the confused and disorderly accounts submitted to it of which the appellant should be the last person to complain.

We think no error was committed in the disposition of the case. The appellant apparently made no attempt in his administration of these trusts to keep the funds separate and apart. He filed an involved and complicated account which no one, unless an expert bookkeeper, could understand or unravel. He introduced almost inextricable confusion into the affairs of the several trust estates,

and he now seeks to take advantage of these wrongs and troubles of his own creation.

As to the motion to retax costs, the district court sustained the motion in part and overruled it in part. There were three separate appeals filed in the district court, and, of course, the costs for the separate transcripts were properly taxed against the losing party, which is the main complaint made as to the ruling upon the motion.

The judgment of the district court finding no error in the record is

AFFIRMED.

DEAN, J., not sitting.

IN RE ESTATE OF WILLIAM FLETCHER.
MARY J. FLETCHER, APPELLANT, V. WALTER S. FLETCHER ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,387.

1. **Homestead:** ACCOUNTING BY SURVIVOR. A widow need not account to the estate of her husband for the rents and profits of their homestead which have accrued subsequent to his death.
2. **Executors and Administrators:** INVENTORY. The inventory filed by an executrix is not conclusive, but is open to explanation or denial.
3. ———: ACCOUNTING. The executrix will not be given credit in her account for money expended for her personal advantage concerning said estate.
4. ———: ALLOWANCE TO WIDOW. The widow of a testator is entitled, under subdivision 1, sec. 176, ch. 23, Comp. St. 1905, to the chattels therein specified, and also to $200 in cash from her husband's estate, and said property is not assets of the estate in the hands of the executor.
5. ———: ———: FINAL ORDER. F. by his last will and testament, which was duly probated, devised all of his property to his wife during her natural life, and named her as executrix, with succession in said office to a son after her death. Subsequent to that time said property is to be sold and the proceeds divided

among four devisees. More than a year subsequent to her appointment as executrix the widow applied to the county court for maintenance from said estate. Notice was not given of the filing or presentation of said application, nor was the time for the settlement of said estate extended. The court allowed $25 a month, pending said settlement, to be paid from the assets of said estate. Thereafter a devisee secured a modification of said order so that from said date the allowance was to be paid only out of the income from said estate. An appeal was not prosecuted from either of said orders. *Held*, That the order as modified was valid, binding all persons interested in said estate.

6. **Cases Reviewed.** *Estate of James v. O'Neill*, 70 Neb. 132, distinguished, and *Rieger v. Schaible*, 81 Neb. 33, approved.

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

J. E. Addie and *R. D. Brown,* for appellant.

R. M. Proudfit and *R. P. Anderson, contra.*

ROOT, J.

Appeal from a judgment of the district court for Saline county, modifying a judgment of the county court settling and allowing the final account of Mary J. Fletcher as executrix of the last will and testament of her husband, William Fletcher, deceased. The executrix appeals.

1. The attorneys who appeared for the executrix have requested that their names be stricken from the docket as her attorneys, and from the briefs filed herein. No one appeared to argue the case for the executrix, but the briefs referred to are still on file, and, there not being any evidence before us that appellant has elected not to urge the errors assigned, we have concluded not to affirm the judgment under rule 2 of this court.

2. William Fletcher died August 7, 1904, and his last will and testament was duly probated September 7 of that year. The widow is therein given, during her natural life, all property, real and personal, of the testator, and is appointed executrix of said will, with succession in said office to Walter Fletcher, a son of the deceased. After

the death of the widow the property of the deceased husband is to be sold and the proceeds equally divided among four children. The testator directs that his debts and the expense of administering his estate shall be paid out of his personal property, and, if that is insufficient, the executrix is authorized to sell so much of his real estate as may be necessary to supply the deficiency. Three hundred and fifteen dollars and thirty-five cents in claims were allowed against said estate. The executrix appealed from the allowance of one claim, and on the 14th day of December, 1905, it was disallowed in the district court, but at the costs of the estate. There then remained, exclusive of costs incurred, but $70 in claims against said estate.

On the 2d day of January, 1906, on the widow's application, and without notice to the other devisees under the will, the county court granted her an allowance of $25 a month out of the assets of the estate from the date of the testator's death until the close of her administration for the support of herself and a minor child, said to be under 14 years of age. In June, 1906, said Walter Fletcher applied to the county court for a revocation of said order because it was made *ex parte,* without notice, and for the further reason that the widow was in possession of the estate of the deceased; that to permit the order to stand would necessitate a sale of a portion of the real estate of the deceased and thereby defeat the intention of the testator as evidenced by his will. June 11, 1906, the county judge modified the order first made by him, so that from said date the widow's allowance would not be a charge on anything other than the income from the estate, and directed her to forthwith file her final report. An appeal was not taken from this order. In September, 1906, the executrix filed her report, claiming a balance of $654 due her from the estate. Objections were filed thereto, and the county judge disallowed some of the items, so that there was found to be due the widow $504.51. The devisees appealed, and the district court disallowed the

item of $200 selected and claimed by the widow under subdivision 1, sec. 176, ch. 23, Comp. St. 1905, $75 attorney fees paid by her, and all of the allowance for support for herself and child. Some questions other than the disallowance of said items are also presented.

3. It is claimed that the widow should account for rent received by her for the use of a house and two lots in the city of Crete. The court found that said property was the homestead of the deceased, and that finding is sustained by the evidence. The widow, upon her husband's death, became seized of a life estate in said homestead, and she need not account for the use thereof or the rents accruing subsequent to her husband's death. *Durland v. Seiler,* 27 Neb. 33.

4. The widow claimed that an item of $95.40 cash included in the inventory of the estate was not received by her. It is suggested that she is absolutely bound by the inventory, but we do not so understand the law, but that the inventory is open to denial or explanation. *Cameron v. Cameron,* 15 Wis. 1, 82 Am. Dec. 652; *Stewart's Estate,* 137 Pa. St. 175; *Baker v. Brickell,* 87 Cal. 329.

5. The executrix claims credit for seventy-five dollars paid by her to attorneys in securing her allowance and in defending the son's application for the annulment thereof. She cannot charge the estate for moneys expended for her personal benefit and those items were properly disallowed. *McDowell v. First Nat. Bank,* 73 Neb. 307.

6. The item of $200 cash selected by the widow was properly allowed by the county court, and improperly disallowed by the district court. Comp. St. 1905, ch. 23, sec. 176, subd. 1. Section 200, ch. 23, *supra,* provides that the personal property aforesaid shall not be considered assets in the hands of executors or administrators. The allowance above referred to is in the nature of a specific exemption. *Godman v. Converse,* 43 Neb. 463; *Tomlinson v. Nelson,* 49 Wis. 679; *Jackson v. Wilson,* 117 Ala. 432, 23 So. 521; *Western Nat. Bank v. Rizer,* 12 Colo. App. 202. Counsel argue that sections 152, 153, 154, ch. 23,

supra, control the instant case, and that they do not provide that the widow of a testator shall receive $200 or any personal property, and that section 176, *supra,* relates solely to estates of those dying intestate. All of the cited sections were contained in one comprehensive act of legislation. Section 176 specifically provides that the allowance therein referred to shall be made without regard to whether the husband died testate or intestate, and we are not justified in ignoring the plain letter of the law.

7. The devisees other than the widow claim that she is not entitled to an allowance for support pending settlement of the estate. It is suggested that the order for her maintenance was made without notice; that the will of the deceased confined the widow's support to the rents and profits of his estate; that the order for maintenance was not made within the time fixed for the settlement of said estate, nor was the time extended therefor; and that the orders for allowance were interlocutory and did not conclude the estate. The statute is silent concerning notice of the application of a widow for an allowance from the estate of her deceased husband. Such notice is not jurisdictional, although the executor or administrator, ordinarily, ought to be notified, but not necessarily by citation or service of process. *Freeman v. Washtenaw Probate Judge,* 79 Mich. 390; *Bacon v. Judge of Probate,* 100 Mich. 183; *Babcock v. Probate Court,* 18 R. I. 555; *In re Dougherty's Estate,* 34 Mont. 336; *Morgan v. Morgan,* 36 Miss. 348. At one time the Massachusetts statutes required notice of the making of such application. Said law was repealed, and it was thereafter held, in *Wright v. Wright,* 95 Mass. 207, that notice was not necessary. In Georgia the statute provides that the widow of a deceased person or the guardian of his minor children, or any other person in their behalf, may apply to the probate judge for the appointment of appraisers to make an allowance for the support of such widow or minor children, and that notice shall be given to the representatives of the estate. *Held,* That the special administrator might make such ap-

plication and that his act was notice to the estate. *Mackie, Beattie & Co. v. Glendenning,* 49 Ga. 367; *Baggs v. Baggs,* 54 Ga. 95. The order was not void because notice was not given.

The will of William Fletcher did not restrict either the widow or her child to the income of the estate for their support pending the settlement of his estate. Section 152, ch. 23, Comp. St. 1905, cited by appellees does refer to personal estate and the income of the real estate of a testator as the source for payment of the allowance for the widow and minor children, but section 155 imposes a liability on the estate, real and personal, received by devisees, to pay "debts, expenses of administration and family expenses," and we are of opinion that a consideration of all of the sections of chapter 23, *supra,* warrants the conclusion that the maintenance of the widow and minor children of a testator pending the settlement of his estate may be charged upon the real estate itself, if the income therefrom and the personal property be insufficient for the payment thereof and the other expenses of administering such estate. We have not overlooked *Godman v. Converse,* 43 Neb. 463, but the court was there concerned solely with section 176, ch. 23, *supra,* and the testator had explicitly restricted the widow to her bequest, which was generous, for her support. Judge POST was of opinion that the widow was put to her election to renounce the will and take under the law, or remain content with the allowance made for her benefit. In the instant case the will did not in terms exclude the widow from the statutory allowance pending the settlement of the estate.

The executrix did not render her account or settle the estate within one year of her appointment, and the allowance referred to was made subsequent thereto. Nor did the county court extend the time for such settlement. It will be observed that the testator's will contemplated that, as far as possible, the estate should be held intact until the death of his wife, because he has provided for

an executor to succeed her in that event, and has directed a sale of his property thereafter to the end that the proceeds thereof may be divided among certain devisees. The statute limiting the time within which the estates of decedents shall be settled was not designed to frustrate or render nugatory any lawful provision of a will, and does not control the case at bar. *Scott v. West,* 63 Wis. 529; *Ford v. Ford,* 88 Wis. 122. The court acted within its jurisdiction in making the allowance.

The order granting the widow an allowance was appealable, and until modified was conclusive on all parties in interest. *In re Estate of Stevens,* 83 Cal. 322; *Curtis v. Schell,* 129 Cal. 208; *Strauch v. Uhler,* 95 Minn. 304. The devisees cite *Estate of James v. O'Neill,* 70 Neb. 132, to the effect that said order was interlocutory and could therefore be assailed at the hearing on the executrix' final report. The cited case was dismissed because this court did not have jurisdiction to hear it on appeal, and any suggestions made therein on any other subject were dictum merely. The third paragraph of the syllabus in that case was unnecessary, but, when read with reference to the authorities cited in support thereof, suggests that an order fixing a widow's allowance may be modified as to future support. In such case the modification, where the first order was not secured by fraud, will relate to future, and not accrued, allowance. *Baker v. Baker,* 51 Wis. 538; *Ford v. Ford,* 80 Wis. 565; *Harshman v. Slonaker,* 53 Ia. 467. In *Rieger v. Schaible,* 81 Neb. 33, we held squarely that an order allowing the surviving widow an allowance against the estate of her deceased husband was appealable. An appeal was not prosecuted from the last order made by the county judge and it is binding on the widow.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

DEAN, J., not sitting.

OTTO MEYER, APPELLEE, V. JOHN ENGLISH, APPELLANT.

FILED JANUARY 9, 1909. No. 15,424.

Animals: TRESPASS: DEFENSE: DAMAGES. In a suit for damages to crops injured at different times by trespassing animals, defendant may plead and prove a partial defense extending to damages resulting from plaintiff's negligence and breach of contract to repair fences, and plaintiff may recover other damages for which defendant is liable, where the evidence contains proper data for admeasurement thereof.

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

Berge, Morning & Ledwith, for appellant.

W. C. Frampton, contra.

ROSE, J.

Defendant's cattle trespassed upon land cultivated by plaintiff, and the latter brought this suit to recover resulting damages in the sum of $200 to growing crops, garden, hay and grain, between May 1, 1905, and March 1, 1906. In addition to a general denial, defendant answered in substance that, during the grazing season of 1905, cattle owned by both parties and others were pastured by defendant in a field separated from plaintiff's land by a division fence which plaintiff in consideration of a reduced rate for pasturage agreed to keep in repair, and that whatever damage may have been caused by cattle breaking through the division fence into plaintiff's premises was due to the carelessness and negligence of plaintiff in failing to keep it in repair, according to the terms of his agreement. The making of this contract was denied by plaintiff in his reply. He also denied that defendant pastured his cattle at a reduced rate. The case was tried to a jury. Plaintiff adduced evidence to the effect that the cattle frequently broke into his premises during the summer and fall of 1905 and winter of 1906;

that his garden and crops were damaged in the summer; and that alfalfa in the stack, sweet corn in the shock and matured corn in the field were destroyed in the fall and winter. Though plaintiff admitted in his testimony that the cattle at times had broken into his crops through the division fence, he stated positively they had often broken in elsewhere, and in this he was corroborated by other witnesses. Defendant and a number of his witnesses testified that plaintiff entered into the agreement to repair the division fence, as pleaded in the answer. Plaintiff recovered a judgment for $110. Defendant appeals.

It is argued by defendant that there should have been no recovery against him, since he is not liable for damages caused by the animals breaking into plaintiff's premises through the division fence which plaintiff agreed to keep in repair, and that from plaintiff's testimony the jury were unable to separate the damages for which defendant was not liable from the damages for which he was liable, if any. In arguing these points defendant assails, as inapplicable to the evidence and as erroneous, the following instruction given by the trial court to the jury: "In the event you find from the evidence that the defendant's cattle, or those being pastured by him, did break through the pasture fence and damage plaintiff's crops, then plaintiff would be entitled to recover such damage, not due to his own negligence, as you find from the evidence he suffered on that account, unless you further find from the evidence that plaintiff had agreed to keep said fence in repair, and that he did not do so, and the damage suffered was due entirely to plaintiff's own neglect in that particular, in which event you will find for the defendant. Any such damage as you find from the evidence plaintiff suffered by reason of the trespass of defendant's stock on account of said stock breaking out elsewhere than where defendant claims plaintiff was to keep up the fence, plaintiff can recover in any event." Defendant's criticism of this instruction, as already indicated, is based on the assertion that it permitted a re-

covery against him on proofs which afforded no basis for separating the damages attributable to plaintiff's negligence from other damages. This point has no substantial foundation in the record.

Plaintiff's evidence showed that after the latter part of November, and after defendant had taken the cattle out of the pasture and transferred them to stalks, they destroyed about 8 tons of alfalfa, of the value of $8 a ton; 30 shocks of sweet corn, of the value of 50 cents a shock; and 5 acres of corn in the field, averaging 50 bushels to the acre, of the value of 37 cents a bushel. The aggregate of these items of damage exceeds the amount of the verdict. There was also direct testimony from which the jury might properly find that the corn in the field was destroyed during the winter of 1905 and 1906, and that the alfalfa and sweet corn were destroyed by defendant's cattle on plaintiff's premises after the stock had been taken out of the pasture in the latter part of November, and after plaintiff's obligation to repair the division fence between his land and defendant's pasture had terminated. On these proofs and defendant's evidence the jury, under the instruction quoted, were permitted to find in favor of defendant on his partial defense that whatever damage may have been caused by cattle breaking through the division fence was due to plaintiff's negligence, and at the same time find in favor of plaintiff for whatever damage he sustained in the fall and winter, after the cattle had been removed from the pasture, and when he was under no obligation to keep the division fence in repair. The instruction, under the separate items and dates disclosed by the evidence, furnished a proper basis for the admeasurement of damages. It is applicable to the evidence, and is not open to defendant's criticism.

Defendant in his brief has also directed attention to a number of rulings on the admission of evidence, but an examination of the record discloses no error requiring a reversal, and the judgment is

AFFIRMED.

DEAN, J., not sitting.

ESTATE OF CHARLES KEEGAN, APPELLANT, V. MAGGIE WELCH, APPELLEE.

FILED JANUARY 9, 1909. No. 15,423.

1. **Special Administrators:** APPOINTMENT. Under section 5045, Ann. St. 1907, whenever it is made to appear to the probate court that for any reasonable cause the interests of an estate pending in said court demand action by some one authorized to act prior to the time when letters testamentary or of administration can be issued, it is the duty of such court to appoint a special administrator to act in collecting and taking charge of the estate until an executor or administrator has been appointed.

2. ———: ———: NOTICE. And in such a case said court may appoint such administrator immediately, and without notice to the heirs or devisees of the deceased.

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

A. P. Moran and *W. F. Moran,* for appellant.

Roddy & Bischof, contra.

FAWCETT, J.

On March 3, 1907, Charles Keegan, departed this life, leaving a last will and testament, which, at the time of his death, appears to have been in the custody of defendant, Maggie Welch. On March 16 defendant filed said will in the probate court of Otoe county, together with a petition for the probate thereof. On the same day she filed a petition asking for the appointment of a special administrator to collect and care for the property of deceased until the issuance of letters testamentary. In her petition she alleged that the court had entered an order requiring notice of the pendency of the petition for probate of the will to be published in a newspaper for a period of three weeks, and that by reason thereof the issue of letters testamentary would be delayed for one month; that said Charles Keegan died seized of 30 acres

of farm land in Otoe county (particularly described), together with real estate in the city of Nebraska City; that the farm land had not been rented for the season of 1907; that a tenant should be secured within the next 30 days; and that a special administrator should be appointed for that purpose and for the purpose of collecting rents and looking after the other property of said estate, to the end that said estate might be preserved for the best interests of all parties interested therein. The probate court granted the prayer of the petitioner, and appointed the petitioner, Maggie Welch, as such special administratrix. Defendant thereupon gave bond, duly qualified, and acted as such administratrix until the appointment of an executor, when she filed her report as such special administratrix, which, over the objection of Ann Mallon residuary legatee under the will, and W. F. Moran, executor, was approved, and the special administratrix discharged. Error proceedings were prosecuted to the district court by the objectors, where the rulings of the probate court were sustained, and its judgment affirmed. From such judgment of the district court, this appeal is prosecuted by the executor alone.

While numerous assignments of error are made by plaintiff, but two are insisted upon in his brief, viz.: (1) That the petition asking for the appointment of a special administrator failed to state a cause of action. (2) That the county court had no jurisdiction to appoint such special administratrix.

Plaintiff contends that the only authority a probate court has for the appointment of a special administrator is derived from section 5045, Ann. St. 1907, which is as follows: "When there shall be a delay in granting letters testamentary, or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, the judge of probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question on the allowance of the will, or such other question as shall oc-

casion the delay, shall be terminated, and an executor or administrator be thereupon appointed, and no appeal shall be allowed from the appointment of such special administration."

Plaintiff contends that this statute contemplates a delay occasioned by some action not provided for in the general statute; that there must be some delay caused by some action out of the ordinary; that it will not be sufficient to say that the appointment of the regular executor will be delayed on account of the time necessary for the service; that the petition in this case, excluding the conclusions, did not give the court jurisdiction to appoint a special administrator; that it showed on its face that the only delay would be delay necessary to secure service, which, he argues, is not sufficient. In this view of the statute we are unable to concur. We think the language of the section of the statute quoted, "or from any other cause," must be construed to mean that, whenever it appears to the probate court that for any cause the interests of the estate demand action by some one authorized to act prior to the time when letters testamentary can be issued and an executor appointed under the will of a deceased person, the probate court not only has the power, but it is its duty, to appoint such special administrator. In this case the petition showed that there was a tract of farm land, which is shown by the inventory to have been worth $3,500, which had not been rented for the year 1907. It was then March 16, more than two weeks past the time when farm lands are ordinarily rented for the current year. Under the order of the court requiring three weeks' publication of notice of the petition for probate of the will, no executor could be appointed prior to the early part of April, a delay which would seriously interfere with the renting of the land for that year. This delay might deprive the estate of its entire income for a whole year from $3,500 worth of real estate. It is clear that the action of the probate court in appointing the special administrator under those circumstances was not

only within its jurisdiction, and not an abuse of discretion, but was the performance of a plain duty, and that the district court was right in affirming its action.

The judgment of the district court is

AFFIRMED.

CHARLES A. NELSON, APPELLEE, V. ORLANDO W. WEBSTER ET AL., APPELLANTS.

FILED JANUARY 9, 1909. No. 15,438.

Brokers: VOID CONTRACT: QUANTUM MERUIT. Where a contract for the sale of real estate between the owner thereof and a broker employed to sell the same is void because not in writing, as required by section 10856, Ann. St. 1907, the broker cannot recover on a *quantum meruit* for services rendered in accordance with such contract, nor for the value of his time expended in that behalf. *Barney v. Lasbury*, 76 Neb. 701, followed.

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

Tibbets & Anderson, for appellants.

Burkett, Wilson & Brown, contra.

FAWCETT, J.

In 1904 plaintiff, who was the owner of the real estate known as 1010-1012 P street, in the city of Lincoln, requested defendants to find him a purchaser therefor. No agreement as to compensation or commission was made at the time, nor was any written contract ever entered into between plaintiff and defendants with respect to said employment. During the succeeding winter defendants were active in their efforts to secure a purchaser, and on April 19, 1905, succeeded in making a sale of the property for $17,000, a price satisfactory to plaintiff. At the time of making the sale the purchaser gave defendants a check payable to their order for $500, which check was shown

to plaintiff, but was retained by defendants, pending the final consummation of the deal. Defendants thereupon ordered an abstract of title, for which they paid $8.50. They also assisted plaintiff in inducing a tenant, who was occupying the upper portion of said buildings, to vacate. They also took to themselves a $3,000 mortgage outstanding against the property, in order to avoid any hitch in the consummation of the sale. On June 1 the sale was finally consummated, and the purchaser gave defendants another check payable to their order for $16,500, being the balance of the purchase price. Defendants reimbursed themselves for the $3,000 represented by the mortgage, and paid over the balance of the large check to plaintiff. Plaintiff then asked them to turn over to him the $500 check, stating that he would give them his check for the amount of their commission, which he claimed they had agreed should be 1 per cent., or $170. To this defendants objected, claiming that the contract was that, if the property sold for $17,000, they were to receive the customary commission paid real estate agents in the city of Lincoln, viz., 5 per cent. on the first $1,000, and 2½ per cent. on all in excess thereof, which in the present case would amount to $450. Shortly thereafter defendants met plaintiff and his attorney in the office of plaintiff's attorney, and tendered them $50 in gold, stating that it was "their money." Plaintiff, by the advice of his attorney, accepted the $50. Plaintiff and his attorney both testified that, when they accepted the $50, it was expressly understood that the acceptance of the same should not in any manner affect the rights of either party as to the $450 in controversy. The testimony of defendants is to the effect that no such an understanding was had. Defendants still refusing to pay over the remaining $450, this action was brought to recover the same. In the course of the trial, plaintiff's attorney made the following statement: "The plaintiff, without waiving any legal defenses that he may have, now offers to concede to the defendants that they may retain out of the $450 in controversy $170 for services in the sale of

the plaintiff's property, and $8.50 by them claimed to have been paid for the extension of the abstract, and plaintiff now offers to take in full satisfaction of the claim set forth in his petition a judgment for the sum of $271.50, with 7 per cent. interest thereon from the time of the commencement of this action, to wit, July 15, 1905." When both parties had rested, the court directed a verdict in favor of plaintiff for the said sum of $271.50, with interest, amounting to $303.16. From a judgment on the verdict so rendered, defendants prosecute this appeal. In their answer, as a second defense, defendants set out a counterclaim for services rendered in the sum of $450, but in their testimony on the trial they admit that the services set out in their counterclaim are the same services which they set out in the first paragraph of their answer as a defense to plaintiff's action.

That defendants rendered plaintiff valuable services, for which they were morally entitled to be well paid, is beyond controversy, but there is no escape from the conclusion that this case falls squarely within section 10856, Ann. St. 1907, which provides: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." This section of the statute is set out and the authorities fully reviewed in *Barney v. Lasbury,* 76 Neb. 701. The syllabus in that case reads: "Where a contract for the sale of real estate between the owner thereof and a broker employed to sell the same is void because not in writing, as required by section 74, ch. 73, Comp. St. 1905, the broker cannot recover on a *quantum meruit* for services rendered in accordance with such contract, nor for the value of his time expended in that behalf." Our holding in that case is decisive of the case at bar.

The judgment of the district court is therefore

AFFIRMED.

ALBERT PIKE, APPELLEE, V. W. F. HAUPTMAN, APPELLANT.

FILED JANUARY 9, 1909. No. 15,392.

1. **Evidence on Former Trial:** ABSENCE OF WITNESS. Where it is apparent that the sheriff made an honest effort to serve a subpœna, and was unable to do so on account of the absence of the witness from the state, such information being given by those in a position to know, it is not error to allow the evidence of the absent witness given at a former trial of the case to be read to the jury; the party desiring the presence of such witness having taken timely steps to secure his attendance by compulsory process.
2. **Trial:** OFFER OF PROOF. No error is committed in rejecting an offer of proof not within the limits of the question on which the offer is based.
3. **Appeal:** EXCEPTIONS. In order to save a question for review in this court, an exception must be taken to the ruling of the trial court of which complaint is made.

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

Bartos & Bartos and *Hall, Woods & Pound,* for appellant.

Hazlett & Jack and *Grimm & Grimm, contra.*

DUFFIE, C.

Action upon a promissory note given in part payment for a team of horses. The defense was breach of warranty. A full statement of the issues made by the pleadings will be found in the opinion of Mr. Commissioner ALBERT, *Hauptman v. Pike,* 77 Neb. 105. Plaintiff recovered in the district court, and defendant has appealed.

The only errors alleged by appellant arise from a blemish upon one of the horses, which defendant claims was a

spavin. On the former trial one Ojers was a witness for the plaintiff. February 20, 1907, plaintiff caused a subpœna to issue for said Ojers, which was served by the sheriff by leaving a copy at the usual place of residence of said Ojers in Saline county. The sheriff's return shows that, after diligent search, he was unable to find Ojers in the county. The trial was commenced on the 26th day of February, 1907, and the sheriff testified that Ojers' wife informed him that Ojers was in the city of St. Joseph attending school, and was not expected to return for a period of three months. Thereupon the court admitted the evidence of Ojers given upon the first trial. The appellant alleges this as error. The subpœna with the return thereon shows due diligence on the part of the plaintiff in taking timely action to secure the attendance of Ojers as a witness. The testimony of the sheriff that he made inquiry from those who were presumably acquainted with the whereabouts of the witness ought, we think, to be satisfactory evidence that the attendance of the witness could not be secured, and the case differs materially in its facts from *Wittenberg v. Mollyneaux,* 59 Neb. 203, where the defendant apparently relied upon the promise of the witness to be present at the trial and who took no steps either to notify the witness of the time of the trial or to secure his attendance by legal process until the day before the trial, and after he had learned that the witness was absent from his home, when he secured a subpœna, knowing that service on the witness could not be procured. Abbott, Trial Brief, Mode of Proving Facts (2d ed.), p. 31; *Phelps v. Foot,* 1 Conn. 387.

The defendant introduced evidence tending to show that "spavined stock breeds from spavined stock" and that there is a hereditary predisposition to spavin. An expert witness called by the defendant testified that a spavined condition of the mare in question would deteriorate her value as a brood animal and was then asked if he could tell to what extent the spavined condition would affect her value for breeding purposes. He answered that he could.

The examiner then said to him: "You may now state." He answered: "On my part, I would consider her worthless. If we wish to breed sound horses, we must breed from sound horses. If we breed from spavined stock, we get spavined stock in most instances." Without any further question to the witness, the defendant then made the following offer: "The defendant now offers to prove by this witness that Mr. Chapman pointed out a sister of the mare in question, and upon examination he found that her hock joint was covered with spavin and was greatly inflamed, and that she was unsound from the same trouble as the mare in question now is." To which offer the court sustained an objection and excluded the testimony. This is now assigned as error. The rule appears to be that, unless there is pending a question to which the offer made is responsive, and objection to the question has been sustained by the court, an offer of proof should not be entertained by the court, and that sustaining an objection to such offer is not prejudicial error. In other words, an offer to prove facts wholly disconnected with any matter concerning which the witness has been questioned is not proper, and presents no question for review by the district court. *Dunphy v. Bartenbach,* 40 Neb. 143; *Perkins v. Tilton,* 53 Neb. 440; *Sellars v. Foster,* 27 Neb. 118; *Barr v. Post,* 56 Neb. 698.

The third error assigned is the refusal of the court to allow expert witnesses to testify with respect to the statements of standard text-writers on veterinarian medicine as to what is spavin. It is conceded that *Van Skike v. Potter,* 53 Neb. 28, disapproves the custom of reading on evidence to the jury a scientific treatise written for a learned profession, but it is urged that a member of the profession ought to be allowed to fortify his opinion by showing that it is borne out by standard text-books upon the subject. Without expressing any opinion upon this subject, we are driven to the conclusion that the record does not fairly present the question. Aside from not being interrogated as to the definition of spavin given by

the text-writers, no exception was taken to the ruling of the court sustaining an exception to the question which was asked, and the record therefore presents no question for review.

The last error assigned is in allowing a witness for the plaintiff to make a statement regarding his difficulties with the defendant in a matter wholly unconnected with the case. Relating to this, it is sufficient to say that upon cross-examination of the witness defendant's counsel asked him if he had not had difficulty with the defendant, and on re-examination the witness was requested to state the facts relating to the difficulty, which he did. We cannot see that this constitutes any reversible error.

We recommend an affirmance of the judgment.

EPPERSON, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

AMELIA HEIDEMANN, APPELLEE, V. WILLIAM NOXON, APPELLANT.

FILED JANUARY 9, 1909. No. 15,419.

1. **Bastardy**: WARRANT: ABATEMENT. That a warrant issued for the arrest of the putative father of a bastard is not directed to the sheriff, coroner, or constable of the county is not a cause for abating the action in the district court where the question was not raised before the examining magistrate.
2. ———: CONTINUANCE: JURISDICTION. The examining magistrate does not lose jurisdiction of the case by granting a continuance of the hearing on the request of the defendant.
3. **Appeal**: EVIDENCE. This court will not disturb a judgment based on conflicting evidence where the evidence sufficiently supports the judgment.

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

D. O. Dwyer, for appellant.

Byron Clark, contra.

DUFFIE, C.

On the 18th of December, 1906, the plaintiff filed an information, duly verified, before a justice of the peace of Cass county, alleging that she was an unmarried woman, and that in November, 1906, she was delivered of a bastard child of which defendant was the father. The justice thereupon issued a warrant for the defendant, and appointed Joseph Fitzgerald to serve the same. On the 19th of December, 1906, the defendant, who was a minor, together with his father, appeared before the justice and requested a continuance of the case until December 22. The continuance was granted upon the defendant entering into a recognizance in the sum of $1,000 for his appearance on the date to which the case was continued. On the 22d of December the plaintiff appeared with her witnesses, and, the defendant failing to appear, the justice proceeded to examine the plaintiff, reducing said examination to writing, and from the evidence given found that her complaint had been established, and entered an order that the defendant enter into a recognizance in the sum of $2,000 for his appearance at the next term of the district court for Cass county to answer such complaint and abide the order of that court. A transcript of these proceedings was duly filed in the district court, and at a term of said court held in February, 1907, the defendant appeared by his duly appointed guardian *ad litem,* and filed a plea to the jurisdiction of the court and to abate the action. The district court found against the defendant upon this plea, and upon a trial of the case on the merits found that the defendant was the father of the plaintiff's illegitimate child; that the reasonable value of the support of the said child was $750, which should be paid to the plaintiff at the rate of $15 a month, said payment to be made quarterly, and that he give security for the payment thereof. From this judgment plaintiff has appealed.

It is first urged that the court erred in overruling plaintiff's plea in abatement. It is insisted that our bastardy act provides for a special proceeding complete in itself, and that its provisions must be strictly followed. Section 1 of the act, being section 6300, Ann. St. 1907, provides that the justice before whom the information is filed shall issue a warrant "directed to the sheriff, coroner, or constable of any county of this state, commanding him forthwith to bring such accused person before said justice, to answer said complaint, and on return of such warrant the justice, in the presence of the accused person, shall examine the complainant under oath respecting the cause of her complaint, and such accused person shall be allowed to ask the complainant, when under oath, any question he may think necessary for his justification; all of which questions and answers, together with every other part of the examination, shall be reduced to writing by the justice of the peace." It is argued with great insistence that the proceeding had before the justice was without jurisdiction on account of the warrant being placed in the hands of Joseph Fitzgerald for serving, instead of one of the officers named in the statute. It is further insisted that the justice had no authority to continue the case and take a recognizance from the defendant for his appearance on the day for which the hearing was set, and that the hearing had in the absence of the defendant was illegal.

Relating to the first alleged error, we conclude from the evidence in the record that the appearance of the defendant before the justice was entirely voluntary. Mr. Fitzgerald testified that he had a conversation over the telephone with the defendant, whom it appears was under arrest in Kansas City under some other charge, and the defendant told him that he would accompany him back to Plattsmouth if he came after him. It further appears that the warrant was not served in Kansas City, and that the defendant voluntarily accompanied Fitzgerald back to

Plattsmouth, and on their arrival there the defendant was not placed under any restraint, was allowed full liberty of action, the only evidence of arrest being the return made upon the warrant when the parties appeared before the justice. If Fitzgerald had no authority to arrest the defendant, and if he did in fact arrest him and restrain him of his liberty (a matter which we do not determine), that question should have been raised before the justice, and not being raised, was waived.

Relating to the second point, it will be borne in mind that a suit against the putative father of a bastard is a civil action, and, while the court can enter no orders not warranted and authorized by the statute, it cannot be good law that the justice lost jurisdiction of the case by granting a continuance of the hearing on the defendant's own motion. It would be a singular rule which allows a defendant to take advantage of the order of a court made on his own request and apparently for his own benefit. By his appearance before the justice without objection, that court obtained jurisdiction of the case, and, the action being civil in its nature, the defendant cannot urge a want of jurisdiction because of his own failure to appear at the hearing on the day to which the case was continued on his own request. The court committed no error in finding against the defendant on his plea in abatement.

Relating to the merits of the case, the most that can be said is that the evidence was conflicting; but that it was sufficient to support the finding of the court is not a question open to discussion.

We recommend an affirmance of the judgment.

EPPERSON, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

CHICAGO HOUSE WRECKING COMPANY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED JANUARY 9, 1909. No. 15,427.

Taxation: ASSESSMENT. The deputy tax commissioners of the city of Omaha omitted to assess the plaintiff's property in the year 1899 for the tax levy of 1900. During the sitting of the board of review in December, 1899, this omission was discovered, and the board passed an order placing the omitted property on the assessment roll at a valuation of $30,000. Thereupon the tax commissioner notified the plaintiff of the action of the board of review, stating in said notice that, if the plaintiff did not appear and show cause why the assessment should not be made, the same would stand as fixed by the board. *Held*, That, while the board of review had no authority to assess the plaintiff's property, the notice served upon the plaintiff by the tax commissioner indicated his intention to adopt the valuation made by the board unless a showing against such assessment should be made, and that his return of the assessment roll to the board of equalization on the third Monday of December with the plaintiff's property included therein at a valuation of $30,000 was sufficient proof that the tax commissioner had adopted as his own the attempted assessment made by the board, and that such assessment, while irregular was not void.

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

W. D. McHugh, for appellant.

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

DUFFIE, C.

The plaintiff and appellant instituted this action to enjoin the collection and have adjudged void a certain personal property tax assessed and levied against its property by the defendant city for the year 1900. On the trial the district court dismissed the action, and the plaintiff has appealed.

Plaintiff is insistent in its contention that no assessment of its property was ever made by the tax commis-

sioner or any deputy tax commissioner for the year 1900. It asserts that the board of review of the city of Omaha made whatever assessment the tax sought to be enjoined is based upon. It is conceded that the board of review had no authority to assess the plaintiff's property, and that a tax levied against property without assessment in fact or in form is wholly illegal and void, and will be enjoined. The tax in question was levied while chapter 10, laws 1897, was in force. Section 13 of said chapter provides for the election of a tax commissioner in cities of a metropolitan class, and section 98 makes the tax commissioner the assessor of the city, and requires him to appoint deputies for the purpose of assessing the real and personal property within the corporate limits of the city subject to taxation. Section 138 requires the assessment to be made between the 15th day of September and the 15th day of November of each year, and complete return of such assessment to be made to the tax commissioner by his deputies on or before the 1st day of December of each year. It requires the deputy assessors to make a return to the tax commissioner at the end of each week, in order that he may review and correct the assessments made by them during such week. It also makes it the duty of the tax commissioner to add to the assessment made by his deputies any property subject to taxation which he may find they have omitted. The section further provides for a board of review composed of the tax commissioner and two resident freeholders of the city to be appointed by the mayor, and this board had power to review the assessments of all the real and personal property returned by the deputy assessors, "and to cause to be corrected all errors in the assessments so returned whether of undervaluation or excessive valuation." The board was to sit from the 15th of November to the 15th of December of each year. Section 141 of the act requires the tax commissioner to complete the assessment roll of the city on or before the 3d Tuesday of December, when the city council was to hold a session of not less

than five days as a board of equalization, giving the six days' notice thereof in the official papers of the city. The statute above referred to makes it plain that the assessment roll of the city was in the custody and under full control of the tax commissioner from the 15th of September until delivered to the city council on the third Tuesday of December, 1900, and that during all that time it was his duty to add to such roll any taxable property which had been omitted by his deputies.

The ground upon which the plaintiff seeks to avoid the tax in suit is that the assessment of its property was made by the board of review, and not by the tax commissioner or one of his deputies. The defendant introduced in evidence an order made in December, 1899, appearing on page 326 of the record kept by the board of review, in the following words: "It was ordered that the personal property of the Chicago House Wrecking Company be added to the assessment roll at the valuation of $30,000, and that notice be served on said company to show cause why the assessment should not stand." The record further shows a notice served upon one of the officers or agents of the plaintiff as follows:

"Tax Department, City of Omaha. Omaha, Neb., 12-2, 1899. To .....: You are hereby notified that the personal property of the Chicago House Wrecking Company was omitted from the assessment roll and that the same has been added thereto by the board of review for assessment for the city taxes of the city of Omaha for the year 1900 at a valuation of $30,000, and unless you appear before said board on or before December 15th and show cause why said assessment should not be made the same will stand as fixed by the board of review. Fred. J. Sackett, Tax Commissioner." This notice is signed by the tax commissioner, whose duty it was to assess the property omitted by his deputies. The notice is explicit in its terms that, unless the plaintiff appeared before the board of review and showed cause why the assessment should not be made, the same would stand as fixed by the board

of review. In other words the tax commissioner informed the plaintiff that, if there was no showing that the valuation fixed by the board of review was unfair or excessive, he would adopt such valuation as his own. That is the only reasonable construction which can be placed on the above notice in view of the tax commissioner's duty under the law. We know of no rule which prevents the tax commissioner or other assessing officers from advising with third parties relative to the valuation of taxable property within his jurisdiction, and, if the tax commissioner sought or obtained the opinion of the other members of the board of review in fixing a valuation upon the plaintiff's property, this could not have the effect of invalidating the assessment. Conceding, however, that the valuation placed upon the property was fixed by the board of review, the evidence is clear that the tax commissioner, by returning such assessment to the board of equalization, adopted as his own the amount fixed by the board of review as the taxable value of the property, and, as held in *South Platte Land Co. v. City of Crete,* 11 Neb. 344, a very similar case: "While the mode here adopted was not the one contemplated for fixing the value of property for the proposed levy, it was by no means void. In form, at least, it was correct, and, for aught that is shown, was entirely just and equitable to the plaintiff." Under this holding, the assessment placed upon the plaintiff's property having received the sanction of the tax commissioner cannot be said to be an absolutely void assessment.

It may be, and presumably was, the case that the board of review thought it a duty incumbent upon it to notify the owner of omitted property of any additions made to the assessment roll during the sitting of such board, as section 138 requires said board to notify owners of any increase in their assessment. That the board of review should construe this section as requiring them to notify the property owner of any addition made to the roll by the tax commissioner during the sitting of the board is not at all improbable. At any rate, the assessment placed

upon the plaintiff's property received the sanction of the tax commissioner, whose duty it was to assess the same, and this, we think, a sufficient assessment and a sufficient compliance with the law.

No complaint is made that the assessment is too high or the tax levied for any illegal purpose. So far as the record discloses, the plaintiff is called upon to bear only its due proportion of the public burden, and we recommend an affirmance of the judgment.

EPPERSON, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

HORACE E. BURNHAM, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1909. No. 15,367.

1. **Railroads**: INCLOSURE OF RIGHT OF WAY. A railroad company is not required to inclose that portion of its right of way, even outside of towns, villages and cities, and public highways, the inclosure of which by the construction of fences and cattle guards would be an increased danger to human life.
2. ———: INJURY TO ANIMALS: DIRECTING VERDICT. In an action charging a railroad company with failure to inclose its right of way, the defendant pleaded in excuse that to fence the same would unnecessarily endanger the lives of its employees. *Held*, That, as it plainly appeared from the evidence that the safety of the employees of the defendant company requires that the *locus in quo* remain uninclosed, the court should so declare, and withdraw consideration of the case from the jury.

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

James E. Kelby, F. E. Bishop and *Fred M. Deweese*, for appellant.

W. B. Comstock, contra.

EPPERSON, C.

On its Lincoln and Denver line of road, about two miles southwest of Lincoln, the defendant maintains a station called "Burnham," which is not an incorporated town, village or city. At this station defendant has its sheep yards, barns and pasture, where sheep in transit are unloaded and cared for. There are no general stock yards, depot buildings, elevators, corncribs or coal houses at or near this station. In the sheep yards there are at times from 20,000 to 30,000 sheep, and several hundred cars are there loaded and unloaded during the year. This traffic averages 10 cars a day, and during the busy season a great many more; the maximum as shown by the evidence, amounting to 125 cars. The plaintiff herein owned and occupied a small tract of land in the shape of a right-angle triangle in the northwest corner of the southeast quarter of section 4, about 1,700 feet southwest of defendant's sheep yards. The hypothenuse of plaintiff's lot was about 10 rods long and formed the boundary line between his lot and the northerly side of defendant's right of way. The defendant's railway at this point runs in a northeasterly and southwesterly direction. This main track is in the center of its right of way, and 100 feet from the plaintiff's lot. The defendant has constructed and operates a side-track on the north side of its main track for the purpose of reaching the sheep barns, and connected the same with its main track by switches, one of which is at a point about 100 feet southwest of the intersection of the railroad with the south line of a public highway running east and west along the north side of plaintiff's property, and is therefore 100 feet from the plaintiff's land. About 12 years ago defendant constructed a fence along the line between its right of way and the plaintiff's property, which was later abandoned. The plaintiff, joining his lines of fence with the abandoned fence of the defendant, made an inclosure, and turned his horses therein. On July 5, 1906, one of plaintiff's horses escaped from the

lot by breaking through the abandoned fence, got upon the defendant's track at or near the switch, and there was struck and killed by one of defendant's trains. The plaintiff brought this action to recover the value of the horse, alleging negligence on the part of the defendant in not fencing its right of way. Defendant admitted that its right of way was not fenced at this point, and alleged that its tracks and grounds at the place in question were not such as could be lawfully inclosed with fences and cattle-guards; that to so inclose them would greatly hinder and obstruct the operation of trains, and unnecessarily endanger the lives of its employees. Upon trial the court submitted to the jury the issue thus presented by defendant's answer. This is assigned as error by the defendant on an appeal from an adverse judgment below.

The statute requires each railroad company to erect and maintain fences on the sides of its right of way sufficient to prevent cattle, horses, sheep and hogs from getting on the railroad, except at the crossings of public highways and within the limits of towns, cities and villages, and requires it to maintain cattle-guards at all road crossings sufficient to prevent cattle, horses, sheep and hogs from getting upon the railroad, and, for a neglect of this duty, the railroad company is made liable in damages for stock killed or injured thereby. A liberal construction has been placed upon this statute in cases where the fencing of the right of way at the place of the accident would render railroad facilities inconvenient to the public or dangerous to human life. *Chicago, B. & Q. R. Co. v. Hogan,* 27 Neb. 801, 30 Neb. 686; *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 793, 799. Manifestly the inclosure of the right of way at stations, although not within a platted or an incorporated town, city or village would be an inconvenience to the public. For this reason, a liberal construction is given to the statute in the cases above cited. Each of the above cases pertain to the liability of the company for the killing of live stock at such stations; but they recognize, also, that the company is excused from

fencing if the inclosure would necessarily render the service of employees more hazardous. The station here in controversy is not one established for the accommodation of the people in its vicinity; but it is, nevertheless, a necessary station, and one constructed for the proper care of live stock shipped over the defendant's line of road, and is needed for the proper expedition of its business. The volume of business done here and the amount of switching probably far exceeds that of any one country station in this state. Therefore with greater reason can it be said that the railroad company should be excused from inclosing its right of way. The evidence shows that the switch in controversy is in frequent daily use, and, although the inclosing of the right of way at the place where this switch is maintained would be of no inconvenience to the public, it would, nevertheless, be an inincreased danger to defendant's employees engaged in switching trains to and from the main line and side-track. It would be necessary for the inclosing of the right of way at this place to construct a lateral fence along the public highway and construct a cattle-guard within the rails of both the main and side-tracks at a point but 100 feet from the switch. The evidence shows that such a construction so near the switch would be an increased danger to defendants' employees engaged in transferring cars. That such a construction at a place frequently used for switching cars is an increased danger is well known, and would be recognized as such by the courts in the absence of specific evidence. The inquiry, therefore, should be as to the use of that part of the right of way and tracks. The court should ascertain whether or not the manipulation of trains or cars at the *locus in quo* is frequent and necessary. If this is admitted or proved, it necessarily follows that the establishment of wing-fences and cattle-guards would be an additional danger to trainmen. Under such circumstances, a railroad company is not only excused from inclosing its right of way, but it is its duty not to do so. The danger to live

stock should not be obviated, if by so doing human life is endangered.

Our decision depends upon whether or not it was for the jury to say that the defendant was guilty of wrongdoing in its failure to inclose its right of way. In *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 799, it is said: "If it plainly appear from the evidence that the locality is one where the proper conduct of the business, considering both public convenience and the operation of the railroad with regard to the safety of the employees, requires that it be left unfenced, then the court may so declare; but where the question is one of doubt it is for the jury." In *Grondin v. Duluth, S. S. & A. R. Co.,* 100 Mich. 598, it was held as a matter of law "that at least as much of the track and grounds outside of the switches as is required and is in actual use for reaching these side-tracks is a part of the station grounds, to which the statutory requirement to fence does not apply." In *Rabidon v. Chicago & W. M. R. Co.,* 115 Mich. 390, it was held that the defendant conclusively established that the place was within the yard limits, and exempt from fencing. The judgment of the lower court was reversed because the case was submitted to the jury. That case is very similar to the one at bar so far as it relates to the use by the railroad company of the switch in controversy. In *Cole v. Duluth, S. S. & A. R. Co.,* 104 Wis. 460, it is said: "Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive and the *locus in quo* is outside of and beyond the switches and side-tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury."

Adhering to the rule last announced, this court decided *Rosenberg v. Chicago, B. & Q. R. Co.,* 77 Neb. 663. It was there held that the trial court erred in withdrawing the case from the jury. That case may be distinguished from this, for it appears that there the rail-

road company had not fenced within a quarter of a mile of the switch limits, and about half a mile from the place where the animals were killed. The facts in that case were such that reasonable minds might differ as to the defendant's obligation to inclose the right of way at the place where the cattle entered the right of way. In the case at bar it does not seem possible that reasonable minds can differ as to the defendants' duty in this regard. In attending to the duties of switching, trainmen are required to step between the cars along the train at and near the switch, and are frequently required to be in close proximity to or even jumping to and from moving trains, or to ride upon the sides thereof. In the performance of these duties both night and day, the existence of cattle-guards and fences is a continuous increased danger, which it is the duty of the railroad company to avoid. In 3 Elliott, Railroads (2d ed.), sec. 1194, it is said: "The exemption of switch grounds is founded on the danger to employees which would necessarily result were the tracks fenced. The safety of the employees at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks." In the case at bar it appears that not only would trainmen be endangered, but, also, that shippers accompanying their sheep would probably encounter the same dangers as do the trainmen in and about the *locus in quo*. Undoubtedly the jury should be permitted to decide the reasonableness or unreasonableness of such excuses pleaded by a railroad company, where the evidence leaves a doubt as to the dangerous character of such improvements, or in any case where the place in controversy is near a switch of occasional use only, or at a siding used infrequently, and not at the centers of active commercial industry. But such is not the character of the evidence in this case. The switch in controversy is not one established for the occasional use of the defendant in permitting its trains to

pass, but one which is in continuous daily use of the company in the transferring of sheep to and from its yards, and, under these circumstances, the facts being established by uncontradicted evidence, it was the duty of the court to withdraw the consideration of this question from the jury, and to direct a verdict for the defendant as requested.

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

ROSE and DEAN, JJ., not sitting.

LETTON, J., concurring.

I concur in the opinion for the reason that to hold otherwise at this time would be to change the law which has been in force in this state since the case of *Chicago, B. & Q. R. Co. v. Hogan,* 30 Neb. 686. In that case it appeared that, if that portion of the depot grounds not within the city limits had been fenced, it would have required the construction of cattle-guards and wing-fences across the track. It was stipulated in that case that it would be unsafe to the railroad employees if cattle-guards and fences were erected. To quote from the opinion: "It is stipulated by the parties that it would be inconvenient and unsafe to employees of the road if cattle-guards and fences were erected there. Such guards within station grounds could not be otherwise than exceedingly dangerous to those whose duty it is to attend to the switching of cars. This work of necessity is done at stations, and freight cars must be coupled and uncoupled by a person standing on the ground. To perform such labor with cattle-guards constructed across the tracks, within station

grounds, would not only be perilous to the life and limb of the employees, but would greatly interfere with the proper discharge of its duties as a carrier." While Burnham is not a passenger station, it is a station for loading and unloading live stock, and much more switching is done there than at many regular stations, and it is the undisputed evidence that the placing of the required cattle-guards would be dangerous to the men employed in the necessary switching operations. If this were a new question, I would be in favor of holding strictly to the letter of the statute and leaving its amendment to the legislature, for a defective law is usually speedily amended if enforced in all its strictness, but, since the law of the *Hogan* case has been followed, and since this construction is in favor of life and limb, I do not think it well to depart from the established rule.

In my judgment the whole matter of relieving railroad companies from the statutory duty to fence at points outside of towns, cities and villages, where fencing would interfere with the convenience of the public or the proper operation of the railroad with regard to the safety of its employees and the public generally, should be committed by the legislature to the discretion and supervision of the state board of railway commissioners, who are much better fitted to determine the need of such relief than the courts are, and should not be left to be determined by the courts after accidents have happened.

REESE, C. J., dissenting.

I cannot agree to the holding in this case. It is provided in section 1, art. I, ch. 72, Comp. St. 1907, that railroad corporations shall erect and maintain fences on the sides of their railroads, "suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, * * * and when such fences, * * * or any part thereof, are not in sufficiently good repair to

accomplish the object for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation." It is provided by section 2 of the same act, that, in case of failure to fence as required in the first section, the company "shall be absolutely liable to the owner of any live stock injured, killed, or destroyed." The language of these sections could not well be made any stronger or more definite. There are two exceptions, and only two, in the act. The railroad company is exempted from liability only at the crossings of public roads and highways, and within the limits of towns, cities, and villages. In all other cases the companies are liable for the value of live stock killed upon their tracks. It is conceded that the place where plaintiff's horse was killed does not come within either one of the exceptions. Then what legal right or authority have the courts to read into the act any other exception? I known of none. Courts are not established for the purpose of amending or explaining away any part of a valid law enacted by the law making power, which is the supreme power of the state. The case of *Chicago, B. & Q. R. Co. v. Hogan,* 27 Neb. 801, on rehearing, 30 Neb. 686, is not in point, for the court held that the place where the animal was killed was within one of the exceptions prescribed by the statute. *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 793, on rehearing, 72 Neb. 799, goes to the limit, the opinion being based largely upon the question of the convenience of the public in having access to the station. In this case the public has no possible interest in the existence or nonexistence of the fence, so far as the public convenience is concerned, and the fence could not interfere with the operation of defendant's trains, nor the safety of human life. I very much doubt if the safety of defendant's employees could be taken into consideration in any event, as the act referred to makes no such exception. Then, again, to say that the companies may create a "danger point" at any

place on the line of their railroad and thus set aside the statute at their own pleasure was never intended by the legislature.

There is another reason why I think this decision is wrong. The record shows beyond all question that defendant had its road fenced at the point where the horse was killed but had not kept its fence "in sufficiently good repair" to prevent live stock from going upon its tracks. The fence, standing, as it was, on the line of the right of way, was equivalent to a representation that it would be maintained, and to an invitation to plaintiff to join his fence to it, and that it would be adequate to turn stock. Plaintiff joined his fence to that of defendant, and placed his horses within the inclosure. There is no evidence in the record tending to show that any objection to this was ever made by defendant, or any suggestion that it was its purpose to allow the fence to become insecure.

While no error is shown by the record to the prejudice or disadvantage of defendant, yet I think the court erred in submitting the whole question to the jury. To my mind the only question was: "Did the evidence show that the place where plaintiff's horse was killed came within any of the exceptions contained in the statute?" If not, plaintiff was entitled to recover the value of the horse killed. The proofs all showed that it did not. No one claimed otherwise. This being true, by the plain and unequivocal language of the statute, plaintiff was entitled to a judgment for the value of the horse. There is no question here as to what the statute ought to be. Courts should only inquire as to what it is. The fact that a statute, if otherwise valid, is more strict in its provisions than the court may think it should have been, furnishes no authority for the avoidance of its terms, or otherwise changing it, but all courts should be governed by it. The changes, limitations, and exceptions are for the legislature. I am unable to see any reason why the judgment should not be affirmed.

J. D. STIRES V. FIRST NATIONAL BANK OF COLUMBUS, APPELLANT; COLUMBUS STATE BANK, APPELLEE.

FILED JANUARY 9, 1909. No. 15,411.

1. **Bankruptcy**: CONTRACT BETWEEN CREDITORS: ASSIGNMENT OF DIVIDENDS. A contract between two creditors of a common debtor, wherein one agrees that a debt owing to a third creditor may be preferred by the debtor, if purchased by the other contracting creditor, does not amount to an assignment of the first party's debt, nor of dividends declared thereon in subsequent bankruptcy proceedings.

2. ———: DIVIDENDS. A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured.

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

Albert & Wagner and *Edson Rich,* for appellant.

A. M. Post and *J. D. Stires, contra.*

EPPERSON, C.

The parties to this appeal are interpleaders in an action instituted in the court below by J. D. Stires, trustee in bankruptcy of the estate of Garrett Hulst. The funds in controversy are dividends which the trustee has collected, and which were declared upon the claim of the appellant as a creditor of the bankrupt. The material facts may be stated in substance as follows: On June 15, 1904, Garrett Hulst was in the merchandise business in Columbus, and owned a large stock of goods. His four principal creditors, and the amounts owing to each on their respective notes, as subsequently allowed, are as follows: The Hundley Smith Dry Goods Company, $11,560.41; First National Bank of Columbus, $7,130.50; Columbus State Bank, $10,995.98; and Lucy Hulst, $12,-

724. Early in 1904 Lucy Hulst, who is the mother of the bankrupt, pledged her note to the Hundley Smith company as security for its indebtedness against Hulst. On June 15, 1904, the Hundley Smith company was pressing its claim and threatening to institute bankruptcy proceedings to enforce its payment. The two banks, in order to prevent such proceedings, entered into a written agreement of which the following is a copy: "In consideration of the purchase by the undersigned, the Columbus State Bank, of a certain note and account owing by Garrett Hulst to the Hundley Smith Dry Goods Company, amounting in the aggregate to the sum of $11,160.47, exclusive of interest, and the extension of time for payment of said claim and any and all other indebtedness owing by said Hulst to said bank, to the end that said Hulst may continue his business and avoid the cost to all creditors which would follow the institution of proceedings in bankruptcy against said Hulst now threatened by said Hundley Smith Dry Goods Company, the undersigned, the First National Bank of Columbus, hereby agrees that all money, the proceeds of the business of said Hulst, less necessary expenses and money owing by him for goods heretofore purchased and such as may hereafter be necessary to supply current needs, shall be paid by said Hulst to the Columbus State Bank and credited by it upon the debt so purchased from the Hundley Smith Dry Goods Company until payment of such debt in full, and upon payment of the debt last above mentioned the money applicable upon the claims of either party hereto shall be applied *pro rata* upon the respective claims of the respective banks and of Mrs. Lucy Hulst." Hulst consented to the arrangements thus made by the banks. The State bank paid the claim of the Hundley Smith company, and received an assignment thereof, together with the Lucy Hulst note. Soon after the execution of the above agreement by the banks, Hulst assigned to the State bank certain book accounts, and Lucy Hulst made an assignment to the State bank of her note against Hulst, pledging the

same again as security for the debt assigned to said bank by the Hundley Smith company, and further pledged the same to secure the original indebtedness owing by Hulst to said bank. Hulst did not pay any part of the Hundley Smith claim. In October following Hulst was declared a bankrupt, and his estate has been fully administered by the trustee. In the bankruptcy court the National bank filed its claim, and the State bank its original claim, also the note bought of Hundley Smith company, and the pledged note of Lucy Hulst. All these claims were allowed as liabilities of the estate. The trustee realized 42.36 per cent. of the indebtedness. *Prima facie* the National bank is entitled to the dividends, amounting to $3,020.49, payable upon its note. The State bank contends that, under and by virtue of the above contract, it is entitled to apply the dividends declared upon the National bank's note to the payment of the claim bought of the Hundley Smith company, or so much thereof as will be sufficient, with the dividends declared upon the Hundley Smith claim itself and the original claim of the State bank, to satisfy it; and, further, that the dividends upon the Lucy Hulst note are not applicable upon the Hundley Smith claim. The lower court found for the State bank, and the National bank appeals.

Appellee's argument does not appeal to us as a proper disposition of this case. Appellant did not by the contract assign or pledge its note to the appellee, nor the dividends which might thereafter be declared in the bankruptcy proceedings. At most the contract was only an agreement on the part of the appellant that the debtor Hulst might prefer the claim assigned to the appellee by the Hundley Smith company, or that from the proceeds of Hulst's business that claim should be first paid. The contract was not made in contemplation of Hulst's bankruptcy, but quite the contrary. It contemplated that bankruptcy proceedings should not be instituted, and that Hulst would be able to pay out if not pressed by the Hundley Smith company. Lucy Hulst had no property

except her son's note. It was not desirable security except in the event that it should become collectible. The contract contemplated that the indebtedness owing to the Hundley Smith company should be paid before any of the funds apparently available should be paid to any of the other three principal creditors. The Lucy Hulst note stood pledged as security for the Hundley Smith claim, and by the assignment of that claim to the appellee it became a security in the hands of the latter for the payment of the Hundley Smith note. It is immaterial, so far as our inquiry is concerned, that it was later pledged also as security for the original claim of the appellee. When the contract was made, the Lucy Hulst note was apparently without value as security, but, when any amount thereof became collectible, it was of value, and the amount paid thereon was applicable upon the debt which it was first pledged to secure. The appellant, by agreeing that the Hundley Smith claim should be preferred, became interested in seeing that all funds available for its payment were applied thereon.

The appellee asserts as the essential provision of the contract that portion thereof which provides that, upon the payment of the Hundley Smith claim, "the money applicable upon the claim of either party hereto shall be applied *pro rata* upon the respective claims of the respective banks and of Mrs. Lucy Hulst." The lower court found that after the payment of the Hundley Smith claim the amount of dividends declared upon the claim of the National bank and the original claim of the State bank should be paid *pro rata* upon these two debts and the note of Lucy Hulst, and this without regard to the dividends payable upon the Lucy Hulst note. We cannot find any law, equity or justice in such a distribution. The contract did not release Hulst nor his bankrupt estate from paying the Lucy Hulst note. It did not release it as security for the payment of the Hundley Smith claim. Although the contract did not contemplate that the Lucy Hulst note would be paid until after the terms

of the contract had been complied with, yet it did not stipulate to the contrary. It is apparent that the banks intended by this clause of their contract that neither should attempt to procure a preference over the other or over Lucy Hulst, but that the funds available, after the payment of the Hundley Smith claim, should be paid *pro rata* upon the three remaining principal claims. Had the Hundley Smith claim been secured by collateral not pertaining to Hulst's business, it could not be said that the State bank could discard the same, or appropriate it to the payment of other indebtedness simply because the contract contemplated that the principal indebtedness would be paid by the principal debtor, and that occasion would not require the enforcing of the securities. Parties are entitled to all the benefits of their contract although, when made, they were apparently of little or no value. The contract entered into was made with reference to the fact that the Lucy Hulst note was pledged as security for the Hundley Smith claim, and the parties are entitled to the benefits derived from such security. To permit the State bank to apply the proceeds thereof upon their original indebtedness by reason of the subsequent pledge therefor would be to enforce against the National bank a contract to which it was not a party.

As contended for by appellant, the Lucy Hulst note stood in the position of surety for the payment of the Hundley Smith claim, and as such the dividends paid thereon must be applied. But appellee contends that appellant is foreclosed of this contention because inconsistent with its answer in the court below. There appellant did allege that the contract was rendered inoperative by reason of Hulst's disposition of his business and subsequent bankruptcy. Possibly the case might well be disposed of along the line suggested by the answer, but we do not so decide. The facts were set forth in the pleadings, and the appellant claimed the amount declared as a dividend upon its note. *Prima facie* it was entitled to it. Under these circumstances, inconsistency in pleading or a

change of theories is not very damaging. Appellee must rely upon the strength of his own case, and not upon the inconsistencies of an adversary so strongly fortified.

The amount collected by the State bank from the book accounts, and the dividends upon the Hundley Smith and Lucy Hulst notes, were sufficient to pay the Hundley Smith claim in full. With this appellee must rest content.

We recommend that the judgment of the lower court be reversed and this cause remanded that judgment may be entered conforming to this opinion.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded, with instructions to the lower court to enter judgment conforming thereto.

JUDGMENT ACCORDINGLY.

MARY SMITH, ADMINISTRATRIX, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED JANUARY 9, 1909. No. 15,397.

Railroads: INJURY TO PERSONS: CONTRIBUTORY NEGLIGENCE. Defendant in error's intestate, while driving on the public road, parallel with the railroad track of the plaintiff in error, upon a moonlight night, left the public road and went diagonally toward the railroad track, and over the side of a cut, where he, with his wagon box and a load of lumber, were thrown upon the track. A train soon after struck the obstruction, and he was afterwards found mangled upon the track. There is no evidence indicating that his team ran away or became unmanageable, but the evidence shows that he was much intoxicated a short time before the accident. *Held*, That the deceased was guilty of such contributory negligence as to preclude a recovery, though the railroad was not fenced at the locality of the accident, as by law it was required to be. *Union P. R. Co. v. Smith*, 5 Neb. (Unof.) 631, followed and approved.

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

Tibbets & Anderson and *J. R. Swain,* for appellant.

Edson Rich and *J. E. Rait, contra.*

GOOD, C.

Mary Smith, as administratrix of the estate of Michael Smith, deceased, brought this action against the Union Pacific Railroad Company to recover damages for negligently causing the death of her intestate. The defendant denied negligence on its part, and pleaded contributory negligence on the part of the plaintiff's intestate. At the conclusion of the evidence the court directed a verdict for defendant. Plaintiff has appealed.

At a former trial of this cause in the district court plaintiff recovered a judgment against defendant, which was reversed by this court. See *Union P. R. Co. v. Smith,* 5 Neb. (Unof.) 631. After the cause was remanded to the district court a second trial was had upon the same issues and upon substantially the same evidence as was adduced upon the first trial. A full statement of the issues and facts disclosed by the record may be found in the former opinion, and will not be repeated here. The only additional evidence adduced upon the second trial was that of plaintiff, who testified that the night on which the accident occurred was cloudy and dark, and that there were three tracks in the public highway which ran parallel to defendant's line of railroad near the place where the accident occurred, and that one of these tracks, which was used in muddy weather, ran quite close to defendant's railroad track. We have carefully read and examined all of the evidence in the record. The testimony of the plaintiff that the night was dark was general in its nature and would not refer to any particular hour of the evening. The evidence was not at all inconsistent with

the evidence adduced at the former trial. It was there shown that it was quite dark in the early part of the evening before the moon had risen. It was clearly shown, however beyond question that at the time the accident occurred the moon had risen and that it was sufficiently light for those who met and passed Mr. Smith upon the highway to recognize him, and further shows that it was sufficiently light immediately after the accident for persons to see and trace the wagon tracks where it had left the highway, and trace them to the point where the accident occurred. The testimony further shows that at the time of the accident plaintiff was several miles distant, and she would not therefore have determined the condition of darkness or light at the place of the accident. Plaintiff's own testimony shows that at the time of the accident there was but one beaten track in the highway which was used, and that the beaten track was on a portion of the highway that was graded up. Plaintiff's own evidence, therefore, adds nothing materially to the facts disclosed by the record upon the former trial. The record discloses that plaintiff's intestate had frequently driven over the highway for the past 26 years and that he was very familiar with it. Under the evidence and the circumstances disclosed by the record, the conclusion appears irresistible that plaintiff's intestate was guilty of contributory negligence in turning from the highway and driving over an embankment onto or near the defendant's railroad track, and but for his own negligence the injury could not have happened. The present case made is in no respect different from that presented when the case was first before this court. Upon the authority of the former opinion, plaintiff was not entitled to a judgment. The district court properly directed a verdict for the defendant.

The judgment should 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.

NANETTE E. MCCARN, APPELLEE, V. ESTHER LONDON, APPELLANT.

FILED JANUARY 9, 1909. No. 15,416.

Statute of Frauds: SALE OF REAL ESTATE: MEMORANDUM. Where the owner of an entire city lot signs a written memorandum of sale in which the property is described as the north —— feet of such lot, the memorandum is insufficient under the statute of frauds, and a specific performance thereof will not be enforced.

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

F. W. Button, for appellant.

Frank Dolezal, contra.

CALKINS, C.

On the 21st day of March, 1907, the plaintiff, being the owner of certain property in the city of Fremont, described as lot 8, in block 182, made a writing in the words and figures following: "Fremont, Nebraska, March 21, 1907. Received of Esther London fifty dollars ($50) to apply on payment on sale of the north ..... feet of Lot No. 8, Blk. No. 182. Esther London agrees to pay for this property $1,250 in all, $550 cash June 15, '07, $600 cash Aug. 1st 1907, with 6 per cent. interest from April 21, '07 when Esther London is to get possession. Nanette E. McCarn." Afterwards she brought this action to quiet title against the defendant, who, it was alleged, claimed to own a portion of said lot 8 by virtue of the writing above quoted. The defendant filed a pleading denominated an answer and cross-petition, in which she alleged

that said lot 8 was in dimension 66 feet east and west and 132 feet north and south, and was bounded by C street on the east and Second street on the south; that there were upon this lot three houses all facing east, and with each house there had been kept certain definite separate parts of said lot; that the portion of the lot occupied with the north house was 28 feet north and south, and that this was marked by the placing of a coal house used in connection with the north house in the rear and to the south thereof, and by placing a privy appurtenant to the middle house to the rear and north thereof and adjoining the coal house; that the plaintiff and defendant had a definite understanding that this north 28 feet was the property being sold, but at the time did not know the frontage thereof in feet, and that it was agreed that the number of feet might be ascertained by measurement and thereafter inserted in the contract. The answer also contained suitable allegations of readiness on the part of the defendant to fulfil such contract and prayed that the plaintiff be compelled to specifically perform the same. To this answer the plaintiff filed a demurrer, which was sustained; and, judgment being rendered for the plaintiff, the defendant appeals.

It is conceded that the only question presented by this appeal is the sufficiency of the above writing under the statute of frauds. It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute. 20 Cyc. 270. The connection between the signed paper and the external standards cannot be made by parol. It must appear or be reasonably inferred from the writing itself. *Johnson & Miller v. Buck,* 35 N. J. Law, 338. In this case the contract fails to identify the property, and there is no reference to any external standard. The only way to ascertain what was in the minds of the contracting parties is to re-

sort to parol testimony of what was said between them, which would in effect nullify the statute requiring the contract to be in writing.

The defendant places stress upon the use of the words "this property" in the memorandum. The word "this" may be used to refer to something mentioned or about to be mentioned; but, where there is nothing elsewhere in the writing to which it can refer, it does not in any way supply the lack of such mention.

The defendant cites the case of *Ruzicka v. Hotovy,* 72 Neb. 589. In this case the vendor owned the southeast quarter of section 7, and the memorandum did not specify which quarter in the section named was to be sold. A reference to the records disclosed the fact that the vendor owned but one quarter in this section, and the contract in that case was held to mean the quarter owned by such vendor. If in this case the vendor had owned one-third of the lot mentioned, and the memorandum had described one-third of said lot without further specifying the property to be sold, we might, under the authority of *Ruzicka v. Hotovy, supra,* go to the record, and, having ascertained that the plaintiff owned but one-third of such lot, declare that her intention to sell that third sufficiently appeared from the contract. But no such certainty could be attained by an examination of the record of the title of this lot. Any determination of the number of feet of frontage intended to be sold must rest upon parol testimony unsupported by the writing or any legitimate inference to be drawn therefrom. The case cited does not apply.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

DEAN, J., not sitting.

FRED GORDER & SON, APPELLEE, V. HERMAN E. PANKONIN, APPELLANT.

FILED JANUARY 9, 1909. No. 15,418.

1. **Specific Performance:** RENEWAL OF LEASE: DESCRIPTION OF PROPERTY. In an action brought to compel the specific performance of a covenant to renew a lease, the fact that the description of the property in the lease is indefinite will not defeat the plaintiff's right to have the same specifically performed, where it appears that both parties have, without question, acted under said lease, the defendant surrendering, and the plaintiffs accepting, certain specified property as being the property described in said lease.

2. **Partnership:** NEW PARTNER. While the sale of his interest to a stranger by one member of a partnership does not make such stranger a member of the firm, there is no rule of law forbidding all the members of a firm from agreeing to admit a new member as a partner therein.

3. **Statute of Frauds:** PARTNERSHIP: NEW PARTNER. Where by agreement between all the partners a new member is admitted to the firm, he acquires an interest in the partnership property by operation of law; and such transfer is not within the statute of frauds.

4. **Specific Performance:** LEASE: RENEWAL BY PARTNERSHIP. In an action by a partnership for the specific performance of a covenant to renew a five-year lease, it is immaterial that at certain times during the first term of said lease other persons held an interest in said partnership, where the persons who constituted the partnership at the time of demanding such renewal are the same persons who were members of the firm at the time of the execution of the lease.

5. **Estoppel:** LEASE: ACCEPTANCE OF BENEFITS. Where a lessor has accepted the benefits of a lease made by him to a partnership, he cannot, in an action by such partnership to enforce the specific performance of a covenant to renew, plead that the partnership was without capacity to take the legal title to real estate.

6. **Specific Performance:** REMEDY AT LAW. Where a plaintiff purchases a stock of goods and the good will of a business, at the same time taking a lease of the premises in which said business has been carried on, for a term of years, with an option to renew

at the end of said term, he is not confined to an action at law for damages in case of the landlord's refusal to fulfil the covenant to renew, but may maintain an action in equity for the specific performance of such covenant.

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

D. O. Dwyer and *A. L. Tidd,* for appellant.

Byron Clark, contra.

CALKINS, C.

The defendant was a dealer in implements and harness in the village of Louisville. He occupied a store upon lots numbered 262 and 263, and had warehouses and buildings on lots 293 and 294. On the 13th day of February, 1901, he entered into a contract to sell to the firm of Fred Gorder & Son his stock of goods, excepting only pumps and windmills, and to rent the buildings upon said lots 262 and 263, together with all warerooms occupied for storage purposes, reserving an office room in the main building. The rent was to be $22 a month for a term of one year, with the privilege of five years or more. The vendor further agreed not to engage in the implement or harness business in Louisville so long as the vendee should rent said property. On the 15th day of February the parties entered into a more formal lease, for a term of five years from February 20, with an option to the lessees to, at the end of such term, renew for a period of one year or more up to five years. In this lease the property was again described as lots 262 and 263, with all the buildings, warehouses and out buildings "which are now occupied by said party except one room in the southwest corner of the main building therein located, which said room was then occupied by S. W. Ball and used as a barber shop." On the 12th day of September, 1902, the parties entered into an agreement which purported to be additional and supplemental to the agreement of February 15, 1901, "providing

for the leasing of lots 262, 263, 293 and 294." It recited that it was made in consideration of the settlement of certain differences arising between said parties on account of a breach by the defendant of the conditions of the lease entered into on the 15th day of February, 1901. It stipulated that, in addition to the covenants in said former contract contained, the defendant was to have the use of one-half the building on lot 294, and $1.50 a month rent in addition to the $22 provided in the former contract and lease, and that the lessees were to pay the sum of $23.50 a month for the use of the buildings on lots 262, 263, 293, and one-half the building on lot 294. The lessees appear to have remained in possession of said premises and paid the stipulated rent until about the expiration of their term, when they gave to the defendant notice that they would avail themselves of the option to renew said lease for a term of five years from the 15th day of February, 1906. The defendant refused to renew the lease in accordance with said option, but notified the lessees to give up possession, and began a suit in the county court of Cass county charging the lessees with unlawfully and forcibly detaining possession of said premises, in which action a judgment of restitution was rendered. Thereupon the plaintiffs brought this action to enjoin the defendant from enforcing such judgment of restitution, and to compel the specific performance of the agreement to execute a lease for the additional term of five years. There was a judgment for the plaintiffs, and the defendant appeals.

1. Defendant alleges that the description of the property in the lease is too indefinite to enable the court to enter a decree for the specific performance of the agreement to extend the lease. It is to be observed that the lots 293 and 294 were not specifically described in the contract made in February, 1901; but in the supplemental contract made in September, 1902, this uncertainty was supplied by the reference to the February contracts as being contracts for the leasing of the four lots mentioned. It is the rule that, where the contract is ambiguous, the court will

generally follow the interpretation placed upon the same by the parties themselves. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471; *Hale v. Sheehan*, 52 Neb. 184; *Lawton v. Fonner*, 59 Neb. 214; *State v. County Commissioners*, 60 Neb. 566. We are satisfied that, where a lessor surrenders possession of property imperfectly described in the lease, and the lessee accepts possession of such property as being the property intended to be let, neither party to the contract should be allowed to afterwards question the sufficiency of the description. In this case, however, the contract of September, 1902, includes the description of the two lots upon which the buildings mentioned in the first contract were situate. This supplies any defect that might have existed in the prior contract regarding the two lots in question.

It is contended that it introduced a new element of uncertainty, in that it provided that the defendant should have the use of one-half of lot 294, without specifying which half of said lot was intended. The defendant's answer alleges that the description in the lease is indefinite because it calls for a lease upon buildings, without particularly describing the land upon which they are situated. It does not plead the uncertainty in the specification of the half of lot 294. It sufficiently appears in the record that the parties themselves had no difficulty in determining which half each was to occupy. Had this question been raised in the case, it would have been the duty of the court to follow the interpretation put upon this clause by the parties, and it might, in its decree awarding an extension of the lease, have specifically described the half of lot 294 which was actually occupied by the plaintiffs under the lease. As there was no controversy presented in the court below regarding this matter, it was not necessary for the court to specifically describe the half to be awarded the plaintiffs, and its failure to do so does not make the judgment erroneous.

2. It appears that at the time of making the lease of February 15, 1901, the firm of Fred Gorder & Son was

composed of Charlotte Gorder, August Gorder and Fred Gorder, and that on February 3, 1902, John Gorder acquired a one-fourth interest in the business from August; that in May, 1904, August sold his remaining one-fourth interest to the other members of the firm; and that on February 19, 1906, John sold to Fred Gorder, and on the same day Fred sold to August, a one-half interest in the business. The defendant argues that each change in the membership of the firm operated as a dissolution of such firm and the formation of a new partnership, and that the plaintiffs could not maintain this action without showing an assignment of the lease in writing, sufficient under the statute of frauds to convey real estate, from the firm as it existed at the time of the making of the lease. It is said that an assignment of a partner's interest works a dissolution of the firm, and many authorities are cited to sustain this proposition. The reason for the rule is that a partner cannot introduce a new member into the firm without the consent of the other members, nor make them members of another firm; but there is no rule of law which forbids a partnership, with the consent of all its members, to admit a new member, and when members so taken in are recognized and treated by all as partners, and the business is continued with them under the original agreement, this is sufficient to make them partners, and does not work a dissolution of the firm. *Meaher v. Cox, Brainard & Co.*, 37 Ala. 201; *Rosenstiel v. Gray*, 112 Ill. 282.

3. In such case the new member has an interest in all the partnership property by operation of law. If the partnership has or is equitably entitled to an estate in land, such interest passes to the new member so admitted without any formal assignment. The statute of frauds expressly excepts from its provision transfers by operation of law.

4. Again, it appears that Charlotte Gorder, Fred Gorder and August Gorder were the sole members of the firm at the time of the commencement of this action, as well as at the time of the execution of the original lease. It is

hardly necessary to say that the fact that the shares held by them were in different proportion at the two dates is immaterial except as between themselves. If, therefore, the defendant's position that the right which the original firm had in the lease did not pass to the succeeding members were sound, it must have remained in the original members of the firm, who now constitute all the members thereof and are the persons in whose behalf this action is being prosecuted. Admitting, for the purpose of the argument that an assignment of the lease which should deprive the defendant of his right to resort to the property of all the members constituting the firm with which he made the original contract could not be made without his consent, that question does not arise. The firm which is asking a renewal of the lease is composed of the same individuals as the firm with which the defendant originally contracted, and a lease executed by the plaintiff firm gives to defendant everything in the way of security for performance by the lessees of their covenants that was contemplated at the time of the execution of the original lease, or which he is entitled to demand in any view of the case. It is entirely immaterial to the defendant that for some portions of the period of the original lease, for which he has received his stipulated compensation, some other persons than those constituting the firm at the time of making the contract, were interested therein as partners.

5. The defendant contends that, since a partnership may not take the legal title to an estate in land, the plaintiffs cannot maintain this action. It does not follow that, because a partnership cannot take the legal title to land, a lease to such partnership and the acceptance of rent thereunder by the lessor creates no rights in the partnership. In such case if the name of a natural person is included in the name of the partnership, such person will take the legal title in trust for the benefit of such partnership, and if there is not included in the designation of the firm the name of a natural person to whom such legal title would

pass, equity will regard the lessor, who had received the benefits of such attempted conveyance, as holding the legal title in trust for the partnership. In this case the defendant did not raise this question in his answer, and it was not, therefore, necessary for the district court to consider the same. Had it been raised by the defendant, it would have been the duty of the court, if it found the plaintiffs were otherwise entitled to a renewal of such lease, to require the defendant to make the same to some member of the firm, or other person capable of taking title to real estate, in trust for the plaintiff firm.

6. Finally, the defendant insists that the plaintiffs' remedy at law was adequate, and that they are not entitled to any equitable relief. Whatever the rule may originally have been, it has become almost a matter of course to award specific performance of contracts concerning real estate. When such contract is valid, unobjectionable in its nature, and in the circumstances connected with it capable of being enforced, and it is just and proper that it be fulfilled it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it. *Morgan v. Hardy,* 16 Neb. 427. In this case the plaintiffs purchased a stock of goods and the good will of the business theretofore carried on upon the property rented by them, with the stipulation that the defendant should not engage in the same business while they continued to rent said property. They appear to have been still carrying on this business at the time of the commencement of this action, and to have desired to renew the lease for the purpose of its continuance. Under these circumstances, an action at law would not have been an adequate remedy, and the right of the plaintiffs to equitable relief is clear and unmistakable.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

IN RE JOHN C. WATSON.

JOHN C. WATSON, APPELLANT, V. WILLIAM HAYWARD ET AL., APPELLEES.

FILED JANUARY 23, 1909. No. 15,108.

1. Attorneys: DISBARMENT. The defendant, an attorney, dictated a form of affidavit in the presence and hearing of the witness, and which was assented to by him and taken in shorthand by a stenographer, with the understanding that the statement was to be typewritten above a signature made by the affiant on a blank sheet of paper. Upon later consultation with associate counsel and a statement to him of the facts as they had occurred, the associate not being present at the time of the dictation, it was thought the affidavit did not sufficiently detail the transaction. The associate counsel dictated additional statements, and to which a further statement was added by defendant, which was probably true, but not known so to be by the witness, together with the statement that the affidavit was made in the presence of three other persons, who were not present at the time of the dictation. The reformed affidavit was given a notary, with instructions to find the parties and procure the signature of the affiant. The notary attached his jurat and seal and handed the paper to another, with instructions to find the proposed affiant, but he was not found. The affidavit afterwards appeared with the name of the affiant erased where written by him and placed at the end of the extended instrument. The paper was originally intended for use on the hearing of an application for an interlocutory order by the district court in a cause then pending, but was never so used, nor was any attempt made to use it. Charges were presented against the defendant, by which he was accused of an effort to deceive and practice a fraud upon the court and of causing a false, forged and untruthful affidavit to be made. *Held*, That in the absence of any attempt on the part of defendant or any other person to make use of such paper, and upon a consideration of all the evidence introduced upon the hearing of the disbarment proceedings, the conduct of defendant, while not to be commended, was not such as to warrant a judgment of disbarment or suspension from practice.

2. Witnesses: PRIVILEGED COMMUNICATIONS. Upon the hearing of the disbarment proceedings, an attorney who was associated with defendant in the principal suit was called to the witness stand by the prosecution and detailed facts within his knowledge as to the conduct and statement of defendant in their consultations concerning said affidavit and its use in the principal case, and also the conversations and statements of their client upon the same subject. *Held*, That the testimony did not divulge any communications which were privileged by law.

APPEAL from the district court for Otoe county: WILLIAM H. KELLIGAR, BENJAMIN F. GOOD and LINCOLN FROST, JUDGES. *Reversed and dismissed.*

Roscoe Pound, Frank T. Ransom, Matthew Gering and *J. B. Strode,* for appellant.

William Hayward, W. H. Pitzer and *D. W. Livingston, contra.*

REESE, C. J.

An information consisting of three counts was filed against defendant in the district court, by which he was accused of unprofessional conduct as an attorney at the bar of this state. Upon a hearing before the district court, the defendant was acquitted on the first and third counts; the charges in the second count were sustained, and he was deprived of the right to practice in the courts of the second judicial district for the term of one year. From that judgment he appeals.

As there is no cross-appeal by the prosecution from the findings and judgment on the first and third counts, they need not be noticed further.

The second count is quite voluminous, too long to be here copied, and we must be content with a brief summary of what it contains. The substantial averments are: That defendant was, at the time stated an attorney and counselor, duly licensed to practice at the bar of the courts of the county and district; that he was employed by one

Minitree E. Catron to aid in the defense of a suit pending against him in the district court, and in which suit one Charles D. Butterfield was plaintiff; that in the management of said defense he obtained from one A. G. Graham an oral statement of facts, then dictated by defendant to a stenographer in his employ, the said statement being taken in short hand; that he induced said Graham to sign his name on a blank sheet of paper in order that the stenographic statement might be typewritten above the signature; that at the time of procuring said signature it was not the intention of defendant to have written above the said signature the statement dictated, but that his purpose and intention was to have written a false statement not agreed to by said Graham; that he did cause to be written upon said blank sheet of paper another, untruthful and material statement, reciting that it was made in the presence of persons not present; that the false statement was of too great length to be written above the signature so made, and he caused the signature to be erased and the name of Graham written and forged at the end of the false statement; that he wrongfully and fraudulently caused the said stenographer, who was a notary public in defendant's office, to affix a false and untruthful jurat, with his seal appended, certifying that said statement was subscribed and sworn to before him, the said defendant well knowing that said statement and jurat were false and that Graham's signature was forged, and also well knowing that neither of the persons referred to as having been present were at the place where and time when the statement was in fact made by said Graham; that the purpose and intent of defendant in causing and procuring said false statements to be written and certified to by the notary was to deceive and impose upon the court where the suit to which the statement referred was pending; that he did not expect the said Graham would be present in court when said cause was heard, thereby giving him an opportunity to practice the deception intended; that he sought to procure one L. F. Jackson to testify falsely, upon the

hearing of said cause, to the effect that the false statement was signed and sworn to by said Graham in his presence, and in all of said matters the said defendant did not abstain from offensive practices as such attorney, but performed the acts alleged and consented to the acts of others, as alleged, with intent to deceive the court and procure an unfair advantage for the said Catron over the said Butterfield.

Copies of the statement agreed to by Graham as dictated, and of the purported affidavit, as prepared in the absence of Graham, are attached to the information as exhibits, but it is not deemed essential that they be set out here. It must be sufficient to say that the purported affidavit with the jurat and seal attached were of a character and contained statements which might become material upon the hearing of the question then pending and awaiting a trial in court. There was no special finding made as to any of the facts, but it clearly appears that neither of the statements were offered in evidence upon the hearing, and that no effort was made to introduce or use them. In so far as they are concerned, the misconduct was limited to their preparation. Evidence was introduced tending to show that the first statement was dictated in the presence of Mr. Graham, and to which he assented, and which was, no doubt, truthful, as it tended to show that an alleged altercation between Catron and Butterfield in a room adjoining the front room of defendant's office was not heard by Graham; the apparent object being to show that defendant was not aware that any difficulty between the parties occurred in a room which constituted a part of his office. The second statement, in the form of an affidavit, and which included the contents of the first, was much more extended, a portion of which was dictated by Mr. E. F. Warren, co-counsel with defendant in the suit; the dictation being made from the statements of defendant to Mr. Warren. It was claimed that this statement embodied the facts, in the main, which were not stated in the first, and which it was intended should also contain statements of

facts which were to be presented later, and that, when completed, was to be signed and sworn to. The paper, it was claimed, was given the notary, who was to find Graham and administer the oath; that the notary appended his jurat and official seal, but failed to find Graham, and returned the paper to defendant's office. There are other facts from which the inference is drawn by the prosecution tending to prove guilty knowledge and a fraudulent and unlawful purpose and intent on the part of defendant. There are some features of the case which tend more or less strongly to support this contention. If it be conceded that such is the fact, and taking the evidence and inferences to be drawn therefrom in their most criminating light, we yet fail to see how that unexecuted purpose, there being no attempt to make use of the papers upon the hearing, would or could justify the disbarment of defendant. That such conduct, if established would show a depraved conscience and would be highly reprehensible, no one can doubt; but, if there were no overt act the tendency of which could or would deceive the court or practice any fraud upon the opposite party in interest, we cannot see that it would call for any disciplinary action on the part of the court. In view of the contradictory evidence and the explanation of his conduct by defendant, we are forced to this conclusion. Had he made an attempt to mislead or deceive the court by the production and presentation of a spurious affidavit, even though he might not have been successful, a different question would have been presented. We have been cited to no case which holds that the acts of defendant, even if viewed as contended for by the prosecution, would call for the disbarment of an attorney. It is argued, in substance, that the loose and probably criminal conduct of the notary, with the knowledge and consent of the defendant, should call for the denunciation of the court and an affirmance of the decision. It appears that it was the practice of the notary to attach his certificate and seal to papers previous to the signing by the affiant and administration of the oath to him. That

such practice by a notary is highly culpable cannot be questioned. It should be and is denounced by all authority, honesty and reason. Yet a paper, when completed by this method, might not be invalid. The action of the notary might be a crime, and yet not call for punishment to fall upon his employer. But, treating the whole transaction as the act of defendant, accompanied by no attempt to make use of such paper in any way that could result in deceiving the court or in a miscarriage of justice, we cannot see where or how the drastic punishment of disbarment should be administered. In *In re Haymond,* 121 Cal. 385, the accused, an attorney, was informed against for offering to sell to a newspaper the confession of a party who was on trial for the crime of murder, and while the trial was in progress, it was held as not sufficient ground for disbarment; the negotiations being discontinued without the publication having been made.

We fully recognize and adopt the rule quoted from the great number of decisions cited in the very able and exhaustive brief of counsel for the prosecution, yet we are unable to see that they can be applied to this case as shown by the evidence. That there might be ground for suspicion that the course pursued by an attorney was intentionally unprofessional, or even criminal, would not alone be sufficient to call for his disbarment. A proceeding to disbar is not a criminal prosecution, nor governed by the rules of evidence in such cases, yet it partakes somewhat of that nature, and the rule seems to be well settled that the evidence must be clear and convincing in order to warrant a judgment of disbarment. 4 Cyc. 915. Upon a consideration of all the evidence, we are not convinced that there is that "clear preponderance" of the evidence which is required.

An attorney who was employed with defendant in the defense of the suit of *Butterfield v. Catron* was called as a witness for the prosecution and gave evidence as to certain transactions and conversations with defendant and their client, Catron, concerning the existence of, and use

to which it was at one time proposed to make of, the affidavit referred to. It is insisted by the defense that the attorney violated his obligation of secrecy as to such communications and that the receipt of his testimony was error. We are satisfied that neither position can be maintained. It was the theory of the prosecution that the action and conduct of defendant indicated a purpose of perpetrating a conscious, intentional fraud upon the court, and that the testimony of the attorney who knew the facts was essential to their establishment. If he believed such was the purpose, it was not only proper, but his duty, to expose and make known what had been done. The record shows that he hesitated and practically declined to speak until urged to do so by the judge of the court. The facts testified to by him did not expose the secrets of his client, such as were necessary to the management of the case. There was no privileged communication detailed by him in his testimony. See Weeks, Attorneys at Law (2d ed.), sec. 170; Reynolds' Stephen, Evidence, art. 115.

As we have seen, the information charged defendant with soliciting a witness to testify falsely upon a material matter then in issue and to be heard by the court. We find no evidence sufficient to sustain this charge, nor is it insisted upon in the briefs.

It follows that the finding and judgment of the district court will have to be reversed and the prosecution dismissed, which is done.

REVERSED AND DISMISSED.

FAWCETT and ROOT, JJ., not sitting.

JOSEPH MORRIS, APPELLEE, V. ARCHIE MILLER, APPELLANT.

FILED JANUARY 23, 1909. NO. 15,460.

1. **Assault and Battery:** ACTION FOR DAMAGES: INSTRUCTIONS. In an action for damages for an assault and battery, wherein it was claimed by each of the parties that the other was the aggressor, and by the defendant that what he did was in self-defense, it was not error for the court to instruct the jury, among other things, that the right of self-defense did not imply the right to attack, or to voluntarily enter into an affray, nor to use more force than was necessary for his defense, and that the question as to who provoked the difficulty or made the first assault was for the jury to decide under the evidence.
2. **Trial:** INSTRUCTIONS: CONSTRUCTION. In construing instructions upon any given proposition, all instructions bearing upon the same should be construed together as a whole.
3. **Assault and Battery:** RIGHT OF RECOVERY. Where two persons engage voluntarily in a fight either can maintain an action against the other to recover the actual damages for the injuries he may receive, and the fact that the combat was by agreement or mutual consent of the parties to it is no defense.
4. ———: EVIDENCE. Immediately after an encounter between plaintiff and defendant, the plaintiff's hat was picked up near where he fell, and was introduced in evidence upon the trial, showing a break or rent at a place which, when worn, would be over or near the point of injury upon plaintiff's head. The identity, condition and possession of the hat were shown by evidence preliminary to its introduction. *Held*, That the admission of the hat in evidence was not erroneous.
5. **Appeal:** HARMLESS ERROR: NEW TRIAL. After the conclusion of the instructions by the court to the jury, and upon the jury retiring from the courtroom to deliberate upon their verdict, one of the jurors, by mistake and inadvertence, picked up the hat which had been introduced in evidence and carried it into the jury room, where it remained until the next day, when it was removed by a bailiff and returned to the courtroom. The evidence adduced upon the motion for a new trial showed that the hat was taken by mistake, and that little, if any, attention was paid to it by the jurors; that it was upon the table around which the jurors assembled, and used as a ballot box a part of the time; that it was not used in any way for the purpose of influencing the minds of the jurors, and did not influence them. *Held*, That the taking of the hat to the jury room, under the circumstances, was an irregularity, but without prejudice to the defendant.

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

H. M. Sinclair and *W. D. Oldham,* for appellant.

C. A. Robinson, John A. Sheean and *H. D. Rhea, contra.*

REESE, C. J.

This action was instituted in the district court for Buffalo county by plaintiff, Morris, and against defendant, Miller, for damages resulting from an assault and battery alleged to have been made and inflicted by defendant upon plaintiff. A jury trial was had, which resulted in a verdict in plaintiff's favor, upon which, after an adverse ruling upon a motion for a new trial, judgment was rendered, and from which defendant has appealed. The motion for a new trial and the assignments of error in this court consist of a number of alleged grounds, but none of them is urged in the briefs, except that there was error in the instructions given by the court to the jury, errors in the admission of evidence, and misconduct of the jury while deliberating upon their verdict. These contentions will be noticed in the order in which they are presented.

1. There is no contention that there was not an encounter between the parties at the time and place named in the petition, and there would seem to be no reasonable ground to contend that plaintiff was not seriously injured in the conflict. It is claimed by defendant, both in his answer and upon the witness stand, that whatever injury plaintiff sustained was inflicted by defendant in the legal and reasonable defense of his person from an attack made by plaintiff. In support of this it is urged that the injury suffered by plaintiff was the result of a fall by him against a hitching post in front of a business house in the village of Elm Creek, and through which post was a bolt to which a ring was attached, and that the bolt protruded through and beyond the side of the post opposite the ring and

against which plaintiff fell, inflicting the wound upon his head of which complaint is made, and that the fall was occasioned by a blow given by defendant with his left hand, but which was of no greater force than was reasonably necessary for defendant's protection and defense. It was also claimed that the personal conflict was voluntarily entered into by the parties, and that defendant should not, under the circumstances, be held responsible for the resultant injury. Upon the other hand, it was claimed by plaintiff that defendant was the aggressor, and that the assault which led to the conflict was by him. Upon this part of the case the court gave the following instruction, numbered 9, and to which defendant excepted: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant. But, if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe. Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, if you believe from the evidence that he was injured, or that he provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first

assault, you should take into consideration all the facts and circumstances in evidence before you."

The jury were quite fully instructed upon the different phases of the case, and, with one other exception, to be hereafter noted, no complaint is made of instructions given. As it is the well-established rule that all instructions given should be considered and construed together, we refer to instruction numbered 10, to which no complaint is made, and which we here set out: "The court instructs the jury that, if you believe from the evidence that plaintiff began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have the right to use that amount of force which was reasonably and apparently necessary in making his defense. And if you believe from the evidence that the defendant was so acting in self-defense from a real and honest conviction of apparent danger, or what would seem apparent danger to a reasonable man, you will return a verdict for the defendant, unless you further believe from the evidence that the defendant unlawfully used a degree of force and violence upon the plaintiff that was not reasonably and apparently necessary under the facts and circumstances then and there surrounding the defendant."

These instructions correctly state the law. The evidence clearly and conclusively establish the fact that the parties were in a business house in Elm Creek, and that there was a difference or quarrel between them. As to the extent of the anger displayed by each of them, the evidence is conflicting; but all agree that plaintiff left the building through the front door closely followed by defendant, both crossing the sidewalk into the street, but to only a few feet beyond the outer edge of the sidewalk, and the conflict was immediately entered upon. Just which one made the first attack may be in some doubt, as each one places the blame upon the other. It is claimed by plaintiff that defendant made the first attack and struck him in the forehead with some deadly instrument

by which the wound was inflicted, while defendant claims he did not make the attack, but acted solely in the defensive, using only his fist, and by which the wound complained of could not have been inflicted. When we consider these contentions, we can see no objection to the instruction complained of as being to defendant's prejudice. If it is true, as claimed by plaintiff, that defendant sought or invited the combat, and made use of a dangerour instrument by which the injury was inflicted, or that he created the occasion in order to inflict it, or did intentionally inflict it, the instructions cannot be said to be misleading, or to misstate the law. They properly left the whole question for the consideration of the jury under "all the facts and circumstances in evidence" before them.

The next instruction of which complaint is made is numbered 11, and is as follows: "You are instructed that, if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action." This instruction was given as applicable to the contention that the fight or combat was entered into voluntarily and by mutual agreement, and that the unsuccessful party to the strife could not transfer his cause from the street to the courts, and recover damages for whatever injury he might sustain by reason of the prowess or activity of his adversary. At the time of the argument of the case at the bar of this court, the writer was of the opinion that the giving of the instruction might have been erroneous, but more mature reflection and an examination of the authorities have led to a different conclusion. It is true that an instruction of this kind would be condemned by some reputable authorities, among which are *Galbraith v. Fleming,* 60 Mich. 403, and *Smith v. Simon,* 69 Mich. 481; but it is quite clear

that the great weight of authority is the other way, and that the recognized rule is that, where two parties fight voluntarily, either party may recover from the other the actual damages suffered, and the consent of the plaintiff to engage in the combat will not bar his suit to recover. In jurisdictions where punitive damages are allowed, the consent will prevent the allowance of such damages, but will not prevent recovery for the actual loss or damage.

In referring to the rule that one cannot recover for an injury to the infliction of which he has consented, the supreme court of Ohio, speaking through Judge Marshall, in *Barholt v. Wright,* 45 Ohio St. 177, say: "But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace, as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. * * * This, however, is the full extent to which the cases have gone"—citing cases. In *Grotton v. Glidden,* 84 Me. 589, it is said: "The evidence satisfies us that the plaintiff's injuries were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense. But the evidence satisfies us that the fight was voluntary on the part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We

think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally. And it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of punitive damages, but not to reduce the actual damages"—followed by citations and extracts from a number of cases. The rule is also recognized and stated in *Willey v. Carpenter,* 64 Vt. 212, annotated in 15 L. R. A. 853; *Shay v. Thompson,* 59 Wis. 540; *McNeil v. Mullin,* 70 Kan. 634; *Adams v. Waggoner,* 33 Ind. 531; *Jones v. Gale,* 22 Mo. App. 637; *Bell v. Hansley,* 48 N. Car. 131. See, also, 1 Cooley, Torts (3d ed.), p. 282, and 3 Cyc. 1070. In *McNatt v. McRae,* 117 Ga. 898, 45 S. E. 248, which was an action for an assault and battery, it was held that cross-actions in favor of each party against the other may arise out of the same affray, and such claims for damages may be presented in separate suits, or in a petition by one and a plea of set-off by the other.

We therefore find no error in the instructions complained of.

2. It is insisted that the court erred in permitting a hat, which plaintiff claims to have worn at the time of the encounter, to be put in evidence. It is said that the hat introduced had a hole or rent at or about the point where plaintiff was wounded; that the hat was on his head at the time; and it was claimed that the break or rent in the hat showed that it could not have been made with the fist of defendant, and from this it was argued that some heavy and dangerous instrument was used by defendant in striking the blow. The claim is that there was not sufficient preliminary proof of the identity of the hat, or that it was presented in the same condition as when found, to permit its submission to the jury. The hat introduced was shown to be the property of plaintiff

and upon his head at the time of the encounter; that it was picked up at the place where plaintiff had fallen, and had been preserved in its present condition from that time to the time of its introduction. We can detect no error in the action of the court in that behalf.

3. The next contention is upon the ground of misconduct of the jury with reference to the hat above alluded to. From the evidence submitted upon the hearing of the motion for a new trial it appears that, when the jury retired from the courtroom for the consideration of their verdict, one of the jurors, presumably by mistake and inadvertence, picked up the hat in question and carried it to the jury room, where it remained until the forenoon of the next day, when it was returned to the courtroom by a bailiff; that practically no attention was paid to it in the jury room; that it attracted little or no attention while there; that it had no influence on the verdict of the jurors; and that during a part of the time it was upon the table, around which the jurors were gathered, and was used as a ballot box into which the jurors placed their ballots when voting. There is no suggestion that the removal of the hat to the jury room by the juror who took it there was with any evil or corrupt intent, or that it was there used for any improper purpose, or, indeed, any purpose which could influence the deliberations of the jury, or have any effect upon the result thereof. That the taking of the hat to the jury room was an irregularity is perhaps true, and would not have occurred had the attention of the court, counsel, or juror been called to the fact. But, as the act was an innocent mistake, without wrongful intention, and as it is shown beyond question that no use was made of the hat by the jury which could in any way affect or influence the minds of the jurors or work any injury to defendant, we must hold that it was without prejudice to him and affords no ground for a reversal of the judgment. Code sec. 145.

Finding no reversible error in the record, it follows

that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

AMOS MOTT V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,653.

1. **Rape: EVIDENCE: CORROBORATION.** In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.

2. **Evidence** examined, its substance stated in the opinion, and *held* not sufficient to sustain the verdict.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair and *W. D. Oldham,* for plaintiff in error.

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

BARNES, J.

Amos Mott, hereafter called the defendant, was convicted of the crime of statutory rape at the April, 1908, term of the district court for Buffalo county, and was sentenced to imprisonment in the penitentiary for seven years. He now alleges error in the proceedings. His assignments, so far as we deem them material, will be considered in the order in which they are presented.

Defendant contends, first, that the verdict is not sustained by sufficient evidence, and, second, that the verdict and judgment are contrary to law, and these assignments will be considered together.

It may be conceded at the outset that there is no sub-

stantial controversy in the record as to the following facts: The defendant is a male person over the age of 18 years. The prosecutrix, at the time she alleges the offense was committed, was under 15 years of age. That some one had sexual intercourse with her at or about the date of the alleged offense, in Buffalo county, Nebraska, is established beyond question, and so the only fact in dispute is whether the defendant is the person who committed the unlawful act. The defendant's argument is that the prosecuting witness is uncorroborated as to the principal fact, and therefore the verdict cannot stand. This contention requires a careful review of the evidence. We find that as to the alleged criminal act the prosecutrix testified, in substance, that on the evening of June 1, 1907, she left her home in Kearney and went to a meat market, situated upon one of the principal streets of that city, with two other girls whose errand was to purchase meat; that they met the defendant, who went with them a part of their way home; that she and the defendant returned to the principal business street, where in a building adjoining the post office he kept an automobile garage; that he asked her to go out riding with him, and she consented to do so; that about 9 o'clock or shortly after that time, they got into an automobile and went west on the main street, past the normal school building and the ball ground; that about a block from the ball ground defendant turned the machine out to the left side of the road, stopped, and said to her: "Let's have some fun?" that she said: "I won't do it." That he thereupon pushed her over onto the seat, and had sexual intercourse with her; that they then returned to the garage, put up the machine, and went to her home, the defendant accompanying her and helping her up the steps; that they had intercourse but once; that she never had intercourse with the defendant either before or since that time, and had never known any other man.

The defendant testified in his own behalf, and denied positively and explicitly that he ever at any time had

sexual intercourse with the prosecutrix. He also testified as to his whereabouts at the time she alleges the unlawful act took place between them and, if his evidence is to be believed, the occurrence to which the prosecutrix testified could not have taken place. His evidence is strongly corroborated by the testimony of a Mr. Edwards, with whom he claims he was at the day and hour in question. The act of unlawful commerce being thus specifically and positively denied, the evidence of the prosecutrix as to that fact must be corroborated, and, if there is want of corroboration such as the law requires, the judgment of the district court should be reversed.

The state contends that the fact that the parties were well acquainted tends to corroborate the evidence of the prosecutrix. It appears that a brother of the defendant married a sister of the prosecuting witness and this fact is sufficient to account for the matter of mere acquaintanceship, and the slight acts of familiarity, if any such acts are shown to have occurred between the parties. It is also claimed the defendant was seen in company with the prosecutrix on the evening of June 1, 1907, and afterwards took her home and helped her onto the porch. This defendant denies, and shows his whereabouts at that time. It is true that the mother of the prosecutrix testified that the defendant brought her daughter home and helped her onto the porch on the night of June 1, 1907; but at least four other witnesses testified that she was at a dance at the home of a man of the name of Shaw, and was accompanied by a young man of the name of Jesse Shoop, who says he took her to the dance, and escorted her home therefrom. It is doubtful if the mere fact of being seen in her company and taking her home amounts to a corroboration, but, if so, the whole question is put in doubt by the conflicting evidence as to her whereabouts when she alleges the transaction in question occurred. The mother also testified that at or about 7 or 8 o'clock on the morning of June 2, she found a blue silk skirt worn by her daughter the previous evening across

the foot of her bed; that it had a substance on it which she said was "what comes from a man"; that it was wet and slimy; and it is claimed by the state that this is sufficient corroboration. The truth of this evidence is greatly shaken by expert testimony, by which it was shown that under such circumstances and conditions, if there had been any such substance on the skirt, it would have been so dry at the time the witness claims to have discovered it that a miscroscopic examination would have been required in order to determine what it was. Be this as it may, however, this evidence would not show, or even tend to prove, that defendant was responsible for the condition of the skirt; and it is just as likely that the condition described was caused by some one of the numerous young men with whom she says she was keeping company as by the defendant. Again, the fact that the mother thought so little of the matter at the time that she failed to even call the daughter's attention to it stamps the whole story with the mark of improbability. It is claimed that the fact that the prosecutrix gave birth to a child at a time which corresponds with the usual period of gestation from and after June 1, 1907, corroborates her as to the principal fact of unlawful cohabitation. It is true that this is not only corroboration, but is conclusive evidence of that fact, but it does not even tend to prove that the defendant was the guilty person.

Finally, it is contended that defendant left the county after learning that a warrant was out for his arrest, and this is corroborative of his guilt. We think the evidence fails to support this contention. It is an undisputed fact that complaint was filed in this case, and a warrant was issued and placed in the hands of the sheriff of Buffalo county with a request not to serve it upon the defendant until further orders. It also appears that defendant was advised of that fact, and the warrant was held by the sheriff for several weeks without any attempt to serve it; that defendant notified the sheriff of his intended trip to Illinois, and, as shown by the evidence, as soon as he as-

certained that the prosecutor had decided to proceed with the case he returned to Kearney, and entered his voluntary appearance before the magistrate. It is therefore apparent that this contention must fail.

Without resorting to quotation, we have stated the substance of the evidence which the state claims corroborates the testimony of the prosecutrix as to the principal fact involved in this controversy. That such corroboration is required is well settled. *Mathews v. State,* 19 Neb. 330; *Klawitter v. State,* 76 Neb. 49; *Burk v. State,* 79 Neb. 241; *Fitzgerald v. State,* 78 Neb. 1. As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accomplished by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. *State v. Kingsley,* 39 Ia. 439; *State v. Lenihan,* 88 Ia. 670; *State v. McGinn,* 109 Ia. 641. Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit; and it is self-evident that the main fact in this case cannot be strengthened by a collateral fact, the existence of which is dependent upon the same class of testimony.

Again, if it be admitted that the defendant was in the company of the prosecutrix, as testified to by the Grieves girls, and if it be further admitted that the defendant on one occasion at or about June 1, 1907, brought the prosecutrix home in the evening, as stated by the mother, these facts of themselves alone are not corroborative, because they simply mean opportunity, and opportunity is not of itself corroboration. *Fitzgerald v. State, supra.* So we conclude that the testimony of the prosecutrix was not sufficiently corroborated, and the evidence is insufficient to sustain the verdict. This requires a reversal of the judgment, and renders it unnecessary for us to discuss any of the other errors complained of.

It is possible, and indeed it is quite probable, that the

state, if the case is tried again, will be able to produce some corroborating evidence. It is not at all probable that the defendant and the prosecutrix could take an automobile from his garage adjoining the post office upon a principal street of the city of Kearney on a Saturday night at an hour when the street was full of people, and travel along that street to the point described in the evidence, return and put away the machine, without being seen and recognized by some one; and, unless the city of Kearney is in the condition of Goldsmith's deserted village, it is reasonable to suppose that by suitable and proper inquiry on the part of the prosecuting attorney he will be able to find some one who, if the testimony of the prosecutrix is true, saw them and recognized them upon that occasion.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

ROSE, J., not sitting.

ROOT, J., dissenting.

I cannot concur in a judgment of reversal. Defendant was given a fair trial. He was ably defended by experienced counsel, and, as the jurors heard all of the witnesses testify and found beyond a reasonable doubt that he was guilty as charged, their verdict ought not to be disregarded because the corroborative evidence is contradicted and not altogether probable. The sufficiency of that evidence was for the jury to determine. *State v. Norris,* 127 Ia. 683; *Van Vleck v. Anderson,* 136 Ia. 366; *State v. Montgomery,* 79 Ia. 737; *Commonwealth v. Allen,* 135 Pa. St. 483. The birth of the complaining witness' child established the fact that some one had committed the offense charged. *Suther v. State,* 118 Ala. 88. To connect defendant therewith there is the positive statement of the injured female, the testimony of the

two Grieves girls that defendant met complainant in the evening just as she detailed, the testimony of the mother that defendant brought her daughter home late in the night during which the child says the act was accomplished, the testimony of both daughter and mother that the child's underskirt was stained with semen, the testimony of the girl, which defendant did not deny, that within a few weeks thereafter he sought on two different occasions to entice her to his bachelor apartments, the fact that defendant left the state shortly after he was accused of the offense, and that he escaped from custody of the officers in Indiana when arrested on request of the Nebraska authorities. It is true that explanatory evidence was offered by defendant, that some of the state's testimony does not seem reasonable, and that defendant attempted to prove an alibi. But if the jurors believed the girl, her mother, and the Grieves girls, as they had a right to do, their verdict is amply sustained by the evidence and it should not be disturbed by this court.

REESE, C. J., concurs in dissent.

MARY G. RUSSELL, APPELLEE, V. ESTATE OF JOHN A. CLOSE, ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,850.

1. **Executors and Administrators: CLAIMS: EVIDENCE.** C., an aged man, who was afflicted with an incurable disease, agreed with R. that if she would remain in his home as his housekeeper, companion and nurse, and care for and nurse him until his death, he would pay, or cause to be paid, to her, $1,000 in addition to the wage he was then paying her, which was $2 a week. He reduced his agreement to writing and signed the same. She accepted its terms and fully performed its obligations on her part. He accepted her services until his death, which occurred nearly a year thereafter. *Held*, That this created a debt against his estate, and that the writing could be received in evidence as tending to prove the agreement.

2. Trial: WRITING: DELIVERY: QUESTION FOR JURY. One of the defenses interposed by those interested in the estate was nondelivery of the writing. The plaintiff having produced some competent evidence tending to prove a delivery, the court submitted that question to the jury under proper instructions. *Held*, That this furnished the defendants no ground for complaint, and the court did not err in refusing to instruct the jury to return a verdict for the defendants.

3. Witnesses: TRANSACTION WITH DECEDENT: WAIVER. The defendants reproduced in evidence, as tending to show nondelivery, a part of the plaintiff's testimony, given without objection on the hearing upon her claim in the county court, relating to a part of the transacton which took place between her and the deceased when the agreement in question was made. *Held*, That they thereby waived the protection afforded the estate by section 329 of the code, and that the plaintiff was entitled to reproduce the rest of her former evidence as to that particular transaction.

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

Frank Dolezal, George L. Loomis and *H. C. Maynard,* for appellants.

Grant G. Martin, R. J. Stinson and *J. C. Cook, contra.*

BARNES, J.

The appellee, who was the plaintiff in the trial court, filed a claim against the estate of one John A. Close, late of Dodge county, consisting of several items, one of which was for $1,000, based on a certain agreement or written promise made to her by the deceased about a year before his death, which reads as follows: "Arlington, July 15th, 1903. I do hereby promise to pay Mary G. Russell $1,000 —one thousand dollars—or leave that sum to be paid to her at my death, for services rendered me by her as housekeeper and companion and nurse for the past four years, and until my death, besides her weekly wages, which I pay quarterly. Mr. John A. Close." She alleged that she had fully complied with all of the provisions of the agreement on her part; that she had remained in the home of

the deceased as his housekeeper, companion and nurse; that she nursed and took care of him until his death, which occurred nearly a year after he gave her the promise above quoted; that no part of the $1,000 mentioned therein had been paid to her, and prayed for a judgment against his estate for that sum. The executor of the estate refused to pay any of the items of plaintiff's claim, and a hearing was had before the county court of Dodge county thereon. From the order entered therein the case was appealed to the district court. For defense to that portion of the claim above mentioned the defendants denied the execution and delivery of the writing, and alleged that it was made and obtained by the plaintiff by means of undue influence over the deceased; that he was, by reason of his mental and physical condition, incompetent to make said agreement or promise, and defendants also introduced testimony tending to show that the instrument was a forgery. A trial in the district court resulted in a verdict and judgment for the plaintiff upon all of the items of her claim. Thereupon the executor prosecuted error to this court, where the judgment was reversed because the trial court received plaintiff's evidence as to the transactions which had taken place between her and the deceased in violation of the provisions of section 329 of the code. See *Russell v. Estate of Close,* 79 Neb. 318. Upon a retrial in the district court, the plaintiff again recovered judgment, and the defendants have brought the case here a second time by appeal.

Three grounds are assigned for a reversal of the judgment: First, that the evidence does not sustain the verdict, in that it fails to show a delivery of the written promise; second, that the trial court erred in receiving in evidence the cross-examination of the witness Anna Godel; and, third, that the court erred in refusing to direct a verdict for the defendants. These assignments will be disposed of in the order in which they are presented.

1. The defendants' contention as to the insufficiency of the evidence is based on the claim that the instrument in

question was never delivered to the plaintiff by John A. Close, and therefore it never became operative, and no action can be maintained thereon. As a foundation for this contention, defendants treat the instrument as a negotiable promissory note, and have cited many authorities which hold that a promissory note in order to furnish a basis for an action must be absolutely and unconditionally delivered to the payee in the lifetime of the maker. If the writing in question was in fact or in law such a note, defendants' contention would merit serious consideration. The instrument, however, in our opinion, is not a promissory note. It is merely the written evidence of an agreement on the part of the deceased to pay, or cause to be paid, to the plaintiff, the sum of $1,000 in case she should remain with him as his housekeeper, companion and nurse, and should perform those duties and care for him until his death. To be binding on him, it required her acceptance of its terms, and the performance of the duties imposed thereby upon her part. The agreement was so treated by her when she entered upon its performance, and continued to faithfully care for the deceased, which she did, until his death, and it was so treated by her in her petition in the district court. It is true that in two places in her petitions he speaks of the writing as a "promissory note or agreement," but this does not affect its real nature or change its legal effect. Full performance of the terms of this agreement having been shown by the plaintiff, and her services having been accepted, the writing was admissible in evidence when it was shown to have been signed by the deceased, and failure to prove delivery would not destroy its evidential value as proof of the agreement which it purports to set forth. The instrument was, therefore, properly received in evidence, even if there had been no proof of its manual delivery to the plaintiff. 3 Ency. of Evi., p. 521; *Eager v. Crawford,* 76 N. Y. 97; *Mobile Marine D. & M. Ins. Co. v. McMillan & Son,* 31 Ala. 711. Again, if John A. Close dictated and signed this contract or agreement, and thereby induced

the plaintiff to believe that he had made provision for her other than her weekly wages, and afterwards permitted her to render him valuable services as a housekeeper, companion and nurse under such belief, neither he nor his representatives should be allowed to say that the agreement was inoperative for want of a formal delivery. *Walker v. Walker,* 42 Ill. 311; *Reed v. Douthit,* 62 Ill. 348; *Hayes v. Boylan,* 141 Ill. 400.

The record before us discloses, however, that the district court was of opinion that delivery of the agreement was essential, and submitted the case to the jury on that theory under the belief that there was competent evidence tending to show an actual or, at least, a constructive delivery of it to the plaintiff. This ruling favored the defendants' theory of the case, and furnishes them no grounds of complaint. The testimony on this point was, in substance, that on the 15th day of July, 1903, the plaintiff suggested to John A. Close that he was so badly afflicted, and that it was so much work to care for him and nurse him, that $2 a week was not a sufficient compensation. He assented to that statement, and thereupon dictated the instrument in question, which she wrote precisely as he gave it to her; that he signed it, and delivered it to her with the suggestion that she keep it in a desk which contained his will and some of her private papers. She assented to this suggestion, and placed the paper in the desk, where it was found and taken possession of by the executor. It appears that she carried the key to the desk, and, whenever the deceased wanted any papers taken out of that receptacle, she unlocked it and got them for him; that she also had some private papers of her own which she kept in the same desk, and that she gave the key to the executor to enable him to get the will. It therefore seems clear to us that the district court was right in the conclusion that there was sufficient evidence of a delivery to require the submission of that question to the jury.

2. This brings us to the consideration of the defendants'

second assignment, which is that the district court erred in admitting incompetent and immaterial evidence. It appears that, after the plaintiff had introduced all of her evidence and rested her case, the defendants deeming the question of the delivery of the instrument a material and important one, for the purpose of proving nondelivery, called a witness, one Anna Godel, a stenographer, who reported the testimony which was taken on the hearing in the county court, and had her reproduce from her stenographic notes so much of the plaintiff's testimony relating to the transaction in question with the deceased, and which had been there given by her without objection, as they thought tended to show that the instrument had never been delivered to her. The plaintiff thereupon, by the cross-examination of this witness, was allowed to reproduce the remainder of the plaintiff's evidence relating to that particular transaction. It is now strenuously contended that this evidence should have been excluded, and that its reception was a violation of the provisions of section 329 of the code, which reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Now, if the defendants had not introduced a part of the plaintiff's testimony relating to the transaction in question, the evidence complained of could not have been received. But, having seen fit to waive the protection

offered by the statute, and having produced a part of the plaintiff's evidence relating to the transaction in question with the deceased, they thereby rendered the rest of her testimony as to that transaction competent.

In *Niccolls v. Esterly,* 16 Kan. 32, and *Roberts v. Briscoe,* 44 Ohio St. 596, it was held that by introducing a part of the evidence of the interested party the defendant opens the door to all of it. Again, this statute has been many times construed by this court in cases which are decisive of this question. It has been held that, where an administrator introduces in evidence a letter from the adverse party, giving a narrative of the transaction with a deceased person, upon which the action is based, the evidence of the adverse party as to the transaction recited in the letter upon his own behalf is not incompetent under the provisions of this section. *Cline v. Dexter,* 72 Neb. 619. In *Davis v. Neligh,* 7 Neb. 84, it was said: "But where a witness has related a portion of what took place at a particular time or place, or a part of a particular transaction, he may be cross-examined as to matters showing the *entire transaction.*" *American Savings Bank v. Estate of Harrington,* 34 Neb. 597, was an action on a note signed by a father and son, filed as a claim against the estate of the father. On the trial the son testified as a witness that his father was merely a surety on the note, and that he was the principal; that the note had been extended from time to time without the knowledge or assent of his father. He was then asked if it was not a part of the agreement between himself and his father on one side, and the bank on the other, that the note was not to be paid in full when due, but was to be extended from time to time for about one year. The evidence was excluded, and it was held by this court that it was competent and proper because, the estate having shown a part of the transaction, the plaintiff was entitled to show the whole of it. In *Taylor v. Ainsworth,* 49 Neb. 696, it was alleged by plaintiff, an executor of a person deceased, that the defendant had received from the deceased during her

lifetime, the sum of $1,000, which he undertook to loan for her at advantageous rates, and which he falsely and fraudulently pretended to her he had so loaned, and that he had refused to pay the same or any part thereof. On the trial of the issues as properly involving the performance of a trust, certain letters of the defendant were introduced in evidence by plaintiff, which defendant was required to identify as a witness, and as a witness he was required by plaintiff to state simply that he had received from the deceased $1,000. It was held that the transaction between the deceased and the witness was an entirety, and that the proof above made authorized the defendant to testify as to how little, if anything, remained unpaid to the estate of the testatrix. It appears from the record that the trial court carefully excluded all of the evidence of the plaintiff given upon the hearing in the county court, except so much as related to the particular transaction about which the defendants inquired. By introducing the evidence of the witness Anna Godel, the defendants waived the right guaranteed them by the statute, and the district court did not err in refusing to exclude the evidence complained of.

3. As to the defendants' third contention, that the court erred in refusing to direct the jury to return a verdict in their favor, it is sufficient to say that, if we are right in our conclusions as to the other two assignments, it was proper for the court to refuse this instruction. There was at least some competent evidence tending to show the delivery of the instrument in question, and to establish all of the elements necessary to authorize a recovery on the part of the plaintiff. It would therefore have been reversible error for the district court to have directed a verdict against her.

Finding no error in the record, and it appearing (to quote a favorite expression of a former honored member of this court) "That substantial justice has been done," the judgment of the district court is

AFFIRMED.

CHARLES R. POSTON V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,927.

1. **Criminal Law:** ASSIGNMENT OF ERRORS: MOTION FOR NEW TRIAL. In a case brought to this court by a petition in error, exceptions to the giving or refusing of instructions will not be considered unless such rulings are specifically assigned in the motion for a new trial.

2. **Witnesses:** CROSS-EXAMINATION. The rule that the right to cross-examine a witness is confined to matters brought out in his direct examination, obtains in a criminal prosecution the same as in a civil action, and a defendant in such prosecution will not be permitted to prove matters of defense upon the cross-examination of a witness for the state, where such matters are not brought out or suggested by the direct examination.

3. **Intoxicating Liquors:** KEEPING FOR UNLAWFUL SALE: EVIDENCE. In a prosecution for a violation of the provisions of section 7170, Ann. St. 1907, making it a crime for a person to keep and have in his possession intoxicating liquor for the purpose of unlawful sale, the state chemist, who analyzed the liquor found in the defendant's possession, is a competent witness to testify as to the per cent. of alcohol contained therein, and, where such liquor is designated in the information as an intoxicating liquor called "beer," it is competent for such witness to give the amount or per cent. of alcohol contained therein, and the amount or per cent. of alcohol contained in the different kinds of beer commonly sold and used in this state.

4. **Witnesses:** CROSS-EXAMINATION: INCRIMINATION. Where a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, and may be required to testify on his cross-examination as to any matters brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.

5. **Intoxicating Liquors:** UNLAWFUL SALES: EVIDENCE. Where it is shown in a criminal prosecution that certain liquor has been sold by the defendant from time to time as a beverage, it is competent for the state to prove that during such time certain persons had been seen in an intoxicated condition in the defendant's place of business as tending to show that the liquor so sold was intoxicating in its effect.

6. **Indictment and Information: SEPARATE COUNTS: ELECTION.** In a criminal prosecution, where two or more counts are properly joined in an information, and there is evidence tending to prove the facts alleged in each of them, the state will not be required to elect upon which of the several counts it will rely for a conviction.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Evcrson, for plaintiff in error.

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

BARNES, J.

The plaintiff in error, hereafter called the defendant, was prosecuted for a violation of the provisions of section 7170, Ann. St. 1907, making it unlawful for any person to keep for the purpose of sale, without a license, any malt, spirituous or vinous liquor in this state. The first count of the complaint charged defendant with keeping and having in his possession certain intoxicating liquor called "barley mead," for the purpose of unlawful sale. The second count charged him with having in his possession, for the same purpose, certain intoxicating liquor called "beer." The third count charged him with having in his possession certain intoxicating liquor called "whiskey," for the purpose of sale without a license. There was a search and seizure of three barrels of liquor called "barley mead," which was found in the defendant's possession. He was held to answer to the district court, where an information was filed against him by the county attorney charging the same offenses set forth in the complaint before the magistrate. His trial resulted in a conviction upon the first count of the information, and a verdict of not guilty as to the second count; the prosecution in the meantime having dismissed as to the third

count. Defendant was thereupon adjudged to pay a fine of $100 and the costs of prosecution, and from that judgment he has brought the case here by petition in error.

His first seven assignments of error relate to the giving and refusal to give certain instructions to the jury, and these assignments will be considered together.

We find from an examination of the record that in the defendant's motion for a new trial no complaint was made of the giving or refusal to give instructions. It is therefore contended by the attorney general that this court has no right to consider any of these assignments. It seems clear that this contention must be sustained. In *Cleveland Paper Co. v. Banks,* 15 Neb. 20, it was held that "under the general assignment, in the motion for a new trial, of 'errors of law occurring at the trial,' only such errors as appear in the bill of exceptions can be considered. If objection is made to any of the instructions, it must be specifically assigned." This rule, so far as we are able to ascertain, has been approved and followed in all cases where this question has arisen since the decision above mentioned. In *Hamilton v. Goff,* 45 Neb. 339, it was said: "It has long been the rule of this court that exceptions to the giving or refusing of instructions will not be noticed unless such rulings are specifically assigned in the motion for a new trial"—citing *Cleveland Paper Co. v. Banks, supra,* and *Omaha & R. V. R. Co. v. Walker,* 17 Neb. 432. The rule announced in these cases is decisive of this question as presented by the record in the case at bar.

The eighth assignment of error is as follows: "The court erred in refusing the defendant the right to cross-examine the witness for the state, T. W. Carroll, and in sustaining the objections to such cross-examination." The record discloses that the examination in chief of this witness was limited to the seizure of the liquor in question on March 16, 1908. The rule that the cross-examination of a witness should be limited to matters brought out upon his examination in chief is too well settled to require the cita-

tion of authorities to support it. It is contended, however, that it was the purpose of the defendant by the cross-examination in question to bring out the fact that the liquor seized was not in his place of business on the 14th day of March, two days before its seizure; that it arrived after the 14th inst., and was stored away by him pending his investigation of his right to sell it. The record shows that he was permitted to ask the witness whether he made a search under the warrant on March 14, and the answer was, "No." The witness was thereupon excused by the defendant with leave to recall him for further cross-examination, but he was not recalled during the trial. It also appears that the witness on direct examination testified that he searched the defendant's place of business on the 16th day of March, 1908, and was not interrogated upon his direct examination as to any other search or seizure than the one which occurred upon that day. So, technically speaking, the objection to the testimony attempted to be brought out by the defendant on the cross-examination of this witness was well founded. It further appears that the defendant was permitted to show the fact that the sheriff came to his place of business on the 14th day of March, and found no liquor in his possession; that on the 16th he accosted the defendant while at the depot, and told him that he desired to search his premises. This is the only search and seizure mentioned in the record. The defendant was permitted to show all of the facts and circumstances surrounding that transaction, and to introduce on his own behalf, testimony of the fact sought to be elicited from the sheriff by the cross-examination in question. It is apparent, therefore, that he was not deprived of any substantial right by the refusal of the court to permit him to cross-examine the witness on that point.

It is also contended that the court erred in receiving the testimony of the state chemist, Redfern, who analyzed the barley mead which was found in the defendant's possession. It appears that the witness upon his redirect

examination was permitted to testify as to the per cent. of alcohol contained in the different kinds of beer commonly sold and used in this state, naming them, as well as the per cent. of alcohol contained in the liquor in question. The defendant admitted having this liquor in his possession, and testified that he had from time to time for at least a year previous to his arrest sold the same as a beverage. It was therefore competent for the state to prove that the liquor was intoxicating in character, and it was proper for the chemist to testify as to the amount or per cent. of alcohol contained therein. Again, the defendant was charged in the second count of the information with having in his possession certain intoxicating liquor called "beer" for the purpose of selling the same without a license; and this evidence tended to show that the liquor seized belonged to the class of intoxicating liquors called "beer."

Defendant further alleges error in the refusal of the court to sustain his objections to his cross-examination while testifying in his own behalf. The record discloses that after the defendant had admitted having the liquor in question in his possession, and after having stated that he was not intending to sell it, but just keep it in order to ascertain whether he had the right to sell it or not, he was asked on cross-examination by the prosecuting attorney if it was not a fact that he had this kind of liquor in his possession before the time set forth in the information. Over the objections of his counsel that the question was not proper cross-examination, he was required to answer. His reply was: "Yes, sir." He was then asked if he had been selling this same kind of liquor called barley mead, and over his objections he was required to testify, and stated that he had been selling it, and that he had been keeping it in his place of business for sale. It is now contended that this was not proper cross-examination, and that it required the defendant to give testimony incriminating himself. We think the examination was entirely proper. One of the questions for the consideration of the

jury, according to defendant's own theory of the case, was whether or not his possession of the liquor was for the purpose of unlawful sale. He had voluntarily taken the witness stand in his own behalf, and had testified to his intention and purpose in regard to that matter. It was therefore proper for the state to prove by him on cross-examination that he had theretofore been selling it as a beverage as tending to show the real purpose of such possession. Again, having voluntarily become a witness in his own behalf, he was subject to the ordinary rules of cross-examination, the same as any other witness.

Complaint is also made of the fact that the state was allowed to introduce evidence tending to show that from time to time during the previous year certain persons had been seen in an intoxicated condition in the defendant's place of business. While this testimony was rather immaterial, it was apparently offered for the purpose of showing that the liquor in question which had been sold by the defendant was intoxicating in its effect. Taking this evidence in connection with the fact that the defendant had been openly selling this liquor under a claim that it was a nonintoxicant, this evidence was not only proper, but it was in no way prejudicial to the defendant's substantial rights.

Finally, it is contended that the court erred in not requiring the state to elect upon which of the two counts of the information it would rely for a conviction. In answer to this complaint it is sufficient to say that the counts were properly joined, and there was evidence before the jury tending to sustain the charge contained in each of them. It also appears that the case was submitted to the jury upon proper instructions, and the defendant was found guilty upon the first count of the information, and not guilty as to the second count. So it is apparent that he suffered no prejudice by the failure of the court to sustain his motion. In such a case the state will not be required to make an election.

A careful examination of the record satisfies us that

the defendant had a fair and impartial trial, that he was not restricted in any manner in the presentation of his defense, and the judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

DANIEL C. CALLAHAN V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,688.

1. **Unlawful Disinterment:** EVIDENCE. In a prosecution against the superintendent of a cemetery for unlawfully assisting, inciting and procuring another to disinter human remains, where the evidence is that the accused had no knowledge of the disinterment, and the state relies upon general instructions to a person employed as a grave digger as constituting the inciting and assisting act, instructions in another and a particular instance are not sufficient to support a conviction.

2. ———: ———. Evidence set forth in the opinion *held* not to constitute such instructions to a laborer as to warrant a conviction in a case where it is shown that no knowledge of the disinterment was had by the superintendent until some time after the act had been performed.

3. **Witnesses:** CROSS-EXAMINATION. Cross-examination should be restricted to matters covered by the examination in chief.

4. **Criminal Law:** INSTRUCTIONS: REVIEW. Under the evidence set forth in the opinion, *held* error to submit the question to the jury as to whether the instructions given by the defendant to the laborer in the particular instance constituted a rule of action for future instances.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Weaver & Giller and *Hall & Stout,* for plaintiff in error.

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

LETTON, J.

Patrick Callahan the plaintiff in error, was convicted of unlawfully and feloniously assisting, inciting and procuring one Clark to open a grave and dig up, disinter and remove from their place of deposit and burial the remains of the dead body of one ——— (name unknown), deceased, in January, 1905, without the knowledge and consent of the relatives or intimate friends of the deceased, and without lawful authority. Callahan was the superintendent of Prospect Hill Cemetery in the city of Omaha. This cemetery had been in existence for many years, and Callahan became its superintendent in 1890. The cemetery association was incorporated in 1892. Prior to the incorporation the cemetery was uninclosed, and, while interment had been made for many years prior to this time in and about the cemetery grounds, no records had been kept of the former burials, and many graves were unmarked and undistinguishable from the surrounding ground. When the corporation was formed a large number of iron markers were ordered by the association, and were placed by the superintendent at the head of each discernible grave, and thereafter records were kept by the association of each lot sold and of the location of each grave thereon. In 1905 one James C. Clark was employed as a grave digger by Mr. Callahan. Clark testifies that in January of that year, while he was digging a grave, he came upon a coffin inclosing the remains of a woman; that the coffin and remains were decayed and decomposed to such an extent that of the mortal remains the skeleton alone was left; that he removed the pieces of the skeleton, and laid them by the edge of the grave until he had dug the same to the required depth, when he replaced these remains in the bottom of the grave and covered them with earth. A number of shocking and repulsive details of his doings are given by the witness, and also by two members of his family who were present at the time. The evidence shows that at the place where Clark was digging the

grave there was no indication that the ground had ever been disturbed, and that neither he nor Callahan knew that there was or ever had been an interment at that place. The evidence also shows that Callahan had no knowledge that any remains had been disinterred or disturbed by the grave digger until a long time afterwards. The state bases its case, therefore, upon the proposition that prior to this time Callahan as superintendent had given Clark certain general instructions as to what he should do in the event that, while digging a grave, he should come upon human remains, that what was done in this instance was done in compliance with the general instructions or rule of action so laid down, and that, since Callahan gave such instructions he unlawfully aided, incited and procured Clark to disinter the remains and thereby committed the crime inhibited by the statute. Conceding the state's contention that general directions may render one giving them guilty of a specific crime, it will be seen, therefore, that Callahan's guilt under these circumstances rests entirely upon the proposition that his general instructions to Clark directed him to do the acts complained of, or, in other words, that Clark's unlawful acts were clearly within the scope of Callahan's directions. To determine this we must examine and scrutinize the evidence. Clark's testimony on this point is as follows: "Q. From whom did you have the instructions? A. From Mr. Callahan. Q. What were those instructions? A. The first one I went down on I said, when I got to the box—I went down to the office and talked to Mr. Callahan about that. He told me when I come to them to take them out nicely and lay them on the bank, and when I got the grave done down to where I wanted it, to dig a hole in the bottom and put those remains all back and cover them over nicely. Q. That was when you first encountered? A. Yes, sir; that was the first one I struck. Q. What did he say with reference to what should be your conduct whenever you met with that sort of an obstruction? A. He didn't give me any other orders. I went

right ahead with my work and asked him no more questions." This evidence was not as to the grave the desecration of which is charged but refers to another grave which Clark dug, in which remains were found. On cross-examination he testifies: "Q. You say, then, you had worked up there a day before you came across some bones, or some remains? A. Yes, sir. Q. And you went to see Callahan at the office? A. Yes, sir. Q. And you asked him what was done in a case of that kind? A. Yes, sir. Q. And he told you that orders were to simply take those bones out, those remains, and go on with your grave, and then put them back in? A. He didn't exactly speak it in that way, but he meant it in that way from the way he talked. He told me in a case of that kind we took them out and put them in the bottom of the grave again and covered them up. Q. You were speaking about this particular grave you had then? A. The first one I went into; yes, sir. Q. You were talking about what to do in that particular instance? A. Yes, sir." He further testified that Callahan knew nothing about this act with which he is charged with inciting until some time after it had been done.

The testimony above set forth contains all the instructions given to Clark by Callahan, according to Clark's own testimony. This is all there is in the record to sustain the allegations of the information as to Callahan's aiding, inciting, assisting or encouraging Clark to perform the act charged. At the close of the state's case, defendant moved for an instructed verdict, which motion was overruled and exception taken. We are of the opinion that the motion should have been sustained. Viewed in the most favorable light for the state, Clark's testimony falls short of establishing the fact that any general instructions were ever given to him by Callahan which authorized the removal and reinterment of the remains found in the excavation or the revolting acts described by him. It was, no doubt, necessary to admit the repulsive details of the act in evidence in order to establish that

the substance of the principal crime had been committed, so that evidence of the procurement or inciting of the act by Callahan might be introduced. The nature of the testimony was such as to shock the minds of all normally constituted persons, and it was liable to excite hostility and prejudice in the minds of the jurors toward any person accused of being guilty of such acts or of their procurement. There was the more reason, therefore, that the evidence by which it was sought to establish the connection of the accused with the principal act should be closely scrutinized; and, if it failed to establish such connection, the case should not have been permitted to go to the jury. We are of the opinion that Clark's evidence failed to establish that Callahan aided, assisted, incited or procured Clark to disinter the remains of the unknown person as charged in the information.

According to the testimony introduced upon the part of the defendant, before Callahan was permitted to open a grave for the purpose of interment or for the removal of a body previously interred, it was necessary for him to obtain a permit from the office of the secretary of the cemetery association, and also one from the board of health. He denies that he ever gave any general instructions with reference to the disinterment or reinterment of remains found in digging graves, but says that, upon one occasion when such an incident occurred, he brought Judge Baldwin, who was then the president of the cemetery association, to the grave, and that Baldwin in his presence gave instructions to a grave digger as to the particular instance. He testifies that he is not able to recall which grave digger it was and whose remains were being interred. He denies specifically giving any such instructions as Clark recites, either to Clark or to any other person, and swears that he knew nothing about this particular exhumation until he was charged with it in the police court about three years after the time that Clark disturbed the remains. Upon cross-examination the accused was asked whether after he heard Judge Baldwin's

instructions he pursued that course wherever he encountered the same conditions. Objection was made to this and subsequent questions of this nature, which were overruled, and the witness was required to answer as to his actions in that regard. We think that the overruling of these objections was erroneous. The defendant was upon trial for inciting Clark to disinter the remains of an unknown person in January, 1905. The state was only entitled to cross-examine upon the facts testified to by Callahan bearing upon this charge, and it was prejudicial error to compel the witness to answer a question relating to other acts of like nature as to which he had not been examined in chief, of which he was not accused, and the tendency of which question might be and probably was to arouse a prejudice against the defendant.

Complaint is made of the submission to the jury by the court in its instructions of the question whether the directions given by Callahan to Clark formed "a rule of action in future instances." From a consideration of the testimony, we think this criticism is well founded, and that there is no actual proof that any instruction given by Callahan was intended as a rule of action for Clark to follow in future instances. It is true Clark says that he acted upon this theory, but this is not enough. We cannot sustain a conviction upon mere inference or suspicion; the inciting act must be proved, and this is especially true where proof of knowledge by the accused of the wrongful act of the alleged agent is entirely wanting.

While we cannot sustain this conviction, we think enough has been shown in the case to justify the belief that the authorities in charge of Prospect Hill Cemetery have not exercised the careful supervision and control over its employees which is necessary where new burials are made in an old cemetery. The statute is designed to protect the last resting place of the dead, and graves should not be disturbed unless the case falls within the exceptions provided for by the statute. It is very probable that this prosecution may serve a useful purpose by

ending a careless and unlawful practice and abuse. A number of other questions are raised in the briefs, but in the view we take of the case it is unnecessary to consider them.

For the errors pointed out, the judgment of the district court is

REVERSED.

ROSE, J., not sitting.

IN RE ESTATE OF WILLIAM W. WILSON.

GEORGE E. HIBNER, ADMINISTRATOR, APPELLEE, V. J. R. WILSON ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,459.

1. **Executors and Administrators:** ACCOUNTING: APPEAL. H. in his report as administrator of an estate claimed compensation for services. Said item was allowed in part and the remainder of his account approved. H. gave notice that he would appeal from the order diminishing his said claim, and gave a bond which referred solely thereto. *Held*, That the transcript filed in the district court did not bring up the entire account for review.
2. ———: COMPENSATION: LEGAL SERVICES. H., being an attorney at law, performed legal services in the administration of said estate. *Held*, That, if such services were necessary for the proper administration of said estate and beneficial thereto, the court in its discretion might allow the administrator reasonable compensation therefor.
3. ———: ———: EXTRAORDINARY SERVICES. For services rendered by H. in a business way, such as collecting rents of real estate, paying taxes theron, insuring property, and attending to repairs, it was within the discretion of the court, if the evidence established that such services were extraordinary, to allow H. a reasonable compensation.
4. ———: ———: APPEAL: TRIAL BY COURT. In the district court the claim should have been tried without the assistance of a jury.
5. **Case Distinguished.** *Sheedy v. Sheedy*, 36 Neb. 373, dintinguished.

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

Mockett & Mattley, John M. Stewart, Robert Ryan and *A. M. Harrah,* for appellants.

Tibbets & Anderson, contra.

ROOT, J.

This is an appeal from a judgment of the district court allowing plaintiff compensation for his services as administrator of the estate of William W. Wilson, deceased.

1. The estate consisted of two farms, three business buildings in the city of Lincoln, and choses in action amounting to $13,000, consisting of bank credits and promissory notes. Plaintiff claimed $2,775 for extraordinary services rendered in a business capacity and $2,000 fees as an attorney at law. The county judge allowed plaintiff but $2,000 for attorney fees and extraordinary services, and otherwise approved his account. Plaintiff thereupon gave notice of appeal "from the order of the court of June 26, 1906, in which the court fixes the compensation of this administrator for services rendered at two thousand dollars ($2,000), and the said George E. Hibner administrator prays the court to fix appeal bond on such appeal." The bond recites that the appeal is from the action of the court on Hibner's claim for compensation.

It is claimed by the heirs that the district court should have submitted to the jury every contested item in the administrator's account, whereas plaintiff claimed, and the district court held, that the record presented for consideration only the question of plaintiff's compensation. The appeal only transferred to the district court the controversy over the administrator's compensation. Although such claim was but part of the account, yet it was segregated as to subject matter and form. The remainder of the account relates to alleged disbursements by the administrator, and inquiry concerning the legality thereof would not involve a consideration of the value of the ad-

ministrator's services or the amount that he should be allowed therefor. If the heirs were dissatisfied with the action of the county court, they could have appealed generally and presented their complaints to the district court. *St. Paul Trust Co. v. Kittson,* 84 Minn. 493. The contrary view has been taken by the supreme court of Michigan in *Showers' Estate v. Morrill,* 41 Mich. 700, but the position of the Minnesota court appeals to us as better supported in reason and more likely to facilitate the transaction of business in our district courts. *Ribble v. Furmin,* 69 Neb. 38, 71 Neb. 108, cited by defendants, does not rule the instant case. In the cited case a belated creditor sought to have time extended so that he might file a claim against an estate. The county court denied the request, and on appeal to the district court the order of the county court was vacated and permission given the creditor to file his claim in the lower court. We held that the appeal brought the entire subject matter concerning the proposed claim to the district court. The claim in the *Ribble* case was a distinct controversy between the claimant and the representative of the estate. In the instant case the claim of the administrator for compensation is as clearly separate from the other part of his account.

2. It is contended that the administrator was not entitled to compensation other than the fees allowed by section 283, ch. 23, Comp. St. 1907. The succeeding section, however, permits such further allowance as the probate judge shall deem just and reasonable "for any extraordinary services not required of an executor or administrator in the common course of his duty." Defendants insist that many of the services for which plaintiff was given compensation were neither extraordinary nor out of the common course of his duty as such official, and that some of them did not relate to the administration of said estate. To some extent the claim is well founded. The estate, while considerable, was free from debt. After Hibner's appointment an attempt was made by interested parties to probate an alleged lost will of the deceased

wherein Hibner had been designated as executor. The litigation continued some time, and terminated in favor of the contestants. Mr. Hibner appeared as a witness for the proponents in said litigation, and claims to have given considerable attention to the case in the interest of the estate. Such conduct was entirely voluntary. Mr. Hibner was an officer of the county court, and had no proper concern with the outcome of the litigation over the will. If the will had been allowed, it would have been his duty as administrator to account to himself as executor. As it was defeated, he merely continued his duties as administrator. Pending the settlement of the estate Mr. Hibner brought an action for one of the heirs for a partition of the real estate of which Wilson died seized, and all parties interested were impleaded therein. Thereupon various of the heirs claimed that some of said litigants had received advancements from the deceased, and asked to have an accounting with regard thereto. It was charged that $5,000 had been advanced to Mr. Hibner's client, and plaintiff defeated that claim. He also succeeded in having an advancement of less than $2,000 charged against one of the other heirs. For none of those services should he, as administrator, be allowed compensation. All of the debts and funeral charges had then been paid. The deceased was not survived by a widow or any children. There were more than sufficient funds in the administrator's hands to pay all costs of administration, and he did not have any duty as such official to perform in said action, except to file a disclaimer if impleaded as a party therein. Plaintiff also claimed compensation because various of said heirs had frequently called at his office and talked with him about the estate and thereby secured his counsel. We do not understand that Mr. Hibner was thereby rendering the estate any service within or without the course of his duty. His duties were simple and easily understood—to collect the assets and rents, preserve and protect the estate, resist unlawful claims, and pay out

money on the order of the court or for the useful purposes of administration.

Plaintiff charged the estate $2,000 for legal services rendered. Defendants assert that plaintiff is not entitled to any compensation therefor, but we do not agree with them. The property of the estate was worth $80,000 and, if the administrator had been a layman, common prudence would have dictated that he secure counsel to assist him in said settlement. To the extent that such services were necessary and beneficial to the estate, he could have charged the estate therefor. *Marshall v. Piggott,* 78 Neb. 722; *Estate of Rapp v. Elgutter,* 77 Neb. 674. Section 284, ch. 23, Comp. St. 1907, authorizes the probate judge to allow for services extraordinary in their character and out of the common course of the duty of the administrator. While it would have been within the course of plaintiff's duty to have secured the services of an attorney, it was not within that duty for him to perform those services himself, and in the discretion of the court he may be allowed therefor. *Wisner v. Mabley Estate,* 74 Mich. 143. Plaintiff in his official capacity is a trustee and an officer of the court. *Henry v. Henry,* 73 Neb. 746. In such case, where the trustee seeks to charge the trust funds in his possession for his services, his claim should be closely scrutinized and the benefit of all doubt given to the estate.

3. As to the $2,775 claimed by plaintiff for extraordinary services rendered by him as a business man in securing tenants for the property, collecting rents, attending to repairs, securing insurance, hiring janitors, paying taxes, and looking after a heating plant used jointly by the estate and the First National Bank, we are of opinion that some allowance may be made in the discretion of the court therefor. No hard and fast rule can be laid down to govern all cases, nor can we do more in the instant one than to say that the trial court should exercise a wise discretion, so that neither the heirs of the decedent on the one hand nor the officer of the probate court on the other will be dealt with unjustly in this matter. In the instant

case the administrator seems to have exercised most commendable diligence and to have collected some $15,000 in rentals without any loss to the estate, and no injustice will be done defendants by making a reasonable allowance to him therefor. *Ivey v. Coleman,* 42 Ala. 409; *Estate of Beideman,* Myr. Prob. Rep. (Cal.) 66; *In re Estate of Wolfe,* 4 Ohio N. P. 336. It is evident, however, that the administrator was permitted to recover for services that should not have been charged against the estate.

4. As this case must be reversed, we suggest that the issues joined should be tried by the court, and not submitted to a jury. The subject matter of the litigation relates solely to remunerating an officer of the court for the transaction of its business. *Ford v. Ford,* 88 Wis. 122; *Schinz v. Schinz,* 90 Wis. 236; *In re King's Estate,* 113 Mich. 606. Unsatisfactory results will ordinarily follow submitting that question to a jury. Although we held in *Sheedy v. Sheedy,* 36 Neb. 373, that, on appeal from an order of the county court fixing a widow's allowance, either party was entitled to a jury trial, that rule does not apply in the instant case, nor will it control in the settlement of executors' or administrators' accounts, which, when resisted, present an accounting merely, to be determined by the judge, and not by twelve men who would not have the proper data before them or facilities for ascertaining and striking a proper balance.

The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

It is my opinion that the appeal of the administrator from the allowance of a part of his account opened up the whole question of the correctness of said account and that the district court erred in limiting the investigation to the one question of his compensation.

DEAN and ROSE, JJ., concur.

WILLIAM FOUSE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,789.

1. **Criminal Law**: ROBBERY: EVIDENCE. In a prosecution for robbery, it was proper for the state to prove that in the afternoon of the day that deceased was killed and robbed, and preceding the time he left his abode for the city where he was killed, he had considerable money in his possession, even though no part thereof is traced into the possession of defendant.

2. ———: REVIEW. An answer responsive to a question should not be stricken from the record.

3. ———: TRIAL: DISCRETION OF COURT. It is within the discretion of the trial court to permit a witness used by the state on rebuttal to testify, even though all witnesses were ordered excluded from the court room, and said witness had not obeyed the rule.

4. ———: MOTION FOR NEW TRIAL: AMENDMENT: REVIEW. This court will not review an order made by a district court refusing a defendant permission to file an amendment to his motion for a new trial, where such application is made more than three days after the return of verdict.

5. ———: INSTRUCTIONS: CONFESSIONS. A statement freely and voluntarily made by a defendant not induced by threats or promises, wherein he admits that he had participated in the main facts essential to constitute the crime for which he is being tried, may properly be referred to by the court as a "confession."

6. ———: ———: REVIEW. If the evidence does not tend to prove that defendant, at the time he committed the acts complained of, was intoxicated to such a degree as to interfere with his judgment and understanding, and defendant testified clearly and plainly to the transaction, and claimed that he acted in self-defense, this court will not examine an instruction whereby the trial court submitted to the jury the defense of intoxication.

7. ———: CONFESSIONS. The court may permit a police officer to testify concerning statements made to him by defendant, even though such defendant at said time was handcuffed and in the custody of said officer, where it is apparent that the statement was voluntary, and not induced by threats or promises.

8. ———: VIEWING PREMISES: DISCRETION OF COURT. It is entirely within the discretion of the trial court to order, or refuse to permit, the jury to inspect the scene of the alleged crime.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed: Sentence reduced.*

Frank Crawford and *Henry G. Meyer,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

ROOT, J.

One Joseph Bowles came to his death as the result of an assault committed during the night of December 11, or the early morning of December 12, 1907. William Fouse, who will be referred to hereafter as the defendant, was informed against for causing said death while perpetrating a robbery. From a conviction, which resulted in the death penalty, defendant has appealed. Counsel advance various reasons for reversing said judgment.

1. That the court erred in permitting a witness to testify that between lunch and 4 o'clock of December 11 he noticed that Bowles had money in his possession. Bowles was a soldier stationed at Ft. Crook, which is about 12 miles from the city of Omaha where the crime was committed. Bowles came to Omaha from Ft. Crook, and was dissipating in a disreputable part of said city that afternoon and the following night. While it is not shown by direct evidence that defendant secured any money from the person of the deceased, yet there is evidence that defendant was with Bowles during the afternoon and evening of December 11, and we think the reception of said evidence was proper.

2. The witness Savage, who had charge of the detective force of the city of Omaha, testified for the prosecution that in a conversation with defendant he referred to the fact that said prisoner's coat was stained with blood, and told him, "You must have murdered that man," and in response defendant, after some hesitation, said, "I will

tell the truth," and told his story. Counsel moved to strike out the latter part of said answer as not responsive to the question, which the court overruled. The answer was responsive, and the court did not err.

3. It is claimed that one Julia Rose, a witness for the state on rebuttal, should not have been permitted to testify because the court had entered a rule that all witnesses should be excluded from the court room, and that she remained after said order was made, and heard other witnesses testify, and that the court also erred in refusing to permit defendant to prove said fact. Assuming that said witness was in the court room, which she denied, it was within the discretion of the court to permit her to testify. *Bone v. State,* 86 Ga. 108.

4. That the court erred in refusing to permit defendant to amend his motion for a new trial. The application was made more than three days after return of verdict, and the ruling of the court was right. *Lillie v. State,* p. 268, *post.*

5. That the court erred in giving instruction numbered 15. Therein the court advised the jurors that a confession freely and voluntarily made by a defendant may be received in evidence, but that it was insufficient in itself to convict him, and should be received with great caution. Defendant had signed a writing wherein he admitted striking Bowles on the head with a brick, but claimed that he acted in self-defense, but admitted that he had taken Bowles' watch and knife. Defendant denied making that part of said statement relating to the taking of personal property from the body of the deceased. Strictly speaking, the statement was not an admission that defendant had committed the crime, but there was evidence of oral statements made by deceased at other times, to which the instruction would to some extent apply. Moreover, the statement was in a sense a confession, as it connected defendant with many of the main facts essential to constitute the crime charged in the information, and the in-

struction, in view of all of the evidence in this case, was not erroneous. *Austin v. State,* 15 Tex. App. 388.

6. It is urged that the court should not have permitted the witness Donohue to testify to a statement made by defendant during the time said witness was accompanying defendant from the coroner's inquest to the jail. Donohue, who is a policeman, stated that Fouse, without any threats or promises made to him, asked the witness if he thought that, if defendant pleaded guilty, he would get off with a life sentence in the penitentiary. Counsel suggest that, as Fouse was then handcuffed and in custody of the officer, his statement was not voluntary, and that Fouse testified that he had been threatened with great bodily violence unless he did confess. At the time the court admitted Donohue's testimony Fouse had not testified and a sufficient foundation was laid for the introduction of said testimony. Moreover, the court instructed the jurors that they should receive all of the testimony given by policemen and detectives with great caution, and that a confession should not be considered unless made voluntarily, and not under the pressure of threats or promises. The testimony was properly admitted.

7. Counsel contend with great fervor that instruction numbered 13, given by the court, is erroneous. Therein the court assumed to instruct the jurors concerning the defense of intoxication. It is not necessary to ascertain whether it gave defendant the benefit of the law upon this subject, because we are satisfied that the evidence did not warrant submitting that defense to the jury. Defendant was a witness in his own behalf and detailed the transaction, claiming self-defense. While he states that he was intoxicated, he does not claim that he did not know what he was doing. The testimony of the woman to whose house defendant went immediately after his encounter with Bowles shows clearly that Fouse requested admission and shelter because he was cold and had been drinking, and it is related that the woman's girl stated that defendant was then drinking. Something like an hour or

two thereafter this woman did go to defendant's aid, and found him stupid and thereupon, with the aid of a companion, she dragged him into her room, and prepared a pallet, whereon he slept until the morning, but there is not a particle of evidence that even suggests that Fouse at the time he killed Bowles did not know or appreciate the nature of said act or that he was incapable of forming an intent to rob his victim. Whatever benefit defendant received from said instruction was more than he was entitled to under the facts, and he ought not to complain.

8. It is suggested that the court abused its discretion in not permitting the jurors to visit and inspect the scene of the crime. There is a conflict in the testimony as to whether or not at said point there were bricks lying on or imbedded in the ground. This fact is important as tending, possibly, to explain that defendant did not carry to said location the brick used by him. The court had suggested that the jurors would be permitted to view said premises, but later refused to permit such examination. Counsel say that they relied on said promise, and did not prepare themselves with rebuttal testimony on said point. The jurors were permitted to inspect photographs taken December 13, which advised them quite fully as to the condition of said premises. Testimony pro and con on said subject was also given, and a view of the premises would have furnished cumulative evidence only, confused with evidence as to whether or not conditions were the same at said point as at the time Bowles was killed. The court did not abuse its discretion in ruling as it did.

9. It is most strenuously argued that the verdict is not sustained by the evidence. The testimony is conclusive that Bowles came to his death as a result of blows inflicted by some blunt instrument on his head. Defendant admits that he engaged in an altercation with the deceased and struck him at least two severe blows on the head, and that he employed a brick for that purpose, and left deceased senseless on the ground during a cold night in February. Defendant made no attempt to succor de-

ceased or to notify any person of Bowles' precarious condition. The following day a watch and knife, the property of Bowles, were found in defendant's possession. It is true that defendant testified that Bowles had assaulted and cut him with a knife because he did not comply with a request made by Bowles, and that the watch and knife were put in defendant's pocket by a colored man who has since said date left the state. From the evidence, the jury might logically find as they did, that defendant assaulted Bowles for the purpose of robbing him, and that he carried out his purpose. The verdict is sustained by the evidence.

10. It is suggested that the death penalty ought not to be inflicted, and all members of the court participating in this decision are agreed with counsel on this point. The crime was committed in that part of Omaha inhabited by degenerates, white and colored, and where an intoxicated person would not be safe were it known, or suspected, that he had any money in his possession. Bowles had been drinking in the saloons and visiting houses of ill-fame in the afternoon and evening of the day he was killed. He had money when he started on said trip, and expended a part thereof in those places, and this fact and his condition was manifest to many individuals in that quarter. It is possible, although not probable, that defendant did not kill the deceased, or that Bowles was the aggressor, or that robbery was an afterthought. There is considerable evidence in the record tending to prove that Fouse was an industrious man and generally bore a good reputation as a law abiding citizen.

For the foregoing reasons, the judgment of conviction is affirmed, but the penalty is changed to imprisonment in the state penitentiary at hard labor during the natural life of defendant.

AFFIRMED: SENTENCE REDUCED.

ROSE, J., not sitting.

HOMER FOSTER V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,848.

1. **Criminal Law**: SERVICE OF COPY OF INFORMATION: WAIVER. An information was filed with the clerk of the district court charging that F. had committed a felony, and the same day he pleaded not guilty. A copy of said information was not delivered to F., but thereafter he procured an order of the court for compulsory attendance of witnesses and permission to take depositions. Three months later a jury was impaneled and sworn in said case, and after the state had called a witness and propounded three questions, F. for the first time objected that he had not been furnished a copy of said information. *Held*, That the court did not err in overruling said objection.

2. ———: COUNSEL: APPOINTMENT AFTER PLEA. The court did not appoint an attorney for F. until after he had entered his plea of not guilty. *Held*, That it was not error to thus receive said plea.

3. NEW TRIAL: MISCONDUCT OF JURY. After submission of the case, and while the jurors were in charge of a bailiff, five of them were permitted to remain in a room with locked doors, and the remaining seven were taken by said bailiff to a toilet room. One of said jurors returned in advance of his companions. It affirmatively appeared that no one approached any of the jurors or communicated with them concerning said case. *Held*, Not misconduct of the jury or irregularity in the proceedings sufficient to justify a new trial.

4. **Robbery**: EVIDENCE: SUFFICIENCY. The evidence disclosed that defendant and one S. were strangers to each other until December 5, and that after dark of said day they were together at a small railway station; that each to the knowledge of the other had a small sum of money; that defendant demanded that S. should "dish up" or "divy up," saying also "hands up," and received two or three silver dollars which S. handed to him. *Held*, That a verdict of guilty of robbery from the person is sustained by the evidence, although S. later attacked and wounded defendant and recovered his money, and the evidence further established that each party was at said time somewhat under the influence of intoxicating liquor.

ERROR to the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering and *A. L. Tidd,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

ROOT, J.

Defendant was convicted of committing the crime of robbery from the person, and from the minimum sentence of three years appeals to this court.

1. It is argued that defendant should not have been tried because he was not furnished a copy of the information, as required by section 436 of the criminal code. The objection is without merit. The statute was enacted for the wise and beneficent purpose of advising a defendant of the nature of the charge against him, and to give him at least 24 hours to prepare to plead thereto. The alleged crime was committed December 5, 1907, and within a few days thereafter defendant was arrested and given a preliminary examination, at which time he was represented by counsel. December 16 defendant was arraigned in district court and entered a plea of not guilty. Prior to that date the deputy clerk of the court had presented a copy of the information to said attorney, who handed it back to that official, with the statement that he did not then represent the accused. December 26 defendant entered into a recognizance for his appearance at the next term of court, and on the 15th day of February, 1908, made an affidavit to be used in securing an order for compulsory process and the taking of depositions, wherein he swore that the information charged him with the crime of robbery from the person. The court's attention was not challenged to the fact that a copy of the information had not been served on defendant until after a jury had been impaneled, a witness sworn, and three questions propounded. The objection was overruled, as it should have been. The right to have a copy of the information is one that a defendant may waive. *Barker v.*

State, 54 Neb. 53. By his conduct defendant waived all right to object to his situation.

2. That the court erred in neglecting to appoint counsel for defendant prior to his arraignment. The record does not disclose just when counsel was appointed, but we assume that it was subsequent to the entry of defendant's plea. Doubtless, had counsel desired to present any defense other than "not guilty," the court would have permitted defendant to have withdrawn his plea for that purpose; but the record does not disclose such request. Moreover, the certified record which defendant has presented for our consideration recites that he was accompanied by his attorney when he entered said plea. The objection is without merit.

3. That there was misconduct of the jurors in escaping from the custody of the bailiff while considering of their verdict, and in separating from each other after the submission of the case. The facts as we glean them from the bill of exceptions, seem to be that the jurors were confined in a room on the third floor of the court house; that the toilet room was in the first story of said building, so that it became necessary from time to time to take the jurors from one room to the other; that on one occasion seven of said jurors were taken by the bailiff to said toilet room, leaving the other five jurors in a room on the third floor. On returning, one of the seven jurors was some distance in advance of his companions, and stood beside the door to the jury room waiting for the bailiff to unlock the same. It affirmatively appears that no one communicated with said jurors during said time, and there could not have been any possible prejudice to the defendant, unless the mere separation of the jurors under the aforesaid circumstances as a matter of law invalidated their verdict, which was later rendered. Under the facts defendant was not prejudiced. *Spaulding v. State,* 61 Neb. 289.

4. Finally, it is urged that the verdict is not supported by the evidence. Because of the severity of the law

which compels a sentence of at least three years' imprisonment if a defendant is found guilty, we have carefully read all of the evidence, and feel an abiding conviction that the jurors were justified in returning a verdict of guilty. Defendant and one Smith met as strangers in Omaha, and went together to South Bend, some 30 miles distant, for the purpose of securing work. Not receiving much encouragement, they determined to leave said village that night. Both Foster and Smith had been indulging in intoxicating liquors and each was possessed of a small amount of money, of which fact the other had cognizance. While waiting outside the station for a train, defendant admits that he demanded Smith to "dish up" or "divy up." Smith says that defendant also ordered "hands up," and placed his hand back toward his hip pocket, whereupon Smith delivered three or four silver dollars to defendant, but later drew a pocket knife and attacked Foster, wounding him, recovered Smith's money, and then took defendant into custody and delivered him to the village authorities. Defendant on cross-examination stated that he only referred to a bottle of whiskey in Smith's pocket, and had no intention of securing money from his companion, but later admitted that he wanted 50 cents that he claimed to have lost, and suspected that Smith had taken. Smith is corroborated by the witness Fountain in many important particulars, and, after all is said, the record on this point presents simply a question of veracity of witnesses, which it was the jurors' peculiar province to determine. If they believed Smith's testimony and rejected that given by defendant, as they had a right to do, the verdict is sustained by the evidence.

No complaint is made concerning the instructions. There is considerable evidence in the record tending to show that defendant bore an excellent reputation for honesty and as a law-abiding citizen in the neighborhood of his old home and that of his parents in Kansas. He has traveled extensively, but seems to have been indus-

trious, and, when not under the influence of intoxicating liquor, trustworthy and honest. We regret that we cannot reduce his sentence to one year in the penitentiary, but under the statute under which he was convicted we are powerless in the premises.

The record is without error, and therefore the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

JAMES LILLIE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,928.

1. **Criminal Law**: INFORMATION: JOINDER: ELECTION. If the state joins in one information three separate counts, charging robbery, assault with intent to commit robbery, and an assault with intent to do great bodily harm, and all counts refer to the same transaction, the defendant is not prejudiced if, before he introduces any evidence and as soon as the matter is brought to the court's attention, it compels the state to elect whether to prosecute on the first and second or upon the third count.

2. ———: MOTION FOR NEW TRIAL: AMENDMENT: REVIEW. More than three days after the return of the verdict defendant by leave of court complained of the court's failure to give an instruction tendered by defendant. He did not claim that he was unavoidably prevented from including said assignment in his motion for a new trial, which was filed within time. *Held*, That the refusal of the court to grant a new trial for any reason set out in said amendment will not be reviewed in this court.

3. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted for newly discovered evidence that is cumulative, unreasonable and incredible, and was known before trial to defendant's brother, who was in the county and immediate neighborhood of the crime at the time it was committed and until trial.

4. ———: EVIDENCE: IDENTIFICATION OF ACCUSED. Where the complaining witness positively identified the accused as his assailant, and his testimony is sustained by many facts established by dis-

interested witnesses and the subsequent conduct of the accused, the verdict will not be set aside because of defendant's denial corroborated by an alibi sought to be established by the testimony of a nephew and niece.

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

L. Crocker and *W. H. Ashby,* for plaintiff in error.

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

ROOT, J.

Defendant was convicted of committing the crime of robbery from the person, and, from a sentence of eight years' confinement at hard labor in the state penitentiary, he appeals.

1. The first count in the information charged defendant with robbery from the person, the second with making an assault with intent to commit a robbery, and the third an assault with intent to commit great bodily injury. On the 24th day of March, 1908, a jury was impaneled to try the issues joined by defendant's plea of not guilty, and the same day defendant filed a motion that the state be required to elect whether it would prosecute defendant upon the first and second or the third count in said information. The following day the motion was presented to the court and sustained. Whereupon the state elected to proceed under the first and second counts. It may be doubted whether the court should have sustained the motion, as the alleged crimes all grew out of the same transaction. *Jackson v. State,* 39 Ohio St. 37; 1 Bishop, New Criminal Procedure, sec. 449; *Miller v. State,* 78 Neb. 645. Conceding, for the sake of argument, that the counts charged separate and distinct offenses, defendant might have been lawfully tried therefor unless he made seasonable objections thereto. (1 Bishop, Criminal Procedure, sec. 449); and, the court having ruled in favor of

defendant as soon as the motion was presented and before he had commenced his defense, the accused is without standing to complain in this court.

2. It is argued that the court erred in refusing instruction numbered 3 requested by defendant. While the instruction was proper, its subject was much the same as that of the eleventh instruction given by the court on its own motion. Defendant did not assign the action of the court in refusing to give said instruction as error in his motion for a new trial but more than three days after the return of the verdict was given permission to, and did, file an amendment to said motion and therein made such complaint. Defendant did not claim that he was unavoidably prevented from filing said assignment within three days and the ruling of the court thereon is not subject to review. *Davis v. State,* 31 Neb. 240; *Willis v. State,* 43 Neb. 102; *Aultman, Miller & Co. v. Leahey,* 24 Neb. 286; *Gullion v. Traver,* 64 Neb. 51; *State v. Dusenberry,* 112 Mo. 277; *State v. Hunt,* 141 Mo. 626.

3. Defendant asserts that a new trial should have been granted because of the discovery, subsequent to the return of the verdict, of material evidence. This assignment is supported by the affidavit of George Lillie, a brother of the accused, who stated that on the evening of December 11, the day the crime was committed, he was working for his mother at a point south of the scene of the crime; that about dark he heard shouting and the discharge of firearms in the direction of Frank Lillie's place, and soon thereafter two men on horseback rode out of Frank Lillie's pasture into the highway, which runs north and south, and galloped south; and that he had never disclosed those facts to his brother because he apprehended trouble from the Martins. The statement does not seem reasonable, and it seems incredible that affiant would have kept this knowledge locked within his own breast while his brother was on trial. Defendant and his counsel testified that they did not know of said facts until after verdict but we do not think that there was a show-

ing of diligence on their part. Affiant does not state that either of the horsemen were strangers, and, for all his affidavit advises us, one of them may have been the defendant himself. Criminal trials would never end if immediate relatives of an accused may wait until after verdict and then come forward with disclosures of evidence, and a new trial be granted.

4. It is claimed that the evidence does not sustain the verdict. We have read the evidence with great care, and to our mind the verdict of the jury is the only one that should have been returned thereon. Thomas Martin had supped with Frank Lillie, a brother of, and with the accused, and stated to them that he had cashed his pension check that day. About dusk the accused with three of his brother's children started for church some two miles distant. Martin lingered from 15 minutes to half an hour, and started home in the direction traveled by the accused, and was assaulted, beaten and robbed within 150 yards of Frank Lillie's home. Martin testified positively that he recognized defendant as his assailant. Defendant arrived at church something like a half hour subsequent to the arrival of his nephew and nieces, and five witnesses noticed blood on his hands and the cuffs of his shirt. Subsequent to the transaction defendant concealed himself, and later fled to the state of Washington, from whence he was extradited. Defendant, his nephew and one of said nieces stated that James Lillie rode in the buggy until within 70 yards of the church, at which point he alighted for the purpose of vomiting; that the children drove on, and that defendant followed them some five or ten minutes later. One of the nieces did not testify, nor is any explanation given for her absence, and the nephew stated to the sheriff in the presence of his deputy the day after the crime that his uncle got out of the buggy over a mile from the church, and within less than a fourth of a mile of the point where Martin was robbed. There is evidence in the record that Martin has made contradictory statements concerning the person who assaulted and robbed him, and

there is some evidence tending to corroborate defendant's testimony, but the credibility of the witnesses was for the jury, and not this court, to pass upon.

The court fairly instructed the jury, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

WALTER O. SHULTS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 23, 1909. No. 15,443.

Railroads: LICENSEE: DUTY OF LICENSOR. "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, approved and followed.

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

J. E. Kelby, Halleck F. Rose, Frank E. Bishop and *Fred M. Deweese,* for appellant.

Shepherd & Ripley, contra.

FAWCETT, J.

On February 28, 1906, the yards of defendant in the city of Lincoln, in which freight trains were made up and freight cars weighed, consisted of a network of tracks, which, by reason of limited area, ran very close together. By reason of the large number of trains and cars handled in such yards, both night and day, it was a very busy place, and a very dangerous place for persons not familiar with the business of the yards. It was used exclusively for the purposes of defendant, and was not in any man-

ner open to the public. On the evening of that day, some time between 7:30 and 10 o'clock, the plaintiff went to the night yardmaster, and, as plaintiff testifies, "asked him if he could tell me where Kimballs' two cars were, and if I could get permission to go and see him; that I had some business to transact, and he told me they was over northeast. I believe he said X six, or six X, something. If they are not on that track, they are on the scale track, in the neighborhood. He said: 'You go down in there, and some of the hands will show you where they are.' I went down there, and got there without any accident. I was pretty cautious not to have any. I kept track of the tracks wherever I went across. * * * I found a man there with a brakeman's lantern. * * * I asked him where Kimballs was, and he said they were over in the car, and showed me the light in the car door. * * * I went right down to the car and got in. I found my cousins there." It seems that the Kimballs were cousins of plaintiff, and were shipping two cars of freight from Palmyra to York. One of the cars was what is called an "emigrant" car. In one end there were five horses and three mules, standing crosswise in the car, and tied to a piece of 2 by 4 spiked to the side of the car. The other end of the car contained farm implements and household effects. The middle of the car between the two side doors was a clear space where the Kimballs were riding, and where it appears they intended to sleep that night. The horses and mules were separated from the rest of the car by two pieces of 2 by 8 and two pieces of 2 by 4 timbers across the car, fastened with 20-penny spikes. After entering the car plaintiff and the Kimballs sat down and engaged in friendly conversation. About 15 or 20 minutes after they had seated themselves the car in which they were seated suddenly received a severe jolt by having other cars bumped against it, the result of which was that the horses and mules were thrown off their feet, their tie straps and ropes broken, and the animals precipitated

through the barricade, completely breaking it down. Plaintiff and his cousins testified that one of the mules fell across plaintiff and the other animals upon top of the mule, the result being that plaintiff was so severely injured that he was laid up for a number of months, and, as he claimed, was not entirely well at the time of the trial. The trial resulted in a verdict and judgment for plaintiff for $1,000, from which judgment defendant appeals.

There is no dispute that plaintiff received the injury complained of, and in the manner above stated. Plaintiff argues that the shock to the car was so great as to show negligence on the part of the defendant. The testimony of the train crew doing the switching is that they had been weighing the cars upon that track. The weighing was done by pushing the cars up an incline to an elevation of some five or six feet, and, when the top of the elevation was reached, uncoupling them, one at a time, and permitting them by gravitation to pass down and over the scales, which weighed each car automatically as it passed over. The evidence also shows that, in order to permit a correct weighing by the automatic scales, a car must pass over it at a low rate of speed; that a speed of even five or six miles an hour would be so great that the scales would not correctly weigh the car. The members of the train crew all testified that on that evening, while handling and weighing the cars which caused the injury, the work was done in the usual and customary manner, no greater speed or bumping of cars occurring than was customary in the yards.

When both sides had rested, defendant moved the court to instruct the jury to return a verdict in favor of the defendant, which motion was overruled. The question as to whether or not the court erred in overruling this motion depends entirely upon the duty which defendant owed plaintiff at the time he received the injury complained of. The night yardmaster was called by defendant and interrogated as to what took place at the time plaintiff received his license to enter the yards. He says: "The gentleman

that came into my office asked me about a car that was shipped from Palmyra to York. Q. Anything said about who was with it? A. Well, not that question. That was the first question that the gentleman asked me, and I asked the bill clerk if we had anything of that description, and he said we had a car of emigrants that came in from Palmyra on 3, and that the car was going to York. So I then told the gentleman. I told the gentleman that the car was there, and he asked me where he could find it. He said that the car was shipped by his cousin, and that he wanted to see him, asked me about where the car would be situated, and I told him that the car would have to be weighed here, and it would undoubtedly be on X 6. Q. That the scale track? A. The scale track. At least, if it wasn't there now, it soon would be. Well, he said that he guessed he could find it all right, and he asked me was the scales situated where they formerly was near the same house, and I told him 'Yes,' and I said to him, I said, 'You belong with the car?' and he said, 'It is my cousin's car, and I want to see him.' He says, 'I live here in town, and they are shipping through, and I haven't seen him for some time, and I want to see him.' And I said, 'Well, you understand this is a very dangerous place here,' I said, 'for anybody to be prowling around through the yard.' Q. About what time was it? A. This was, I should say, about 7:30. I know I had just got done my little preliminaries for starting the men at work at 7 o'clock after coming to the office and sitting down to the desk. He said he realized that, and I said, 'If you go down into the yards, you go at your own risk,' and he smiled, and started out of the office; and I said, 'You are not even safe right here in the office.' I said that in a bantering way more than anything else, because I thought he was ignoring what I said to him. I said, 'You are not even safe right here in the office in the Lincoln yard.' With that he turned and went out of the office. I did not see the man again until he was taken out of the car."

Plaintiff on redirect examination, while testifying in chief, was asked this question: "Q. Did you have any conversation with this overseer or yardmaster, the man that directed you about the dangers of the place? A. Well, not only he said I would have to be pretty careful. Q. Were you careful? A. I was. As I stated once before, I went up between the tracks where the brakey walks, so in case a collision or anything of that kind comes with the cars I would be out of danger." On recross examination he testified: "Q. You say that the man did warn you that that was a dangerous place? A. Yes; he said I would have to be careful. Q. Well, did he say anything more than that? A. Not that I recollect; no, not only giving me the directions. Q. But about the taking care? A. Sir? Q. About taking care, or about the risk of the place? A. No, sir; he didn't say anything, only he says you want to be careful, it is dangerous, something of that kind. Q. You don't pretend, then, to remember all that he said about that? A. Well, that is in the neighborhood of all he said." Plaintiff was placed on the stand in rebuttal, and testified as follows: "Q. Mr. Shults, when you went into the yard office and asked permission to go out to these cars, to where they were, state whether or not the yardmaster said to you that, if you went out there, you must go at your own risk? A. I think not. He said nothing of that kind as I understood."

This is substantially all of the testimony in relation to the permission that was given plaintiff to enter defendant's yards on that occasion. Viewed in the light most favorable to plaintiff, it establishes the fact that when he entered the yards of the defendant, and at the time he was injured, he was a bare licensee. He was not there as a passenger or servant, nor under any contractual relation with the defendant, but had been permitted to enter upon the premises for his own interest, convenience or gratification. In such a case the authorities substantially all say that the rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such

premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or wilfully cause him harm; that the licensee enters upon the premises at his own risk, and enjoys the license subject to its concomitant perils. 29 Cyc. 451, and notes 69 and 70, citing a large number of authorities from many states, including the decision of this court in *Chesley v. Rocheford & Gould,* 4 Neb. (Unof.) 768. In that case we held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." The writer presided as the trial judge in the trial of that case, and, following the well-established rule, directed a verdict in favor of the defendant, which this court affirmed. The same rule is announced in 3 Elliott, Railroads (2d ed.), sec. 1250, where reference is made to a long line of decisions in support of the text. In December, 1907, the supreme court of Illinois in considering this rule said: "If a mere licensee goes upon another's premises for purposes of his own, and not for any purpose connected with the owner's business, the owner's duty to guard him against injury is governed by the rules applicable to trespassers, and he can recover only for an injury knowingly and wilfully inflicted." *Pauckner v. Wakem,* 83 N. E. 202, (231 Ill. 276). In *Glaser v. Rothschild,* 106 Mo. App. 418, 80 S. W. 332, the same rule is announced, and *Chesley v. Rocheford & Gould, supra,* cited with approval.

Counsel for plaintiff place a good deal of reliance upon *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645, and *Omaha & R. V. R. Co. v. Wright,* 47 Neb. 886, but those cases are clearly distinguishable from the case at bar. In the former case it appears that about 2 o'clock in the morning a special freight train, west-bound, failed to get onto a side-track at Mullen in time to get out of the way of an east-bound train, which resulted in a collision that

piled the two engines and a number of cars up in a heap upon the two tracks and upon the space between them. Wymore was a section foreman in the employ of the railroad company, and resided in a section house upon the right of way of the railroad, south of the tracks, west of the station, and almost due south of the point where the west-bound engine stood at the time of the collision. A young lady who had come to Mullen that day for the purpose of taking a passenger train which was due about half past 3 o'clock in the morning had gone to Wymore's house, and she and Wymore left the house for the depot about 2 o'clock. When the wreck was cleared away, their dead bodies were found beneath the wreck and between the side-track and the main track. A public roadway, accessible from Wymore's house, crossed both tracks between Wymore's house and the station, which was situated north of the main track. In the opinion it is said: "The inference is that Wymore and Miss Wilgus, on leaving the house, found the roadway blocked by the west-bound train on the side-track, and, in the effort to reach the station, crossed the side-track at a point almost north from Wymore's house, and were proceeding between the two tracks toward the depot when the wreck occurred. There was evidence tending to show that the tracks were at that point from 15 to 25 feet apart. * * * We can conceive a case where the right of way of the railroad is protected by fences, where ample means of ingress are offered the passenger by absolutely safe methods, and where the attempt of a person to approach a station along the right of way would be so hazardous, so difficult, or so unusual that a jury could hardly be justified in finding that the company in operating its trains should be required to exercise any precaution to avoid injuring such persons. On the other hand, there are many stations in this state where the station house stands upon the open prairie, where the means of approach are by roads which are nothing more than partly beaten paths over the prairie, where the most convenient and the generally used means of access is over

and along the company's tracks. In such a case the company has every reason to expect that persons having occasion to approach its station probably will be found near the station and along and upon its tracks, and a jury might reasonably find a company wanting in due care in the operation of its trains under such circumstances where such an inference, under the circumstances first mentioned, would be unreasonable." Under that state of facts we said in the second paragraph of the syllabus: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way."

In the latter case above cited the action was to recover damages on account of cattle, belonging to plaintiff, killed and injured by a train of the railway company. The allegations of the petition were: "First, that a gate on one of the fences along the right of way was insufficient and negligently permitted to be out of repair, and that by reason of those facts the cattle got upon the right of way; second, that after they got upon the right of way their injury resulted from the careless operation of the train." The position taken by the defendant in that case was that the cattle were trespassers upon the right of way of the company. The evidence showed that there were about 340 cattle along the right of way; that, while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after 7 o'clock on the morning of December 15. Some of the witnesses testified that it was a clear morning and quite light at that time; others, that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that, "if the engineer saw the cattle, or by the exercise of due care should have

seen them, in time to stop the train and avoid the accident, the company was liable for his not doing so." On those facts we said: "It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and, if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced." We do not see how this case has any application to the case at bar.

We fully recognize the rule laid down in the former of the two cases above referred to: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way." But can such a rule be applied to the facts in the case at bar? We think not. The evidence shows that the train crew that was engaged in the weighing and switching of the cars which caused the injury to plaintiff had no knowledge, information or notice of any kind that plaintiff was in the car, or that there were any strangers in the yard. It is true the night yardmaster knew that plaintiff had gone down into the yard to see his cousin, who was on an emigrant car then in the yard; but we do not think it was any part of his duty to send word all through the yards to the various train crews there at work that he had given plaintiff a license to go into the yards on a private mission, and for them to be on the lookout to avoid injuring him. In other words, giving the most favorable construction to plaintiff's theory, before the company could be held liable under the facts in this case, plaintiff would have to show that the defendant's agents engaged in the switching and operating of the cars

which caused plaintiff's injury knew, or had reason to know, of his presence in the car. *Pettit v. Great Northern R. Co.*, 58 Minn. 120.

We deem it unnecessary to further pursue the citation or discussion of authorities, as a careful and painstaking investigation of our own has satisfied us that they are substantially all one way. Under this settled state of the law, defendant did not owe plaintiff any such duty as rendered it liable for the unfortunate injury which he received. The district court should have directed a verdict in favor of the defendant; and, for its error in refusing so to do, its judgment must be

REVERSED.

CORA M. DAVIS ET AL., APPELLEES, V. FRED F. BORLAND ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,414.

1. **Intoxicating Liquors:** ACTION FOR DAMAGES: PLEADING: EVIDENCE. In an action against the vendors of intoxicating liquors to recover damages suffered from the acts of an intoxicated person, it is sufficient, under the provisions of section 7168, Ann. St. 1907, to plead and prove that the defendants sold or gave intoxicating liquors to the intoxicated person, from whose act the damage arose, on the day or about the time the injuries to the plaintiff were received. In such cases the statute by its terms supplies allegations and proofs required in other actions for damages.

2. ———: ———: INSTRUCTIONS. In an action for loss of means of support caused by the death of a person, it is error for the court to instruct the jury that such loss began upon the death of the deceased person, and would continue as to one of the defendants "until such time as he would have lived had he been permitted to reach the end of his natural life, as indicated by the tables of expectancy, which have been introduced and received in evidence in the case," and especially is this true when there is tesimony in the case tending to show a serious injury suffered by the deceased previous to any sale of liquors made by the defendants, and which would naturally tend to shorten his life or to cause his insanity.

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

Heasty & Barnes, for appellants.

A. G. Wolfenbarger and *W. J. Moss, contra.*

DUFFIE, C.

The plaintiff, for herself and as next friend of her two minor children, brought this action against the defendants Borland and Greve, and the sureties upon their several liquor license bonds, to recover for loss of means of support caused by the death by suicide of Llewellyn H. Davis, the husband and father of the plaintiffs. The petition, after alleging that the defendants Borland and Greve had been licensed to sell intoxicating liquors and had executed the bonds sued upon, proceeds to state: "That Davis immediately thereafter commenced to drink in their saloons, and that said defendants furnished him intoxicating liquors in sufficient quantities to produce his intoxication; that in consequence his mental condition became seriously impaired as a result of his continued debauchery until, on or about the 15th day of July, 1904, the said defendant saloon-keepers, and each and all of them, separately and severally, by themselves and respective bartenders, agents and servants at their respective places of business in the said city of Fairbury, sold, gave and furnished to said Llewellyn H. Davis intoxicating liquors and drinks in sufficient quantities to produce his intoxication, and did thereby cause and produce his intoxication, and while under the influence of the intoxicating liquors so sold and furnished to him by said defendants, and each of them, the said Llewellyn H. Davis became irresponsible, despondent, and deranged in mind, and was incapable and unable to properly care for, control or protect himself, and while in said despondent, irresponsible and deranged condition, and while so intoxi-

cated, he, the said Llewellyn H. Davis, took, and with his own hand administered to himself, a deadly poison, to wit, carbolic acid, from the effect of which he then and there came to his death."

A demurrer to this petition, upon the ground that it failed to state a cause of action against the defendants, was overruled by the trial court, and this is the first error assigned. It is urged with great earnestness that the petition fails to show any connection between the act of the defendants in furnishing the deceased with intoxicating liquors and his suicide. In other words, that it is not alleged that the taking of poison which resulted in his death was caused by the sale of intoxicating liquors by the defendants. That there may be no misunderstanding, we quote from the defendants' brief upon this point: "The mere fact that a man kills another while intoxicated fixes no liability on the saloon-keeper. Liability attaches only when the jury are satisfied that intoxication caused or contributed to cause the homicide. If Davis killed himself while intoxicated, there is no liability, unless the jury conclude that the drinking of intoxicating liquors caused or contributed to cause the suicide." There can be no doubt that as a legal proposition the above quotation from the brief of the defendants is a correct statement of the general rule of law, and that in ordinary cases it is well settled that a petition, in order to state a cause of action, should set forth every essential fact which the plaintiff must prove in order to entitle him to recover. Our legislature, however, has created an exception in this respect in cases brought against the vendor of intoxicating liquors for damages sustained in consequence of intoxication arising from the sale thereof. Section 7168, Ann. St. 1907, is in the following language: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxi-

cated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." This section of itself supplies allegations and proof in respect to matters that are essential in the ordinary action. When damage has been suffered at the hands of an intoxicated person, the statute, in an action brought against the vendor to recover for such damages, raises a presumption in favor of the plaintiff that the sale which caused the intoxication, or which contributed thereto, was the cause of the injury; and, as stated in *Nowotny v. Blair*, 32 Neb. 175: "It was sufficient to plead and prove that the defendant sold or gave intoxicating liquor to the intoxicated person 'whose acts or injuries by him inflicted are complained of, on that day, or about the time when the acts were committed, or the injuries to the plaintiff were received.'" We conclude, therefore, that, under the statute and our former opinions, the petition states a cause of action, and that the demurrer thereto was properly overruled.

Error is further assigned in giving instructions 3 and 10 covering the measure of damages. In the third instruction the jury are told "that the loss of the means of support to said wife and children became permanent by the death of the husband and father, and the period covered by such loss began at the time of the death of the husband and father, and continued, as to the minor children, until they became of age, and as to the wife, from the death of the husband until such time as he would have lived had he been permitted to reach the end of his natural life, as indicated by the tables of expectancy, which have been introduced and received in evidence in

the case." The tenth instruction embodied the same principle, except that the jury were told that in making their calculation they were to use the Carlisle table of expectancy of life, which has been introduced in evidence on the trial. The objection to these instructions is based upon the fact that the jury were restricted to the tables of expectancy of life in determining the probable duration of Davis' life in ascertaining the damages sustained. There are numerous cases to the effect that tables of expectancy of life, while admissible for the purpose of showing the probable duration of the life of a deceased party, are not controlling in their effect as evidence, but that many other facts should be considered by the jury. The proper rule is stated in *City of Friend v. Ingersoll,* 39 Neb. 717. It is there said: "The Carlisle table of expectancy of life is competent and admissible in evidence as bearing upon and tending to prove the expectancy of life, but not conclusive of the question, and is to be received and considered by the jury as any other evidence, and subject to the same rules as to its weight and sufficiency as other testimony; and its statement as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party, such as testimony pertaining to the health of the party at the time of the injury upon which the action is based."

It is established by the evidence that about ten years previous to the death of Davis, he met with an accident, which resulted in the fracture of his skull at the base of the brain, producing his insanity, on account of which he was confined for a time in an insane hospital of the state. There was testimony, also, to the effect that a recurrence of his insanity might take place at any time without any new or intervening cause. In this condition of the case an instruction which in effect told the jury that they were to be guided by the Carlisle table of expectancy of his life and his earning capacity was erro-

neous and misleading. The jury returned a verdict for $1,750, and it is insisted that the instruction, if erroneous, was, considering the amount of the verdict, without prejudice to the defendants, the claim being made that the evidence established that the deceased contributed about $1,000 a year to the support of the plaintiffs. The partner of the deceased testified that the gross receipts from their business for the seven months previous to the death of Davis was from $175 to $200 a month, and their expenses from $50 to $75 a month. As said in *Greenwood v. King*, 82 Neb. 17: The damages "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, * * * under instructions which their oaths required them to follow, and which directed that the damages be measured by a broad and erroneous rule." We must presume that the jury followed the instructions of the court, and that they agreed on the amount of support which Davis contributed to his family each year, and then multiplied that by the years of his expectancy.

For the error of the court in directing an erroneous measure of damages, we recommend a reversal of the judgment.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

IN RE ESTATE OF F. W. BUERSTETTA. GRANT BUERSTETTA, EXECUTOR, APPELLEE, V. HENRY BUERSTETTA ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,353.

1. **Appeal:** QUESTIONS CONSIDERED. Where a judgment of the lower court and the disposition of the case in this court are not prejudicial to the interests of an appellant, this court will not consider an assignment of error that the lower court had no jurisdiction over the person of the appellant.
2. **County Court:** JURISDICTION: TITLE TO REAL ESTATE. The provision of section 16, art. VI of the constitution barring the county court from jurisdiction of actions in which title to real estate is sought to be recovered or may be drawn in question does not apply to cases wherein the title to realty is involved as an incident to an important litigable question of which that court has exclusive original jurisdiction.
3. **Wills:** CONSTRUCTION. In the construction of a will, the court will presume that the testator intended the will as a consistent whole, and will consider it in its entirety, its several parts with reference to each other, to ascertain, if possible, the meaning which the testator attached to any part thereof.
4. **Executor as Trustee:** TITLE TO REAL ESTATE. An executor, as a trustee, cannot hold the legal title to land devised for the use of the beneficiary, unless the testator has by his will expressly or impliedly created in him a trust estate other and different from that of executor, or unless a trust is made necessary that the intentions of the testator may be executed.

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

E. B. Quackenbush, for appellants.

Hugh La Master and *Burkett, Wilson & Brown, contra.*

EPPERSON, C.

This action was instituted in the county court of Johnson county by the executor of the last will of F. W. Buerstetta, deceased, for the purpose of procuring judicial con-

struction of the will in order that he might carry out the provisions thereof. The will was admitted to probate February 27, 1905. Provision was made in paragraph 1 for the payment of debts, funeral expenses, etc. By the second paragraph testator gave to his wife, Belle Buerstetta, the use of certain valuable real estate not necessary to describe here. This devise was not absolute, but the wife's right to enjoy the land was limited, and fixed as follows: "During the term of her natural life, and all the rents, profits and benefits to be derived therefrom. In case the rents, profits and benefits of this property is more than is needed for her support, it shall be loaned or invested in real estate as seen fit by my executor."

Other paragraphs are as follows: "Third. After the death of my said wife Belle Buerstetta the property heretofore mentioned shall be divided in the proportion which shall be mentioned hereafter in this will, among my brothers and sisters.

"Fourth. I give to my beloved Mother Sarah C. Berry, $50 in cash.

"Fifth. It is my desire that the property mentioned as the share of my beloved brothers John Buerstetta, Henry Buerstetta and William Buerstetta and my beloved sister Matilda Tingle is to be invested in real estate, chosen by them, to be theirs as long as they shall live without the right to incumber or sell the same, and all the rents profits and benefits of the same to be theirs, taxes to be paid by them and at their death it shall be divided equally among their living children.

"Sixth. To the three children of my beloved brother George (deceased) I give $500 each to be retained by my executor until they become 21 years of age and shall be loaned on real estate and the income shall first pay expenses and in case there is accumulation it shall go to the children herein mentioned.

"Seventh. To my beloved Brother John Buerstetta I give $2,000 in cash."

And in paragraphs 8 to 13, inclusive, are bequests to

each of his several brothers and sisters, among whom are Henry, William and Matilda, each bequest being identical with paragraph 7, except as to the name of the beneficiary. Paragraph 14 is as follows: "Fourteenth. To my beloved half-sister Jessie Hahn I give $250, this to be the full amount of her share and all she shall have of my estate."

Paragraph 15 makes a gift to a church, and by paragraph 16, a brother, Grant Buerstetta, is named executor. Following this is the date of the will, December 31, 1904, and the signature of the testator. But following the signature are other testamentary provisions in consecutively numbered paragraphs. Number 17 provided for the sale by the executor of all the real estate, except such as had been mentioned above.

Other sections are as follows: "Twentieth. After all my affairs are settled and the sums paid over or invested as has been mentioned heretofore in this will whatever is left shall be divided among my brothers and sisters in the same proportion as has been mentioned heretofore in this will and shall be invested or paid over as has been stated heretofore except to the three children of my beloved brother George and the part heretofore mentioned in this will as their share to be the full amount of their share and all they shall have of my estate.

"Twenty-First. I have made this will in view of a contract existing between myself F. W. Buerstetta and my wife Belle Buerstetta that at her death she agrees that the residence property owned by her in Tecumseh, Johnson Co., Nebraska, situated one block east of public square on Clay st. go to my brothers and sisters and be disposed of in the same proportion as has been provided for in this will and she hereby acknowledges this contract by signing her name (Signed) Belle Buerstetta."

Other paragraphs provide for intended recipients or for the execution of obligations, none of which are here involved. The will was again signed and attested.

The executor appointed by the will qualified and entered upon his duties. He has sold all the land, except that mentioned in the second paragraph, and now has on hand about $27,000 after paying all the legacies, except the bequests to the brothers and sister.

The adult defendants contend that the county court did not acquire jurisdiction over their persons; but by their general appearance in that court they waived whatever defects may have existed in the service of process.

Fred Buerstetta, a nephew of the testator, is here urging that the county court had no jurisdiction over him. He was a minor at the time of the trial in the lower court. Whether he is now or not the record fails to disclose, but as he has appealed from the judgment of the district court, we presume he has reached his majority. We ignore his appeal. The judgment of the lower court was favorable to his financial interests, although adverse to his contentions. The judgment we recommend does not prejudice him. He is now, and in the lower court his guardian *ad litem* was, contending that he had no interest in a $2,000 gift, which was made for the benefit of Henry Buerstetta during his life, with remainder to his (Henry's) children, of whom Fred is one. If he does not want his uncle's gift, he can dispose of it now that he has reached age, without license from the court.

It is also contended that the county court had no jurisdiction of the subject matter of this case. By section 16, art. VI of the constitution, county courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons, etc. The county court is thereby invested with such powers; and it has been held that the county court has exclusive original jurisdiction in all matters of probate, and in actions for the construction of wills upon the application of the administrator, when such construction is necessary for the purpose of enabling him to carry into effect the provisions of the will. *Reischick v. Rieger,* 68 Neb. 348; *Youngson v. Bond,* 69 Neb. 356, and cases cited. This general rule

is not assailed by the defendants, but they contend that a question of title is here presented, which defeats the jurisdiction of the county court, by reason of other provisions of said section of the constitution, which deny to the county court jurisdiction in cases involving the title to real estate. It is conceded that the authority of the county court in actions to consider wills is confined to the purpose of giving necessary and proper directions to an executor so that he may effectually execute the intentions of the testator as expressed in the will. In *Youngson v. Bond, supra,* a distinction is made between actions brought by an executor for a construction of a will and one by a trustee after settlement of the estate to obtain a construction of the provisions of the will relating to the trust. In the latter case a court of general equity powers should have jurisdiction. But this action is brought before distribution. The executor has in his hands $27,000, a part of which, on account of an ambiguous provision in the will, he does not know how to distribute, and he calls for judicial guidance. There is no land the title to which is in controversy. The question involved is what disposition shall be made of certain sums of money, and this only to the extent of determining whether this money shall be delivered in specie to the beneficiary or invested in real estate for his benefit. In other words the intention of the testator is to be ascertained, and the language used by the testator in expressing his intention is the matter in dispute. Incident to the main inquiry, the question of the vesting of the legal title to land which is to be purchased is concerned, but the constitutional inhibition barring the county court from jurisdiction in cases where the title to real estate is involved does not apply to those cases wherein the title is determined as an incident to an important litigable question of which that court has exclusive original jurisdiction. If the title to real estate is the principal thing to be determined, then, necessarily, the title is in issue, but, if that question arises incidentally, it is not considered in issue so as to

bar the court from entertaining the action. As was said by Mr. Commissioner POUND in *Youngson v. Bond, supra,* referring to the constitutional limitation upon the jurisdiction of the county court: "The evident meaning is that the county court shall have no jurisdiction of actions to recover real property or wherein the present title to real property is directly or substantially involved. But the provision does not mean that the county court is to be without jurisdiction where a question of title arises incidentally or collaterally or where the present title is not involved."

The questions to be determined are whether or not the testator intended that $2,000 was to be paid in cash to each of the three brothers, John, Henry and William, and the sister, Matilda, or that that sum was to be invested in real estate for them during life with remainder to their children. If invested, should the title be taken in the name of the executor as trustee, or in the names, respectively, of the beneficiaries? In what lands are these funds to be invested? Who is to select the lands? If the beneficiaries for life, then can the court place any restraint whatever upon their selection? Who takes the remainder, the living children of the three brothers and sister named *per stirpes* or *per capita?* It is apparent, and in fact there is no serious contention but that, if the funds are to be invested in land, at the death of each of the brothers and sister his or her children then living should take the property of which their parent was the life beneficiary.

The lower court found and decreed that the $2,000 given to each of the brothers and sister above named should be invested in land by the executor as trustee, taking title in his name, for the use and benefit of the beneficiaries; that the trustee should manage such real estate, pay taxes, insurance, etc., pay the net proceeds to the beneficiaries, and make annual reports of all moneys collected and expended. By this decree a continuing trust was created. Henry Buerstetta and his children have appealed. Other relief was granted by the lower court, ap-

proving the conduct of the executor in disposing of real estate, which is not assailed by this appeal.

A few general observations here noted are of value in the interpretation of this instrument: The testator intended, although not expressly saying it, that his brothers and sister of the whole blood should be the beneficiaries of equal shares of his estate. The will may, for the purpose of analysis, be considered as consisting of three parts or divisions: First, specific real estate is disposed of in paragraphs 2 and 3; second, a number of specific bequests or devises; third, the residuary clause. It is assumed that the testator intended that his will should be a consistent whole, and we must consider it in its entirety, its several parts with reference to each other, to ascertain, if possible, the meaning which the testator himself attached to any part thereof. The function of the court is to interpret, and not to construct. The cardinal rule requires the court to ascertain the expressed intentions of the testator. We have not found it necessary to examine the extraneous evidence introduced upon trial for the purpose of ascertaining the testator's intentions.

The first important question is to determine what property was referred to in the fifth paragraph as "the property mentioned as the share of my beloved brothers John, Henry and William and my beloved sister Matilda." Defendants contend that it refers to the real estate mentioned in the third paragraph, in which all the brothers and sisters were given the remainder. We cannot accept this construction. The second and third paragraphs effectively dispose of the property therein mentioned, and, beginning with the fourth paragraph, by a bequest of $50 in cash to his mother, testator undertook to dispose of other property. It does not seem probable that, after disposing of specific real estate in unequivocal terms, and after beginning the disposition of other property by making specific bequests, the paragraphs referred to could have been intended as a limitation upon the devise made in the former division of the will. Nor does it seem pos-

sible that it could refer to the residue disposed of by the third division. The fifth paragraph did not specifically mention any property, but it referred to whatever property the testator intended to identify by the phrase "property mentioned as the share." The only property mentioned in the second division of the will as the shares of these beneficiaries are the items of $2,000 to each. Although the "property mentioned" in the fifth paragraph cannot refer to the residue of the estate disposed of in the third division of the will, yet the language used in the residuary clause is of evidential value in ascertaining the intentions of the testator as expressed in the fifth paragraph. This clause provides for the disposition of the residue after "the sums paid over or invested as has been mentioned heretofore." This *"invested"* may possibly have referred to the bequest to nephews in the sixth paragraph; but, in view of what follows, we think not, for, continuing the residuary clause provides that the residue shall "be *invested* or paid over" to the brothers and sisters as stated heretofore. This indicates that testator contemplated that an investment had been previously arranged for some of his brothers and sisters. And in this regard it is improbable that he referred to the remainder of the specific real estate in the second and third paragraphs, as the enjoyment of that remainder would not probably begin until long after the bequests mentioned in the will had been paid over and the estate settled. Although the $2,000 was mentioned as a cash bequest to each of the three brothers and one sister, it is very apparent, from the whole instrument that testator intended that it should not be paid to them, but should be invested for each of them "in real estate chosen by them." Their share of the residue is likewise to be invested.

The executor is entitled to judicial guidance in making this investment. Should he purchase in his own name or in the names of the beneficiaries? In no case can the executor hold the legal title as a trustee unless the will itself has, either expressly or impliedly, created in him a

trust estate other and different from that of executor, or unless the trust is made necessary that the intention of the testator may be enforced. It is the executor's contention that the language used in the will was sufficient to create such a trust. It does appear that the testator considered that the executor would indefinitely have control of some part of the estate. For instance, the second paragraph provides that the surplus accumulated from the rents derived from the land mentioned therein shall be loaned or invested by the executor, and paragraph 6 provides that he shall hold the bequest to the children of his deceased brother George until they arrive at their majority. But there are no similar expressions made with reference to the $2,000 bequest in controversy, and the expressed intentions relative to other funds does not imply a similar intention as to these particular gifts. And, again, such a construction would be absolutely contrary to the expressed will of the testator, for in the fifth paragraph the land procured by these investments is "to be theirs (the brothers and sister named) as long as they shall live without the right to incumber or sell the same and all the rents profits and benefits of the same to be theirs, taxes to be paid by them and at their death it shall be divided equally among their living children." It is apparent, therefore, from this expression that the title is not to be held in trust but that the right to the enjoyment of the estate is to be circumscribed only by the limitations expressed in the will. The executor argues that, if the title is vested in the beneficiaries without reservations, they might permit it to be incumbered by an accumulation of taxes, or otherwise. This may be so, but such a condition will not permit the creation of a trust. At most this argument only shows that testator did not use as good judgment as would the executor or the court, but his judgment, although unwise, must be respected. The court should have advised the executor to invest for Henry Buerstetta, John Buerstetta, William Buerstetta and Matilda Tingle the said $2,000 devised to them, respect-

ively, as follows: In land in Nebraska to be selected by said devisee so that a life estate only, and without the power to incumber or alienate the same, should vest in the devisee, remainder in equal shares to his children him surviving.

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

DUFFIE and GOOD, CC., concur.

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

REVERSED.

LIZZIE ACKEN, APPELLEE, V. FRED TINGLEHOFF ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,432.

1. **Intoxicating Liquors:** ACTION FOR DAMAGES: EVIDENCE. In an action by a wife against licensed liquor dealers to recover damages for nonsupport by her husband, who was made an habitual drunkard either wholly or partially through the defendants' traffic, it is competent to introduce the Carlisle table of mortality as evidence of the husband's expectancy of life, when a sufficient foundation therefor is laid by evidence tending to show that the husband's habitual inebriety has premanently impaired his earning capacity.

2. ———: ———: ———. In such action, the plaintiff may prove that necessaries were furnished the family by the county and by charitable institutions; and, also, may show the suffering to which the family was subjected through the husband's neglect caused by his drunkenness.

3. ———: ———. Liquors sold by the defendant need not be the sole cause of an injury to permit a recovery.

4. **Appeal:** AMOUNT OF RECOVERY. Upon conflicting evidence as to the amount of damages, there being sufficient evidence to sustain the verdict, a judgment will not be set aside as excessive.

5. **Intoxicating Liquors:** ACTION FOR DAMAGES: INSTRUCTIONS. An instruction stating: "If you further find from the evidence that, prior to the wrongs complained of in plaintiff's petition, plaintiff's husband was a strong robust man, but that after said wrongs plaintiff's husband was permanently impaired in his earning capacity, then in determining the damages to be allowed plaintiff you may take into consideration the tables of expectancy which have been introduced in evidence" is not erroneous because it permitted the jury to consider permanent impairment from whatever cause, when the uncontradicted evidence showed that the permanent impairment was caused solely by habitual drunkenness.

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

Strode & Strode, for appellants.

Morning & Ledwith, contra.

EPPERSON, C.

This action was brought by plaintiff for herself and in behalf of her seven minor children against the principal defendants who are licensed liquor dealers, and the surety upon their bonds. Plaintiff alleged substantially that the principal defendants, during the years 1901, 1902, 1903 and 1904, sold intoxicating liquors to her husband, thereby causing him to become an habitual drunkard, permanently injured in health and earning capacity, whereby plaintiff and her children have been deprived of the husband's support, upon which they were dependent. Defendants appeal from a judgment for $3,750.

Plaintiff recovered in part for damages resulting from the permanent disability of her husband. She introduced in evidence the Carlisle table of expectancy of life. Defendants argue that this was inadmissible because there was no evidence of a permanent disability. No witness testified that plaintiff's husband was permanently incapacitated from contributing to the support of his family. It is improbable that any person could have special knowl-

edge which would permit him to testify to a certainty as to whether or not an habitual drunkard would reform or be restored to health, regain his natural faculties, and perform the duty of supporting his family. Such testimony would not strengthen the plaintiff's case. It is for the jury to determine from the evidence of the husband's habits and condition whether his failure to support the family will be permanent. The Carlisle table may be given in evidence after the introduction of creditable evidence tending to show the permanent character of an injury. *Howard v. McCabe,* 79 Neb. 42. Evidence of expectancy is usually introduced in damage cases for personal injuries or death. The case at bar is not, strictly speaking, a personal injury case. It is permitted by the statute, and did not exist at common law. It is, however, very similar to a personal injury case in so far, at least, as the amount of recovery is measured by the same rules. There can be no doubt but that, had the death of a person resulted from the sale of intoxicating liquors, the Carlisle table would be admissible as evidence of expectancy. Every reason for permitting such evidence in personal injury cases exists in the case at bar. Of course, in any such case the foundation for this evidence must be laid. But defendants argue that the husband may reform, and quote from *Rouse v. Melsheimer,* 82 Mich. 172, as follows: "The law does not presume that a drunkard cannot reform, for the world is full of instances of such reformation." The above statement was not made with reference to the life expectancy of the drunkard, and, although the statement is true, it cannot be considered as a judicial predecent to be followed here. In *Jones v. Bates,* 26 Neb. 693, MAXWELL, J., said with reference to a particular drunkard: "Had they (the liquor dealers) ceased supplying him with intoxicating drink, it is probable that he would soon have regained his usual vigor." In *Stahnka v. Kreitle,* 66 Neb. 829, this court disagreed with Judge MAXWELL'S dictum above quoted. While it is true that drunkards may reform, yet the probability of any par-

ticular one doing so is a matter for argument, and not for presumption. In the case at bar the evidence shows that the plaintiff's husband at the time of the trial and for a few years preceding was in a deplorable condition of habitual, almost continuous, miserable drunkenness, broken in health by reason thereof, an old man in appearance at the age of 44 years, and, when frequenting defendants' saloons, even late at night, was almost entirely indifferent to the entreaties, not only of his wife, but of his aged mother, and his little boy, who, notwithstanding the degradation to which their husband, son and father had fallen, sought to protect him against the impending danger. The whole record indicates that he has no desire to return to virtuous manhood or good citizenship. The evidence was sufficient to permit the jury to find that his inability was permanent. *Jessen v. Wilhite,* 74 Neb. 608.

The plaintiff over objection was permitted to prove the following facts: That one of her little girls, two years old, did not get any milk to drink; that the county had paid the burial expenses of a deceased child; that a charity organization, the county and the salvation army had at times provided some coal for the use of the family, and provided other necessities; that at times the family did not have sufficient coal to keep them warm, and that the children would go to bed in the daytime to keep warm. Defendants argue that such evidence was calculated to play on the passions and prejudice of the jury. We consider such evidence admissible. It was necessary for the plaintiff to prove that the family was not supported by her husband, and it was perfectly proper to prove that the subsistence of the family was obtained from other sources, and also to prove the physical suffering occasioned by want and neglect.

The court instructed the jury as follows: "If you further find from the evidence that, prior to the wrongs complained of in plaintiff's petition, plaintiff's husband was a strong robust man, but that after said wrongs plaintiff's husband was permanently impaired in his earning ca-

pacity, then in determining the damages to be allowed plaintiff you may take into consideration the tables of expectancy which have been introduced in evidence." It is argued that this was error because not limited to permanent injuries to the husband's earning capacity caused by the use of intoxicating liquors furnished by the defendants, but permitted the jury to consider permanent impairment caused otherwise. There was undisputed evidence that the husband's disability was caused by drunkenness, and that otherwise he was a healthy man. The instruction was necessary.

During the first year of the time when the wrongs complained of were done, one of the principal defendants was not engaged in the liquor business and defendants insist that the court should have given an instruction directing the jury that they should not find against this defendant for damages which resulted from the sale of intoxicating liquors to plaintiff's husband prior to the time that he sold or furnished him intoxicating liquors. No such instruction was asked by any defendant. All the principal defendants joined in a motion for a new trial, whereby the defendant entitled to such an instruction waived this alleged error. Defendants requested a certain instruction not necessary to quote here. We have examined it, and find it substantially the same as No. 3, given by the court on his own motion.

It is insisted that the judgment is so excessive as to indicate that it was the result of passion and prejudice. Under this assignment, the defendants also point out certain evidence tending to show that the plaintiff's husband was addicted to the excessive use of intoxicating liquors at the time he was married in 1893 and thereafter, but prior to the time of the defendants' wrongs complained of. The evidence on this point is conflicting. The mere fact that the plaintiff's husband had used liquor excessively prior to the time that defendants sold to him is not sufficient to defeat the plaintiff's action. We are cited to *Stahnka v. Kreitle, supra,* in support of defendants' con-

tention that they are not liable for damages resulting from a like traffic before they engaged in the business. This proposition is sound but it cannot control this case, because the plaintiff does not seek to recover for her non-support prior to the time the defendants engaged in business. By considering the evidence in the light most favorable to the defendants, the fact still remains and stands out boldly that the wrongful conduct of the defendants contributed to the condition of the plaintiff's husband as alleged in the petition and proved at the trial. This being the situation, the defendants are liable. It has been held that the liquors furnished by a defendant need not be the sole cause of an alleged injury in order to permit an aggrieved party to recover. *Wiese v. Gerndorf,* 75 Neb. 826; *Gorey v. Kelly,* 64 Neb. 605; *Wardell v. McConnell,* 23 Neb. 152; *Chmelir v. Sawyer,* 42 Neb. 362. Although conflicting, the evidence was sufficient to justify a finding that prior to the year 1901 the husband supported his family; that he provided a suitable house for their occupancy; that it was fairly well furnished, and the family supplied with necessary provisions; that he was capable of earning and did earn from $1,000 to $1,500 a year by which the necessary family supplies were furnished, and that at the time the plaintiff's husband began to frequent the defendants' saloons; that he was a strong man in good health; that thereafter he expended nearly all his earnings for liquor with defendants, and became substantially worthless to his family from a financial standpoint. A verdict for the amount returned was not excessive.

The record being without error, we recommend that the judgment of the court below be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

JOHN O. YEISER, APPELLANT, V. FRANK A. BROADWELL ET AL., APPELLEES.

FILED JANUARY 23, 1909. No. 15,739.

1. **Attachment: PRIORITIES.** A written assignment of a sum of money in the custody of an agent, intended to convey the title thereof to the assignee, and made in definite terms, without the reservation of control in the assignor, is sufficient to give the assignee priority over a creditor attaching such funds in the hands of the agent subsequent to the date of the assignment.

2. **Fraudulent Conveyances: PRESUMPTIONS.** Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered in the future.

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

John O. Yeiser, pro se.

Byron G. Burbank and *Lysle I. Abbott, contra.*

EPPERSON, C.

Upon a former appeal to this court the plaintiff obtained the reversal of an adverse judgment because he had been refused a jury trial. The cause was remanded to the lower court, whereupon he waived a jury and again suffered defeat. One of the appellees intervened in the court below, and prayed that he might be permitted to go hence without day. Other than the above there is nothing in this case characterizing it as a comedy. It has not even the rhythm of melodrama. The subject matter is apparently the last crumb of the Nebraska estate of Adolphus Frederick and Phoebe Rebecca Elizabeth Elwina Linton, which has been consumed by their creditors.

Prior to December, 1902, W. K. Potter, receiver of the Omaha Loan & Trust Company, had collected $1,830 of rent money belonging to the Lintons. In December the appellee Cathers garnisheed this fund in the hands of the

receiver, thereby attempting to apply it to the payment of a judgment against the Lintons. Potter then brought the money into court and deposited the same with the clerk, Broadwell, one of the parties hereto, who has since had the actual custody thereof. Subsequently, however, it was determined that the judgment upon which the proceeding was founded had been paid. *Linton v. Cathers*, 4 Neb. (Unof.) 641. Cathers then by motion sought to subject the fund to the payment of another judgment which he obtained against the Lintons January 17, 1903. Yeiser intervened. These proceedings were dismissed February 23, 1905; it being held that the funds were not *in custodia legis*. Immediately Cathers garnisheed both Potter and Broadwell. A few days later this action was instituted; plaintiff claiming the fund in controversy by assignment from the Lintons. By agreement the garnisheed defendants were discharged as such, and were permitted to answer the plaintiff's petition in this action wherein Cathers and another claiming under him had intervened. In May, 1902, the Lintons employed the plaintiff herein, an attorney at law, to take charge of all litigation in which they were involved. There was an understanding between them, but not reduced to writing, in which it was agreed that the plaintiff should receive the rents from all the property in Nebraska belonging to the Lintons. On May 20, 1902, at the request of plaintiff, the Lintons sent to Potter a telegram as follows: "Pay to John O. Yeiser any money in your hands due the undersigned." By errors in transmission it was addressed to "W. K. Ralter" instead of "W. K. Potter," and signed "A. S. Linton" and "P. R. E. E. Linton" instead of "A. F. Linton" and "P. R. E. E. Linton," notwithstanding which it reached Mr. Potter. On April 20, 1903, the Lintons directed Broadwell, the clerk of the court, by writing to pay the plaintiff Yeiser "any funds in your hands up to date which may be or has been found by the court to be due either severally or jointly to the undersigned." In January, 1904, the Lintons executed an instrument, as-

signing the rent due or to become due upon any real estate in Nebraska owned by them to the plaintiff, but said assignment was made subject to revocation at any time without notice. On August 29, 1904, the Lintons executed an assignment, the body of which is as follows: "For value received we assign all money due to us for rents from the Linton estate, Omaha, Nebraska, up to date, to John O. Yeiser."

The sufficiency of these assignments to convey title is the real question for determination. It is argued by the interveners that plaintiff's contract with the Lintons for the rents and profits of their estate is within the statute of frauds; the same not being in writing. Although the original contract, being for any and all rents which might accrue in the future, may have been within the statute of frauds, yet the plaintiff's right to the funds in controversy would not thereby be defeated if he subsequently procured a sufficient assignment thereof. When Potter collected the funds in controversy, they belonged to the Lintons and were wholly subject to their control. Potter, although receiver of the Omaha Loan & Trust Company, in his relations with the Lintons was but a collection agent, or, at most, the custodian of their funds. By the direct request of the plaintiff herein, the Lintons sent to Potter a telegram directing him to pay the money in his hands to Yeiser. This was a sufficient assignment, and was binding upon the Lintons. Had Potter complied with its terms and paid the amount then in his hands to Yeiser, the Lintons would have been irrevocably bound thereby. It is true that, on account of the errors in transmission Potter was justified in withholding the fund until the telegram could be authenticated. But, as the telegram was genuine, it was sufficient to vest title to the moneys then in Potter's hands in the plaintiff. In a former case between some of the parties hereto the telegram was not proved, and the plaintiff herein was not permitted to recover. *Yeiser v. Cathers,* 5 Neb. (Unof.) 204. But that case is not *res adjudicata,* as appellees contend.

The judgment there was that the garnishee should pay the fund into court to abide its future orders. Nothing further was determined, except that the evidence there did not establish the authenticity of the telegram. Be that as it may, subsequently executed written assignments were sufficient to cure any defects therein. The assignment of January, 1904, was without vigor, and we do not consider that the plaintiff obtained any rights thereunder. But all the other assignments were made in writing, and at times prior to the legal impounding of the fund by the intervener Cathers. With the exception of the one assignment of January, 1904, the assignments made by the Lintons of the funds in controversy were definite and without reservation. In form they were similar to instruments usually made for the purpose of assigning funds. They were intended to pass title from the assignor to the assignee. They are, for these reasons, distinguishable from the attempted assignments construed in the cases cited by the appellees (*Nebraska Moline Plow Co. v. Fuehring,* 60 Neb. 316; *Phillips v. Hogue,* 63 Neb. 192), and cases in other states construing assignments in which the power to control was reserved in the assignor. For more than two years the fund was improperly impounded, during all of which time it has or should have been subject to the control and disposition of the Lintons or of their assignee, the plaintiff herein. At the time the garnishee summons upon which Cathers relies was served, the title to the fund had vested in plaintiff under his assignments, and his right thereto is superior to that of the interveners, unless, as contended by the latter, the assignments were made in fraud of the Lintons' creditors.

The Lintons were insolvent in May, 1902, and have continued so until the present time. It seems that they had no property except the rents and profits derived annually from certain real estate. These rents they attempted to assign to the plaintiff Yeiser, some of which,

including the fund here in controversy, had been collected at the time of the assignments. Faithful to his employment, the plaintiff took charge of their litigation and in a great measure was successful. There is no contention that his charges were exorbitant. The unpaid balance thereof exceeded the amount here in controversy. There is no evidence of actual fraud on the part of either the Lintons or the plaintiff herein. Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered in the future. To hold that such is the case would be to say that an insolvent has no legal right to compensate an attorney to assist him in litigation. It appears that the Lintons had need of the professional services of an attorney at law. They were assailed by creditors, one of whom, at least, was attempting to collect the same debt twice, others were asserting demands subsequently defeated. We know of no law which will bar even an insolvent litigant from contesting unjust suits brought against him. It is true that transfers of property to an attorney by an insolvent client are scrutinized very closely by the court, and if the alleged consideration is disproportionate to the services rendered or if the attorney's charges are exorbitant, such transfers will be set aside. But where the transfer is made for services rendered or to be rendered in litigation, conducted in good faith by the attorney and the client, and where the charges made by the attorney are fair and just, such transfers are upheld. This question, we think, was ably discussed and properly disposed of in *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130, and the principles underlying the conclusion which we have reached need not again be set forth here at greater length.

At a former trial the plaintiff herein testified that the rents in controversy were assigned to him by the Lintons for the benefit of their children. Had they been assigned solely for the benefit of the junior Lintons, much doubt would exist as to the legality of the assignment, but from

the whole case it appears that the plaintiff herein was employed by the Lintons, not only to protect the interests of their children, but their own. This evidence is insufficient to brand the transaction as fraudulent. In *Farmers & Merchants Nat. Bank, v. Mosher, supra,* the contract of employment in controversy was made in part on behalf of the assignor's wife.

The judgment of the lower court on the evidence of this case should have been for a dismissal of the petition of the interveners and for the payment of the fund in controversy to the plaintiff.

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

DUFFIE and GOOD, CC., concur.

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

REVERSED.

FAWCETT, J., not sitting.

FRANK F. FEE, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 23, 1909. No. 15,399.

1. **Railroads:** INJURY TO ANIMALS: INSTRUCTIONS: HARMLESS ERROR. In an action against a railway company for damages for killing horses on its track at a point where the law requires its right of way to be fenced, an instruction which permits plaintiff to recover by proving the fence or gates insufficient to prevent the horses from going upon the track, and that the horses were killed by defendant's train on its track, is not prejudicial, when the undisputed evidence shows that the horses went upon the railway track at the defective or insufficient gate.

2. Trial: INSTRUCTIONS: DIRECTING VERDICT. An instruction which directs a jury to find for the defendant if a certain state of facts is proved is not equivalent to a direction to find for the plaintiff if any of the facts therein enumerated are not proved.

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

James B. Kelby, H. F. Rose and *F. E. Bishop,* for appellant.

John Everson and *Gomer Thomas, contra.*

GOOD, C.

This action was brought to recover for the value of two horses killed on defendant's railway track at a point where defendant was required to fence its right of way. Plaintiff alleged that the fences and gates along defendant's right of way had been allowed to become and remain in a bad state of repair, and that by reason of the condition of the fences and gates plaintiff's horses went upon the track and were killed. The answer was a general denial. Plaintiff had judgment, and defendant has appealed.

The evidence shows that defendant's railway track runs through the farm occupied by plaintiff; that there are three farm crossings on the farm and a gate on each side of the track at each of the crossings. The record shows that the horses were killed on defendant's track at or near the middle crossing. So far as disclosed by the record, defendant's section foreman was the first person who saw the horses after the accident. He testified that the gate at the crossing was open. There is nothing to disclose who left the gate open, nor whether it was open when the horses went upon the track. The evidence tended to show that the fence was in good repair. As to the condition of the gates, the evidence was in conflict. Defendant's evidence tended to show that they were in a good state of repair and were sufficient, when closed, to prevent horses

and other live stock from going upon the track. Plaintiff's evidence tended to show that one of the gates was in a bad state of repair, that it was wholly insufficient to turn live stock, and that live stock had passed back and forth through the gate when closed. The gate is what is commonly known as a "wire gate," and consisted of a number of wires fastened to the gate-post at one end and to a pole or stake at the other. The pole or stake was then fastened up to the opposite gate-post, thus stretching the wires and forming a gate. Plaintiff's evidence showed that a number of wires were broken at the post, and some were broken at the stake or pole; that "the wires were loose and hung low." The evidence is undisputed that the horses went upon defendant's right of way at this gate. Whether the gate was left open and the horses went through the gateway, or whether the gate was closed and the horses went over it because it was insufficient, is unknown.

Defendant contends that the evidence is insufficient to support the verdict. We do not think this contention sound. From the plaintiff's evidence the jury were warranted in finding that the gate was wholly insufficient to prevent the horses from going upon the track, and so found. It was immaterial whether the gate was open or closed, because the closing of the gate would have formed no barrier and would not have prevented the horses from going upon the track.

The court instructed the jury as follows: "It is incumbent upon the plaintiff, before he is entitled to recover, to prove to you by a preponderance of the evidence that the defendant did not keep and maintain its fence in such condition as to render it sufficient to prevent horses and cattle from getting on the track, and, if he so proves, and that his horses were killed, and the value thereof, then your verdict should be for such sum as you find he has sustained by reason of the killing of his horses. On the other hand, if you find under the evidence in this case that the defendant has erected a fence and gates at the

place where the accident is claimed to have happened, and that the fence and gates were sufficient to prevent cattle and horses from getting upon the track, then your verdict should be for the defendant." Plaintiff assails this instruction, and contends that it made the company liable if it did not keep and maintain its fence in such condition as to prevent horses and cattle from getting on the track, regardless of whether or not the horses entered through the fence or through the gate by reason of any insufficiency or defect in them, and that proof on the part of the plaintiff of the insufficiency of the fences or gates imposed liability upon the defendant, regardless of whether the animals came through the fence or gates which were defective, or by reason of the defect. We think the instruction is subject to the criticism made. But defendant concedes that the horses entered the company's right of way at the gate. Plaintiff's evidence was amply sufficient to show that the gate was insufficient and constituted no barrier to the horses going upon the right of way. Under the instruction, the jury could not find for plaintiff unless it found that the gate was insufficient to prevent the horses from going upon defendant's right of way. It is clear that the jury so found, and, the evidence showing that the horses entered the right of way at the place so found to be defective and insufficient, we think the conclusion is inevitable that the horses went upon the track by reason of or in consequence of the insufficient and defective gate. The failure of the court to direct the jury that the horses must have come upon the right of way in consequence of the insufficient or defective gate was therefore not prejudicial to the defendant. If there had been any dispute or contention as to whether the horses went upon the right of way at the place where the gate was defective and insufficient, then the instruction would have been prejudicially erroneous.

The court further instructed the jury that, if some one other than the company left the gate or gates open, they being sufficient to turn stock, and the horses strayed upon

the track and were killed, the company would not be liable, and their verdict should be for the defendant. Defendant contends that this instruction makes liability follow for failure to maintain the fence and gate in a condition which the jury may think sufficient, and where the loss may have resulted from an entirely foreign cause. The instruction is not subject to the criticism made. It nowhere directs a finding for the plaintiff. The instruction directed a finding for the defendant if a certain state of facts was found to exist. It is not equivalent to directing a verdict for plaintiff if any of the facts therein were not found to exist. The most that can be contended for is that the instruction did not state defendant's theory of the case as strongly as it was entitled to have it stated. What has been said with respect to the first instruction is applicable to the present instruction.

We find no prejudicial error in the record, and therefore recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

MARY E. JESSE ET AL., APPELLEES, V. LAFE BROWN ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,415.

Cancelation of Instruments: EVIDENCE. Evidence examined and discussed in the opinion, *held* sufficient to sustain the judgment of the district court.

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

Heasty & Barnes, for appellants.

Talbot & Allen, T. W. Tipton and *C. H. Denney, contra.*

John C. Hartigan, guardian *ad litem.*

GOOD, C.

John Brown died intestate on the 7th day of May, 1906. A few hours previous to his death he attempted by warranty deed to convey to his son Lafe Brown the northwest quarter of section 13, township 1, range 4 east of the sixth P. M., in Jefferson county, Nebraska. This action was brought by certain of the heirs of John Brown against all of the other heirs at law of John Brown, including Lafe Brown and his wife, Etta Brown. In their petition the plaintiffs alleged that on the 7th of May, 1906, John Brown was the owner of said premises; that he was a man 98 years of age, mentally weak on account of his age, very deaf, almost blind, seriously and dangerously sick; that he could never read, write, nor sign his name; that he died about 11:30 P. M. of said day; that, about five hours before the death of said John Brown, the defendant Lafe Brown intending to cheat and defraud the other heirs at law of said John Brown, fraudulently induced him to sign a warranty deed conveying said premises to said defendant; that no consideration was paid for said transfer; that by reason of said John Brown's physical and mental disabilities he was incompetent to transact any business, and that said deed was never delivered; that for more than three years prior thereto said John Brown had been living with the defendant Lafe Brown and family on said premises, and that by reason thereof, and the relationship of father and son, and the infirmities of said John Brown, the defendant Lafe Brown was able to and did, by undue influence, induce said John Brown to execute said deed, and thereby fraudulently procured title to said premises. They prayed for a cancelation of the deed, and that the title to the premises be quieted and confirmed in all of the heirs at law of John Brown, deceased.

The defendant Lafe Brown answered, and alleged that on or about the 2d day of March, 1903, the said John

Brown and said defendant entered into an oral agreement, by the terms of which said defendant and his family were to move upon and take possession of said premises, care for said John Brown, furnish him a home with said defendant, with the necessary food and such care and attention as he should need in sickness and in health during the remainder of his natural life, and in consideration thereof and of natural love and affection said John Brown was to convey said premises by good and sufficient deed to said defendant; that pursuant to said agreement said defendant and his family moved upon and took possession of said premises, and fully complied with the terms of said agreement until the death of said John Brown; and that pursuant to said agreement the said John Brown, while in possession of all of his faculties, executed and delivered said deed to said defendant, and thereby conveyed said premises to him. Said defendant prayed, among other things, that if the court should find that there was no delivery of said deed, or that the said John Brown at the time of the execution thereof was incompetent to execute the same, the court should decree specific performance of said oral agreement, and that his title to said premises be quieted and confirmed. All of the defendants other than Lafe Brown and his wife joined with the plaintiffs in asking the same relief as prayed for in the petition. All of the affirmative allegations of the answer were denied in the reply.

A trial was had upon the issues so joined. The court found that the deed was made without consideration, was procured by undue influence exercised by the defendant Lafe Brown, and was executed when said John Brown was incompetent, and that there was no delivery of the deed. It further found that no contract was entered into between said defendant and John Brown whereby the latter agreed to convey the lands to said Lafe Brown. The court entered a judgment in conformity with its findings. From that judgment the defendants Lafe Brown and Etta Brown have appealed.

The only assignments of error relied upon by appellants are that the judgment is contrary to the weight of evidence and is not sustained by sufficient evidence.

We will first consider the evidence relating to the competency of John Brown to make the deed on May 7, 1906. The record shows that Mr. Brown was 98 years old; that he could neither read nor write; that he was hard of hearing, and his eyesight greatly impaired. In addition to the land in controversy, he owned 480 acres of other land, which he rented, and that he personally superintended the marketing of his grain and the collection of his rents; that he had been vigorous mentally and physically until the later years of his life, when he became somewhat feeble, eccentric, filthy and careless in his personal habits; that he would go to bed with his clothes and muddy boots or shoes on, and on a number of occasions had shown a disregard of the proprieties in exposure of his person; that he kept a tub of water standing in his room without any known reason therefor, and on one occasion he lost his way with his horse and buggy upon the highway and wandered into a field, and did other things tending to show a mental decline. A number of witnesses testified that they did not think him competent to transact business during the last two years of his life. For three years before Mr. Brown's death Lafe had rented and cultivated the farm in controversy, and he and his family had occupied the residence except the one room occupied by the father. Lafe and his family furnished the old gentleman with his meals, and took care of his room and did his washing. For two weeks previous to his death he was too feeble or ill to go to the table for his meals. On the 6th of May he was suffering from a cold and pain in his side, and a physician was consulted and prescribed for him. On the morning of the 7th the physician was called and examined him, and testified that he found Mr. Brown with a temperature of 101, his pulse 110 to 120, and his respiration 28 to 30; that his right lung was filled with mucus or phlegm, and his left lung somewhat involved,

and that he was suffering from lobar pneumonia with pleurisy complications. It is evident that the doctor considered Mr. Brown dangerously sick, and so informed Lafe and his wife, for they immediately thereafter sent telegrams to various members of the family in different states informing them of Mr. Brown's sickness and asking them to come. On the afternoon of May 7 Lafe telephoned to Mr. Price, a banker and notary public at Diller, to come out and draw some papers for his father. According to the evidence of Etta Brown, Lafe's father had requested that Mr. Price be sent for. There is some difference in the testimony as to the time Mr. Price arrived at the Brown residence. Upon a consideration of all the evidence and the circumstances, it appears reasonably certain that Mr. Price reached the Brown residence a little after 6 o'clock in the afternoon. Mr. Price testified that he was informed by Lafe that his father wished him to draw a deed conveying the 160 acres upon which they lived to Lafe Brown; that he went to Mr. Brown's bed and roused him, and asked him how he was feeling, to which Mr. Brown responded: "Oh, I want to rest"; that he inquired of him if he wished him to draw a deed to his son for the 160 acres of land on which he lived, and Mr. Brown said, "What"? that he repeated his question, and Mr. Brown answered "Yes"; that the deed was drawn, and he took it to Mr. Brown informing him what it was and asking him if he wished to sign it. Mr. Brown again responded "Yes." Mr. Brown was propped up in bed, and placed his hand upon the pen, which was guided by Mr. Price in making his mark. Mr. Price then asked Mr. Brown if it was his voluntary act and deed, and he again said "Yes." Without any direction from Mr. Brown, Mr. Price handed the deed to Lafe, informing him it would be necessary for him to bring the deed in to town to have the notarial seal placed upon it. Lafe handed the deed back to Mr. Price, directing him to put his seal upon it and send it to Fairbury for registration. Mr. Price was at the Brown residence for half an hour or more, and the

foregoing is all that is shown to have been said by Mr. Brown during Mr. Price's visit. Mr. Price saw nothing to lead him to believe that Mr. Brown did not understand or comprehend what he was doing. At 7 o'clock Mr. Brown became unconsious, and so remained until his death at 11:30 that night. It is apparent that he became unconscious within a few minutes after the signing of the deed, and died five hours later. Mrs. Etta Brown testified that after Price had gone Mr. Brown asked Lafe if he was satisfied with what he had done. From other witnesses it appears that Mr. Brown was in more or less of a stupor during the afternoon previous to his death. Upon hypothetical questions fairly reflecting Mr. Brown's condition and illness, four physicians testified that in their opinion he was wholly incompetent to transact any business at the time of the signing of the deed. They testified that the filling up of the lungs with mucus and phlegm prevented access of sufficient air to the lungs to properly oxidize the blood, and that the necessary result thereof was that the patient became dull, stupid, and relapsed into a comatose condition, from which he might be roused and might temporarily know what was said to him, but that he would be without power to reason or think connectedly or to understand any business transaction.

From the consideration of this testimony and from other circumstances needless to mention, we think the evidence warranted the finding that Mr. Brown, by reason of his advanced age, feeble condition, and serious illness, was incompetent to comprehend or understand what he was doing at the time he signed the deed. In this connection it is proper to say that the only evidence tending to show that Mr. Brown was competent at the time of signing the deed was that of Mrs. Brown, Mr. Price and Dr. Pritchard. Mrs. Brown was an interested witness, and in addition thereto her testimony is in direct conflict with that of a number of disinterested witnesses on several material points. With reference to Mr. Price, it will be ob-

served that his opinion was based upon a visit of a half an hour, and that during that time Mr. Brown spoke less than 20 words, and spoke no word except when he was roused and in response to a question, and that one of the questions had to be repeated to him before he apparently understood it. We are of the opinion that the evidence of the physicians as to Mr. Brown's mental condition was entitled to greater weight than the opinions of Mr. Price and Mrs. Brown. The findings of the district court that Mr. Brown was incompetent to make the deed was entirely justified by the testimony.

The only evidence of the existence of an agreement between Mr. Brown and his son Lafe for the conveyance of the land is that of Mrs. Etta Brown. She testifies that in September, 1902, she heard a number of conversations between Mr. Brown and her husband to the effect that, if Lafe would move onto the farm and take care of his father during the rest of his life, his father would convey to him the quarter section of land. As before noted, the testimony of Mrs. Brown was in direct conflict with that of a number of other witnesses, some of whom were disinterested. In June, 1903, Mrs. Brown wrote a letter wherein she stated that her husband was bound to go to Oklahoma the coming fall, and if he liked it to buy a farm there. On one occasion after the making of the alleged contract, Mrs. Brown is shown to have requested Mr. Brown to convey the land to her husband, and that he refused, and said they should get their start as he got his. On one occasion Lafe is shown to have unsuccessfully tried to induce his father to make a will leaving him the farm. At a meeting with his brothers and sisters in Illinois immediately after his father's funeral he told his sisters and brothers that his father had not recompensed him for his care of him, that his father had done nothing for him. On the night of his father's death he told two of his neighbors that his father had but a short time previously made a will leaving him 160 acres of land, and $4,000 out of his other property, and that his father had thought that was

too much, and had changed it and had left him 160 acres by will. Lafe, some weeks after his father's death, when questioned as to the deed, said: "Father had always said he would give me a farm." On one occasion after the making of the alleged contract, when his father found fault with him for the way in which he managed the farm, Lafe said: "If you are not satisfied with the way I am farming your place, just get Walter Ross back here." Another significant fact is that no one outside of the interested parties ever heard of the making of the alleged oral agreement until long after the death of Mr. Brown. From a consideration of this evidence, we do not think it can be said that the contract has been proved by clear and satisfactory evidence. The burden of proof was upon the defendant Lafe Brown to establish the contract by clear and satisfactory evidence. *Harrison v. Harrison,* 80 Neb. 103; *Peterson v. Estate of Bauer,* 76 Neb. 652, 661, and cases there cited. In view of all of these circumstances, we think the contract is not clearly and satisfactorily proved.

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

DUFFIE, EPPERSON and CALKINS, CC., concur.

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

AFFIRMED.

IN RE ESTATE OF WOLFGANG FREDERICK.

A. M. ROBBINS, EXECUTOR, ET AL., APPELLANTS, V. MARILLA FLYNN, APPELLEE.*

FILED FEBRUARY 6, 1909. No. 15,494.

Wills: TESTAMENTARY CAPACITY. A will was presented to the county court of V. county for probate. A contest was instituted upon a number of grounds, among which was that the testator was not

* Rehearing denied. See opinion, p. 321, *post.*

of sound mind at the time of executing the will. This contention was supported by evidence sufficient to justify the submission of the issue to the jury, who found in favor of the contestant.

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

A. M. Robbins, Robbins Bros. and *Clements Bros.*, for appellants.

John J. Sullivan, A. Norman and *A. R. Honnold, contra.*

REESE, C. J.

This cause originated in the county court of Valley county by the presentation for probate of a will alleged to be the last will and testament of Wolfgang Frederick, deceased. A contest was filed by Marilla Flynn, his daughter and only heir, in which a number of grounds or reasons for the contest were stated; but as we view the case but one need be here noticed, and that is whether at the time of the execution of the will the deceased was of unsound mind. The hearing in the county court resulted in a finding by the county judge that at the time of the execution of the will the deceased was incompetent to make a will, and probate was denied. The cause was appealed to the district court, where a jury trial was had, and a verdict was returned finding in favor of the contestant, and that the paper proposed was not the valid will of the deceased. A motion for a new trial was filed, which was overruled, and the usual judgment denying probate was entered. The cause is appealed to this court.

The record is voluminous. We have read it carefully throughout. The evidence as to the mental capacity of the deceased, covering a period of some 30 years, was conflicting. Many facts stated by the witnesses on the part of the contestant show marked eccentricities of the testator, and upon some subjects an unbalanced mind. He left his wife, and possibly other members of his family, in Wis-

consin in the early 70's, bringing with him the contestant, then a little girl, taking a homestead, where he settled. The Indians at that time were supposed to be inclined to attack settlers, but he would leave her alone and unprotected to such an extent as to cause his neighbors deep solicitude on her behalf. The evidence shows a state of mind throughout his whole life on the frontier and while an inmate of the soldiers home at Leavenworth, which on some subjects was irrational and unreasoning, and which from imaginary and unreal causes would cause him to forget his obligations to his daughter, who in later years was in absolute want, with a family upon her hands, and whose husband had died. In the will presented, and which was the last of a number of wills made, he without any known cause practically disinherited his daughter and cast nearly all of his property upon a stranger to whom he was under no obligations and in no sense related. The evidence shows that he had at times taken a dislike to his daughter and determined to furnish her no aid or assistance, but, upon discussing the matter with friends, would declare she was worthy of his bounty and should have his property. This inclination would soon disappear, and he would declare his determination to leave what he had to strangers. Witnesses testified to his conduct and weakened and distorted mind, espcially with reference to his daughter. That this unnatural, irrational and unreasonable feeling was the cause and produced the will in question there seems to be no doubt from the evidence. At any rate there was sufficient proof of his unsound mental condition to justify the submission of the case to the jury upon that issue. This being true, the verdict must be sustained.

In arriving at the conclusion here announced, we have refrained from quoting, or even summarizing, the evidence introduced, for the reason that it would extend this opinion to an unreasonable length and it could serve no good purpose to do so. The will was executed at Leavenworth, Kansas, in the absence of either the devisee or her

father Mr. Robbins, who was named as executor. Mr. Robbins had been the testator's trusted attorney, agent and adviser for many years. The testator had met the devisee but once, and then for only a short time. We are unable to find anything in the evidence reflecting upon the conduct of either which could be said to have exerted any undue influence upon the mind or action of the testator, except such as might naturally arise in his mind from the relations existing between him and Mr. Robbins. After the death of the testator, Mr. Robbins was informed of the existence of the will, and, as was his duty, he presented it for probate.

Finding sufficient evidence in the record to sustain the verdict of the jury upon the one contention, we deem it unnecessary to pursue the subject further. The judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed April 24, 1909. *Rehearing denied:*

PER CURIAM.

A motion for a rehearing has been filed in this case supported by a vigorous brief, in which our attention has been challenged to an expression found in *Buchanan v. Belsey,* 72 N. Y. Supp. 601, and *Cash v. Lust,* 142 Mo. 630, 64 Am. St. Rep. 576, which reads as follows: "Where a will is contested on two grounds, and the jury find in favor of the contestants, but it cannot be told upon which ground; the verdict must be set aside, if there was a failure of proof upon either ground." 64 Am. St. Rep. 576. It is conceded that this expression is contrary to the general rule which prevails in ordinary civil cases, but it is insisted that the rule should be applied to the case at bar. It is not necessary for us to determine this matter, for we are satisfied from a further and more critical examination of the record that there was substantial evi-

dence requiring the submission of both grounds of contest, to wit, undue influence and want of testamentary capacity, to the jury.

It appears that for many years the proponent had been the sole attorney and confidential adviser of the testator; that such friendly relations existed between them as to induce the testator to loan money to the proponent at an unusually low rate of interest, and in some cases interest was entirely forgiven; that after the testator went to the soldiers home at Leavenworth, Kansas, the proponent continued to care for and conduct his business affairs; that much correspondence passed between them, and these facts, with other circumstances detailed by the evidence, in view of the confidential relation of attorney and client which existed between them, required the submission of the question of undue influence, as well as the question of testamentary capacity, to the jury for their determination. This being so, the cases above mentioned are not in point, and the verdict of the district court must be sustained.

For the foregoing reasons, among others, we are satisfied that the motion should be overruled, and it is so ordered.

REHEARING DENIED.

CHARLES E. SEIFERT, APPELLEE, V. ROSE DILLON, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,507.

1. **Nuisance: INJUNCTION: DEFENSES.** The right of a landowner to restrain an adjoining property owner from using his property as a bawdyhouse, or house of ill fame, to which persons resort for the purposes of prostitution and lewdness, is a right belonging to the land, and the fact that defendant's premises were so used before plaintiff purchased his property constitutes no defense to an action to enjoin the same.

2. ———: ———. The illegal use of property as a house of ill fame constitutes a continuing injury to a nearby property owner which is unaffected by lapse of time.

3. ———: ———: DEFENSES. The fact that municipal authorities tolerate the maintenance of a house of prostitution on defendant's property, and thereby violate the law themselves, constitutes no defense to a suit by a nearby property owner to enjoin such maintenance, special damages being shown.

4. ———: ———: SPECIAL INJURY. Where a nearby property owner and those in his employ are compelled to witness indecent conduct of the inmates of a bawdyhouse, and to hear loud, boisterous, indecent and annoying noises made by them and their dissolute companions, he thereby suffers a special injury different from that suffered by the general public, and is therefore entitled to enjoin the same, notwithstanding the maintenance of such place is a public nuisance.

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

T. J. Doyle, G. L. De Lacy and *James E. Philpott,* for appellant.

John M. Stewart and *D. H. McClenahan, contra.*

REESE, C. J.

This action was instituted in the district court for Lancaster county by the plaintiff, who is a merchant engaged in business at No. 133 South Ninth street in the city of Lincoln, and against the defendant, the keeper of a house of ill fame at No. 124 on the same street, being diagonally across the street and nearly opposite plaintiff's place of business. From the pleadings and evidence it is shown that O street is one of the principal business streets of said city, and that the properties referred to are south of said street, and within less than a block thereof, and within that part of said city used for general business purposes. The place of business of plaintiff is in a two-story brick building, both floors of which are used in the conduct of the business, which is a general store for the sale of harness, fur coats, work coats, mit-

tens, gloves and bicycle supplies. The value of his stock of goods is about $7,000. The building occupied by defendant is a two-story brick, and is confessedly used by her as a house of prostitution.

It is alleged in the petition that defendant is using and intends to continue the use of said building as a bawdy-house and house of prostitution, wherein are kept a large number of prostitutes under the control and charge of defendant, and as a resort of prostitutes and licentious men, and is resorted to at all times of the day and night by persons of that description, and is a disorderly house where fighting and brawls, drinking of intoxicating liquors, and disturbances of the peace continually occur; that from the doors and windows of said house passers-by are hailed by the prostitutes and invited to licentious commerce with them, and indecent exposures of their persons are made therefrom, and that the house as kept and used is a nuisance, and a detriment to plaintiff, his business and his property; that plaintiff's property has been greatly depreciated in value, and the rental value thereof greatly lessened; that he is deprived of the comfortable use and enjoyment of the property, and his business has been injured by the loss of customers who are unwilling to visit his store on account of the disgraceful and indecent acts and conduct of defendant and those kept by her and who frequent her place. The prayer of the petition is for an injunction restraining defendant and those under her control or authority or procurement from using the property or any part thereof for the purposes of prostitution, or keeping or maintaining a disorderly or bawdy-house upon said premises. The answer admits the location and use of the properties as alleged, and avers that both are situated "in the immorally submerged part of said city"; that there are other houses of prostitution and a number of saloons in the immediate vicinity; that her house has long been kept and used for the purpose named; that plaintiff was reared from boyhood in the immediate neighborhood, and, knowing the use to which defendant's

property was devoted, had purchased the store and business. All averments of the petition charging offensive acts or boisterous noises as well as damages to plaintiff are denied, and she avers that she has at all times maintained a quiet and orderly house, which has been closed to men of vicious, brutual and degenerate character when known to her. A trial was had in the district court, which resulted in a finding in favor of plaintiff, and enjoining defendant and all others acting with her consent and authority from using said premises as a bawdyhouse or a house of prostitution and maintaining or operating the same for such purposes. Defendant has appealed.

There is not much question as to the facts in the case. The principal dispute thereon is as to whether the proof sustains the finding of the court as to a special injury to plaintiff as distinguished from the injury to the public generally sufficient to justify the issuance of an injunction in favor of plaintiff personally. It is not deemed necessary here to set out the evidence in detail, except to say that enough is shown to support a finding that the averments of the petition are sustained by the proof that the maintenance of the house of defendant as a bawdyhouse has contributed to the depreciation of the value of plaintiff's property and the rental thereof, and has rendered his place of business an undesirable one, has prevented the extension of his local trade, and has been and is a source of annoyance to him, his clerks, and customers; that men and women of vicious, lascivious and drunken habits congregate at her house and along the street and sidewalk adjacent to plaintiff's property, and engage in brawls and fights to such an extent as to prevent respectable customers from frequenting his place of business. It may be said that it is true that these acts have been indulged in to a less extent in later years than formerly, yet enough is shown to justify the finding that they have been continued until recently before the beginning of the suit.

The principal contention is as to the law to be applied.

It is a generally accepted rule of law that a private individual may not enjoin a nuisance of a public character unless he can show that he suffers damages or injury which is special to himself or his interests; that public nuisances are criminal in their nature and can be suppressed by the enforcement of the criminal law applicable to such cases. It is conceded that the house of defendant is a bawdyhouse, and that she maintains it as one of that character; but it is insisted that she is subject only to the action of the state in the enforcement of the criminal law in the usual way. In support of this, a number of authorities are cited, which we do not deem it necessary to notice further, for the reason that, as a general rule, the position must be conceded. See 1 High, Injunctions (4th ed.), sec. 762. A bawdyhouse is a public nuisance. 1 Wood, Nuisances (3d ed.), sec. 29; Criminal code, sec. 210.

In order to avoid the extension of this opinion to an unreasonable length, we will treat the assignments of defendant together. They are, not only that plaintiff has failed to show a sufficient personal interest to enable him to rightfully maintain the action, but that by his laches he has forfeited his right, if any ever existed, to seek the remedy of injunction in his own behalf. It is said in defendant's brief that "prescription will not run against a public nuisance so as to defeat the abatement of it by public authorities. But the appellant contends that prescription does run against the right of a private citizen to abate a public nuisance by injunction." Under certain conditions this is probably true, but we hardly think such a rule could rightfully be invoked in a case of this kind. The case of *Ingersoll v. Rousseau,* 35 Wash. 92, was much like the one now under consideration in its facts. The action was brought by a lot owner in the city of Everett against the owner of an adjoining lot to restrain him from maintaining a house of ill fame upon said adjoining lot. The issues were quite similar to those here presented. The court held that such illegal use of property could not be continued over the objection of the plaintiff in the

case, upon the ground that defendant's property was so used before the plaintiff purchased; that the right of the plaintiff to maintain the action was not affected by lapse of time; that the fact that the authorities of the municipality tolerated the maintenance of the house of prostitution (as shown in this case) was no defense; and that where the adjoining proprietor was compelled to witness indecent conduct of the inmates of the bawdyhouse, and listen to the loud, boisterous and unseemly noises made by them and their dissolute companions, he thereby suffered a special injury different from that of the general public, and was therefore entitled to enjoin the same, notwithstanding the maintenance of such a place was a public nuisance. In *Dempsie v. Darling,* 39 Wash. 125, it was held that the owner of a vacant lot upon which he desired to construct a building to be used for a lawful purpose had the right to enjoin the owner of an adjoining lot from continuing a house of prostitution then in existence. See, also, *Wilcox v. Henry,* 35 Wash. 591. *Blagen v. Smith,* 34 Or. 394, was where the defendant had remodeled certain buildings and was about to rent them to be used for immoral purposes. In many other respects the questions involved were quite similar to those presented in this case. The supreme court of Oregon, in quite an elaborate opinion, held that a house of ill fame is a public nuisance, but that the plaintiff being the owner of adjacent property could enjoin its use or continuance. To the same effect are *Weakley v. Page,* 102 Tenn. 178, 53 S. W. 551; *Marsan v. French,* 61 Tex. 173; *Cranford v. Tyrrell,* 128 N. Y. 341. The case of *Ingersoll v. Rousseau,* 35 Wash. 92, is republished and annotated in 1 Am. & Eng. Ann. Cas. 35. The heading of the note at page 38 in referring to the principal case says: "This case is clearly within the rule that private citizens may maintain a suit to enjoin a nuisance where special injury is suffered. The particular nuisance which produces the injury is immaterial, provided it is of such character as to cause special damages to certain persons"—citing a number of cases from England,

Canada, the United States, and more than half of the state supreme courts. It seems that there can be no doubt as to the rule or that plaintiff has brought himself within it by the pleadings and evidence.

We have not overlooked the cases cited by counsel for defendant, but cannot here review them. They generally state the correct rule, but are not decisive of the case in hand.

It follows that the decree of the district court making the injunction perpetual must be, and is,

AFFIRMED.

FAWCETT, J., not being present at the time of the argument, took no part in the decision.

MARGERY H. SMULLIN ET AL., APPELLEES, V. IDA M. WHARTON ET AL., APPELLANTS.

FILED FEBRUARY 6, 1909. No. 15,840.

1. **Wills: CONSTRUCTION: ALLOWANCE TO WIDOW: INTEREST.** As construed upon a final adjudication, the will of G. B. bequeathed and devised a portion of his estate to a trustee, the income, and, if necessary, a portion of the body of the trust estate, to be applied to the maintenance and support of I. B., his wife, the surplus of the income to be divided between his collateral heirs, and upon the death of I. B. the whole of the trust estate to pass to and be divided between such heirs. There was nothing in the will fixing the amount which I. B. might receive and retain annually for her maintenance. In an action seeking a decree fixing such sum as she might retain and for an accounting, the district court by its decree fixed the amount at $5,400 per annum. *Held*, That the legal effect of the decree was the same as though that sum had been written in the will, and should take effect from the date of the death of the testator, but subject to the deduction of all sums received from the trust estate by said I. B.; and for the purpose of ascertaining the amount due, if anything, an accounting should be had and decree rendered in favor of I. B. or against her as the balance might appear, but that in rendering such account neither party would be entitled to interest upon annual balances.

2. ———: CONTEST: COSTS. Where there was a contest of such will, the contestants seeking to prevent the probate thereof, and which contest caused long and expensive litigation, the will being finally admitted to probate, the reasonable and necessary attorneys' fees and expenses in defending against such contest should be charged to the estate devised and bequeathed by the will. And the fact that other property, named and specified in the will, was devised and bequeathed to I. B., but which was, after the making of the will, and before the death of the testator, conveyed and transferred to her personally, would not affect her rights, as the title to such property was not involved in the contest of the will.

3. ———: COSTS. On a trial of an action against I. B. and the trustee for an accounting, and which trial necessarily resulted in the decree fixing the amount which I. B. was entitled to retain annually from the trust fund in her hands for her maintenance and support, under the provisions of the will as construed, there being no other method of ascertaining and fixing such amount, the same not having been previously ascertained, the taxable costs should be charged to the estate, and not against I. B. personally. The language of LETTON, J., quoted in the opinion, had no reference to the accumulation of costs in subsequent proceedings.

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

W. W. Morsman, for appellants.

John C. Cowin, J. H. McIntosh and *F. A. Brogan, contra.*

REESE, C. J.

For a statement of the issues and facts in this case up to the filing of the opinions reported in 73 Neb. 667-711, we need only refer to the record in the report of the decisions. The cause was remanded to the district court, and by the mandate issued by the clerk of the supreme court, of date October 8, 1907, the district court was directed to "take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the pay-

ment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust; second, to charge the said appellee as trustee in trust to pay and distribute annually all such surplus income from the trust estate, if any there be, after providing for the maintenance of the appellee as aforesaid, and such gifts to charitable purposes as she may desire to make from time to time, not exceeding $10,000 in all, to the brothers and sisters of the testator, share and share alike, the issue of deceased brothers and sisters, if any such issue, to take the share of the deceased parent; third, for such other accounting and decree as may be necessary to carry fully into effect the provisions of the constructive trust declared to exist and of the trust declared by the will in Westerfield, and according to the views expressed in the opinion by Chief Justice HOLCOMB, and the subsequent opinions of this court." The commanding part of the mandate is practically a repetition of the above, and need not be further copied here. A copy of the opinion by Judge LETTON (73 Neb. 706) was attached to the mandate and made a part of it.

Upon the reappearance of the case in the district court, a number of amended and supplemental pleadings were filed, but it is not deemed necessary to set them out, as they consisted principally in shaping the issues to correspond with the mandate and opinion of this court. They also contained statements of accounts of moneys received and expended by defendant and the trustee, and a list of the property of which the testator died seized. Defendant claimed that the amount of money to which she was entitled, as of her own, absolutely, out of the trust estate, was $7,200 per annum, as and for her maintenance according to her previous style of living, while plaintiffs insisted that $2,000 per annum would be a sufficient allowance. The cause was tried to the district court, which resulted in an extended and elaborate find-

ing of facts and decree fixing the amount which defendant could retain for her maintenance and support at $5,400 per annum, the allowance beginning January 1, 1908, and also allowing her to make donations to charitable purposes, as indicated in the will, and approving and allowing her for moneys paid out for taxes, improvements of the trust property, and directing that the same be paid out of the trust fund for her reimbursement. Her claim for moneys paid for attorneys' fees and expenses growing out of the litigation in the contest of the will of the testator by plaintiffs was allowed in part, and the costs of this suit were adjudged against her personally. From this decree she appeals, assigning as error the ruling of the district court limiting the allowance of $5,400 for her maintenance to begin January 1, 1908, instead of June 1, 1895, the date of the death of the testator, and refusing to allow interest at 7 per cent., that the court erred in not allowing her a sufficient sum for her expenses incurred in the litigation in which the will was established and admitted to probate, and that the court erred in adjudging her to pay the costs of this action. The case is brought here upon the pleadings, the findings and decree alone. Defendant presents no bill of exceptions. All orders and parts of the decree allowing her for moneys expended, payment of commissions, and for services of the trustee, in fact all findings not involved in the three assignments above pointed out, stand affirmed, approved and as final, and will not be noticed herein. There is no appeal from the action of the trial court in fixing the amount to which defendant is to be entitled at $5,400 per annum, and that part of the decree will stand without review, save as to the date from which the allowance is to be made, and, in case it is directed to have its beginning at an earlier date, upon the question of interest.

The contention of defendant is that the allowance, if it might be so designated as determined by the trial court, is and was the first that it has at any time been judicially, or otherwise, ascertained as to what is meant by

the disposition of the property contained in the will, and therefore it is of the same import and effect as if it had been written in the will specifically and must be now so treated; that, had this provision been written in the will, there could be no question but that defendant would have been entitled to that sum out of the trust estate annually from the date of the death of the testator; that the decree of the district court fixing the amount per annum which defendant might retain as hers absolutely should be treated in the same way and governed by the same rule. It is claimed by defendant that, since the estate has been in constant litigation from the time of the proposing of the will for probate to the present, she has not been able to realize the full allowance, and therefore an accounting should be had; that she be credited with the said sum of $5,400 each year since the death of the testator, and charged with the amount received out of the trust estate and applied to her own use, a balance struck, and if the amount so received and applied by her should be less than the sum fixed, that the difference be decreed to her, with interest thereon from the close of each year to the present time, at the rate of 7 per cent. per annum; that the fixing of the date at January 1, 1908, in the decree cuts off such accounting and is to the prejudice of defendant. It is insisted that defendant has not received to her own use, for any one year, the amount so fixed, and that there is due her, of principal and interest, under this contention, the sum of $63,077, which the trial court refused to allow. Upon the other hand it is contended by plaintiffs that it was within the jurisdiction and power of the district court to fix upon a date when the allowance should begin to run; and that, since the defendant has had during the time named sufficient to supply her needs, without reference to whether the same was supplied in part from her own means or from the trust estate, and since no greater demand has been made by her than for the amount actually received, no greater allowance should be made.

As finally construed by this court, the will created a trust or duty on the part of the defendant to distribute the surplus income of the trust estate annually, after supplying her own wants, among the designated relatives of the testator, who to that extent were made legatees under the will; that, while the will was silent upon the subject, yet sufficient was shown of the requests of the testator to his wife, and her agreement thereto, to warrant the reading into the will the provision thus agreed to by her providing for his relatives. By the terms of the will the subsequent conveyances and transfer by the testator of certain property to his wife, and, as held by the former decisions of this court, the property so conveyed and transferred to the wife, forms no part of what is termed the trust estate. As said by Judge LETTON (73 Neb. 708), in referring to this property: "With this property so conveyed the *cestuis que trustent* have no concern whatsoever. They have no interest in it. It belongs to Mrs. Wharton. Both the property itself and the income from it are hers to do with as to her seems best." This being true, it is claimed that, since she is limited to the $5,400 per annum, it would not be equitable to compel her to rely to any extent upon her own means for her support, thus depleting the amount to which she is entitled, and to the same extent increasing the surplus going to plaintiffs; that, if she is entitled to withhold the sum named under the provisions of the will of her deceased husband, this has been her right each year since his decease, but the segregation of said sum from the trust estate and the distribution thereof has been prevented by the litigation in which the estate has been continuously involved, and has prevented the receipt of the same by her and the distribution of the surplus. Defendant demanded of the court that a finding and decree be entered directing the trustee to pay her the said sum of $5,400 for each year ending the 1st day of June, commencing June 1, 1895, the date of the death of the testator, less the amounts received by her from said estate each year, with accrued

interest. This the court refused to do, holding, "as a matter of law, that the defendant Ida M. Wharton is not entitled to recover from the trust estate any part of the sum of $5,400 for any prior year, for the reason that the evidence fails to show that during any such year she actually expended for her support more than she received during the year from the trust estate."

As above suggested, the first and principal question presented is from what date should the allowance be made to run? If the defendant's contention that the effect of the decree is that the sum of $5,400 should, by virtue of the decree, be treated as if written in the will in terms, it would seem that it should have been held that the sum thus ascertained as the amount to be retained for the sole use of defendant must date from the death of Mr. Boggs, the testator. The provision of the will, as finally construed, is that defendant shall receive to her own use from the trust estate a sufficient sum of money annually to maintain and support her according to her standard of living prior to the death of her husband, no definite sum being named. The district court by its decree has said that the amount of money annually necessary to such maintenance is $5,400. This, if correct now, must have been the correct amount during the whole time since the right accrued, else it would be fluctuating and changing each year, and nothing could be said to be fixed or determined by the decree, the whole inquiry remaining open for modification and change by any subsequent ruling. This is not, and cannot be, the case. The amount fixed by the court is to stand as a permanent finding and decree. It is a judicial declaration that the will shall read "$5,400 per annum to defendant, the surplus to plaintiffs." If this be correct, it would seem that the question is one of easy solution. Treating it as though the sum fixed by the court was within the will, as we must, it follows that defendant has been entitled to the retention annually from the trust fund of the amount named. The rule declared by some of the English courts seems to be

that, if the annuity is payable from the body or principal of a fund, the first payment is due at the end of the first year after the death of the testator. But, if it is payable only out of the interest or income of the fund, it becomes due at the end of the second year. 1 Roper, Legacies, p. *877. The reason for this distinction arises out of the fact that in the latter case there must be sufficient time after the settlement of the estate for the interest upon the principal fund to accumulate. The rule, however, has been questioned, and by some it has been held that the annuity would become due at the end of the first year in either event. See *Estate of Flickwir,* 136 Pa. St. 374.

It is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator. By the provisions of the will itself, unaided by extrinsic evidence, there is no specific trust imposed upon defendant with reference to the income or body of that portion of the estate devised and bequeathed to the trustee. The clause included in the trust provision conferring any rights or interest in the estate is the fourth thereof, which makes it the duty of the trustee, upon the death of the wife of the testator, defendant herein, to divide the remaining portion of the trust estate equally between his brothers and sisters, or, in case of the decease of any of them leaving issue, that such issue receive the portion that the parent would have received had he or she been living. But, as has been declared in the previous decisions, a contemporaneous conversation and agreement between the testator and his wife created a trust in their behalf, said trust being engrafted upon and read into the will, doubtless as giving effect to the trust created in and by the will. By the terms of the mandate issued from this court to the district court, the latter court was "commanded, without delay, to take an account and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was

accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust." This command was the warrant of authority to the district court to make that inquiry. There is no intimation that the inquiry should be limited to the present or future, no time limit being suggested. If the will, when considered in the light of the agreement of the parties, the agreement being a part thereof, as between the testator, his wife and plaintiffs, created and suggested the trust, it must be considered as a part thereof, and as taking effect at the time of the death of the testator, and therefore the district court had not the power to impose the limitation as to time. We are persuaded that this must be the case, since it was evidently not the intention of the testator that his wife should in any event be compelled to maintain herself from her own estate, for it is expressly provided in the will that the trustee shall deposit in the bank to the credit of defendant during her life, for her own use, all rents, issues and profits of the trust estate, such deposits to be made promptly upon the collection of the income. Nothing could be plainer than that it was the purpose of the testator that his wife should have her living and maintenance out of the trust estate, and that the property conveyed and bequeathed to her should be free from this burden, but should be hers absolutely. From the pleadings, findings and decree it is apparent that she has not received the full amount which it is now for the first time established is given her by the will from the trust estate, but that she has received the same in part. An accounting will have to be had, in which she will be credited with the sum of $5,400 annually since the first day of June, 1895, and charged with what she has received and appropriated during that time. Should a balance be found due her, the same should be decreed to her out of the trust estate. Should it be found that she has received more

than the amount of such allowance, she will be required to refund the excess. As to the demand for interest at the rate of 7 per cent. upon the several balances from the end of the year for which they were due, there can be little, if any, doubt but that the general rule of law is that, in ordinary cases of legacies bequeathed, the legatee is entitled to interest at the legal rate from the time they could be legally demanded. In the case *In re Woodward's Estate,* 78 Vt. 254, the question arose as to when pecuniary legacies would begin to draw interest, and it was held that, under the law of that state, interest would begin to accrue at the end of the first year from the death of the testator, unless otherwise provided in the will. The case is annotated in 6 Am. & Eng. Ann. Cas. 524, and the decisions of the courts of this country are quite thoroughly collated. From the citations given, we conclude that, in the absence of modifying statutory provisions, that is the general rule. It may be suggested that probably the rule is modified by the statutes of this state. Sections 244, 245, ch. 23, Comp. St. 1907, provide, in substance, that the county court at the time of granting letters testamentary shall make an order allowing to the executor a time for disposing of the estate and paying legacies, which may be, in the first instance, one year and six months, but that time may finally be extended to three years. By sections 288 and 289 it is provided that, after the proper allowances have been made for the support of the family of the deceased, the amounts due legatees from the estate may be distributed and assigned to those entitled to participate therein, and by section 290 the distribution must be by decree, naming the parties entitled to such participation, and they shall (then) have the right to "demand and recover their respective shares from the executor." By these sections it would appear that none of the legacies are due and demandable until after the entry of the decree provided for, and therefore they could draw no interest prior to that date. If this be the

case there could be no interest allowed in any event until after the termination of the litigation over the final admission of the will to probate and the necessary proceedings thereafter leading up to the decree. Should these conclusions be applied, it would be necessary to compute the interest beginning with the event named. However, we are of opinion that, under the peculiar circumstances of this case, the defendant would not be entitled to interest on the unpaid portion of the allowance fixed by the district court subsequent to the final probate of the will and the necessary proceedings thereafter in the county court, the trust estate being largely in her own hands and subject to her control. So far as we are able to ascertain from the record she presents here, she made no demand nor effort to obtain the right to the use of more of the estate than she actually appropriated to that purpose. True, she was not at fault for this, as the estate has been in constant litigation, and, until the entry of the decree by the district court, the amount to which she was entitled for her own use was unknown, and, while it was not within the power of the district court to deprive her of the allowance for the full time contemplated by law, yet it was a proper exercise of its jurisdiction to disallow the accumulation of interest. We therefore hold that the defendant is entitled to the said sum of $5,400 annually from the date of the death of the testator, to be paid out of the income of the trust estate, less the amount received by her, but that she is not entitled to interest thereon for any portion of said time, nor is she chargeable with interest should it be found that she has received and appropriated more than the annual allowance made. In this the court did not err.

In the opinion by Judge LETTON (73 Neb. 709), it is said: "Mrs. Wharton's reasonable expenses in the litigation in which the will was established should be paid out of the whole estate taken under the will, including taxable costs and reasonable attorneys' fees. The taxable costs in this case should be adjudged against Mrs. Wharton per-

sonally, each party paying their own attorneys." It is possible that this language may have been misapprehended or misconstrued by the district court, as by the findings and decision of this court, and the second finding of the district court on the hearing now here on appeal, the property conveyed and transferred to Mrs. Wharton vested in her absolutely and unconditionally upon the conveyance and transfer, and, as said in the finding, "the said George H. Boggs did not die seized of the same." It must be apparent therefore, that in the language above quoted the writer of the opinion referred only to the estate devised and bequeathed as "the whole estate taken under the will," and that the costs and expenses therein referred to as payable out of the whole estate should be paid out of the estate thus transferred; but that such payment should not in any way deplete the amount to be paid or retained by Mrs. Wharton for her maintenance and support. Upon this part of the case the eighth finding of fact, which is too long to be here quoted, is not very clear. Among other things it is said, in substance, that the separate estate of Mrs. Wharton, acquired as the donee of the real and personal property given her after the execution of the will, and prior to the death of Mr. Boggs, and which was of about the same value as the estate transmitted by the will, received an indirect but real benefit from the services of counsel in the litigation growing out of the contest of the will. That such benefit was taken into consideration by her counsel in fixing the amount of their charges, and should be apportioned accordingly. That one-third thereof should be borne by "the estate indirectly benefited, and two-thirds thereof by the estate directly benefited"; that $10,333.33 of the $15,500 paid out as attorneys' fees should be charged to and paid by the trust estate, and to which should be added the sum of $340 paid out for expenses, making a total of $10,673.33; that the value of the trust estate, which included $10,000 bequeathed to Mrs. Wharton, was $135,000, $125,000 thereof going to the trustee; that the trust estate

should therefore be charged with the payment to Mrs. Wharton of 125-135 of the $10,673.33, being $9,882.90. It is true, as claimed by counsel for appellees, that there is no bill of exceptions preserved by appellant to which we can refer for the evidence upon this feature of the case, but we are persuaded that enough is shown by the record and findings to justify a review of this question. As we have hereinbefore said, it is well settled by the former opinion that the reasonable expenses made in probating the will should be paid out of the estate devised and bequeathed. This must of necessity include the whole expense, since the title to the property conveyed and assigned to defendant by her husband constituted no part of the estate to be affected by the will. Her title to that property did not depend upon the validity of the will. Had probate been finally denied, the property would still have been hers. Then why should she be required to defray any of the necessary expense of that litigation out of her own estate, except in so far as she was directly interested? We fail to see any reason why she should. Instead of the trust estate paying 125-135 of two-thirds of that expense, it should pay that proportion of the whole, less the amount to be deducted on account of the $10,000 interest she had in the bequeathed estate, in order to equitably reimburse defendant what she has reasonably and necessarily expended in that litigation. The question as to whether the $15,840 was a reasonable and fair charge can be further investigated, if deemed necessary.

Lastly, it is insisted that the district court erred in taxing all costs to defendant. We grant that a large discretion is vested in the trial courts in the matter of the taxation of costs under section 623 of the code. But, as held in *Wallace v. Sheldon,* 56 Neb. 55, and *In re Clapham's Estate,* 73 Neb. 492, this discretion is not an arbitrary one, but a legal one, to be exercised within the limits of legal and equitable principles. It is suggested that in the opinion of the district court the statement contained in the above excerpt from the former opinion in this case

that "the taxable costs in this case should be adjudged against Mrs. Wharton personally" was intended as imposing upon her all the costs which might be made throughout the whole of the litigation, without reference to its length, or whether or not she was in the wrong. There can be no doubt but that what was in the mind of the writer of that opinion was that the costs of the case to that time, including that appeal, should be taxed to her. It would be wholly inequitable and unreasonable to say that whether she be found to be in the right or wrong, or if the litigation should be protracted wrongfully and against her wish or desire, all the costs which might be made in the future should be taxed to her, without reference to the result of the litigation. This would be giving a weapon to one side during the future continuance of the litigation, and imposing a handicap upon the other, which neither the law nor this court ever contemplated. It was impossible for either party to this action to say, prior to the decree in this case, just what amount of money defendant could legally and safely use for her maintenance and support. Any disbursement she might have offered to plaintiffs could have been rejected and made the source of almost endless litigation, for each year's apportionment would have furnished new grounds for legal contest. The rights of no one were settled until adjudicated by the court. It was as necessary for one side as the other that all ground for contention should be removed. There is no finding or decree fastening any malversation, fraud, or wrongdoing upon defendant or her husband, the present trustee. True, the court did not allow her to retain as much of the trust fund for her maintenance as she desired, but more was allowed than plaintiffs were willing to grant. In view of all the circumstances, it would seem but just that the taxable costs of the trial and this appeal be paid out of the trust estate, each party paying their own attorneys' fees. The order taxing the costs to defendant Ida M. Wharton is reversed, with directions to tax the taxable costs to the trust estate.

The judgment of the district court, in so far as the matters here discussed are concerned, is reversed, and the cause is remanded for further proceedings and decree in accordance with law and this opinion.

REVERSED.

LETTON, J., dissenting.

I am unable to take the same view of the rights of the parties in this case as that expressed in the opinion of the chief justice. In the second opinion in the case, written by HOLCOMB, C. J. (73 Neb. 705), the following language is used: "The former opinion should be accordingly modified, and the trust property held to have *vested in the collateral heirs* of the testator named in the will, *subject to the use of the net* annual income and the principal estate by the appellee, Ida M. Wharton, as the same may be reasonably necessary and required to support and maintain her in the style of living she had been accustomed to, and subject to her right to devote not exceeding $10,000 to charity." In the body of the opinion the following expressions are used (p. 700): "It seems reasonably clear that he impounded a specific portion of his estate, the bulk of it, to be used, first, for the support of his wife, *if required;* and, second, the remainder to go to his heirs as named in the provisions of the express trust found in the will." On page 701 the following is found: "If this language be construed, as we think it should be, as applying to the property devised to Westerfield in trust, and as giving to the wife the *right to the use of the annual income* in so far as it is required to maintain her in the style and comfort she had been accustomed to, and also a like right to the original fund or property devised in trust, if so required for a like purpose, then the matter is resolved into a very simple proposition wherein lies no serious difficulty in the way of the enforcement of the trust. The $5,000 or $10,000 to be devoted to charity, if the wife so desires, involves only a matter of mathematical computation, the limit being $10,000, the limit in other respects being what is required and reasonably necessary for the support of the wife in the style and

comfort in which she had been living." On page 703: "They would make clear that as to this part of the estate she had only the right of use reasonably necessary to support and maintain her as she had been accustomed to living." On page 709 in the supplementary opinion written by myself, the following language is used. "The remaining property was placed in trust with Westerfield, with the right to his wife *to use the income from it,* or if necessary the corpus thereof, for her maintenance and support during her life, in her accustomed style, or to give a part to charity, and the annual surplus income after this was done, and the property in trust remaining at her death, was to be divided among his relatives." At the close of this opinion, the district court was directed "To take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust." I think that these quotations from the former opinions make it perfectly clear that the intention of the court was that Mrs. Wharton should have the use of the income so far as necessary for her support, and that all that was necessary for her to do when the case went back to the district court for an accounting was to establish that she had expended a certain amount either of the income or of the corpus of the trust estate, if the income was insufficient, in her support, the only limit being that she did not exceed or go beyond the style of living to which she had been accustomed in her husband's lifetime.

While the contest of the will was pending, this income was not accessible to her, and she could take nothing from the estate except as allowed by the county court and paid to her by the special administrator. The property was not

within her control, and, hence, if upon the accounting she had shown that the allowance made her by the county court was insufficient to enable her to live according to the prescribed standard, and that she had been compelled to use her own means for that purpose, she should have been allowed from the trust estate the sum she thus supplied, with interest from the time that she furnished the money. After the will was probated and established, and Westerfield entered upon the execution of the trust as trustee, the conditions were changed. From that time on there was nothing to prevent her from using the income, and, if necessary, a part of the corpus of the estate, in order to furnish her a living in her accustomed manner. From that time on all proceeds of the trust estate were at her absolute disposal, the only limitation being as to the disposition she could make of the surplus after her own support had been taken out. If the amount which she received from the income of the trust was not sufficient to satisfy her desires, she had the right to use a portion of the principal. The whole matter was within her own discretion. She was only accountable in case she exceeded the limitations as to her use of the fund. Her husband's intentions were not that she should skimp and save and create a large estate by living in a meager style and hoarding the sum thus saved, but his expressed intention was, and the language quoted from the opinions of the court I think clearly indicates, that the only right she has or had was to the *use* of the money, and not a right to its accumulation for the benefit of her heirs or donees. This was the very thing he sought to avoid. Of course, as soon as an accounting was had, it was then within the power of the court to ascertain what the expense of a course of living such as was contemplated by her husband is now, and will be in the future, and to fix and determine that amount and charge the payment of it upon the estate. This does not change the fact that, strictly speaking, she is only entitled to use this sum of $5,400 for the purposes designed, but though her expenditures may not in fact reach

this sum, or may exceed it, it is so approximately correct that in all probability it is as near as can be attained, and ought not to be re-examined, even if conditions change.

We are confined to the findings of the district court in regard to the facts. It found "that the sum per annum sufficient to support and maintain Ida M. Wharton, formerly Ida M. Boggs, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator * * * is $5,400." The court further found: "The defendant Ida M. Wharton, since the death of the testator, has not lived and is not now living in the style intended by the testator, but has lived and is living in a less expensive style than that to which she was then accustomed, and it does not appear whether the actual expenses of her maintenance exceed the amount received by her from the allowance made by the county court and the net income from the trust estate." The decree further recites: "The court holds, as a matter of law, that the defendant Ida M. Wharton is not entitled to recover from the trust estate any part of the sum of $5,400 for any prior year, for the reason that the *evidence fails to show that during any such year she actually expended for her support more than she received during the* year from the trust estate." Under these findings of the district court, I think no other decree would be proper, on this branch of the case, than that which the trial judge rendered. I think the following cases tend to support these views. *Blanchard v. Chapman,* 22 Ill. App. 341; *Collister v. Fassitt,* 163 N. Y. 281; *Bailey v. Worster,* 103 Me. 170; *In re Simon's Will,* 55 Conn. 239; *Johnson v. Johnson,* 51 Ohio St. 446; *Garland v. Smith,* 164 Mo. 1.

As to the matter of the allowance for expenses in defending the will, the lower court found that $10,673.33 was her reasonable expenses incurred in the litigation in which the will was established. I think we are concluded by this finding in the absence of a bill of exceptions, and

that we have no right to set it aside upon statements made in briefs and oral arguments.

As to the costs in the matter of the accounting in the district court, I think it proper that they be paid out of the corpus of the trust estate, since the controversy was one made in good faith as to the proper disposition of that property. I think the judgment of the district court should be affirmed, except as to this last item, as to which I concur with Judge REESE.

ROOT, J., concurs in this dissent.

The following opinion on motions to correct and for rehearing was filed May 7, 1909. *Corrections allowed. Rehearing denied:*

1. **Wills: CONSTRUCTION: ALLOWANCE TO WIDOW.** The opinion filed and judgment entered in this court, *ante*, p. 328, corrected and amended so as to allow defendant's support from the trust estate instead of from the income thereof.
2. **———: ACTIONS: COSTS.** At the suggestion of counsel for defendant, in order to prevent further litigation, the decree of the district court in the matter of the allowance to defendant for costs, expenses and attorneys' fees is affirmed.
3. **Interest.** The former holding refusing to allow defendant interest on the annual allowance of $5,400 for support adhered to.

PER CURIAM.

The opinion written upon the last appeal in this case is reported, *ante*, p. 328. Subsequently defendants filed a motion to correct alleged verbal errors in the opinion. The first clause in this motion seeks to correct a supposed error occurring at the close of the paragraph which discusses the allowance to defendant of $5,400 per annum to begin at the date of the death of the testator instead of January 1, 1908, as fixed by the judgment of the district court. In the opinion it is held that the defendant is entitled to the $5,400 annually from the date of the death of the testator, "to be paid out of the income of the trust estate, less the amount received by her," but without in-

terest. From an examination of the provisions of the will it appears that the right of defendant to her support out of the trust estate is not limited to the income, and therefore the use of the words "the income of" were inadvertently used, and it should have read, and is changed to read, "out of the trust estate," subject to a deduction of what she received from said estate during said time.

Again, objection is made to the holding, *ante,* p. 328, in which the decision of the district court is reversed on the question of the allowance of attorneys' fees paid by the defendant. It was stated by counsel for her in the argument on this motion that, rather than enter upon a re-examination of this question in the district court, and thus cause further delay in the final settlement of the estate and the further continuance of the litigation, defendant would prefer that the judgment of the district court giving her credit for $10,000, instead of the whole amount paid, should stand. The judgment will therefore be that that part of the decree will be affirmed.

It follows that the order for the judgment of this court should be changed to read as follows: The judgment of the district court, as to the questions herein reviewed and set aside, is reversed and the cause is remanded, with directions to said court to enter a supplemental decree requiring the trustee to pay to the defendant, Ida M. Wharton, out of the trust estate, a sum equal to the sum of $5,400, per annum, from June 1, 1895, to January 1, 1908, less such sums as have been heretofore paid to or received by her out of the trust estate, as established by the facts found and set forth in the decree of said court, and that all taxable costs of the last trial and of this appeal be taxed to the trust estate to be paid by the trustee.

Plaintiffs have filed a motion for a rehearing, which is supported by an elaborate brief which has been carefully considered. Some of the propositions contended for have already been disposed of doubtless to the satisfaction of plaintiffs. All others are found to question the correct-

ness of the former opinion. Those have received consideration, but we are satisfied with our holdings upon the points discussed. The motion is therefore overruled.

Defendants have also filed a motion for rehearing, alleging as ground therefor that this court erred in directing that a further accounting be had, since, as alleged, an accounting has already been made and all necessary facts found. The only matter now left for an accounting is as to the amount received by defendant out of the trust estate since the death of Mr. Boggs to be charged up against the $5,400 per annum to which she is entitled. To our minds the findings of the district court are not entirely specific upon this point, but, should it be so held by that court, or should the court be able to arrive at a satisfactory conclusion from the evidence offered upon the trial, which is not before us, no accounting will be necessary; if not, it will have to be made.

The second ground of the motion is error in not allowing defendant interest at the rate of 7 per cent. on the annual allowance of $5,400. While we adhere to the holding that the annual allowance must date from the death of the testator, we are entirely satisfied that defendant cannot, in equity, be held entitled to interest under the circumstances of this case. It would be against right and conscience to allow it.

The one other ground presented is upon the allowance to defendant of the costs and expenses in establishing the will, including her attorneys' fees paid in that behalf, and which has herein above been disposed of. Defendant's motion for rehearing is also overruled.

CORRECTIONS ALLOWED. REHEARING DENIED.

WORRALL GRAIN COMPANY, APPELLEE, V. FRANK JOHNSON, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,449.

1. Pleading: DEMURRER: WAIVER. Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling.
2. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the judgment.
3. Appeal: REFUSAL OF TRIAL BY JURY: HARMLESS ERROR. It is error to refuse a request for a jury trial in an action at law, but where the one making the request has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice, for which the judgment will not be reversed.

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

O. B. Polk, for appellant.

Field, Ricketts & Ricketts, contra.

BARNES, J.

Plaintiff, now the appellee, brought this action in the district court to recover of the defendants the difference between the sum advanced to them on a car-load of wheat and what was realized therefor when it was sold on the market. It appears that the grain was sold to plaintiff by defendants Johnson and Cave, through their agent, defendant Hempel, as No. 2 hard wheat, and defendants, when the grain was loaded at the point of shipment, drew a sight draft on the plaintiff (which was duly paid) for a sum equal to 90 per cent. of the purchase and market price for that grade of wheat. When the grain reached Minneapolis, which was its place of destination, it was found to be wet and badly heated, so that it was not up to any grade whatever, and could not be sold on that mar-

ket. It was immediately billed to Chicago, where it was sold at the highest price obtainable, and brought net $322.60 less than the sum advanced thereon. It also appears that the plaintiff was not certain as to whether Hempel was the principal in the transaction or whether he was merely the agent of the defendants Johnson and Cave, who, it developed later, were in fact his undisclosed principals.

The plaintiff therefore by its petition set forth all of the foregoing facts, and alleged that the wheat delivered to it by the defendant Johnson was wet and damaged and not up to grade when delivered and loaded into the car by him, and that he well knew its quality and condition. The petition further set forth the amount of wheat delivered by Johnson, the amount delivered by Cave, and prayed for an accounting and adjustment of the rights of the several defendants, a judgment for the sum of $322.60, with interest thereon from the 28th day of August, 1905, and "for such other and further relief as may be just and equitable."

The defendants answered separately. The answer of defendant Johnson, who is the sole appellant, was: First, misjoinder of parties defendant; second, misjoinder of causes of action; third, no equity in the plaintiff's bill; fourth, an admission that plaintiff is a corporation, and a denial of all of the other allegations of the petition. Defendant Johnson also filed a motion praying that the case be transferred from the equity docket to the law docket of the district court, which motion was overruled; and when the case came on for hearing he demanded a trial by jury, for the reason that the action was one at law, and not in equity. His request was denied, to which he duly excepted. A trial resulted in a finding and judgment for the plaintiff, and against the defendant Johnson, for the sum of $257.50, and he has brought the case here by appeal.

Defendant now assigns as error certain rulings of the district court, to wit, overruling his motion to require the

plaintiff to elect whether it would proceed against him or the defendant Hempel, and overruling his demurrer to the plaintiff's petition. In disposing of these questions, it is sufficient to say that by answering over after the rulings complained of he waived his exceptions thereto, and they cannot now be considered. In *Becker v. Simmonds,* 33 Neb. 680, it was held that, where a party answers over and goes to trial on the merits of an issue which he has elected to join, he waives the error on the overruling of motion or demurrer. To the same effect are *Buck & Greenwood v. Reed,* 27 Neb. 67; *Pottinger v. Garrison,* 3 Neb. 221; *Lederer v. Union Savings Bank,* 52 Neb. 133, and *Dorrington v. Minnick,* 15 Neb. 397.

Defendant also contends that the evidence is insufficient to sustain the findings and judgment of the district court. His principal reason for this contention is his assumption that this action was based on a breach of warranty that the wheat in question should grade No. 2 on the Omaha market, and proof that it did not so grade at Minneapolis is not sufficient to establish a breach of that warranty. It appears, however, from both the pleadings and the evidence, that the plaintiff agreed to purchase, and the defendant agreed to sell, a car-load of No. 2 hard wheat, to be shipped to the Minneapolis market at the agreed price of 74½ cents a bushel; that the wheat delivered in the car by the defendant Johnson was wet and damaged; that it was not of the grade and quality agreed upon, and was in fact in such a condition that when it reached its destination it was not up to the standard of any grade at all, and that plaintiff had no opportunity to examine or inspect the wheat until it was received in Minneapolis. Under these circumstances, plaintiff was entitled to recover of defendant the difference between the price paid and the highest price the wheat would bring in the market where it could be sold. An examination of the plaintiff's evidence, which is in no way questioned or disputed, satisfies us of its sufficiency to sustain the judgment.

Finally, it is contended that this is not an equitable action, and the court erred in overruling defendant's motion to transfer it to the law docket, and in refusing a jury trial. We are of opinion that these contentions are well founded. The action was one for the recovery of money only, and, while the petition prayed for equitable relief, the facts alleged and proved do not require or authorize such relief. It therefore remains for us to ascertain whether the errors thus committed were at all prejudicial to the rights of the appellant. The record discloses that no evidence was introduced by him at the trial, and in fact he made no attempt to defend against the case made by the plaintiff. We are therefore of opinion that at the close of the evidence, had a jury been impaneled, the judge of the district court would have been required to direct a verdict for the plaintiff. We have examined the evidence and find that the amount of recovery is not excessive. In fact no other or different judgment could have been rendered in this case. It follows that the refusal to grant the appellant a jury trial resulted in no prejudice to any of his substantial rights, and therefore does not call for a reversal of the judgment complained of. *Chamberlain v. Brown,* 25 Neb. 434; *Degering v. Flick,* 14 Neb. 448; *Pollard v. Turner,* 22 Neb. 366; *Gage County v. King Bridge Co.,* 58 Neb. 827.

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

AFFIRMED.

FAWCETT, J., not sitting.

ORD HARDWARE COMPANY, APPELLEE, V. J. I. CASE THRESHING MACHINE COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,484.

1. **Appeal:** INSTRUCTIONS. It is reversible error to instruct a jury on an issue not sufficiently raised by the pleadings, and which is unsupported by the evidence, where it is apparent that such instruction has resulted in an excessive verdict.
2. **Principal and Agent:** ACTION FOR COMMISSIONS: CONTRACT: CONSTRUCTION. Where, in an action by an agent against his principal to recover money alleged to be due on commissions, it clearly appears that the parties have adopted a fair and reasonable construction of their contract and have acted thereon for a number of years, the court will also adopt such construction.
3. **Appeal:** JUDGMENT: REMITTITUR. Where the adoption of such construction results in reducing the question of the amount of plaintiff's recovery to a mere matter of computation, this court may make such computation, and require plaintiff to file a remittitur of the excess of the judgment rendered in the trial court over the amount he was entitled to recover, or submit to a reversal of his judgment.

APPEAL from the district court for Valley county: JAMES R. HANNA, JUDGE. *Remittitur ordered.*

O. A. Abbott and *H. E. Oleson,* for appellant.

A. M. Robbins, contra.

BARNES, J.

This action was brought by the Ord Hardware Company against the J. I. Case Threshing Machine Company in the district court for Valley county to recover the sum of $591.25 alleged to be due the plaintiff as commissions for selling a threshing outfit. The plaintiff had a verdict and judgment in the court below, and the defendant has brought the case here by appeal.

It appears from the pleadings and the evidence that the plaintiff was the agent of the defendant company

under a written contract of agency, which had been renewed from year to year for a period of something like seven years; that on or about the 14th day of July, 1899, the plaintiff as such agent sold the threshing outfit in question to Coon and Anderson, residents of said county, for the agreed price of $2,260, which was evidenced by certain notes, as follows: "$365 due Dec. 1st, 1899; $400 due Jan. 1st, 1900; $365 due Dec. 1st, 1900; $400 due Jan. 1st, 1901; $350 due Dec. 1st, 1901; and $380 due Jan. 1st, 1902." The payment of the first two notes was guaranteed by the plaintiff, and the remainder of the purchase price was secured by a chattel mortgage on the property sold. That part of the written contract of agency relating to commissions was as follows: "But it is understood that no commission is earned or payable where from any cause a machine shall be returned by the purchaser, or is taken by the company in settlement of any note or notes, or part thereof given therefor, or is bid in by the company upon sale on execution, attachment or foreclosure. A nonnegotiable commission certificate or equivalent instrument shall be issued by the company representing the commission to accrue upon each such instalment, payable upon full payment in money of the note or instalment represented by such certificate * * * reserving the right to the company to renew, extend or compromise all notes at its discretion." This contract was modified as to the sale in question by the following letters: "Lincoln, Neb., July 15th, 1899. Ord Hardware Company, Ord, Neb. Gentlemen: I have yours, also the Coon *et al.*, as sent in by our Mr. McFarland. We do not wish to accept this order in this way. But if you will accept your commission proportionately on the last four notes, on the payments due in 1900, and give us this year's payment without commission we will accept the order and ship the goods immediately. What we mean by this is not to reduce the amount of your commission, but that you accept them proportionately on the 1900 and 1901 payments. If this is satisfactory to you and you wish this rig shipped

immediately please wire us, and the rig will go forward at once. Awaiting your reply, we remain yours very respectfully, J. I. Case, T. M. Co., E. F. Gittings." "Ord, Neb., 7-25-99. J. I. Case, T. M. Co., Lincoln, Neb. Gentlemen: Please change the Coon and Anderson rig to a 36-in. cylinder 58 rear instead of the small separator 32 by 54, and be ready to send out in about eight or ten days, for they came in today and told us to let it come about that time, and we may have something to load with it about that time, and we will settle by your letter of July 15th, '99, taking our commission out of the 1900 and 1901 notes. They don't want the rig for about ten days, so we may want to ship something else with it. Yours resp., Ord Hardware Co., by A. J. Firkins, mgr."

The sale was made on those terms, and shortly thereafter the defendant furnished the plaintiff with four commission certificates, as follows: $111.60 on note due Dec. 1, 1900; $122.40 on note due Jan. 1, 1901; $107 on note due Dec. 1, 1901; $106.50 on note due Jan. 1, 1902. These certificates were accepted and retained by the plaintiff, and no complaint appears to have been made or objection raised to them until the commencement of this action. It also appears that they refused to surrender them when, later on, and some time in the year 1903, the defendant, being unable to collect the amount still due for the threshing outfit, took back the machine and surrendered up the unpaid notes. It further appears that the two notes guaranteed by the plaintiff, due December 1, 1899, and January 1, 1900, and against which no commission certificates were issued, were paid after considerable delay, and that long after the third note became due there was paid thereon the sum of $163.36; that the matter remained in that condition until in July, 1903, when the final settlement was made, and the outfit was returned to the defendant, there was paid by Coon and Anderson a further sum of $350, which fully paid the first three notes in question. The amended petition set out the agency, the contract for commissions, the letters above quoted, the

payments made, the settlement which was concluded between Coon, Anderson and the defendant, alleged that it was thereby made impossible to collect the remainder of the notes, and claimed a judgment for full commissions, which it was alleged amounted to $591.25, together with interest thereon.

The answer of the defendant set out the sale of the machinery, the notes given therefor, the commission certificates that were issued and delivered to the plaintiff; alleged that the plaintiff had kept and refused to surrender them; had demanded payment on them, and denied that any other or different commission was due, alleged that no commission was ever demanded on the first two notes, and that by the words contained in the letter, "This year's payments," the parties understood payments for the current year, and not the calendar year, alleged the payment of the first two notes, and the payment of the $163.76 on the third note, and no more, alleged the surrender of the property and the payment of $350 in settlement; that the property was much depreciated by use; that the balance due was much augmented by interest, and that the settlement was made in good faith and to prevent further loss to the defendant. The pleadings also contained some matters relating to alleged imperfections in the machinery, and threatened litigation. The defendant specially denied that the settlement in question was made in order to cheat or defraud the plaintiff. The reply admitted the dates and amount of notes, denied all other allegations contained in the answer, and alleged that the settlement or repurchase of the machinery was in part settlement of the damages sustained by the purchasers, and for the purpose of cheating and defrauding plaintiff out of its commission.

There is no serious disagreement between the parties or conflict of evidence as to the principal facts involved in this case. It is disclosed by the evidence that some complaints were made by Coon and Anderson about the machinery; that the defendant replaced such parts as were

complained about; that Coon and Anderson used the machine at least three years; that none of the notes were paid promptly when they became due, but were paid in instalments from time to time, and after much urging, and that at the time of the settlement the purchasers refused to make any further payments, and that the payment of $350 made at that time was for the purpose of avoiding litigation and closing up a losing transaction; that it was accepted by the defendant, together with the machinery in its damaged and worn out condition, and that the remainder of the notes were canceled and delivered up to the makers.

With the record and the evidence in this condition, the trial court instructed the jury, at the request of the plaintiff, as follows: "The jury are instructed that where two persons enter into a contract, the one to furnish articles and the other to sell them on commission, and receive his commission when the notes taken for the articles are paid for, the person furnishing the goods cannot retain or reserve the right in said contract to defraud the person acting as agent, nor reserve or retain the right to do any act or thing which will operate as a fraud upon the seller on commission. If the seller or agent sells goods and takes good paper, which is collectible at law, or which is well and amply secured, the seller or principal cannot so interfere with the customer of the seller so that the effect of said interference, or that the effect of such transaction, is necessarily fraudulent toward the agent and seller of goods on commission, which act would deprive him of the commission to which he was lawfully entitled, and which act was not necessarily done in order to protect the principal, then the seller or agent of the goods would have a right to demand of the principal the whole amount of the commission, notwithstanding the fact that the principal might seek to reserve in the contract those rights which would, if exercised, result in such fraud upon the seller and agent."

The giving of this instruction was duly excepted to by

the defendant, and is now assigned as reversible error. While it is true that parties cannot lawfully agree to commit a fraud, and the instruction as an abstract proposition of law may be correct, we are of opinion that it has no application to the facts of this case. The pleadings do not fairly raise an issue of fraud, and there is no competent evidence in the record tending to establish that issue. The evidence clearly shows that the contract was made in good faith, and was well understood by both parties. By the construction which they had given the contract for many years the selling price of the machinery was determined by adding to the list price the amount of commissions agreed upon, and the sum thus obtained was what the customer was required to pay. When time was given to the purchaser each note taken in payment carried its share of the total commission, and whenever it was paid in full the agent was entitled to so much of his commission as was included therein. In case the machine was returned or was taken back, the agent was not entitled to any commission on the unpaid portion of the purchase price. It is true that this contract was modified or changed by the agreement contained in the letters above quoted so as to postpone or transfer the payment of the commission to the last four notes, but, when the machine was taken back by the defendant and those notes were surrendered, the agreement contained in the letters was necessarily abrogated, and the plaintiff was entitled to recover so much of the commission as should have been included in the first two notes, which had been paid in full. As to the third note for $350, on which there had been paid at that time the sum of $163.36, so much of the $350 paid to the defendant at the time of settlement as was necessary to pay that note in full should have been applied to that purpose (*Belcher v. Case Threshing Machine Co.*, 78 Neb. 798), and the plaintiff would then have been entitled to receive the amount of the commission contained therein. This is a fair construction of the contract, and is the one previously adopted by the parties

themselves. The jury, therefore, would have been authorized to return a verdict for the plaintiff for the sum of $223.75, with interest thereon from the 13th of July, 1903, at the rate of 7 per cent. per annum, and no more. Notwithstanding this fact, the verdict was for $448.80, for which final judgment was rendered. We therefore conclude that the giving of this instruction was reversible error.

It is conceded by the defendant, however, that the plaintiff was entitled to recover $143.15, so in any event it should have had a verdict. As we view the record, there is really no dispute as to any relevant fact contained therein, and the whole question should be treated and disposed of as one of law. Giving the contract the construction placed upon it by the parties themselves, the amount which the plaintiff was entitled to recover was a mere matter of computation, and was such part of the whole commission agreed upon as the amount of the fully paid notes bear to the selling price of the threshing outfit. The price agreed to be paid by the purchaser was $2,260; the amount paid to take up the first three notes was $1,130, or one-half of the selling price; the amount of the commissions agreed upon was $447.50, and plaintiff was therefore entitled to receive one-half of that sum, or $223.75. This was payable when the settlement was concluded, and the plaintiff should have interest thereon from that date to the time of the trial at the rate of 7 per cent. per annum. The verdict should have been for $287.05, and a new trial would probably result in such a verdict. We think, however, the case should be disposed of without further litigation or expense, and it is therefore considered that, in case the plaintiff files a remittitur of all of the judgment rendered in the court below, except $287.05, within 40 days from the filing of this opinion, the judgment of the district court will be affirmed. But, if a remittitur is not so filed, the judgment is re-

versed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

WALDO E. WHITCOMB, APPELLANT, V. HIRAM CHASE, APPELLEE.

FILED FEBRUARY 6, 1909. No 15,505.

1. **Elections: APPEAL: TRANSCRIPT: AUTHENTICATION: WAIVER.** To properly perfect an appeal from the county court to the district court in an election contest, the filing of a duly authenticated transcript is required. But if the transcript filed is not duly authenticated, yet no objection thereto is made by the appellee, and the parties treat it as sufficient and try the case on its merits, the jurisdiction of the district court cannot be questioned for the first time on appeal to this court.

2. ———: **CHANGE OF POLLING PLACE.** It is the general rule that an election should be held at the place designated in the election notice. But, where the board cannot procure the place so designated for the purpose of holding the election, they may, in such emergency, change the polling place to another suitable, convenient, and proper location, giving due notice of that fact; and, unless it appears that a sufficient number of the electors to change the result of the election were deprived of an opportunity to cast their votes by reason of such change, and where it affirmatively appears that the election was fairly and honestly conducted, and that the result would have been the same had it been held at the place designated in the notice, such change will not render the election void.

APPEAL from the district court for Thurston county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Howard Saxton, Thomas L. Sloan, Curtis L. Day, J. H. Van Dusen, L. J. Te Poel and *Waldo E. Whitcomb,* for appellant.

Hiram Chase and *R. E. Evans, contra.*

BARNES, J.

Waldo E. Whitcomb and Hiram Chase were rival candidates for the office of county attorney of Thurston county at the general election held in November, 1906. Chase was declared elected, and has served out his term. Whitcomb contested his election by proceedings instituted in due time in the county court, where he had judgment. Chase appealed to the district court, where, after a protracted trial, the judgment of the county court was reversed, and his election was confirmed. Whitcomb thereupon appealed to this court, and asks for a reversal of that judgment. For convenience he will be called the plaintiff, and Chase will hereafter be called the defendant.

The plaintiff contends that the district court never obtained jurisdiction of the case, and its judgment is therefore void. It appears that the transcript from the county court, as copied by the clerk of the district court, is without a certificate, or, in other words, is not duly authenticated, and it is claimed that the district court never obtained jurisdiction of the case. The defendant has brought here a certified copy of what he alleges to be the last page of the transcript of the judgment of the county court which contains a proper certificate, and alleges that the same was a part of his transcript when it was filed in the district court, and that it has in some way become detached therefrom and asks leave to file it as a part of the transcript in this court. To this the plaintiff strenuously objects. In our view of the matter, it is unnecessary for us to determine this question. It appears that plaintiff made no objection to the jurisdiction of the district court; that both parties treated the case as though the appeal was properly perfected, and no suggestion was made, or appears in the record, that the transcript of the judgment of the county court was not properly certified at the time it was filed, and when the trial in the district court took place. Therefore the plaintiff is not in a position at this time to object to the jurisdiction of that

court. A like question was before us in *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28, where it is said: "Although the filing of a duly authenticated transcript is required in order to perfect an appeal from the county court to the district court, and although the transcript filed for such purpose is not thus authenticated, yet, if the parties proceed in the district court on the theory that the appeal has been perfected, they will not be heard to question the sufficiency of such transcript in this court." Plaintiff strenuously contends that this rule should not be applied to the case at bar. It is argued that the district court has no original jurisdiction in cases of this kind; that it only obtains jurisdiction by appeal, and if the appeal is not properly perfected that court has no jurisdiction. In support of this proposition many cases are cited which hold that jurisdiction of the subject matter of an action cannot be conferred by consent. That this is the well-established rule cannot now be questioned; but we are of opinion that it has no application to the facts of this case. Our statutes relating to the contest of elections provide for an appeal from the judgment of the county court, and declare that the proceedings shall be assimilated to those in an action as far as practicable. The district court having been given appellate jurisdiction of the subject matter of such contests, mistakes and irregularities in perfecting an appeal will not deprive it of such jurisdiction. Defects and irregularities in perfecting an appeal may be waived by the parties, and failure to make seasonable objection to the jurisdiction of the district court will constitute a waiver. In such case an objection to the jurisdiction made for the first time in this court comes too late, and will not be considered. We are therefore of opinion that the district court had jurisdiction of the subject matter and the parties, and had power to pronounce the judgment complained of.

This brings us to the consideration of the merits of this controversy. It appears that plaintiff's ground of contest is based on the removal of the polling place in Omaha

precinct, which had been designated in the notice of election as the "Lamson or Quinton schoolhouse," to the village of Walthill in said precinct. And it is alleged that by such removal a large number of electors who would have voted for the plaintiff but for such removal were deprived of their right to vote, and that a sufficient number of voters were deprived of that right to change the result of the election.

The testimony discloses that during the two years previous to the general election in question there had grown up in that precinct a thriving village called Walthill, which is located about three miles from the Lamson or Quinton schoolhouse; that the village was the most convenient place for holding the election, and a change of the polling place to that village would best accommodate a great majority of the electors residing in that precinct. When it was ascertained that the notice of the election designated the schoolhouse above named as the polling place for that precinct, it caused much dissatisfaction and the electors sought to make suitable arrangements for the removal of the voting place to the above named village. To that end the members of the election board went to the county seat and advised with the plaintiff, who was then the county attorney of Thurston county, as to what method should be adopted in order to effect such removal. It seems that it was agreed that, in case the schoolhouse could not be obtained for election purposes, that fact would create such an emergency as would authorize the board to procure another polling place and enable them to thus designate Walthill as the place where the election should be held. It further appears that on the morning of election day, and before it was time to open the polls, the election board met at the schoolhouse, took the oath of office, and ascertained from one of their number, who was also one of the directors of the school district, that the schoolhouse could not be used for election purposes. They thereupon ordered that the election should be held in the village of Walthill, gave notice to

all persons present of that fact, and posted a suitable notice of the change of place of election upon the schoolhouse door. They thereupon repaired to Walthill, where the election was held in all other respects in due conformity to law.

The plaintiff on the trial produced several witnesses who testified that but for the change of the place of election they would have voted, and, if they had voted, they would have voted for him for the office of county attorney, and that they did not vote at said election. It appears, however, from the cross-examination of those witnesses that they were members of a threshing crew who were working that day for a man by the name of Phillips, at a place about equidistant from the schoolhouse and the village of Walthill; that they knew of the change of the place of election and discussed that matter as early as 2 o'clock in the afternoon of election day; that they were anxious to finish their threshing and those who worked at and about the machine concluded that they would not attend the election for that reason and not for the reason that the voting place had been changed. It further appears that some of the persons engaged in hauling the grain away from the machine did go to Walthill and cast their votes for the plaintiff; that none of the crew were prevented, by reason of the removal of the place of election, from voting if they had desired to do so. There is some evidence in the record tending to show that one person, an Indian, called Little Soldier, came to the schoolhouse and went away again; that he afterwards went to Walthill; that he did not vote, but it is doubtful if it can be said that he went to the schoolhouse for the purpose of exercising his right of franchise.

It further appears that all of the members of the election board who took part in the transaction belonged to the political party with which the plaintiff affiliates, and that all of them voted for him at said election; that the defendant took no part in procuring the change and was not aware that such change had been made until long

after the election. So it may be said that it affirmatively appears that the change was made in good faith and without fraud, and without any intention or purpose to injure the plaintiff or deprive him of the vote of any elector of Omaha precinct. It is the contention of the plaintiff however, that this is immaterial, and that the mere fact that the election was not held at the place designated in the notice renders it void as to that precinct. It appears that the defendant had a majority of 6 votes in the whole county, and a majority of 19 votes in Omaha precinct. Of course, if the whole of this precinct was rejected, it would result in plaintiff's election. As to whether the whole vote of this precinct should be rejected we find the authorities are divided; some holding that the mere change of the place of voting renders the election void, while it is declared by others that, unless it is shown that the change was fraudulently made or resulted in the loss of votes to the plaintiff, the electors of the precinct should not be disfranchised and the election declared void. It is unnecessary for us to review these conflicting authorities for we are satisfied that we are committed to the rule that, if an irregularity, of which complaint is made, is shown to have deprived no legal voter of his right or admitted a disqualified person to vote if it cast no uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from it; it may well be overlooked, and that such irregularity will not render the election void. *Baltes v. Farmers Irrigation District,* 60 Neb. 310. This rule is also supported by *Piatt v. People,* 29 Ill. 54; *DeBerry v. Nicholson,* 102 N. Car. 465; *Seymour v. City of Tacoma,* 6 Wash. 427; *Cleland v. Porter,* 74 Ill. 76, and *Fry v. Booth,* 19 Ohio St. 25.

It is urged by the defendant that the plaintiff is estopped to question the validity of the election because of his advice to the election board and his apparent participation in their act of changing the place of election. We deem it unnecessary to determine this question, and

we are not prepared to say that, if the change had actually deprived any considerable number of the electors of their right to vote or had in fact been the means of changing the result of the election, the contestant could not take advantage of that fact; but such is not the case. The election was fairly conducted, no one was deprived of his right to vote if he desired to exercise that right, and there is no competent evidence in the record that the result would have been at all different had the election been held at the place designated in the election notice.

For the foregoing reasons, we think the judgment of the district court was right, and it is

AFFIRMED.

CHARLES G. SHELLEY, APPELLANT, V. GEORGE P. TUCKERMAN ET AL., APPELLEES.

FILED FEBRUARY 6, 1909. No. 15,445.

Landlord and Tenant: LIEN ON CROPS: SALE: BONA FIDE PURCHASER. In an action in equity by a landlord to establish a lien by contract upon the proceeds of the sale by the tenant of certain crops in the hands of a grain dealer, evidence examined, and *held* to sustain the finding of the trial court that the buyer paid the purchase money to the tenant without notice of the plaintiff's claim.

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

Tibbets & Anderson, E. P. Holmes and *G. L. DeLacy,* for appellant.

Burkett, Wilson & Brown and *Hall, Woods & Pound, contra.*

LETTON, J.

This is an action in equity brought by the plaintiff against the defendants Tuckerman to recover rent for a

certain tract of land leased to them by the plaintiff, and against the defendants Barber & Sons to enforce a lien on the proceeds of the sale of the crop produced upon the land. By the terms of the lease between Shelley and Tuckerman the tenants agreed to give a chattel mortgage upon the crop not later than June 15 of each year to secure the payment of the rent for that year. As to the defendants Barber & Sons, it is charged that they are grain dealers, and that in 1905 they purchased from the Tuckermans a portion of the crops from the farm, with full notice and knowledge of the terms of the contract affecting the property, and that they refused to pay the plaintiff the proceeds of the sale. Trial was had, and judgment rendered against the Tuckermans for the amount of the rent; but the court found specifically in favor of the defendants Barber & Sons, and found that immediately after the purchase and delivery of the grain to them, and without notice of the claim of plaintiff, they paid over the purchase money to the other defendants. The cause was dismissed as to the defendants Barber & Sons. From that portion of the decree dismissing the case as to the Barbers, plaintiff appeals.

The sole contention of the plaintiff is that the judgment is not sustained by the evidence. The only point in dispute between the parties is as to whether or not Barber & Sons had notice of the nature and extent of the claim of lien made by the plaintiff upon the crop. In the case of *Sporer v. McDermott,* 69 Neb. 533, it was held by a divided court that an agreement to execute, after they are growing, a mortgage upon crops may be enforced specifically in equity if the circumstances so justify, and that it is no objection to such an agreement that the crops referred to were not in being when it was made. In that case it appeared that one defendant sold the crop to the other with the fraudulent purpose of defeating the lien, and not in good faith, and that the buyer before the purchase knew of the seller's fraudulent intention and purpose, and knew that the plaintiff claimed a lien on

the crop for the rental of the land. In this case there is no contention made that there was any fraudulent purpose upon the part of the buyers, but their liability is predicated upon the assertion that the plaintiff through his agent, Theodore Stanisics, before the purchase gave them full notice of all the facts and of the provisions of the lease. It is claimed this was done in conversations with Mr. Ernest Barber, a member of the firm of Barber & Sons.

Mr. Stanisics, the plaintiff's agent, testifies that on the 15th of June, 1904, after Tuckerman had refused through his attorney, E. W. Brown, to execute a chattel mortgage, he went to Barber & Sons; that he saw Ernest Barber, and showed him the papers he had asked to have signed and told him the circumstances. That the year before, when he leased the place to Tuckerman, he told him that the lease called for giving a mortgage of $1,500 on all the crops, that "we had a lease, and we expected them to see that we got our money; that we had really a chattel mortgage; that the lease was virtually a chattel mortgage on all the crops raised"; that he did not see him again after that until the next year; that after June 15, 1904, he had several conversations with Barber asking for a settlement; that in one of these talks Barber stated that if there was any controversy he would keep the money until settlement, and that this conversation was after the crop was delivered. On cross-examination he testifies that, although the lease was for the year 1903, as well as 1904, and the grain was sold to Barber & Sons in 1903, yet Barber never paid him any money for grain under the lease of that year; that the note was paid to him directly by Mr. Brown for the Tuckermans. He further testifies that after the 1904 corn was sold Mr. Barber told him he would turn the money over to Wilson & Brown, the attorneys, who had said they would protect him. Mr. A. S. Tibbets, one of the plaintiff's attorneys, testified that before the suit was begun he went to the place of business of Barber & Sons, and saw one of the younger members

of the firm, who stated to him that Stanisics and the Tuckermans had got into a controversy as to whom the money belonged; that they had held it for some time, but had finally turned it over to Wilson & Brown, under the assurance from Wilson & Brown that Shelley had no lien upon the crops, and that the lease was simply one that provided for a lien in the future, and that you could not mortgage crops in the future.

For the defendants Mr. Ernest Barber testified that he bought the 1904 corn and paid Tuckermans $1,075.10 for it; that he had never seen any lease between Shelley and the Tuckermans; that prior to the time he bought the corn he had a few conversations with Stanisics, and that Stanisics asked him in a friendly way to help him collect his rent out there. He asked him to hold the money, and told him that he thought they would try to beat him out of his rent, and appealed to him on the ground that he had sold Barber lots of grain; that he had no knowledge that Stanisics claimed a lien upon the corn by virtue of a provision in the lease until after the money was paid, and that he, Barber, never had a clear idea about the Stanisics' claim until he talked to Judge Tibbets about it. As to this he says that Tibbets explained to him the nature of the claim, and referred him to a case, and asked him to pay the money in order to avoid a lawsuit, and that this was the first time that he had definite notice so that he understood the claim. He testifies that he did not know the grain had been delivered to his elevator at Denton until Mr. Brown, Tuckermans' attorney, called him up over the telephone and demanded the money, and stated that Stanisics or Shelley had no legal claim on the money in question, and that he then notified the agent at Denton to pay the check. He further denies that he had any conversation with Stanisics after the corn was delivered and before he paid the money. He says that he has no recollection of any conversation with Stanisics such as he describes on June 15, and never saw the papers he

speaks of, and never heard of any such agreement to make a mortgage until after the purchase and payment of the money. On cross-examination he says that he knew that Stanisics was claiming that the money was to go to him, but that he did not make any statement as to his legal rights; that he would not have paid the money over if he had known that Stanisics claimed to have a lien either in the form of a chattel mortgage or in the form of an agreement in the lease to give a chattel mortgage. He denies that Stanisics stated that he based his claim upon any chattel mortgage or an agreement under a chattel mortgage, and says he claimed he was entitled to the amount because the men were on his farm, and he wanted to collect his rent, and wanted Barber to help him. On recross-examination he testifies that he cannot remember of Stanisics telling him that he had a lease and of the provisions of the lease, and to the best of his belief he did not do so.

It is incumbent upon the plaintiff to establish that when the defendants Barber & Sons bought the crop they had such notice and knowledge of the lien claimed by the plaintiff as to place them in the same position as the Tuckermans with respect thereto. The plaintiff's claim rests almost entirely on the testimony of Mr. Stanisics. The main points are denied by Mr. Barber. While the testimony of Mr. Barber is not as positive and direct as it might have been, yet, not having the witness before us, it is impossible to tell what weight and effect as regards his credibility should be given to his manner of answering the questions. Experience has taught the writer that whether an answer is positive, direct and unequivocal, or not, often depends upon the temperament and mental habits of the witness. Some individuals will make a positive affirmation or denial, where another equally truthful, or perhaps more worthy of belief, will give his testimony in a halting and hesitating manner, and perhaps will not seem to be sure of anything, yet the testimony of the careful, cautious and hesitating witness

will, as a matter of fact, often be entitled to more weight than that given by a more positive, direct and self-confident one. It is clear that Barber knew that Stanisics expected the rent to be paid from the sale of the crop, but this is what the landlord usually expects. Knowing the imperfections of memory as to the exact words of conversation, we are disposed to adopt the view of the trial court as to the explanation by Mr. Barber of his talk with Judge Tibbets. In fact, there is but little difference in their recollection, except that Tibbets says that in the talk it appeared to him that Barber knew of the lease provisions previously, while Barber swears he never knew the facts until he learned them from Tibbets in this conversation.

Upon the whole question as to whether or not the buyers had such notice or knowledge of the rights of the plaintiff as to charge them equally with the Tuckermans, we believe the trial court, perhaps knowing the parties, and with the great advantage that actual presence of the witness gives, had a much better opportunity of forming a correct judgment as to their respective credibility than we have, and we think his conclusions are entitled to consideration. We are satisfied from the whole record that the complaint of appellant that the findings of the trial court are not sustained by the evidence is not well founded, and we are of opinion that this court would not be justified in reversing his findings upon that point.

For these reasons the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. WILLIAM T. DUDGEON.

FILED FEBRUARY 6, 1909. No. 15,772.

1. Criminal Law: POLICE COURTS: JURISDICTION. The police judge of the city of Lincoln has jurisdiction in cases of violations of the rules of the excise board of that city.

2. ———: POLICE JUDGE: EXAMINING MAGISTRATE. The jurisdiction of

a police judge under section 18, art. VI, of the constitution, section 260 of the criminal code, and section 7943, Ann. St. 1907, in relation to misdemeanors, is concurrent with that of a justice of the peace, and, where the punishment may be a fine of over $100, he can only sit as an examining magistrate.

3. **Intoxicating Liquors: EXCISE BOARD: POWERS.** In so far as rule 27 of the excise board of the city of Lincoln authorizes a fine of over $200 for a violation of the excise rules, it is beyond the power conferred by the legislature and is void, but to that extent the penalty may be enforced.

4. **Rules of the excise board within its authority, duly adopted and published, are of like force and effect as ordinances of the city adopted by the city council.**

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *State's exceptions overruled.*

J. M. Stewart, F. M. Tyrrell and *T. F. A. Williams*, for plaintiff in error.

Greene & Greene, contra.

LETTON, J.

William T. Dudgeon was charged before the police judge of the city of Lincoln with unlawfully keeping spirituous and vinous liquors for the purpose of sale without license, in violation of the rules and ordinances of the excise board of that city. A search warrant was issued, certain liquors were found in his possession, and the defendant arrested, brought before the magistrate, tried and found guilty. He appealed to the district court, and there filed a plea in abatement, which was sustained by that court, and the defendant discharged. From the judgment of the court sustaining the plea in abatement, the state has prosecuted error to this court.

The plea in abatement was based upon the propositions that the police judge had no jurisdiction of the subject because the excise board alone has this power; that the police judge had no jurisdiction to try and determine, but only to examine into the matter charged in the complaint

as an examining magistrate, as in cases of felony; that the excise board of the city of Lincoln was without power or authority to declare the acts described in rules 27 and 28 an offense or to punish the commission of them, and that said rules are in conflict with the statutes and with the constitution of the state; and that the rules under which the prosecution was had were not passed or published as required by law.

The argument in support of the first proposition is that section 64, art. I, ch. 13, Comp. St. 1907, known as the "Lincoln Charter" makes the excise board a judicial body having power to issue subpœnas and commitments to hear testimony to punish violation of its rules, and generally to have such powers as a justice of the peace has on an examination before him, and that this power is conferred upon the excise board alone, and not upon the police judge, and hence that it is the proper tribunal to try offenses of this nature. We think this is a misapprehension of the purport of the provisions referred to. When the board is in session as a licensing body or in the proper exercise of its functions in the management and control of the police force, it might be shorn of much of its usefulness if it had no power to compel the attendance of witnesses or compel them to testify, or if its presiding member had no power to administer oaths. The excise board is not a police court, and it has no power of jurisdiction to try persons charged with offenses under the criminal laws of the state or with the violation of ordinances.

It is next contended that section 260 of the criminal code gives police judges jurisdiction equal to that of a justice of the peace in all matters relating to the enforcement of the criminal laws of the state, and that section 44, art. I, ch. 13, Comp. St. 1907, gives them exclusive jurisdiction over all offenses against the ordinances of the city, but that there is no provision giving police judges jurisdiction over a violation of the rules of the excise board, and that the constitution of the state limits the

jurisdiction of a justice of the peace in criminal matters to cases where the punishment may not exceed three months' imprisonment or a fine of over $100, and that since the rules of the excise board under which this prosecution is had provide that the fine may be a sum greater than $100, and the defendant may be committed to jail, and the liquors seized may be ordered destroyed, the maximum penalty is beyond the jurisdiction of either a justice of the peace or police judges.

It is unnecessary to copy section 64 of the Lincoln charter in full. It confers upon the excise board the exclusive power of licensing and regulating the sale of liquors within the city, provides that the license fee shall not be less than the minimum sum required by the laws of the state, that bonds shall be given, and that "all the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." It is further provided that "any person selling or giving away in said city any liquor of the description mentioned in this section, without first having complied with such regulations, and procured a license or permit therefor, or who shall violate any of the rules and regulations established by such excise board and governing the sale of such liquor, shall on conviction thereof be fined in any sum fixed by such rule, not more than two hundred dollars for each offense and shall be committed to the city jail until such fine and costs are paid." It also provides for the revocation of licenses or permits upon the conviction of the licensee of a violation of the laws or regulations governing the sale of liquor; that the excise board shall control all such places where liquors are sold; and that "all such rules and regulations, when adopted by said board and published once in a daily newspaper published and of general circulation in said city, shall have like force and effect as the ordinances of said city adopted by the city council thereof, and shall be proved in like

manner." Rule 27 of the excise board, adopted in 1906, made it unlawful for any person to keep for the purpose of sale without a license or permit any intoxicating liquors, and rule 28 authorizes the destruction of the liquor seized upon conviction. These sections are almost identical with sections 7170, 7171, Ann. St. 1907, relating to liquors, except that the penalty provided by the statute (Ann. St. sec. 7161) is a fine of not less than $100 nor more than $500, or imprisonment not to exceed one month in the county jail; while rule 27 provides that any person found guilty "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars for each offense, and be committed to the city jail until such fine or fines and costs are paid." It is upon the difference between the penalties prescribed by the statute and those provided for by the rules that the defendant bases a part of his contention that the police judge was without jurisdiction. His contention is that since the penalty provided by the statute for this offense was beyond the jurisdiction of a justice of the peace, except as an examining magistrate, the police judge could have no other or different powers, and hence had no jurisdiction to try and determine the guilt or innocence of the accused or to impose a fine upon conviction.

Under section 18, art. VI of the constitution, relating to the judicial department, a justice of the peace has no jurisdiction in a criminal case where the punishment may be a fine of over $100, and under section 260 of the criminal code and section 44 of the Lincoln charter (Ann. St. sec. 7943) the police judge is given exclusive jurisdiction of all offenses against the ordinances of the city, and concurrent jurisdiction with justices of the peace of misdemeanors under the laws of the state arising within the limits of the city, and for the preliminary examination of persons charged with offenses beyond his jurisdiction. The penalty imposed by the general liquor law of the state for the offense with which the defendant was charged

was beyond the jurisdiction of a justice of the peace or a police judge, except as an examining magistrate. When section 64 of the Lincoln charter was enacted, it is evident that it was the intention of the legislature that the wholesome restrictions and regulations surrounding the liquor traffic, and the rigorous forfeitures and penalties provided for its unlawful sale by the statutes, should not be relaxed, and it was therefore therein provided that "all the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." This provision obviated any question that might be raised as to whether the general liquor laws of the state were applicable within the municipal boundaries, and effectually preserved the operation of the general liquor laws of the state within the city.

This section next provides, as we have seen, for a fine of not more than $200 for a violation of the excise rules. It will be observed that the penalty which is authorized to be inflicted for a violation of the rules of the excise board is a different, and it may be a much smaller, penalty than that provided for the statutory offense. There is thus given to the excise board power to enact rules, a violation of which may be punished by the imposition of a fine of not more than $200, while it leaves the general provisions of the statute still enforceable by the proper authorities. In *Bailey v. State,* 30 Neb. 855, it appeared that a village board was given power to impose fines for a violation of ordinances "not exceeding one hundred dollars for any one offense," while the liquor law fixed the penalty for the same offense as not less than $100 nor more than $500. Bailey was arrested, tried by the justice, found guilty, and sentenced to pay a fine of $100 and costs. It was urged that the ordinance was void because the board had no power to enact an ordinance providing a different punishment from that provided for a violation of the general law on the same subject, but it was held

that the statute conferred the power to pass such an ordinance upon the village authorities. It was further contended that the provisions of sections 11 and 12 of the Slocumb law (Comp. St. 1907, ch 50), fixing the penalty, and sections 7161, 7162, Ann. St. 1907, providing for a preliminary examination of persons charged with a breach of the statute, fixed a method of procedure which was exclusive, and that, therefore, the justice had no jurisdiction other than to examine and bind over to the district court, but the conviction was sustained. We conclude, therefore, that the general statutes with reference to the sale of liquor are in force within the city of Lincoln, but, at the same time, that the excise board has power to provide rules and fix a punishment for their violation, not, however, in excess of the limitation of $200 for each offense fixed in the charter. *Sanders v. State,* 34 Neb. 872; Black, Intoxicating Liquors, sec. 225. We find nothing in the statutes which confers any greater power or jurisdiction upon the police judge with respect to the punishment of violation of the rules of the excise board than he possesses with respect to the punishment of offenses against the laws of the state. Under the constitution his jurisdiction to try and determine is limited to criminal cases in which the penalty may not exceed a fine of $100. Where the punishment may exceed a fine of $100, he can only sit as an examining magistrate. We conclude, therefore, that the finding of the district court that the police judge was without jurisdiction was right.

We are further of the opinion that in so far as rule 27 seeks to authorize a fine in excess of $200, the amount limited in the charter for the violation of an excise rule, it is inoperative and void, but this does not affect the otherwise valid provisions of the rule. *State v. Hardy,* 7 Neb. 377; *Bailey v. State,* 30 Neb. 855; *State v. Stuht,* 52 Neb. 209; *Town of Eldora v. Burlingame,* 62 Ia. 32.

We think there can be no doubt of the validity of the provision of the charter giving the rules of the excise board, when duly adopted and published, like force and

effect as ordinances of the city adopted by the city council. The legislature, not being restrained or limited by the constitution, may confer the power upon the excise board to pass such rules, and may provide for their enforcement by such agencies and in such manner as it may direct. See authorities collected in McQuillin, Municipal Ordinances, sec. 90; *Riley v. Trenton*, 51 N. J. Law, 498.

Having reached these conclusions, it is unnecessary to determine the other points raised. The judgment of the district court is therefore correct, and the exceptions of the state are

OVERRULED.

FAWCETT, J., not sitting.

JOHN BOESEN, APPELLEE, V. OMAHA STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,922.

1. **Trial:** INSTRUCTIONS: EVIDENCE. In this an action for personal injuries alleged to have been occasioned by the derailment of a street car, whereby the plaintiff was thrown from the car and thereby injured, the defendant pleads contributory negligence, in that the plaintiff was negligently standing upon the running board of the car at the time of the accident, and his injuries resulted from such negligence. *Held*, That it was not error to refuse an instruction that if the jury believe from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car when it was in motion, and fell into the street, their verdict should be for the defendant, since such an instruction is neither within the issues made by the pleadings nor the evidence in the case.

2. ———: ———: CONSTRUCTION. Instructions should be considered together. Separate clauses or parts of a sentence should not be separated from the context in order to arrive at the true meaning of the language, but all that is said upon the particular subject is to be taken.

3. **Appeal:** EVIDENCE: HARMLESS ERROR. A witness testified that the plaintiff "was thrown from the car," but he testified later that

he did not see the plaintiff until he was lying on the ground. A motion to strike his answer as being merely a conclusion of the witness was overruled, and exception taken. *Held*, That, while the answer should have been stricken, the error was not prejudicial, since the jury could not have been misled by the testimony.

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

John L. Webster and *W. J. Connell,* for appellant.

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

LETTON, J.

This is the fourth appearance of this case in this court. See 68 Neb. 437; 74 Neb. 769; 79 Neb. 381. The facts are fully set forth in the former opinions. On account of the nature of some of the errors assigned, it becomes necessary to notice particularly the issues as now presented by the pleadings. The petition, in substance, alleges that the defendant is a common carrier of passengers operating a street railway in the city of Omaha; that, while the plaintiff was a passenger, the car upon which he was riding, through the negligence of the defendant, suddenly left the track and threw the plaintiff violently to the pavement, and that he was permanently injured by the accident. The answer denies that the car left the track and threw plaintiff to the pavement, avers that the car and track were in good order and condition, and were so long before, at the time of, and after the accident. It also avers that the accident was caused from extraneous causes over which the defendant had no control. It also alleges that the defendant was guilty of contributory negligence in riding upon the running board of the car, denies that the plaintiff has been injured permanently or to any extent, and further contains a general denial. The reply denies the new matter in the answer. The case was tried to a jury, and a judgment rendered for the plaintiff, from which defendant appeals.

1. The first complaint made is that the court should have given an instruction requested by the defendant to the effect that if the jury believed from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car when it was in motion, and fell into the street, their verdict should be for the defendant, and it is argued in support of this assignment that the theory and contention of the railway company on this trial are the same as they were at the time this case was before the court for the first time. The defendant is in error upon this point. The issues, as will be observed, are the same as when the case was presented here the last time. After reading the evidence, we adopt and fully agree with the statement made in the opinion by Mr. Commissioner Duffie on that occasion that "we have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion." There was no error in refusing this instruction.

2. The seventh instruction given by the court is said to be erroneous. By the fifth instruction the jury were instructed that a street railway is not an insurer of the personal safety of its passengers, nor is it bound to do everything which possibly might be done to insure their safety. It is bound to exercise the utmost skill, diligence and foresight consistent with the practical conduct of its business, and a failure on its part to exercise such skill, diligence and foresight would be negligence. By the seventh instruction the jury were told, in substance, that the defendant had alleged in its answer the good order and condition of its car and track, and that the accident occurred presumably from extraneous causes which could not be guarded against by the exercise of the greatest care, skill and diligence of the defendant, and the jury were told that if they found "that the derailment of the car on which the plaintiff was riding (should you find that the same was derailed) was one of those unforseen accidents that could not have been guarded against or prevented by the exercise of the highest degree of care,

diligence and foresight on the part of the defendant, consistent with the practical conduct of its business, and that said defendant was not guilty of the slightest negligence which contributed to the said accident, then the defendant would not be liable to the plaintiff for injuries sustained by him, and your verdict should be for the defendant." The defendant calls special attention to the following clause in the seventh instruction: "And that said defendant was not guilty of the slightest negligence" —and contends that this language was highly prejudicial as imposing an undue burden upon the defendant, and that the extent of its duty is to exercise the highest degree of care, diligence and foresight consistent with the practical conduct of its business, and no more.

Instructions should be considered together. Separate clauses or parts of a sentence should not be disconnected from the context, if it is desired to obtain the true meaning of the language. Taking the two instructions referred to together, while the language of the latter may not be entirely proper, we think it impossible that the jury could have been misled with regard to the extent of the duty imposed by law upon the defendant with regard to the care of its passengers, and, when considered in connection with the evidence in this case, we cannot see how this language, even if objectionable in nature, in anywise prejudices the defendant.

3. The eighth instruction is also complained of. This instruction is quite lengthy. It states the defendant's plea of contributory negligence, in that at the time of the accident the plaintiff was standing upon the running board of the car. It defines contributory negligence, and instructs the jury that the burden of proof is upon the defendant to establish this defense. It further instructs them that, if he was standing upon the running board at the direction of the conductor of the car, this "would not constitute negligence on his part, but the negligence, if any, in so standing where he was directed, would be the negligence of the

defendant company." It is the quoted portion which is specifically claimed to be erroneous. We fail to see wherein this instruction is prejudicial to the defendant. While the clause complained of, "but the negligence, if any, in so standing where he was directed, would be the negligence of the defendant company," we think adds nothing beneficial to the plaintiff or prejudicial to the defendant, this statement was made in the opinion of Mr. Commissioner DUFFIE in this case, and we cannot see but that it is a correct proposition of law. If the conductor in charge of the car directed the plaintiff to stand upon the running board, and as a consequence thereof he was injured, we think it ordinarily would be the negligence of the company, since within reasonable limits the conductor has the right to designate upon what part of the car a passenger may ride, and if it is a place which is known to be not necessarily dangerous, and which is used by passengers as a matter of custom and usage well known to the company, the negligence, if any, is not that of the passenger, but of the carrier, since it ought to be better advised as to the safety of any portion of its vehicles than an ordinary passenger.

4. The defendant complains of the refusal of certain instructions requested by it. We have examined these instructions and think that, in so far as they are material or proper, the substance of them had already been given, either by the court upon its own motion or in the instructions requested by the defendant and given.

5. Error is assigned with reference to certain rulings upon the admission of a portion of the testimony of the witness Jodeit. In that portion of the testimony objected to, Jodeit stated, in substance, that he saw the plaintiff at Twenty-fourth and O streets; that "he was thrown off the car"; that Jodeit was in the car; that "the car went straight south on Twenty-fourth street, and the motor went over, and the trailer took the Y, and from the circumstances from what I know threw him out." The defendant objected to some of the questions which

elicited this evidence, and also moved to strike out the answers and conclusions of the witness, for the reason that they were shown to be merely a conclusion, and argued that it clearly appeared from the record that the first time the witness saw Boesen was when he was lying in the street back of the car. The objections and motion were overruled. We are inclined to think the answers complained of should have been stricken out, but we fail to see wherein any error prejudicial to the defendant was committed. The witness stated that he did not see Boesen until he was lying on the street, and it must have been clearly apparent to any juryman of ordinary intelligence that, when the witness said Boesen was thrown from the car, he was merely testifying to his idea as to how the accident happened. We must presume that the jurors were men of ordinary common sense, and it is also an entirely safe presumption that the learned and diligent counsel for the defendant did not fail to dissect this testimony and clearly eliminate from the minds of the jury any erroneous notions as to its effect. The general credibility of Jodeit is also strongly assailed, but this is a matter entirely for the jury, and, whatever may be our own opinion as to its credibility, we have no right to interfere with their verdict upon that ground alone.

6. It is also contended that the verdict is not sustained by the evidence, but with this contention we cannot agree. It is true that a number of conductors and motormen testify that they had been over this track repeatedly on the day that the accident happened, and that the car and the track and switch were in proper condition. The conductor and motorman on the car upon which Boesen was riding also denied that the trailer left the track. It appears, however, that the witness Tobin, who was a passenger and who was called by the defendant, testified on cross-examination that the car stopped because it was off the track. It was also shown that Motorman Lear, who was in charge of the car the morning that the accident occurred and who at this trial denied that the trailer

left the track at the switch, testified on cross-examination at the former trial, as follows: "Q. Did you notice that switch that morning as you went over it? A. No, sir; not any more than I would any other morning. Q. Did you notice it any other time that day more than you did that morning? A. I looked to see if there was anything wrong with it." He then denied that the following question had been put to him, and denied the answer: "Q. Why? A. The trailer left the tracks there." But it was proved by the official stenographer who took the testimony of Mr. Lear at the first trial that he did in fact testify as above. In addition to this testimony given by the defendant's witnesses, the evidence of the plaintiff and the witness Oeldeman to the same effect amply sustain the findings of the jury with reference to the trailer leaving the track at the switch. In such cases it is to be expected that the evidence will be conflicting; otherwise, in all probability, there would be no contention between the parties.

In the whole record we find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J. I am unwilling to hold that the giving of instruction No. 7 was not reversible error.

BARNES, J. I am unable to approve of instruction No. 7, but otherwise concur in the opinion of the majority of the court.

ANNA M. LARSEN, APPELLEE, v. JOSEPH SANZIERI, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,463.

Appeal: EJECTMENT: INSTRUCTIONS: WAIVER. In 1893 L., by virtue of an executory contract with P., entered into possession of five acres of land. For ten years L. made payments thereon, and then received a deed from P. for said five acres only. When L.

took such possession, the five acres were part of a larger tract, all of which was uncultivated and covered with brush. By mistake L. encroached on a strip of P.'s land adjoining said five acre tract, cleared and cultivated it, and received the exclusive benefit therefrom for more than ten years. L. testified that he discovered his mistake within a year and held possession adverse to P. *Held*, in ejectment by P.'s grantee against L.'s grantee, that as the court had instructed the jury that unless L.'s possession was hostile in its inception they should find for defendant, and no exception was taken thereto, a verdict for defendant was sustained by the evidence.

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

H. Fischer, for appellant.

Guy R. C. Read, contra.

ROOT, J.

Ejectment to recover possession of a strip of land 18 feet in width. Trial to a jury, verdict and judgment for plaintiff. Defendant appeals.

No exception was taken by defendant to any of the court's instructions, nor does he claim that they were erroneous, but asserts that the evidence does not sustain the verdict of the jury. It will be unnecessary to ascertain whether the instructions correctly reflect the law, for, if the verdict responds thereto and is supported by the evidence, the judgment was right, as it was the duty of the jurors to follow said instructions. *Boyesen v. Heidelbrecht*, 56 Neb. 570. The jurors were instructed that plaintiff was entitled to recover unless defendant proved by a preponderance of the evidence that he had acquired title by adverse possession to the land in controversy, and that to establish such defense he must prove that such possession was hostile in its inception and continued uninterruptedly for ten years, was open, notorious, adverse, and exclusive, and held during all of that time under claim of ownership.

Emanuel Long, in March, 1893, agreed to purchase five acres of land in Douglas county from Perkins, who resided in Iowa. The tract was covered with brush, and was part of 80 acres then owned by Perkins. Long testified that he went into possession of the five-acre tract by virtue of his contract with Perkins, and took possession of this strip of land which joins his five-acre tract, and that he did not know for a year that said land was not included in his purchase, but that he continued in possession and claimed to own it, not by virtue of his contract with Perkins, but by possession merely; that he never disclosed to Perkins his intentions, but continued regularly to make payments on said land and received a deed for the five-acre tract in 1901; and that he has held undisputed possession of the land in controversy since 1893 or 1894, and enjoyed all profits therefrom until 1905, the date he conveyed the land to defendant, but did not pay any taxes thereon. Defendant has held possession of the disputed tract since 1905, and honestly believed that it was described in Long's deed to him, and has had the exclusive use thereof since his said purchase. Long went into possession under Perkins, and that possession was not hostile, but subject to Perkin's rights, and thus continued for at least a year. *Beer v. Dalton,* 3 Neb. (Unof.), 694; *Kirk v. Taylor's Heirs,* 8 B. Mon. (Ky.) 262; *McKelvain v. Allen,* 58 Tex. 383; *Jackson v. Walker,* 7 Cow. (N. Y.) *637.

Under the instruction that unless Long's possession was hostile in its inception the jurors should find for defendant, they could not do otherwise than to return the verdict that they did. On the other hand, if defendant is entitled to the benefit of the law that possession need not be hostile in its inception, but that the statute would commence to run as soon as such possession was adverse (*Cervena v. Thurston,* 59 Neb. 343), then it was still for the jury to say from Mr. Long's testimony whether that possession ever did become adverse (*Gaines v. Saunders,* 87 Mo., 557). Nor was the jury bound to find for defend-

ant upon the uncorroborated testimony of his grantor. *Bush v. Griffin,* 76 Neb. 214; *Knight v. Denman,* 64 Neb. 814.

As controlled by the court's instructions, the evidence cannot be said to be insufficient to sustain the verdict, and the judgment of the district court, therefore, is

AFFIRMED.

FAWCETT, J., not sitting.

C. E. V. SMITH, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,493.

1. Waters: OBSTRUCTIONS BY RAILROAD. A railway company in constructing its road filled in a ravine and substituted another way for flood waters that would otherwise pass down said watercourse. Subsequent to such construction it became apparent that the artificial watercourse did not have the same capacity as the natural one. *Held,* That the railway company was bound to know that excessive rains might occur at any time and damage result as a consequence of the inadequate provisions made by it as foresaid.
2. ———: ———: LIABILITY OF LESSEES. That a lessee of the original owner and builder of said road is also charged in law with notice of said conditions and liable for damages resulting from its failure to exercise reasonable diligence to protect adjacent landowners from the consequences of its neglect.
3. Appeal: INSTRUCTIONS. A new trial will not be granted because instructions are somewhat confusing and contradictory, where they are favorable to the defeated litigant, and evidently did not mislead the jury.

APPEAL from the district court for Furnas County: ROBERT C. ORR, JUDGE. *Affirmed.*

J. E. Kelby, Halleck F. Rose, Frank E. Bishop, Byron Clark and *Fred M. Dewecse,* for appellant.

J. F. Fults and *E. B. Perry, contra.*

ROOT, J.

Appeal from a judgment on the verdict of a jury for damages.

Beaver creek flows east and west through sections 25 and 26, town 2, range 24, Furnas county. In 1887 the Oxford & Kansas Railroad Company constructed its railway east and west through said sections and about 40 rods north of said creek. The village of Wilsonville is situated on section 26 and principally north of the railway. A ravine runs south into Beaver creek about the west line of section 26, and one of like character is situated about the center of section 25. About the center of section 26, a smaller ravine runs south from about the north line of the railway right of way to said creek. In the construction of the railway, the last mentioned draw was filled in across the right of way. A ditch was then constructed north of and parallel with the railway so that the water that theretofore would pass down the draw in the center of said section was forced east or west for a considerable distance and discharged into the ravine west of said town or through a culvert about 600 feet east of the village. The water that passed through said culvert would spread over considerable territory and flow towards and into Beaver creek. About the time that the railway was constructed a water-power mill was built on Beaver creek southeast of Wilsonville. The testimony is undisputed that the provision made by the railway company for the drainage of the surface water that collected north of its railway was insufficient; that before said road was built the surface water did not cover the land south of the railway grade and north of the creek, but flowed into the ravines and draw described and thence continued into said stream. In July, 1905, after a heavy rain, the flood waters which accummulated north of the railway were held back and retained by said grade, and a considerable part thereof escaped through the opening east of Wilsonville and, controlled by the law of gravitation, flowed down toward and

against the corner of said mill, inflicting substantial damage thereto.

1. The first proposition advanced by defendant is that the proof does not establish that defendant had notice that the provisions for drainage at said point were insufficient, and therefore it was not liable for a nuisance which it did not construct. The contrary rule is announced in *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. While the general rule as to landlord and tenant may be as suggested by counsel, and might apply to railway companies as to some nuisances, we do not think it should control in relation to those active duties which the law imposes on every railway company with relation to the construction and maintenance of its railway. Those duties concerning provision for the accommodation of flood waters are succinctly, and we believe correctly, set forth in *Morse v. Chicago, B. & Q. R. Co., supra; Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575; *Clark v. Dyer*, 81 Tex. 339; *Brown v. Carolina C. R. Co.*, 83 N. Car. 128.

2. The court instructed the jury that the burden was on plaintiff to prove his damage; that the same resulted from defendant's negligence as set forth in the petition; that it was the duty of a railway company in constructing its roadbed across a ravine or other natural watercourse, so far as consistent with the safe and proper operation of its road, to provide for the discharge of such water as would naturally flow therein; that the original owner of the railway had the right to control and change the direction of surface water, and, if it did not negligently and unnecessarily make such change, it would not be liable, and that defendant was not liable for the original construction of said road; that defendant would not be liable for unprecedented and excessive rainfall, and that it was the duty of the village authorities to keep open the waterways outside of the right of way but within the corporate limits. The jury, after considering the case, requested further instruction, and were informed again that defendant was not liable for the acts of its predecessors, "but

any act by the defendant company which caused or contributed to damming up or changing the course of such surface water and which unnecessarily and negligently damaged the plaintiff, for such damage the defendant company would be liable." Counsel assert that this instruction made defendant liable, without reference to negligence, for any act on its part which contributed to the injury. The words "which unnecessarily and negligently damaged the plaintiff" so qualified the preceding language that the instruction is not open to the criticism made. The instructions, when considered in connection with each other, are as favorable to defendant as the law warrants.

3. It is argued that, if defendant provided for the passage of such flood waters as might reasonably be contemplated at the time the road was built, it was not guilty of negligence, and that the evidence does not affirmatively establish that such provisions were insufficient. The evidence upon this point is not as clear as a court might desire, but it does appear that a sewer pipe beneath the roadbed of the railway at a point between the old channel and the culvert east of the town had become filled up with dirt at the time of the flood so that the provisions originally made by the railway were not continued. The testimony further discloses that the railway grade holds back surface water north of the railway after rains so that a pond is formed which remains for a time; that before the construction of said grade such waters passed down the ravine which the railway filled up. A greater amount of water was thus held back in July, 1905, than after ordinary rains, and probably more than ever before in the history of the railway, but there were sufficient facts before defendant and its predecessors to warn and instruct them that they had not made provision for the usual and ordinary flow of the water at said point. Having knowledge of that fact, defendant and its predecessors were charged with further notice that unusual rains might occur and that the channel that did not suffice for ordi-

nary rains would be totally insufficient for excessive ones. A rainfall of two inches on each of two days, such as the evidence establishes occurred in the instant case, cannot be said to be excessive or so unusual that defendant ought not be have anticipated it. *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854.

4. The objections concerning the admission of evidence need not be referred to in detail. We have considered all of them, and they do not entitle defendant to a reversal. There is not any substantial conflict in the evidence, nor any question but that the verdict is for a much smaller sum than the amount of plaintiff's damages.

The judgment of the district court, therefore, is

AFFIRMED.

ERNEST S. KENNISON v. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,718.

1. **Criminal Law: VENUE: WAIVER.** The constitutional right to a trial before a jury of the county where the crime is alleged to have been committed is a mere personal privilege of the accused which he will waive, if the venue is changed at his request, without objection, and he appears without protest, and goes to trial and for the first time objects in the supreme court, although the venue is not changed to an adjoining county. *State v. Crinklaw*, 40 Neb. 759.

2. ———: REVIEW: PRESUMPTIONS: SELECTING JURY. Error is not presumed, and this court will not reverse a conviction because of alleged error in overruling challenges to jurors for cause, and because it is claimed that defendant exhausted his peremptory challenges on jurors who should have been excused for cause, where the record does not affirmatively support such assignment. *Shumway v. State*, 82 Neb. 165.

3. **Homicide: INSTRUCTIONS.** K., after a fist fight with C., drew a revolver and fired twice at his antagonist, who grappled with him, and during the struggle the weapon while in K.'s hand was discharged and C. mortally wounded. The court fully instructed the jury concerning all of the degrees of homicide and the subject of self-defense. *Held*, That, if K. did not act in self-defense but

purposely and unlawfully in presenting his firearm and shooting at C., the last shot would refer back to the purpose with which K. commenced to shoot, and that he was not entitled to an instruction on the theory that the killing was accidental.

4. ———: ———. Instructions criticised by defendant examined, and *held* to present the law of self-defense to the jury.

5. ———: MISCONDUCT OF ATTORNEY. Alleged misconduct of an assistant prosecuting attorney *held* not to have been prejudicially erroneous to defendant.

6. ———: TRIAL. It is the province of the district court to regulate the course of business during the progress of trials, and, during the term, to control its own sittings, and an order made compelling counsel for defendant in a criminal case to argue said cause at night, unless it clearly and unmistakably appears that defendant was prejudiced thereby, will not entitle defendant to a new trial.

7. ———: NEW TRIAL: LIMITATION OF ARGUMENT. An order of the court limiting counsel for the state and defense in a murder trial to two hours and fifteen minutes on a side within which to present their arguments will not justify this court granting a new trial, and especially where the record does not disclose that at the end of the time limited counsel requested an extension of time.

8. ———: ———: REPROOF OF COUNSEL. It is the duty of counsel to obey the instructions of the trial court to not interrupt opposing counsel while he is propounding questions to a witness, and, if counsel is contumacious, the court may, with propriety, threaten to discipline him, and such fact will not so impede the course of justice as to entitle defendant to a new trial.

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

Hamer & Hamer, for plaintiff in error.

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

ROOT, J.

Defendant appeals from a sentence of 23 years at hard labor in the state penitentiary upon a conviction of murder in the second degree. This is a second appeal, a former conviction having been reversed. 80 Neb. 688.

1. Defendant asserts that the district court for Kimball county did not acquire jurisdiction to try him, because it does not join any part of Scott's Bluff county, where the crime is alleged to have been committed. After reversal, on defendant's application, a change of venue was granted. The transcript discloses that defendant made a written application for a change "to some adjoining county," and the court ordered: "It is directed and ordered upon the request of the defendant that the venue thereof (of the case) and the place of trial be and the same is hereby changed to the county of Kimball." The attorney general asserts that this record establishes that defendant is responsible for said order and all that it contains, whereas defendant contends that he asked merely for a change to an adjoining county. The transcript discloses that two entries were made the same day in said case in Scott's Bluff county. One recites the making of the order for a change of venue merely, and the other that it was made at defendant's request. Defendant presents the record as a true one, and we shall treat the latter order as correct. Defendant did not object to the entry or take any exception thereto. He has not preserved the evidence upon which it was made, nor did he challenge the jurisdiction of the district court for Kimball county to try him. In fact, except as he raises the point in his brief, the record is silent as to any objection on his part concerning the change of venue. In *State v. Crinklaw,* 40 Neb. 759, we held that the constitutional right to a trial before a jury of the county where the crime was committed is a mere personal privilege of the accused which he would waive by applying for a change of venue. Defendant ought not to complain of that to which he not only consented but actually procured. Nor does the fact that the waiver applies to a constitutional right lessen its force or application. 1 Bishop, New Criminal Law, secs. 995, 996; 1 Bishop, New Criminal Procedure, sec. 50; *Kent v. State,* 64 Ark. 247; *State v. Hoffmann,* 75 Mo. App. 380; *Weyrich v. People,* 89 Ill. 90; *Lightfoot v. Commonwealth,* 80 Ky. 516; *Perteet*

v. People, 70 Ill. 171; *Krebs v. State,* 8 Tex. App. 1; *State v. Kent,* 5 N. Dak. 516. The district court for Kimball county had jurisdiction to try defendant.

2. It is argued in the brief that the court erred in overruling defendant's challenges for cause to the veniremen Bobbit and Brown. Neither of those gentlemen formed part of the jury that tried defendant, nor does the record affirmatively disclose that he employed any of his peremptory challenges to exclude them therefrom. For all the record advises us, they may have been excused on the peremptory challenge of the state or by agreement of the parties. Error will not be presumed, and defendant's said assignment of error is not well taken.

3. Defendant requested and the court refused the following instructions:

"1. If you find that the revolver was accidentally discharged at the time the last shot was fired, neither the deceased nor the defendant having complete control of the revolver, but both struggling for the possession of it, or if you have a reasonable doubt whether it was not so discharged, you cannot find the defendant guilty of murder in the first or second degree.

"2. Before you can find the defendant guilty of murder in the first degree or murder in the second degree, you must find that he intended to cause the death of the deceased and that he purposely discharged the revolver at the time the last shot was fired. If the discharge of the revolver at that time was accidental or you have a reasonable doubt whether it was not accidental, you should acquit the defendant of murder in the first and second degree."

Counsel assert that there was sufficient evidence tending to support their theory of an accidental discharge of the revolver to entitle them to these instructions. The court had with commendable clearness instructed the jurors as to the various degrees of homicide, and that the burden was on the state to prove the elements essential to constitute murder in the first or second degree or manslaughter,

as the case might be, and that defendant was not guilty of murder in the second degree unless he maliciously and purposely killed the deceased. It had also given defendant the benefit of the defense of intoxication and of self-defense. The testimony tends to prove that defendant for some weeks preceding the tragedy had entertained the thought of beating Mr. Cox, the deceased; that on one occasion he had challenged him to fight in the street, and Cox had refused; that he frequently referred to deceased in vile language; that on the afternoon of the 29th, the day the crime was committed, defendant stated that Cox had to take a whipping, that there was no way out of it; and that a short time before the encounter defendant had stated that he would whip the first man he met that afternoon that he didn't like. Defendant then went into a drug store for some purposes of his own, and, coming out, stated to the deceased, who was also in said store, that he wanted to see him, and Cox went out with defendant. Soon thereafter the noise of scuffling attracted attention, and individuals in a bank and store building either went to the windows or out into the street, and noticed Kennison and Cox fighting. One witness claims to have seen the first blow struck, and testified that defendant was the aggressor, whereas Kennison testified that Cox was the guilty person. The testimony is overwhelming that, although Cox was the better boxer and was more than holding his own, he retreated from 20 to 40 feet from the point where the fight commenced, and finally knocked defendant against a store building, and then stepped back about 6 feet with his hands at his sides; whereupon Kennison drew a revolver from his pocket and fired at Cox. Cox then rushed toward defendant, was shot in the left arm, and, after the parties had grappled, the fatal shot was fired, so that the bullet penetrated the neck of deceased about two inches below the lobe of the left ear, and, following a downward course, severed veins and arteries, causing almost instant death. No witness other than defendant testified that Cox had made any movement intermediate

the time defendant was knocked against the building and the instant that Kennison put his hand back toward his hip pocket. Defendant excuses his conduct in commencing to shoot by saying that he was whipped and scared; that he had thrown up his hand and asked Cox to quit; whereas witnesses but a few feet distant testified that they only heard Kennison utter an oath. Defendant did not testify that he feared any serious beating at the hands of Cox, nor does that seem probable with several disinterested men within 20 feet of him.

The court, in its solicitude for defendant, gave instructions concerning self-defense, and properly refused to mingle therewith anything relating to an accidental discharge of the firearm. Defendant did not accidentally draw the revolver from his pocket or by misadventure point it at and shoot Cox. There is no claim that the first and second shots were not the result of intent, action and control on the part of Kennison. If the circumstances warranted him in shooting in self-defense, he was justified in doing what was done up to that time, and still more would he be justified in acting when his adversary had grappled with him. On the other hand, if not warranted in firing the first and second shots, he cannot be excused for the third one, nor can it be said that he purposely fired the former shots and did not intentionally cause the last one. Defendant's purpose in this last act of the tragedy will refer back to the criminal intent, if any, that accompanied his actions in presenting his revolver and firing the first shot at Mr. Cox. *Holmes v. State,* 88 Ala. 26, 16 Am. St. Rep. 17; *Epps v. State*, 19 Ga. 102; Wharton, Homicide (3d ed.) sec. 356. Moreover, the testimony tends to prove that defendant expressed the keenest satisfaction when informed that Cox was dead. He denied making those statements, but we are satisfied that he made them, and such conduct destroys his present assertion that the killing was accidental. *State v. Botha,* 27 Utah, 289, 75 Pac. 731.

4. The fifteenth instruction given by the court is as-

sailed by counsel, and is as follows: "The jury are instructed that, in considering whether the killing was justifiable on the ground that the killing was in self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the defendant in making what is claimed to be his self-defense, as bearing upon the question whether the shot, if fired, was actually done in self-defense, or whether it was done in carrying out an unlawful purpose. If the jury believe from all the evidence that the force used was reasonable in character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether or not the killing was done in self-defense." This instruction was supplemented by instructions numbered 16, 18 and 19, given by the court on its own motion, instruction numbered 1, requested by the state, and instructions numbered 3 and 5, requested by defendant, and, combined, they fairly state the law of self-defense. *Carleton v. State,* 43 Neb. 373; *Davis v. State,* 31 Neb. 240. Counsel, however, argue that the theory of the defense was not self-defense, but accidental killing, and that the opinion of Judge Letton establishes that defense as the law of this case, and the district court was bound to submit it to the jury. Whatever may have been written by Judge LETTON to demonstrate error in certain instructions given on the former trial, the opinion does not hold as contended by defendant, and the district court did not err in this particular.

5. It is argued that the first instruction given by the court at the request of the state does not correctly state the law of self-defense. If, as counsel elsewhere argue in their brief, the theory of the defendant was not self-defense, but an accidental killing, we fail to appreciate any prejudicial error in imperfectly instructing upon a defense not available for defendant. If this instruction is read in connection with the other instructions on said

subject, it will be found that all of the elements of self-defense were minutely and correctly explained to the jurors.

6. It is argued that counsel who assisted the prosecuting attorney in the district court was guilty of misconduct in the examination of witnesses, in statements made during the trial, in causing one Wilkinson to be attached for contempt of court, and in his argument to the jury. We do not commend much that was said and done by counsel, but the trial court, so far as the record made at the time of the trial discloses, ruled promptly and properly, and instructed the jury not to consider the remarks made by counsel during the trial of the case. We do not consider that because of any or all of said improprieties a new trial should be granted. *Bohanan v. State,* 18 Neb. 57, 78; *Argabright v. State,* 62 Neb. 402.

7. It is suggested that there was an abuse of discretion by the trial court in compelling counsel to conclude their argument Saturday night and in limiting the time therefor. Tuesday and Wednesday of the trial week were consumed in selecting a jury, Thursday, Friday and Saturday thereof in the taking of testimony, including two evening sessions. At 7 o'clock P. M. Saturday, all testimony having been offered, the court over defendant's objections directed the final submission of the case that night and limited each side to two hours and fifteen minutes within which to make their arguments. We are not advised concerning the reasons that prompted the court to make said orders, except that some of the jurors preferred to have the case finally submitted that night. The trial court is vested with great discretion in these matters, and unless we can say that discretion has been abused to defendant's prejudice we cannot interfere. It is doubtless true that counsel were somewhat exhausted after their strenuous labor of the week, but the trial court could better judge of that fact than we can, and we are not justified in interfering. *Wartena v. State,* 105 Ind. 445. Counsel assert that it was impossible to properly present an argument

within the limited time. While many witnesses had been examined, the facts testified to were not intricate. The same counsel had previously tried the case, and must have understood and remembered the testimony of the various witnesses, and we do not find that the court abused its discretion in the premises. Nor does the record disclose that counsel asked for an extension of time at the end of their argument. In *State v. Collins,* 70 N. Car. 241, a homicide case, it was held not reversible error to limit the argument of counsel for defense to one hour and a half. *Hart v. State,* 14 Neb. 572; *Rhea v. State,* 63 Neb. 461. While the court acted within its discretion, we do not commend the practice, and especially in cases like the one at bar.

8. Complaint is made that the trial court threatened to send counsel for defendant to jail if he would not obey an order to desist from interrupting the examination of a witness. The record discloses that counsel was not sent to jail, but that he continued to represent his client, and that he refrained from the obnoxious practice which incited the action of the court, and we fail to discern any error in this part of the trial.

This verdict of murder in the second degree is the second one of that character that has been found against defendant. The evidence amply sustains the finding of the jury. The record will not justify a reversal, and the judgment is therefore

AFFIRMED.

ROSE, J., not sitting.

WILLIAM M. MINER, APPELLEE, V. ESTHER E. MORGAN, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,444.

1. **Pleading**: REPLY: DEPARTURE. Where a petition to quiet title states that defendant has no interest in the land, but claims an unfounded dower interest therein, a reply alleging the claim is unfounded by reason of defendant's nonresidence does not introduce a new cause of action.

2. ———: ———: ———: WAIVER. A defendant who submits his defense to the court on issues raised by the reply, without attacking it in any form, waives the objection that it introduces a new cause of action. *Gregory v. Kaar*, 36 Neb. 533.

3. **Appeal**: ISSUES. On appeal from a decree in a suit against a widow to quiet plaintiff's title to land, her homestead interest cannot be considered on a record which fails to disclose, either by pleading or proof, that the land had ever been occupied or claimed as a homestead.

4. **Dower**: NONRESIDENTS. "Where a husband conveys lands in this state while his wife is a nonresident thereof, she has no dower interest in the lands thus conveyed." *Atkins v. Atkins*, 18 Neb. 474, followed.

5. ———: ———: EVIDENCE. Proof that a man left his wife in Wisconsin, came to Nebraska in 1870, never lived with her afterward, concealed his residence from her for nine years, represented himself to be a single man, and conveyed land as such, moved in 1888 to Kansas, where he died in 1902, his wife never having lived in this state until after his death, *held* sufficient to sustain a finding that she was a nonresident, within the meaning of the statute limiting the dower right of a woman living out of the state to lands in which her husband died seized.

6. **Constitutional Law**: DOWER. A statute limiting the dower right of a nonresident widow to lands of which her husband died seized, and extending the dower right of a resident widow to other lands, *held* not inhibited by constitutional provisions relating to due process of law and to distinctions between resident aliens and citizens in the possession, enjoyment or descent of property.

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

John L. Webster, Victor McLucas and *E. U. Overman,* for appellant.

Bernard McNeny, contra.

ROSE, J.

This is a suit to quiet plaintiff's title to a quarter section of land in Webster county. In his petition plaintiff alleges in substance the following facts: Milton M. Morgan owned the land September 13, 1881, and on that date conveyed it by a warranty deed, describing himself as a single man, to Charles F. Allen. By mesne conveyances it was transferred to plaintiff, May 8, 1902. Defendant claims she was the wife of Morgan when he executed the deed mentioned, and is now his widow and has a dower interest in the land. Plaintiff further pleads that the claims of defendant are unfounded, that she has no estate or interest in the premises, that her claims are clouds upon plaintiff's title, and that Morgan died in Kansas, January 28, 1902. By answer defendant avers she was married to Morgan August 5, 1855, was his lawful wife until his death, and is entitled to the rents and profits of one-third of the land from January 28, 1902, by virtue of her dower interest. She also avers that she is a resident of Douglas county, Nebraska, and that Morgan left surviving him the defendant, his wife, and two daughters. Plaintiff filed a reply, in which he stated that defendant was a nonresident of the state of Nebraska, September 13, 1881, when Milton M. Morgan deeded the land to Charles F. Allen, and that at the time of the death of Morgan he and defendant were nonresidents of the state of Nebraska; the defendant being a resident of Wisconsin, and Morgan being a resident of Kansas. The district court found the issues thus joined in favor of plaintiff and entered a decree in his favor. Defendant appeals.

The first assignment of error argued by defendant is

based on the assertion that the reply introduces a new cause of action. It is insisted that defendant's nonresidence is for the first time pleaded in the reply to defeat her dower. In this situation defendant invokes the rule that plaintiff can recover only on the cause of action stated in the petition, and the reply cannot introduce a new one. The petition states defendant has no interest or estate in the land, but that she claims a dower interest which is unfounded. The reply, by alleging facts which show that the claim of dower is unfounded by reason of defendant's nonresidence, does not introduce a new cause of action. In any event the reply was not assailed in any form in the lower court, and defendant went to trial on the issues raised by it and the other pleadings. The objection now made by defendant is therefore waived. *Gregory v. Kaar*, 36 Neb. 533.

Another point argued by defendant is that the realty in controversy was the homestead of the Morgan family, and therefore was not conveyed to Morgan's grantee, September 13, 1881, by the deed to which defendant was not a party. The answer to this argument is there is no pleading or proof to show that the property was ever claimed or occupied as a homestead by either defendant or her husband.

Defendant's principal argument is directed to the proposition that her absence from the state did not deprive her of her dower rights. The facts upon which this argument rests, as contended by defendant in her brief, are that the Morgans did not own a home in Wisconsin; that the husband, as the head of the family, went to Nebraska to take up a homestead, and, when settled and established, was to send for his family; that they had lived together more than 15 years; that he kept up a correspondence with his wife and a daughter, informing them that he intended to bring them to the homestead in Nebraska when ready; that there had never been any trouble in the family, and that it was not a case of separation. After presenting this summary of facts, as understood by de-

fendant, she asks the court to presume that her residence was with her husband on the land in controversy, and to reverse a contrary finding of the trial court, as follows: "The court finds that the defendant, Esther E. Morgan, at the time of the conveyance of the premises described in plaintiff's petition, was a non-resident of the state of Nebraska and was a resident of the state of Wisconsin, and, at the time of the death of said Milton M. Morgan, he was a non-resident of the state of Nebraska, being a resident of the state of Kansas, and defendant was a non-resident of Nebraska."

Morgan parted with his title to the land, September 13, 1881, and died January 28, 1902, and, if the finding of the trial court is sustained by the evidence, defendant's claim is defeated by the following statutory provisions, which were in force at the time of her husband's death: "A woman being an alien shall not, on that account, be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seized." Comp. St. 1903, ch. 23, sec. 20. In giving effect to these provisions this court, in an opinion by Judge MAXWELL in *Atkins v. Atkins,* 18 Neb. 474, said: "This section of the statute seems to have been copied from the statute of Michigan on that subject, the language being the same. The proper construction of the section was before the supreme court of that state in *Ligare v. Semple,* 32 Mich. 438, and it was held that where a husband conveyed lands in that state while his wife was a nonresident thereof she was not entitled to dower therein. In our view this is the proper construction to be given to the language of the statute, and we approve of and adopt it." Other courts have taken the same view of similar statutes. *Bennett v. Harms,* 51 Wis. 251; *Buffington v. Grosvenor,* 46 Kan. 730; *Thornburn v. Doscher,* 32 Fed. 810.

Was the evidence sufficient to sustain the finding that Morgan executed his deed when defendant was a non-resident? Morgan came to Webster county, Nebraska, in

1870, or later, represented himself to be a single man, and so described himself in his deed. A witness who lived in the neighborhood and knew Morgan from the time of his arrival until he moved to Kansas did not know he had a wife. Morgan left Webster county in 1888 or 1889 and did not return, except on a visit, and was living in Kansas at the time of his death. He never returned to his family. For nine or ten years after he left defendant and her daughters in Wisconsin they never heard from him, and defendant was never in Nebraska until after her husband died in Kansas. The evidence thus summarized is sufficient to sustain the finding that defendant was a "woman residing out of the state," within the meaning of the statute which limits the dower interest of a nonresident wife to lands of which her husband died seized. *Thornburn v. Doscher, supra.*

If the wife's domicile followed that of the husband, the evidence would still sustain the finding of the trial court, as to defendant's nonresidence, since, in that event, she would be a resident of Kansas, where her husband was residing at the time of his death, and not a resident of this state. It is insisted, however, that defendant's domicile followed that of her husband to Webster county, Nebraska; that her dower interest attached to his land there, before his death, and vested in her the instant he acquired title, and still remains a charge upon the land; that resident widows are protected in such a dower right, and that the statute quoted, in so far as it has been construed in *Atkins v. Atkins, supra,* to deprive a nonresident widow of the same right, is unconstitutional. One provision on which defendant's argument is based appears in both the state and federal constitutions, and declares that no person shall be deprived of property without due process of law, and another is section 25, art. II, of the state constitution, which provides that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." In other states similar legislation has been upheld

when thus attacked. It rests on the inherent power of the state government over the marriage relation, the means by which land within the state may be transferred by husband or wife, the interest each shall have in the property of the other, the descent or testamentary disposition of realty and the protection of titles. In both Kansas and Wisconsin a statute like our own was sustained. *Buffington v. Grosvenor,* and *Bennett v. Harms, supra.* In discussing a statute like the one under consideration, the circuit court of the United States for the district of Oregon said: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may for the security of titles, and the protection of innocent purchasers, provide that a nonresident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man." *Thornburn v. Doscher,* 32 Fed. 810. The statute does not violate the constitutional provisions upon which defendant relies, and the construction adopted in *Atkins v. Atkins,* 18 Neb. 474, is followed.

No error appearing in the record, the judgment of the district court is

AFFIRMED.

SARAH MATILDA PETERSON, APPELLANT, V. JOHN ALBERT BAUER ET AL., APPELLEES.

FILED FEBRUARY 6, 1909. No. 15,833.

1. **Specific Performance: ORAL CONTRACT.** An oral contract to adopt the daughter of a stranger and leave her property by will may be enforced by specific performance, where she has fully performed her part and established the agreement by clear and satisfactory evidence.

2. ———: ———: EVIDENCE. In a suit for specific performance, direct evidence that a testator had made an oral contract to adopt the daughter of a stranger and leave her one-half of his estate at his death may be corroborated by his statements to witnesses of his purpose to do so.

3. **Evidence:** ANCIENT DOCUMENT. An unacknowledged ancient document coming from doubtful custody may be rejected as evidence, where a credible witness having knowledge of the handwriting of obligor condemned his signature as not genuine.

4. **Specific Performance:** ORAL CONTRACT: EVIDENCE. In a suit to enforce an oral contract to adopt the daughter of a stranger and leave her property by will, performance on part of plaintiff was properly shown by evidence that she became a member of testator's family when the contract was made, remained 18 years, performed dutifully every detail of her relation during that time, and left with his consent.

5. ———: ———. Whether an oral contract to devise realty shall be enforced by specific performance after it has been performed by plaintiff depends upon the facts and circumstances of each case.

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

T. J. Mahoney, and *P. A. Wells,* for appellant.

Matthew Gering, contra.

ROSE, J.

This is a suit in equity to enforce an oral contract obligating John H. Bauer to adopt Sarah Matilda Peterson, and at his death leave her one-half of his estate for becoming a member of his family as his daughter and for performing the duties of that relation. The petition states that plaintiff's maiden name was Sarah Matilda Nix, that her mother died in October, 1871, and that the contract was made on plaintiff's behalf by her father, Samuel Nix, in February, 1872, before she was 9 years old, and that thereafter she was never in her father's custody or control, but in the performance of her contract was for 18 years continuously in the home of John H. Bauer, and at all times faithfully and dutifully bestowed upon him

and his wife the service, love and affection of a daughter. In her petition plaintiff further avers that John H. Bauer did not keep his promise to adopt her and leave her one-half of his estate, but at his death left a will by which he bequeathed his personalty to defendant, John Albert Bauer, and devised his realty to him for life, with the remainder in fee to his four minor children, Mabel, Grace, Gertrude and Hazel, defendants. The mother of these children, Lizzie Bauer, wife of John Albert Bauer, and John Albert Bauer, administrator with the will annexed of the estate of John H. Bauer, deceased, are also defendants. The answers of defendants admit that the realty of which John H. Bauer died seized was devised in the manner described in the petition, that defendants John Albert Bauer and Lizzie Bauer are husband and wife, and that Mabel, Grace, Gertrude and Hazel Bauer are their children. Other averments of the petition are denied. Upon the trial below the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appeals.

Was this oral contract made? Was it fully performed on part of plaintiff? Was it violated by John H. Bauer after he had accepted for himself and family the services and devotion of plaintiff in the relation of daughter during 18 years? If the record answers these questions in the affirmative by competent evidence which is clear and satisfactory, a court of equity should decree specific performance. This doctrine has been settled in this state by repeated decisions, and the principal question for determination in this case is whether the making of the contract pleaded by plaintiff has been so established.

Plaintiff contends that the agreement was made during a conversation at the home of her father, who lived in a dugout in Cass county. Three witnesses testified to what was said at the conversation, namely, Mrs. Mary J. Locke, Samuel Smith and George L. Berger. On the issue as to the making of the contract the most direct and positive testimony was given by Mrs. Mary J. Locke, plaintiff's

oldest sister. At the time of the conversation she was a girl 19 years of age. Her mother died in October, 1871, and left her with the care of a number of children, among them plaintiff. Her father's name was Samuel Nix, who made the agreement with John H. Bauer on plaintiff's behalf. When the witness testified, she was a married woman 51 years old. She testified that she remembered the time plaintiff went to live in Bauers' family; that it was in February, 1872; that she remembered the circumstances of plaintiff's going from her father's home to Bauer's, and that Bauer came there, and that she heard a talk between her father and Bauer relative to plaintiff. In this connection the witness was asked: "What did Bauer say?" She answered: "Mr. Bauer said he would take my sister as his own child and care for her and school her, and at his death she should share equally with the boy." In reply to the question, "Share equally in what?" she answered: "His property. What he had." In reply to a further question as to what her father said after Bauer had made these statements, she replied: "He said she could go." On cross-examination she answered a question as to what else Bauer said at the conversation, as follows: "Mr. Bauer said he would like to take her as his own girl and care for her, and she should have half of what he had at his death, as his own child." This testimony was stated in different forms by the same witness. If she actually remembered the substance of what was said during the conversation, the fact would neither be suspicious nor remarkable. What was said about her sister would naturally make a deep impression on her mind. Her mother had only been dead a few months. She was the oldest sister and was left with the responsibility and care of the children. It would not be unusual if the severing of family ties and the terms upon which plaintiff was to leave made a lasting impression on the witness. Plaintiff did not want to go, and a little brother was sent along. Poverty does not make the breaking of the family circle a matter of indifference. Under

the circumstances narrated it would not be too much to believe that the witness will not live long enough to forget what she in fact heard of the conversation relating to her little sister's future. There is no reasonable ground to question her remembrance of the substance of the conversation. If she told the truth, the oral contract was made, as pleaded in the petition. There is nothing in the record to discredit her as a witness. Her statements show evidence of candor and fairness, and under the circumstances disclosed by the record, there was nothing improbable in Bauer's making the promise to leave plaintiff one-half of his estate at his death. A number of witnesses testified that he wanted a little girl and that he was anxious to get one. Being anxious, he would quite likely offer inducements. Outside of the sentiment and comfort a daughter would bring to his home, he had reasons for anxiety. His wife was a large, corpulent woman, afflicted with rheumatism, and there is proof that, to some extent, she was incapacitated for active work when plaintiff became a member of his family. The making of the contract on the part of John H. Bauer was, therefore, altogether probable.

The testimony of Mary J. Locke, however, does not stand alone. Samuel Smith, who was present at the solicitation of John H. Bauer, also testified that he heard a conversation between Bauer and Nix at the time plaintiff went to live in the Bauer home; that he could not remember the words used, but that the conversation with Bauer was about the division of property, the taking of the girl, and providing for her as one of his own children. On cross-examination he was asked to state his recollection of the conversation, and said: "That it was, he wanted a girl and that he was to provide for the girl as his own." While this evidence of the witness Smith would not alone establish the making of the contract, his testimony corroborates that of Mary J. Locke. In addition, the record is full of the testimony of employees and neighbors of John H. Bauer and others, corroborating the di-

rect and positive evidence of Mary J. Locke, and showing that John H. Bauer understood the agreement to be as pleaded in the petition and that for many years he fully intended to keep his promise. By disinterested witnesses the following facts were shown: Plaintiff was in the Bauer family continuously for 18 years; was known in the neighborhood as "Tilly Bauer," where she was thought to be the adopted daughter of John H. Bauer and wife. They recognized her as their daughter and called her their "girl," "child" or "Tilly." She called them "father and mother" or "papa and mamma." They sent her to school and took her to church. At the age of 16 she was baptized in a church, in which John H. Bauer was deacon, in the name of "Sarah Matilda Bauer." They discussed her prospects of marriage, and objected to an unworthy suitor because plaintiff was a member of the family and would get her interest in their property. They petted her and expressed for her both pride and affection. In addition, John H. Bauer deeded her real estate worth $1,000 or more, and visited her frequently after she was married, and often took her little boy with him to call upon a neighbor by the name of Mrs. G. W. Rennie, who testified to what he said on one occasion, in the following language: "When he came up there, he said that he took Tilly when she was, I think, about seven years old, to raise her, and he had her adopted, and that she had always worked hard and had done, he said, really more for him than one of his own children could or would; and he said at his death she should come in and share half of everything that he had." Jacob Levy, a justice of the peace in South Omaha, who had formerly visited the home of John H. Bauer, as a peddler, in 1881, testified that both John H. Bauer and his wife told him that plaintiff would be the same as their own daughter, and that they had further said, "After we die she will get her interest in the property." Francis M. Young, a farmer living in the vicinity, stated that John H. Bauer told him that when he died plaintiff should have one-half of what he was worth, and that she should have

just as much as John Albert Bauer. Eliza A. Johnson, a witness who frequently called at the Bauer home, in testifying, said: "He always spoke of them as his two children, his girl and his boy. He was going to divide equally with them; and, 'when he was laid away,' he spoke of her as being cared for, and her being a little lady some day of wealth and money. He always said that."

Plaintiff adduced other evidence to the same effect, but defendants insist that all the testimony of this character is evidence only of a testamentary intention which could be abandoned at any time, and does not prove the contract pleaded by plaintiff. It may be conceded that this testimony tended to show a testamentary intention, but it also corroborates the positive testimony of the witness, Mary J. Locke, to the effect that John H. Bauer took plaintiff into his home under a promise to adopt her, care for her, and leave her one-half of his estate at his death. The corroborating proof also shows that John H. Bauer understood the agreement to be as stated by Mary J. Locke, and that for many years he intended to perform his part of it.

Defendants insist that substantially the same evidence was before this court in *Peterson v. Estate of Bauer,* 76 Neb. 652, and that it was condemned therein as insufficient to show the making of the contract upon which plaintiff asks relief. The answer to this contention appears in an opinion on rehearing, reported in 76 Neb. 661.

To refute the testimony on behalf of plaintiff as to the terms of the contract, defendants introduced the following document: "Louisville, Cass County, Neb., March the 8th A. D., 1873. This is to certify that I, Samuel Nix, do hereby state that I am satisfied for John Bauer to have my little girl Sarah Matilda Nix and adopt her in his family, as his own child, or bound, as he may think best. Said John Bauer is to have control of her until she is eighteen years of age, for which he agreed to do a good part by her, and give her reasonable good schooling and give her a good outfit for housekeeping. Sarah Matilda was born Sept. the 17th A. D. 1864. Samuel Nix. John

Bauer." This paper was admitted in evidence under the rule permitting ancient documents, which are more than 30 years old, to be received in evidence without proof of execution, where they are shown to have come from proper custody. Plaintiff argues that this document should be rejected for the reason it is not shown to have come from proper custody, and also insists that she introduced evidence to show that the signature of Samuel Nix was not genuine, thereby necessitating proof of execution. Defendant John Albert Bauer testified that he found the instrument among his father's papers in the drawer of a small stand in his own bedroom about two weeks after his father's death, and that the stand had been in the room of witness probably a year. The character of the other papers in the drawer was not shown. The witness did not state that his father kept other valuable papers in the drawer. It is shown without contradiction that John H. Bauer did not leave his will, a valuable paper, in the drawer. At the time of testator's death the will was in a safe in possession of Stephen Hulfish, at Wabash. Besides, the evidence is conclusive that John Albert Bauer was not free from artifice in his relations with his father. In testifying he admitted that he once threatened suicide, bought poison, pretended to take it, and allowed a physician to be called, for the purpose of influencing his father to do better by him. The circumstances indicate a doubtful custody. In addition there was no attempt to prove that the signature of Samuel Nix was genuine. On the other hand Francis M. Young testified that he knew Samuel Nix, had transacted business with him, had seen him write, had received a letter from him, and that from these sources of knowledge the name of Samuel Nix on the ancient document was not in his handwriting. Under such circumstances it would be carrying the ancient-document rule too far to consider the paper as authentic without some proof of execution on the part of Samuel Nix. If the ancient document were admitted without question, however, it would not necessarily defeat

plaintiff's recovery. If genuine, it permitted the child to be taken on one or the other of two options. The first option authorized plaintiff's adoption, and the second permitted John H. Bauer to receive her as a bound girl. The facts already narrated show that plaintiff's status in the Bauer family was not that of a bound girl. Plaintiff was treated as an equal, and her standing in the family was that of a daughter. Bauer, therefore, did not accept or act under the second option. With the second option and the qualifying language eliminated by Bauer himself, nothing remained of the instrument except his permission to adopt plaintiff. This permission would have enabled Bauer to carry out his part of the agreement. The only option which Bauer recognized as binding upon him does not contradict the terms of the oral contract pleaded in the petition.

Defendants also direct attention to the testimony of George L. Berger to contradict that of Mary J. Locke. His version of the conversation was stated in one of his answers as follows: "Mr. Bauer said that he wanted to try the girl—take her home and see if he liked her and wanted to keep her. He told Mr. Nix if he kept the girl he would give her a reasonable amount of schooling, clothe her, and if she stayed with him until she married or was of age, he would give her a reasonable outfit to go to keeping house." The witness Berger was present at the conversation by request of John H. Bauer, and was a half or full brother of defendant John Albert Bauer, there being a conflict in the evidence as to their relationship. On the question in issue Berger's evidence contradicts that of the other two witnesses present, and is also at variance with later statements of John H. Bauer himself, that at his death plaintiff should have one-half of his estate. More than 30 years after the conversation Berger testified to details of no importance in such a glib and reckless manner as to discredit his testimony. He had no extraordinary interest or obligation to arrest his attention or impress his memory. The language in which he at-

tempts to reproduce what John H. Bauer said bears a remarkable resemblance to the style accredited by defendants to Samuel Nix in the foregoing ancient document, which was not in existence at the time of the conversation. This similarity in language, after the lapse of more than 30 years, can be accounted for on the supposition that the witness refreshed his memory from the ancient document, instead of stating his recollection of what he actually heard. His testimony does not discredit that of Mary J. Locke.

It is also argued by defendants that John H. Bauer's reputation for honesty and fair dealing, and the solemn will and testament by which he excluded plaintiff from sharing his estate at his death, ought to have great weight in the determination of this case. The provisions of testator's will were at variance with his statements and intentions as expressed by him to many witnesses during the 18 years plaintiff lived in the Bauer family. Moreover, the record furnishes no reason to question the honesty or truthfulness of plaintiff, who was permitted to testify to John H. Bauer's statements of his own obligations and intentions in 1890, and to show they were not then as expressed in his will. The opportunity for plaintiff to testify to such facts was given when defendants introduced proof that he deeded her real estate worth $1,000 or more. In relating the circumstances of the transfer plaintiff testified that John H. Bauer in substance said he had given her the property because he was having to spend much on Albert; was going to take him to Canada; wanted plaintiff to stay on the farm until he returned. Albert had gotten himself and Bauer into so much trouble, he was having to dispose of his property and go away, and wanted her to have the property transferred; mentioned the terms on which she was taken into the family; would give her half of what he had at his death. This testimony and the direct and corroborating evidence, to the effect that John H. Bauer took plaintiff into his family under a promise to leave her one-half of his estate at his death,

cannot be overturned by his reputation for honesty, nor by the solemn instrument through which he violated his promise, after having received under it for himself, his invalid wife and John Albert Bauer the benefit and comfort of plaintiff's faithful service and affection during 18 years of the best part of her life.

Defendants further argue that plaintiff has not fully performed her part of the oral contract pleaded in her petition. Before she was 9 years old she was taken from her father, brothers and sisters to the home of John H. Bauer and thereafter was a member of his household continuously for 18 years. When she arrived the family consisted of John H. Bauer, his wife, defendant John Albert Bauer and plaintiff. There is proof that, to some extent, Mrs. Bauer was incapacitated for work at the time plaintiff first went to the Bauer home. Five years later Mrs. Bauer was practically an invalid, requiring a great deal of care and attention during the rest of her life. She died August 7, 1886, and during those years plaintiff waited on her and at times was her nurse. She dressed her, watched by her at night, rubbed her for rheumatism, and otherwise ministered to her wants. In addition, she was housekeeper and cook for the family, washed and ironed, did chores on the farm, milked cows in summer and winter, churned, took care of the chickens, worked in the garden, and performed these and other services and duties cheerfully. Witnesses testified that Mrs. Bauer had praised plaintiff's conduct and work, and that John H. Bauer repeatedly boasted to the neighbors and others of her being a good girl, and of her taking care of the home, and of her discharging all her duties faithfully and cheerfully. No witness for any of the parties testified to a complaint on the part of either John H. Bauer or his wife as to the behavior of plaintiff or of the manner in which she fulfilled her obligations to them. Plaintiff's relation with the Bauer family terminated after John Albert Bauer came home with a wife. Of this incident a witness said that John H. Bauer made a statement to the

effect plaintiff should leave if John Albert Bauer returned after an absence in Canada, and that she could not be blamed for refusing to live in the house with him and his wife. Plaintiff remained in the Bauer family a number of years after Mrs. Bauer's death, 9 years longer than she could be bound by the contract made by her father in her behalf, and 9 years after she had reached the age when a parent could retain the custody and control of a daughter against her will. When plaintiff severed her connection with the Bauer family her right to do so was recognized by John H. Bauer. The contention of defendants that the contract pleaded in the petition has not been fully performed by plaintiff is not sustained by the record. That John H. Bauer broke his promise to leave plaintiff at his death one-half of his estate, after having received the benefit of performance on her part, is also established by the evidence.

Reference cannot be made to all the evidence without making the opinion too long, but each item of proof on both sides has been examined in its relation to every part of the record. The character and effect of the evidence described will not furnish a measure for other cases. The direct evidence of the making of the contract might prove wholly insufficient when given by other witnesses in a case presenting different corroborating facts and circumstances. *Kofka v. Rosicky,* 41 Neb. 328. Most of the testimony was submitted in the form of depositions, and for that reason the trial court was deprived of the usual advantage over this court in determining the credibility of witnesses.

The conclusion is that the oral contract was made as pleaded in the petition, that it has been fully performed by plaintiff, and violated by defendants' testator. The judgment of the district court is therefore reversed and the cause remanded to the court below, with directions to enter a decree in favor of plaintiff for the specific performance of her contract as prayed in her petition.

REVERSED.

FAWCETT and ROOT, JJ., having been of counsel in the case, did not sit.

IN RE ESTATE OF JOHN MANNING.
THOMAS BONACUM, BISHOP, APPELLANT, V. JOHN MANNING, JR., ET AL., APPELLEES.*

FILED FEBRUARY 6, 1909. No. 15,497.

Descent and Distribution: JURISDICTION. The district court is without original jurisdiction to distribute the funds of an estate of a deceased person.

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

Perry & Lambe, for appellant.

W. S. Morlan, John T. McClure and *J. F. Fults, contra.*

FAWCETT, J.

This is an appeal from a judgment of the district court for Furnas county, determining the rights of the beneficiaries under the will of John Manning, deceased, and ordering a distribution of the moneys in the hands of the administrator of said estate among the beneficiaries named in said will. We have made a careful examination of the record, and are unable to find anything showing that the county court was ever called upon to construe the will, or that it ever made any order of distribution of the moneys in controversy. The only thing in the record even tending to show that any steps were ever taken in the county court to construe the will or make distribution of the funds is the written application of the four children of John Manning, deceased, asking the court to declare certain provisions in the will void and to make distribution of the estate. This application was verified June 4, 1906, by John T. McClure, as attorney for the applicants, but there is nothing in the record to show when the application was filed in the county court, nor is there anything to show that the county court ever acted upon the appli-

* Rehearing allowed. See opinion, 85 Neb. ——.

cation, nor does the record show an appeal by any of the parties from any order which the county court may have made, if at all, upon such application. The record fairly shows that all of the estate of John Manning, deceased, with the possible exception of one lot in Arapahoe, has been converted into money, and that the money is now in the hands of the executor. Such being the fact, the county court alone has original jurisdiction to determine the question as to who is entitled to receive such moneys, and in what proportions, and to order distribution. The district court has no original jurisdiction in such a case (*Reischick v. Rieger,* 68 Neb. 348), and can only take jurisdiction upon an appeal regularly prosecuted after an adjudication of the question in the county court. It is clear therefore that, so far as the record before us discloses, the district court was without jurisdiction to enter the decree complained of.

While it is unnecessary to say anything further in disposing of this case, we deem it prudent to suggest that no order distributing the funds of this estate should be made until due notice has been given to all persons interested of the application for such distribution. No such notice is shown to have been given. We do not think there is any authority in the court to appoint a guardian *ad litem* for an insane party until such party has first been served with all due process. Furthermore, we notice in the record some stipulations that were signed, making certain allowances for attorneys' fees and other expenditures. A guardian *ad litem* has no authority to make any such stipulations. At every stage of the proceedings it is the duty of a guardian *ad litem* to insist upon strict proof of everything which in any manner affects the rights of his ward. While we do not so decide, an examination of the record before us leads us to strongly suspect that all of the proceedings of this case since the filing of the will for probate have been without any binding force upon Ellen Manning, insane. It is possible that if all of the proceedings in the county court were before us, including

proof of service of the proper notices upon Ellen Manning, insane, they might show the legality of what has thus far been done, but the record now before us leads us to seriously doubt it. Unless it can be made to appear to the district court, by a proper transcript from the county court, that the county court had jurisdiction of the parties in interest, and has, after due and proper notice, adjudicated the questions presented, and that an appeal has been properly prosecuted from the judgment of the county court to the district court, it is the duty of the district court to dismiss this action or appeal, as the case may be.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

SADIE BERGERON, APPELLEE, V. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,500.

1. Insurance: PART PAYMENT: ACTION FOR REMAINDER. Where an insurance company, after the death of one to whom it has issued its policy or beneficiary certificate, sends its agent to the beneficiary for the purpose of adjusting the claim of said beneficiary under such policy, and said agent obtains from the beneficiary a surrender of such policy with a receipt on the back thereof signed in blank by the beneficiary, under an agreement that the company will pay such beneficiary the full amount of the policy within a few days or return such policy to said beneficiary, and the company retains possession of said policy, but remits to the beneficiary only a portion of the amount named therein, the amount so paid will be treated as a partial payment only, and the beneficiary may maintain her action for the balance called for by said policy.

2. ———: LIABILITY ON POLICY. And in such case the fact that the company, after obtaining possession of the policy, fills in the blank receipt on the back thereof for less than the amount agreed upon, will not relieve the company of its full liabilty under said agreement.

3. ———: ARGUMENT: RATIFICATION: WAIVER OF DEFENSES. And in such a case the retention of the policy by the company will be treated as a ratification of the agreement made by its agent, under which it obtained possession of said policy, and as a waiver of all defenses which it may have had on account of anything which had occurred prior to such adjustment by said agent.

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

Isaac E. Congdon, for appellant.

Greene, Breckenridge & Matters, contra.

FAWCETT, J.

The petition, among other things, alleges that on the 22d day of November, 1902, defendant issued to Philip Bergeron, husband of plaintiff, a beneficiary certificate upon the life of said Philip Bergeron, for the benefit of plaintiff, in the sum of $1,000; that on October 22, 1905, said Philip Bergeron departed this life; that plaintiff furnished defendant due proofs of death; that after the death of Philip Bergeron defendant, through one of its directors, one Frank H. Scott, after attempting by numerous threats set out in the petition to obtain a settlement of the claim for a sum much less than the face of the policy, finally agreed with plaintiff that, if she would surrender to him her said certificate, defendant would pay her the face thereof, $1,000, in cash; that, relying upon his promise as a director and agent of the defendant, plaintiff signed a receipt in blank, and delivered to said Scott the beneficiary certificate; that shortly thereafter defendant sent plaintiff the sum of $250, but has failed to pay the other $750, for which last named sum, together with interest, plaintiff prays judgment. The defendant in its answer, after setting out numerous reasons why it thinks it should be relieved from paying plaintiff's demand, which we do not deem it necessary to set out, alleges that, "in order to save to its membership expense and annoyance through

litigation, authorized and directed a settlement with Sadie Bergeron, the plaintiff, in and for the sum of $250 in full of any and all demands which she might assert against the defendant under and by virtue of said benefit certificate or any contract between said Philip Bergeron and the defendant, and to that end empowered one of its then directors, Frank H. Scott, to make said settlement on defendants' behalf with said Sadie Bergeron. On the 3d day of February, 1906, in the city of St. Louis, state of Missouri, said Sadie Bergeron, the plaintiff, surrendered said benefit certificate and delivered the same to defendant, and signed a receipt on the back thereof in words and figures as follows: 'Received from the Modern Brotherhood of America, of Mason City, Iowa, through the proper officers of this lodge No. —— two hundred and fifty ($250) dollars in full payment of the amount due the beneficiaries under the within benefit certificate No. 48920, issued to Philip Bergeron now deceased, proof of claim having been filed with said brotherhood on the 13th day of November, 1905. Dated at St. Louis this 3d day of November, 1906. Sadie Bergeron, Beneficiary. Witness: Frank H. Scott.' Immediately thereafter the defendant paid to said Sadie Bergeron the sum of $250, as named in and called for by said receipt, in full payment of the amount due to her under and by virtue of said benefit certificate. The plaintiff received said sum of $250 in full payment of any and all amounts due to her under and by virtue of said benefit certificate, and receipted to the defendant for the same; and she has at all times retained the same, knowing that it was paid her in full satisfaction, and has at no time returned or offered to return the same or any part thereof." The reply, so far as it applied to the alleged settlement set out by defendant, is a general denial.

Plaintiff testifies positively that at the time Mr. Scott, director of defendant, called on her in St. Louis he at first attempted to obtain a settlement from her for the sum of $250, which amount he later raised to $500, both of which offers she declined; that he came to her house at

9:30 in the morning and remained there until the hour of midnight, declaring that he would not leave until he had obtained a settlement; that he was so persistent in staying right with plaintiff that neither of them ate either lunch or dinner that day; that he even went with plaintiff to a dentist's office, where plaintiff had an appointment, and remained with her during all of the time she was there; that he subsequently said to her that he must obtain a settlement that night; that he finally agreed with her that, if she would deliver to him the policy and sign the blank space on the back of it, he would have the company send her the full $1,000 by the following Tuesday or return her the policy; that, relying upon such promise, she signed the blank receipt on the back of the policy and delivered it to him, whereupon he took his departure; that she subsequently received the sum of $250, and no more, and that defendant never returned the policy; that when she signed the receipt on the back of the policy she signed it in blank, except as to the date, which she required him to insert before signing. No attempt is made by the defendant to contradict any part of this testimony by the plaintiff. It stands in the record entirely uncontradicted. Nor is there any attempt at denial, either in the pleadings or the evidence, of the authority of Scott to make the settlement pleaded in the petition and above referred to.

When both sides rested, plaintiff moved the court to direct a verdict in her favor for the balance due of $750, with interest, and defendant moved the court to direct a verdict in favor of the defendant. The court overruled the motion of the defendant, sustained plaintiff's motion, and directed a verdict for the plaintiff for the said sum of $750, with interest, upon which judgment was subsequently rendered. The district court was clearly right. When the defendant made the adjustment testified to by plaintiff, and retained the policy which it had obtained from her in the manner detailed in her uncontradicted testimony, it waived all defenses which it may have had on account of anything which had occurred prior thereto.

It could not retain the policy without ratifying the agreement of Scott under which it obtained it. The above holding being decisive of the case, the other matters pleaded and discussed will not be considered.

The judgment of the district court is right, and is

AFFIRMED.

CLARA HART, ET AL., APPELLEES, V. KNIGHTS OF THE MACCABEES OF THE WORLD, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,417.

1. Insurance: PROOF OF LOSS: CONCLUSIVENESS. Statement in the proof of loss, as to the cause of the death of an insured, may be contradicted on the trial of an action on the policy of insurance, unless the usual elements of equitable estoppel are present.
2. ———: ACTION: EVIDENCE. A fraternal insurance company cannot have the benefit of its by-laws and amendments thereto, in defending against a death claim, unless certified copies of such by-laws and amendments have been filed with the auditor of public accounts.

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

Hainer & Smith and *D. D. Aitken,* for appellant.

Grant G. Martin and *Courtright & Sidner, contra.*

DUFFIE, C.

November 14, 1902, William F. Hart became a member of a subordinate lodge of Maccabees, known as the "Hooper Tent, No. 75," and on that date there was issued to him the beneficial certificate sued on in this action. In its answer the defendant alleges that at the time of securing admission into the Maccabees section 430 of its laws was in force, and is as follows: "Section 430. No benefit shall be paid on account of the death or disability

of any member while engaged in a mob, riot or insurrection, * * * or who may be injured or killed in any quarrel, controversy or any fight in which such member may be the offending party." The answer further alleges that after Hart became a member, and in 1904, the Maccabees revised their laws and enacted the following sections: "Section 404. QUARREL OR FIGHT. No benefit shall be paid on account of the death or disability of any member who has been killed or injured in a quarrel, controversy or fight in which such member is the offending party." "Section 405. VIOLATING LAW. No benefit shall be paid on account of the death or disability of a member who dies or becomes disabled in consequence of a violation or attempted violation of the laws of any state, district, territory or province, or in consequence of resisting arrest." Sections 372 and 373 of the laws of the order, relating to proofs of death, are set out in the answer, and it is then alleged that Hart came to his death while engaged in a quarrel in which he was the offending party, and a copy of the finding of the coroner's jury is set out in the answer, showing that Hart "came to his death by a bullet from a revolver of 45 caliber in the hands of one Frank Owens, and was fired in self-defense, and for the protection of his mother, and we, the jury, believe the act was justifiable." From a judgment in favor of the plaintiffs the defendant has appealed.

It is insisted by the defendant that as proofs of death made by the plaintiff show that Hart was killed while engaged in an altercation, and that his killing was justified by the circumstances, the evidence which established his death also established that his death occurred under such circumstances as exempted the defendant from any liability on account thereof, and that the defendant's motion for an instructed verdict in its favor should have been sustained.

Relating to the proof of death, it is clearly shown that it was prepared by the officers of Hooper Tent, No. 75, and that Mrs. Hart, who signed it, had little or no knowledge

of what it contained, and no knowledge of the finding of the coroner's jury being made a part thereof. The general rule appears to be that the burden of proving that death ensued while deceased was engaged in some act violative of the rules of the order is on the defendant company, though the proof of death offered by the plaintiffs may recite facts from which such violation of the rules may be presumed. In *Supreme Tent, K. M. W., v. Stensland,* 206 Ill. 124, the by-laws of the defendant company provided that, if the insured committed suicide, whether he was sane or insane at the time, no benefit should be paid, and the proofs of death contained a statement taken from the verdict of the coroner's jury that the cause of death was suicide by strangulation. In that case the defendant company insisted that the plaintiff and beneficiary was estopped from showing that death arose from any cause except that shown in her proofs made to the company. The court said. "While there may be some slight authority for the contention of appellant, we are convinced that reason and the great weight of authority are with the rule which permits the statements in the proof of loss to be contradicted on the trial, unless it appears that the usual elements of equitable estoppel are present." A further statement of the court in that case describes almost the exact condition relating to the proofs of death in the case we are considering, and is as follows: "The rule insisted upon by appellant is that before the statements in the proof of loss can be contradicted the plaintiffs must show that they were made by mistake or produced by fraud. The evidence shows that the plaintiffs knew nothing as to the cause of death. * * * She swears that the agent of the insurance company prepared the proof of loss and that she did not read it before she signed it. * * * But even granting that she knew and comprehended, at the time, that the proof of death contained the statement that the death was from suicide, still no estoppel arises, for the reason that the statement that the death resulted from suicide by strangulation was a mere opinion." See,

also, *Cluff v. Mutual Benefit Life Ins. Co.*, 99 Mass. 318; *Bankers Life Ass'n v. Lisco*, 47 Neb. 340; *Dougherty v. Pacific Mutual Life Ins. Co.*, 154 Pa. St. 385.

The defect in the defendant's evidence to sustain its defense lies back of this, and arises from its failure to show that the by-laws of the order, relied on as a forfeiture of the certificate issued to the deceased, were in force in this state. Section 6656, Ann. St. 1907, is in the following words: "Every such society shall file with the auditor of public accounts a copy of its constitution and by-laws duly certified to by the secretary or corresponding officer, and before any amendment, change or alteration thereof shall take effect or be in force a copy of such amendment, change or alteration, duly certified to by its secretary or corresponding officer, shall be filed with the auditor of public accounts." It appears from the deposition of John L. Pierce, deputy auditor of the insurance department of this state, that copies of the laws of the Maccabees, revised and amended July, 1904, were filed in the office of the auditor of state December 16, 1904. The certificate of the supreme record keeper of the Knights of the Maccabees is a printed form, and the signature of the grand record keeper is not in his own handwriting, but is also printed. The certificate bears the impression of the seal of the order, but contains no venue, which may not be a fatal defect; but as we construe it, the statute above copied requires the certificate to be under the hand of the secretary, as well as under the seal of the order. Attached to the deposition of the supreme recorder of the order, which was read in evidence by the defendant, was a printed book, entitled, "Revised Laws of the Knights of the Maccabees of the World, Edition of 1901," and the grand record keeper testifies that said pamphlet contains a true copy of the laws of the order in force November 8, 1902, when Hart was admitted to membership. There is no evidence coming from the grand record keeper, or from the office of the auditor of state, or from any other source, that these laws were ever filed in the office of the auditor of state,

or that the defendant order had taken any steps which would make their laws competent evidence in this state in defense of a suit brought on a certificate of membership.

It is familiar law that no presumption will be indulged in favor of a forfeiture, and the burden of proof, where the society seeks to escape liability on that ground, is upon the society. An allegation in the petition that all the conditions in the contract were fulfilled by the assured, even when denied by the answer, does not impose on the plaintiff the burden of proving that each condition was fulfilled; but, when the breach of any particular condition is relied on as a defense, the burden of proving it is upon the society. 29 Cyc. 232. The certificate issued to the deceased contained no condition upon which a forfeiture may be declared, and the conditions relied on by the defendant to establish a forfeiture are set out only in the laws of the order. It was necessary, therefore, in order to establish its defense, that the laws of the society should be introduced in evidence, and to further show that they were in force in this state. As we have seen, none of these laws or regulations were in force in this state, because no copy of such laws were on file with the auditor of state in 1902, when the deceased became a member, and the revised laws of 1904, which were filed with the auditor, were not properly certified. This was fatal to the defense offered. *Knights of the Maccabees of the World v. Nitsch,* 69 Neb. 372.

On the record before us, the judgment appealed from is the only one which the district court was authorized to enter, 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.

ROSE, J., concurring.

Payment of the death claim in this case was resisted on the ground that the assured came to his death while en-

gaged in a quarrel in which he was the aggressor. In the certificate itself this was not a condition of forfeiture. The defense rests on a by-law found in a pamphlet in the office of the auditor of public accounts. The pamphlet containing the by-law is not authenticated by the signature of any officer of the society, though the name of an officer is printed with a purported certificate which any printer can duplicate. The statute quoted in the opinion of the commissioner declares that such society shall file with the auditor of public accounts a copy of its constitution, by-laws and amendments, "duly certified to by its secretary or corresponding officer." Within the meaning of this statute the words "duly certified" mean more than a printed certificate and printed name of an officer. The purpose of that term in the law is to require a means of authentication by a responsible officer of the society. This purpose might be defeated by recognizing the printed name of the officer as sufficient. The statute requires a public record which affords the means of identifying the genuine by-laws. When members and beneficiaries are bound by rules which may result in the forfeiture of their insurance, the law protects them by requiring a certificate over the signature of a responsible officer. To hold that printed names may be used in making such certificates for the benefit of the public would take away the safeguard of authentication and weaken official responsibility in disregard of the statute. In the sense used, "duly certified" means attested or identified in writing by the signature of the secretary or corresponding officer. *State v. Brill,* 58 Minn. 152; *Kipp v. Dawson,* 59 Minn. 82; *State v. Schwin,* 65 Wis. 207. In *State v. Gee,* 28 Or. 100, the court said: "To 'certify' means simply 'to testify in writing'; 'to make a declaration in writing.'—Webster. It is not even necessary that the word 'certify' or 'certified' be used in the certificate, but it is sufficient if the required statutory fact be made known in writing under the hand of the officer."

The commissioner in his opinion correctly interprets and applies the statute.