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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1909.

VOLUME LXXXIV.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1909.

ANDREW KERR, APPELLANT, V. JOSEPH MANGUS, APPELLEE.

FILED MARCH 20, 1909. No. 15,454.

Trial: INSTRUCTIONS. It is not error to refuse an instruction which permits a jury to base any of its findings on their belief, unless such belief is required to be founded upon a consideration of the evidence.

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

Hazlett & Jack, for appellant.

Sackett & Brewster and *E. O. Kretsinger, contra.*

GOOD, C.

Plaintiff sued to recover damages for the destruction of certain floodgates and fences on his land caused by the alleged negligence of the defendant. Plaintiff alleged that he and defendant were the owners of adjacent farms which were both traversed by Mud creek, plaintiff's land lying immediately down stream from the land of defendant; that defendant negligently placed and permitted to remain in the channel and on the banks of said creek a large quantity of brush and limbs of trees which were washed and carried down by the flood waters of said stream against plaintiff's gates and fences, thereby break-

ing and destroying them. The defendant denied the allegations of the petition, and alleged that the flood referred to was so unusual, extraordinary and unprecedented, that it could not reasonably have been foreseen, and amounted to an act of God. The reply was a general denial. A trial to a jury was had on the issues joined, resulting in a verdict for defendant and a judgment thereon, from which plaintiff has appealed.

The record discloses that in the month of May, 1903, the waters of Mud creek were very high, and that plaintiff's floodgates and fences were injured and partially destroyed by the water and debris carried down said stream. The evidence is in conflict as to whether the flood was so unusual as to amount to an act of God, and as to whether defendant caused any brush or limbs to be placed in the channel or on the banks of said creek, and as to whether any brush was washed from defendant's land against plaintiff's gates and fences, and as to whether plaintiff's damage was caused by the high waters alone, or by brush and debris that was carried down said stream.

The only error which plaintiff alleges and relies upon is that the court erred in refusing to give the eighth instruction requested by him. The court instructed the jury upon the general issues in the case, but plaintiff contends that plaintiff's injury may have been caused partially by the unprecedented flood waters, and partially by the negligence of the defendant in placing brush in the channels and on the banks of said stream, and that in such case defendant would be liable for so much of the injury as was caused by his negligence, and that this phase of the case was not covered by any of the court's instructions. He insists that the instruction requested properly stated the law upon this phase of the case. It is as follows: "You are further instructed that, if you believe there was in the stream in question on its bank and near it on defendant's land brush which washed away, and that plaintiff's property would not by reason of the water alone have been damaged or not damaged to the extent

you find it was damaged, then, if you find that defendant negligently left or permitted such brush to remain in or near said stream, the defendant would be liable for the extent of the damage which resulted from the brush and limbs being carried by the water coming from defendant's land." It will be observed that the wording of the instruction does not require the jury to be governed by the evidence in its findings, but permits the jury to determine from their belief whether there was brush in the stream or on its banks, and whether it was washed down the stream, and whether the water alone would have damaged plaintiff's gates and fences to the extent that they were, and does not require this belief to be founded upon or governed by the evidence. Under the instruction certain of the jury's findings might have been founded upon mere rumor, speculation or caprice. In *Hoover v. Haynes,* 65 Neb. 557, an instruction which permitted the jury to fix the plaintiff's damage at such sum, within the amount claimed, as they think he has sustained was held to be reversible error. We think the instruction under consideration is open to the same criticism as was the instruction in *Hoover v. Haynes, supra.* The instruction was properly refused.

There being no error apparent in the record, we recommend that the judgment of the district court 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.

LEE CARD, APPELLANT, V. HENRY DEANS, APPELLEE.

FILED MARCH 20, 1909. No. 15,517.

1. **Ejectment:** EQUITABLE DEFENSES: TRIAL TO COURT. In ejectment, when the defendant prays for affirmative equitable relief and pleads facts entitling him thereto, such issues are triable to the court without a jury.

2. ———: LANDLORD AND TENANT: DEFENSES. The general rule that plaintiff in ejectment must recover on the strength of his own title is not applicable when the defendant obtained possession as tenant of the plaintiff and refuses to vacate at the expiration of his lease. In such case the defendant cannot acquire and set up a superior outstanding title against his landlord until he has first surrendered possession, unless such purchase was necessary to protect his leasehold possession.

3. **Guardian and Ward:** SALE OF LAND: OATH. A sale of real estate by a guardian is void, if he does not take and subscribe the oath prescribed by section 55, ch. 23, Comp. St. 1907, before he fixes upon the time and place of sale.

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

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

GOOD, C.

Plaintiff brought this action in ejectment for the recovery of the northwest quarter of section 33, township 31 north, range 49 west of the Sixth P. M., in Dawes county, Nebraska. Defendant admitted possession, denied plaintiff's title, alleged title in himself and other facts which he claimed estopped plaintiff from asserting title as against him, and prayed to have his title quieted as against plaintiff. In his reply plaintiff alleged that he had leased the premises to defendant, who, under the lease, had entered into and ever since remained in possession thereof; that the lease had by its terms expired; that defendant refused to surrender possession, and that he was estopped

from denying plaintiff's title. Plaintiff's request for a jury trial was denied and the cause tried to the court. Defendant had judgment quieting his title as against plaintiff, who has appealed.

The record discloses that some time prior to January 1, 1900, Orville J. Wressell, a resident of California, died intestate, seized of said premises, and that he left surviving him his widow, Minnie Wressell, and an infant daughter, Ruth. In April, 1904, Mrs. Wressell executed and delivered to plaintiff a warranty deed to said land, and in May following plaintiff leased said premises to defendant for a term of two years. The guardian of Ruth Wressell instituted proceedings for the sale of said land as the property of his ward, which proceedings resulted in a sale of said land to defendant in April, 1905. The sale was later confirmed and deed issued June 19, 1905. At this sale plaintiff and defendant were both bidders, and plaintiff witnessed the execution of the guardian's deed, and as stenographer and clerk for the guardian's attorney drew most of the papers in the proceedings by the guardian for the sale of the land. This action was begun October 10, 1906.

Plaintiff complains because he was refused a jury trial. The petition was such as is usual in actions in ejectment, but the defendant alleged ownership of the real estate, and prayed for affirmative equitable relief, which could not be granted in a jury trial. This court has held that in a law action where the answer sets up an equitable counterclaim the cause is triable to the court. *Hotaling v. Tecumseh Nat. Bank,* 55 Neb. 5. In *Jewett v. Black,* 60 Neb. 173, it was held that in an action in ejectment where the defendant prays for affirmative equitable relief, and pleads facts entitling him thereto, the issues are triable to the court without a jury. The case at bar falls within this rule, and a jury trial was properly denied.

Plaintiff contends that the judgment is not sustained by the evidence. This requires an examination of the relations existing between the parties and of their re-

spective claims of title. Plaintiff's title rests wholly upon the deed from Mrs. Wressell. It is contended that the land was the homestead of Orville J. Wressell at his death, and that the homestead descended to Mrs. Wressell, and by her deed her unassigned dower and homestead estates passed to plaintiff. The evidence shows that Orville J. Wressell never lived upon the land after his marriage, and that he was a resident of California at his death. He had no right of homestead in the land and none descended to his widow. The only interest she acquired in the land was a dower estate which has never been assigned or set off to her or her grantee.

It is a general rule in ejectment that plaintiff must rely for recovery upon the strength of his own title, and not upon the weakness of his adversary, and in this state he must, as a general rule, allege and prove a legal estate in himself and an immediate right to the possession. There are cases, however, to which these rules do not apply. It is a familiar rule generally established in this state that a tenant will not be permitted to deny his landlord's title, nor will he be permitted to acquire or set up against his landlord a superior title, unless it is done to protect him in his possession under his lease. *Mattis v. Robinson,* 1 Neb. 3; *Thrall v. Omaha Hotel Co.,* 5 Neb. 295; *Lausman v. Drahos,* 10 Neb. 172; *Parker v. Nanson,* 12 Neb. 419; *Nissen v. Turner,* 50 Neb. 272; *Mosher v. Cole,* 50 Neb. 636; *Ross v. McManigal,* 61 Neb. 90; *Iowa Savings Bank v. Frink,* 1 Neb. (Unof.) 14. In the instant case the defendant obtained possession of the land in controversy under a lease from plaintiff, and has never surrendered possession to him. Defendant's possession was not threatened, and he was therefore not compelled to buy a superior outstanding title to protect him in the enjoyment of his lease. Defendant claims that he was induced to accept the lease from plaintiff by the latter's fraudulently misrepresenting that he was the owner of the land and entitled to lease the same. It is admitted that defendant questioned plaintiff's ownership and right

to lease the land prior to the execution of the lease, and that plaintiff then exhibited his deed from Mrs. Wressell, but plaintiff denies that he asserted the ownership of fee title to the land. It is disclosed that defendant knew of Wressell's ownership of the land and of his death, and that defendant had previously rented the land from Mrs. Wressell. The record does not affirmatively show that plaintiff fraudulently induced the defendant to accept the lease of the land.

Defendant further contends that the part taken by plaintiff in the guardian's sale estops him from asserting any claim of title to the land, and relieves defendant as tenant from the estoppel of denying his landlord's title. In this view we cannot concur. Plaintiff was not the attorney for the guardian in the proceedings to sell the land, and made no representations to defendant as to the title which was being sold. Defendant bought with his eyes open, and the rule of *caveat emptor* applies. Plaintiff had a right to buy in the title of the minor, which, with the unassigned dower of Mrs. Wressell, would have given him a complete and perfect title, provided the guardian's sale had been regular. The fact that plaintiff bid on the land at the guardian's sale is not sufficient to preclude him from asserting whatever title he had, nor is it sufficient to permit defendant to deny his landlord's title. It appears that the guardian did not, before he fixed upon the time and place of sale, take and subscribe the oath required by section 55, ch. 23, Comp. St. 1907. Such failure rendered the guardian's sale void. *Bachelor v. Korb,* 58 Neb. 122; *Levara v. McNeny,* 5 Neb. (Unof.) 321. It thus appears that defendant acquired no title by the guardian's sale, and the judgment entered by the district court quieting title in defendant was erroneous. Because defendant was not in a position to deny plaintiff's title judgment should have been rendered for plaintiff awarding the possession of the land to him.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with

instructions to enter judgment awarding possession of the premises to plaintiff.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to enter judgment awarding possession of the premises to plaintiff.

REVERSED.

H. F. REED, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 20, 1909. No. 15,578.

1. **Pleading:** CONSTRUCTION. In an action against a railroad company, plaintiff alleged the purchase and possession of a mileage ticket, the possession of a freight train permit, and that defendant, disregarding its duties as a common carrier of passengers, wrongfully ejected him from a caboose attached to one of its freight trains, but did not allege any contract to carry him as a passenger or any breach thereof. *Held* to state a cause of action *ex delicto* and not *ex contractu.*

2. **Carriers:** REGULATIONS. Railroad companies may properly designate on what trains passengers may be carried and may exclude passengers from unscheduled extra freight trains.

3. ———: LICENSE: REVOCATION. A permit issued by a railroad company without consideration, which authorized its train operatives to carry the holder of the permit on freight trains, is a mere license and may be revoked at any time when the holder is not actually a passenger under it.

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

W. A. Bergstresser, for appellant.

James E. Kelby, Halleck F. Rose, Frank E. Bishop and *Fred M. Deweese, contra.*

GOOD, C.

In this action, which was for the recovery of damages alleged to have been sustained in consequence of defendant's breach of duty as a common carrier of passengers, the defendant had judgment on an instructed verdict, and plaintiff has appealed.

Plaintiff alleged in his petition that on September 17, 1905, at Sterling, Colorado, while he was a passenger on one of defendant's regular freight trains bound for Holdrege, Nebraska, the defendant, disregarding its duty as a common carrier of passengers, unlawfully and with force and violence ejected and expelled him from the cars of said train and refused him permission to further ride therein, and that he at the time tendered the conductor in charge of said train a mileage ticket and freight train permit. Defendant in its answer alleged that plaintiff sought to be carried on an extra freight train not running as a scheduled train; that before said train started plaintiff was notified that it did not carry passengers and that he could not ride thereon, and that he abided by said notice, and denied the other allegations of the petition.

The evidence discloses that plaintiff, while at Sterling, Colorado, on Sunday, the 17th day of September, 1905, desired to go to Holdrege, Nebraska; that there were no regular trains leaving until the afternoon of the same day; that plaintiff was informed that an extra freight train was being made up in defendant's yards to go to Holdrege, Nebraska, and that plaintiff might ride thereon. He thereupon went to the yards of the defendant and to the way car of the train that was then being made up, and was informed by the conductor that the train was an extra, and did not carry passengers, and that he could not ride thereon. Plaintiff replied that he had a mileage ticket and a freight train permit, and insisted that he was entitled to ride upon the train. When the train was made up the conductor went to the train despatcher for his running orders, and there saw the train-

master, and reported to him plaintiff's desire to ride upon the train, and was by the trainmaster informed that no passengers could be carried upon that train. The conductor returned to the way car and found plaintiff therein, and informed him of the statement made by the trainmaster, and that he could not ride on that train. Plaintiff refused to leave the car. Thereupon the conductor and brakeman took plaintiff by the arms and led him out of the car. The evidence discloses that plaintiff at the time was the possessor of a mileage ticket, a considerable portion of which was unused, and that he had in his possession a freight train permit. It is conceded that plaintiff received no injury to his person or to his baggage, and that the train was an unscheduled "extra freight."

Plaintiff contends that the action is *ex contractu* and a breach of the contract was proved, and that he was in any event entitled to recover nominal damages, and that it was therefore error to direct a verdict for the defendant. Plaintiff alleges the ownership of the mileage ticket and freight train permit and his expulsion from the train, but does not allege any contract to carry nor any breach of the contract, but does allege a breach of the defendant's duty arising out of its calling as a common carrier of passengers. The question presented is fairly disposed of in *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773. In the opinion in that case it is said: "The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove, without alleging that the defendant agreed to carry him between these points in consideration of the sum paid, and alleging further a breach of the contract, does not set forth an action *ex contractu*, 15 Ency. Pl. & Pr., p. 1125, and notes. 'There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty,

for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. * * * But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in cases of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties.' *Frink v. Potter,* 17 Ill. 406. See, also, *Wright v. Geer,* 6 Vt. 151; *Bank of Orange v. Brown,* 3 Wend. (N. Y.) 158; *M'Call v. Forsyth,* 4 Watts and Serg. (Pa.) 179. We conclude therefore that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage." Under the ruling in the opinion just quoted from, the action is clearly *ex delicto,* and plaintiff was not entitled to recover on the theory that his action was for a breach of contract.

It is clear that plaintiff must recover, if at all, for a breach of defendant's duty as a common carrier of passengers, and to maintain his action it was incumbent upon him to prove that the relation of passenger and common carrier of passengers existed, and, if he has failed to prove this relation or to offer evidence from which it might be inferred, he cannot recover. The train on which plaintiff sought passage was not a regular train and was not scheduled, but is what is commonly known as an extra freight, and on which passengers were not generally carried. This fact was known to plaintiff before he sought passage on it. It is generally recognized that a railroad company may make and enforce reasonable rules with reference to carrying passengers on freight trains, and that it may properly exclude passengers from certain of its freight trains. Railroad companies may properly designate on what trains passengers may ride,

and, generally speaking, persons seeking passage have not the right to elect for themselves what train they may ride on. *Burlington & M. R. R. Co. v. Rose,* 11 Neb. 177; *Chicago, B. & Q. R. Co. v. Mann,* 78 Neb. 541; *Roberts v. Smith,* 5 Ariz. 368, 52 Pac. 1120. There can be no doubt of the propriety of railroad companies refusing to carry passengers on certain of their freight trains, and, under some circumstances, consideration of public policy would require them to refuse to carry passengers, as, for instance, where the trains were carrying large quantities of highly inflammable or explosive substances which might render the lives and limbs of passengers extremely hazardous.

It was proper for the defendant to refuse to carry passengers generally on the extra freight train on which plaintiff sought passage, but he appears to contend that because he held a freight train permit he was entitled to ride on any of the defendant's freight trains. The permit is in the following form: "Chicago, Burlington & Quincy Ry. Co. Lines west of the Missouri River. Freight Train Permit. Conductors, Freight Trains: 1905. When presented with regular transportation this will be your authority to carry Mr. H. F. Reed, representing R. Hershel Mfg. Co., between all stations at points where your train stops for other business. This permit is subject to conditions printed on back, which must be signed in ink by the person named, but does not authorize agents to flag freight trains. Good until December 31, 1905. When countersigned by G. W. Loomis or J. Hodge. (Signed) G. W. Holdrege, General Manager. No. 2926. Countersigned: J. Hodge. 1905. Nontransferable. This permit is granted at the special request of, and accepted by, the undersigned, upon the following conditions, it being understood that greater danger attaches to riding on a freight train than on a passenger train: I hereby agree to assume all risk of accident to my person and loss or damage to my personal effects, and also to board and alight from freight trains only at points where such trains may be stopped for

the convenience of the railway company. It is understood that freight trains do not as a rule start from or stop at stations with the caboose or coach at the station platform. Baggage will only be accepted for transportation, under check, on freight trains when there is room in the ordinary equipment of such trains, when baggage may be loaded or unloaded from or to platform without requiring special stop, and when passenger with proper ticket travels on same train. (Signed) H. F. Reed. (Sign in ink here.)" This permit was not issued at the time of the purchase of the mileage ticket, nor was any consideration paid for it. It could have no more efficacy than a pass issued without consideration. It was not a valid contract, but was a mere license, which might be revoked by the company at any time when the holder was not actually a passenger under it. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Turner v. Richmond & D. R. Co.*, 70 N. Car. 1.

In the instant case plaintiff was denied permission to ride upon the train before he entered it. This amounted to a revocation of the freight train permit, at least for the one passage sought. He was a mere trespasser when he entered the caboose after having been refused passage on the train, and the defendant and its employees were authorized to use such reasonable force as was necessary to eject plaintiff from the train. It is conceded that they did no more than take him by the arm or coat sleeve and lead him quietly from the train. Plaintiff does not contend in his evidence that he received any injury other than loss of time and humiliation of being ejected from the train. The relation of passenger and carrier of passengers did not exist at the time plaintiff was ejected from the car. Defendant did not owe tc plaintiff that high duty which the law imposes upon carriers of passengers and could not therefore be liable for a breach of that duty.

It follows that the judgment of the district court is right, and we recommend that it 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.

AUGUST BRUNKE, APPELLEE, V. ALBERT GRUBEN, APPELLANT.

FILED MARCH 20, 1909. No. 15,579.

Judgment: REVIVOR: DEFENSE. In proceedings by an assignee of a dormant judgment for a revivor thereof, the defendant admitted the recovery of the judgment and the assignment thereof to plaintiff, and denied that plaintiff was the real party in interest, without alleging that the assignee had in any way transferred or parted with his ownership of the judgment. *Held* to state no defense to the revivor proceedings.

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

W. A. Bergstresser, for appellant.

W. H. Miller and *Cole & Brown, contra.*

GOOD, C.

The defendant has appealed from an order of the district court reviving a dormant judgment in the name of the assignee thereof. The plaintiff, who is the assignee, in his motion and affidavit for revivor alleged the recovery of the judgment by one Henry Brunke, and set out a transcript of the judgment and a copy of the assignment, and alleged other facts entitling him to a revivor of the judgment. In response to the conditional order of revivor, the defendant answered, and alleged, among other things, "that the action on said note and the proceedings herein to revive said judgment were not prosecuted and are not now prosecuted in the name of the real party in interest, neither the said Henry Brunke, nor his assignee having any interest in the note or in the judgment sought

to be revived in this proceeding, and that these proceedings are not brought in the name of the real party in interest." A demurrer to this answer was sustained, and, defendant electing to stand upon his answer, an unconditional order of revivor was entered.

The defendant contends that his answer stated sufficient grounds to defeat the revivor of the judgment, and that he was entitled under the facts set up to prove that plaintiff was not the real party in interest. But one question is presented, viz.: Were there sufficient facts stated to show that plaintiff was not the real party in interest? Defendant by his answer admitted the recovery of the judgment and the assignment thereof to the plaintiff. An assignee of a judgment is entitled to have the same revived in his own name and is the real party in interest. *Moline, Milburn & Stoddard Co. v. Van Boskirk*, 78 Neb. 728. The facts set up do not show any assignment or transfer of the judgment by the plaintiff. In the absence of any such allegations, the admission of an assignment of the judgment to plaintiff is an admission that he is the real party in interest. Pleading the mere conclusion that the proceedings are not brought in the name of the real party in interest amounts to naught when the facts pleaded negative such conclusion.

The defendant has not pointed out any error in the revivor proceedings, and we therefore recommend that the judgment of the district court 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 ROBERT AYERS.

ARTHUR C. DAILEY ET AL., APPELLEES, V. CHARLES TREADWELL ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,526.

1. **Wills:** PROBATE: EVIDENCE. Where a witness to a will testified that another witness and himself signed the will at the request of the testator, such testimony will not be disregarded on appeal because in the form of a conclusion, no objection on that ground having been made at the time.

2. ———: PUBLICATION. Where the evidence shows that the witnesses to a will signed the same at the request of the testator, who thereupon directed the draftsman thereof to place the same in an envelope addressed to the county judge, in whose office it was afterwards found, such acts constitute a sufficient publication of the will.

3. ———: DOMICILE. Evidence examined, and found insufficient to show a change of residence.

4. ———: TESTAMENTARY CAPACITY. Where it appears that a testator had been on various occasions temporarily confined in a hospital for the insane, but in the intervals was competent to transact with judgment and discretion his ordinary business, and had sufficient strength of mind and memory to know and comprehend and retain in his mind those who were or naturally should have been the objects of his bounty, the nature and extent of his estate and the distribution he wished to make of it, and that during such an interval he executed in due form his last will and testament making a reasonable distribution of his estate, a judgment probating said will should be sustained.

5. **Appeal:** HARMLESS ERROR. It is not error for a district judge to refuse to hear argument where an examination of the evidence discloses the fact that the conclusion arrived at was the proper one.

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

Charles H. Sloan, Paul E. Boslaugh and *John A. Moore,* for appellants.

Thomas H. Matters, contra.

CALKINS, C.

Robert Ayers died at Omaha, Nebraska, August 1, 1906, a widower and without issue, leaving him surviving his sole heirs at law Charles Treadwell and Ezekiel Ayers, brothers, and Kate Addis and Fanny Inglis, sisters. He died seized of about $1,000 in personal property and an 80-acre farm in Clay county, where he had resided for many years. In 1892 he executed and deposited with the county judge of Clay county an instrument purporting to be his last will, which was in the words and figures following:

"I, Robert Ayers, of Clay county, Nebraska, being of sound mind, memory and understanding do hereby make my last will and testament in manner and form following:

"First. If my beloved wife, Kate E. Ayers, be living at the time of my death, I give, devise and bequeath to her all the real and personal property belonging to me wherever the same may be at the time of my death.

"Second. Should my wife, Kate E. Ayers, die previous to my death or before the proving of this will, it is my desire that after paying all just debts by me owing, that my property both personal and real be given to my niece, Gussie M. Inglis, daughter of my sister Fannie, wife of Alix Inglis of Victoria, Knox county, Ill.

"In Witness Whereof, I, Robert Ayers, the testator, have to this my last will and testament set my hand and seal this 22d day of February, 1892.

"ROBERT AYERS. (Seal.)

"Signed, sealed, published and declared by the above named Robert Ayers as and for his last will and testament in the presence of us who have hereunto subscribed our names at his request as witnesses hereto in the presence of the said testator and of each other.

"L. S. BACKUS, of Harvard, Nebraska.

"EZRA BROWN, of Harvard, Nebraska."

The probate of this will was contested by the sister Kate Addis and the brothers Charles Treadwell and Ezekiel Ayers. The county court overruled their objections to the will and admitted it to probate, and, an appeal being taken to the district court, a trial was had to the judge without a jury. Upon his finding in favor of the proponents the will was admitted to probate, and from this judgment the contestants appeal.

1. The first objection of the contestants is that the will was not properly executed and attested. From the copy above given it appears that there was an attestation clause thereto attached, which certified that the will was signed, sealed, published and declared by the testator as and for his last will and testament in the presence of the witnesses, who subscribed their names at his request, in the presence of the testator and of each other. It appears that the witness Backus died before the proving of the will; but the other witness, Ezra Brown, was present at the trial and testified that he acted as draftsman of the will. Upon presentation and identification of the paper by him, he having testified that he recognized the same, the following examination was had: "Q. In whose hand writing is that paper except the signatures that are attached? A. I wrote the paper. Q. At whose request? A. At Mr. Ayers request. Q. Did you see him sign it? A. I did. Q. And did he see you affix your signature there? A. Yes; and Mr. Backus also. Q. That was done at his request? A. That was done at his request and in his presence."

The contestants admit that in other jurisdictions and in a dictum by this court the rule is stated to be that, where the attestation clause recites all the requirements of due execution and attestation, it will be presumed *prima facie* that all the requirements existed. It is, however, insisted that this rule would be in violation of section 141, ch. 23, Comp. St. 1907, which provides that, in case there shall be no contest to the probate of a will, the county court may grant probate thereof on the testi-

mony of one of the subscribing witnesses only, "if such a witness shall testify that such will was executed in all the particulars as required in this chapter, and that the testator was of a sound mind at the time of the execution thereof." We do not think it necessary to determine this question. The testimony of the surviving witness we think established each and all of the facts recited in the attestation clause.

The contestants argued that the testimony of Mr. Brown that Backus signed at Mr. Ayers request is to be disregarded as being a conclusion of the witness. There was no objection to the form of the question which elicited this response, nor to the answer, at the time, and we do not understand the rule to be that the court may disregard testimony when it is received in that form without objection.

2. It is said that the evidence fails to establish a publication of the will, and it is true that we do not find any statement in the testimony that the testator declared he published the will. Publication, as the term is used in the law of wills, is the act or acts of the party by which he manifests that it is his intention to give effect to the paper as his last will and testament, and any communication indicating to witnesses that the testator intends to give effect to a paper as his will by word, sign, motion or conduct is sufficient in law to constitute a publication. *In re Claflin's Will,* 73 Vt. 129, 87 Am. St. Rep. 693. In this case the evidence shows that the witnesses signed the will at the request of the testator, and that the draftsman of the will, at the direction of the testator, placed the same in an envelope addressed to the county judge, and that the same was afterwards found in the office of the county judge in that envelope, bearing the marks of the post office, showing that it had been sent through the mail. We think the request of the testator to the witnesses to sign and the steps taken by him to have the will deposited with the county judge sufficiently show his intention to give effect to the paper as his will.

3. It is urged that the deceased was not a resident nor inhabitant of Clay county at the time of his death, and that the county court of Clay county had no jurisdiction to probate the will. It appears that the deceased moved to Clay county from Illinois when he was about 26 years old; that he purchased land which he continued to farm either by himself or tenants up to the time of his death; that about three or four months before his death he went to Omaha and lived in a boarding house, which he left to go to the hospital. He had a trunk and a bicycle with him. The landlady of his boarding house, being called as a witness, testified as follows: "Q. While living at your place did he speak of that as his home? A. Yes. Q. Did he during that time state to you what and where his home was? A. Yes; Clay county. Q. No; I mean while he was with you. A. Well, no; he didn't say. He lived in Omaha and stayed here, and he called my house his home. Q. While he was there? A. Well, that was just about after he had been there a month. Q. And did he speak of that as his home only once? A. Just once that I talked to him." Similar testimony was given by the landlady's assistant, but we do not think it sufficient to establish any intention to permanently abandon his residence in Clay county. It appears that he left his money on deposit in Clay county, and it does not appear that he moved therefrom any of his property except his trunk and bicycle. The evidence clearly supports a finding that he was a resident of Clay county.

4. The principal contention of the contestants, and one argued with great earnestness and insistence, is that there was not sufficient evidence to sustain the finding of the district court as to the testamentary capacity of the deceased. It appears that Robert Ayers was born in Illinois, and lived there until about 26 years of age, when he moved, with his wife, whom he had married in Illinois, to Clay county, Nebraska, where he purchased a farm. He displayed mental peculiarities as a boy. When about 20 years of age he was committed to an asylum for the insane

in Illinois. He was released from this confinement, and returned to his father's home, where he remained until June, 1879, when he was again taken to an asylum, from which he was released in about a year. He returned again to his father's, married, and soon after moved to Nebraska. In January, 1888, he was sent to the Nebraska hospital for the insane, from which he was paroled September 24, 1890, and finally discharged January 28, 1891. On March 26, 1892, he was again sent to the insane hospital. It does not appear from the record whether he was paroled from this commitment, but the final discharge appears to have been dated March 9, 1894. On February 18, 1897, he was again committed, and his final discharge from this commitment was dated October 5, 1901. In March, 1903, he was again committed and was again discharged October 4, 1905. It appears that conservators of his property were appointed from time to time as he was committed to the asylum, and that upon a discharge and return he would settle up with such conservators and resume the dominion over his property and the conduct of his business. The history of the recurrence of these attacks contained in the record is not very precise, and does not clearly establish their cause; but the use of intoxicants is associated with them, and undoubtedly exacerbated the mental disorder. After the restraint imposed upon him and the treatment given in the hospital, his condition would improve until he was fitted to follow his ordinary vocations and attend to his usual business affairs, although it is probable in the light of the entire history of his case that he never absolutely recovered from the malady with which he was afflicted.

The contestants produced a formidable array of witnesses, boyhood acquaintances of the deceased, his sister and brother, officers who had had charge of him while under restraint, and one or two medical witnesses beside Dr. Hay, then superintendent of the Nebraska insane hospital. The testimony of the latter was that he believed from the history he had of the case that the deceased in-

herited a strong predisposition to insanity; that he, without any apparent cause, had an attack of acute insanity in early life, and partially or wholly recovered, and had another attack, which was followed by others until he had in all five or six distinct attacks of acute insanity, in which he was either in a state of melancholia or a state of acute or subacute mania; that between these attacks there was a certain degree of sanity, but, judging from the character of most cases like his, the doctor asserted that after one or two attacks of acute insanity his mind was so weakened that he was never, probably, in a normal state after his first, second or third attack of that kind; that his disease was a form of periodic insanity called melancholic depressive insanity, which is an incurable constitutional disease. A long hypothetical question reflecting his life history as it was established or tended to be established by contestants' evidence was propounded to the doctor, who gave in answer thereto the opinion that, while he would not speak positively as to the whole period, the deceased was certainly insane the greater portion of the time.

On the other hand, the proponent produced the testimony of the scrivener of the will, of the men who had been appointed conservators for the deceased when he was sent to the hospital, and neighbors and acquaintances who knew him more or less intimately at about the time of the execution of the will, the consensus of whose testimony was that he understood business affairs and was perfectly capable of transacting business.

There is nothing in the record to show that his business ability or his understanding of business matters and affairs was ever directly affected even during the acute attacks. On the contrary, he seems to have always been accurate in his business methods, and careful and intelligent in his business transactions. Even at the last, while he was in Omaha, and when, as the testimony of his landlady tended to show, there were increasing aberrations of conduct which probably marked the progress

of his disease, he was careful and accurate about his business transactions and capable of taking care of his business interests. She testified that he insisted upon having his board at a low price, and that he never forgot the date at which he began to board there nor when his payments were due, but invariably met the same according to his contract. The testimony of the contestants' witnesses was directed to the point whether they considered him sane or insane, but not to whether he had sufficient mental capacity to comprehend the nature of, and conduct with ordinary prudence, business transactions. Even his sister, who contests the will, and testifies to the opinion that he was insane, upon the death of his mother purchased his interest in the land of his father, which had been set aside as his mother's dower, taking his deed therefor, which was dated on the 2d day of April, 1891. If she understood insanity to mean a manifestation of a disease of the brain characterized by a partial derangement of one or more of the faculties of the mind, but which left her brother capable of looking after his business interests and transactions, then her testimony is consistent with her conduct; but, if she believed or meant that his mental faculties had been impaired to the extent that he was unable to properly care for his business interests, her conduct is altogether inconsistent with her testimony.

This brings us to the crux of this case. The medical definition of insanity as given by Dr. Hammond in his work on Diseases of the Nervous System is a manifestation of disease of the brain characterized by a general or partial derangement of one or more of the faculties of the mind, in which, while consciousness is not abolished, mental freedom is perverted, weakened or destroyed. That, pathologically considered, the deceased was insane for many years may be admitted; but the real question is: Was his mind so diseased that his mental freedom was perverted and his understanding destroyed so that he was incapable of knowing and comprehending in a

general way the natural objects of his bounty, the nature and extent of his estate and the distribution he wished to make of it. The older view regarded the human mind as a single indivisible potency not comprising distinct functions, and consequently that any impairment thereof must be absolute, and not partial. But modern medical science recognizes, as shown by the definition above quoted, that there may be a partial derangement of one or more of the faculties of the mind, leaving others practically unimpaired, and hence arises what is called partial insanity. This court has laid down the rule that, where the insanity is not general, the question to be determined is whether the subject was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred. *McClary v. Stull,* 44 Neb. 175. A very full discussion of the degree of soundness of mind required for the making of a valid will and a full citation of authorities will be found in the case of *Perkins v. Perkins,* 116 Ia. 253. The law makes no distinction between mental incapacity whether congenital or caused by age, sickness or disease, and it therefore follows that partial insanity does not necessarily disqualify a testator from making a valid will. Some courts have gone so far as to say that, when there is nothing unreasonable on the face of the will by one habitually insane, it will be presumed to have been made in a lucid interval. *Kingsbury v. Whitaker,* 32 La. Ann. 1055, 36 Am. Rep. 278. In this case there was nothing unreasonable upon the face of the will. He gave all his property to his wife if she should survive him. He had no children, and his next of kin were brothers and sisters. What his relations were with the mother of the niece whom he made his beneficiary or with his brother Ezekiel does not appear; but the other sister and brother testified in the case, and, judging from their testimony, there was nothing in their conduct toward this brother to keep alive fraternal affection or to cause them to be held in gentle remembrance by him. No reasons appear except

the tie of blood from which it could be argued that he was under any obligation to any of his brothers or sisters, and we do not therefore regard it as strange nor unreasonable that he selected this niece as the sole subject of his bounty.

There is a charge of undue influence, and the contestants complain of the rejection by the court of certain testimony of Mrs. Addis that Mrs. Ayers was embittered against her, the theory being that Mrs. Ayers influenced her husband to make a will hostile to Mrs. Addis. We think, if we assume that Mrs. Ayers was unfriendly to Mrs. Addis, the theory that she influenced her husband would have no support whatever. The only thread upon which this supposition is hung is that Ayers stated to the scrivener when he had drawn the will that his wife would now see that he had kept his word. This remark is fully explained by the fact that he had made a will in his wife's favor, and it is more likely that he referred to some promise of that kind than to the contingent remainder which he left to the niece.

5. Finally, the contestants complain that the district court erred in declining to hear argument. While we think it better that the judge trying a case should observe the admonition which he often gives to jurors not to make up their minds or form an opinion until they have heard all the evidence and arguments of counsel, we do not see how it could be reversible error upon an appeal to this court, where the question is whether the decision upon the evidence was right. Perhaps the fact that the trial judge declined to hear argument should take away some of the weight which a court of error is accustomed to give to his decision upon the facts, yet we do not think it should reverse the case unless we were satisfied that his decision upon the facts was wrong. We have read the printed and listened to the oral arguments of counsel, and after a patient reading of all the testimony we are satisfied that the decision of the district

court was right, and that his refusal to hear argument, if wrong, was error without prejudice.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

EPPERSON, C., not sitting.

LEVI F. WELLS, APPELLEE, v. PETER G. COX, APPELLANT.

FILED MARCH 20, 1909. No. 15,548.

1. **Occupying Claimants:** IMPROVEMENTS: COMPENSATION. While the provision of the occupying claimant's act which gives the successful claimant the option to deed the land for its appraised value is not applicable where such claimant cannot convey the fee, the provision that the occupying claimant shall not be evicted without payment to him of the value of his lasting improvements is enforceable.

2. ———: PUBLIC LANDS: HOMESTEAD. The provision of the occupying claimant's act applies to evictions had under sections 1019-1032 of the code of one claiming under the homestead laws of the United States.

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

F. Dolezal, for appellant.

John A. Davies and *N. D. Burch, contra.*

CALKINS, C.

On the 10th day of December, 1900, the defendant entered the tract of land in dispute under the provisions of the act of congress to secure homesteads to actual

settlers on the public domain. He established a residence on said land, and has continued in possession thereof to the present time. At the time of his entry he purchased from a former claimant certain improvements, and made others in addition thereto. On the 22d day of June, 1902, the plaintiff began a contest against the defendant's homestead entry, and such proceedings were had thereupon that on the 5th day of July, 1904, the defendant's homestead entry was canceled and the plaintiff was permitted to enter the same. The plaintiff thereupon began proceedings under the statute relating to forcible entry and detainer to recover possession of said lands. This proceeding resulted adversely to the plaintiff in justice court, but upon appeal to the district court there was a verdict in favor of the plaintiff. The defendant thereupon filed an application under the statute for the relief of occupying claimants (Ann. St. 1907, sec. 10857 *et seq.*) praying for the appraisement of the lasting and valuable improvements made by him upon such real estate. This application was denied, and the defendant appeals.

1. The statute above referred to provides in section 10857: "That in all cases where any person claiming title to real estate * * * for which such person can show a plain and connected title, in law or equity, derived from the records of some public office, or from the United States, or from this state, or derived from any such person by devise, descent, deed, contract, or bond, such person * * * shall not be evicted or turned out of possession of such real estate, nor shall his claim or title be set aside or canceled by any court in any proceedings brought or commenced by any person setting up and proving an adverse and better title or claim to such real estate, until such person claiming as aforesaid shall be fully paid the value of all lasting and valuable improvements made upon such real estate by such claimant or by those under whom he claims." And in section 10858, it is further provided: "Any person in possession of or

claiming any real estate under a certificate of entry or under the homestead or pre-emption laws of the United States, as well as the persons enumerated in the first section of this act, shall be considered as having sufficient title to demand the value of improvements," etc. The section last above quoted clearly shows the intention of the legislature to confer the benefits of the statute upon homestead or pre-emption claimants who, in reliance upon their entry of such lands under the homestead and pre-emption laws, placed lasting and valuable improvements upon them. The only reason why the remedy is not applicable in its entirety to a case where the evicted party claimed under an entry made under the homestead law, which occurs to us, is that the provision giving the successful claimant the option to accept the appraised value of the land and deed the same to the person evicted, instead of paying for the improvements, could not apply because the successful claimant in such a case could not convey a good title to the property. But this objection would be available in all cases in which the successful claimant did not have the fee; and the fact that the provision above referred to is inapplicable to such cases cannot prevail over the plainly expressed intention of the legislature that the person so evicted should be paid the value of his lasting improvements. The statute can be enforced to that extent, and, so enforced, places no greater burden upon the successful litigant for the possession of lands than is imposed by courts of equity in all cases where he must resort to that jurisdiction for his remedy. It is sometimes a reproach to the administration of legal remedies that they do not provide, as does the system of equity jurisprudence, for the rights of the unsuccessful party; and any attempt by legislation to introduce the more beneficient rules which are recognized in courts of equity to relieve the hardship of such cases should be liberally construed.

2. The theory of the district court seems to have been that the remedy afforded by this statute did not apply to

actions in the nature of forcible entry and detainer. The provisions of the statute are that the claimant "shall not be evicted or turned out of possession of such real estate" until he shall be paid the value of such improvements. If the effect of a judgment in forcible entry and detainer proceedings is to evict or turn the party who has made the improvements as a homestead claimant out of possession, then we can see no good reason why such proceedings do not apply. Forcible entry and detainer was originally a criminal proceeding, a trace of which origin appears in the form of the verdict of guilty or not guilty prescribed by the statute. The earlier statutes giving a civil remedy were directed against those who made unlawful and forcible entry into lands and tenements and detained the same, and this was without reference to either title or right of possession, the purpose being to restrain individuals from securing by violent means possession of lands to which they were justly entitled in law. In our own statute of forcible entry and detainer the proceedings to summarily remove persons in possession of land are not confined to those who make their entry by force or forcibly detain the same. It is extended to cases of tenants holding over their terms, to defendants in judgments upon which judicial sales are had, and to all cases where the defendant is a settler or occupier of lands or tenements without color of title, to which the complainant has the right of possession. Code, sec. 1020. In cases where the gravamen of the action is the force in the entry or detention, its purpose is to put the parties *in statu quo*, leaving them free to litigate the right of possession. In such case the statute for the protection of occupying claimants could not apply because not even the right of possession is determined. And, where a claimant would otherwise be entitled to relief under the provision of the act relating to occupying claimants, the fact that he was ejected by process issued upon a judgment rendered in proceedings under the statute relating to forcible entry and detainer will not deprive him of its benefit.

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

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

REVERSED.

STATE, EX REL. JOHN J. LEDWITH, RELATOR, V. LAWSON G. BRIAN, TREASURER, RESPONDENT.

FILED APRIL 6, 1909. No. 16,058.

1. **States:** APPROPRIATIONS: SURPLUS. Under the constitutional provisions as to the ending of appropriations with the expiration of the first fiscal quarter after the adjournment of the next regular session of the legislature (art. III, sec. 19), it is not essential that the money be actually drawn during the two-year period, but the expense must have been incurred during the two years for which the appropriation was made. It is the unexpended surplus of the amount appropriated that lapses, not the uncollected portion of an appropriation.

2. ———: TAXATION: APPROPRIATION. An appropriation of "the proceeds of the one mill tax for the years 1907 and 1908" is an appropriation of the whole amount of the tax, and not of that portion only which was actually collected during the biennium.

3. **Public Lands:** GRANT TO STATE: CONSTRUCTION. By the terms of the acts of congress granting public lands to the state for the use and support of the university and agricultural college, and by the acceptance of the grants by the state, and the pledges contained in the state constitution and statutes with reference thereto, the state became a trustee of the funds derived from such grants for the sole purpose of applying them to the objects of the grant, and with no power to divert the same to other purposes or to render them general funds of the state.

4. **States:** APPROPRIATIONS. The acts of the legislature of the state appropriating the income from said grants to the use of the university and agricultural college, creating a board of regents, and conferring power and authority upon that body to draw and

expend such funds, and upon the state auditor to issue and the state treasurer to pay warrants from such funds, is a complete appropriation to the beneficiary of the income from such trust funds.

5. ———: ———. The provisions of section 19, art. III of the constitution, providing for biennial appropriations, are not applicable to such trust funds, so devoted by congress to a specific use.

ORIGINAL application for a writ of mandamus to compel respondent, as state treasurer, to countersign a warrant drawn on the university temporary fund. *Writ allowed.*

Charles S. Allen, for relator.

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

LETTON, J.

This is an application for a mandamus to compel the state treasurer to countersign a warrant for the sum of $35 issued by the state auditor and payable from the university temporary fund. The state treasurer's return to the writ alleges that he refused to countersign the warrant for the reason that there is no money in the temporary university fund with which to pay the same or to become available for its payment; that he has paid and canceled warrants on this fund to the amount of $661,297.40, and that there are $138,651.22 of outstanding warrants against it; that his collections have been from taxes $569,312.60, and from interest on investments $69,728.07; that, estimating the amount of taxes which will be received by him during the remainder of the biennium with reference to the amount already paid in warrants, warrants have already been issued to a greater sum than the total collections will amount to for the biennium, and that all taxes collected after the end of the first fiscal quarter after the adjournment of the present legislature lapse, as provided by section 19, art. III of the

constitution; that the appropriation of the proceeds of the one mill tax for the years 1905 and 1906 not appropriated by the leglislature of 1905 is a nullity for the reason that the appropriation of that legislature exceeded the whole of the one mill tax for these years; and that the income from the university permanent investment was not appropriated by the legislature, and hence said income cannot be used in the payment of warrants until appropriated.

1. The first point made by the respondent is that under the constitution appropriations made by the legislature of 1907 end with the expiration of the first fiscal quarter after the adjournment of the present legislature, and that consequently all taxes collected after the end of that fiscal quarter cannot be credited to the university fund or be included in calculations made to ascertain the money accruing to said fund. The language of the appropriation act is: "The proceeds of the one mill university tax for the years 1907 and 1908 and so much of the proceeds of the one mill tax for the years 1905 and 1906 as was not appropriated at the last session of the legislature are hereby appropriated for the biennium ending March 31, 1909 to the use of the state university for current expenses, buildings and permanent improvements, as directed in section 19, ch. 87, Compiled Statutes of Nebraska of the year 1905." Laws 1907, ch. 151. Several of the points argued in the hearing of this case were decided in the case of *State v. Searle,* 79 Neb. 111. In that case it was held that the appropriation of the proceeds of the one mill tax for the years 1907 and 1908 was a specific appropriation within the meaning of the constitution; that the appropriation was certain because it can be made certain, and that warrants might be drawn against the fund whether the money was actually in the treasury or not, as long as the warrants did not exceed the amount of the appropriation. See, also, opinion of POUND, commissioner, in *Weston v. Herdman,* 64 Neb. 24, 30. Respondent now contends that, because the legis-

lature used the words "the proceeds of the one mill tax," and since the constitution (art. III, sec. 19) provides that each appropriation shall end with the expiration of the first fiscal quarter after the adjournment of the next regular session of the legislature, the treasurer has no right to countersign warrants in excess of the amount collected or which in all probability will be collected during the biennium. We think that, under the constitutional provision as to the ending of appropriations, it is the unused or unexpended surplus of the amount appropriated that lapses into the general fund, and not the uncollected portion of an appropriation, as the respondent contends. To illustrate, if an appropriation of $100,000 is made from a certain fund, and if when the end of the biennium arrives only $90,000 has been used or expended, either by the issuance and payment of warrants or by their issuance and registration under the law, then $10,000 would lapse; on the other hand, if the whole $100,000 had been expended by the issuance of warrants, there would be nothing unexpended which could lapse. The uncollected portion of the appropriation could not lapse, if its collection had been anticipated by the issuance of warrants. *Opinion of the Judges,* 5 Neb. 566. The object of the constitutional provision requiring biennial appropriations for the support of the government is to render all departments of the state government dependent upon the will of the people as expressed by its representatives and to require the return to the source of power every two years for the necessary means of existence. The conservation of our liberties by the fathers in the past depended largely upon the control of the purse by the representatives of the people. *State v. Moore,* 50 Neb. 88; *Ristine v. State,* 20 Ind. 328; *Humbert v. Dunn,* 84 Cal. 57; *Clayton v. Berry,* 27 Ark. 129; *McCauley v. Brooks,* 16 Cal. 11; *State v. King,* 108 Tenn. 271.

Appropriation laws, as well as all others, should be

construed so as to promote and effect their object and design. Note to *Carr v. State,* 22 Am. St. Rep. 624, 638 (127 Ind. 624). This we think would not be done if we held that no money could be expended in advance of its collection during the biennium, under the provisions of the appropriation. In order to constitute an appropriation, the only things necessary are that an amount be specified and a fund be provided out of which the money shall be paid. It is not essential that the money be in the treasury either at the time of the appropriation or at the time that warrants are issued in payment of claims under the appropriation, unless in the latter case the law expressly limits in some way the issuance of warrants.

We are also of the opinion that the appropriation was of the whole amount of the tax, and not of that portion only which was actually collected during the biennium. If the act had said "that portion of the proceeds of the one mill tax for 1907 and 1908 which will be collected during the biennium," it would then have meant what the respondent contends, but this is not what the legislature said. The Century dictionary defines "proceeds" as "the amount proceeding or accruing from some possession or transaction." Webster defines it as "yield, issue, product." Levy is defined by the Century as "the amount accruing from a tax or an execution." To appropriate "the one mill levy" would seem, under these definitions, to be the same as to appropriate "the proceeds of the one mill levy," and we think the expressions have no different force or effect. In *People v. Auditor,* 12 Ill. 307, the supreme court of Illinois speaks of the fund created by a tax of two mills on the dollar as "the proceeds of the two-mill tax," and treats the appropriation as specific, though limited by a further provision as to annual collections not contained in our constitution.

We are of the opinion that the legislature intended to appropriate an amount of money equal to that produced by the collection of one mill upon each dollar of assessed valuation in the state. The appropriation could be

made specific by a mere matter of computation, and the case is no different than if the legislature had made the computation and inserted the amount in the act. As soon as the grand assessment roll was ascertained, the sum became fixed and certain. The constitutional provision limiting the duration of the appropriation to the end of the first fiscal quarter after the adjournment of the legislature only applies if the fund appropriated has not been exhausted by the issuance of warrants upon it during the biennium. In such case whatever unexhausted surplus there might be would lapse. It is argued that this construction of the law may result in creating a deficit, and that warrants may be issued which there is no money to pay. We can only say that this is a matter for the legislature. In a number of instances it has limited the issue of warrants to a certain per cent. of the levy, or restricted their issuance except when there was money in the treasury to meet them, but this it failed to do in this instance. While we may question its good judgment in making the appropriation in such a form, we cannot interfere with its action, and we think it is entirely proper for the auditor to issue, and the duty of the treasurer to countersign, warrants to an amount equal to the whole of the one mill levy.

2. The next question necessary to decide is whether the money arising from the rental of university lands and interest upon deferred payments for sales of such lands can be drawn without a specific biennial appropriation. This fund is primarily derived from the act of congress approved July 2, 1862 (12 U. S. Statutes at Large, ch. 130, p. 503), donating public lands to the several states for the endowment, support and maintenance of colleges of agriculture and the mechanic arts, and from the act to enable the people of Nebraska to form a constitution and state government, passed April 19, 1864 (13 U. S. Statutes at Large, ch. 59, p. 47). Section 10 of this act provided: "That seventy-two other sections of land shall be set apart and reserved for the use and support of a state

university, to be selected in manner as aforesaid, and to be appropriated and applied as the legislature of said state may prescribe for the purpose named, and for no other purpose." The constitution of Nebraska adopted in 1866 (art. VII, sec. 1) provided: "The principal of all funds arising from the sale, or other disposition of lands or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations." The preamble to the act of congress of February 9, 1867 (14 U. S. Statutes at Large, ch. 36, p. 391), which provided for the admission of the state of Nebraska to the Union recites: "Whereas, on the twenty-first day of March, A. D. 1864, congress passed an act to enable the people of Nebraska to form a constitution and state government, and offered to admit said state, when so formed, into the Union, upon compliance with certain conditions therein specified; and whereas it appears that the said people have adopted a constitution which, upon due examination, is found to conform to the provisions and comply with the conditions of said act, and to be republican in its form of goverment, and that they now ask for admission into the Union: Therefore," etc. The provision of the enabling act making the grant, and of the constitution of 1866 setting apart and pledging the principal and income from such grant "to the specific object of the original grant or appropriation," and the subsequent act admitting the state into the Union under such constitution constituted a contract between the state and the naional government relating to such grants. By section 1, art. XVI of the constitution of 1875, it was "ordained and declared" that "all laws in force at the time of the adoption of this constitution, not inconsistent therewith, and all * * * contracts of this state * * * shall continue to be as valid as if this constitution had not been adopted." This provision carried forward into the new

constitution the pledge made in the constitution of 1866, and a further pledge was made by sections 2 and 9, article VIII of the constitution of 1875. Section 2 provides: "All lands, money, or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes shall be used and expended in accordance with the terms of such grant, bequest, or conveyance." Section 9: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, * * * and such funds, with the interest and income thereof, are hereby solemnly pledged for the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." The agricultural college grant of 1862 was specially accepted by the legislature on February 12, 1869, and the faith of the state pledged to the faithful performance of the trust. 2 Complete Session Laws of Nebraska, 1866-1877, p. 517. By section 19, ch. 87, Comp. St. 1905, the income from these grants is placed by the legislature in the temporary university fund and this fund is specifically appropriated and directed to be applied by the board of regents of the university "to any and all university needs." The section further provides "disbursements from the four funds (one of which is the one in question) last named herein shall be made in accordance with * * * section 25, ch. 87, Comp. St. 1897." The section referred to provides that "disbursements from the university fund shall be made by the state treasurer, upon warrants drawn by the auditor, who shall issue warrants upon certificates issued by the board of regents, signed by the secretary and president. All money accruing to the university fund is hereby appropriated to the use of the state university." By the provisions of "An act to make the state treasurer, treasurer of the state and university and custodian of its funds and to define the duties of such treasurer," passed in 1907 (laws 1907, ch. 147), the state treasurer was made the treasurer of the state university and the custodian of

all funds donated to the university or agricultural experiment station by the United States, and it was further provided by section 2 of the act: "University funds other than those created by taxation shall be held subject to the order of the board of regents, and shall be disbursed for the purposes enumerated in section 19, ch. 87, Comp. St., on presentation of warrants on the auditor of public accounts to be issued on certificates of the board of regents executed as required by law."

From a consideration of these provisions of the constitutions and statutes of this state, and of the statutes of the United States, it seems clear to us that the fund created by the grant in the enabling act and by the agricultural college act of 1862 were taken by the state as a trustee for the benefit of the university and agricultural college; that these funds cannot be diverted to any other purpose; that they have been specifically appropriated to the use of the university by the statutes mentioned, and that a board has been created with power to disburse the same, and the manner and method of the disbursements fully provided for. This is the ground taken by the courts of other states. *Massachusetts Agricultural College v. Marden,* 156 Mass. 150; *People v. Davenport,* 117 N. Y. 549; *In re Agricultural Funds,* 17 R. I. 815; *Brown University v. Rhode Island Agriculture & Mechanic Arts,* 56 Fed. 55. In *State v. Maynard,* 31 Wash. 132, an act which directed that part of the proceeds of the normal school land grant in the enabling act of that state to be devoted to pay for the erection of normal school buildings in violation of the terms of the trust imposed by the grant was held void; the state as trustee having no power to divert the fund. We can see no reason for a biennial appropriation of these funds. It was the pledged duty of the state to apply them to the use of the university and agricultural college, and the motives which prompted the makers of the constitution to hold the purse strings in the hands of the people cannot apply to the situation presented. The regents of the university under

the law are the proper persons and the only persons who may expend this money, and it can be used for no other purpose.

We are further of the opinion that, when once set apart and appropriated to the proper custodian and beneficiary, subsequent biennial appropriations are not required. We are not alone in our views. The constitution of the state of Washington provides (art. VIII, sec. 4): "No moneys shall ever be paid out of the treasury of this state, or any of its funds or any of the funds under its management, except in pursuance of an appropriation by-law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act." The United States granted to the state of Washington in the enabling act certain lands for the purpose of erecting public buildings. The legislature of Washington created a "state capitol commission" and gave it power to enter into a contract for the erection of a capitol building, to audit claims for their erection of same, and to issue warrants upon the "state capitol building fund" for the amount. It was also provided that a fund to be known as "the state capitol building fund" should be created by the proceeds of the sale of the lands granted. It was contended in *State v. McGraw,* 13 Wash. 311, that such funds could only be paid out under the provisions of the section of the constitution providing for specific biennial appropriations, but it was held that the money was "charged with a special trust * * * and 'must be disbursed in accordance with the terms of the trust.'" The court further said: "In thus disposing of the case we give full force to the various provisions of the constitution relating to the different officers of the state who are made respondents in this proceeding, but it may well be doubted whether the limitations of the constitution are at all applicable to the subject which we are here considering, inasmuch as the whole subject matter of this case relates to the donation from the congress of the United States of lands for the purpose of erecting a

suitable building at the capital of the state. For such purpose, and only for such purpose, were the lands granted. It would be beyond the power of the legislature to use an acre of said lands for any other purpose or to appropriate a dollar of the funds arising from their sale to the accomplishment of any other object. It would have been entirely competent for congress, the donor, to have particularly designated the manner in which the lands should be sold and their proceeds applied." While the decision of the case was not placed upon this point, we are satisfied the reasoning is correct.

A similar question as to the necessity of biennial appropriation of trust funds has already been before this court. In *State v. Searle,* 77 Neb. 155, the question was as to the fund derived from the "Adams bill." In that case money in the hands of the state treasurer as treasurer of the university was held to be a trust fund not requiring biennial appropriations. The language of the act of congress making the grant, however, was more specific than of those we are now considering, in that it provided that the money should be paid by the secretary of the treasury to the treasurer of the experiment station. It was held that the money was paid under the act to the "state treasurer as the agent of the board of regents and custodian of the funds of the university." In the opinion, in speaking of the fund involved in *State v. Babcock,* 17 Neb. 610, and other cases therein cited, it was inadvertently stated that "the fund in question was money paid into the state treasury as taxes, and therefore it belonged to the state until specifically appropriated * * * to the use of the university." Only a portion of the money sought to be used was derived by taxation. In the *Babcock* case it was properly decided, under the facts presented, that "the regents of the university, in the absence of an appropriation by the legislature, have no power to dispose of the endowment fund or that derived from the three-eighths mill tax." It is stated in the opinion that the bill making appropriations for the university provided that

the money should be appropriated out of the regents' fund, but that by some means during its passage the provisions of the bill were changed, making the appropriations out of the general fund, and it was said: "The regents, however, can only use such funds as are placed by the legislature in their control." This must be true. If the legislature had failed to provide that the state university was the proper beneficiary of these funds and had failed to specifically set apart these funds to its use, there can be no doubt that no authority would exist in the board of regents to expend the fund, or in the auditor to draw, or in the treasurer to countersign and pay, warrants upon it.

We are of the opinion that, when the state accepted from congress the trust as to the disposition of these funds, carried it out by designating the state treasurer as the custodian thereof, and further designated the beneficiary, and provided the manner in which the funds should be drawn and expended, it was not fettered or controlled by the provisions of section 19, art. III of the constitution, providing for biennial appropriations, and that such trust funds may be and have been applied by a specific and general appropriation which was within the power of the legislature to make, and which must stand until changed by the legislature. As to the details regarding the funds involved, we are not fully advised, but enough appears to justify us in requiring the respondent to countersign the warrant presented by the relator.

WRIT ALLOWED.

ROSE, J., dissenting.

The auditor of public accounts drew a state warrant in favor of relator for $35 to pay him for services as an instructor in the law department of the university of Nebraska and the state treasurer refused to countersign it for the reason there was no legislative appropriation available for its payment. In a single sentence of relator's application for mandamus he asks relief as fol-

lows: "Relator prays a writ of mandamus requiring the respondent to countersign the warrant and place to the credit of the university for the biennium ending March 31, 1909, the sum of $946,017.96." Relief for the credit prayed has not been granted, but the treasurer is required to countersign the warrant. The following is the concluding paragraph of the opinion:

"As to the details regarding the funds involved, we are not fully advised, but enough appears to justify us in requiring the respondent to countersign the warrant presented by the relator."

1. I join in the finding that we are not fully advised as to the details regarding the funds involved, but dissent from the conclusion that enough appears to justify us in requiring the state treasurer to countersign relator's warrant. If an instructor in the law department of the university is a proper relator to apply for a writ commanding the state treasurer to credit that institution with the sum of $946,017.96, I think we ought to require him to point out the lawful appropriations comprising that sum, and not leave us unadvised as to the details regarding the funds involved. If there is an unexpended appropriation out of which the state treasurer may lawfully pay the warrant for $35, I am of the opinion relator should be required, as a condition of relief, to describe it in definite and precise terms, especially under a constitution providing that "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session"; that "all appropriations shall end with such fiscal quarter"; and that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." When these provisions of the constitution are respected, there is never any mistake or uncertainty about the identity of any appropriation or the amount of any unexpended balance in any fund in the state treasury. By reason of his official relations with the state the treasurer is in a position

to ascertain the amount of each appropriation and the unexpended balance in every fund under his control. His records are open books and impart his knowledge to relator. There is a presumption that the treasurer's duties are being performed according to law. A relator who asserts the contrary and asks us to subject the treasurer to coercive process should point out a plain, definite, statutory duty which that officer refuses to perform. Since the writ could not be allowed as prayed, I think it should have been denied. We did not grant relator's prayer to compel the state treasurer to credit the university with $946,017.96, but confessed we were not fully advised by the pleadings or the evidence as to the details regarding the funds involved. The burden was on relator. In my judgment, our failure to grant his prayer in the form in which it appears in his own application for mandamus ought to have resulted in a dismissal of his case. As I view the record, the allowance of the writ was a radical departure from the proper rules of procedure.

2. For the use of the state university the legislature in 1907 appropriated "the proceeds of the one mill university tax for the years 1907 and 1908." Laws 1907, ch. 151. In the opinion of the court "the *proceeds* of the one mill university tax" is held to mean the *"whole of the tax."* It is a matter of common knowledge that the whole of a tax on the assessable property in the state is never collected. I think the word "proceeds" was used by the legislature in its ordinary sense. By the language used the lawmakers meant the funds arising from the tax, and did not intend to appropriate that portion of the tax which will never be collected. The uncollectible part of the tax is not proceeds. According to my understanding of the law, the interpretation that the words "proceeds of the one mill university tax" means "the one mill university tax" strikes from the statute the word "proceeds" and is a violation of the established canon of construction that effect must be given to every word of the statute, if possible. If the legislature intended to appropriate the

whole of the tax, the word "proceeds" would have been omitted. Appropriation of the proceeds of a tax means appropriation of the fund arising from the tax. *People v. Auditor,* 12 Ill. 307; *People v. Miner,* 46 Ill. 384. Before the appropriation was construed by this court no court ever held, so far as my investigation goes, that the proceeds of a tax was the whole of the tax, nor have I been able to find such a meaning of the word in the connection in which it is used by the legislature in the definition of any lexicographer. The one mill tax will never be collected in full. If the legislature appropriated the whole of the tax and authorized the issuance of warrants to the full amount, some of them will never be paid out of the funds appropriated. The creation of a deficit by means of an appropriation bill is inconsistent with legislation making provision for the expenses of government. I am unwilling to attribute to the lawmakers an intention to create a deficit in the manner described or to impute to them a want of business sense not warranted by the language of the statute. I am firmly convinced the legislature did not intend that the treasurer should countersign warrants against the whole of the one mill tax.

3. The state constitution provides that "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session"; that "all appropriations shall end with such fiscal quarter"; that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law"; that "the general government of the university of Nebraska, shall, under direction of the legislature, be vested in a board of six regents," and that "their duties and powers shall be prescribed by law." These constitutional provisions have had a contemporaneous, long-continued and practical construction by both the legislative and executive departments of government, to the effect that biennial appropriations by the legislature are

essential to the lawful expenditure of the endowment and other funds devoted exclusively to the university. I think this construction is right and that we ought to follow it. Two members of the constitutional convention who participated in the deliberations of that body afterwards constituted a majority of this court, one of them being the present chief justice and the other Judge MAXWELL. In an opinion by the latter these jurists took the same view as the legislative and executive departments of government, and after citing *Regents v. McConnell*, 5 Neb. 423, and *State v. Liedtke*, 9 Neb. 468, said: "These decisions were rendered by an unanimous court, after full and careful consideration of the question, and are decisive of this case. The regents, therefore, in the absence of an appropriation by the legislature, have no right to appropriate any part of the regents' fund. That the legislature should make ample appropriations for the support of the university will be conceded, and that it will do so there is but little doubt. Ample appropriations have been made, so far as appears, for the support of every department of the university and agricultural college, authorized by the legislature for the years 1885 and 1886. No attempt has been made or will be made, or is threatened, to divert the funds to any other purpose, or in any manner to defeat the object of the grant. It is well known that the bill making appropriations for the university and agricultural college provided that the money should be appropriated out of the regents' fund; but, by some means, during its passage, the provisions of the bill were changed, making the appropriation out of the general fund. As the same mistake occurred a few years ago, and it is well known to be a mistake, it shows a want of care on the part of those having the matter in charge. The alleged mistake, however, materially adds to the burdens of taxation of the people of the state, but does not in the slightest degree affect the efficiency or usefulness of the university. The regents, however, can only use such

funds as are placed by the legislature under their control." *State v. Babcock,* 17 Neb. 610.

The endowment and other trust funds of the university must be disbursed under biennial appropriations the same as the funds appropriated for other state institutions. *Regents v. McConnell,* 5 Neb. 423; *State v. Moore,* 46 Neb. 373. University funds in the hands of the state treasurer can only be drawn out in pursuance of specific appropriations. *State v. Liedtke,* 9 Neb. 468. An appropriation can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature, and an appropriation for a longer period is unconstitutional and void. *State v. Moore,* 50 Neb. 88. The university is a state institution. Its legal obligations are obligations of the state, whether payable out of trust funds or funds arising from general taxation. The constitution provides a definite method of paying the expenses of the state institutions. That method requires biennial appropriations. No provision is made by the constitution for any other plan. If the fiscal system so established and maintained and as thus understood by all three departments of the government for many years is to be abandoned, the change should be made by constitutional amendment. It may be that the trust funds of the university should be disbursed under a perpetual appropriation which has the effect of clothing the regents with power to make contracts pledging such funds to specific purposes or projects for long and indefinite periods in the future without the disturbing factor of intervening legislation, but I am fully convinced that such power has not been conferred upon them by any statute of this state, or by the constitution, or by any act of congress. Entertaining these views, I am compelled to dissent from the opinion and judgment of my associates.

CHARLES M. SMITH, APPELLANT, V. PETER G. HOFELDT ET AL., APPELLEES.

FILED APRIL 13, 1908. No. 14,762.

1. **Cities: IMPROVEMENTS: LIENS.** Plaintiff was the owner of a number of lots in the village of Dundee, a suburb of the City of Omaha. The village board ordered the construction of sidewalks, giving the required notice by publication; the plaintiff being a non-resident. At the expiration of the time fixed in the notice, the village, by its contractor, constructed the walks, first completing a small portion of the necessary grading. The grading and construction of the sidewalks were practically concurrent acts. The tax for each was duly certified to the county officers for collection. Plaintiff enjoined their collection. *Held*, That the tax for the construction of the sidewalk was a lien upon the property abutting on the walk.

2. **Former Opinion Modified.** The holding and decision in this case on a former hearing (79 Neb. 276) modified.

3. **Affirmance.** The decree of the district court is in all things affirmed.

REHEARING of case reported in 79 Neb. 276. *Former judgment vacated in part and judgment of district court affirmed.*

REESE, C. J.

This case was argued and submitted upon a rehearing. The opinion reversing the decree of the district court was filed June 7, 1907, and is reported in 79 Neb. 276. The facts and issues involved are stated in that opinion and need not be restated here. The action was for an injunction restraining the officers of the village of Dundee and the proper officers of the county from enforcing a tax levied upon certain lots to defray the expenses of grading the sidewalk space and constructing the sidewalk thereon. The result of the trial in the district court was a decree enjoining the tax for grading the sidewalk space, but dismissing the suit as to the cost of the construction of the

sidewalk. The cost of regrading the sidewalk space upon all the lots was $212.85, and for laying the sidewalks, with $1 upon each lot for the notice, etc., was $372.60. It is contended by defendants that the cost of regrading the sidewalk space should be taxed to the lots for the reason that the street had formerly been graded from lot line to lot line, which included the sidewalk space, and that the only grading required before the sidewalk could be laid was made necessary by the washing and falling of earth from the walls or sides of the excavation, all of which was from plaintiff's lots, and that, had he prevented the wash and caving in, as was his legal duty, no grading of the space would have been necessary, except for the removal of the loose soil and debris which had accumulated through the fault of, or lack of attention by, plaintiff. There would be some degree of force in this contention were there no question as to the facts. However, there was sufficient evidence submitted to the district court upon which to base a finding that a part at least of the grading required was not of the character named, but was of earth which had not been previously removed. Such being the case, we cannot interefere with that portion of the decree of the district court, and, to that extent, our former decision is adhered to.

Upon further investigation we are of the opinion that the decree of the district court, holding the tax to the extent of the cost of the construction of the sidewalk to be a valid lien upon the lots in front of which the sidewalks were severally constructed, was correct, and that, to that extent, our former holding should be modified. The ordinance under which the trustees ordered the construction of the sidewalk required that, if the owner of the lot in front of which the sidewalk was to be constructed was known and a resident of the village of Dundee, a personal notice should be served upon him or left at his residence 15 days before the construction of the walk, and that, if the walk was not constructed within the time named, the village contractor should do the work. In case the resi-

dence of the owner should not be known or he had no fixed place of residence, service might be made by one publication in a newspaper of general circulation in the county. This was done. It is claimed that plaintiff should have been allowed sufficient time after the sidewalk space was graded in which to construct the sidewalk. It appears that, after the expiration of the 15 days' notice, the sidewalk space was prepared by removing the loose or washed earth, and, where necessary, the completion of the grading, when the sidewalk was laid without further delay. Were it not that the district court found that the removal of what is termed "native earth" constituted a part of the grading, we should hesitate to declare the tax illegal owing to the fact that the earth in its original and natural condition constituted such a small portion of the grading necessary to be done, the greater portion being the removal of the washed or caved in earth. But, allowing that part of the decree to stand, we are far from concluding that the condition of the sidewalk space required further delay before it became the duty of the plaintiff to construct the walks. Plaintiff was not a resident of Dundee nor of the state, his home being in Rockford, in the state of Illinois. We find no proof that he was at Dundee, either by himself or agent, for the purpose of constructing the walks. It is quite probable that no notice was necessary as to him, but, if such notice was necessary, it was certainly sufficient to authorize the construction of the walk upon his failure to do so. Under any condition shown there are no equities in his favor. He has profited by the sidewalk; it also tends to increase the value of his property, and there is no justice in allowing him to escape the expense thereof upon the mere technicality that the walk was laid a few days before it might have been done, had he presented himself and done the work.

It follows that the part of our former judgment making the injunction restraining the collection of the sidewalk

tax perpetual must be vacated, and the decree of the district court affirmed, which is done.

JUDGMENT ACCORDINGLY.

LETTON, J., dissenting.

I am not inclined to recede from the position taken in the former opinion. The ordinances required that, upon the passage and publication of an ordinance ordering the construction or repair of any sidewalk, it should be the duty of the overseer of the streets to serve upon the owner of the abutting premises, "if such owner is known and is a resident of the village of Dundee," a notice, stating that, after the expiration of 15 days from the service of such a notice, the sidewalk ordered to be constructed, unless previously constructed by the owner according to specification required by the ordinance, will be constructed by the contractor having the contract for that class of work, and that the cost thereof will be assessed upon the property described. Section 10 provides for service of notice at the usual place of residence, "providing that, whenever any owner or owners of any such property are not known or have no fixed place of residence, service of such notice may be made by publication at least once in some newspaper of general circulation in Douglas county, Nebraska. An affidavit of service of publication of each of said notices with a copy thereof shall forthwith be made and filed with the village clerk and by him be preserved." Section 11 makes it the duty of every owner to construct the sidewalk within 15 days from the publication of the notice. Section 12 provides that, if, after 15 days from the publication of the notice, the owner shall fail, neglect or refuse to repair or construct the same, the overseer of streets shall cause same to be constructed. Ordinance 55 of the village specifically directed permanent sidewalks of artificial stone to be constructed in front of plaintiffs' property within 15 days from the publication of the notice, upon the failure of the owner to construct the same.

The testimony shows that at no time during the 15 days was it possible for plaintiff to construct a permanent walk as directed, for the reason that at the time the street had not been brought to grade, and that the contractor was obliged to remove 665 cubic yards of earth along the sidewalk space before it was brought to grade.

The evidence further shows that the street itself was not "permanently improved" at the time this order was made, the grading in the roadway being only partially done at this time. It is only upon streets which are permanently improved that the village authorities are authorized to require the construction of a permanent sidewalk. Neither sidewalk space nor roadway being graded so that the street was permanently improved at that time, the notice was prematurely given, and the board was without power to assess the cost of the walk to the owner.

I think the former opinion should be adhered to.

BARNES, J., concurs in the dissenting opinion.

CLAUS SCHADE, APPELLEE, V. DUNCAN CONNOR ET AL., APPELLANTS.

FILED APRIL 13, 1909. No. 15,649.

1. **Executors and Administrators**: DEBTS: PAYMENT. The personal estate of a deceased person is primarily liable for all debts created or personally assumed by him, whether secured by mortgage on his real estate or not, and his heirs and devisees have the right to require his executor, who is also his residuary legatee, to pay such debts out of the personal estate. *Patrick v. Patrick*, 72 Neb. 454.

2. ———: MORTGAGES: PAYMENT. Where in a foreclosure suit brought against a devisee and the heirs of a deceased purchaser of the mortgaged premises, who is personally liable for the payment of the mortgage debt, it appears from the cross-petition of the devisee that the executor of the will, who is also the residuary legatee, has received personal property belonging to the estate of the testator exceeding the amount of the lien sought to be

enforced, such executor may be compelled to pay off and remove the mortgage lien.

3. ———: ———: ———. The right to enforce such payment is not barred by reason of the failure of the mortgagee to file a claim against the estate of the deceased purchaser for the payment of the mortgage debt.

4. **Infants:** GUARDIAN AD LITEM: PLEADING. A guardian *ad litem* appointed by the court to protect the rights of an infant defendant should file a general denial, and, in case the proper protection of the rights of his ward requires it, he may take such affirmative action by filing a cross-petition, or other pleading, as may be necessary for that purpose.

5. **Mortgage Foreclosure:** PARTIES. One charged with the duty of paying off and discharging a mortgage on real estate may, on application of the owner of the land, be made a party to the foreclosure suit, and be compelled to pay off the mortgage debt and relieve the real estate of the mortgage lien.

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

Harrison & Prince, for appellants.

W. H. Thompson and *T. T. Bell, contra.*

BARNES, J.

This action was commenced in the district court to foreclose a mortgage on the northeast quarter of section 35, township 15 north of range 11 west, situated in Howard county. The petition discloses that on the 14th day of January, 1899, one Duncan Connor, who was then the owner of the land above described, and his wife, Mary, executed and delivered a mortgage thereon to the plaintiff for the purpose of securing the payment of a promissory note for $700 due the 14th day of January, 1904; that after making the mortgage they sold and conveyed the land to one Sarah Kerr, who, as a part of the purchase price, assumed and agreed to pay the mortgage debt; that in the month of December, 1903, Sarah Kerr departed this life, leaving certain real and personal property which was disposed of by her last will and testament, and

by which she devised the mortgaged premises to her minor grandson, David W. Kerr, who was then about four years of age; that her son James Kerr was designated by her will as the executor of her estate; that the will was duly admitted to probate and James Kerr was appointed as executor; that he entered upon and performed the duties of his said trust until the close of the administration of the estate; that no claim for the amount due on the mortgage was ever filed in the county court of Howard county or allowed against said estate; that the executor had been discharged, and that David W. Kerr, who is a minor, was the owner in fee of the land in question. He was therefore made a party defendant, and plaintiff prayed for a receiver to take charge of the mortgaged premises, to collect the rents and profits thereof, and apply them to the payment of the amount found due upon the mortgage, and for a decree of foreclosure.

It appears that one Frank J. Taylor was appointed guardian *ad litem* for the minor defendant, and in due time filed an application to have James Kerr made a party to the action, which was accordingly done. The guardian thereupon filed an answer, and a cross-petition against the defendant James Kerr, setting forth, among other things, that by assuming and agreeing to pay the mortgage debt, Sarah Kerr became personally liable therefor; that by the terms of her will provision was made for the payment of her just debts, after which the rest and residue of her estate, both real and personal, was devised and bequeathed to James Kerr; that he was thus made her residuary legatee, and was thereby charged with, and became liable for, the payment of the mortgage debt; that during his administration of the estate, and afterwards, he recognized his liability for its payment and his duty to pay off and discharge said mortgage by paying the interest and a part of the principal thereof, which sums so paid by him were credited on said note and mortgage; that he failed to disclose said facts, and to report his liability thereon to the county court of Howard county,

and concealed the same from the knowledge of said court, and thereby procured his discharge from his said trust; that he afterwards refused to pay off said mortgage debt, and, although as residuary legatee he had received more than $1,000 worth of personal property of the said estate, after the payment of all of the other debts of the testator, he still refused to pay the said mortgage debt, and left the same a charge upon and against the real estate bequeathed to the minor defendant, David W. Kerr. The cross-petition concluded with a prayer that the defendant James Kerr be declared liable for the payment of the amount found due on the mortgage, and that judgment be rendered against him therefor.

A demurrer was interposed to the cross-petition based upon the following grounds: "(1) That the court has no jurisdiction of the action. (2) That there is a defect of parties plaintiff. (3) That said answer does not state facts sufficient to constitute a cause of action. (4) That said Frank J. Taylor, guardian *ad litem* for the said David W. Kerr, has no legal capacity to sue or prosecute this action. (5) That the cause of action stated shows on the face of the pleading to have been barred by the statute of limitations, as no claim was filed therefor in the county court as provided by law, or otherwise, in the probate of the estate of the said Sarah Kerr." The district court sustained the demurrer, dismissed the action as to James Kerr, found that $592 was the amount due on the mortgage, appointed a receiver, entered a decree of foreclosure as prayed for in the plaintiff's petition, and the guardian *ad litem* has brought the case here by appeal.

His first contention is that the facts pleaded in his cross-petition and admitted by the demurrer were sufficient to require the district court under its equity power to hear, adjust and determine the rights and liabilities of all of the parties to the transaction, including the liability of James Kerr for the payment of the mortgage debt, and require him to pay the same. The first question to be

decided is: Did the testator, Sarah Kerr, under the undisputed facts of this case, become personally liable for the payment of the mortgage debt? In *Rockwell v. Blair Savings Bank,* 31 Neb. 128, it appeared that one Tebury bought the mortgaged premises of the Rockwells for $2,500; that he only paid $300 thereof, and for the balance of the purchase price he assumed and agreed to pay the mortgage. It was held that he thereby made the mortgage debt his own and was personally liable to the Rockwells for the amount of the deficiency remaining after foreclosure and the sale of the mortgaged premises. The same doctrine was announced in *Cooper v. Foss,* 15 Neb. 515, and has been declared by numerous other cases decided by this court. It follows that under the facts disclosed by the pleadings in this case Sarah Kerr, at the time of her death, was personally liable for the amount due plaintiff on his mortgage, and a personal judgment could have been rendered against her therefor. We are therefore of opinion that it was the duty of the executor in this case to pay off and discharge the mortgage in question. *Beard's Appeal,* 78 Conn. 481; *Turner v. Laird,* 68 Conn. 198; *Sutherland v. Harrison,* 86 Ill. 363; *Jones v. Null,* 9 Neb. 57.

Again, James Kerr was the residuary legatee of the estate of which he was executor, and he took the property of his testator charged by the terms of her will with the payment of her debts. When he took over the property and secured his discharge as executor, he made himself personally liable for the payment of the mortgage debt, and equity will not now permit him to deny his liability therefor, for "equity considers that done which should be done." *Sutherland v. Harrison, supra,* was a case brought to foreclose a vendor's lien upon certain real estate situated in the city of Chicago. It appears that Sutherland, by contract, purchased the land in question of one Samuel Smith. The purchase price being $2,000, payable on January 18, 1873, with interest at 6 per cent. per annum, payable semiannually. No payment of the

principal was made, but the interest was paid to December 18, 1870. Sutherland died in 1868 intestate, leaving a widow, but no children. His widow, his brother and the children of two brothers, who died before his death, were his only heirs. Sutherland's estate was administered upon, his widow and one Page being administrators. They filed their final account in 1871, and, all the debts proved having been paid, an order of distribution was then made, giving the widow, as heir, the whole of the personal property, and discharging the administrators. In 1871 the land was partitioned, and in December, 1875, the legal representatives of Smith, then deceased, filed their petition against the heirs of Sutherland, and prayed that they be ordered to pay the amount due upon the contract upon delivery of the deed, and upon default thereof that the contract be annulled. The other heirs filed a cross-bill, praying that the widow be required to satisfy the amount due on the contract, and that the surplus personal estate received by her might be marshaled to the payment of such indebtedness. On the issues thus joined it was held that the personal estate of a deceased person is primarily liable for all debts created by him, whether secured by mortgage on his real estate or not; that his heirs and devisees have the right to compel the payment of a mortgage out of such personal estate, and thereby relieve the real estate of the lien; that where a person files a bill to enforce his vendor's lien upon real estate against the heirs of a purchaser, and it appears that upon the settlement of the estate of the purchaser his widow has received, as his heir, her special allowance given her as widow, all of the personal property and one-half of the real estate, including that upon which the lien is sought to be enforced, and the amount of the personal property so received by her exceeds the amount of the lien, she will, as between her and the other heirs of th purchaser, be compelled to pay off and remove said lien without contribution from them. In the opinion it was said: "It is a well-established principle that in the

administration of assets the personal estate is the natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted before the real estate can be made liable; and it will not be exonerated by a charge on the real estate, unless there be express words, or a plain intent, in the will to make such exoneration"—citing *Clincfelter v. Ayers,* 16 Ill. 329; *Harris v. Douglas,* 64 Ill. 466. This rule we find to be supported by *Beard's Appeal, supra; McGonigal v. Colter,* 32 Wis. 614; *Blinn v. McDonald,* 38 S. W. (Tex. Civ. App.) 384; *Byrd v. Ellis,* 35 S. W. (Tex. Civ. App.) 1070; *Allen v. Conklin,* 112 Mich. 74.

Indeed, this general principle does not seem to be seriously questioned by counsel for the appellee, but it is earnestly contended by him that the debt in question is a claim against the estate of Sarah Kerr; that, because it was not filed and allowed by the county court of Howard county during the process of administration, it is now barred by the statute of limitations, and no action can be maintained against the executor and residuary legatee thereon. We think this contention is beside the mark. It is true that the mortgage debt was, in a way, a claim which might have been filed against the estate, but the mortgagee was not required to pursue that remedy. *Null v. Jones,* 5 Neb. 500, and *Jones v. Null,* 9 Neb. 57. The claim was not so presented, and the filing of the cross-petition herein is not the presentation of the claim against the estate. It constitutes a proceeding in equity to enforce the liability incurred by the executor and residuary legatee by his failure and neglect to pay off and discharge the mortgage in question. Having by his conduct made the claim his personal debt, equity will require the executor and residuary legatee to pay off and discharge the mortgage for the benefit of the owner of the fee of the real estate, and the action is not barred by the statute of limitations. *Patrick v. Patrick,* 72 Neb. 454.

It is further contended that the district court had no jurisdiction of the subject matter of the action set out in

the cross-petition. We think this contention is fully answered by *Sutherland v. Harrison, supra,* and *Beard's Appeal, supra,* where like cross-actions were maintained.

It is also contended that the guardian *ad litem* of David W. Kerr has no legal capacity to prosecute this action. At common law infants were required to sue by guardian *ad litem,* but by the statute of Westminster they were authorized to sue by next friend in all actions, and this remedy was held to be cumulative, leaving it optional for the suit to be brought by guardian or next friend. In this country the procedure is governed by the statutes of the several states, and at the present time an infant plaintiff is usually represented by his next friend, but in some states an infant may sue by guardian *ad litem* as well as by next friend, while in others he must sue by guardian *ad litem. Grosovsky v. Goldenberg,* 86 Minn. 378. In respect to the representation of an infant plaintiff, there would seem to be little, if any, difference between the functions of a guardian *ad litem* and of a next friend. An infant defendant, however, should always be represented by a guardian *ad litem* appointed for that purpose. Code, sec. 38.

Now, in the case at bar David W. Kerr was made a party defendant. Therefore it was necessary for the court to appoint a guardian *ad litem* for him to protect his interests in the litigation. We find that section 36 of the code provides that the action of an infant may be brought by his guardian or next friend, and the word "guardian" may be said to have been used by the lawmakers in its general and comprehensive sense, which would include a guardian *ad litem.* We think therefore it may be well said that the guardian *ad litem* appointed for an infant defendant, in addition to filing a general denial, would not only have the power, but it would be his duty, to take affirmative action and prosecute a cross-petition if it should be found necessary to do so for the protection of the interests of his ward. We are therefore of opinion that this contention is without merit.

Finally, it is submitted that James Kerr was not a necessary or proper party to the cause of action set forth in the plaintiff's petition; that the cross-petition of the guardian *ad litem* stated an independent cause of action with a prayer for a personal judgment against him, and therefore the demurrer was properly sustained. No authorities are cited and no argument is presented in support of this contention, and so we are required to decide the question as one of first impression. The action, as commenced by the plaintiff, was one in equity to foreclose a mortgage on real estate. The infant owner of the fee title was made a party defendant, and it was discovered by his guardian that it was the duty of the executor and residuary legatee to pay off and discharge the mortgage in question. As we have seen, the executor had made himself personally liable therefor, and we can see no good reason why he should not have been made a party to the action, and have been required, as a protection to the rights of the fee owner, to pay the amount found due thereon, and in default of such payment a personal judgment rendered against him therefor. Such a course would prevent all future and further litigation and the whole matter would be thus speedily and equitably determined.

For the foregoing reasons, we are of opinion that the demurrer to the cross-petition should have been overruled. The judgment of the trial court sustaining the demurrer and dismissing said petition is therefore reversed and the cause is remanded to the district court for further proceedings in harmony with this opinion.

REVERSED.

CHARLES A. CURRIER, APPELLANT, V. SETTY SCHMIDEKE TESKE ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,245.

1. **Husband and Wife:** CONVEYANCES. A deed of conveyance direct from husband to wife without the intervention of a trustee, made in good faith, and not in fraud of creditors, is valid both in law and equity, and operates to pass the full title and estate which it purports to convey. In so far as *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260, and *Johnson v. Vandervort*, 16 Neb. 144, hold to the contrary, such cases are overruled.

2. **Mortgages:** FORECLOSURE: SALE: ASSIGNMENT OF BID. A mortgagee purchased at the foreclosure sale through an agent, and the sale was confirmed to him. Prior to the sale the agent had been negotiating with one Schmideke for the sale of the land. After confirmation the agent completed the sale to Schmideke, and caused the sheriff to execute a deed direct to him, reciting that Schmideke was the purchaser at the sale. The agent delivered the deed to Schmideke, and received the amount of the bid therefor. *Held*, after the lapse of more than 20 years, the mortgagee having made no claim that the deed was void, and by his agent having received the purchase money, that an assignment of the bid and purchase will be presumed, and the sheriff's deed will be held sufficient to pass all the rights of the original purchaser to the grantee.

3. ———: ———: ———: TITLE ACQUIRED. The purchaser at a foreclosure suit buys all the interests of the parties to the suit.

4. ———: ———: ———: ———. The owner of an estate by the curtesy in certain land was made defendant to an action to foreclose a mortgage given by the wife in her lifetime. His son, who had inherited the estate subject to his life estate, was not brought in. *Held*, That the sale on foreclosure could only convey the life estate of the defendant, even though the purchaser may have believed he acquired the whole title.

5. **Ejectment:** ACTION: BAR. An action of ejectment is prematurely brought against one claiming under a life tenant, if begun before the death of such tenant. Such action, however, is no bar to a subsequent action seasonably instituted.

REHEARING of case reported in 82 Neb. 315. *Affirmed in part and reversed in part.*

LETTON, J.

The facts in this case are fully stated in the former opinion, 82 Neb. 315. In that opinion it was held that the defendants were mortgagees in possession, and that, since plaintiff had not tendered or offered to pay the amount of the mortgage debt, he could not maintain ejectment. A motion for rehearing was filed, accompanied by a request that, if the court still held upon a rehearing that the defendants were mortgagees in possession, the plaintiff might be permitted to amend his petition so as to offer to pay the amount properly due under the mortgage. A rehearing was allowed, the case argued and submitted to the court, as augmented by the adoption of the constitutional amendment, and is now before us for decision. In the view the court takes, it becomes necessary to consider several points argued, but not decided, at the former hearing.

1. The nature of the estate, if any, conveyed by the deed made directly from Eugene Currier to his wife, Mary J. Currier, must be determined. As to the legal effect of a deed direct from husband to wife, the former opinions of the court are difficult to reconcile. In *Aultman, Taylor & Co. v. Obermeyer,* 6 Neb. 260 (1877), opinion by MAXWELL, J., it was held that by the common law neither husband nor wife could convey lands to each other, that our law still regards them in relation to each other as one person, notwithstanding the statutes enlarging the rights of the wife, and it was further held that a deed of conveyance direct from husband to wife is "absolutely void." In *Berkley v. Lamb,* 8 Neb. 392 (1879), while not essential to the disposition of the case, it was said: "At law such a deed is void, but equity will sustain it when made upon a sufficient consideration." In *Smith v. Dean,* 15 Neb. 432 (1884), action to quiet title, opinion by MAXWELL, J.: "At common law no title passed by a deed from a husband to his wife, for the reason that the right of the wife to make contracts was suspended during coverture.

The doctrine evidently originated at a time when a wife was regarded as but little better than a slave, and has but little application to our state of society, and will not be extended beyond the strict requirements of the law. In equity a wife has ever been regarded as a distinct person, capable of contracting, and whenever equitable grounds for relief have existed her rights have been enforced and protected. So the deed of a husband to his wife, though void at common law, will be sustained whenever equitable grounds exist for sustaining the same, such as a valid consideration." In *Johnson v. Vandervort,* 16 Neb. 144 (1884), COBB, C. J.: Action to quiet title and for partition. Plaintiff claimed through a deed direct from husband to wife. The court held that the wife acquired no legal title by the deed, but that the "deed was evidence of a provision made for her support by her husband, which upon timely application by her for that purpose would have been aided by a court of equity. But she made no such application." It was held that there was no title in the plaintiff, and he could not maintain the action. In *Furrow v. Athey,* 21 Neb. 671 (1887), opinion by REESE, J., the opinion does not show the nature of the action: "The first question presented in this case is, whether a husband can convey his real estate to his wife without the intervention of a third party as a trustee, in a case where no fraud is shown, and the rights of creditors or other third parties do not intervene. * * * If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention." In *Ward v. Parlin,* 30 Neb. 376 (1890), opinion by NORVAL, J., the action was to set aside a certain deed from Ward to his wife as being in fraud of creditors. It was held that a husband may legally give his wife a deed or mortgage to secure a preexisting *bona fide* deed, and such conveyance is not fraudulent as to his other creditors if taken in good faith and without any fraudulent purpose. This was a creditor's bill, and the legal effect of direct con-

veyance was not decided nor discussed. *Wanser v. Lucas,* 44 Neb. 759 (1895), was an action by heirs to recover real estate conveyed by deed direct from husband to wife. The opinion does not state the nature of the suit, but apparently it was ejectment. The deed was upheld, POST, J., quoting and adopting the language of Judge REESE in *Furrow v. Athey, supra.* In *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622 (1896), certain creditors attached real estate mortgaged direct from husband to wife. On error to this court from an order dissolving the attachment, the opinion by HARRISON, J., cites the prior cases in this state without distinguishing them, reverses the district court, and holds that the mortgages were valid. In *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892 (1901), it was held that, where real estate is conveyed by a husband to his wife without pecuniary consideration, the presumption is that it was a gift or advancement, and that the parties intended that the full and absolute title both real and equitable should pass by the conveyance.

From this resume of the former holdings of this court it appears that, while the doctrine of *Aultman, Taylor & Co. v. Obermeyer* and *Johnson v. Vandervort, supra,* that a deed direct from husband to wife is void in law, has never been directly repudiated or the cases overruled, the fact is that in every case for the last 25 years in which the validity of such conveyance has been attacked it has been held that such a deed, in the absence of fraud, was valid in all respects, and conveys the entire estate, both legal and equitable. The writers of the opinions have clung to the verbal husks of the old rule, while in fact it was ignored in the action taken and the decision made. The rule of *Furrow v. Athey, supra,* announced in 1887, that the deed "is just as good" without the intervention of a trustee, has been followed ever since that opinion was written, and is the law of this state. This is common sense, and is in accordance with the modern tendency to disregard the fictions and technical niceties and distinctions of the common law. While the language of the

married woman's act does not apply to such a transaction, yet the liberalizing tendency and spirit of this legislation has permeated the body of the law relating to husband and wife, and the tendency of modern courts is toward enlarged freedom of contract between them. From the writer's own knowledge it has been generally accepted among the legal profession in this state since *Furrow v. Athey* that a direct conveyance is good, and, in so far as *Aultman, Taylor & Co. v. Obermeyer* and *Johnson v. Vandervort, supra,* hold that a deed direct from husband to wife made *bona fide,* and not in fraud of creditors, does not operate to pass both the legal and equitable estate, such cases are overruled. We conclude, therefore, that the deed from Currier to his wife conveyed to her the full legal and equitable title to the land, and that upon her death the estate vested in her son, the plaintiff, subject to the life estate by the curtesy of her husband. The foreclosure action was prosecuted without making the plaintiff, who was then the owner of the remainder and equity of redemption, a party, and consequently was without effect upon his rights.

2. Plaintiff contends that the sheriff's deed to Schmideke under which defendants claim title is absolutely void, and conveyed neither a legal nor an equitable estate to him because he was not the purchaser at the sale. At the foreclosure sale the bidder was John Campbell, the owner of the mortgage debt and the plaintiff in that action, and the sale was confirmed "to the purchaser, John Campbell." The evidence indicates that one Frank Barnes of Madison had been acting as Mr. Campbell's agent in the matter of the mortgage, and that prior to the sale he had also been negotiating with Mr. Schmideke for the sale of the land to him. Mrs. Teske says he was to buy the land for her then husband Schmideke, and that Barnes procured the sheriff's deed to Schmideke and delivered it to him. The sheriff's deed recites that Schmideke was the purchaser at the sale. Under these circumstances, after the lapse of so many

years, and considering that Campbell never made any claim that the deed was void, and through his agent accepted and retained the purchase money and caused the deed to be made to Schmideke, it will be considered that he became by equitable assignment the owner of Campbell's interest in the bid, that the deed was made pursuant to such assignment, and that he thereby became vested with all interests that Campbell then had. The purchaser at a foreclosure sale buys all the interests of all the parties to the suit. Code, sec. 853. *Young v. Brand,* 15 Neb. 601; *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276; *Buchanan v. Griggs,* 18 Neb. 121. That which was sold, therefore, was the life estate of Eugene Currier and Campbell's unforeclosed mortgage on the plaintiff's equity of redemption. At the sale the interest of the defendant sold for $500, while the amount of the decree was $367.87. The proceeds of the defendants' interest, therefore, paid the mortgage debt and extinguished the lien on plaintiff's equity of redemption. So that, when Campbell sold to Schmideke, he sold the life estate which he had foreclosed upon and purchased, and that alone. If the mortgage had been upon several tracts, the title to which was in several owners, and the action had been brought against one owner and as to his tract alone, if that tract sold for enough to pay the entire mortgage debt, the mortgage would be discharged as to all. We think that the effect in this case is the same.

The defendants assert that it was "the land itself" that was sold, and not the life estate, but this cannot be true. The interests alone of the parties to the suit were sold. To hold otherwise would be to deprive one of property without due process of law. The purchaser at a foreclosure sale must advise himself of the title he buys, and when the real owner of the fee is not made a party he cannot deprive him of any of his rights by the purchase. Schmideke took possession under the sheriff's deed, as he was entitled to do. Eugene Currier died October 17, 1901.

The defendants' estate and right of possession were contemporaneous with Currier's life, and died with him. This action in ejectment was begun nearly ten months before the death of Eugene Currier, and while the defendants were fully entitled to possession of the land. Proper service was had upon all the defendants except Walter Schmideke. As to him, the first service was quashed, and a new summons was served in 1906 after the termination of the life estate. The insanity of Carl Teske was suggested by amendment to the petition in 1905, and the cause revived in the name of Gustave Teske as his guardian. Since the action was begun as to all the defendants except Walter Schmideke during the life estate of Eugene Currier, the action was prematurely brought as to such other defendants. The court did not err in directing a verdict for such defendants. This, however, does not constitute a bar to an action brought within the statute of limitations to recover the possession of the land.

A number of other questions are discussed in the brief, and have been considered by the court, but under the conclusion reached it is unnecessary to notice them.

The judgment of the district court is affirmed as to all of the defendants except Walter Schmideke, without prejudice to a proper action to recover possession. As to Walter Schmideke, the judgment of the district court is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

REESE, C. J., and BARNES, J., not sitting.

IN RE PETER THOMPSEN.

C. R. MUNSON ET AL., APPELLANTS, V. PETER THOMPSEN, APPELLEE.

FILED APRIL 13, 1909. No. 15,498.

1. **Intoxicating Liquors:** LICENSE: PETITION. A freeholder otherwise qualified to sign a petition for a liquor license is not disqualified because he is not personally acquainted with the applicant, or does not know that he is a man of respectable character and standing in the community.

2. ———: APPLICATION FOR LICENSE: APPEAL. If a remonstrant appeals from an order of the excise board granting a saloon license, the district court is without authority in that proceeding to direct said board to reconvene and receive testimony that was offered by the remonstrant and excluded by said board.

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

Elmer E. Thomas, for appellants.

A. S. Ritchie and *Charles L. Fritscher, contra.*

ROOT, J.

Appeal from a judgment of the district court for Wayne county confirming the action of the city council of Wayne in granting one Thompsen a license to sell intoxicating liquors in said city. The license year has expired, so that as between the parties the only issue is the payment of costs. Counsel requests a consideration of but two questions.

1. Must the petitioners have personal knowledge that the applicant is a man of respectable character and standing in the community? Four only of the petitioners were acquainted with the applicant. The statute does not require the petitioners to have such knowledge. If the allegation in the petition with reference to character is not denied, the excise board will generally accept that statement as true; if traversed, the applicant, and not the

petitioners, must make the proof. Remonstrants have not cited any authority to sustain said proposition, and the point must be resolved against them.

2. Was it the duty of the district court in the appeal case to order the city council to reconvene and receive the evidence excluded by them? The attorneys for applicant and remonstrants signed an agreement that the city attorney should rule upon all objections to the introduction of evidence, and that the board would adopt such decisions. Remonstrants sought to prove that the applicant while the manager of a saloon the preceding year had sold intoxicating liquors to minors and to a confirmed drunkard. The testimony was excluded by the council on the ground, as the record recites, that the applicant was not a licensee the preceding year. The license was granted, and remonstrants filed notice of an appeal to the district court, and lodged therein a transcript of the proceedings had and evidence taken before the council. Remonstrants then moved the district court to reverse and remand the case, with instructions to the council to vacate the license because there was not any competent evidence in the record that Thompsen was a man of respectable character and standing in the community, and because but 4 of the 33 petitioners knew him. They also requested the court to reverse and remand said cause and command the council to reconvene and hear and reduce to writing all of the evidence offered by remonstrants and excluded by it. The motions were overruled, and the action of the council confirmed. The district court did not err in overruling the motion to compel the council to reconvene and hear the proffered testimony.

Upon an appeal the appellate court only reviews the final order upon the pleadings and the evidence admitted in the lower court. Errors committed in rejecting evidence must be corrected by other proceedings. *Battelle v. McIntosh*, 62 Neb. 647. The general proposition is well established, and the statute which authorizes an appeal in liquor license cases is emphatic that the appeal

shall be decided by the judge of the district court upon the evidence contained in the transcript, and none other. Section 4, ch. 50, Comp. St. 1907; *State v. Bonsfield,* 24 Neb. 517; *Livingston v. Corey,* 33 Neb. 366. It is likely that reference may be found in some cases decided since *Livingston v. Corey, supra,* to the effect that the board improperly excluded competent testimony, but in each instance, independent of those matters, there was sufficient in the record to sustain the action of this court. Counsel argue that *State v. McGuire,* 74 Neb. 769, and *State v. Board of Fire and Police Commissioners of Omaha,* 76 Neb. 741, changed the practice in this state, and entitled him to the relief demanded in the district court. The former case was mandamus to compel an excise board to reduce to writing the testimony taken before it in a liquor license case. It was held that the extraordinary writ would not issue for several reasons, one being that remonstrants had a plain, adequate and speedy remedy at law, that is, they could file a transcript of so much of the pleadings and proceedings before the excise board as they could obtain, and, if a complete record was not furnished, the district court by rule would compel the board to supply the deficiency. Section 28, ch. 19, Comp. St. 1907; *Worley v. Shong,* 35 Neb. 311. In the case of *State v. Board of Fire and Police Commissioners of Omaha, supra,* the district court, on the application of relator, had commanded the excise board to forthwith and without compensation furnish him 127 transcripts of evidence, taken in as many contests determined by them. The judgment of the district court was reversed, and it was again decided that mandamus was not necessary to secure remonstrants all of their rights on appeal, which were a truthful and certified transcript of the pleadings and evidence and of the rulings of the excise board. This court has never held that a remonstrant may appeal to the district court, and by the orders of that tribunal in that proceeding compel an excise board to reconvene and correct any errors committed in

the exclusion of evidence. The excise board acted arbitrarily in the instant case, and, if the offered testimony was true, Thompsen should not have been granted a license, but those errors could not be corrected on an appeal to the district court.

We have disposed of the two propositions argued in remonstrants' brief, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF EDWARD MCSHANE.

JOHN MCSHANE, APPELLANT, V. ESTATE OF EDWARD MCSHANE ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,608.

Appeal: JURISDICTION. The duty cast by statute upon a county judge to transmit to the clerk of the district court a transcript of the proceedings in county court in case of an appeal therefrom is a ministerial one, and, if he is induced by the advice of an attorney for appellant to delay such transfer beyond 40 days from the date of the order appealed from, the district court will not acquire jurisdiction of the case.

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

C. A. Kingsbury, M. H. Dodge and *Charles A. Dickson,* for appellant.

J. J. McCarthy and *John V. Pearson, contra.*

ROOT, J.

January 15, 1907, the county court of Dixon county disallowed certain items in a claim of John McShane against the estate of Edward McShane, deceased. The claimant that day gave written notice of his appeal from said order, and executed a bond, which was duly approved. The transcript was not filed till 44 days sub-

sequent to the making of said order. On the application of the representatives of said deceased, the appeal was dismissed. Claimant appeals.

The county judge testified, on the hearing of the application to dismiss the appeal, that he was advised by counsel for claimant that, if the transcript was filed with the clerk of the district court on or before the first day of the next succeeding term thereof, it would be in time; that he did not at that time know that the transcript should be filed within 40 days subsequent to the entry of the judgment, but relied on said attorney's advice, and filed the transcript accordingly. The attorneys for claimant each made an affidavit contradicting the county judge, and were corroborated by claimant's affidavit. The court found, as a matter of fact, that the judge did thus rely on counsel, and was not guilty of any laches in the premises. The finding of the court must be sustained unless clearly wrong upon the evidence. The record discloses that two of the affiants at least were in court, but were not cross-examined. We cannot say that the district court was not justified in accepting the evidence of the county judge, who was cross-examined and sustained himself upon that subject, rather than to take the statements in the *ex parte* affidavits as true. In *Drexel v. Reed,* 65 Neb. 231, 69 Neb. 468, we held that, if a party had not waived his right to have the county judge transmit to the district court the transcript on appeal, the laches of that official would not deprive the litigant of his day in district court. In the instant case, applying the law to the findings of the court, the delay of the county judge was the delay of the claimant. The duty to transmit a transcript is ministerial, and one that the county judge may discharge according to the advice, and at the risk, of the litigant interested.

The judgment of the district court on the findings is right, and will be

AFFIRMED.

JOHN M. FARRELL, APPELLANT, V. FARMERS AND MERCHANTS INSURANCE COMPANY, APPELLEE.

FILED APRIL 13, 1909. No. 15,657.

1. **Insurance:** POLICY: CONSTRUCTION. That part of an insurance policy relating to proofs of loss should be construed with great liberality.

2. ———: PROOF OF LOSS: WAIVER. An agent of an insurance company charged with the duty of adjusting its losses has authority to waive the giving of notice and proof of loss.

3. ———: ———: ———: ESTOPPEL. And if such an adjuster, after property covered by a policy of insurance issued by his principal has been destroyed by fire, goes to the scene of the conflagration, and informs an agent of the assured, who was directed to look after an adjustment of said loss, that said loss is total, and the company will be compelled to pay it, and that, if the policy holder were present, they would have no trouble in settling, such conduct and statement, if the assured relies thereon, amount to a waiver on the part of the company of notice and proof of loss, and will estop it from insisting on a forefeiture based upon the nonreceipt of such notice and proof.

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

Starr & Reeder, for appellant.

Cordeal & McCarl and *A. L. Chase, contra.*

ROOT, J.

Plaintiff appeals from a judgment against him in a suit on a fire insurance policy. Defense that plaintiff did not make proof of loss as required by said contract. Replication that notice was given, that defendant waived such proof, and is estopped to make said defense.

The jury, in conformity with the court's instruction, returned a verdict in favor of defendant. We must therefore give the evidence a liberal construction in plaintiff's favor. The evidence discloses that the policy was issued through a Mr. Berry, defendant's recording agent at Mc-

Cook, and the premium paid. During the life of the policy the property insured was totally destroyed by a fire which originated in a store building in the same block, but not adjoining plaintiff's building. The following day plaintiff told Berry, who was still defendant's agent, that the building had been burned, and asked him what he (plaintiff) should do. Berry answered that nothing further was necessary, that he would write to the company and within a short time an adjuster would settle with plaintiff. Berry immediately notified the company at its home office on blanks furnished him for that purpose, and about 20 days thereafter an adjuster appeared and settled other losses resulting from said fire. Plaintiff was absent from town, and the adjuster did not see him, but did see and talk with a Mr. Booth, who had been authorized by plaintiff to attend to said business. The adjuster told Booth that the loss was total, and, if plaintiff were present, they would have no trouble in settling. Berry told plaintiff that the adjuster said that he had been to Lebanon where the loss occurred, that plaintiff was not at home, and that a settlement was not made, but that, if Farrell had been there, a settlement would have been made. Defendant asserts that the authority of this adjuster was not shown, but the record discloses that Mr. Lawler, said adjuster, and Mr. Funkhouser, the secretary of defendant, were present at the trial of this case; that the secretary was charged with the duty of attending to the settlement of losses, and had told a representative of plaintiff that Lawler had been sent out to adjust the losses resulting from said fire, and that the reason plaintiff's loss was not adjusted by said agent was because plaintiff was not at Lebanon at that time; so it may safely be assumed that Lawler had full authority to adjust and settle said loss. Berry further testified that plaintiff frequently spoke to him about said loss, and that the witness would invariably say that the adjuster would be out and adjust it. The policy provides that, "in any matter relating to this insurance, no person, unless duly

authorized in writing, shall be deemed the agent of this company"; that the making and delivery of said proof of loss in writing within 60 days after the fire shall be a condition precedent to the maintenance of any action upon the policy, and failure to make or deliver said proof within said period shall discharge the company from all liability, and further, "this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added hereto, and no privilege or permission affecting the insurance under this policy shall exist or be claimed by the insured unless so written or attached."

Defendant argues that Berry did not have authority to waive any condition in the policy, and that his assurance to plaintiff that notice to said agent was sufficient, and that the loss would be paid, did not bind the company. In *Continental Ins. Co. v. Lippold,* 3 Neb. 391, we held that that part of an insurance policy relating to preliminary proofs and notice should be construed with great liberality. In *Union Ins. Co. v. Barwick,* 36 Neb. 223, Mr. Chief Justice MAXWELL, speaking for the court, said: "A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof." It is argued with great learning, and many authorities are cited to sustain the proposition, that a local agent whose duties are confined to securing risks, issuing policies and collecting and remitting premiums is not clothed with power to waive a condition precedent to be complied with subsequent to a fire. There is respectable authority to the contrary. *Nickell v. Phœnix Ins. Co.,* 144 Mo. 420, 46 S. W. 435. Plaintiff's right to recover in this action does not depend entirely upon Berry's authority, or lack of authority, but rather upon the conduct of defendant and the statements made by the adjuster. In *Home Fire Ins. Co. v. Kuhlman,* 58

Neb. 488, it was held that an agent of a corporation acting within the scope of his authority may by his declarations and conduct waive his principal's right to take advantage of a forfeiture, and that such an inference may be drawn from any declaration or conduct on the part of the agent which fairly indicates that the principal has, with full knowledge of the facts, elected to treat the policy as a subsisting obligation. And in *Northern Assurance Co. v. Hanna,* 60 Neb. 29, it was held that a stipulation that suit should not be commenced until 60 days after full compliance by the assured with the requirements of the policy was intended to give the insurer time to inquire into the cause of loss and make provision for payment. In *Phenix Ins. Co. v. Rad Bila Hora Lodge,* 41 Neb. 21, we held that, although a policy provided that an action could not be maintained thereon unless commenced within six months after loss, yet, if the company's agents led the assured to believe that his claim would be paid without suit, and thereby caused him to delay action until after that period of time, the company would be estopped from maintaining such defense. See, also, *Allemania Fire Ins. Co. v. Peck,* 133 Ill. 220; *Bonnert v. Pennsylvania Ins. Co.,* 129 Pa. St. 558; *Thompson v. Phenix Ins. Co.,* 136 U. S. 287.

We do not think it important for a solution of the instant case to inquire whether the adjuster's authority was in writing. The scope of his employment was such that the assured would be justified in relying on his statements concerning a settlement of the loss. The evidence discloses that the adjuster was acting generally in that line, and the court should have permitted plaintiff to prove that said agent settled with other policy holders whose property was destroyed by said fire, and who had not made proof of loss. Although the 60 days within which plaintiff might make proof of loss had not expired when the adjuster visited Lebanon so that he did not waive any absolute and completed right to forfeit the policy, still plaintiff had a right to believe from what was said,

and the adjuster the authority to induce the belief, that the company was satisfied with the notice given and proofs. It was a question of fact for the jury to determine whether, under all the facts and circumstances of this case, defendant had waived proof of loss in the manner and within the time provided by the policy.

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

REVERSED.

GEORGE B. PETERSON V. STATE OF NEBRASKA.

FILED APRIL 13, 1909. No. 16,028.

1. **Incest:** DECLARATIONS: COMPETENCY. Where a defendant is being tried for incest, the declarations of the prosecutrix, made in his absence, concerning an alleged criminal intercourse with him in a county other than the one wherein he is being tried, are incompetent, and, if received over defendant's objections, entitle him to a new trial.
2. **Criminal Law:** INSTRUCTIONS. Where the defendant in a criminal case has testified in his own behalf, and the court has given a proper instruction concerning the credibility of the witnesses generally, it is not proper in another instruction to state, "neither is the jury bound to blindly receive the testimony of the defendant as true."

ERROR to the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed.*

J. L. McPheely, for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

ROOT, J.

Plaintiff in error, who will hereafter be referred to as the defendant, was convicted of violating section 204 of the criminal code, and appeals to this court.

1. The venue of the alleged crime is Kearney county. The state, over defendant's objection, was permitted to prove by a Mrs. Parrish that, some years preceding the commission of the offense for which defendant was convicted, his daughter, the prosecutrix, told the witness in Johnson county, in the absence of defendant, that her father had been criminally intimate with her in the latter county. The daughter had also testified to such intercourse. The state, in justification of the ruling of the trial court, invokes two well-known rules of law: First, that, in prosecutions of this character, it is competent to show criminal intercourse between the prosecutrix and defendant anterior to the act for which he is being tried; and the other that, in cases of rape, the prosecutrix may be corroborated as to the main fact by proof of her declarations concerning the offense. But no authority has been cited, and we suspect none can be found, to show that the prosecutrix' declarations, made in the absence of defendant, may be received in a prosecution for incest to corroborate her testimony concerning a fact which in itself merely tended to prove defendant's adulterous disposition toward her. Such evidence has been adjudged incompetent in *State v. De Masters,* 15 S. Dak. 580; *Poyner v. State,* 40 Tex. Cr. Rep. 640, 51 S. W. 376; *Clark v. State,* 39 Tex. Cr. Rep. 179, 73 Am. St. Rep. 918. Not only was the testimony incompetent, but it was prejudicial, and well calculated to inflame the passions of the jury.

2. We are of opinion, furthermore, that some of defendant's criticisms of the instructions given are not without merit, although we are not inclined to reverse the case because of such errors alone. The court gave instruction numbered 1, requested by defendant, which fairly submitted to the jury the credibility of all of the witnesses, including that of defendant, who testified in his own behalf. In addition, instruction designated "D," given by the court, specially instructed the jurors to consider defendant's interest in the result of the suit, and cautioned them, "neither is the jury bound to blindly re-

ceive the testimony of the defendant as true." The instruction gave undue prominence to the fact that defendant's interest might induce him to testify falsely. *Burk v. State,* 79 Neb. 241. Instructions numbered 5, 10, and 11 might well have been omitted, and instruction numbered 8, so modified as to permit the jury to say whether certain facts, if proved, were corroborative or not. The instructions concerning a reasonable doubt were given at defendant's instance, and therefore he will not be heard to complain thereof. It might be well, however, to trust jurors to use their own good sense in applying the term "reasonable doubt," whereby the trial and appellate court would be spared much labor, and the jury some confusion.

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

REVERSED.

MARY BUTLER, APPELLANT, V. BANKS M. SMITH ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,363.

1. **Mortgages:** CONSTRUCTIVE SERVICE: NAMES. For the purpose of giving constructive notice to a defendant in a suit to foreclose a mortgage, where he is not sued on a written instrument signed by himself, his legal name includes his first Christian name and surname.

2. ———: ———: DECREE: VALIDITY. Foreclosure of a mortgage does not divest the title of a nonresident defendant who was sued by the initial letters of his name, there being no personal service of summons upon him or appearance in his behalf, and the record showing that he did not sign the mortgage or the note secured thereby.

3. **Limitation of Actions:** PLEADING: AMENDMENT. Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem.

4. **Adverse Possession:** UNIMPROVED LAND. Unimproved and unoccupied land is deemed to be in possession of the holder of the legal title.

5. ———: EVIDENCE. Title by adverse possession is not established, unless the proof shows actual, exclusive and continuous possession under claim of ownership for the full statutory period of ten years.

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

M. F. Harrington and *W. R. Butler,* for appellant.

J. F. Greene and *W. A. Meserve, contra.*

ROSE, J.

The subject matter of litigation in this suit is 640 acres of land in Knox county. Both parties claim title. When Clement L. Boon was the undisputed owner, he conveyed the land and 160 acres more to Ellis W. Wall January 1, 1890. Eight days later the grantee and his wife mortgaged the entire tract of 800 acres to Pierce, Wright & Company for $2,850, and by deed, dated January 11, 1890, reconveyed it to Boon, subject to the incumbrance thus created. Boon did not pay the taxes, interest, or the mortgage, but left the state a year or two later, and never returned. September 28, 1903, Boon executed and delivered to Paul Butler a quitclaim deed to the premises, and the latter's interest was transferred to plaintiff March 7, 1904. In the meantime Henry H. Drake became the owner of the mortgage, brought suit March 1, 1894, to foreclose his lien, procured a decree of foreclosure, bought the land August 18, 1894, at judicial sale thereunder, which was confirmed September 25, 1894, and received April 27, 1895, a sheriff's deed to the entire tract of 800 acres. Through mesne conveyances from Drake, defendants claim title to the 640 acres in controversy and are now in possession thereof. Plaintiff instituted a suit in ejectment against them March 11, 1905, for the realty

in dispute. In their answer defendants pleaded the mortgage described, an assignment to Drake, nonpayment, foreclosure, a judicial sale, the sheriff's deed, title in themselves through mesne conveyances from Drake, and adverse possession for ten years. After the court acquired jurisdiction in the ejectment suit, plaintiff was permitted to amend her petition by changing the form of action to a suit to redeem the land and to require defendants to account for rents and profits. If plaintiff has any right to redeem, it rests on the quitclaim deed from Boon and the conveyance from Boon's grantee to plaintiff. Defendants have no title, unless it is derived from the sheriff's deed to Drake, or acquired by adverse possession. The trial resulted in a decree for defendants. The suit was dismissed, and plaintiff appeals.

The trial court held that Boon's title was divested and the right to redeem terminated by the foreclosure of the mortgage. Plaintiff insists that this holding was erroneous, and that the foreclosure proceedings were void for the following reasons: Boone did not sign the mortgage or the notes secured. He was sued by the initial letters of his name. There was no notice except by publication. The verification in Drake's petition did not state that he could not discover Boon's true name, and neither the summons nor notice contained the words "real name unknown," as required by section 148 of the code. The title to the land described in Drake's petition stood on the public records in the name of Clement L. Boon. On these facts plaintiff argues that the district court had no jurisdiction to bar her equity of redemption, and that the sheriff's deed was void. In an effort to meet this attack on the foreclosure proceedings, defendants adduced proof in the present case to show that in the name of "C. L. Boon" he transacted business, accepted deeds, transferred realty, and acted in the capacity of deputy county clerk and of notary public. It is insisted by defendants that these facts show he was sued by his true name. They have argued this point at some length, and have referred

to a number of cases in support of their contention. Their view of the law, however, cannot be accepted as applicable to the present controversy. Statutes creating a method for bringing a defendant into court without personal service are strictly construed, where actual notice may never reach him. *Stull v. Masilonka,* 74 Neb. 322. For the purpose of constructive notice under the statutes of this state, in a case where defendant is not sued on a written instrument signed by himself, the legal name of a defendant includes his first Christian name and surname or patronymic. *Enewold v. Olsen,* 39 Neb. 59. Not having been so described as a defendant, Boon's title was not divested by the foreclosure proceedings, since he was not personally served with notice, did not appear in the case, and did not sign the mortgage or notes secured by the name of C. L. Boon or by any other name. *Herbage v. McKee,* 82 Neb. 354; *Enewold v. Olsen,* 39 Neb. 59. The law required personal service, when Boon was not sued by his true name. He was protected by that law. The fatal defect deprived the court of jurisdiction to bar his right of redemption. In the present suit the law was not abrogated, nor jurisdiction restored in the foreclosure proceeding by proof that Drake sued him by the initial letters used by himself and by which he was known in the community. It follows that the title of defendants fails, in so far as it rests on the sheriff's deed to Drake.

Plaintiff also complains of the trial court's ruling that defendants have title to the land by adverse possession. The objection to this finding is that there is no evidence to support it. Plaintiff commenced her action in ejectment March 11, 1905. Summons was issued the same day, and afterwards returned with the appearance of each of the defendants indorsed thereon. She takes the position that the running of the statute of limitations against her cause of action was arrested March 11, 1905, when the summons was issued. Defendants insist that the ejectment suit was abandoned, and by reason thereof the

statute of limitations continued to run until her action to redeem was barred at a later date. The question thus presented is not an open one in this state. Under both petitions plaintiff asked the court to protect her title, and the changing of the form of action did not delay the assertion of her rights until she filed in the ejectment suit her amended petition to redeem the land. Defendants having waived service of summons in ejectment, the running of the statute of limitations was arrested when it was issued March 11, 1905. In *McKeighan v. Hopkins,* 19 Neb. 33, plaintiff by amendment of his petition changed the form of his action from ejectment to a suit to redeem, and this court, in an opinion delivered by Chief Justice MAXWELL, held that the statute of limitations ceased to run from the date of the summons in ejectment, saying: "The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition filed by him by leave of court he seeks to recover the land in question upon the ground that he is the owner of the same, but while asking equity he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitation ceased to run when the summons which was served on him was issued."

To establish title by adverse possession, it was therefore necessary for defendants to show that Drake took actual and exclusive possession of the premises as early as March 11, 1895. *Clark v. Hannafeldt,* 79 Neb. 566. Drake's action in attempting to enforce his mortgage against the real estate was inconsistent with his claim of title by adverse possession. *McKeighan v. Hopkins,* 19 Neb. 33. He received the sheriff's deed through which defendants claim title as late as April 27, 1895, and ten years had not elapsed March 11, 1905, when plaintiff's ejectment suit arrested the running of the statute of limitations. There is evidence that Drake and his gran-

tees did not have exclusive occupancy for the statutory period; that the land was never cultivated after 1890; and that it was open territory or commons, where cattle ran at large, as late as May 24, 1895. Unimproved and unoccupied land is presumed to be in possession of the person holding the legal title. *Herbage v. McKee,* 82 Neb. 354; *Yorgensen v. Yorgensen,* 6 Neb. 383; *Troxell v. Johnson,* 52 Neb. 46. There is no pretense that Drake ever made a personal effort to take possession of the premises. Defendants rely chiefly on the testimony of E. D. Wigton to establish title by adverse possession. Wigton lived in Sioux City, Iowa, and was Drake's attorney. For a time John Green was lessee and Robert Peyton was local agent under Wigton's directions. Wigton testified that he came over from Iowa and went out to the land in the summer or fall of 1893. When asked what he did upon that occasion with reference to taking possession, he answered: "I viewed the land, and it was particularly pointed out to me by a Mr. Green who had been using it for grazing purposes; and I informed Mr. Green that I represented the man who held the mortgage against the the land, and that the interest on the mortgage and taxes were delinquent, and that I had charge of the land for my client, and instructed him that the rents hereafter would be payable to my client; Mr. Boon and Mr. Wall both being out of the country, and unable to reach them by any usual process." Wigton further stated that on behalf of Drake he declared himself to be in possession of all the land described in the mortgage, and claimed the same against all the world; that he actually took possession openly and notoriously under claim of ownership; that Green was pasturing the land at the time, and was instructed to make settlement with Peyton, and that Green agreed to recognize Drake as landlord. Wigton also testified that he afterwards saw the land on two different occasions. Green stated that he never rented the land from Wigton, and never paid any rent except to Peyton. Pey-

ton said he never leased the land to any one before May 24, 1895, and that the first rent received was for the period between May 24, 1895, and January 1, 1896. The lease is in the record. It is dated May 24, 1895, expired January 1, 1896, and is signed by Green and Peyton. In a letter dated May 17, 1895, Wigton wrote Peyton as follows: "We have arranged to take legal steps, if necessary, to disabuse Mr. Green of his idea in regard to control of the land. * * * It might be Green would rent land, but he must first get the idea of his right to the land out of his head." In a letter dated May 22, 1895, Wigton wrote Peyton further: "You may rent the land to Green for pasturage for $40 cash, lease to run to January 1, 1896. Sign lease 'Henry H. Drake' by you as agent, and have it distinctly understood therein that Green acknowledges Drake's ownership, and that he will give possesssion without further trouble January 1. Green's claim to the land is entirely without foundation, even if he had rented it from some other party, as the sheriff's deed entitled Drake to possession." Wigton's testimony that he viewed the land, and his conclusion that he took possession for Drake, when considered with his letters and the entire record, fail to show actual and exclusive possession under claim of ownership prior to May 24, 1895. From that date ten years did not elapse before plaintiff brought her ejectment suit March 11, 1905. Defendant's testimony has been carefully considered, and is found to be wholly insufficient to establish title by adverse possession for the full statutory period.

Delay on the part of plaintiff in bringing her suit is also urged to defeat her recovery, but the rule in this state is that an action to redeem may be brought at any time before the statutory bar of ten years is complete. *Dickson v. Stewart,* 71 Neb. 424.

For the reasons given, the decree of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MARY BUTLER, APPELLANT, V. MARY E. SECRIST ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,362.

1. Trial: CONSOLIDATION OF SUITS. A court of equity has inherent power to consolidate suits for the purposes of trial.

2. Appeal: DISCRETION OF COURT. An order overruling a motion by plaintiff to consolidate cases for trial will not be reversed on appeal, except for an abuse of discretion.

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

M. F. Harrington and *W. R. Butler,* for appellant.

J. F. Greene and *W. A. Meserve, contra.*

ROSE, J.

This is a suit in equity to redeem 80 acres of land in Knox county from the lien of a mortgage. The real estate in controversy is part of the 800-acre tract involved in the foreclosure proceedings described in *Butler v. Smith, ante,* p. 78. The issues and facts are substantially the same in both cases, except that the defendants are different and claim title to separate parts of the original tract. From a decree dismissing her action plaintiff appeals.

Plaintiff brought a separate suit in ejectment for each piece of land. Afterwards by amendment of her petition she changed the actions to suits to redeem. In the amended form the purpose of the litigation was to redeem two separate pieces of land in possession of different defendants from the lien of a single mortgage. In this condition of the controversy plaintiff moved the court to consolidate the actions. The motion was overruled, and the ruling is assigned as error. Section 150 of the code permits the consolidation of actions on motion of the defendant, but makes no reference to such procedure on behalf of the plaintiff, who is the party having the right

to choose the form of action, name the defendants, and amend the petition, or dimiss the suit and pursue a different remedy. A court of equity, however, in absence of statute, has inherent power in regulating its procedure to unite suits for trial, and, where such practice is not authorized by statute, an order allowing or denying consolidation should not be reversed on appeal, except for a palpable abuse of discretion. 8 Cyc. 592, 593. The records in the present cases do not show such an abuse of discretion as to require a reversal on that ground, but, for the errors pointed out in the opinion in the preceding case, the judgment below in this case is reversed and the cause remanded for further proceedings.

REVERSED.

R. G. STRONG, APPELLEE, V. THURSTON COUNTY, APPELLANT.

FILED APRIL 13, 1909. No. 15,588.

1. **Counties:** CLAIMS: ALLOWANCE: ACTION. A former county attorney who has been deprived of his salary and office rent for a number of years through mismanagement of county affairs or misapplication of county funds may sue the county in the district court to recover the amount due him on claims allowed by the county board, where there is no fund available for their payment.

2. ———: ACTION ON CLAIMS: ESTOPPEL. Failure of a county attorney to institute proceedings to abolish a fiscal system through which county business was mismanaged and payment of his allowed claims for salary delayed does not estop him from asserting his right to judgment for the amount due.

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

Hiram Chase and *Howard Saxton,* for appellant.

R. G. Strong and *J. M. Curry, contra.*

ROSE, J.

This is a suit by a former county attorney of Thurston county to recover salary and office rent. His claims were duly allowed by the county board, but have not been paid, and warrants on the county treasurer to pay them have never been issued. The action is based on the allowed claims. It will only be necessary to discuss two questions raised by the answer. They are as follows: (1) An original action to recover judgment against a county on claims allowed by the county board cannot be maintained. (2) Recovery on plaintiff's cause of action is defeated by estoppel. To these and other technical defenses pleaded in the answer, plaintiff filed a demurrer, which was sustained. Defendant refused to plead further, and judgment was rendered in favor of plaintiff for $701.95. Defendant appeals.

1. Defendant argues that authority to sue a county in the district court on allowed claims has not been granted by statute, and does not exist. It is also argued that orders of a county board in allowing claims are equivalent to judgments, are final, when not questioned by appeal, and that matters involved therein cannot be relitigated in an original action in the district court. These propositions are earnestly presented, but the doctrines invoked are at variance with former holdings of this court. The owner of a valid claim against a county has statutory authority to bring suit thereon in any court of competent jurisdiction, where he is not required to present it to the county board in the first instance. Comp. St. 1907, ch. 18, art. I, sec. 20; *Ayres v. Thurston County,* 63 Neb. 96. In the present case plaintiff was not required to present his allowed claims to the county board. They had already been presented and allowed, and under the statute cited, he had authority to bring in the district court an original suit thereon. He could not appeal from the county board, because the orders were entered in his favor for the full amount of his claims. A county board which exhausts

current funds, allows a claim in full, fails to issue a warrant therefor, and refuses to pay the claim cannot by that means close the doors of the courts against the claimant and prevent him from recovering a judgment for the amount due. A county may be sued on an unpaid county warrant. *Ayres v. Thurston County,* 63 Neb. 96; *Thurston County v. McIntyre,* 75 Neb. 335. The right to maintain a suit on an unpaid claim allowed by the county board rests on the same ground and is conferred by the statute cited. It would not change the result to regard the allowed claims as judgments, since in this state an action may be maintained on a domestic judgment. *Eldredge v. Aultman, Miller & Co.,* 35 Neb. 884. The district court did not err in entertaining jurisdiction.

2. During plaintiff's incumbency as county attorney of Thurston county the tax levies, when kept within the limits fixed by the constitution, were insufficient to pay the running expenses of the county. In this connection it is alleged in the answer that the county board and county treasurer inaugurated for the management of county affairs an unlawful system. Instead of applying to current expenses the funds arising from the annual levy, the revenue was applied to the payment of expenses incurred during previous years. Under this system claims were paid in the order presented. The indebtedness increased year by year and eventually resulted in postponing the payment of all claims for several years from the time they were allowed. It is also stated in the answer that plaintiff acquiesced in the system described, took no action to abolish it, neglected to demand warrants for his salary, and made no effort to require the county treasurer to pay his claims out of the annual levies. Plaintiff's conduct, both official and private, is pleaded as an estoppel to prevent a recovery.

The fiscal management of the county was under the control of the county board and county treasurer. There is nothing in the answer to show that the county attorney ever advised them to adopt or carry out the system de-

nounced, or that he was ever consulted on that subject. His failure as county attorney to abolish by litigation a fiscal system which temporarily deprived him of his compensation in the interests of creditors having prior claims did not forfeit his salary or estop him from claiming it as an individual. Plaintiff as county attorney did not use his office to procure a preference in the payment of his claims, but awaited his turn like other claimants. There is no pretense that his allowed claims were fraudulent, unjust or illegal. It is not contended that they have been paid. No fact or circumstance which precludes plaintiff from recovering judgment on his claims has been shown by the answer, and the defense of estoppel is wholly without merit.

Other technical defenses are urged, but there is no error in the record, and the judgment is

AFFIRMED.

MEYER-CORD COMPANY, APPELLANT, V. CHARLES E. HILL ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,530.

1. **Corporations:** DUTY TO FILE ARTICLES. Corporations formed for the purpose of engaging in the business of manufacturing are governed by section 37, ch. 16, Comp. St. 1905.
2. ———. ———. And, in such a case, the law does not require that their articles of incorporation shall be filed with the county clerk in the county where their headquarters are located.

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

Mockett & Mattley, for appellant.

Burr & Marlay, contra.

FAWCETT, J.

From plaintiff's brief we obtain this statement: "On or about April 15, 1905, defendants associated themselves

together for the purpose of forming a corporation for the manufacture of a talking machine known as the 'Duplexophone.' The said defendants pretended to organize what was known as the 'Duplexophone Company.' Said company never filed articles of incorporation in the county clerk's office of Lancaster county, Nebraska, where their principal place of business was located, as required by the statutes of the state of Nebraska, before they could become a body corporate. The plaintiff made sales to the said Duplexophone Company in the sum of $1,206.62, and asked judgment against the parties pretending to organize said corporation as partners or as individually liable. To this the defendants demurred. The court below sustained the demurrer and dismissed plaintiff's cause of action, and adjudged costs against plaintiff, and plaintiff elected to stand on its petition. The only question presented by the record and appeal is: Are the defendants below individually liable by reason of the failure of the parties interested in said pretended corporation to file their articles of incorporation in the county clerk's office of Lancaster county, Nebraska?"

This succinct statement of the case and of the only issue to be determined obviates the necessity of setting out the petition in this opinion. We will therefore consider only the one question presented by plaintiff in its brief, assuming that it is the only question covered by the petition. Plaintiff bases its right to hold the defendants personally liable for the debts of the corporation which they attempted to form under the name of the "Duplexophone Company" under section 126, ch. 16, Comp. St. 1905, which reads as follows: "Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them filed in the office of the secretary of state and recorded in a book kept for that purpose, and domestic corporations must also file with the county clerk in the county where their headquarters are located."

We think this case is controlled by section 37, ch. 16, and not by section 126 above quoted. Under plaintiff's allegation that "defendants associated themselves together for the purpose of forming a corporation for the manufacture of a talking machine," it is evident that defendants were incorporating a manufacturing company under the special provisions of section 37, and not a corporation for general business purposes, as contemplated by sections 123 to 126, inclusive. Section 37 provides: "Whenever any number of persons associate themselves together for the purpose of engaging in the business of manufacturing, they shall, under their hands and seals, make a certificate, specifying the amount of capital stock necessary, the amount of each share, the name of the place where such manufacturing establishment shall be located, and the name and style by which such company shall be known; said certificate shall be acknowledged, certified, and forwarded to the secretary of the state, and by him be recorded and copied; and when so incorporated, they are hereby authorized to carry on the manufacturing operations named in said certificate of incorporation, and by the name and style provided in said certificate, shall be deemed a body corporate with succession, and they and their associates, successors, and assigns shall have the same general corporate powers as are conferred in this chapter upon bridge companies, and subject to all the restrictions hereafter provided." In *Bolton v. Nebraska Chicory Co.*, 69 Neb. 681, the corporation was organized to "plant, harvest, store, purchase, manufacture, sell and deal in chicory." To the action, upon a subscription to stock, the defense was interposed that the company was not a manufacturing corporation within the purview of section 37, ch. 16; but we held otherwise. In the opinion we said: "The statute here in question was obviously designed to encourage the promotion of manufacturing enterprises of all kinds, in the widest sense, by relaxing the rules as to organization. There is every reason for giving it a liberal construction, and no fraud can result

from so doing." Plaintiff bases its right to recover against the incorporators individually because they never filed their articles of incorporation "in the county clerk's office of Lancaster county, Nebraska." No such duty was required of them. Plaintiff's only contention being without foundation, its appeal must fail.

The judgment of the district court is right, and is

AFFIRMED.

JOHN FISHER, APPELLEE, V. CHARLES W. CHAMBERS, EXECUTOR, APPELLANT.

FILED APRIL 13, 1909. No. 15,634.

Appeal: EVIDENCE. "Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of want of sufficient evidence to support it unless the want is so great as to show that the verdict is manifestly wrong." *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529.

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

Strode & Strode, for appellant.

R. D. Stearns and *J. C. McNerney, contra.*

FAWCETT, J.

This action was brought in the district court for Lancaster county to recover for personal injuries sustained by being crushed in a freight elevator in the livery barn of defendant. The petition alleges the negligence of defendant's servants, and particularly of defendant's foreman, as the cause of said injury. The answer denies any negligence on defendant's part, alleges that the accident was the result of plaintiff's negligence, that at the time of the injuries complained of plaintiff was at defendant's place of business without invitation from the defendant,

and without defendant's knowledge or consent, and that plaintiff assumed the risk of injury in the work in which he was engaged at the time he received the injuries complained of. The reply is a general denial.

The evidence shows substantially that defendant was the proprietor of a livery barn in the city of Lincoln; that the Anheuser-Busch Brewing Association, one of defendant's patrons, was in the habit of keeping one of its heavy delivery wagons in defendant's barn; that on the evening before the accident the driver of the delivery wagon notified plaintiff's employer that one of the wheels needed repairing and was advised that the repairs would be made by 9 o'clock the next morning. About 7 o'clock in the morning plaintiff, by direction of his employer, went to defendant's barn for the purpose of getting the wheel. The evidence as to what occurred after plaintiff arrived at the barn is conflicting. Plaintiff testified that he spoke to the foreman of the barn and requested him to assist in getting the wheel from the wagon; that the foreman at first refused, and plaintiff started away, whereupon the foreman called him back, and then the foreman and one or more other employees of defendant engaged with plaintiff in the work of removing the wheel from the wagon; that it was a heavy wagon, weighing about 2,000 pounds. The wagon was kept on the ground floor of the barn. When brought in in the evening, they would run it into its regular position for the night. In doing so, they always attempted to run the wagon as near to the freight elevator shaft as possible, in fact, running it just close enough so that the hubs of the wagon would not strike the elevator. On the morning in question it appears to have been standing within 6 to 18 inches of the elevator. We think the evidence clearly shows that the wagon was so near the elevator that it was impossible to remove the wheel without standing on the floor of the elevator shaft. Plaintiff testifies that, in connection with defendant's foreman and such other employees, they obtained boxes to push under the axle after it had been lifted by a jack so that

the wheel could be removed; that defendant's servants had obtained the jack, and defendant's foreman and one other employee were standing, holding the lever of the jack ready to lift the wagon so that plaintiff could push the boxes under; that, in order to get into position to do this, it was necessary for plaintiff to stand upon the elevator space; that before doing so he asked defendant's foreman if it was safe to stand there, and was assured that it was; that the question was asked a second time, and again he was assured that it was perfectly safe for him to step in there; that he stepped in, and while standing on the floor of the elevator shaft, and leaning forward for the purpose of manipulating the boxes, the elevator came down upon him; that, when the elevator struck him, he yelled and fell upon his face, and that the elevator still descended and crushed him badly. He denies having seen the elevator passing up or down during the time he was in the barn. Defendant's foreman testified that, when plaintiff came there and asked him to help take the wheel off the wagon, he told plaintiff that he would do so as soon as he got the horses hitched up; that he had a number of horses on the floor all ready for hitching; that plaintiff said he must have the wheel at once; that he, the foreman, declined to help him, and that thereupon plaintiff set to work himself to try and get the wheel off the wagon; that neither he nor any of the men under him took any part in assisting plaintiff to remove the wheel and were no near him at the time he was struck by the elevator. The man who was running the elevator testified that, after plaintiff got there and was standing near the wagon, he went up with the elevator to the floor above, in full view of plaintiff, loaded two buggies on the elevator, brought them down to the lower floor and unloaded them, and again ascended to the floor above for another load; that, when he went up the second time, plaintiff was standing within ten feet of the elevator shaft, within full view; that he loaded on some more buggies and started down the second time; that as he approached the ground floor he

heard plaintiff "holler," and that he immediately stopped and reversed his elevator.

There was a trial to a jury, and a verdict and judgment for plaintiff. Defendant rests his claim for reversal upon the one ground that the verdict and judgment are not sustained by sufficient evidence, and that therefore the court erred in overruling defendant's motion for a new trial. Defendant argues that, under the testimony as above outlined, the verdict of the jury cannot be sustained; that plaintiff is contradicted and his testimony destroyed by the testimony of the two witnesses for defendant, above referred to, and that plaintiff's testimony is entirely without corroboration.

We are unable to concur in this view of the case. A further reference to the testimony will show that plaintiff is in fact corroborated by both of defendant's witnesses, while each of defendant's witnesses, to a certain extent, contradicts the other. For instance, defendant's foreman denies that he or his employees under him took any part in assisting plaintiff in his efforts to remove the wheel, yet the elevator man testifies that, when his elevator struck the plaintiff, Smith (the foreman) had gone "to get something to jack the wagon up with." "Q. How do you know? A. When I came down with the first load of buggies, they was talking about getting something to lift it up with." Again he testifies: "Q. You knew Smith was getting a jack to jack it up to get it out of there? A. Yes, sir. Q. Did you hear them talk about what they were jacking it up for? A. Yes, sir. Q. What did they say they were jacking it up for? A. To get the wheel off. Q. At the time you were running the elevator? A. Yes, sir." This testimony of the elevator man strongly corroborates the testimony of plaintiff that Smith and the other employees were assisting plaintiff in the work in which he was engaged, just as plaintiff claims. Turning to Smith's testimony on the question as to whether or not the elevator had been going up and down with buggies while plaintiff was there, we have the following: "Q. Did

you notice the elevator coming down just before he called? A. No, sir; I did not. Q. Did you notice the elevator go up that morning? A. No, sir. Q. Did you notice buggies being taken up or down? A. I did not notice any buggies going up and down when he was under it. Q. Were there any buggies on the elevator at the time he got crushed? A. I could not say now whether there was or not. Q. What buggies were you hitching to? A. Single rigs. Q. Were they rigs that were up or down below in the barn? A. We had them all down before he came. Q. You were not taking down any buggies at that time? A. No, sir. Q. Had not been for some time? A. No, sir. Q. The elevator was not running up and down, was it? A. No; not then at the present time. Q. No; there was no buggies to take down then? A. No; I guess there was not. Q. They were all down, what you were hitching to? A. All down, what I wanted to hitch to. Q. You did not want any more to come down then? A. I could not say whether they had any more to come down right then or not. Q. But there wasn't any coming down at that time? A. I do not think there was. Q. Had there been, you would have known of it at that time? A. You bet I would." This evidence strongly corroborates the testimony of plaintiff that the elevator had not been running, and that there was nothing to indicate to him that he was liable to be struck by it, except the single fact that he was stepping into the elevator shaft, a place which he admits he knew was a place of danger, but into which he went on the assurance of defendant's foreman that there was no danger in doing so. In the light of this testimony, we cannot say that the jury were not warranted in finding that plaintiff's injuries were received as the result of defendant's negligence, without fault on plaintiff's part.

Complaint is made that defendant was not given an opportunity to fairly cross-examine plaintiff. The cross-examination of plaintiff certainly shows that he was either intoxicated at the time he was upon the witness stand, or that he is a very eccentric character. The cross-

examination is the most rambling, disconnected and eccentric of any that the writer has ever read. The fact remains, however, that defendant's counsel pursued their cross-examination from interrogatories 498 to 624, inclusive, covering 16 pages of the record. At its conclusion no objection was made by counsel that they had not had a fair opportunity to cross-examine plaintiff, nor was any request made for a postponement of the hearing to give plaintiff time to sober off, if he were in fact intoxicated. In fact, no objections were made or exceptions taken by defendant at the time, and we think it is too late to make such objections here. Indeed, there is great force in the argument of counsel for plaintiff that this exhibition of plaintiff on the witness stand, whether from intoxication or eccentricity, could not have been prejudicial to defendant, but would be much more apt to prejudice plaintiff in the eyes of the jury. However that may be, the jury and the trial judge saw the plaintiff upon the witness stand, heard the testimony given, and observed the manner in which it was given, and it was for the jury to determine, under all the circumstances, just what weight should be given to it. If the conduct of plaintiff while thus testifying was the result of eccentricity or natural excitability, no blame could attach to him for that. If it was the result of intoxication, there can be no doubt but that the learned judge who was hearing the case would, if he had been requested so to do, have stopped the hearing of the case until the next morning and have required the plaintiff to submit himself for cross-examination in a due state of sobriety.

No objection is made as to the amount of recovery, nor as to any of the instructions given by the court, nor as to any of the rulings upon the admission or exclusion of evidence. The case, as presented, was therefore peculiarly one for the jury.

The verdict of the jury has been sustained by the trial court, and its judgment is

 AFFIRMED.

HERMAN SCHUSTER, APPELLEE, V. ANTON SCHUSTER ET AL., APPELLANTS.

FILED APRIL 13, 1909. No. 15,645.

1. **Tenancy in Common:** ACCOUNTING. A tenant in common who is in sole, exclusive and adverse possession under claim of title, is liable to his cotenant for an accounting for rents and profits.

2. **Limitation of Actions:** ACTION FOR ACCOUNTING. An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action.

3. **Tenancy in Common:** ACTION FOR PARTITION AND ACCOUNTING. A., J., L., and H., brothers, by joint contributions of labor and money, purchased 320 acres of farm land, taking the title in the names of all the brothers. The evidence examined, discussed in the opinion, and *held* the brothers are tenants in common, and H. may lawfully prosecute and maintain an action for partition and for rents and profits.

APPEAL from the district court for Polk county: BENJAMIN F. GOOD, JUDGE. *Affirmed in part and reversed in part.*

J. J. Sullivan and *J. G. Reeder,* for appellants.

W. M. Cornelius, contra.

DEAN, J.

The Schuster family came to the United States from Austria in 1877, arriving in Platte county, Nebraska, in midsummer of that year. The members of the family involved in this action consist of the four sons, Anton, Julius, Louis and Herman, who were all minors when they came to America; Anton, the eldest, then being about 15 years of age. After a brief residence in Columbus the family, consisting of the parents, the four sons, and one or more minor children who are not involved in this suit, moved onto a rented farm in Platte county upon which they resided and farmed until 1885 or 1886, when the

father of the household and the boys together purchased a farm in Polk county, taking the title in the father's name, and upon which for many years was maintained the Schuster family home, final payment of the purchase price being made about the year 1895 from the proceeds of the farm and the joint earnings of the father and his boys. The testimony shows that, by the industry and united effort of the father and his boys, both before and for a period long after the latter attained their majority, considerable property, both real and personal, besides the home farm, was accumulated by them and held jointly.

This action was brought in Polk county by Herman Schuster, plaintiff and appellee, the youngest of the brothers, and who is hereinafter called the plaintiff, for an accounting of rents and profits and for a partition of 320 acres of farm land in Polk county, purchased, as he alleges, and paid for jointly by him and his brothers, the record title thereof standing in the name of himself and the defendants.

In June, 1899, the plaintiff, who testifies he was then 27 years of age, went to the city of Columbus to engage in the business of manufacturing scales, and it appears the father and the sons were then the owners of three quarter sections of land, one quarter section being the home farm with the title in the name of the father, and a half section with the title in the names of the four sons jointly, and in which latter tract the father has no claim or interest, about $3,600 in cash, and a considerable amount of personal property, all of the land having been bought and paid for by the joint earnings of the family and from the sale of the products of the farms. The ownership of the half section of land standing in the names of the Schuster brothers, parties hereto, and the right of plaintiff to participate in the rents and profits arising therefrom are the questions in dispute between the plaintiff and the defendants.

In his petition the plaintiff alleges, in substance, that himself and the defendants, Anton, Julius and Louis

Schuster, who are hereinafter called the defendants, "now are, and for more than five years have been, seized in fee and tenants in common each of the undivided fourth of the S.E.¼ of section 11 and the N.W.¼ of section 13, all in township 15, range 3 W., in Polk county, Nebraska"; that defendants have exclusively used and occupied said premises for 8 years; that the rental value of plaintiff's interest therein is $160 a year and is unpaid.

The defendants filed a joint answer, denying generally the allegations of the petition, and alleging that on May 26, 1890, the defendants Anton and Julius Schuster purchased and paid for said section 13; that "title to said premises * * * was taken in the name of A., J., L. & H. Schuster Bros."; that in February, 1893, defendants Anton and Julius Schuster purchased said section 11 for $4,400, and that "title was taken in the name of defendants Anton Schuster, Julius Schuster, and Louis Schuster and plaintiff Herman Schuster," in pursuance of an agreement with plaintiff, which reads: "May 26, 1890. It is herewith agreed that Louis and Herman Schuster may, after they become of age, obtain for home purpose from Anton and Julius Schuster a part of N. W. 13-15-3 by paying the purchase price for it. (Signed) Anton Schuster, Julius Schuster, Louis Schuster, Herman Schuster"; that it was the understanding between the parties that plaintiff would assist in the work and management of the land, so that by united effort they might accumulate property and build up a large and profitable business; that the written contract and oral agreement were made "for the purpose of encouraging said Herman Schuster in said work, and upon the express promise of said Herman Schuster as above set forth, and, relying thereon," that the defendants Anton and Julius Schuster consented that legal title to an undivided one-fourth part of said premises be taken in the name of plaintiff; that plaintiff has always failed "to perform his part of said contract, and has never contributed one cent toward the payment of the mortgage assumed as a part of the purchase price of one of the

parcels of land above described"; that plaintiff engaged in a separate scale manufacturing business on money supplied by defendants, and retained the proceeds of the business.

Plaintiff's reply denied all the material allegations of new matter in the answer, admitted title to the land was taken in the name of plaintiff and defendants, alleges he was a minor when the written contract was entered into, and that he was never bound thereby.

Upon the issues thus presented, the district court, upon trial, rendered judgment of partition in favor of plaintiff and against the defendants, finding and decreeing that plaintiff was an owner of an undivided one-fourth part of the premises involved herein. Upon the question of rents and profits, judgment was rendered against the plaintiff and in favor of the defendants. The usual exceptions were taken by each of the parties, and the cause is brought here for review.

After a careful examination of the entire record, we are convinced the proofs sustain the material allegations of plaintiff's petition. Anton vigorously contends the 320 acres in dispute were bought and paid for without any contribution of either time or money from the plaintiff, but two of his own letters, one under date of June 1, 1906, and one under date of June 16, 1906, written by him to Herman, utterly refute his contention on this vital point. In the letters he corroborates the testimony of plaintiff in almost every essential particular. The course of Anton's testimony is so devious that he is met at almost every material point by contradictory statements formerly made by himself in his letters to Herman.

The plaintiff testified that a settlement was had between himself and his father and his brothers concerning the cash on hand in the common family fund just before his departure for Columbus in 1899, and that the money then apportioned among them was derived in large part from the sale of farm products from the father's 160 acres and from the 320 acres owned by the four boys. He testi-

fied the total amount of cash then on hand was approximately $3,600, and that it was divided into five parts, the father and each of the boys receiving approximately $730. This was denied by Anton and the other defendants. They admitted that money in about the sum named by Herman in his testimony was handed to him about the time of his departure for Columbus, but that it was not given as a settlement or a distribution of the cash on hand, but as a gift from the family. On this point the testimony of Anton and his codefendants is met and overcome by Anton's letter of June 1, 1906, wherein he says to Herman, among other things: "Wel Brother Herman i talkt with Julius and Louis and pa—they said nothing about wether they would or would not pay you a rent. Father said you have a perfeck right to come and work and dig monie out of your ground. i thing you should have somting for it, even if we are looser by it, as we have not made waitches by farming it you can figure it yourselfe we had 730 apice wen you left and now 2135 you can also figure it out yourself how much we made when you was with us. You should know where the money went to but mony or no mony it is ouer home and other people shal not kik us around any more. * * * Wy dit you not come out last January the 15th—dit i not tell you to that effect. you dit not come also you dit not answer me my letter from January the 10th. my mony will be with me after July 20th, if you need it come than and get it. Al you need is a quit claim deed for one fourth (¼) your interest in n. w. ¼ of section 13-15-3—also s-east ¼ quarter 11-15-3—Polk county, Nebr. the land will never be divided in 40's but in strips runing through the whole quarters. You cannot nor any of us sell to outside partys unles by (mutual agreement of all concerned)." In the trial court Anton testified that the plaintiff was only three years old when they arrived in the United States, and was thus, in his tender years, a charge upon the family and a hindrance rather than a help, and that he never contributed anything after he reached his majority to aid in farming

or stock-raising or to assist in the common enterprise of accumulating property. The plaintiff testified that he began attending school before the family left Austria, and that he was 8 years of age upon their arrival at Columbus, and that he put in practically all of his time from early boyhood until he was 27 years of age in farm work and kindred occupations upon the lands of the family in the furtherance of the joint enterprise, and that the proceeds of all of his skill and labor went into the common family fund. Again Anton, after denials on the witness stand, corroborates the statement of Herman by his letter of June 16, 1906, which he identifies as having been written by himself, and which reads as follows: "Silver Creek, Neb. 6-16 1906. Dear Brother Herman. In regard to yours of the 12th i state that it was written by all 3 of us. it is not ouer intention to bet you or run you short. ouer time and all we saved went to Father up to 21 yeahrs and even latter and it is only fair if yours goes the same way. Then we commenced with nothing as the cattle that was on hand would hardly have covered the then existing indeptenes. all the mony that was payd for the land up to 1,000 dollars was on hand before you reashed your age, afterwards you put in six yeahrs with us, and through those 6 yeahrs each one of us saved 218 Dollars a yeahr. the land was bought for home purpose and not for selling or speculating. also a deed to that effect will never be signed by any of us. Louis and Julius do not want it and i myself do not care for it (i am about workt out) but in order to have piese in the family and as i do consider you as a brother yet, i offer you 2,000 for your share of it. it will be the bigest 6 yeahrs wages you ever had. * * * You can acept my offer or go to Law. i thing i have don the right and actet right. * * * Yours truly, (signed) Schuster Bros." It is significant that Anton's letter of June 16 corroborates Herman in regard to the latter's age. He says: "All the mony that was payd for the land up to 1,000 dollars was on hand before you reashed your age, afterwards you put in six yeahrs

with us." Herman testified he was 27 years of age in 1899 when he left home, and this in effect is what Anton says in his letter, which contradicts his own testimony at the trial and also the testimony of both of his codefendants upon this point. Upon the subject of the litigation herein, the letters of Anton are their own commentary. They require no labored analysis. They disclose a recognition of Herman's title as a tenant in common with his brothers, from which there is no escape. Anton with pen in hand writing letters in an unguarded way in June, 1906, furnishes testimony upon the subject in controversy more convincing than when, in October, 1907, as a self-interested witness, he testifies upon the same subject. Both letters were identified, introduced in evidence, and attached as exhibits to the record, and form a material part of the case. None of the defendants disavowed their contents at the trial.

The defendants undertake to explain the reason why the first tract was taken in the names of all of the brothers jointly in 1890, and to this end, besides oral testimony, they introduce as exhibit 4 the original contract that is set out in full in the outline of defendants' answer in this opinion. This instrument is of doubtful validity. When it was dated, plaintiff was yet a minor, and he testified he had no recollection of signing it. Besides, the proof shows the tract then purchased was paid for by the contributions of all the brothers. *Cameron v. Nelson,* 57 Neb. 381; *Dailey v. Kinsler,* 31 Neb. 340; *Pillsbury-Washburn Flour-Mills Co. v. Kistler,* 53 Minn. 123; *Hansen v. Berthelsen,* 19 Neb. 433

The defendants' attempted explanation of their reasons for taking the second tract in the names of the four brothers in 1893 is even less satisfactory than their attempt to explain the purchase of the first tract in that manner. When the second tract was purchased, a part of the purchase money was paid at the time, and notes and a mortgage given by all the brothers for the deferred payments, and the obligations so incurred were paid by all of them.

The plaintiff thus shared with the defendants the burdens of the joint enterprise, and must not now be deprived the privilege of sharing with them the benefits. From the record before us, we therefore conclude the judgment of the district court is right in holding plaintiff to be an owner of an undivided one-fourth part of the half section of land and a tenant in common with the defendants.

The plaintiff alleges that defendants have exclusively used and occupied the half section of land in dispute for eight years, and he contends that he is entitled to remuneration for his share of the premises so occupied by them in the sum of $160 annually. The answer alleges, and the proof clearly shows, that the defendants denied plaintiff's title and exclusively occupied and used the land continuously ever since the year 1899. The proof also shows the defendants not only alone occupied the common property, but they held possession thereof adversely under a claim of sole ownership to the exclusion of their cotenant from the enjoyment of any part of the premises, thus bringing themselves substantially within the rule announced by this court in *Names v. Names,* 48 Neb. 701, which holds: "A tenant in common who alone occupies the common property, and holds possession adversely as sole owner, or where he excludes his cotenant from the enjoyment of the premises, is liable to his cotenant for the rents and profits." The doctrine of the *Names* case, *supra,* which was unknown to the common law, finds support in many jurisdictions, and among them are the following: *Edsall v. Merrill,* 37 N. J. Eq. 114, which holds: "A tenant in common who prevents his cotenants from obtaining from the premises held in common their just shares of the income the premises are capable of yielding, or who takes possession of the whole, and uses them as his own, and thereby makes a profit, is bound to account to his cotenants either for the rental value of the premises or the profit he has made." See, also, *Roberts v. Roberts,* 55 N. Car. 128; *Woolley v. Schrader,* 116 Ill. 29. *Medford v. Frazier,* 58 Miss. 241, holds: A cotenant "will

be liable only where it is shown that he has occupied more than his rightful share of the common estate, and then only for the rent of the excess." *Cain v. Cain,* 53 S. Car. 350, holds: "An occupying tenant using more than his share of the common property is accountable to his cotenants for the net profits arising from such use." *Berry v. Whidden,* 62 N. H. 473, holds, in substance, that a tenant in common who occupies and receives the income of the whole estate by permission of his cotenant, without any agreement to account, is not liable to his cotenant for a share thereof where it does not appear that he has received any more than his share of the rents and profits of the common estate. *Shiels v. Stark,* 14 Ga. 429, holds: "Occupancy by one cotenant of the joint property, by the consent of the other, does not necessarily relieve him from the payment of the rent. At common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate. By the Statutes of Westminster II, cc. 6, 22, and 4 Anne, c. 16, sec. 27, joint tenants, and tenants in common, have an action for waste as well as an account for the profits." In support of the above propositions the court say: "According to the doctrines of the common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate, although he may have embezzled the profits, or appropriated the whole to himself. The injustice of this doctrine was obviated in England by the Statutes of Westminster II, cc. 6, 22, and 4 Anne, c. 16, sec. 27. The first giving to joint tenants and tenants in common an action for waste; and the second an account for the profits. (5 Bac. Abr. 304.) It is to be presumed, from the reasonableness of their provisions, that these acts * * * are everywhere treated as the general law of this country. * * * And the court say in *Thompson v. Bostick,* McMul. Eq. 75: 'There is nothing, I think, in the objection that the defendants did not receive rent, but cultivated the lands themselves. To cultivate and have the use of lands *is to receive the rents and*

profits, though the occupier is his own tenant.' " See, also, *Ward v. Ward's Heirs,* 40 W. Va. 611, 52 Am. St. Rep. 911; *Bates v. Hamilton,* 144 Mo. 1, 66 Am. St. Rep. 407. The defendants' answer asserts sole and exclusive ownership. They attempted to substantiate this claim at the trial, thus denying plaintiff's title, and hence, also, his right to participate in any part of the rents and profits arising from the land. The plaintiff fairly tendered in his petition an issue upon the question of the rents and profits and supported it by proof upon the trial. An examination of the record and the law applicable to the facts therein disclosed convinces us that fair dealing demands an accounting between the parties. We conclude, therefore, that the learned trial court erred in rendering judgment against the plaintiff upon this feature of the case.

It is therefore ordered that so much of the judgment as is in favor of the defendants be, and it hereby is, reversed and the cause remanded, with directions to take an accounting of the rents and profits of the land in controversy herein for a period of four years next before the beginning of this action, and to render a judgment in favor of plaintiff and against the defendants therefor in such amount as plaintiff may be entitled to recover in accordance with the views expressed in this opinion, and that in all else the judgment of the district court be, and it hereby is, affirmed.

JUDGMENT ACCORDINGLY.

ELZY ERVIN, APPELLANT, V. WILLIAM P. MONTGOMERY, APPELLEE.

FILED APRIL 13, 1909. No. 15,461.

Replevin: ACTION ON SUPERSEDEAS BOND: DEFENSES. In an action of replevin, judgment went against the plaintiff for a return of the property, for damages for wrongfully withholding the same, and

for costs. Plaintiff executed a supersedeas bond intending to appeal to the supreme court, but no appeal was perfected. In a suit on the bond against the surety, he pleaded and proved an offer to return the property in substantially the same condition as when taken. *Held*, That this was a good defense to the extent of the value of the property fixed by the judgment in the replevin action.

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

Edwin F. Warren, for appellant.

John C. Watson, contra.

DUFFIE, C.

One Botts replevied from the possession of the plaintiff a wood-sawing machine, one horse and a set of harness. Two trials of the case were had, one in the county court where the action was commenced, and one in the district court for Otoe county. Ervin, the plaintiff herein, prevailed on both trials. Judgment in his favor was entered in the district court for a return of the property, and, in default thereof, for its value, fixed by the jury at $339.70, and damages for the wrongful withholding by Botts, found by the jury to be 5 cents, and for the costs, taxed at $132.18. Botts gave a supersedeas bond for the purpose of appealing to this court. Montgomery signed said bond as surety. This suit is upon the bond. The petition alleges that no appeal to this court was ever taken; that Botts died in May, 1904, a short time after the bond was executed; that he left no estate to be administered upon, and was at the time of his death wholly insolvent. The answer is, first, a general denial; and, second, that, shortly after the death of Botts, the defendant tendered to the plaintiff a return of the property to be delivered at any place in Nebraska City that plaintiff might designate, and in substantially the same condition as when taken on the writ of replevin, and that plaintiff refused to accept the

property or any part thereof, and that defendant has been ready at all times since, and is now ready, to return said property to the plaintiff, if he will accept the same.

A trial was had to the court, and on the trial the defendant made the following offer: "The defendant, William P. Montgomery, offers and tenders the offer in court of the property that is mentioned in the notice served by the sheriff on the plaintiff, and will deliver the same at his own cost at any place that the plaintiff may designate in Nebraska City, and he offers to pay all costs of this case, and all costs in the replevin case in the case of Botts against this plaintiff, Ervin, in the county court and in the district court, and offers to pay 5 cents damages, and the defendant further states to the court and to the counsel that the horse cannot be delivered because the same is dead, but he will pay the value of the horse into court." In answer to this tender the plaintiff said: "The plaintiff objects as immaterial and irrelevant to the issue to this action, no tender heretofore having been proved of the property in controversy, and counsel stating that all the property cannot be so returned, and the judgment in this case being for a gross sum wherein the several articles replevied are not specifically valued. For the present the plaintiff will stand mute as to refusing or accepting the offer." The court found the issues in favor of the defendant, and that on the 28th of May, 1904, the defendant tendered the plaintiff all the property taken from him by the writ of replevin in the case of *Botts v. Ervin* in substantially the same condition it was in when taken; that the tender has been kept good, except as to the horse, which was of the value of $10; that said tender has resulted in a satisfaction *pro tanto* of the judgment in said cause of *Botts v. Ervin*. Judgment was thereupon entered in favor of the plaintiff against the defendant for $132.18, the cost in the replevin action, and 5 cents damages, and the further sum of $10, the value of the horse, which could not be returned, together with the costs in this action. From this judgment plaintiff has appealed.

A review of the evidence would serve no useful purpose. It sufficiently appears that, a few days after the death of Botts, the defendant herein made a written offer to return all the property taken on the writ of replevin, and to make such return at any place in Nebraska City, (where the property was situated when replevied) as the plaintiff might designate. We are inclined to believe that the failure of plaintiff to say where he would accept a return of the property was equivalent to a refusal to accept, and certainly his standing mute when the tender of the full amount of the judgment and value of the horse, which had died, was made on the trial does not add to his equities in the matter.

The judgment is sufficiently supported by the evidence, and we recommend its affirmance.

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.

EXCHANGE BANK OF WILCOX, APPELLEE, V. NEBRASKA UNDERWRITERS INSURANCE COMPANY, APPELLANT.

FILED APRIL 13, 1909. No. 15,589.

Insurance: TRANSFER OF TITLE: NOTICE. In a suit on fire insurance policies covering certain personal property, and conditioned that a change in the title of the property should avoid the policy, notice to the company of a bill of sale made by the insured to a bank was attempted to be shown from the knowledge of such bill of sale possessed by the agent of the company, who at the time was also assistant cashier of the bank. *Held*, That, while notice to an agent will generally be imputed to his principal, the rule does not apply where the agent's duty to his principal is opposed to his own interest or conflicts with the interest of another party for whom he acts in the transaction where knowledge is obtained.

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

Halleck F. Rose, Wilmer B. Comstock and *Hague & Anderbery,* for appellant.

J. L. McPheely, contra.

DUFFIE, C.

Action by the plaintiff on three policies of insurance issued by the defendant. Judgment for the plaintiff, and defendant appeals.

The facts are practically undisputed. One Frank Langloss was the owner of a restaurant in the town of Wilcox, and procured two of the policies in question upon his stock and fixtures. He sold his business to Long & Jackson, and assigned to them the two policies. Long & Jackson took out a third policy upon the stock and fixtures, and afterwards sold the business to Hall & Hartley, to whom the three policies were transferred. One Charles W. Lamborn, residing at Wilcox, was a recording agent for the defendant company, and issued these three policies and approved the several transfers made. When Hall & Hartley purchased the restaurant, they borrowed $667.95 from the plaintiff bank and executed a bill of sale upon all the property covered by the insurance as security therefor. This was about the middle of May, 1906. The insured property was destroyed by fire July 13, 1906. It is alleged in the plaintiff's petition that the three policies of insurance were verbally assigned to the bank as additional security for the loan made at the date of said loan. Lamborn, the agent of defendant company, was also assistant cashier of the plaintiff bank, and it quite clearly appears that the policies were left either in his possession or in the possession of the bank from the time of their issue. About the 20th of July one Lynde, an adjuster for the defendant, visited Wilcox for the purpose of securing information concerning the loss, and called upon Lamborn, who, as

before stated, was assistant cashier of the bank. Lamborn produced the policies for Lynde's inspection, and among them Lynde discovered the bill of sale. Each of the policies contained conditions making it void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, or if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance, whether by legal process of judgment, or by voluntary act of insured, or otherwise, or if the property above mentioned (meaning the property insured) be or shall be thereafter mortgaged or otherwise incumbered."

On discovering that Hall & Hartley had executed a bill of sale covering the insured property to the bank by way of security, Lynde informed Lamborn and the insured that its effect was to void the policies, and he took no further steps in the matter until he had prepared a writing and secured the signature of Hall & Hartley to the effect that any steps which he might then take should be regarded as an effort to ascertain the amount of the loss and report the same to his company, and that his action was without reference to any other question or matter of difference within the terms and conditions of the several policies. On the 2d of August, 1906, Lynde returned to Wilcox, and proof of loss was made in the name of Hall & Hartley and verified before Lamborn as notary public. The proof of loss does not disclose any interest claimed by the bank in the policies. Lynde at all times, as he claims, denied any liability on the part of the company, but offered to pay Hall & Hartley $200 in settlement of their claim, telling them that he would prefer to give them this amount rather than undergo the expense of a suit, which he estimated would cost them about the same sum. Not being able to effect a settlement during the day, Lynde went to the hotel and retired about 8 P. M., as he wished to take an early train in the morning, and about 9 o'clock Hall & Hartley called upon

him and proposed to settle for $250, which proposition was accepted and the amount paid by a draft drawn by Lynde upon his company. This amount was paid by Lynde without any knowledge, as he asserts, that the bank claimed any interest in the policies, although the evidence is somewhat conflicting upon that point. He knew that the policies were in possession of the bank, but Hartley testified that they were there for the purpose of settlement, and Lynde says he understood that they were left at the bank for that purpose. Lamborn does not in terms deny this, but on his direct examination says: "Well, he (Lynde) asked me as agent what I knew about the loss, and I told him I had the policies there, and Hall & Hartley owed the bank money, and we had a bill of sale which had never been recorded; that it was a personal matter, and stated the case as fully and completely as I knew." On his cross-examination he said: "I told Mr. Lynde that Hall & Hartley had left the policies there with me for settlement. Q. You didn't tell him at any time that the policies were assigned after the fire? A. Yes; no written assignment; just a verbal agreement between Hall & Hartley. Q. I understood you to say on direct examination that the policies were left there for adjustment by you. Now, which will you have it? A. Well, I don't remember of saying adjustment any more than settlement. Settlement is what they were left there for. Q. Now, that is what you told Mr. Lynde, is it? A. Yes, sir. Q. And this conversation occurred after the fire? A. Yes, sir."

It is conceded that the defendant company had no actual notice of the bill of sale made by Hall & Hartley to the bank until after the fire, and the principal dispute arises upon the effect that should be given to the knowledge of Lamborn, the agent of the defendant company, and who, at the same time, was the assistant cashier of the bank. The plaintiff asserts that knowledge of the agent, who, it is conceded, was present when the bill of

sale was made, and had knowledge of all the facts, is notice to the defendant company; while the defendant asserts with equal vigor that knowledge of Lamborn cannot be imputed to the company, as his interest as an employee and officer of the bank was adverse to the interest of the defendant company.

As a general rule the knowledge of an agent is imputed to his principal. In *Kennedy v. Green,* 3 Myl. & K. (Eng.) *699, Lord Brougham gave as a reason for the rule "that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, * * * and yet all the while let his agent know, and himself, perhaps, profit by that knowledge." The same reason, framed in different language, is given by Church, C. J., in *National Life Ins. Co. v. Minch,* 53 N. Y. 144: "The rule which charges the principal with what the agent knows is for the protection of innocent third persons." Like most other legal rules, this one has its exceptions, and one of the exceptions is that a corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interest, and deals with the corporation as a private individual, and in no way representing it in the transaction. *Koehler v. Dodge,* 31 Neb. 328; *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123. Another exception to the rule is recognized in *Houghton & Co. v. Todd,* 58 Neb. 360, where it is said: "The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of the agency." We think it may be regarded as well established that where an agent's duty to his principal is opposed to or even remotely conflicts with his own interest, or the interest of another party for whom he acts, the law will not permit him to act, nor will it hold his acts or his knowledge gained in such transaction obligatory upon his principal. That the execution of the bill of sale rendered void

policies conditioned as are those in question was held in *Farmers & Merchants Ins. Co. v. Jensen,* 56 Neb. 285, and in *Home Fire Ins. Co. v. Collins,* 61 Neb. 198. To the same effect are *Johansen v. Home Fire Ins. Co.,* 54 Neb. 548, and *Seal v. Farmers & Merchants Ins. Co.,* 59 Neb. 253.

In this condition of the case it is evident that unless the knowledge of Lamborn may be imputed to the company, and a waiver of the conditions of the policies implied from such knowledge, then the plaintiff's action must fail. The bank must be charged with knowledge of the conditions of the policies prohibiting a transfer of title of the property insured. It knew that in accepting the bill of sale the policies were made void, unless the company was notified and consented thereto. It was the duty of the bank to inform the company that it was about to take this security and to obtain its assent. To keep secret the proceeding and to attempt to collect the policies would be a fraud upon the company. A like duty was cast upon Lamborn, the agent of the company, but it appears that the adverse interest cast upon him as an officer of the bank kept him silent, and that same adverse interest creates an exception in the application of the general rule of law imputing knowledge and notice of the agent to his principal. We do not wish to be understood as charging either the bank or Lamborn with a scheme to defraud the insurance company. At the time of taking this bill of sale it is probable that no thought of the consequences arose in the minds of the officers acting for the bank, and yet it was a moral fraud upon the company to take security upon property insured, without the consent of the defendant company first obtained. The result is that, under the circumstances, the knowledge of Lamborn cannot, under all the authorities, be imputed to the defendant company, as his position as an officer of the bank rendered his interest in the transaction adverse to the insurance company.

We recommend a reversal of the judgment and remand-

ing the cause for further proceedings not inconsistent with this opinion.

EPPERSON, GOOD 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.

J. H. TEASDALE COMMISSION COMPANY, APPELLANT, V. SOLOMON C. KECKLER, APPELLEE.

FILED APRIL 13, 1909. No. 15,602.

Sales: BREACH OF CONTRACT: ACTION: DEFENSES: STATUTE OF FRAUDS. The defendant, a resident of Manley, sold 10,000 bushels of corn to the plaintiff, the sale being made through a broker residing in Omaha; communication being had between them by telephone. On the next day the broker wrote the defendant stating the terms of the sale, and that confirmation thereof would be received by the defendant from the plaintiff. Plaintiff wrote the defendant from St. Louis, where it was located and where the corn was to be delivered, confirming the sale and stating fully the terms thereof. This letter was headed in bold type as follows: "REPORT IMMEDIATELY ANY ERRORS IN THIS CONFIRMATION." Defendant did not reply to either of these letters, but on a later date shipped one car of corn upon the contract, but failed and refused to ship the remainder. In an action brought by the plaintiff to recover the damage suffered from a failure to deliver all the corn, the defendant alleged, as one ground of defense, that his contract to furnish the corn was conditioned on his ability to get cars to make the shipment, and that cars could not be procured. He also pleaded the statute of frauds as a defense. *Held*, First, that the agreement was taken out of the statute of frauds by shipping part of the corn; and, second, that, if the plaintiff's letter of confirmation did not properly state the terms of the sale, it was the duty of the defendant to observe the directions of the letter and report any error therein relating to the terms of the agreement, and that the rule that he who is silent when it is his duty to speak shall not be heard when he should be silent should be applied.

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

Byron Clark, for appellant.

Matthew Gering, contra.

DUFFIE, C.

December 2, 1906, one J. E. Thatcher, a grain broker living at Omaha and representing J. H. Teasdale Commission Company, the plaintiff herein, sent a written proposal to Keckler, offering to pay 40½ cents a bushel for white corn delivered on the track at St. Louis or East St. Louis on or before January 31, 1907. Acceptance of the offer was directed to be made by wire to reach Thatcher at Omaha by 9 A. M. the following day. Instead of replying by wire, Keckler, who resided at Manley, called Thatcher over the telephone the day following his receipt of the proposition, and agreed to sell 10,000 bushels of corn at the price offered. After the conversation over the phone Thatcher wrote the defendant as follows: "Omaha, Neb. Dec. 3, 1906. Mr. S. C. Keckler, Manley, Neb. Dear Sir: I bought of you this morning for J. H. Teasdale Commission Co., by phone, 10,000 bushels No. 3 white corn or better at 40½c, delivered at St. Louis, shipped on or before January 31, 1907, St. Louis weights and inspection. You will get confirmation and billing from J. H. Teasdale. I thank you for this business, and hope that my bids will continue to be allowed and can do more business with you. Yours truly, J. E. Thatcher." Thatcher wired this purchase to the Teasdale Commission Company, and on December 3, 1907, that company sent to Thatcher the following communication: "Report immediately any errors in this confirmation. J. H. Teasdale Commission Co. Receivers and Shippers of Grain. St. Louis, Dec. 3, 1906. Mr. S. C. Keckler, Manley, Neb. Dear Sir: We confirm purchase from you today by J. E. Thatcher of —— cars, 10,000 bushels 3 Wh corn or better

at 40½ cents per bushel, free on board cars at St. Louis, Mo., to be shipped on or before Jan. 31, 1907, by the any line Ry., and to be billed as follows: J. H. Teasdale Commission Co., St. Louis, Mo. This grain is subject to St. Louis inspection and St. Louis weights. Unless otherwise above provided any grain falling below the grade above specified to be applied on contract at the ruling difference in the St. Louis market price on day of inspection. Inspection and weighing fees to be charged to the shipper. Cars to be loaded in accordance with rules of the R. R. Co. regarding minimum and maximum weights. Any surplus over the contract quantity to be accounted for on basis of St. Louis Market value on day of inspection of last car arriving. If contract is not filled at maturity seller agrees to pay buyer difference between the St. Louis market price on day of maturity and the contract price unless the contract should be extended by mutual consent. Shipper agrees to notify consignee of weight of each car-load shipped and to leave ample margin on drafts to cover his guarantee of weight and grade. Yours truly, J. H. Teasdale Commission Co." Keckler did not reply to either of these communications, but on January 12, 1907, he shipped one car to the plaintiff containing 767 bushels and 28 pounds of corn, the net proceeds of which, after deducting freight, inspection and weighing, amounted to $259.02. Attached to the bill of lading was a draft upon the plaintiff for $250, which plaintiff paid, leaving a balance in its hands of $9.02. Defendant having failed and refused to ship the remainder of the 10,000 bushels contracted for or to pay the difference between the contract price and the market price at St. Louis, on January 31 this action was brought to recover such difference.

The answer of the defendant denies that he made an unconditional sale of 10,000 bushels of corn to the plaintiff, and alleges that the contract made over the telephone with Thatcher was for the sale of 10,000 bushels of corn conditioned upon his ability to obtain cars from the Mis-

souri Pacific Railroad Company in which to make shipments. He excuses his failure to deliver the corn by pleading that he was unable to procure cars. He admits receiving from Thatcher the letter of December 3, and from the Teasdale Commission Company the letter of confirmation of December 3, but denies that he ever accepted or agreed to accept said letter of confirmation. Another defense pleaded is the statute of frauds, the contract of sale being oral, and the value of the corn being more than $50. He also pleads a counterclaim, asking judgment for $9.02 against the plaintiff, the balance due on the car-load shipped January 12, 1907. Plaintiff replied, alleging facts claimed as an estoppel. The jury returned a verdict finding for the defendant for the amount of his counter-claim, and, judgment being entered upon the verdict, the plaintiff has appealed.

There can be no question that up to January 12, 1907, when defendant shipped to the plaintiff a car-load of corn upon this contract, no valid or binding agreement for the sale of corn existed between the parties, as up to that date no part of the price had been paid, and no part of the corn delivered. The contract sued upon by the plaintiff shows upon its face that the value of the corn exceeded $50. By his action in shipping the corn on January 12 the defendant took the case out of the statute of frauds, and the contract became a valid and binding contract.

There is a sharp conflict in the evidence as to the terms of the agreement made between Thatcher and the defendant over the telephone. Thatcher testified that the defendant did not stipulate that his delivery of the corn should depend upon his ability to secure cars in which to make the shipments. An employee of the plaintiff company who called upon the defendant for the purpose of making a settlement testified that Keckler did not claim at that time that the contract was a conditional one, and there are other circumstances going to support the plaintiff's contention that the sale was an absolute sale, uncoupled with any conditions. On the other hand, the de-

fendant asserts and testified that the contract was to be binding on him only in case he could secure cars from the railroad company. If the case rested upon the oral evidence introduced upon this question, we could not say that the verdict of the jury was not supported by the evidence, but we think that under the law applicable the defendant is estopped from making such a defense.

It will be noticed that the letter of confirmation sent by the plaintiff is headed in bold type: "REPORT IMMEDIATELY ANY ERRORS IN THIS CONFIRMATION." Defendant admits receiving and reading this letter. If it did not contain the correct terms of the contract, it was his duty, when making the first shipment of corn, to inform the plaintiff company of the terms of the contract as he understood them. It is true that he says he wrote and mailed a letter at the time of making this shipment containing the following information: "I stated the number and initial of the car, and that I had shipped it on the sale of December 3, and that I had considerable trouble in getting cars, and that I had other sales I couldn't fill, but, if I received the cars, I would fill their order." The plaintiff denies that it received such a letter, but, if it did, it contained no claim that the contract was different or other than set forth in the plaintiff's letter of confirmation of December 3, and the plaintiff was well warranted in proceeding and conducting its business upon the theory that by January 31 it would have the 10,000 bushels of corn contracted for to fill orders or to meet sales made in the meantime. From the letter of confirmation the defendant must have known that the plaintiff understood the contract in a different sense from what he now claims it to be, and the law is well settled that, if a person by a course of conduct or by actual expressions so conducts himself that one may reasonably infer the existence of an agreement or license, whether the party intends that he shall do so or not, the person so conducting will not be permitted to gainsay the inference. *Viele v. Judson,* 82 N. Y. 32. It is a general

rule, everywhere applied, that he who holds his peace when he ought to have spoken shall not be heard from now that he should be silent. *Bank of United States v. Lee,* 13 Pet. (U. S.) *107; 2 Herman, Estoppel and Res Judicata, sec. 774. The rule was enforced under somewhat different facts in *Emery v. Cobbey,* 27 Neb. 621. At the time of sending its letter of confirmation the plaintiff inclosed a duplicate letter, upon which was printed a request for the defendant to sign and return. The fact that the defendant did not sign this duplicate letter and return it to the plaintiff cannot affect the disposition of the case. Had he signed it and sent it to the plaintiff, the only effect would have been to take the agreement out of the statute of frauds at the date of such signing.

We recommend a reversal of the judgment of the district court and remanding the cause for further proceedings not inconsistent with this opinion.

EPPERSON, GOOD 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.

CORWIN F. JONES, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES; CHARLES A. BUSHMAN, APPELLANT.

FILED APRIL 13, 1909. No. 15,604.

1. **Process:** MISNOMER. If process in an action is served upon a person really intended to be sued, though a wrong name is given him in the summons and return, and he suffers default, or after appearing omits to plead the misnomer, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with the suit or judgment by proper averments.

2. **Judgment:** MISNOMER: INJUNCTION. One who seeks to enjoin the enforcement of a judgment against his property upon the ground that it was entered against a person bearing another name must aver and show that he was not the party sued and served with process in the action in which the judgment was rendered.

3. **Exemptions:** WAGES. The head of a family having neither lands, town lots nor houses, which are exempt under the laws of the state, may claim all of the wages due him as part of the $500 in personal property exempt to him under section 521 of the code.

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

Albert & Wagner, for appellant.

T. W. Blackburn, contra.

DUFFIE, C.

The petition for an injunction filed herein shows that Corwin F. Jones, the plaintiff, is an employee of the Union Pacific Railroad Company, and, while his residence is not clearly shown, the circumstances indicate that he is a resident of the city of Omaha, Douglas county, Nebraska. The defendant, William O'Brien, is a justice of the peace in and for Platte county, Nebraska, residing at Columbus, and the third defendant, Bushman, is also a resident of Platte county. Some time prior to the commencement of this action Bushman obtained judgment in Justice O'Brien's court against one Cal. F. Jones, and thereafter the said justice issued a garnishment, and caused the same to be served upon the Union Pacific Railroad Company, requiring said company to appear before him on the 3d day of August, 1907, and disclose whether it held any money or property belonging to the said Cal. F. Jones; that the plaintiff herein had no notice of said proceedings until after answer made by the Union Pacific Railroad Company, which answer disclosed that said company was owing said Jones the sum of $94, payable on August 19, 1907; that, upon said answer being filed,

the said justice entered an order requiring the railroad company to pay into court the sum of $54.66 to be applied in satisfaction of the judgment of Bushman against Cal. F. Jones. The plaintiff's petition further alleges that the sum due him from the Union Pacific Railroad Company is for wages earned, of which 90 per cent. is exempt from execution; that, upon learning of the proceedings had, he made affidavit that he was a resident of this state and the head of a family, that he had neither lands, town lots nor houses subject to exemption as a homestead under the laws of this state, and that he included in said affidavit a true inventory of all his personal property, including therein $100 due from the Union Pacific Railroad Company, which affidavit disclosed; that his entire personal property was of less value than $200, and claimed the right of exemption awarded him by sections 521, 522, 523 and 530 of the code of 1903; that he filed one copy of the said affidavit with the paymaster of the Union Pacific Railroad Company, and forwarded one by registered letter to Justice O'Brien, at Columbus, Nebraska. It is further alleged that the proceeding taken to garnish his wages was the result of a conspiracy entered into between Bushman and O'Brien to harass, embarrass and annoy the plaintiff, and thus compel him to pay the judgment against Cal. F. Jones out of his exempt wages.

The Union Pacific Railroad Company demurred. The other defendants did not appear, and, said demurrer having been overruled, the defendants were perpetually enjoined from enforcing said judgment, and the railway company was specially enjoined from paying in satisfaction thereof at any time the wages earned by plaintiff. Thereafter defendant Bushman made a fruitless attempt to have the decree set aside so that he might defend, and he only appeals.

We are first to consider the right of the court to perpetually enjoin the collection from the plaintiff of Bushman's judgment against Cal. F. Jones. The plaintiff in his petition does not deny that he was sued in justice

court in Platte county under the name of Cal. F. Jones, or that service of summons in that case was not had upon him personally. If suit was brought against him by Bushman, and he was designated as Cal. F. Jones, and personal service had upon him in such action, the judgment against him would not be void because of such misnomer. It is a well-established rule that, if process in an action is personally served upon the person really intended to be sued, though a wrong name is given him in the summons and return, and he suffers default, or after appearing omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with the suit or judgment by proper averments. *Lafayette Ins. Co. v. French,* 18 How. (U. S.) 404; *Smith v. Bowker,* 1 Mass. *76; *Parry v. Woodson,* 33 Mo. 347, 84 Am. Dec. 51.

Black, in his work on Judgments (sec. 213), in dealing with this question, says: "A name is a means of identity, but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued, but the person to whom it is applied. Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fails to appear, or, appearing, fails to object that he is sued by the wrong name, and the judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name." The plaintiff having neglected to negative the fact that he was the identical person sued, and against whom judgment was entered in the case of Bushman against Cal. F. Jones, we must conclude that such was the case, and that the judgment was a valid judgment against him. The decree of the district court enjoining the collection of this judgment should be reversed.

Is a party who is the head of a family, having neither lands, town lots nor houses which are exempt under the laws of this state, entitled to claim all the wages due him

as a part of the $500 in personal property exempted to him under section 521 of the code? In other words, is money due for wages earned personal property within the meaning of that statute? In *Lappin v. Mumford,* 14 Kan. 9, it is said: "A claim existing in favor of an estate for services rendered by the decedent in his lifetime is personal property which may be sold by the administrator." In *Ritch v. Talbot,* 74 Conn. 137, the court held that the term "personal property" used in a will included debts due the testator, such debts being all the personal property he had except his household furniture and certain money in the bank. In *Lining v. City Council,* 1 McCord (S. Car.) *345, it was said: *"Incomes and profits, labor, wages or hire,* are included under the *nomen generalissimum* of personal property; for the right being attached to a man, and for which, if withheld from him, he has no other remedy but by a personal action, may very properly and emphatically be denominated personal property." The salary of an officer of a bank was personal property, under a city ordinance laying a tax on all profit or income arising from the pursuit of any faculty, profession, or occupation, trade or employment. The words "personal property" "embrace not only goods, chattels, coin, bills and evidences of debt, but in their strict and more appropriate legal definition signify the right and interest of the owner or owners in these articles." *Stief v. Hart,* 1 N. Y. 20. There can be little doubt that wages due are embraced in and covered by the words "personal property" found in section 521 of our code, and that money due either for wages or on any other account may be claimed as exempt under the provisions of that statute, which is to be liberally construed.

As we have heretofore held that one may enjoin the sale on execution of his exempt property (*Cunningham v. Conway,* 25 Neb. 615), we recommend that the judgment of the district court so far as it enjoins the collection of the judgment in favor of Bushman against Cal. F. Jones be reversed, and that it be affirmed so far as it enjoins the

defendant, the Union Pacific Railroad Company, from paying any amount due the plaintiff for wages as garnishee in the case of Bushman against Cal. F. Jones.

EPPERSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed so far as it enjoins the collection of the judgment in favor of Bushman against Cal. F. Jones, and is affirmed so far as it enjoins the defendant, the Union Pacific Railroad Company from paying any amount due the plaintiff for wages as garnishee in the case of Bushman against Cal. F. Jones.

JUDGMENT ACCORDINGLY.

BREE BROTHERS, APPELLEES, V. PHILIP FIRESTINE, APPELLANT.

FILED APRIL 13, 1909. No. 15,656.

Appeal: FAILURE TO FILE TRANSCRIPT: NEGLECT OF JUSTICE. Where a party, free from fault or laches, is prevented from having his appeal docketed in the appellate court within the statutory period solely through the negligence or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal.

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

Starr & Reeder, for appellant.

J. W. Cole, contra.

DUFFIE, C.

This case was originally tried in justice court, where judgment was entered against the defendant on the 27th

day of June, 1907. On the 2d of July the defendant filed a bond for the purpose of appealing to the district court, which bond was duly approved. A transcript of the proceedings was ordered, but the justice failed to prepare the same, and such transcript was not filed in the district court until the 14th day of August, 1907. The district court, on motion of the plaintiff, dismissed the appeal for the reason that the transcript was not filed within 30 days from the rendering of the judgment. Defendant has appealed.

It appears from the evidence that a transcript was ordered in due time, and that the defendant called upon the justice three or four times within the 30 days allowed for an appeal, making inquiry for it. The justice before whom the case was tried was a witness, and gave as a reason for not preparing the transcript in time that he thought the case would be settled. It is quite evident that the failure to file the transcript in due time was not due to any negligence of the defendant, but arose through a failure of the justice to make out the transcript. Under these circumstances, the right of an appeal should not be denied. *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68; *Continental Building & Loan Ass'n v. Mills,* 44 Neb. 136; *Lincoln Brick & Tile Works v. Hall,* 27 Neb. 874.

We recommend a reversal of the judgment and remanding the cause to the district court, with directions to award a trial of the case.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is reversed and the cause remanded to the district court, with directions to award a trial of the case.

REVERSED.

IN RE WILLIAM BERGER.

WILLIAM BERGER, APPELLEE, V. S. C. WILCOX ET AL., APPELLANTS.

FILED APRIL 13, 1909. No. 15,890.

Intoxicating Liquors: LICENSE. Where a barkeeper sells intoxicating liquors to a minor or to an habitual drunkard, the proprietor of the place will be held responsible for such sales, in the absence of evidence that they were made in violation of his orders.

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

E. A. Cook, for appellants.

W. D. Oldham and *H. D. Rhea, contra.*

DUFFIE, C.

The appellee, William Berger, and one Delahunty were licensed saloon-keepers in the city of Gothenburg during the municipal year of 1907, and both these parties applied for a license for the year 1908. A remonstrance was filed against the application of Berger, and upon the hearing the city council refused the license. From the order of the council he appealed to the district court, where the finding of the council was reversed and an order entered directing it to grant the license. From this order the remonstrators have appealed.

The remonstrance upon which hearing was had charged that Berger, during the previous year, had violated our liquor laws in the following respects: (1) Selling to habitual drunkards and to minors; (2) on the Sabbath day; (3) keeping a disorderly house; (4) charging that he was not a man of good moral character. An examination of the evidence leads us to believe that the finding of the district court on all of these questions must be sustained, with the exception of the finding that no sale

was made to minors. It is true that it is shown that Ed. Berger and one Morrell, who acted as barkeepers for the appellee, sold liquor to minors under circumstances which disclose that they were honestly mistaken as to the age of the parties to whom the sales were made, and, while this is no excuse for a violation of the law, they both testified that they had positive instructions from the appellee not to sell to minors, to habitual drunkards, on the Sabbath day, or after the hour fixed by the ordinance of the city for closing the saloon. One Swanson was a bartender for a time in Berger's saloon, and Wiggins, a minor, testified to having purchased beer from him. Swanson had removed from the state at the time of the trial, and no evidence was produced as to any instructions given him by the applicant relating to sales to minors, habitual drunkards, or on the Sabbath day, and we suppose that the district court based its finding upon the presumption that instructions given to the other barkeepers were also given to Swanson. In *Moore v. State,* 64 Neb. 557, we held that a sale made by a servant, without the express or implied authority of his master, is not a sale by the master within the meaning of our law relating to the sale of intoxicating liquors. Under this rule the sales made to minors by Ed. Berger and Morrell, being against the express instructions of the appellee, cannot operate against him. The sales made by Swanson to Wiggins are not explained, and are not shown to be without the knowledge of consent or against the direction of Berger, and, in the absence of Swanson, we think it was the duty of the appellee to himself to go on the stand and show that such sales were not known to him and were made in violation of his orders. The sales being made, the burden rested upon the applicant to show that he was not responsible therefor, and instructions given to his other employees will not be presumed, in the absence of evidence, to have been given Swanson, who made the sales.

For the reason that the sales made by Swanson to Wig-

gins have in no manner been explained by the appellee and shown to be against his direction, we recommend a reversal of the case.

EPPERSON, GOOD and CALKINS, CC., concur.

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

REVERSED.

JACOB CORNELIUS, APPELLANT, V. CITY WATER COMPANY, APPELLEE.

FILED APRIL 13, 1909. No. 15,521.

1. Master and Servant: INJURY: SUDDEN DANGER. An accident caused by the caving in of the wall of a deep trench cannot be said to be the result of a sudden danger when the defects in the wall were recognized by all persons acquainted therewith, including the plaintiff, as a continuing threatening danger.

2. Trial: INSTRUCTIONS. It is error to instruct that the burden is upon plaintiff to prove "all the material allegations of his petition"; but such error is cured by further instructions in which the jury are properly told to find for the plaintiff if they believe from the evidence that the necessary facts pointed out by the instruction have been established.

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

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

Charles A. Robinson and *Francis A. Brogan, contra.*

EPPERSON, C.

Plaintiff, an employee of defendant, was assisting a fellow workman in calking water main pipes in the bottom of a trench about five feet deep. The trench was dug in sandy and unsolid ground. One side caved in upon

the plaintiff, whereby he received personal injuries for which he seeks to recover. Plaintiff alleged that it was defendant's duty to curb or shore up the sides of the trench so as to prevent its falling in, and thereby protect its workmen, which duty was neglected. Defendant admitted that the trench caved in and caught the plaintiff, but declared that, if plaintiff was injured, it was through his own fault or negligence. Defendant prevailed in the court below, and plaintiff has appealed.

Without reviewing the evidence in detail, we will state that it is clearly shown by undisputed evidence that the trench was a place of danger, and was recognized as such by both parties, and that plaintiff was injured. The evidence of either contributory negligence or the assumption of the risk was not so strong that a verdict for plaintiff would have been overthrown, but it is sufficient also to sustain the defendant's verdict.

Plaintiff objected to the following instruction: "You are instructed that, if you believe from the evidence that it was an obvious and apparent condition to a man of the age, experience and mental capacity of the plaintiff that the ditch in which plaintiff was working at the time of the injury was liable to cave in, and that plaintiff, knowing such fact, and after being aware of the condition, if you believe such condition did exist, continued to work in such ditch and was injured, then he cannot recover in this action." This seems to be a fair and adequate statement of the doctrine of assumed risk as the same is applicable to this case. But, as we understand counsel's objection, it is that the instruction should have included the rule exempting a servant from the imputation of assuming the risk, if he is told by the master that the work may proceed with safety, unless the danger is so obvious and manifest that a person of ordinary prudence and caution would not have incurred it. Plaintiff's testimony in part was that a few moments before that accident the workmen were called from the trench because they thought it was about to cave in. Then that defendant's

foreman said: "It is safe and all right. It has been cracked for half an hour—to go back in, it would stand all right." Whereupon the workmen returned, and within a few minutes the accident occurred. Possibly such statements by the foreman may have amounted to an assurance that the place was safe, but it is doubtful that, under the circumstances of this case, the rule may be applied, for it is apparent that the plaintiff well knew the dangerous character of the place. From his own testimony it appears that it was a part of his duty to watch the bank and to warn his fellow workmen of danger whenever the bank would begin to cave in. He had previously had experience in digging trenches through the same kind of soil. A few weeks before the accident the dirt had caved in upon him at another point, and within a few feet from the place of the accident the dirt had previously caved in, and plaintiff had put in a brace intended to prevent future trouble.

But there are other reasons why the rule contended for should not be applied to this case. After the foreman told plaintiff to return to the trench, and before the accident, the foreman and others standing on the surface of the ground saw the impending danger and warned the workmen in the trench. One witness testified that plaintiff had plenty of time to get out if he had gone when Davis, the foreman, first told them; that Davis told them two or three times, "pretty strong the last time before they started." Another witness testified: "I saw the crack and told Davis, and he hollered for the men to get out," and "Davis hollered two or three times. They did not move the first time." Another witness testified substantially the same. He said that Davis got angry and told them to get out. After Davis told them the second time, the dirt caved in. These were plaintiff's witnesses. Substantially all the testimony on this point is the same, indicating that plaintiff had ample time after he was warned to remove from the place of danger. It is thus made apparent that, although the foreman at one time may have

assured the plaintiff that there was no danger, yet, when it was approaching, he gave ample warning, and such as would have obviated the injury had it been heeded by the plaintiff.

Plaintiff also assigns as error instruction No. 15, given by the court, which required the jury to find for defendant if sufficient time elapsed for a reasonable man of the capacity of plaintiff to have gone out of the ditch with safety after warning had been given of the approaching danger, and plaintiff unreasonably failed or neglected to act upon such advice. It is criticised because it omitted the question of sudden and imminent danger, in the presence of which one is not expected to act as wisely as he does when he has the opportunity to deliberate. It can hardly be said that the accident was the result of a sudden danger, when the wall of the trench was a recognized threatening danger which was expected might give way at any time, and well known to plaintiff, as indicated by the evidence above referred to. The instruction meets our approval.

Plaintiff also complains of instruction No. 4, which was erroneous, in that it told the jury that the burden was upon plaintiff to prove "all the material allegations of his petition." The court did not specifically point out the material allegations of the petition. But, in view of the other instructions given, it does not appear that this error could have misled the jury, for we find that in a later instruction the court told the jury to find for plaintiff if they believed from the evidence that the defendant negligently and carelessly failed and neglected to provide plaintiff a reasonably safe place in which to work, and that, in consequence of such negligence, and without fault on his part, and in the exercise of ordinary care he was injured.

No reversible error is found, and we recommend that the judgment of the district 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.

JULIUS ENGELKE, APPELLEE, V. HERMAN ENGELKE ET AL., APPELLANTS.

FILED APRIL 13, 1909. No. 15,544.

Deeds: DELIVERY: EVIDENCE. The evidence relating to the delivery of a deed being conflicting, consideration is given to the conduct of the grantees in surreptitiously recording the deed, in order to determine the weight to be given to the evidence.

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

B. N. Robertson, for appellants.

J. H. Grossman, contra.

EPPERSON, C.

Prior to the 16th day of March, 1904, the plaintiff, a widower, was the owner of an improved lot in the city of Omaha, which was all the property he had. On that day he executed and acknowledged a deed therefor, naming as grantees his children, the defendants Herman Engelke and Louise Wyman, who are his only living children. He has two grandchildren, the daughters of a deceased daughter. This controversy concerns only the question of the delivery of the deed.

It is the contention of the plaintiff that the deed was made at the request of his children, who advised him to thus dispose of his property, instead of making a will for that purpose; that it was not his intention to deprive his grandchildren of a share in his estate; that it was the understanding between himself and his children that the

deed was not to be delivered during his lifetime, and that he was to retain it, and, if he ever wanted to make a different disposition of his property, he would destroy it.

The defendants contend that the deed was made, executed and delivered by the plaintiff, who was prompted only by his own judgment; that he intended to exclude his grandchildren; that said deed was made in lieu of a will, so that the expense of probating could be avoided. Defendants admit that plaintiff was entitled to the possession of the property during his lifetime, with all the rents and profits derived therefrom. At that time plaintiff resided with his daughter. He was about 74 years old, and could not read English. On the day the deed was made plaintiff and defendants went together to the office of a notary public, where the instrument was signed and acknowledged. There is a dispute as to which party took the physical possession of the deed at that time. Plaintiff testified that his daughter carried the deed to their home at his request, as a matter of convenience. The daughter testified that the notary handed her the deed, but that plaintiff carried it home at her request. When they reached home, plaintiff folded the deed in a piece of paper, and tied a string about it, and placed it in a bureau drawer belonging to him, in which he also kept his money and other valuable papers, where, also, the daughter testified that she had some of her valuable papers. On the 18th day of July, 1905, the defendant, Mrs. Wyman, removed the deed from the bureau drawer, without the knowledge of the plaintiff, removed the string and the paper wrapper, and handed the deed to the defendant Herman Engelke, who took it to the office of the register of deeds, a very intimate friend accompanying him. This defendant or his friend requested that the deed be recorded at once and immediately returned, which was done. The volume of business at that time in the office of the register of deeds would have caused a delay of several days in the return of instruments after they were filed for record, except in cases where urgent demand required

an earlier return. The deed was immediately returned by Herman Engelke to his sister, Mrs. Wyman, who placed it in the same wrapper, and tied it with the same string with which it was previously wrapped, and placed it again in the bureau drawer. Later, when her father removed from her home, she permitted him to take the deed with him. Thereafter the plaintiff destroyed it, not knowing that it had been recorded, and desiring to avoid its effect. He subsequently learned that it had been recorded, and instituted this action to cancel the deed of record and to clear his title to the property. Plaintiff prevailed in the court below, and defendants have appealed.

The defendants both testified that plaintiff intended to deliver to them the deed when it was made. Were it not for the peculiar circumstances concerning the recording of the deed, as testified to by the defendants themselves, there would be an irreconcilable conflict of testimony on this question. But from their own testimony as to the manner in which the deed was removed from the bureau drawer for the purpose of having it recorded, and from the plaintiff's apparent custody of the deed from the time of its execution until he destroyed it, we are convinced that the deed had never in fact been delivered to the defendants by the plaintiff, and that it never became effective as an instrument of conveyance. Defendants do not explain the reason why they caused the deed to be so hastily returned to the bureau drawer. The only reason appearing to us for this is to prevent their father from learning that the deed had been recorded. It seems from all the evidence that the defendants planned to keep their father in ignorance of the removal of the deed and of its recording. Such conduct on their part is inconsistent with their claim of right to the deed and affects their credibility in a peculiar manner. There is a great preponderance of creditable evidence supporting the judgment of the lower court, and we recommend that it 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.

WILLIAM KROTTER & COMPANY, APPELLANT, V. G. W. NORTON ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,582.

1. Process: SERVICE. The service of a summons upon a wife at her home is personal service, if the copy intended for her is actually delivered to her husband for her, in her presence, and at the same time is read to her by the officer, and she understands that the copy was intended for her.

2. ———: ———. An unnecessary indorsement upon a summons, which has no tendency to mislead or prejudice the defendants, will not render the service void.

3. ———: ———: DEFECTIVE DESCRIPTION. A court acquires jurisdiction over a defendant by personal service of process, even though she be defectively described therein.

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

R. R. Dickson, for appellant.

Edward H. Whelan, contra.

EPPERSON, C.

Plaintiff instituted an action in equity to foreclose a chattel mortgage given by the defendant G. W. Norton to plaintiff upon a frame dwelling house and frame barn situate on land in the possession of mortgagor under a five-year lease. The mortgagor and his wife were made defendants, and a summons was issued in which they were named as "G. W. Norton and wife, Mrs. G. W. Norton." The return of the sheriff showed personal service. Coupled with his petition for foreclosure, the plaintiff set

forth that the defendants threatened to remove the buildings which would be a damage thereto, and applied for an injunction to prevent the same. A hearing upon the application for a temporary order of injunction was desired, and a subsequent date fixed therefor by the court, and notice thereof, and a restraining order was served upon the defendants by the sheriff at the time the summons was served. At the time fixed for a hearing upon the application for temporary injunction, the records show that, "upon an agreement of parties made in open court, the hearing was continued until April 1, 1907." Still later, and upon default of defendants, the court rendered a decree of foreclosure, and directed a sale of the mortgaged property for the satisfaction of plaintiff's debt. After the sheriff had sold the property, but before confirmation, the defendants filed an application to set aside the sale, and asked that they be permitted to answer by alleging that the buildings in controversy were exempt to them as a homestead, and that the mortgage executed by the husband alone was void. As an excuse for not answering on time, defendants contend that the court was without jurisdiction to render the decree of foreclosure on account of certain irregularities in the summons and the service thereof.

Objection is made that there was no personal service of summons upon Mrs. Norton. It appears from the testimony of the sheriff that the summons was not served by the actual delivery of a copy thereof into the hand of Mrs. Norton, but such service is not necessary to constitute personal service. According to Mrs. Norton's own testimony, we are convinced that there was personal service of the summons upon her. At the time of the service of the summons and the notice of application for injunction, she testified that the sheriff came to their home and into the room where she and her husband were; that the sheriff read the papers aloud, both the notice and the summons, in the presence of both defendants; that she heard them read; that the sheriff handed the two papers to her hus-

band, saying one of them was for the husband and one for the wife; that she knew that there was a paper left there for her, and that she was named therein as the wife of George W. Norton. At the time Mrs. Norton told the sheriff that she did not know what he summoned her for; that she did not sign any papers, nor have any dealings with the plaintiff. Her testimony is corroborated by her husband, also by the sheriff, except the latter testified that he laid the papers intended for Mrs. Norton upon the table, at which she was employed all the time he was there, attending to the breakfast dishes. As we view it, it is immaterial whether the sheriff laid the papers intended for Mrs. Norton upon the table or handed them to her husband. Whichever it was, it was done in Mrs. Norton's presence, with full knowledge on her part that one of the copies of each paper was intended for her. She so understood it, and was as fully informed as though the sheriff had actually delivered the papers into her own hands. This is clearly distinguishable from *Holliday v. Brown,* 33 Neb. 657, in which it appears that the wife was not present, and knew nothing of the attempted service of summons upon her. If the actual delivery into the hand of a defendant is necessary to constitute personal service, one might effectively and forever avoid service of process by refusing to disclose her true name, and by refusing to take a copy of a summons into her hands.

Objection is further made to the summons filed because the words "restraining order allowed" were indorsed on the summons. This indorsement was entirely unnecessary, but it is difficult to see how it could in any way mislead or prejudice the defendants. Such indorsement did not avoid the summons. *Boulware v. Otoe County,* 16 Neb. 26.

The next contention is more serious. As Mrs. Norton was not named as Sarah E. Norton, which is her true name, it is contended that the process is void under the provisions of section 148 of the code. This statute requires a plaintiff, who does not know the real name of

the defendant to state in the verification of his petition that he could not discover the true name, and the summons must state that the real name is unknown, and personal service thereof be made. Nowhere do our statutes declare, that the court acquires no jurisdiction by process personally served, but issued in the wrong name of a defendant, even if the provisions of section 148 are not complied with. This court has decided that process thus issued which was served upon defendant only by leaving a copy at his usual place of residence was insufficient to give the court jurisdiction. *Enewold v. Olsen,* 39 Neb. 59; *Gillian v. McDowall,* 66 Neb. 814. In the case last cited the court considered process in which a defendant had been named by his initials only. There, as here, the verification did not state that the real name could not be ascertained, nor did the summons recite that the real name was unknown. In the opinion we find the following: "It might well be that the omission to state in the summons that the real name of the defendant so sued was unknown would be a mere irregularity, and would not subject the judgment to collateral attack. But it is settled that there must be personal service, and that without it the judgment is of no force." The difference in the effect of summons not served and irregularly served is pointed out in *Muchmore v. Guest,* 2 Neb. (Unof.) 127, where it is held: "There is a well-marked distinction maintained between judgments rendered in which there has been no service of summons at all and those rendered where there has been service of summons irregularly made. In the former class the judgment may be collaterally impeached, but in the latter the defect is waived, unless directly assailed." In the case at bar the failure of the plaintiff to comply with the provisions of section 148 of the code as to the verification of the petition and as to the contents of the summons was but an irregularity which did not avoid the jurisdiction of the court. Personal service of the summons was had, and defendant cannot assail the process because of the misnomer after

permitting the decree of foreclosure. *Davis v. Jennings*, 78 Neb. 462.

As another reason for setting aside the decree, defendants allege fraud, in that G. W. Norton visited the attorney of the plaintiff before the decree was entered, and made an agreement with him whereby plaintiff agreed that no further proceedings were to be had in the case until defendant had the opportunity to see plaintiff and effect a settlement. No testimony was offered in support of this contention, but the affidavit of defendant George W. Norton was introduced over objection. Therein he stated that two months before the entry of the decree such an agreement was entered into, and that he used diligence in his efforts to arrange a settlement with the plaintiff. This is insufficient to sustain the contention for two reasons: It is not shown that the time intervening between the agreement and the rendering of the decree was insufficient for defendant to have an opportunity to make the settlement which he sought. It is not shown that he used diligence in his efforts to arrange a settlement. His statement that he did so is but a mere conclusion.

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

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.

HENRY ROHLFF, APPELLANT, V. ARTHUR BICE, APPELLEE.

FILED APRIL 13, 1909. No. 15,599.

Intoxicating Liquors: PLEADING. In an action to recover the price of liquors sold under a contract, the plaintiff need not allege that he is a licensed liquor dealer.

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

John A. Davies and *G. W. Shields,* for appellant.

A. H. Tingle and *D. A. Harrington, contra.*

EPPERSON, C.

Plaintiff sued to recover for a balance due for one barrel of whiskey sold by him to the defendant. Upon the trial plaintiff introduced evidence sufficient to support the allegations of his petition, and, in addition thereto, uncontradicted evidence that he was a licensed liquor dealer, and that the sale was made under his license. Upon the conclusion of the evidence the court on his own motion instructed the jury to return a verdict for the defendant, because, as stated by the trial court, "a party must confine his evidence to the allegations contained in his pleadings, and he cannot make out a case by evidence which is not based upon the allegations contained in his pleadings, when the missing allegation is a material one." From a judgment upon the verdict plaintiff appealed.

We have not been favored by an argument or a brief in behalf of the defendant, and find nothing in the record indicating what theory of the case the trial court had in mind; but plaintiff informs us that the court gave the instruction upon the theory that plaintiff should have alleged in his petition that he was a licensee. The plaintiff was not required to allege that he was duly authorized to sell the liquor in controversy. It is the rule that, in actions to recover the price of liquors sold, plaintiff need not allege that the sale was authorized by law, or that he was a licensed liquor dealer. If the defendant seeks to defeat plaintiff's action on the ground that the sale was illegal, he must allege its illegality as a defense. Black, Intoxicating Liquors, sec. 250; 23 Cyc. 342. We find no cases to the contrary, nor can we find any reason requir-

ing the plaintiff to allege this fact. In this state, where persons may be authorized to sell intoxicants, the court will not presume that one suing to recover the price of liquors sold had made the sale illegally.

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

DUFFIE, GOOD, and CALKINS, 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.

MARY RADIL, APPELLANT, V. ALICE L. SAWYER, ADMINISTRATRIX, APPELLEE.*

FILED APRIL 13, 1909. No. 15,600.

1. Appeal: REVIEW. Errors committed in the rendition of a judgment of the district court in reversing the judgment of a justice of the peace in error proceedings will not be reviewed on appeal to this court from the judgment of the district court rendered upon a trial of the merits.

2. Judgment: COLLATERAL ATTACK. A party who challenges the jurisdiction of the district court in proceedings in error from a justice of the peace, and suffers an adverse judgment, cannot collaterally attack such judgment.

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

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

W. G. Hastings and *A. N. Dodson, contra.*

EPPERSON, C.

On May 24, 1904, the defendant in error recovered a judgment against the plaintiff's decedent before a justice

* Reversed on rehearing. See opinion, 85 Neb. ——.

of the peace in a replevin suit. To reverse this judgment the plaintiff procured a transcript, which, with a petition in error, he filed in the office of the clerk of the district court June 3, 1904. Nothing further appears to have been done until on December 5, 1904, the defendant in error filed an objection to the jurisdiction of the court over her person, for the reason that no summons in error was issued nor served within the time provided by law. Later the plaintiff in error requested the court to issue a summons *nunc pro tunc,* alleging that the clerk of the court had neglected and failed to issue a summons in error as requested. On May 3, 1905, the special appearance was overruled, and plaintiff's motion sustained. A summons was then issued, as of date June 3, 1904, and served upon the defendant in error May 15, 1905. Defendant in error again filed a special appearance, objecting to the jurisdiction of the court because no summons had been issued within the time prescribed by law. On December 19, 1905, defendant excepted to an order reviving the action in the name of the administratrix, and renewed her objection to the jurisdiction of the court, and objected to the action of the court in proceeding with the case. On December 20, 1906, the court rendered judgment reversing that of the justice of the peace, and held the case for trial. November 16, 1907, upon trial, a judgment was rendered in favor of the plaintiff in error for the sum of $145 and costs, from which the defendant in error has appealed.

It is contended that the district court erred in overruling the special appearance and in rendering judgment in favor of the plaintiff in error. There was no prejudicial error in the court's ruling upon the first special appearance. Although an entry of record was made overruling it, the adverse party did, however, virtually submit to it by suing out summons thereafter. The rights of the parties depend upon the proceedings had subsequently to the overruling of the first special appearance. The issuance of a summons *nunc pro tunc* seems to be a new

feature in the practice in this jurisdiction. The author has never heard of a writ being issued in this manner. A summons previously issued and the return thereof may be properly entered of record *nunc pro tunc* for the purpose of supplying an error of omission; but we can conceive of no reason for permitting the issuance of a summons *nunc pro tunc* for the purpose of acquiring jurisdiction over a defendant. Section 64 of the code provides that a summons must be dated the day it is issued. The court below acquired no more jurisdiction by the issuance of this summons than it would had an ordinary summons been issued at that time and dated on the day it was issued.

This court has frequently held that the jurisdiction of an appellate court is dependent upon the commencement of error proceedings within the time fixed by statute, and that the parties could not by stipulation at a later date confer such jurisdiction upon the court. See *Tootle, Hosea & Co. v. Shirey,* 52 Neb. 674, and cases there cited. It has also been held that the summons must be issued within the time fixed by statute for the perfecting of error proceedings. *Rogers v. Redick,* 10 Neb. 332; *Omaha Loan & Trust Co. v. Ayer,* 38 Neb. 891. Our statute in force at the time of the error proceedings here in controversy were pending limited the institution of such proceedings to a period of six months. Such action was therefore barred at the time the plaintiff in error caused the summons to be issued. Upon the service of such summons the defendant in error again filed a special appearance, the overruling of which is here assigned as error. As we view it, it is immaterial whether the defendant in error filed a special or a general appearance. He had the right to appear generally and set forth the bar of the statute as a defense to the plaintiff's action. Having appeared and objected to the jurisdiction of the court, the court should have sustained such objection. The court's failure to do so was error. The court erroneously de-

cided that it had jurisdiction. But the defendant in error made no further appearance. He did not appeal from the judgment which necessarily followed the court's erroneous ruling; that is, the judgment reversing the judgment of the justice of the peace. This was a final judgment from which he could have appealed. *Banks v. Uhl,* 5 Neb. 240; *Tootle, Hosea & Co. v. Jones,* 19 Neb. 588; *Dane County Bank v. Garrett,* 48 Neb. 916. The defendant in error, having appeared and challenged the jurisdiction of the court, had his remedy by appealing from the judgment there rendered, and he cannot now attack it collaterally.

In *Banks v. Uhl, supra,* it was held: "The failure to except to such judgment of reversal, and to take steps to set it aside until after the original case has proceeded to final judgment, will be deemed a waiver of all errors committed in its rendition." In *David Bradley & Co. v. Matley,* 83 Neb. 589, we held that a special appearance before a justice of the peace objecting to the manner of the service of process need not have been made, but, having been made, an adverse judgment could not be assailed collaterally. We think that the rule there announced controls this case. The former decisions of this court do not establish that the failure merely to issue a summons in error within the time prescribed by statute absolutely deprives the court of jurisdiction over the subject matter. In *Lloyd v. Reynolds,* 26 Neb. 63, it was held that objections to the jurisdiction were too late if filed after the service of process and a voluntary appearance later than the time fixed. In *Benson v. Michael,* 29 Neb. 131, although holding that the issuance of a summons out of time did not confer jurisdiction, yet the rule was conditioned upon the fact that objection was made to the jurisdiction. Defendant's present contention is a collateral attack upon the judgment of the district court reversing that of the justice of the peace. It is a general rule, requiring no citation of authorities to support it, that a court is the judge of its own jurisdiction, and, unless it

was absolutely without power, a wrongful decision that it had jurisdiction was but an error, and such error must be taken advantage of by direct proceedings to reverse the judgment.

We recommend that the judgment of the district 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.

JOHN G. GANNON, APPELLEE, V. JANE WORTH, APPELLANT.

FILED APRIL 13, 1909. No. 15,628.

Contract: CONSTRUCTION. Defendant agreed to pay plaintiff the difference between a certain sum and the amount of rental for which plaintiff would procure for defendant a lease on certain lands belonging to another. *Held,* That the contract was one to pay for services, and not to pay rent.

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

Hiram Chase, for appellant.

T. L. Sloan and *Curtis L. Day, contra.*

EPPERSON, C.

In the year 1902 the defendant seems to have been in possession of a quarter section of land allotted to Little Girl Walker under the provisions of the act of congress approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians of the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes." 24 U. S. Statutes at Large,

ch. 119, p. 388. The defendant desired to rent this land for the years 1903, 1904 and 1905, and was willing to pay $2 an acre per annum for the use thereof. Under these circumstances she entered into an agreement with the plaintiff that, if he would procure such lease, she would pay him the difference between the rent she would be compelled to pay to the Indian owner and $2 an acre. The plaintiff procured Little Girl Walker to execute such lease to the defendant at a rent of $1.25 an acre for the first two years and $1.50 an acre for the third year. To secure this lease he paid to Little Girl Walker $120. When the lease was approved by the Indian agent, and pending its approval by the commissioner of Indian affairs and secretary of the interior, the defendant executed notes payable to the order of the plaintiff for the amount of the difference between each year's rent as actually reserved and what it would have amounted to at the rate of $2 an acre. By the terms of the lease the rent was to be paid in two instalments on the 1st days of March and September in each year, and, while two notes were given for each year, they were both made payable at the time the September instalment of rent became due. Each note contained a stipulation that it was given for rent due outside of a certain government lease upon the northwest quarter of 19-25-7, and should be void if the lease was not approved for the year in which the note matured. The lease was approved, and the defendant remained in possession of the premises and paid the rent due the Indian owner, but refused to pay the notes given to the plaintiff, and this suit was brought to enforce such payment.

The petition alleged that the stipulation above referred to as to the consideration of the notes was inserted by mistake of the scrivener, and that the notes were in fact given to pay plaintiff for services rendered defendant in "securing approved leases of said lands," and prayed a reformation of the same and judgment upon them when so reformed. The answer denied that the stipulation as

to the consideration was inserted by mistake, and set up the fact that Little Girl Walker was an Indian; that the land in question was allotted to her as a member of the Omaha tribe; and that the consideration of the notes was a contract touching the said lands, void as against public policy, and contravening the provisions of the acts of congress in relation to such lands. There was no dispute concerning the facts, the only question being the legal conclusions to be drawn therefrom. The court below found for the plaintiff for the amount claimed, and defendant appeals.

The act of congress referred to provides: "If any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, * * * such conveyance or contract shall be absolutely null and void." 24 U. S. Statutes at Large, ch. 119, p. 388, sec. 5. But the federal statutes, in certain cases, provide that the allotted lands may be leased upon such terms, regulations and conditions as shall be prescribed by the secretary, for a term not exceeding five years, for farm purposes only. Such leases, however, before they are binding, must be approved by the Indian agent and the secretary of the interior. It cannot be doubted but that a valid lease may be obtained for the allotted Indian lands if the conditions imposed by the law are complied with. Such a valid lease was obtained in this case. Negotiations for such a lease are not violations of section 5, *supra*. If the defendant could legally negotiate for a lease such as the government would approve, she could legally employ another to act for her in securing it. There is no contention here that the parties undertook to procure an illegal lease. Neither of them was bound to protect the interests of Little Girl Walker. The rental paid to her cannot be said to be disproportionate to the rental value of the land. It is such as the interior department approved. It does not appear that any attempt was made to violate any law or to defraud any one. Defendant was willing to expend a certain amount in procuring the lease,

which proved to be more than the lessor or the government demanded. The difference between the rental required and the sum defendant was willing to expend she promised to pay to the plaintiff upon his procuring the lease. Such agreement was not one touching an illegal transfer of the allotted land, but one for compensation for services rendered. The stipulation that the notes were given for rent did not change the real character of the transaction. Neither does the fact that the amount was left uncertain, instead of being fixed definitely when the agreement was first made. *Larson v. First Nat. Bank,* 62 Neb. 303, 66 Neb. 595, is not in point.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CARRIE E. BAYARD, APPELLEE, V. CITY OF FRANKLIN, APPELLANT.

FILED APRIL 13, 1909. No. 15,630.

Damages: QUESTION FOR JURY. There is no fixed rule for the measure of damages occasioned by pain. The amount is to be determined by the circumstances of each case, and is a matter peculiarly within the province of the jury.

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

H. W. Short and *Adams & Adams,* for appellant.

W. H. Miller and *George A. Adams, contra.*

EPPERSON, C.

Along one of the public streets of the defendant city there is a sidewalk four feet wide, constructed principally

of cement. In this, however, is a section, ten feet long, made of wood, which passes over a depression in the ground. This wooden section rests at either end upon shelves or shoulders built in the cement walk in such a manner that the surfaces of the different parts are upon a level. The wooden section is constructed by the nailing of ordinary six-inch fence boards to four two-by-four runners, extending from shoulder to shoulder in the cement walks. On November 10, 1906, the plaintiff and several companions were passing over this walk, she and two others walking abreast. Plaintiff was upon the left, and as they approached the wooden section, which was narrower than the cement walk, she dropped a few inches to the rear. The weight of her companions upon the wooden walk, by reason of its defective condition, elevated the left side at the corner which plaintiff was approaching in such a way that plaintiff's left foot caught under the wooden walk, which immediately pressed down, holding her foot and causing her to fall, whereby her foot was crushed and severely injured. Plaintiff instituted this action against the defendant to recover general damages, alleging that the defendant was negligent in maintaining this sidewalk in a defective and dangerous condition. She recovered a verdict and judgment for $3,000, from which the defendant has appealed.

The evidence is sufficient to justify a finding that the wooden section of the sidewalk was in a defective condition and dangerous, and that the city authorities knew of its condition. No contributory negligence was shown. Plaintiff was 24 years of age, and at the time of the accident was engaged in teaching in the public schools of the defendant city, receiving $40 a month as wages. For four days, although her foot was very sore, only household remedies were applied. On the fourth day after the accident she visited a physician and received treatment. For three weeks after the day of the accident she remained in her room, but for two of the three weeks her school was quarantined. Throughout the fourth week

the plaintiff attended to her duties as a teacher. She was confined to her room during the fifth week, and then went to her home in Lincoln, where she remained for about a month. She then returned to her school and taught the remainder of the school year. In September, 1907, about a month before the trial, she entered upon a year's school work in the village of Rokeby. The evidence does not show that plaintiff lost any wages or that her earning capacity has been diminished by reason of the accident, except for a few weeks, as above indicated. The evidence shows definitely that the medical services procured by plaintiff were of the value of $50. From these facts it is apparent that the principal element of damages entering into the verdict was such as plaintiff sustained by reason of pain and suffering, not only prior to the trial, but such as she will suffer in the future as a result of the injury.

The defendant contends that the verdict was excessive, as plaintiff's earning capacity was not shown to have been diminished. The evidence very clearly indicates that her pain and suffering were very great, and such as would usually drive a person of ordinary courage from the field of activity. Although the plaintiff continued teaching, yet she did so under the greatest of pain and inconvenience. During her school work in the defendant city, after the accident, she was required to use a crutch for several months. She was required to keep her foot at rest, and to make this possible it was kept for several months in a plaster of paris cast, or was supported by rubber adhesive casts, and in addition thereto, while in the schoolroom, her foot was kept elevated by resting the same upon a small box provided for that purpose. Plaintiff suffered great pain at night, the weight of the bedclothes causing great distress. She found it necessary frequently to rub the injured member in order to bring about the circulation of blood, and frequently called upon her friends to assist her. The injury was of such a nature that she could not place her heel upon the floor naturally, but was required to bear her weight, after discarding the crutches,

upon the front part of her foot. The plaintiff has not been able to walk without limping nor without pain. At the time of the trial she still suffered. Her foot was swollen, and she was required to sit a great deal of the time in order to favor the injured member. The plaintiff's testimony regarding the pain and suffering was corroborated by numerous witnesses testifying to facts relative to her conduct, and also by medical experts who testified to conditions which would indicate to any reasonable mind that pain and suffering were present. The trial was had eleven months after the injury, and the evidence as to the future pain and suffering was such as to require the submission of that question to the jury. During a part of the time before the trial plaintiff had been treated by Dr. Reynolds, of Lincoln, who testified in part in reference to the injury as follows: "Well, it has progressed slowly, and yet it has made a little progress. * * * I presume the healing has taken place, but the injury, in all probability, will never be fully recovered. * * * She has not had time enough for the general average of injuries to the bones and ligaments to get to about what we call the curative stage, and yet I would say, in an injury like hers, the chances are she never will be entirely cured; that is, it will be a weak foot. It will be one she may go along fairly well on, if she steps just right; * * * but let her make a misstep, or turn her foot on uneven ground, or something like that, and she will immediately know she is having trouble with it, and that may last a lifetime. * * * She could not do anything like what we call manual labor, or something that kept her on her feet constantly, without, it in all probability, breaking down. It would be so excruciating. * * * There is a good bit of suffering with it, and the suffering is prolonged for a period of years. * * * I do not think she is well yet, and won't be for a good long time. If I was going to say when she would be well, she would not be well entirely, so the foot would be like the other, for three to five years. * * * Q. And not sure she ever will be

entirely well? A. No; not sure, but that will be her weak spot." Dr. Ella Sumners, who had also examined the plaintiff's injured foot, was asked if in her judgment the limb will ever be sound. She answered: "Why, it should, if it was just a common sprain. It should have been well by this time. I think it is very doubtful if she ever regains the full use of the ankle and foot." Dr. James Sumner testified that he did not think that it would ever fully recover. There was no evidence introduced on the part of the defendant relative to the nature of the injury. Although the physicians who examined the foot and testified were unable to state definitely as to the exact nature of the injury, whether it was a sprain or a fracture, or both, yet their inability to do so does not reflect the least discredit upon their testimony, for they fully explained that, in an injury of this nature, it was practically impossible for one to tell its full extent and exact nature.

There is no fixed rule by which the amount of damages occasioned by pain and suffering may be measured. It is a matter peculiarly within the province of the jury, and unless the verdict is clearly excessive it will not be disturbed by the court. Especially may this be said of an appellate court, which considers the case only after the trial court, who heard the case, saw the parties and the witnesses, who knew the jury, and has given his sanction to the verdict by rendering judgment thereon. It is a well-recognized law that, where the injuries are such that they are reasonably certain to continue to cause future pain and suffering, they are proper elements of damage. The evidence in this case showing, as it does, severe pain and suffering for a period of eleven months, and showing further that plaintiff will remain for some time in a crippled condition, with continued pain and suffering, we cannot say that the verdict is excessive. On the other hand, it appears to us as fair and adequate.

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

GOOD and CALKINS, CC., concur.

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

AFFIRMED.

HERMAN BREIL, APPELLEE, V. CLAUS GROTH PLATTDUTSCHEN VEREEN, APPELLANT.

FILED APRIL 13, 1909. No. 15,636.

Insurance: SICK BENEFITS. Within the meaning of an insurance contract for sick benefits, it cannot be said that an assured is not confined "constantly in the house" during an illness characterized by recurring periods of severity, although at intervals he may occasionally step into his yard, or make visits to his physician, or other short and unusual trips; the assured at all times being unable to resume the ordinary duties or pleasures of life.

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

A. S. Ritchie and *Charles L. Fritscher,* for appellant.

W. F. Wappich, contra.

EPPERSON, C.

On May 29, 1906, the plaintiff was, and for several years had been, a member of the defendant society. This society is a mutual fraternal association, organized for the purpose of paying sick benefits to its members at the rate of $8 a week, exclusive of the first week of sickness, and for a period not exceeding 26 weeks. No policies, certificates or contracts are issued to its members, but liability is fixed by the rules and regulations adopted for its government, and which provide, omitting provisions not pertinent: "Every member of the society is entitled to sick benefits if his sickness is such that the member must remain constantly in the house and under the care and treatment of a registered physician." On the 29th day

of May, 1906, the plaintiff was suffering with cataracts of the eyes. This trouble continued until after the institution of this action on November 13, 1906. Plaintiff sued to recover a balance due for 23 weeks' benefit; defendant having paid him for five weeks. He recovered in the court below, and defendant appealed.

About the second week of his said illness, and acting under the directions of his physician, he went to a hospital, where an operation was performed, and where he was retained for a period of two weeks for treatment. He then went to his home in the city of Omaha, where his physician resided, and where also the hospital was maintained. His physician never visited him at his home, nor did plaintiff perpetually remain within the house. He stepped into the yard occasionally, and went from one to four times each week to his physician's office. He returned to the hospital a few weeks later (the exact time is not disclosed), and again remained about two weeks, and suffered additional operations. He then spent two months at his home, until October or November, then returned once more to the hospital for further operations. This brings us to the time the suit was instituted, and perhaps beyond such time. The exact dates of the plaintiff's confinement in the hospital are not given, but it is reasonable to presume that such periods prior to the institution of this suit did not exceed six weeks. Plaintiff experienced considerable pain and inflammation of the eyes, but his physical condition was such that he did not need to remain within the house, except when in the hospital, and he was strong enough to go to his physician's office. When he did so, he was accompanied by some member of his family. This was necessary on account of his defective eyesight. On two or three occasions prior to the institution of the suit he went to the place of business of the president of the defendant society and made demands for the sick benefits sued for. The defendant admitted a liability for five weeks of his sickness, covering, we presume, the time plaintiff was in the hospital, but refused

liability for the remainder of the time, claiming that the plaintiff was not required by his sickness to remain in the house.

The rules and regulations of the defendant association constitute the agreement between the parties, and, in construing it, it is necessary to give force to the meaning which the parties evidently intended the words used should have. We are convinced that the only interpretation which may be given to this contract is that the defendant intended to pay to its members a weekly benefit during sickness, provided the sickness was such as would disable the member from departing from the house for the purpose of attending to the ordinary affairs of life. That a person "must remain constantly in the house" does not necessarily mean that one must remain perpetually within the four walls of a house. Within the meaning of the by-law quoted, one is confined to the house by sickness if his condition is such that he is unable to attend to the ordinary affairs of life and is required to remain in the house, except when making necessary visits to his physician. It cannot be said that a patient is not confined to his house constantly during an illness, which is characterized by recurring periods of severity, although at intervals he may step into his yard, or make visits to his physician, or other short and unusual trips, he at all times being unable to resume the ordinary duties or pleasures of life.

In *Hoffman v. Michigan Home & Hospital Ass'n,* 128 Mich. 323, 54 L. R. A. 746, it was held that a similar contract is not defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of the illness, he was continuously confined to the house the larger portion of the time. In the case at bar, there can be no doubt but that the plaintiff was entitled to recover during the time he was in the hospital. With reference to the intervening periods of time, it cannot be said that he was convalescing, except following his last visit to the hospital, and, as to

that time, we are not concerned. Between operations he was simply undergoing treatment for the purpose of preparing for the following operation. At all times he suffered intense pain. There was inflammation about the eyes, and there can be no doubt but that he was physically disabled from attending to his daily business or from enjoying the ordinary pleasures of life. The construction placed upon the contract by the trial court and the jury was consistent with the above.

We find no error in the record, and recommend that the judgment 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.

RICHARD CLEVE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED APRIL 13, 1909. No. 15,929.

Carriers: LIABILITY. A railroad company shipping stock accompanied by the owner is not liable for loss occasioned by excessive heat in transit, in the absence of competent evidence of negligence.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Reversed.*

James E. Kelby, Halleck F. Rose and *Frank E. Bishop,* for appellant.

W. W. Wilson, contra.

EPPERSON, C.

This is the second appearance of this case in this court. The former opinion is reported in 77 Neb. 166. It was there held that the evidence taken on the first trial was

insufficient to support the verdict in favor of plaintiff, and the case was remanded and another trial had.

The action is to recover the value of two fat steers which died in transit between Nebraska City and Chicago. The shipment was made by plaintiff under a contract with the Chicago, Burlington & Quincy Railroad Company, and the defendant is sued as the railroad company's lessee. The only question which we need to consider is the sufficiency of the evidence of negligence at the last trial to support the judgment which plaintiff obtained. The evidence given at the last trial is not materially different from that adduced at the first trial, and which is referred to at some length in the former opinion. It appears, however, that complaint was made by the plaintiff to the defendant's employees, while the train stopped at Hamburg, that the cattle were in danger on account of the excessive heat, and demand was made that the train move on. The evidence shows that soon after the complaint was made, both at Hamburg and at Stanton, the train containing the stock was moved. In the last trial, as at the first, it was not shown by competent evidence that the delays were unnecessary, nor that all the time consumed was not required for the ordinary business of the railway company. There is really very little dispute as to the facts. The evidence shows conclusively that the plaintiff's employees were in charge of the cattle in transit; that the day of shipment was very hot, and very little air was circulating; and that the steers died as a result of the excessive heat to which they were subjected while the train was stopped at Hamburg and at Stanton. There is some evidence in the record tending to show that the railroad company's employees promised the plaintiff a fast run from Stanton and that the same was not made. This is entirely immaterial, because it is conclusively shown that all the damage complained of was done before the train left Stanton. There was also evidence in both trials that the train, at the stations above mentioned, was left standing from 30 to

40 minutes between rows of box cars, thereby shutting off the circulation of air from the cattle. There was but little air circulating that day, and it is not shown that the cattle would have been any better off in any place where the company could have placed them. No demand was made by the plaintiff, or his employees, of the defendant that the train be placed in any different or better position during the delays at these stations. There is absolutely no reason why we should recede from the former opinion.

We recommend that the judgment be reversed and this cause remanded for further proceedings.

DUFFIE, GOOD and CALKINS, 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.

JOSEF KRBEL, SR., APPELLANT, V. LAMBERT KRBEL ET AL., APPELLEES.

FILED APRIL 13, 1908. No. 15,447.

1. **Appeal:** PLEADING: REVIEW. Where both parties to an action treated the case as though affirmative defenses in the answer were denied by a reply and tried the case upon that theory, this court on appeal will treat the case as though such reply had been filed.

2. **Parol Evidence:** WRITTEN CONTRACTS. A written contract cannot be varied or contradicted by parol evidence of a prior or contemporaneous oral agreement between the parties.

3. **Joint and Several Contracts:** RELEASE. Where a contract, joint and several in its form, provides that each of the obligors shall perform certain specific obligations, a release of one of the obligors will not discharge the others from liability on their separate obligations contained in the contract.

4. **Contracts:** LIMITATION OF ACTIONS. Where a written contract provides that the obligors shall furnish certain items annually dur-

ing the lifetime of the obligee, in an action on such contract the statute of limitations may be pleaded as a defense to all items which should by the terms of the contract have been furnished more than five years previous to the commencement of the action.

5. **Infants:** CONTRACTS: DISAFFIRMANCE. In order to avoid liability upon his contract, an infant must disaffirm within a reasonable time after becoming of age.

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

Sullivan & Squires, for appellant.

A. M. Robbins and *N. T. Gadd, contra.*

GOOD, C.

In December, 1894, Josef Krbel, Sr., was the owner of 360 acres of land in Custer county, Nebraska, the title to which was held in trust for him by one Severa. On the 20th of December, 1894, Josef Krbel, Sr., entered into a contract with three of his sons, Josef, Jr., Lambert and Arnold, whereby he transferred to each of said sons certain personal property, and caused deeds to be executed by said Severa conveying to each of said sons 120 acres of land. As a consideration for said personal property and the conveyance of said lands, the said sons executed and delivered to their father the following contract:

"Know all men by these presents: That Josef Krbel, Jr., Lambert Krbel and Arnold Krbel are each severally and individually held and firmly bound unto their father, Josef Krbel, Sr., in the sum of fifteen hundred dollars for the payment of which they each are bound and by these presents firmly bind themselves upon the conditions following: For and in consideration of property and other valuables received the receipt of which is hereby acknowledged, Josef Krbel, Jr., Lambert Krbel and Arnold Krbel each has for himself agreed and they now do by these presents all agree to furnish yearly to their

father, Josef Krbel, Sr., and his wife so long as they live and without additional cost to the said Josef Krbel, Sr., or his wife, the following supplies which shall be delivered in good season each year during the continuance of this contract: 50 bushels of wheat each, 150 bushels; 50 bushels of corn each, 150 bushels; 100 pounds of meat each, 300 pounds; 1 ton of coal each, 3 tons; 1 ton of hay each, 3 tons; also pasture and stable room for one cow; also room in house where the said Josef Krbel, Sr., now lives or in other quarters equally convenient and commodious. As a further guarantee for the faithful performance of this obligation, Josef Krbel, Jr., Lambert Krbel and Arnold Krbel for themselves, their heirs and assigns, grant, bargain and sell unto the said Josef Krbel, Sr., the S. W. ¼ and the W. ½ of the S. E. ¼ of section 34, Tp. 20 and the N. W. ¼ N. E. ¼ and N. ½ N. W. ¼ of section 3, township 19, all in range 17 west Custer Co. Nebr. To have and to hold to the said Josef Krbel, Sr., his heirs and executors the land above described. The conditions of this obligation are such that if the above bounden Josef Krbel, Jr., Lambert Krbel and Arnold Krbel, their heirs and assigns shall fail to comply with the terms of this contract then the above described land shall revert to the said Josef Krbel, Sr., or his heirs or executors; and it is further stipulated and agreed that this instrument shall be full and sufficient notice of the said Josef Krbel, Sr., of his intention to go into court and have title to the above described land quieted in the said Josef Krbel, Sr. Witness our hands and seals this 20th day of December, 1894. Josef Krbel, Jr. Lambert Krbel. Arnold Krbel. Witness: I. E. Reneau. E. R. Purcell."

In January, 1905, Josef Krbel, Sr., brought this action against his three sons and their wives, alleging that each of his said sons had wholly failed to comply with the terms of said contract requiring each to furnish wheat, corn, meat, coal and hay, and alleged the amount of damages sustained by reason of such breach of the contract to be $1,685. He prayed the court to ascertain

the amount due him by reason of the breach of the contract, and for a decree requiring the land to be sold to satisfy the amount found due, or that execution might issue against the defendants upon the judgment. Separate answers were filed by each of the three sons. Josef Krbel, Jr., set up a satisfaction and release of the contract obligation. At the commencement of the trial the action was dismissed as to him and his wife. In the answers of the defendants Lambert and Arnold Krbel it was alleged, in effect, that at the time of the making of the contract it was understood and agreed between the parties that defendants at any time they desired might elect to rescind it, and that they had elected to rescind; second, that the plaintiff had released Josef Krbel, Jr., and the effect of that release was to discharge the other defendants; third, that plaintiff had fraudulently misrepresented the amount of the mortgage incumbrance on the land; fourth, the statute of limitations. In addition to these, the defense of infancy was set up in the answer of Arnold Krbel. A trial was had upon these issues, resulting in a judgment for defendants, from which plaintiff has appealed.

The record does not disclose upon what ground the judgment of the court was based. The execution of the contract was admitted, and the nonfulfilment was clearly shown. At the outset, defendants insist that the judgment is right because there was no reply to the affirmative defenses set up in the answers. The transcript does not contain any reply. The journal entry containing the final judgment shows that the case was submitted upon the petition, answers and the reply of the plaintiff, and the record further discloses that the burden of proof was assumed by the defendants, and it is very clearly disclosed that the case was tried by both parties upon the theory that the allegations of the answer were denied. This court will consider the case upon the same theory.

The defense that it was the understanding and agreement that defendants should have the right at any time

to rescind or repudiate the contract is unavailing. The agreement of the parties was reduced to writing, and the contract does not contain any provisions giving such a right to defendants. The law is well settled that, when a contract is reduced to writing, the obligations of the parties thereto are wholly within and defined by the written instrument, and it cannot be altered or varied by any collateral, oral agreement or understanding. *Clarke v. Kelsey,* 41 Neb. 766; *Mattison v. Chicago, R. I. & P. R. Co.,* 42 Neb. 545; *Thomas v. Nebraska Moline Plow Co.,* 56 Neb. 383; *Te Poel v. Shutt,* 57 Neb. 592.

In January, 1899, by a written release duly signed, acknowledged and delivered by plaintiff to Josef Krbel, Jr., the latter was discharged and "released from any and all obligations of said contract." Defendant claims that this release operated to discharge the other defendants. The rule is well established that a voluntary release by an obligee of one of several joint obligors to a contract operates as a release of all. *Neligh v. Bradford,* 1 Neb. 451; *Lamb v. Gregory,* 12 Neb. 506; *Scofield v. Clark,* 48 Neb. 711; *Banking House of A. Castetter v. Rose,* 78 Neb. 693. An examination of the contract in question shows that it is not joint in all of its parts, but as to the furnishing of wheat, corn, meat, coal and hay the contract is several. Several parties may enter into concurrent contracts respecting the same matter, binding themselves jointly as one party and also severally as separate parties at the same time. In such cases, besides the one joint contract, there are as many several contracts as there are separate obligors. As a joint and several contract is not one obligation, but a combination in one instrument of the joint obligation and as many distinct obligations as there are obligors, it follows that the liabilities must be a combination of those attaching to joint contracts and of those attaching to several contracts. 9 Cyc. 652-656. The effect of the release of Josef Krbel, Jr., was to discharge the other defendants from all liability upon the contract in so far as it was a purely joint

obligation only, but did not destroy the liability that was several, for, as above said, there were as many obligations as there were several obligors. The obligation of the defendants Lambert and Arnold each to furnish 50 bushels of wheat, 50 bushels of corn, 100 pounds of meat, 1 ton of coal and 1 ton of hay was unaffected by the release of Josef Krbel, Jr. That instrument did, however, release all the defendants from any liability as sureties for each other and from any liability to furnish pasture, stable, and rooms for the benefit of plaintiff, and operated to discharge the contract so far as it was a pledge of the land, because that was a joint pledge.

Defendants insist that the plaintiff fraudulently represented that the land located in section 34 was subject to a mortgage of $400, and that in section 3 to a mortgage of $75. It is disclosed by the record that in the deed to Lambert Krbel it is covenanted that the land is free and clear of incumbrance, except "$400 of a mortgage against one eighty and $75 of a mortgage against one forty," and in the deed to Arnold Krbel it is covenanted that the land is free of incumbrance, "except $400 of mortgage on one eighty and $75 on one forty of the tract." The evidence discloses that the two eighties constitute one quarter section, and that the quarter section was subject to a mortgage of $800. The record discloses that the forty-acre tracts that were conveyed to each of defendants were part of another quarter section which was subject to a mortgage of $300. Lambert Krbel, with reference to this matter, testifies: "Q. And you understood that each person was to pay $400 on one mortgage and $75 on another? A. Yes, sir. Q. And you knew $400 was not all of the mortgage, but was a part of the mortgage that was on the various tracts of the land? A. I do not know. From the way the old man told me, I thought we were going to have this $800 to pay. He told us: 'You will each have to pay $400 on an eighty and $75 on the forty.' Well, I suppose that was the way." The peculiar language used in the covenants, together

with the testimony of Lambert Krbel, show clearly that the defendants understood the situation that the land was liable for the amount of the mortgage that actually existed, but that they were taking it only subject to such portions of the mortgage as the proportion of the land conveyed to each bore to the total of the mortgaged premises. There was therefore no misrepresentation which would constitute a defense to the contract sued upon.

Defendants insist that plaintiff's action is barred by the statute of limitations. The contract provides for the furnishing of certain items annually. As to all the items that should have been furnished more than five years previous to the commencement of the action the statute of limitations was a valid defense, but, as to all the items which each of the defendants was to furnish to the plaintiff within five years of the commencement of the action, the statute of limitations constituted no defense.

The defendant Arnold Krbel further pleads the defense of infancy. The record discloses that he was a minor at the time of entering into the contract, being then about 20 years of age. The record also shows that long after he became of age he retained the land and received some benefits therefrom. He did not take any action to disaffirm the contract upon becoming of age or within a reasonable time thereafter. This was necessary, if he desired to be relieved of any liability upon the contract by reason of his infancy. *Englebert v. Troxell,* 40 Neb. 195; *O'Brien v. Gaslin,* 20 Neb. 347; *Ward v. Laverty,* 19 Neb. 429.

From a consideration of the entire case, we reach the conclusion that the defendants Arnold Krbel and Lambert Krbel were each liable upon the contract to the plaintiff for the amount of wheat, corn, meat, coal and hay that each was required under the contract to furnish within the five years next preceding the commencement of the action.

The judgment of the district court is not sustained by

the evidence, and we recommend that it be reversed and remanded for further proceedings according to law.

DUFFIE and CALKINS, CC., concur.

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

REVERSED.

CATHARINE FAUBER, APPELLANT, V. HARRISON KEIM, APPELLEE.*

FILED APRIL 13, 1909. No. 15,471.

1. **Appeal:** FINAL JUDGMENT. A cause is not reviewable in this court on appeal unless a final order or judgment has been rendered and entered in the district court.
2. ——: ——. A final judgment is not disclosed by a journal entry which merely recites the submission of the cause to the court and concludes in the following language: "The court finds for the defendant and judgment of dismissal. Plaintiff excepts to findings and judgment."

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

Hall, Woods & Pound, W. E. Goodhue and *J. T. Crew,* for appellant.

C. L. Richards, C. H. Sloan, F. W. Sloan and *J. J. Burke, contra.*

GOOD, C.

Plaintiff, a legatee under the will of Joseph Keim, deceased, brought this action to declare her legacy entitled to preference over other legacies provided for in said will, and to have it declared a lien on certain real estate owned by testator at his death, title to which real estate was subsequently acquired by defendant pursuant to provis-

* Rehearing allowed. See opinion, 85 Neb. ——.

ions contained in the will. Plaintiff has appealed from what she asserts is a final judgment entered by the district court dismissing her cause of action. The journal entry relied upon as constituting the judgment of dismissal is in the following language: "Now, on this 29th day of May, 1907, that being one of the days of the regular May, A. D. 1907, term of district court, in and for Thayer county, Nebraska, came now the attorneys for the parties to this action, and the cause having been taken under advisement, at a former term of this court, the court finds for the defendant and judgment of dismissal. Plaintiff excepts to finding and judgment."

To obtain a review in this court of the judgment of the district court there must be a final order or judgment rendered, and it cannot be reviewed prior to its formal entry upon the journal of the trial court. A mere memorandum of the trial judge is not sufficient. See *Hall County v. Smith,* 49 Neb. 274; *Hornick, Hess & Moore v. Maguire,* 47 Neb. 826; *Ward v. Urmson,* 40 Neb. 695.

The sufficiency of a journal entry claimed to be a final judgment must be tested by its substance, rather than by its form, but there are certain requisites of a judgment which cannot be dispensed with. The entry must purport to be an actual judgment conveying the judgment or sentence of the law, as distinguished from a mere memorandum, note or recital that a judgment has been or would be rendered. A mere order or direction or permission to a clerk to enter a judgment has not the force or characteristics of a judgment and will not support an execution. 1 Black, Judgments, sec. 115. The journal entry in this case amounts to no more than a finding for the defendant and an order for a judgment of dismissal or a recital that such judgment had been rendered. It does not show that there was any consideration or adjudication of the cause, and there is no entry conveying the sentence of the law or the judgment of the court. Under the record as presented there is no final judgment of the district court which can be reviewed on this appeal.

We therefore recommend that the appeal be dismissed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the appeal is

DISMISSED.

GEORGE WEST ET AL., APPELLANTS, V. DANIEL WEST ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,478.

1. Deeds: UNDUE INFLUENCE: PRESUMPTION. No presumption of undue influence arises from the fact that an aged grantor of failing mind conveys all of his real estate to a near relative, when it is shown that he was under obligation to such relative and received a fair and adequate consideration for the conveyance.

2. ———: MENTAL WEAKNESS. Mere mental weakness is not sufficient to avoid a deed, if such weakness does not amount to inability to comprehend the contract and is unaccompanied by evidence of undue influence or imposition.

3. ———: SETTING ASIDE: MENTAL INCAPACITY. To set aside a deed on the ground of the want of mental capacity on the part of the grantor to make the same, it must be established that the mind of the grantor was so weak and unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport of what he was then doing.

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

George C. Gillan and *John H. Linderman,* for appellants.

E. A. Cook and *Warrington & Stewart, contra.*

GOOD, C.

Henry West, a resident of Dawson county, Nebraska, died intestate January 28, 1907. Some time previous to

his death he executed deeds, whereby he conveyed to defendants the legal title to the southwest quarter of section 30, township 10 north, range 20 west, in said county. Plaintiffs brought this action to cancel and set aside said deeds on the ground that the defendants procured their execution by the exercise of undue influence upon the mind of said Henry West, and that said grantor was mentally incompetent to make the deeds, and that they were executed without consideration. Defendants in their answers deny that Henry West was mentally incompetent, deny that they exercised any undue influence over him to procure the deeds, and alleged that said premises were conveyed pursuant to certain agreements with said Henry West, whereby the defendants agreed to take care of and provide for said Henry West during the remainder of his natural life, and the payment of certain debts and obligations of the grantor, and alleged the full performance of the agreement. Defendants had judgment, and plaintiffs have appealed.

The only assignment of error insisted upon is that the judgment is not supported by the evidence. There is no direct evidence that either of the defendants exercised any undue influence upon Henry West to procure the execution of the deeds. The defendant Harriet Schilling, formerly Harriet West, was the widow of Robert West, a deceased son of Henry West, and Daniel West is a son of said Henry West. Harriet West was the only person residing with and in the home of Henry West at the time the deeds were made. Henry West relied very largely upon Daniel West, who was a favorite son, for assistance and guidance in the management of his affairs. Grantor was 76 years of age when one of the deeds was made, and 79 when the other was made. He apparently never possessed any great mental caliber and was illiterate, being scarcely able to read, and could no more than write his own name. The land in controversy was practically all the property owned by him. He left surviving him three children, all of whom are parties to this action. January 13, 1900, he conveyed

the entire quarter section to Daniel West. In December, 1903, he conveyed the west half of said tract to Harriet West, and in an action in the district court, brought by Harriet West against Daniel West, title to the west half of said tract was quieted in her.

Under these circumstances, plaintiffs contend that the burden was upon the defendants to prove that the deeds were not procured by undue influence. In *Gibson v. Hammang,* 63 Neb. 349, it is said: "But where a conveyance from a parent to one of several children by way of gift, *prima facie,* is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of fact arising from such circumstances." The ruling in that case went no further than to hold that the facts therein stated were sufficient to raise a presumption of undue influence, and the burden then rested upon defendants to overcome the presumption raised by the facts and circumstances proved. In the instant case the evidence discloses that Henry West had previously given 80 acres of land to one of the plaintiffs, and there is sufficient in the record from which it may be inferred that a farm had been given the other plaintiff. the evidence also shows that the deeds in question were not without consideration. Harriet West had taken care of Henry West's home and cared for his wife the last two years of her life, and agreed to remain in his home and take care of him during the remainder of his life, and, in consideration thereof, he promised to convey to her the west half of said quarter section. It further appears that, at the time of the conveyance to his son, Henry West was in debt to a considerable extent, and his inability to discharge his obligations was a source of anxiety and annoyance to him. He conveyed the entire quarter section to Daniel, with the understanding that the latter would

assume a mortgage of $800, then a lien on the land, and would pay the father's debts, furnish him a living during his lifetime, and at the father's death convey the west half of the quarter section to Harriet West, and would erect a suitable monument over his father's last resting place. At the time of the conveyance in 1900 the land was worth $4,000. The value of the services rendered by Mrs. Harriet West is shown to have been $30 a month for a period of eight years, or an aggregate of $2,880. The mortgage and debts assumed and paid by defendant, Daniel West, aggregated more than $1,300, and, in addition, he supplied his father with grain, hay, fuel, and groceries, the value of which is not shown. The entire consideration from the defendants to Henry West appears to have exceeded the actual value of the land. The facts established in this case are very different from those presented in *Gibson v. Hammang, supra,* and the rule therein announced would not be applicable here. The grantor received a fair and adequate consideration for the conveyances, and provided for his care and comfort in his declining years. Besides, he was under obligations to Harriet West for past services, and he had previously assisted his other children by gifts of land. Under these circumstances, no presumption of undue influence arises. The burden was upon plaintiffs to establish undue influence, and this they have failed to do.

The next question for consideration is: Does the evidence establish that Henry West was incompetent to make the deed? That he became of unsound mind prior to his death in 1907 is conceded, and that he was childish, and failing mentally for two years previous to his death is established. There is, however, but little evidence to show that he was of unsound mind at the time of the making of the deed. It is disclosed that, when his wife was dying, he was called from his bed; that he looked at his dying wife for a moment, and returned to his bed; that he did not exhibit any grief at the death of his wife. Whether he and his wife were friendly and affectionate is

not disclosed. It is also disclosed that he was hard of hearing, and that he sometimes fell asleep at the table and during conversations. Upon the other hand, a great weight of the evidence discloses that he thoroughly understood ordinary conversation and was rational in his talk until a year or two before his death; that after the death of his wife each of his children offered him a home, and talked with him about his intentions for the future. He declined all offers of a home with his children, and stated that he wanted to remain on his home place as long as he lived, and that he wanted his daughter-in-law, Harriet West, to remain with him and take care of him and his home. He communicated his wishes to Harriet West, and told her that, if she would remain and care for him, he would give her the west half of the quarter section; that being the part of the farm on which the dwelling and other buildings were located. The reason for conveying the entire quarter section to his son Daniel was that he entertained a fear that, if he conveyed the 80 acres to Harriet West, she might not carry out her agreement to take care of him and his home during the remainder of his life. When Mrs. Harriet West expressed dissatisfaction with this arrangement, Henry West went to his son Daniel and requested the latter to convey the 80 acres to Mrs. West. This he refused to do until the death of his father. Thereupon Henry West, for the purpose of evidencing his agreement with Harriet West, executed a deed to her for the west 80 acres. She then brought an action against Daniel West to quiet her title to said 80 acres. On the day set for the trial of that cause the parties agreed upon a settlement, and by stipulation a decree was entered quieting her title to said land. On that occasion it appears that both the plaintiffs were present, and one or both of them took part in the settlement. They knew of the conveyances by their father, and did not then complain thereof. At that time Charlotte Mumby insisted that Daniel should convey the west 80 acres to Harriet West. No question of their

father's competency to transact his business or make the conveyances was then raised by the plaintiffs, or either of them. They took no step then, or at any other time, to have their father placed under guardianship. The testimony of those who were present when the deeds were made was to the effect that the grantor understood and comprehended the nature and character of his acts, and that in making his deeds he acted on his own volition.

The rule is well recognized in this state that, to set aside a deed on the ground of the want of mental capacity on the part of the grantor to make the same, such want of mental capacity must be established by clear and satisfactory evidence. It must be established that the mind of the grantor was so weak and unbalanced at the time of the executing of the deed that he could not understand and comprehend the purport and effect of what he was then doing. *Schley v. Horan,* 82 Neb. 704. See, also, *Brown v. Cole,* 126 Ia. 711; *Ross v. Ross,* 117 N. W. (Ia.) 1105. Devlin in his work on Deeds says: "A deed may be avoided on the ground of insanity, when the grantor did not possess sufficient strength of mind and reason to understand the nature and consequences of his act in executing it. And by its execution he does not make it his deed, if at the time he was, from weakness of mind, incapable of understanding it if explained to him. But, although it may be uncertain that the mind of the grantor was in all respects sound, still, if he has sufficient ability to execute and deliver a deed, understanding the consideration that he is to receive, and the nature of the transaction in transferring his title to another, it is considered that his mind is sufficiently sound to render his deed valid. 'Weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions.'" 1 Devlin, Deeds (2d ed.), sec. 68. If a grantor has sufficient mental ability to comprehend what he is doing and to understand the nature of his act, he is deemed competent to make a deed.

Mere mental weakness is not sufficient to avoid a deed, if such weakness does not amount to inability to comprehend the contract and is unaccompanied by evidence of undue influence or imposition. Considering all the facts and circumstances proved, we are of the opinion that Henry West was competent to make the deeds in question.

We therefore recommend that the judgment of the district court 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.

PETER BIRKEL, APPELLEE, v. W. C. NORTON, APPELLANT.

FILED APRIL 13, 1909. No. 15,569.

County Courts: JURISDICTION: TITLE TO REALTY. Under section 16, art. VI of the constitution, denying to county courts jurisdiction in actions in which title to real estate is sought to be recovered, or may be drawn in question, a county court does not have jurisdiction in an action to recover damages for a breach of covenants of warranty and against incumbrances, where the breach complained of consists of removal of buildings and fences by a tenant of the covenantor under a paramount title.

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

Matt Miller, for appellant.

Aldrich & Fuller, contra.

GOOD, C.

Defendant has appealed from a judgment in favor of the plaintiff in this action, which was brought to recover

damages for breach of a covenant contained in a deed of conveyance of real estate.

Defendant contends that the court did not have jurisdiction of the subject matter. The determination of this question will be decisive of this appeal. From the record it appears that in August, 1905, the defendant sold and agreed to convey to plaintiff on or before the first of March, 1906, the northwest quarter of section 29, township 15 north, range 2 east, in Butler county, Nebraska. A part of the consideration was paid at the making of the contract, the remainder to be paid when the deed was delivered. The contract provided that the deed should contain the usual covenants of warranty. On or about the first of March, 1906, plaintiff paid the remainder of the purchase price, and defendant executed and delivered to plaintiff a deed in accordance with the terms of the contract. It further appears that, at the making of the contract, the premises were in possession of one Walker as tenant of the defendant, and at that time there were certain buildings and fences upon the premises that were the property of the tenant. In the interval between the making of the contract and the delivery of the deed, and during the life of his lease, Walker removed the buildings and fences that belonged to him. There was no reservation in either the contract or deed of any of the fences or buildings. The deed contained the following covenant: "I do hereby covenant with the said Peter Birkel, and his heirs and assigns, that I am lawfully seized of said premises, that they are free from incumbrance, that I have good right and lawful authority to sell the same, and I do hereby covenant to warrant and defend the title of said premises against the lawful claims of all persons whomsoever." In his petition the plaintiff alleged that the removal of the buildings and fences constituted a breach of the covenants above quoted. The action was originally begun and tried in the county court, and was carried to the district court on appeal. In the district court the defendant objected

to the jurisdiction of the court over the subject matter of the action, upon the ground that the county court was without jurisdiction of the subject matter, and that the district court did not acquire jurisdiction by the appeal. His objections were overruled, and are now assigned as error.

Section 16, art. VI of the constitution, among other things, provides that county courts shall not have jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate." In *Hesser v. Johnson,* 57 Neb. 155, it was held that, within the statutory limits as to amount, a county court had jurisdiction in actions to recover damages for breach of covenant against incumbrances. In *Lorius v. Abbott,* 49 Neb. 214, it was held that county courts had jurisdiction of an action to recover liquidated damages for failure to convey real estate as agreed. In *Garmire v. Willy,* 36 Neb. 340, it was held that a county court had jurisdiction of an action brought upon a party wall agreement to recover one-half the expense of building a party wall where the amount sought to be recovered does not exceed the jurisdictional limit of such court as to amount. In *Mushrush v. Devereaux,* 20 Neb. 49, it was held that county courts had jurisdiction, within the jurisdictional limit as to the amount, of an action brought to recover money paid upon an agreement for the purchase and sale of land where the defendant had omitted or refused to perform his agreement to convey the same. The statute restricting the jurisdiction of a justice of the peace is quite similar to the constitutional restrictions above quoted. In *Campbell v. McClure,* 45 Neb. 608, it was held that a justice of the peace had jurisdiction of an action for breach of a covenant against incumbrance where the breach consisted of a failure to pay taxes that were a lien upon the premises conveyed. The breach of a covenant against incumbrance for which a recovery

was permitted in *Hesser v. Johnson, supra,* was for unpaid taxes which were a lien upon the premises conveyed. In all the foregoing cases the reasons for the holdings were that the title to real estate was not sought to be recovered nor was it drawn in question.

Plaintiff contends that the action in this case is based upon a breach of a covenant against incumbrance, and that, under the holdings in the cases mentioned, the county court had jurisdiction. While it is doubtless true, in all the cases referred to, that the title to real estate was not sought to be recovered, nor drawn in question, we do not think it follows that the title to real estate may not be drawn in question in an action for breach of covenant against incumbrance. Covenant against incumbrance, in the broadest sense of the term, extends to all adverse claims and liens on the estate conveyed, whereby the same may be defeated wholly or in part. 11 Cyc. 1070; *Scott v. Twiss,* 4 Neb. 133. While the removal of the fences and buildings complained of in this action may have constituted a breach of covenant against incumbrance, they also constituted a breach of covenant of warranty of title. See *Van Wagner v. Van Nostrand,* 19 Ia. 422; *Bullard v. Hopkins,* 128 Ia. 703; *West v. Stewart,* 7 Pa. St. 122; *Stewart v. West,* 14 Pa. St. 336. The case of *Van Wagner v. Van Nostrand* is almost identical with the case at bar. The real question for decision is not whether the action is for a breach of covenant against incumbrance or for a breach of covenant of warranty of title, but whether or not the title to real estate is sought to be recovered or drawn in question. In *Holmes v. Seaman,* 72 Neb. 304, it is said: "A justice of the peace has no jurisdiction of an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, where such breach consists of an eviction by one having a paramount title." The decision in that case went upon the theory that the title to the real estate was drawn in question. In the instant case the deed contained no exception or reservation of any of the

fences or buildings, and by its terms it included, not only the land, but all the fences and buildings thereon, and they were conveyed by the defendant to the plaintiff, but were taken by defendant's tenant under a paramount title. The action is to recover the value of these appurtenances, the title to which failed. The situation is the same as though the plaintiff had been evicted of that part of the premises by a paramount title. It seems clear that the title to the real estate was necessarily drawn in question in this action, and therefore the county court did not have jurisdiction, and none was conferred upon the district court by appeal.

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

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THOMAS POWERS, APPELLEE, V. FRANK BOHUSLAV, APPELLANT.

FILED APRIL 13, 1909. No. 15,594.

1. **Appeal:** FINDINGS. A finding of the district court based on conflicting evidence in a law action will not be disturbed on appeal unless such finding is manifestly wrong.

2. **Broker's Contract:** DESCRIPTION. A broker's contract for the sale of land is not void for uncertainty of description, if the contract contains data from which the land may be identified and ascertained with certainty.

3. **Estoppel.** Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold.

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

Matt Miller and *Hall, Woods & Pound*, for appellant.

Skiles & Harris and *E. J. Lambe, contra.*

GOOD, C.

Plaintiff sued on a written brokerage contract to recover a commission for finding a purchaser ready, able and willing to buy defendant's land at the price and on the terms mentioned in the contract. Defendant denied the execution of the contract, and averred that he had, at plaintiff's request, signed a paper which was a printed blank of some kind, but that none of the blank spaces in the printed form were filled out; that defendant was not able to read English, and that he believed the paper signed was for plaintiff to use to show that he had a right to sell the land. The reply was a general denial. A jury was waived and a trial had to the court, which resulted in a judgment for plaintiff, from which defendant has appealed.

It is insisted that the court erred in finding that defendant executed the contract in question. The evidence is in conflict as to whether the blanks in the contract were filled in before or after it was signed by defendant, and as to whether it contains the agreement and understanding of the parties. The rule is well settled in this state that the verdict of a jury based on conflicting evidence will not be disturbed on appeal. A finding of the district court on a question of fact in a law action is entitled to the same force and effect as the verdict of a jury, and it will not be disturbed on appeal unless it is manifestly wrong. From an examination of the record it appears that the findings of the court accord with the weight of the evidence.

Defendant contends that the contract is void for uncertainty of description, and because it does not contain

a description of the land to be sold as required by section 10856, Ann. St. 1907. The material part of the contact is as follows: "Farm owned by *Frank Bohuslav.* For sale by *Thos. Powers*, Ulysses, Neb. Total number of acres, *120 acres S. ½ N. W. ¼ W.*, Qr. Sec. *27*, Tp. *4*, R. *14*, County, *Butler.* State, *Nebr.* Total number of acres to grass—tame *4*, Prairie *27.* Buildings, *house and barn.* Fences—kind *3 wires.* How watered, *well.* Orchard *57.* Distance to Railroad Depot, *3¼.* Distance to Postoffice and name of same, *Brainard,* Church, *3¼.* Title, *two hundred.* Encumbrance—when due, etc. Nov. 16, 1905. Lowest price and terms of sale. *Fifty dollars per acre, three hundred cash. Three thousand. 25 day February 1906. Balance five years at five percent.* I hereby place the above described property in the hands of *Thos. Powers* for the period of *25 February, 1906,* and authorize him to negotiate its sale at the price stated above, for which I agree to pay a commission of *two percent.* if sale is effected directly or indirectly by *Thos. Powers* or owner or agent. If not notified thirty days prior to contract, said contract shall be in full force. (Signed) *Frank Bohuslav, Thos. Powers.* Ulysses, Neb. *May 30,* 1905." The contract is partly printed and partly written. The italics represent that portion of the contract which is in writing.

The plaintiff pleads, and the evidence shows, that the land intended by the parties to be described was the south ½ of the northwest ¼ and the northeast ¼ of the southwest ¼ of section 27, in township 14 north, range 4 east, in Butler county. The description in the contract is township 4, range 14, which is an impossible description, for no such town and range exist in Butler county, but township 14, range 4, do exist in Butler county. The correct township number was inserted in the space intended for the range number, and the correct range number was inserted in the space intended for the township number. That this reversal of numbers of the township and range was a mere clerical error is patent. From that part of

the contract alone where part of the section is sought to be described by government subdivisions, it would be impossible to tell with precision what 120 acres in section 27 was intended, and, if there was nothing further in the contract by which the identity of the land could be ascertained, defendant's contention would have great weight and force; but we find the land further referred to therein as being a farm owned by the defendant, containing 120 acres; that it is located in section 27; that it is distant from Brainard 3¼ (miles); that there is on the premises a house and barn, a three-wire fence, an orchard of 57 (trees), and a well, and that it is incumbered for $200. The evidence shows that the defendant had for many years lived upon the land; that it was located 3¼ miles from Brainard, and that he owned no other land in Butler county. The parties were at defendant's home on the land when the contract was signed. There can be no possible doubt that both parties intended to have the contract describe the defendant's land.

Can it be said, under these circumstances, that the contract does not describe the land to be sold or that it is void for uncertainty? In an action to recover commission for sale of real estate, this court has held that the contract might be established by letters, and, if the letters contain data from which a description of the land placed with the agent for sale or barter can be ascertained with certainty, the contract will be enforced. *Holliday v. McWilliams,* 76 Neb. 324. In that case there was no accurate description of the land contained in the letters. The farm was described as located three miles from the county seat (Columbus), as fenced and cross-fenced, 200 acres under cultivation, 160 acres in hay, mostly alfalfa, and the remainder in pasture, 517 70-100 acres according to government patent, and that by accretions from the river there were really 530 acres. It was held that from this data and the county records the land could be identified and a specific description ascertained. In *Ruzicka v. Hotovy,* 72 Neb. 589, specific performance of a con-

tract for the sale of real estate was enforced where the land was described as "¼ Sc. 7, T. 13, R. 4." It was there said: "A memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description, if the description is otherwise specific, and the land intended can be identified from the description with the aid of parol evidence." *Ballou v. Sherwood*, 32 Neb. 666, was an action for the specific performance of a contract, wherein one parcel of land was described as "twenty acres adjoining Cote Brilliante, Douglas county." Another parcel was described as "lot 14, B. 5, and lot 11 B. 2, Boggs and Hill's addition to Omaha." It was held proper to permit plaintiff to prove by parol testimony that Cote Brilliante was an addition to the city of Omaha, that defendants owned a twenty-acre tract near said addition, and to prove the correct description thereof, and also to prove that Boggs & Hill's addition to Omaha meant Boggs & Hill's Second addition to Omaha, and that the word "Second" was omitted by mistake. *Adams v. Thompson*, 28 Neb. 53, also was an action to enforce specific performance of a contract for the conveyance of real estate, wherein the land was described as "Five a. MacShane's Sub." The court held that it was proper to prove by parol testimony that defendant owned five acres in MacShane's subdivision and to identify it as the land referred to in the contract. From a consideration of the foregoing authorities, we are of the opinion that the contract is not void for uncertainty, for it contains such data and reference to the land that its identity can be ascertained and established with certainty. This meets the requirements of the law.

Defendant insists that plaintiff has not complied with the contract by finding a purchaser who is willing to take the land upon the terms contained in the contract. The precise point made is that the purchaser was willing to

pay $300 cash and all the remainder of the purchase price on February 25, 1906, when the deed was to be delivered, instead of leaving $2,700 of the purchase price as a deferred payment to draw interest at the rate of 5 per cent. per annum for five years. The evidence shows that defendant, when informed by plaintiff that a purchaser was ready and willing to buy the farm and pay the consideration stipulated for, refused to make the conveyance, not on account of the manner in which the purchase price was to be paid, but because defendant was unwilling to sell the land at $50 an acre. He refused to make a conveyance unless the purchaser would pay $55 an acre. The defendant's refusal was not based upon the ground that $2,700 of the purchase price should draw interest at 5 per cent. for five years before it was paid. It is a well-established principle of law that, where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Railway Co. v. McCarthy,* 96 U. S. 258. See, also, *Stanton v. Barnes,* 72 Kan. 541; *Donley v. Porter,* 119 Ia. 542; *McDermott v. Mahoney,* 106 N. W. (Ia.) 925; *Sandefur v. Hines,* 69 Kan. 168; *First State Bank v. Stephens Bros.,* 74 Neb. 616; *Frenzer v. Dufrene,* 58 Neb. 432; *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388. Defendant, having failed to object upon the ground that the purchaser was willing to pay all cash, instead of deferring a part of the purchase price, until after litigation was instituted, will not now be heard to make such defense.

We find no reversible error in the record, and therefore recommend that the judgment of the district court 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.

STATE, EX REL. JACOB KATELMAN, APPELLEE, V. ROBERT O. FINK, TREASURER, ET AL., APPELLANTS.

FILED APRIL 13, 1909. No. 15,606.

Eminent Domain: AWARD OF DAMAGES: OFFSET. In condemnation proceedings had under section 7478, Ann. St. 1903, the award of damages by the appraisers, if confirmed by the mayor and council, and not appealed from, is final and conclusive on all who had notice of and were parties to the condemnation proceedings. If the city appropriating the property has a lien thereon for special assessments and fails or neglects to have such lien established by the appraisers, it cannot after the time for appeal has expired offset the amount of its lien against warrants issued to the property owner for the damage awarded him by reason of the taking of his property.

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

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

Will H. Thompson, contra.

GOOD, C.

This is a mandamus proceeding brought by Jacob Katelman, the relator, to compel the city of Omaha and its treasurer to pay in full certain special fund warrants issued to him by said city. The relator had judgment, and respondents have appealed.

The pertinent facts disclosed by the record are that in October, 1904, the city of Omaha passed an ordinance declaring the necessity of appropriating certain real estate, including lot 14, in block 16, College Place addition to the city of Omaha, and part of the adjacent vacated alley, for park and boulevard purposes. Said lot and a part of the vacated alley on the north thereof was owned by the relator. Freeholders were appointed to assess the damage to the owners of the property and parties inter-

ested therein, respectively, taken by such appropriation, who made their appraisement and reported the same to the mayor and city council on February 25, 1905, and, on the 7th of March following, said report was approved by the mayor and council. The city of Omaha had previously levied special assessments against said lot, which, though not delinquent, were unpaid, and constituted a lien on the lot at the time condemnation proceedings were instituted and when the appraisers' report was approved and confirmed. The freeholders in their appraisement and report named the relator as the owner of the lot, found there was no mortgage thereon, and that there were taxes which will be due and unpaid to the amount of $13.52, and fixed the value of the lot at $3,000. No mention in the report was made of the special assessments, which amounted to about $200. The report of the appraisers was confirmed, and warrants for the sum of $3,000 were drawn against the special fund created for payment of property taken, and delivered to the relator, who presented them for payment, and for want of funds on hand, at the time, the warrants were registered. Afterwards, when funds were available for the payment of the warrants, payment was demanded by relator. The city refused to pay the warrants in full and asserted the right to deduct the amount of the special assessments.

The law under which the condemnation proceedings were had is section 7478, Ann. St. 1903, and, so far as material to this inquiry, is as follows: "Whenever it shall become necessary to appropriate private property for the use of the city for * * * boulevards, * * * and such appropriation shall be declared necessary by ordinance, the mayor, with the approval of the council, shall appoint three disinterested freeholders of the city, who after being duly sworn to perform the duties of their appointment with fidelity and impartiality, and after reasonable notice to the owners and parties interested in said property, shall assess the damages to the owners of the property and parties interested therein, respectively,

taken by such appropriation. Such assessment shall be reported to the advisory board, * * * and said board, after examination, shall submit the same with its recommendations to the mayor and council for confirmation, and if the same shall be confirmed, the damages so assessed shall be paid to the owners of such property, or deposited with the city treasurer subject to the order of such owners, respectively, after which such property may at any time be taken for the use of the city." Respondents contend that, under this law, it was the duty of the appraisers to ascertain and appraise the value of the land taken, but that they were not required to ascertain or set forth in their report the items of liens upon the lands appropriated, and they were not required to apportion the value of the land to the various persons who might have an interest therein or liens thereon, and that the effect of the appraisement and a confirmation thereof was to transfer the title of the land to the city and divest all who were parties to the proceeding of any title, interest in, or lien upon the land appropriated. They further contend that the condemnation money representing the value of the land stands in lieu thereof, and all liens against the land were transferred to and became liens upon the fund in lieu of the land.

Upon the other hand, the relator contends that, under this section of the statute, it was the duty of the appraisers to ascertain the amount and extent of damages suffered by each person having an interest in or lien upon the land, and that the total value of the land taken should be apportioned among the various persons having an interest in or lien upon the land; that the confirmation of the appraiser's report is a final adjudication of all the rights of all persons and parties interested in the lot who had notice and who were parties to the condemnation proceeding, unless an appeal was prosecuted from the award of the appraisers as provided by the statute. It is conceded that the city of Omaha and its treasurer had notice of and were parties to the condemnation proceed-

ing, and that no appeal was taken from the award. Relator contends that under the circumstances the award had become final, and he is entitled to the total amount thereof, less the $13.52 general tax mentioned in the appraiser's report.

The determination of this appeal rests upon the construction to be placed upon said section 7478. If it was the duty of the appraisers to ascertain the amount of the damage that would be sustained by each person having an interest in or a lien upon the land appropriated, it would follow that the report of the appraisers that relator was entitled to $3,000, less $13.52 for general tax unpaid, was the ascertainment of his damage by reason of taking the lot in question, and that, as there was no finding of a lien for the city for special assessments, it was equivalent to a finding that the city had no lien upon the lot. Section 7479, which follows the above quoted section, provides for an appeal from the assessment of damages to the district court of the county within 30 days after the assessment, and further provides that the remedy by appeal shall be deemed and held to be exclusive. The statute provides for reasonable notice of the proposed assessment of damages to the owners and parties interested in the property, and that the appraisers shall assess the damages to the owners of the property and parties interested therein, respectively. In *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270, it is said: "The railroad company acquires merely the right of way possessed by the parties to the proceedings. It is therefore its duty to bring in all parties having an interest in the estate in order that the condemnation money may be properly applied." In *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276, it is said: "The responsibility of making all persons entitled to the fund parties to the action rests with it, and it acts at its own peril when it fails to make interested persons, whose interests are shown by record, parties to the proceeding, in order that they may assert their right to the fund paid in." This court has also in-

timated that the right of ownership or the question as to who is the owner of property condemned could be raised upon appeal. See *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225; *Republican Valley R. Co. v. Hayes*, 13 Neb. 489. In *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 424, it was held that an appeal in condemnation proceedings brought to the district court for decision precisely the same questions that were covered by the award, and none other. In *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514, and cases there cited, it is held that a mortgagee of land taken under the right of eminent domain has the right to an independent appeal and to have the money paid as compensation applied upon his claim. From a consideration of the provisions of the statute above quoted, it would seem clear that it was the intention of the legislature to make it the duty of the appraisers to assess the damages to each and all of those interested in the premises, and to apportion the value of the property appropriated among all those having an interest therein according to their respective interest. If this were not the case, we see no reason for making all persons interested in the lot parties to the proceeding, nor why the right of appeal should be conferred upon other parties than the owners of the fee. From the holdings of the court above referred to, it is apparent that the right of lienors may be determined upon the appeal, and that they may have judgment for the amount of their liens. It would scarcely be contended that such a judgment could be rendered on appeal unless such findings should have been made and reported by the appraisers, for it is elementary that nothing can be heard upon the appeal that could not properly have been determined by the board or court from which the appeal is taken. Our views are strengthened in this respect by the further fact that the right of appeal is made the exclusive remedy of those interested, and that no other method is provided by the statute for apportioning the value of the property taken among the various persons having an interest in or lien

thereon. The respondents have placed the same construction upon the statute, for it appears that in this condemnation proceeding the appraisers in the appraisal of other property did determine and award to different persons having an interest in the property and liens thereon the exact amount of their interest and liens. While this fact is not conclusive, it is at least persuasive.

Respondents contend that the report of the appraisers is final only as to the value of the land appropriated, and that it is not final nor conclusive as to the respective interests of the different parties who have an interest or lien in the property. This view seems to obtain in New York. *Carpenter v. City of New York,* 44 App. Div. (N. Y.) 230; *Matter of Board of Education,* 59 App. Div. (N. Y.) 258. The cases from New York arose from condemnation proceedings by New York City. The statute there apparently contemplates that an action may be maintained against the mayor by any person interested in the property for his proportionate share of condemnation money. The reverse is true in this state. The only remedy afforded is by appeal. For this reason, we do not regard the New York cases as in point.

Respondents urge that the appropriation of the land divests the lien of the city and transfers it to the condemnation money, and therefore the city has a lien on the fund so long as it has not been paid to the relator. It is undoubtedly true that the condemnation proceeding divests the lien of all persons who are parties to the proceeding and transfers all liens existing upon the property to the fund provided for the payment of land which stands in lieu thereof. *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276. But the lienor must protect his lien in the manner provided by law, and that is to have it ascertained and declared by the appraisers, and, if he fails or refuses to establish his lien, he must appeal from the award. The statute afforded the city ample opportunity to protect its lien. It might have had the award provide for its payment out of the damages awarded for the taking

of the land. It had a right to refuse to confirm the award of the appraisers if its lien was not protected. The city neglected to have its lien ascertained and its damages assessed by appraisers. It confirmed their report and award. No appeal was taken from the award, and, in our opinion, it has become final. While the city undoubtedly had the right to have the special assessments declared a lien upon the condemnation money, it neglected to do so, and, by its confirmation of the appraiser's report and its failure to appeal, its right to assert the lien has been extinguished.

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

M. P. BEEBE, APPELLANT, V. ALBERT BAHR ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,632.

Mortgages: FORECLOSURE: BURDEN OF PROOF. In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt.

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

W. C. Brown, for appellant.

C. E. Lear and *H. M. Duval, contra.*

GOOD, C.

Plaintiff brought this action in the district court for Keya Paha county to foreclose a mortgage on real estate

situate in said county. Defendants denied all the allegations of the petition, and averred that the mortgage lien had been extinguished in tax lien foreclosure proceedings had against the land subsequent to the execution of the mortgage. Defendants had judgment, and plaintiff has appealed.

It is unnecessary to consider any of the plaintiff's assignments of error. Plaintiff's petition contained the allegation that no suit, either in law or in equity, had been instituted for the recovery of the debt secured by the mortgage. This allegation of the petition was denied in the answer, and is not sustained by any evidence in the record. It has been repeatedly held by this court that the allegation, although a negative one, unless admitted, must be proved in order to entitle plaintiff to a decree of foreclosure. *Jones v. Burtis,* 57 Neb. 604; *Kirby v. Shrader,* 58 Neb. 316; *Miller v. Nicodemus,* 58 Neb. 352; *Lancashire Ins. Co. v. Kierstead,* 1 Neb. (Unof.) 437; *Plummer v. Park,* 62 Neb. 665; *Omaha Savings Bank v. Boonstra,* 3 Neb. (Unof.) 382; *Hedbloom v. Pierson,* 2 Neb. (Unof.) 799; *Drury v. Roberts,* 2 Neb. (Unof.) 574.

It follows that the judgment of the district court is right, and we recommend that it 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.

STATE, EX REL. MINDEN EDISON ELECTRIC LIGHT AND POWER COMPANY, APPELLEE, V. CITY OF MINDEN, APPELLANT.

FILED APRIL 13, 1909. No. 15,473.

1. Cities: CLAIMS: ALLOWANCE: RECONSIDERATION. The mayor and council of a city of the second class under 5,000 inhabitants, if not restricted by any rule adopted by them, may reconsider their action in allowing a claim against the city at any time before the claimant has, in reliance upon their action in allowing such claim, changed his position to his own disadvantage.

2. ———: ———: ———. Section 80 of the charter act of cities of the second class under 5,000 inhabitants (Comp. St. 1905, ch. 14, art. I), providing that costs shall not be recovered in an action against the city upon an unliquidated claim unless the same is first presented to the mayor and council for audit, does not operate to make their action upon such claim judicial, nor to give their decision the effect of a judgment.

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

M. D. King and *C. P. Anderbery,* for appellant.

J. L. McPheely, contra.

CALKINS, C.

Minden is a city of the second class under the charter act for cities and villages of less than 5,000 inhabitants. Comp. St. 1905, ch. 14, art. I. The relator filed with the clerk of said city a claim for material and labor in the amount of $279.12, which was at a regular meeting of the mayor and council held on March 18, 1907, allowed for $200. The next day, at a special meeting called for that purpose, the mayor and council reconsidered their action allowing the claim for $200 and rejected it altogether. Thereupon the relator applied to the district court for a writ of mandamus compelling the defendant to issue to it a warrant for the sum of $200. The defendant's answer

alleged that the relator had agreed, in consideration of the franchise granted to it for the use of the streets of said city, to furnish and maintain free of any cost to the city certain incandescent street lights in the residence district, and that the items of said bill were all on account of furnishing such incandescent lights, which were to be furnished free of charge, and that therefore the city was not indebted to the relator for any part thereof. The fact of the allowance of said bill for $200 was admitted, but it was alleged that the relator refused to accept said amount until long after the mayor and council had reconsidered its said action and disallowed said bill. Upon this answer, the district court allowed the peremptory writ prayed for, and the defendant appeals.

1. The defendant contended that the answer negatived the existence of any indebtedness of the city to the relator; the relator insisting that the plea of *nil debet* in defendant's answer was a mere conclusion of law, and did not negative the existence of a valid indebtedness. This question we do not deem it necessary to determine, and we shall assume for the purposes of this case that the merits of the relator's claim against the city were not presented to the district court. We have, therefore, the question whether the mayor and council of a city of this class, after allowing a claim against the city, may, before such allowance is accepted by the claimant, reconsider their action and refuse to allow such claim. The relator argues that, because the power to reconsider is not specifically granted, it does not exist. While it is usual for legislative and deliberative bodies to regulate by special rule the time, manner, and by whom a motion to reconsider may be made, in the absence of such special rule on the subject, a motion to reconsider may be made at any time by any member, precisely like any other motion and subject to no other restriction. Cushing, Law and Practice of Legislative Assemblies (2d ed.), sec. 1266. Its power must, of course, be exercised with due consideration for the right of any third party who has, in reliance

upon the action so rescinded, changed his position to his own disadvantage; but, before such right of third persons has accrued, a mayor and council may, if not restricted by the provisions of the charter or any rule adopted by them, reconsider previous votes and orders. 1 Dillon, Municipal Corporations (4th ed.), sec. 290. It may often happen that action may be taken in the allowance of claims against the city, which, upon subsequent consideration and in the light of further information, appears to have been improvident, ill-advised and unauthorized; and considerations of public welfare demand that the mayor and council of a city should be left free to correct such mistakes, so long, at least, as the claimant has not changed his situation to his disadvantage because of such action.

2. The relator further contends that, since under the provisions of section 80 of the charter act (Comp. St. 1905, ch. 14, art. I), in an action against the city for any unliquidated claim, no costs can be recovered unless such claim has been first presented to the mayor and council to be audited, their action is judicial and their decision has the force and effect of a judgment. We do not think the section in question susceptible of any such construction. Its purpose is plainly to give to the governing body of the city an opportunity to audit and pay a claim deemed valid, before the city can be subject to the costs of an action to collect it. The jurisdiction to hear and determine the same in case of dispute is not committed to the mayor and council in any event, but is all the time left in the courts. The allowance by the mayor and council of a bill for less than the amount claimed is not a judgment, but an offer, which is binding upon neither party until it is accepted.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to dismiss relator's application.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to dismiss relator's application.

REVERSED.

SADIE I. GRIFFIN, APPELLANT, V. BENNETT CHRISWISSER, APPELLEE.

FILED APRIL 13, 1909. No. 15,477.

1. Notes: DEFENSES: UNLAWFUL CONSIDERATION: EVIDENCE. In an action upon a note given for the benefit of a girl 15 years old, ostensibly to compromise bastardy proceedings instituted by her against the defendant's son, a defense that a written agreement was signed by her, in which she unlawfully contracted not to testify in a possible prosecution for statutory rape, is overcome by evidence that the plaintiff did not understand the meaning and effect of the written contract, but signed the same upon the assurance of the defendant's attorney that it settled nothing but the bastardy proceeding.

2. ———: ———: ———. The settlement of bastardy proceedings, brought by an infant pregnant with an illegitimate child, is a sufficient consideration for a promissory note; and it is no defense to such note that the mother and guardian of such infant made an unlawful agreement not to prosecute the putative father for statutory rape, unless such infant knowingly participated in such unlawful agreement.

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

Matthew Gering, for appellant.

Byron Clark and *W. C. Ramsey, contra.*

CALKINS, C.

In the fall of 1903 the plaintiff, a girl but 15 years old and unmarried, was found to be with child, the result, as she alleged, of illicit intercourse with the defendant's son,

Ray Chriswisser, who disappeared from that vicinity about the time of the discovery of the girl's condition. The plaintiff's mother was appointed her guardian, and negotiations were had between her and the defendant for the settlement of the liability which had been incurred by his son. Both parties were in the end represented by attorneys, and a settlement was agreed upon December 19, 1903, by which the defendant was to pay plaintiff $1,500, $400 in cash, and $1,100 represented by a promissory note payable in three years from that date. The defendant alleges that his son was under the age of 18 years at the time of the alleged intercourse, and it does not appear whether there was ground for believing him to be old enough to have committed the offense of statutory rape; but the mother of the plaintiff on October 10, 1903, filed a complaint with the county judge charging him with that offense. A warrant was issued upon such complaint and placed in the hands of the sheriff, who returned the same, not served, on the 22d day of December, upon which date an order was entered dismissing the case. On the 19th day of December a proceeding in bastardy was instituted in the county court, the putative father appearing by his attorney, and the compromise was approved and the bond given to the county commissioners in pursuance of the statute. It appears to have been sufficiently understood by the parties that there could be no lawful settlement of the criminal charge; but a written contract was entered into which purported to settle the action for bastardy in consideration of the payment of said sum of $1,500 in the manner above provided; but it contained the stipulation that, if the said Ray Chriswisser should be prosecuted for the crime of statutory rape, and in said prosecution the said plaintiff or her mother should appear upon the witness stand and testify in aid of said prosecution, the said note should be canceled, etc. This, if it did not amount to the composition of a felony, is conceded to be an unlawful agreement to withhold evidence. The $400 was paid, and the defendant

paid the interest on the $1,100 note for two years. When the note became due, he refused to pay the principal, and this action was brought to recover the amount due thereon. The defense was that the consideration for the note was an agreement on the part of the plaintiff and her mother to suppress their evidence in any prosecution that might be had against the defendant's son for the crime of statutory rape. In reply to the defendant's answer, the plaintiff admitted that she signed the written contract in question, but alleged that she was, at the time of signing the same, but 15 years 8 months of age, and incapable of understanding the said contract, and that she relied upon the statement of those present, including the defendant and his attorney, that the said contract did not settle anything but the bastardy proceedings, which she had a right to compromise. There was a trial to a jury and evidence tending to support the contention of the respective parties, at the conclusion of which the court directed a verdict for the defendant, and from a judgment rendered upon this verdict the plaintiff appeals.

1. This is not a case where the entire consideration of the note sued upon was illegal. The settlement of the bastardy proceedings constituted a good and sufficient consideration, and the sole question is whether the insertion in the agreement of the unlawful stipulation not to criminally prosecute must prevent a recovery. That a party who has been in *pari delicto* cannot make his unlawful act the basis of a recovery has been held by this and many other courts. In such case the defense of illegality is said to be allowed, not as a favor, nor in the interest of either of the contracting parties, but in the interest of the public. *Lyon v. Waldo,* 36 Mich. 345; *Wooden v. Shotwell,* 23 N. J. Law, 465. But where the parties are not upon an equal footing, where one is free to act, and the other is the helpless victim, the former should not be allowed to take advantage of his own wrong and reap the benefits thereof. *Klein v. Pederson,* 65 Neb. 452, and cases there cited; *Rozell v. Van Syckle,* 11 Wash.

79. The disparity of the condition of the parties to this case respecting their freedom of action was great. The defendant could not have been apprehensive of a criminal prosecution against his son, for he testified that the boy was under 18 years of age. The most he had to fear for him was a proceeding against him under the bastardy statute. To the plaintiff's suffering from the physical distress of her approaching maternity was added the weight of social condemnation, which she might well apprehend would deprive her of friends and leave her doubly helpless. She was so young that she was presumed by law to be incapable of entering into a valid contract. The testimony in the record would justify a finding that she signed the paper upon the assurance of those present, including that of the defendant's attorney and the defendant, that the same did not settle anything except the bastardy proceedings. It is doubtful if an infant who cannot make a valid contract can commit the offense of making one prohibited by law; but this question, not having been argued, we do not determine. It is enough to say that the infancy of the plaintiff and her unfortunate situation, may be taken into consideration with the other surrounding circumstances appearing in the case, in determining whether she was responsible in any degree for the insertion in the contract of the illegal provisions by virtue of which the defendant now seeks to escape his liability.

It is provided by section 341 of the code that, "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it"; and we have recently held that a party to a contract, who signs the same upon the assurance of the other party that he understands the provisions of the contract to have a certain specified meaning, may, in case the contract cannot be so construed, have an action in equity to reform the same, so that it shall clearly express the meaning specified. *Blair v. Kingman Implement Co.,*

82 Neb. 344. The plaintiff had a right to make an agreement not to prosecute defendant's son under the bastardy act, and to accept in consideration for said promise a reasonable sum for the expenses of her lying in, and for the maintenance, care and nurture of her illegitimate child. It is not shown that the amount to be paid was more than adequate for that purpose. If she is denied relief in this action, it must be because she intended to agree not to criminally prosecute the defendant's son. If she had no such intention, and did not understand that the paper which she signed committed her to such agreement, she did not intentionally make a contract in violation of public policy, and did not, therefore, participate in the wrong.

2. It is suggested that the plaintiff was represented by her guardian and attorney, and that she must take the note in question charged with all the infirmities that would affect the same in the hands of her guardian. It must, however, be borne in mind that the authority of the guardian and the attorney to bind her was limited. They had no right to make any contract on her behalf which was illegal or void as being against public policy. It was their duty to secure for her payment for her lying in expenses, and provision for the sustenance of her child; but they had no right to make any agreement not to prosecute for the crime involved, if such crime in fact existed. If they, together with the defendant and his attorney, entered into an unlawful agreement, the defendant cannot set up such unlawful agreement against the plaintiff, unless she participated in the unlawful intent to do the thing prohibited.

It is argued that the plaintiff, by accepting the note, ratified whatever was unlawful in the conduct of her guardian and attorney, and that she therefore becomes in *pari delicto* with the defendant. An agent cannot bind his adult principal beyond the limits of his actual or apparent authority, and the acceptance of the benefits of a contract made for a valid consideration and apparently

lawful will not constitute a ratification of an unlawful condition made by the agent, of which the principal had no knowledge. If the unlawful agreement to withhold evidence in the criminal prosecution had been the sole consideration for the note, the plaintiff would have taken it subject to that defense; but here there was a lawful and valid consideration, and she is not chargeable with an unlawful agreement made by her agents without authority, unless she had notice of the same. It follows, in either view of the case, that the question of her knowledge and intention should have been submitted to the jury, and they should have been told that, if she did not understand nor comprehend that the agreement signed by her settled anything more than the bastardy proceedings, or if she, being in doubt as to the meaning of said contract, signed the same upon the assurance of her attorney and the attorney for the defendant, made in the presence of the defendant, that the contract did not mean the settlement of anything but the bastardy case, then she did not participate in the wrong, and the defendant could not allege his own illegal act against her.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

ROOT, J., not sitting.

DANIEL C. TYSON, APPELLANT, V. A. L. BRYAN, APPELLEE.

FILED APRIL 13, 1909. No. 15,570.

1. **Appeal:** MOTION FOR NEW TRIAL. Where a motion for a new trial does not include a complaint that any error was committed during the trial, this court will not review errors alleged to have been committed in the rejection of relevant testimony.

2. **Replevin:** QUESTION FOR JURY. Where the evidence establishes title in the plaintiff to the property replevied, and the temporary right of possession in the defendant, the court should submit to the jury the value of defendant's right of possession.

3. **Appeal:** INSTRUCTIONS: MOTION FOR NEW TRIAL. Where an instruction given by the court might have been conveniently divided into two paragraphs, but the district judge failed to number the same separately, the party excepting to such instruction will not be required to separately object to the different paragraphs thereof in the motion for a new trial as a condition of his right to have error committed in giving the same reviewed by this court.

4. **Partnership.** The sharing of gross returns, with or without a common interest in property from which the returns come, does not of itself create a partnership.

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

A. H. Tingle and *J. A. Douglas,* for appellant.

H. F. Barnhart and *W. T. Wills, contra.*

CALKINS, C.

This was an action of replevin to recover the possession of 30 head of cows, a number of younger cattle, some hogs, and a quantity of farm produce. It appears that the plaintiff had let to the defendant to farm on shares a tract of land, and had agreed to supply the defendant with 40 head of cows to be kept on said premises and milked on shares, and that this 30 head of cows were a part of those so furnished by the plaintiff. The lease was in writing, and was apparently drawn upon the ordinary

form prepared for the making of farm leases, and to this was added an addendum, with the stipulation that "the following conditions are made a part of the lease hereto annexed," thus making a single instrument. In this document there was a provision that, if the defendant should fail to keep any of the covenants therein contained, the landlord should have the right at his election to take possession of the premises. The case was apparently prosecuted by the plaintiff on the theory that the defendant had made such default, and that the plaintiff was therefore entitled to enter and take possession of the property placed upon the premises in pursuance of the lease, but the evidence offered as to defendant's failure to perform his part of the covenants was excluded, and at the close of the trial the court instructed the jury that, under the pleadings and undisputed evidence, the defendant was entitled to a verdict for the possession of the chattels in controversy, and that the value of that possession was the fair market value of the property, and thereupon submitted to the jury the question of the value of said property, which they found to be the sum of $1,770.80. A judgment was thereupon rendered for the return of said property to the defendant, with the alternative that, in case a return could not be had, the defendant should recover from the plaintiff the value thereof. The plaintiff appeals.

1. It is contended that the court erred in rejecting evidence tending to show that the defendant had failed to comply with his part of the agreement under which he held the property, but no complaint was made in the motion for a new trial of any errors of law occurring at the trial, and we cannot therefore consider this objection.

2. It appears from the evidence that the 30 cows replevied were placed on the farm by the plaintiff, and that the title to the same remained in him, but, under the agreement produced, the defendant had a right to keep the same upon the farm which had been let to him. This presents a case where the plaintiff is the owner of the

property, and the defendant is entitled to the temporary possession thereof. Section 191 of the code provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant." In 1873 there was added section 191*a*, which provides: "The judgment in the cases mentioned in sections 190 and 191, and in section 1041 of said code, shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit." The same evidence which established the right of the defendant to the possession of these cows as clearly established the fact that they were the property of the plaintiff, and it was the duty of the trial judge, in view of the sections of the code above quoted, to instruct the jury to find, not the value of this property, but the value of its possession. Instead of that, the court instructed the jury as follows: "The jury are instructed that, under the pleadings and the undisputed evidence in this case, the defendant is entitled to a verdict for the possession of the chattels in controversy in this action, and the value of that possession is the fair market value at the commencement of this action of all the chattel property taken by the plaintiff in this action under the writ of replevin, and the only thing left for you to do, gentlemen of the jury, is to find the value of said property at the commencement of this action, and return your verdict accordingly. You are further instructed that no testimony has been introduced as to the damages sustained by the defendant by reason of the unlawful detention of said property by the plaintiff, but you are instructed, as a matter of law, the defendant is entitled to

nominal damages, and nominal damages in law is one or six cents, and it will be your duty to state nominal damages in your verdict." This instruction was erroneous. It should have submitted the value of defendant's possession, instead of the value of the property. *Creighton v. Haythorn,* 49 Neb. 526; *Cruts v. Wray,* 19 Neb. 581.

3. The instruction given by the court we have already quoted. It is contended by the defendant that, since there were two paragraphs in said instruction, it was to be treated as two instructions, and that there should have been a separate objection to each paragraph in the motion for a new trial in order to enable us to consider the error assigned in giving such instruction. We think the instruction given, although it might have been divided into two paragraphs, is to be treated as one. It relates to one subject throughout, and the judge himself, from his failure to number it separately, evidently regarded it as a single instruction.

4. The court below seems to have disposed of this case upon the theory that the writing referred to constituted a partnership, and that for that reason the plaintiff cannot maintain an action. While the exceptions of the plaintiff were not, as we have already seen, reserved in such a manner as to enable us to pass upon the question of the exclusion of the plaintiff's testimony, we deem it proper to say that the agreement referred to does not, in our opinion, make the plaintiff and defendant partners. While there may be a sharing of profits and yet no partnership, there can be no partnership without a sharing of profits. The sharing of gross returns, with or without a common interest in property from which the returns come, does not amount to a sharing of profits, and does not of itself create a partnership. In this case the defendant was to render a share of the gross returns, which might be more or less than the profits of the business, and which were to be paid even in case the business was conducted at a loss. It seems hardly necessary to cite authorities to this proposition, but an exposition of the sub-

ject will be found in Pollock, Digest of the Law of Partnership, ch. I, arts. 1, 2; 1 Lindley, Partnership (2d Am. ed.), p. *18.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE, EPPERSON and GOOD, CC., concur.

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

REVERSED.

ROBERT WILKINS, APPELLEE, v. MARTHA L. WILKINS, APPELLANT.

FILED APRIL 13, 1909. No. 15,581.

1. Divorce: PLEADING: RES JUDICATA. Where a wife brings a suit for divorce on the ground of cruelty, and such suit is finally determined against her on the merits, she cannot afterwards, in a suit for divorce brought by her husband charging her with desertion, plead the facts upon which she depended to establish the charge of cruelty as an excuse for such desertion.

2. ———: ALIMONY: REVIEW. Where a wife was the recipient of an income sufficient for her support, and much larger than could be derived from the property of the husband, and the husband shortly before their separation accounted and paid to her the entire amount of the income derived from her property during the existence of the marriage relation, a judgment of the district court granting a divorce to the husband for the wife's desertion will not be reversed nor modified because such court refuses to allow the wife alimony.

3. ———: CUSTODY OF CHILD. An award of the custody of an infant child made upon granting a divorce, where neither parent is shown to be disqualified, should be made subject to the further order of the court.

4. ———: SUIT MONEY. The amount of money to be allowed a wife to pay the expenses of defending a suit for divorce is largely

within the discretion of the district court, and its action will not be reviewed where it does not appear that the wife has been hampered in making her defense, or is financially unable to pay expenses necessarily incurred.

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

S. P. Davidson, for appellant.

George W. Berge, contra.

CALKINS, C.

This was a suit for divorce on the ground of desertion brought by the husband against the wife. The wife defended, denying the desertion and demanding alimony and the custody of the one minor child, a girl about four years old at the time of the trial. There was a decree granting the divorce and giving to the defendant the custody of the child until she should arrive at the age of eight years, or until the further order of the court, with an allowance of $75 per annum to be paid by the father until the child reached said age of eight years. Alimony was denied, and the defendant appeals.

1. The defendant contends that the charge of desertion is not sustained by sufficient evidence. She left the plaintiff's home more than two years before the commencement of this action, beginning an action for divorce on the ground of his misconduct prior to that time. This suit was determined adversely to her claim, and the judgment has become final. She has never offered to return to plaintiff's home, and the only excuse for leaving is the misconduct which she alleged and failed to establish in the suit brought by her. On the trial of this action, being asked by the court whether she wanted him to have the divorce, she replied that she could not live with him and that she did not know that she cared; while, in answer to a question propounded by her own attorney, she answered that she was satisfied they

could never live together as husband and wife. Her unexcused absence for more than two years from the home of her husband, together with her statement that she could not live with him, were sufficient to justify the district court in finding that she was guilty of desertion.

2. Complaint is made of the refusal of the district court to allow the defendant alimony. It appears that the plaintiff is the owner of a farm of 150 acres, which is valued at about $100 an acre; that he is possessed of a small amount of personal property; that the defendant is the owner of a life estate in 330 acres of farm land, the income from which is about $1,000 per annum; that, during the time the parties lived together as husband and wife, the husband collected the rents from the said 330 acres and used that in common with his own income; that a few days before defendant left plaintiff she demanded an accounting for these moneys and a payment of the amount thereof from her husband, and that he at that time gave her his note for $6,000, which was equal to the amount of the proceeds of these lands received by him, and which note has since been paid. It therefore appears that the wife has property from which she derives a fair income, in addition to the $6,000 which she was thus enabled to accumulate during her married life. While under the statute alimony may be awarded to a wife against whom divorce is decreed (*Dickerson v. Dickerson*, 26 Neb. 318), this is done upon the theory that the wife directly or indirectly assists in the accumulation of the property acquired during the existence of the marriage relation, and that, when the tie that binds the family is severed by the interposition of law, she should receive a just proportion of what she has helped to earn. The mere naked legal liability of a husband to support his wife should not, however, be enforced after her desertion of him. In this case the wife is well provided for in her own right, and, though the income of her husband aside from that produced by his own labor was much less than her own, she was allowed to accumulate the entire amount thereof, while her hus-

band bore the burden of the family expenses during their married life. Under these circumstances, her equities in the accumulations of her husband during this period do not appear, nor do her necessities demand an allowance out of his property.

3. As we have seen, the award of the custody of the child was made until she should arrive at the age of eight years, and this limitation is the subject of defendant's most serious complaint. It is argued that the effect of this decree must be to keep the mother in continual suspense and uncertainty, and in anticipation of the danger that the child may be taken away from her at the end of the period named. We think this criticism is not unfounded. While a decree awarding custody of the children is always subject to modification on account of changed conditions and circumstances there is no reason apparent to us why the award of the custody of this child should be limited to a period ending with her eighth year, thereby inviting a new controversy whether the surrounding conditions should remain the same or not. It is not contended that either of the parents is unfitted morally or temperamentally to have the custody of the child, and it was, we think, eminently proper, considering her sex and tender years, to award her general custody to her mother until the further order of the court.

4. Provision was made in the decree that the father should have the right at any reasonable time, upon his good behavior, to visit said child and have said child visit with him in the village of Cook, not exceeding one hour. While the plaintiff is not here complaining, we deem it proper to say that this seems to us a totally inadequate recognition of the father's rights. He should have an opportunity to become acquainted with his child and to secure her attachment to him, and a child should not be deprived of the acquaintance of her father, nor of his love and affection. This can only be secured by association. The father should have the right, if he so desires, to visit

the child at reasonable times and with reasonable frequency, and should also have the right to have the child visit him. Such visits, however, should not be protracted for such a length of time as to, in effect, remove the child from the custody of the mother. It is very difficult to lay down specific rules upon such a subject which will be just and adequate under the varying circumstances which must arise in the future. It should be sufficient to say that the rights and privileges accorded to each parent should be exercised with good judgment and discretion, with mutual forebearance, and with proper regard to the rights of each other and to the welfare of the child.

5. Complaint is also made of the amount awarded the mother toward the support of the child. The largest item in the maintenance of a child of tender years is the personal care which it requires, the actual amount of expenditures for sustenance and clothing being relatively small. As the child becomes older these proportions change. We think it right that the mother should furnish this personal care, and the amount awarded may be a fair contribution from the father at the present time. If he should fail to voluntarily meet this increasing expense, the decree should be modified to require him to pay a larger amount to the mother.

6. The defendant contends that the amount allowed by the district court for her expenses in defending the action was insufficient. This question is committed to the discretion of the district court. *Brasch v. Brasch,* 50 Neb. 73; *Willits v. Willits,* 76 Neb. 228. We should not interfere in a case where it does not appear that the wife has been hampered in making her defense, or is financially unable to pay expenses necessarily incurred.

7. In the brief and oral argument the defendant asks for an allowance to pay the expenses of prosecuting this appeal. Considering the financial circumstances of the parties to this suit, we think it advisable to refuse to make such allowance.

We therefore recommend that the judgment of the dis-

trict court be modified by striking out the provisions (1) limiting the mother's custody of the child until it arrives at the age of eight years; (2) limiting the right of the father to visit the child and have the child visit him; (3) limiting the payment of the sum of $75 per annum until the child shall reach the age of eight years. We also recommend that the decree be further modified so as to allow the father the right at any reasonable time, upon his good behavior, to visit the child and have the child visit him, and, as thus modified, that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified by striking out the provisions limiting the mother's custody of the child until it arrives at the age of eight years, limiting the right of the father to visit the child and have the child visit with him, and limiting the payment of the sum of $75 per annum until the child shall reach the age of eight years. The decree is further modified to allow the father the right at any reasonable time, upon his good behavior, to visit the child, and have the child at reasonable intervals visit him; otherwise it is affirmed.

AFFIRMED AS MODIFIED.

ETTA J. HOLZ, APPELLEE, V. FRANK A. BURLING ET AL., APPELLANTS.*

FILED APRIL 13, 1909. No. 15,583.

1. **Executors and Administrators:** SALE OF LAND: ASSUMPTION OF MORTGAGE. A purchaser at an administrator's sale who assumes a prior mortgage on the land does not thereby incur any obligation to an heir who repudiates the sale on the ground that the property was the homestead of the deceased.

2. **Remainders:** INCUMBRANCES: PURCHASE BY THIRD PERSON. A party

* Rehearing denied. Case reversed and *remanded.*

who sustains no fiduciary relation to nor privity of estate with a remainderman may lawfully purchase a mortgage which is a paramount lien upon the property and have the same foreclosed with the purpose of obtaining a title good as against such remainderman.

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

Rinaker & Kidd and *M. B. Davis,* for appellants.

W. H. Kelligar, E. Ferneau and *W. H. Ashby, contra.*

CALKINS, C.

In 1887 Gerd Holz died intestate, leaving him surviving his widow and two infant children, of whom the plaintiff alone survives. At the time of his death he was seized in fee of a farm of 80 acres not exceeding $2,000 in value, which was occupied by him as a homestead, and which was incumbered by a mortgage to secure a debt in the principal sum of $500, which mortgage had been duly executed and acknowledged by himself and wife. Upon his death a brother of the deceased and the widow were appointed joint administrators of his estate, and duly qualified as such. About one year after the decease of the said Gerd Holz his widow married one Frank Freirichs, but she continued to act as administrator, and in 1893, with her coadministrator, she filed an application for and secured from the district court a license to sell the real estate in question for the payment of debts. Under this license the land was sold, and purchased by the said Frank Freirichs, the sale being confirmed on the 14th day of May, 1894. The said purchaser, together with his said wife, immediately executed a mortgage upon the said land to one Thomas R. Burling, a relative of Freirichs, to secure the payment of $1,000, and a second mortgage of a similar amount to the same party to indemnify him from liability as surety of Mrs. Freirichs, who had been appointed guardian of the plaintiff.

On the 11th day of June, 1894, the said Thomas R. Burling purchased the $500 mortgage which had been executed by Gerd Holz and his wife before his death, and in August, 1894, he began a foreclosure suit upon said mortgage, together with the mortgage executed to him by the Freirichs to secure the sum of $1,000. The plaintiff was made a party defendant in this suit, due service of summons was had, a guardian *ad litem* was appointed for her, and such action resulted in a decree for the sale of the said premises. In pursuance of this decree the premises were again offered for sale and sold to Frank Freirichs, to whom the same were conveyed by sheriff's deed after the confirmation of such sale. Upon receiving this deed mortgages were executed upon said land as follows: one to E. G. Drake for the sum of $1,000; another to the same party for the sum of $100; and still another to Thomas R. Burling for the sum of $570. The $1,000 mortgage was afterwards assigned to one John Toner, and the $100 mortgage to one Cook. Default having been made in the payment of these mortgages, Toner brought an action to foreclose the same, making Cook and Burling codefendants, each of whom filed cross-petitions, and all said mortgages were foreclosed by a decree rendered May 19, 1897. In December, 1897, Thomas R. Burling purchased the interests of Toner and Cook. Mrs. Freirichs died July 25, 1897, and on the 28th day of December, 1897, the said decree remaining unsatisfied, the said Frank Freirichs conveyed said premises to Thomas R. Burling. Thomas R. Burling died May 11, 1898, leaving him surviving a widow and five children, and a will, by the terms of which he devised one-third of all his real estate to his widow, and the remaining two-thirds to his children share and share alike. Afterwards, and in December, 1902, the widow and children made a partition of said property by voluntary conveyances, the defendants in this action receiving the conveyances from the widow and other children of the land in question, in consideration of which they conveyed to such widow and

the other children their interest in the other lands of their deceased father. The plaintiff, having become of age, brought this action in 1905, claiming that both conveyances to Freirichs were void, and asking that the same be so declared and the title to said lands quieted in her. This suit resulted in a decree rendered the 30th day of September, 1907, granting said prayer upon condition that the plaintiff pay to the defendants the sum of $705, which was the amount of the original $500 mortgage, with interest at 7 per cent. to December 28, 1897, the date when the premises were deeded to Thomas R. Burling by the said Frank Freirichs. From this judgment the defendants appeal.

1. The petition attacks the *bona fides* of the application made by the administrators for the sale of this land. It is conceded that the property was the homestead of the deceased at the time of his death, and that its value did not exceed the sum of $2,000. This being the case, the license of the administrators was void, even though the proceedings were regular. *Tindall v. Peterson,* 71 Neb. 160, 166; *Brandon v. Jensen,* 74 Neb. 569. As the purchaser at such sale could take no title as against the minor heir of the deceased who was seized of a vested remainder in the premises, it is unnecessary to consider whether the proceedings for the sale were instituted in good faith or regularly had.

This brings us to the consideration of the nature of the title based upon the foreclosure of the $500 mortgage. This mortgage was executed and acknowledged by the deceased and his wife before his death in such manner as to make the same a valid lien upon the homestead. It follows that the right of redemption of the widow and heirs of the deceased would be barred by a foreclosure proceeding, and that a sale had under a proper decree in foreclosure, if regularly made and duly confirmed, would be sufficient to convey a title in fee to the purchaser, unless such purchaser sustained such relation to the heirs of the deceased as would under some principle known to

equity jurisprudence prevent him from acquiring such title. No such relation is pointed out, but the plaintiff states that, in purchasing the land at the administrators' sale, Freirichs assumed and agreed to pay off the $500 mortgage. Conceding this to be true, any undertaking on his part to pay off existing liens upon the land purchased was founded upon the consideration of the conveyance of a title to him. Since he got nothing, as we have seen, by said conveyance, there was no consideration for any undertaking on his part to pay off the mortgage, and, regarding the administrators' sale and deed thereunder as void and as conveying no rights to Freirichs, he was placed under no obligation thereby.

2. The only finding of fact which suggests any fraud in the foreclosure proceeding is "that the foreclosure suit carried on in the district court in the name of Thomas R. Burling against Frank Freirichs, Anna Freirichs and this plaintiff was for the purpose of enabling Frank Freirichs to acquire a legal title to the said premises as against this plaintiff." From this finding the district court reached the conclusion of law that the foreclosure of the $500 mortgage was fraudulent as to the plaintiff herein. There are no facts except the alleged assumption of this mortgage by Freirichs at the time of the administrators' sale either pleaded or proved which constitute fraud. It is not pointed out what fiduciary relation Freirichs sustained toward the plaintiff. It was suggested on the argument that by the administrators' sale he acquired the life estate which the widow had in the premises, but it was not argued therefrom, as it might have been, that, he sustaining the relation of a life tenant to a remainderman, the purchase by him of a paramount title would be for their joint benefit if the remainderman should within a reasonable time offer to contribute his share of the expense of such purchase. We do not think, however, that Freirichs acquired the life estate held by his wife. The rule has been established in this state that an administrator derives his authority solely from the

statute, and is with respect thereto a public officer. The rule of the law as to public officers, that they are not personally liable upon their official contracts although in excess of their powers, is applied to administrators. *Henry v. Henry,* 73 Neb. 746; 2 Woerner, American Law of Administration (2d ed.), sec. 480. In this case the deed of the administrator was made in her official capacity, and not as an individual, and according to the doctrine established in *Henry v. Henry, supra,* she did not convey her individual estate. There is therefore a want of any relation between Freirichs and the plaintiff, except that he was her stepfather. It is not, and probably will not be, contended that this relation is one which made his acquisition of a paramount title void, or that a trust resulted from such relation, by which he held the title for her benefit. There being no privity of estate nor fiduciary relation existing between the plaintiff and Frank Freirichs, there is no principle of law or equity that forbade him to purchase the mortgage and have it foreclosed for the purpose of acquiring title to the property.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and plaintiff's action dismissed.

REVERSED AND DISMISSED.

FREDERICK H. WEEKE ET AL., APPELLANTS, V. HENRY W. WORTMANN, ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 13, 1909. No. 15,639.

1. **Contracts:** VALIDITY. A comparatively slight degree of mental incapacity or weakness on the part of a party thereto will justify a court of equity in setting aside a contract for which such party has received no valuable consideration.

2. **Executors and Administrators:** DISBURSEMENTS. An administrator who pays out money in pursuance of an order made by the county court cannot be personally charged with the reimbursement of the same, in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same.

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

Joseph P. Baldwin, O. A. Torgerson, Charles H. Sloan, Richards & Haffke and *T. C. Marshall,* for appellants.

R. D. Sutherland and *J. T. McCuistion, contra.*

CALKINS, C.

The plaintiff Kathrina Weeke was first married to one Burstadt, and by him she had two children, the defendants Minnie Wortmann and Herman H. Burstadt. Burstadt died, and she then married one Stockam, by whom she had two children, the defendants Lottie Knorenschild and Henry H. Stockam. Stockam died when the latter child was an infant, and in about the year 1872 she married Henry W. Weeke, by whom she had one child, the plaintiff Frederick H. Weeke. She lived with Weeke for about 30 years, and until he died in Thayer county on the 6th day of January, 1902. It appears that her first husband left Mrs. Weeke a little personal property, and an interest in some land upon which he had paid $150 and to which she afterwards obtained the title. It does not

appear that her second husband left her any property; but when she married Mr. Weeke she had this tract of land in Missouri which was afterwards sold for $600, and Mr. Weeke at that time had himself about $500 in money. They moved to Nebraska, where Weeke bought land and established his home. His stepchildren were raised in his family, the daughter until she was married, and the boys until they were 17 or 18 years old. Each seems to have been furnished a small amount of property with which to make a start in life. When the older Weeke died he left an estate valued at about $11,000. He owned a house and lot in the village of Deshler, in which he resided with his wife at the time of his death. The remainder of his estate was composed of personal property, principally in money, notes and securities.

After his death the plaintiffs and the defendants Wortmann, Burstadt and Stockam met at the residence of the widow and entered into the following agreement: "This agreement entered into this 11th day of January, 1902, between the heirs of Henry William Weeke, deceased, witnesseth: That the undersigned have agreed and do hereby covenant and agree with each other to settle the estate of Henry W. Weeke as follows: (1) All debts shall be paid. (2) The widow Kathrina E. Weeke shall receive all the household goods, $200 in cash, and one-third of the balance of the estate. (3) Out of the remainder of the estate Lottie Knorenschild shall receive $200, and Frederick H. Weeke shall receive $500. (4) The estate remaining after the widow shall have her portion, and the said sums have been paid Lottie Knorenschild and Frederick H. Weeke, shall be divided into five equal parts. Mrs. Minnie Wortmann shall receive one-fifth, Herman H. Burstadt shall receive one-fifth, Lottie Knorenschild shall receive one-fifth, Henry H. Stockam shall receive one-fifth, and Frederick H. Weeke shall receive one-fifth. In witness whereof we have hereunto set our hands at Deshler, Nebraska, the day and year first above written. Kathrina E. Weeke. Mrs. Minnie Wortmann. Herman

H. Burstadt. Lottie Knorenschild. Henry H. Stockam. Frederick H. Weeke."

A few days later the following addendum was added to said agreement: "Deshler, Nebraska, January 15, 1902. We heirs all agree to give mother the old home place in Deshler with everything that is on the place that she may want. Lots seven (7), eight (8) and nine (9), in block thirteen (13) of the original town of Deshler according to official survey and recorded plot thereof. Kathrina E. Weeke. Mrs. Minnie Wortmann. Herman H. Burstadt. Lottie Knorenschild. Henry H. Stockam. Frederick H. Weeke."

Upon a petition signed by the plaintiffs, the defendant Henry W. Wortmann was by the county court of Thayer county appointed administrator of the estate of Henry W. Weeke, and, having qualified, proceeded to execute said trust, and filed his final report in October, 1902. On the 18th day of November, 1902, the county court made an order of distribution according to the terms of the agreement above quoted, and the administrator, in pursuance thereof, made payment to the parties named therein of the amounts which it was so determined each should receive. On the 9th day of February, 1905, plaintiffs filed their petition in the county court, praying that the order allowing the administrator's final account, the order of distribution and that discharging the administrator be vacated and set aside. This petition, after setting out the death of the deceased, their relation to him, the making of the foregoing agreement, and the proceedings had in the county court, alleged that Frederick H. Weeke was mentally weak and easily deceived, and that the defendant Henry W. Wortmann, with intent to cheat and defraud him, presented to the plaintiff the foregoing agreement and falsely and fraudulently represented to him that his stepbrothers and sisters were heirs of the deceased and entitled to share in the estate, and that, unless the plaintiff would sign said agreement, the whole estate would be squandered and wasted in litigation, and

that, if he would sign it, he would receive $500 more than he was entitled to, and that he, relying upon the said representations, signed the said agreement without any consideration. There were similar allegations excusing his signing of the receipt to the administrator for the share of the estate which he received, and a charge of conspiracy by the defendants to cheat and defraud the plaintiff, with an allegation that the plaintiff had no knowledge of said fraud until within six months from the time of the filing of such petition. A demurrer to the petition was interposed, and, it being sustained, the case was appealed to the district court, where the said demurrer was again sustained. The case was then brought to this court, and the judgment of the district court reversed in an opinion by ALBERT, C., 77 Neb. 407. The case being remanded, an answer denying the fraud and conspiracy was filed and the evidence heard upon issue so formed. The district court found for the defendants, and from a judgment rendered upon this finding the plaintiffs again appeal.

1. It is now confessed on behalf of the defendants that none of them had any interest in the estate of Henry W. Weeke, but it is argued that the parties were one family, living together, and by their joint labor accumulating this estate; that they are Germans, a people with whom the idea of community in the family property is strong; and that the plaintiff Frederick H. Weeke, realizing the justness of an equal division of the property, was, in the execution of this agreement, doing what equity and good conscience prompted him to do. To the suggestion that there was no consideration, it is argued that, where the transaction is one which tends to the peace and security of the family, the motive of avoiding family disputes and litigation is a sufficient consideration. Either of these arguments would have weight if Frederick H. Weeke were the equal in mental ability of his brothers and sisters with whom he was dealing. If we could say that Frederick H. Weeke understood that in signing this agreement he was

making to his half brothers and sisters a gift of four-fifths of his inheritance, and was doing this knowingly and intelligently, we think the agreement might be sustained. According to the testimony of the plaintiff's witnesses, the inducement for him to enter into this agreement was fear that his half brothers and sisters would make claims against the estate which would so diminish the same that he would receive less than under the agreement; while according to the defendants' testimony the proposition to make an equal division came from Frederick, but it was made as it might have been made had he supposed their rights were equal to his own, and without any act or word that would indicate that he knew or realized that he was making them a most generous and liberal gift.

We are impressed with the conviction that none of the parties realized the extent to which Frederick H. Weeke was surrendering his clear legal rights, but we think they were all ignorant of the law and mistaken as to their respective legal rights. Whatever may be the effect of a mistake of law pure and simple, there is no doubt that equitable relief will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud. It is enough that the misconception of the law was the result of or even aided or accompanied by incorrect or misleading statements of the other party. 2 Pomeroy, Equity Jurisprudence (3d ed.), sec. 847. And this leads us to a consideration of the question whether the evidence in the record is such that the district court should have found the allegations as to the mental weakness of the plaintiff Frederick H. Weeke to be true. A number of witnesses were produced who were acquainted with him, and their testimony tended to

show that he was somewhat weak minded and easily persuaded. Opposed to this was the testimony of other witnesses who were so situated that they should have known of this weakness, if it existed, and who testified that they had never heard his mental capacity questioned. So far the testimony is so evenly balanced that we would not feel justified in reviewing the decision of the district court if it were not that his conduct as testified to by both plaintiffs' and defendants' witnesses indicates a degree of stupidity and want of mental understanding that places him below the level of ordinary men. In such a case the mental weakness of the party seeking to avoid a contract unfavorable to him has the same effect as incorrect or misleading statements or acts by the party claiming under such contract. It is undoubtedly difficult to formulate any rule for determining the degree of mental weakness which will justify a court of equity in interfering and setting aside a contract, but it is certain that, where the consideration is inadequate, or, as in this case, where there is no consideration whatever, the degree of mental weakness required is much less than when the contract is made upon a fair consideration and is reasonable and just.

2. It does not follow from the foregoing consideration that the plaintiff is entitled to all the relief which he demands. The judgment of the county court ordering the distribution was based upon this agreement, and that should be set aside, and the parties receiving a share of said estate solely by virtue of said agreement should be required to return the same, with interest from the time of commencement of this proceeding.

The administrator paid out this money in pursuance of an order made by the county court, and he cannot be personally charged with the payment of the same, in the absence of evidence showing guilty knowledge of the fraud on his part. This we think the record fails to disclose, and upon that question the finding of the district court must stand. The plaintiff must be left to his recourse

against each individual receiving a share of the estate under said agreement.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

REVERSED.

STATE, EX REL. THOMAS SULLIVAN, APPELLEE, V. WILLIAM L. ROSS, COUNTY CLERK, APPELLANT.

FILED APRIL 24, 1909. No. 15,644.

APPEAL from the district court for Dakota county: ANSON A. WELCH, JUDGE. *Dismissed.*

Frederick S. Berry, for appellant.

Paul Pizey, contra.

PER CURIAM.

This is a proceeding in mandamus to compel the county clerk of Dakota county to cause to be printed upon the official ballots for use at the November, 1907, election, the names of certain persons as candidates of the democratic party for certain county offices. A demurrer was filed to the petition, which was overruled, and a peremptory writ issued by the district court as prayed.

So far as the record shows, no supersedeas was asked for or allowed. The election was held about 17 months ago, and the controversy ended by obedience to the writ. At its last session the legislature took steps to remove any uncertainty upon the point in question by providing that

names written upon the primary ballot should be canvassed and returned as well as those printed thereon. In this state of affairs the question is merely academic, and with the multitude of cases pressing for decision we do not feel it our duty to consider or decide the question presented.

The appeal is therefore dismissed at the cost of the appellant.

DISSMISSED.

PETER DEBUS, APPELLEE, V. ARMOUR & COMPANY, APPELLANT.

FILED APRIL 24, 1909. No. 15,185.

1. **Master and Servant:** FELLOW SERVANTS. An employee who is entrusted by his master with power to direct and control the work of other servants, and to whom is committed the duty of seeing that the appliances to be used and with which such other servants are to work are kept in safe condition, is not as to such duties a fellow servant.

2. ———: DUTY OF MASTER: INSTRUCTIONS. Under the circumstances as developed by the issues and evidence in this case, an instruction is not erroneous which informs the jury that it was the duty of the master to furnish a reasonably safe working place for his servants.

3. **Appeal:** AFFIRMANCE. Where instructions of the court fairly submitted the issues of fact and the law to be applied to the jury, the verdict, if supported by the evidence, will be sustained.

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

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

Charles S. Elgutter and *Joel W. West, contra.*

REESE, C. J.

Peter Debus, while employed by Armour & Company in its meat packing establishment in South Omaha, fell

through an open hatchway and received personal injuries, and brought this action to recover damages therefor. In his petition he alleged that defendant was negligent in failing to furnish him a reasonably safe working place, in this, that the hatchway over which he was required to travel was left open without any guard rail or fence, and without any danger signal or any watchman to warn him of any danger. Defendant admitted plaintiff's employment, his injuries, and that the hatchway was open; denied negligence; alleged that the hatchway was supplied with a plank guard at each side thereof; that the condition of the hatchway and the fact that the trapdoors of the hatchway were open were plainly visible and obvious to plaintiff; that the condition, equipment, operation, and the management of the hatchway and trapdoors had long been well known to plaintiff, and with this knowledge plaintiff voluntarily continued his employment, and thereby assumed all risk of injury; that during the employment of the plaintiff, and for a long time prior to the accident, the trapdoors were opened and closed in the regular process of the work by an employee, designated as a "drop-man," who was plaintiff's fellow servant, and that, if there was any negligence in opening or operating the trapdoors, it was the negligence of such fellow servant, and that plaintiff was guilty of contributory negligence. The reply was a general denial. Plaintiff had judgment, and defendant has appealed.

At the time of and for five months immediately previous to his injuries plaintiff had been working as a pusher in the defendant's packing house plant at South Omaha. An upper floor of one of the defendant's buildings was used for slaughtering sheep and cattle. The carcasses of the animals were stored in two refrigerator rooms or coolers, one of which was on the floor where the killing was done, and the other two floors below. The carcasses were so tagged as to indicate in which cooler they were to be placed, and were hung on trolley hooks or frames

which were suspended from an overhead rail fastened to the ceiling. All the carcasses were pushed along this rail to a scale where they were weighed. The scale was 20 feet from the door to the upper cooler. It was the duty of plaintiff and one Svoboda to push all carcasses for the upper cooler from the scale to the door of the cooler, where the carcasses were received and stored in the cooler by two other men called "cooler men." Between this scale and the cooler door was a hatchway six feet square. This hatchway was provided with two trapdoors, which, when closed, formed a part of the floor. The hatchway was five feet from the scale and nine feet from the cooler door. Plaintiff and Svoboda, in pushing the carcasses from the scale to the cooler, were required to walk over the trapdoors. When carcasses were to be placed in the lower cooler, an employee designated as the "drop-man" called to the pushers "downstairs." One of the pushers repeated this call to the cooler men. The pushers and the cooler men then went to the lower floor, and the drop-men opened the trapdoors, pushed the carcasses from the scale over the open hatchway and lowered them to the second floor below. The pushers conveyed the carcasses to the lower cooler, where they were stored away by the cooler men. When carcasses for the upper cooler were reached, the drop-man called through the hatchway to the pushers "upstairs," and one of the pushers repeated the call to the cooler men, and then the pushers and cooler men returned to the upper floor. The drop-man closed the trap doors, and the pushers again resumed their work of pushing the carcasses from the scale across the trapdoors to the upper cooler.

Plaintiff's contention is that, while he was engaged in pushing the carcasses over the hatchway to the upper cooler, the trapdoors were opened without his knowledge, and he fell through the hatchway and received the injuries complained of. On the day of the accident carcasses were being stored in the lower cooler until shortly before noon, when the trap-man, Victor Remish, called to the

pushers "up-stairs." The call was repeated to the cooler men, and all ascended to the killing floor. The plaintiff claims that immediately thereafter a lot of sheep carcasses for the upper cooler was reached, and that he was engaged in pushing these to the cooler, when he fell through the open hatchway, the trap-doors having been opened without his knowledge. It is conceded that the trapdoors were opened by the drop-man, Victor Remish. It is claimed by defendant that the work of placing carcasses in the upper cooler had been completed, and the next carcasses were tagged for the lower cooler, and that the trapdoors were opened in the presence of plaintiff for the purpose of lowering the carcasses to the lower floor, but, as it was nearly noon, further work was suspended until after dinner, and that another employee, who was pushing carcasses from a different part of the room to the scale, and who was temporarily called away from his work, requested plaintiff as an accommodation to take his place and push a few carcasses for him; that plaintiff in pushing the carcasses to the scale for another employee, instead of stopping when the scale was reached, absent-mindedly continued on toward the cooler, and thereby fell through the open hatchway. The evidence shows that to push a carcass from the scale to the cooler door and return required about 20 seconds; that there was a plank guard about one foot high placed on each side of the hatchway when the trapdoors were open; and that in opening the trapdoors the drop-man stood upon one side of the hatchway and opened the doors, they opening from the same side, and then placed the two guard planks on either side of the hatchway. Defendant contends that it was impossible for the drop-man to have opened the trapdoors and to have placed the plank guards while plaintiff was pushing carcasses, without his necessarily seeing and knowing that the trapdoors were being opened. But in this connection it is also shown that the trap-doors were immediately in the walk which plaintiff was required to follow in pushing carcasses.

It was the duty of defendant, as expressed in some cases, to exercise reasonable care in seeing that the appliances with which plaintiff was required to work were in reasonably safe condition. The evidence shows that at the time of the accident plaintiff was pushing six carcasses of sheep into the cooler, which was on the same floor upon which he was operating. It is also shown that with those six carcasses in front of him it was impossible for him to see whether the trapdoors were open or closed until too late to prevent his fall. It is conceded that the guard planks referred to could furnish him no protection, and were not placed there for that purpose, their object being to prevent employees from slipping into the opening on account of the slippery condition of the floor surrounding same. Indeed, the presence of those planks constituted an element of danger to one who might stumble over them while pushing carcasses, thus throwing him head downward into the opening. The open hatchway was a most dangerous place to one pushing carcasses to the cooler on that floor, owing to his inability to see in front while engaged in the work. During the time plaintiff was in the service of defendant the trapdoors had been carefully closed by another employee when carcasses were to be pushed to the cooler on that floor, and all the carcasses of sheep were required to be placed in that cooler, none of them being sent below. Plaintiff had been called "upstairs" by the person whose duty it was to give the order when he found the sheep carcasses ready to "push." It was no part of his duty to attend the trapdoors. He had the right to assume that the person upon whom that duty devolved would see to it that the doors were closed. This was the duty of Remish, but who was not in that regard a fellow servant. It must be apparent that plaintiff was guilty of no negligence which contributed to the accident.

It is contended by plaintiff, and not without reason, that the appliances were negligently constructed and created an element of danger when not properly safeguarded by

the one whose duty it was to see that the doors were closed. All carcasses were carried suspended upon a car or contrivance which was itself suspended to a single rail or track, upon which it was moved by means of a wheel or traveler running upon the track, moving to and fro. This track passed immediately over the trapdoors. When carcasses were to go below, the hatchway was found to be open, and, when the carrier to which the carcasses were suspended came over the center of the opening, the rail was automatically broken, and the detached segment went below carrying its load. If the load were composed of the carcasses of sheep, that fact was notice that the load passed over the hatchway and that the doors would be closed. Had another rail and carrier been provided for the upper cooler, not passing over the hatchway, all danger of accidents of this kind could have been avoided. As described by the pleadings and evidence, including drawings and diagrams of the place in question, we cannot look upon the appliances there as otherwise than dangerous, in the absence of the best of care. Did plaintiff's knowledge of these facts in any way exonerate defendant? We think not. As we have seen, it was no part of his duty to open or close the trapdoors or to give them any attention. The conditions there and duties of others were a notification to him that the doors would be closed when the "upstairs" carcasses were to be pushed, and that, as he could not see in front of his feet, he might rely upon the doors being in place, and that he could safely proceed. This was and had been the uniform rule.

But it is claimed that Remish, whose duty it was to give directions and see that the trapdoors were closed, was a fellow servant with plaintiff, and that defendant is not answerable to plaintiff for his negligence, if any existed. To this we cannot agree. It was shown upon the trial that Edward Mix was the recognized foreman over the employees, and that Remish was, under Mix, the foreman over plaintiff and his coemployee, Svoboda, and that plaintiff and Svoboda properly looked to Remish for

orders and directions in the prosecution of their work. Remish directed their movements. His orders were to be obeyed by them. He had charge of the trapdoors. It was his duty to see that they were ready for the course the carcasses were to take, whether into the cooler on the same floor or downward to the cooler below. He was the superior of plaintiff in that line of duty, and therefore his negligence, if any, cannot excuse defendant on the ground that he was a fellow servant.

It is urged that the district court erred in its instructions to the jury. Instructions were given by the court upon its own motion and upon the motion for both plaintiff and defendant. They are quite voluminous, and cannot be set out here without extending this opinion to an unreasonable length, and no good purpose would be accomplished thereby. It must be sufficient to say that we have carefully read all, and find that those given were in harmony with the views herein expressed. All material questions of fact were properly submitted and the law correctly stated. Under these instructions, the jury passed upon the questions submitted, and with their finding we must be content.

The judgment of the district court is

AFFIRMED.

PHIL H. COHN, APPELLEE, V. CHRIS WELLIVER ET AL., APPELLANTS.

FILED APRIL 24, 1909. No. 15,978.

1. **Intoxicating Liquors:** APPLICATION FOR LICENSE. "Under the liquor laws of this state (Ann. St., ch. 32), a petition for a liquor license must be signed by *bona fide* freeholders." *Dye v. Raser*, 79 Neb. 149.

2. ———: ———: FREEHOLDER. "One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law." *Dye v. Raser*, 79 Neb. 149.

3. ———: ———: ———. In order to be a freeholder to enable one to sign a petition for a license to sell malt, spirituous and vinous liquors, the "person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. What is required is title to the property, and not simply a contingent or an expectant estate, nor a right of occupancy or a privilege, with power to prevent alienation or incumbrance by the holder of the legal title." HOLCOMB, C. J., in *Campbell v. Moran*, 71 Neb. 615. Therefore a person holding an executory contract giving the right to purchase land upon a strict compliance with the terms of the contract in the future is not a freeholder.

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

E. A. Cook, for appellants.

Frank E. Beeman and *F. G. Hamer, contra.*

REESE, C. J.

This was an application to the village board of the village of Eddyville for a license to sell intoxicating liquors within said village. A remonstrance was filed by citizens of the village and county, presenting a number of issues, among which was a denial that the petition was signed by the requisite number of freeholders. The application was heard by the board, and the license granted as prayed. The remonstrants appealed to the district court, where the action of the board was sustained, and the license ordered to be issued. They appeal to this court.

The principal question presented is whether the signers of the petition were freeholders, as is required by section 25, ch. 50, Comp. St. 1907. There were 30 petitioners. There is some dispute as to the number of resident freeholders in the village. By the applicant it is claimed that there are less than 60 in number, and by the remonstrants that there are more. By the provision of the statute above referred to, if less than that number, the petition must be signed by a majority; if more, by not less than 30. One witness testified that there were but 51; but it was

claimed that he omitted some who should have been counted. If his enumeration was correct, a petition would be sufficient if signed by 26. It appears from his testimony that in making the count he did not include 11 of the names signed to the petition. If those persons were freeholders, they should have been counted, which would increase the number to 62; if not, they were not competent signers of the petition. If there were 62 freeholders, the law requires that the petition be signed by 30. There were 4 persons who signed the petition who, it is claimed, were not freeholders. If we deduct their names from the 11 above referred to, it would leave 7 to be added to the 51, making 58 freeholders, a majority of which would be 30.

The inquiry then is as to the competency of Carl Baker, E. R. Comstock, Thomas Moore and A. M. Smith as signers of the petition. Neither of them held any real estate in the village except by executory contracts for vacant lots, and one of whom, Thomas Moore, testified frankly that he procured his contract in order that he might sign applicant's petition. This fact alone, it being shown that the contract was procured for that sole purpose, disqualified and must exclude him. He stated that he was 21 years of age, and that his contract was made to him by his father for half a lot about one week before he signed the petition, and was for the purpose named. In *Dye v. Raser,* 79 Neb. 149, we held that "one made a freeholder (in that case by deed) for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law." The proof showing that the four held lots in the village only by contract raises the question as to whether they are freeholders under the provisions of the liquor laws of the state. The importance of this inquiry is made manifest when we remember that a compliance with the law in this respect is jurisdictional and that, "whatever the requirement of the act may be, it must be fully complied with. Without the consent or indorsement of at least the mini-

mum number of qualified persons, there is no jurisdiction to grant the license. A license issued without this sanction is void." Black, Intoxicating Liquors, sec. 161. "The signers to a recommendation of a petition for license must be such as the statute requires — adults, freeholders, taxpayers, residents of the district, citizens, or otherwise, according to the terms of the law. Any attempt to evade the law in this respect, or to practice a fraud upon it, will be discountenanced by the courts. Thus, a deed of lands made to a large number of persons for a single consideration, and merely for the purpose of qualifying them to sign recommendations for licenses, is fraudulent, and will not constitute them 'reputable freeholders' within the statute." Black, Intoxicating Liquors, sec. 160.

One phase of the question here presented was before this court in *Campbell v. Moran*, 71 Neb. 615, and, after a somewhat exhaustive discussion, the court, speaking through Chief Justice HOLCOMB, say: "From the definitions given, it will readily be seen that, in order to be a freeholder, a person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. What is required is title to the property, and not simply a contingent or an expectant estate, nor a right of occupancy or a privilege, with power to prevent alienation or incumbrance by the holder of the legal title." It is shown by the record that about two months before the hearing the Union Land Company agreed to sell Allen M. Smith and Carl Baker two lots in Eddyville for $70, and that $23.33 was paid on the purchase price, the other payments to become due in one, two, and three years thereafter, the contract providing that time and punctuality of payment were the essence of the agreement, and in case of failure the contract to be forfeited. It was further stipulated that, "in consideration of the stipulations herein contained and the payments to be made as hereinafter specified, the party of the first part agrees to sell unto the party of the second part" the real estate, describing it. As this was only an

agreement to sell upon a strict compliance with the terms and payments stipulated in the contract, and no effort was made to vest any title in the purchasers, nor give them any right to claim such title until the terms of the contract were fully met, we are unable to see that they meet the requirements of the statute under the decision above referred to.

E. R. Comstock testified that he had a contract for an interest in a lot in connection with his father, but that he could not give the number of the lot. He testified that the contract was in writing, but it was not introduced in evidence. He had no deed.

The terms "freehold" and "freeholder" have received a great many definitions, but practically all agree with the definition by Chief Justice HOLCOMB. See 20 Cyc. 843; Winfield, Adjudged Words and Phrases, 277; 3 Words and Phrases, 2968. It is true that in some cases parties holding under contracts of purchase are held to be freeholders, either legal or equitable, and that rule, if applied here, would require a different decision as to the signers named. Among the cases thus holding is *Hannah v. Shepherd*, 25 S. W. (Tex. Civ. App.) 137, but no authorities are cited in support of the decision. The holdings in this state are not in entire harmony as to the meaning of the term as used in different statutes, but we are not aware of any decision to the effect that persons having less than a freehold title to land are competent signers of a petition for a liquor license. It was evidently the purpose of the legislature in enacting the law under consideration to place the matter of the issuance of licenses primarily in the hands of those having their own homes and interests within the municipality or ward where the license was to be sought; hence, the use of the words "resident freeholders," which must be construed to mean those living within the subdivision holding title to real estate. We therefore hold that the parties named did not come within the statutory requirement, and that they were not competent signers of the petition, and that the license should have been refused.

A number of other questions were argued at the bar of this court and discussed in the briefs, some of which have been heretofore decided, but it is not deemed necessary to notice any of them.

The judgment of the district court is reversed, with directions to reverse the decision of the village board and require that the license be canceled.

JUDGMENT ACCORDINGLY.

GEORGE E. BARKER, APPELLEE, V. ELLERY R. HUME, APPELLANT.

FILED APRIL 24, 1909. No. 15,665.

1. **Tax Sale:** VALIDITY. A county treasurer cannot make a valid public or private sale of real estate for the nonpayment of delinquent taxes due thereon, unless in such sale are included all taxes, with interest and costs, then delinquent against such real estate. *Adams v. Osgood*, 42 Neb. 450.

2. ———: EFFECT. A sale of real estate for delinquent taxes for less than the amount of taxes, interest and costs due thereon is not a sale of the land. It is only a sale of the taxes, and its only effect is to transfer the lien of the county to the purchaser, who may enforce his lien by proper foreclosure proceedings.

3. **Taxation:** VOID SALE: FORECLOSURE OF LIEN: REDEMPTION. Where the purchaser at a void administrative sale of real estate for taxes brings an action to foreclose the tax lien and obtains a decree under which the land is sold, the sale so made is a judicial sale, and does not become final and complete until confirmation thereof by the court. In such a case the two years given the owner to redeem dates from such confirmation, and an action to redeem may be brought at any time within said period.

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

W. W. Slabaugh and *H. P. Leavitt*, for appellant.

B. N. Robertson, contra.

BARNES, J.

The plaintiff brought this action in the district court for Douglas county to set aside a decree foreclosing a tax lien upon the east 100 feet of the north half of lot 6, block 5, Orchard Hill addition to the city of Omaha, and to redeem the premises from tax sale. He tendered payment of all taxes, interest and penalties due thereon, and prayed for a decree quieting his title thereto as against a sheriff's deed based on said decree. The plaintiff had judgment, and defendant has brought the case here by appeal.

The defendant has urged several grounds for a reversal of the judgment, some of which may be entitled to consideration, but as the case must be tried *de novo,* and we must decide it upon our own conclusions of fact and law, if the plaintiff has shown any substantial ground to support the judgment of the trial court, it must be affirmed. We find that it is stipulated by the parties, and the record shows the fact to be, that the land in question was not sold for all the taxes due thereon at the time the defendant purchased it at the treasurer's administrative sale. It was provided by the revenue law in force at that time that the treasurer should sell each tract of land on which the taxes are delinquent to the person who offers to pay all of the taxes due thereon. The command of this statute is imperative, and a sale for a less amount is a void sale. *Adams v. Osgood,* 42 Neb. 450; *State v. Helmer,* 10 Neb. 25; *Tillotson v. Small,* 13 Neb. 202; *O'Donohue v. Hendrix,* 13 Neb. 257. Such a sale is not a sale of the land at all, and its only effect is to transfer the tax lien of the county to the purchaser. It is a sale of the taxes, and not a sale of the land on which they are a lien. The purchaser at such a sale obtains the rights theretofore possessed by the county, and no more. He is not entitled to demand and receive a tax deed to the premises upon the surrender of his certificate of sale, but he may enforce his lien by proper foreclosure proceedings. *Stegeman v. Faulkner,* 42 Neb.

53; *Adams v. Osgood,* 42 Neb. 450; *Medland v. Connell,* 57 Neb. 10; *Grant v. Bartholomew,* 57 Neb. 673.

Recognizing that rule, the defendant instituted his foreclosure suit, and obtained the decree of which the plaintiff complains. The land was sold to him under that decree, the sale was confirmed on the 25th day of September, 1905, and a sheriff's deed was executed and delivered to him under which he now claims title to the land in question. The rule is well settled by this court that, where there has been no valid administrative tax sale, the owner has two years from and after the confirmation of the judicial sale in the action to foreclose the tax lien in which to redeem his land from such sale. *Logan County v. Carnahan,* 66 Neb. 685; *County of Logan v. McKinley-Lanning L. & T. Co.,* 70 Neb. 406; *Douglas v. Hayes County,* 82 Neb. 577; *Wood v. Speck,* 78 Neb. 435; *Butler v. Libe,* 81 Neb. 740; *Smith v. Carnahan,* 83 Neb. 667. It appears that this action was commenced on the 20th day of November, 1906, a date well within the redemption period, and it follows that the decree of the trial court was the only one which could have lawfully been rendered in this action.

As to the matter of the computation of the amount due the defendant in order to redeem, we find no error therein, and the judgment of the district court is

AFFIRMED.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY, APPELLEE, V. ORSON J. SMITH ET AL., APPELLANTS.

FILED APRIL 24, 1909. No. 15,666.

1. **Judgment:** REVIVOR: DEFENSES. Upon proceedings to revive a dormant judgment which is valid upon the face of the record, no objections will be heard which seek to go behind the original judgment.

2. ———: ———: DEFENSES ON APPEAL. On an appeal to a reviewing court from an order reviving a dormant judgment, where neither

the transcript nor the bill of exceptions contain the pleadings in the case in which the judgment sought to be revived was rendered, it will be presumed that they were sufficient to sustain the original judgment, and a defense of coverture interposed for the first time in the revivor proceedings cannot be considered.

3. **Appeal:** JUDGMENT: REVIVOR: ISSUES. Where, on the trial of an application to revive a dormant judgment, the proceeding has been treated by the parties and the action tried as though the matters of defense were properly put in issue by a reply, it will be so treated by a reviewing court.

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

N. T. Gadd, for appellants.

Robert A. Moore, contra.

BARNES, J.

This is an appeal from a judgment or final order of the district court for Custer county reviving a dormant judgment.

It appears that the defendants on the 8th day of July, 1886, executed their promissory note for the sum of $550 due July 8, 1891, with interest at 8 per cent., payable semi-annually. In order to secure its payment, they at the same time executed and delivered to the plaintiff a mortgage upon certain real estate situated in said county of Custer. Default was made in the payment of the mortgage debt, the mortgage was foreclosed, sale of the mortgaged premises was had, in due time the sale was confirmed, and thereupon a deficiency judgment was rendered against both of the defendants for the sum of $119.83. The judgment afterwards became dormant, and on the 23rd day of July, 1906, the plaintiff made application to revive the same. The defendants appeared, and by separate answers objected to a revivor. An examination of the record discloses that the defendant Ella A. Smith objected for the reason, among others, that she was at the

date of the foreclosure of the mortgage a married woman, and that she at no time signed the note and mortgage sued upon in this action, or that action, for the purpose of charging her estate which she possessed at the time, and that she now has property in her own right. A trial was had, and for the purpose of supporting the issue above set forth defendant Orson J. Smith testified as follows: "Q. Were you the defendant in this original case in which a judgment was rendered—*American Freehold and Mortgage Company v. Orson J. Smith?* A. Yes, sir. Q. Who was Ella A. Smith, one of the defendants at that time? A. My wife." Plaintiff thereupon objected to the introduction of any further evidence on the part of the defendants, for the following reasons: "Because their answers fail to plead any defense, and for the further reason that all of the allegations of said answers are matters which should have been pleaded, if at all, before the deficiency judgment was rendered, and cannot be inquired into upon an application to revive the judgment." By the Court: "The objections are overruled for the present. The court will determine the legal questions later." "Q. At the time of the signing of the notes and mortgage sued upon in this action, was she your wife? A. Yes, sir. Q. Do you remember the incident of you and she signing the note and mortgage? A. Yes, sir. Q. You may state whether or not she received the money or you? A. I did. Q. Do you know why she signed the notes and mortgage? A. Yes, sir. Q. Why did she sign them, if you know? A. Because the notary said she had to because she was my wife. Q. Did she ever personally receive any of the money for her use and benefit? A. No, sir. Q. Did you ever receive notice of the application that they would take a personal deficiency judgment against you?" This question was objected to as incompetent, irrelevant and immaterial, and the objection was sustained. "Q. Was Ella A. Smith, at this time the defendant, at that time your wife? A. Yes, sir. Q. At the time she signed these notes and mortgage did she have any property either personal or

real? A. She had some personal property." Cross-examination: "Q. Was this real estate that you gave the mortgage on your homestead? A. It wasn't my homestead. Q. Well, did you live on it at the time you gave the mortgage? A. Yes. Q. Did you and your wife live on this place at the time you gave the mortgage? A. Yes, sir. Q. And resided there? A. Yes. Q. As your home? A. Yes."

Each of the several questions and answers contained in the direct examination were objected to by the plaintiff, and the foregoing is all of the evidence introduced by the defendants or either of them in support of the issues raised by their answers. The record contains none of the pleadings in the foreclosure suit, and there is no showing that the defendant Ella A. Smith at the time she signed the note and mortgage in question did not intend to bind her separate estate. The record contains a certified transcript of the decree of the foreclosure, together with the order confirming the sale and the deficiency judgment thereafter rendered against both of the defendants. So far as we can ascertain, the proceedings, judgments and orders of the district court were regular and valid in all respects. It therefore seems clear that the evidence above quoted was insufficient to overcome those presumptions of validity and regularity which attach to a judgment of a court of record.

It is contended, however, that the defense interposed by Ella A. Smith was sufficient to protect her rights even after judgment. In support of this contention counsel cites *Parratt v. Hartsuff,* 75 Neb. 706. It was held in that case that such a defense might be interposed at the time of the application for a deficiency judgment, but the opinion does not go to the extent of holding that it may be interposed after such a judgment has been rendered. In *St. Paul Harvester Co. v. Mahs,* 82 Neb. 336, quoting from *Wright v. Sweet,* 10 Neb. 190, it was said: "Upon proceedings to revive a judgment which has become dormant, * * * no objections will be heard which seek

to go behind the original judgment." In the case at bar it is not contended that there was no personal service upon the defendants or either of them, or that the court was without jurisdiction to render the foreclosure decree or the deficiency judgment complained of, for want of jurisdiction of the person of the defendants or of the subject matter. The defendants have introduced no evidence to show that the pleadings in the foreclosure case were not ample and sufficient to support the judgment of foreclosure and the deficiency judgment in question in this case, and, having failed to introduce them in evidence, we must presume that they were sufficient to sustain said judgment.

It is further contended that no evidence was required on the part of the defendants because no reply was filed to their objections. It is sufficient answer to this contention to say that the trial was had, and the cause was treated as though the matters contained in the defendant's answers were properly put in issue by a reply.

It seems clear that the defendants failed to establish any valid defense to the plaintiff's application for a revivor, and the judgment complained of is therefore

AFFIRMED.

FRANK A. SUCHA, APPELLANT, V. JOHN C. SPRECHER, APPELLEE.

FILED APRIL 24, 1909. No. 15,668.

1. **Libel:** AMBIGUOUS LANGUAGE: QUESTION FOR JURY. In civil actions for libel, the court usually decides whether the words are actionable *per se*, but where they are ambiguous or are susceptible to two interpretations, and there is any reasonable doubt as to their true construction, it is for the jury to say what meaning such words would have fairly conveyed to their minds.

2. **Pleading:** CONSTRUCTION ON APPEAL. Where an answer is not attacked either by motion or demurrer, but is treated by the plain-

tiff as sufficient, and a trial is had without objection on the issues raised thereby, it cannot be successfully attacked for the first time on appeal to the supreme court.

3. Evidence examined, and found sufficient to sustain the judgment of the district court.

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

George W. Wertz and *Frank Dolezal,* for appellant.

W. M. Cain, contra.

BARNES, J.

The plaintiff Frank A. Sucha brought this action in the district court for Colfax county to recover damages which he claims to have suffered by the publication of an alleged libelous article in defendant's newspaper.

It appears that the plaintiff was the clerk of the district court for Colfax county, and on or about the 25th day of April, 1907, the defendant wrote and published in his newspaper, called "The Free Lance," of and concerning the plaintiff, the article complained of, which, on account of its length, will not be quoted in this opinion. It is sufficient to say that it set forth the facts that the jury for the May, 1907, term of the district court had been selected; that the board of county commissioners had furnished to the plaintiff the names of 60 electors and taxpayers, from which he as clerk of the district court, together with the sheriff of the county, was required to draw the names of the 20 persons who should constitute the jury; that the plaintiff was unfriendly to defendant; that such drawing had been made, and the result thereof was set forth. The article then stated that it was peculiar and remarkable that none of the defendant's friends, naming them, were selected, and that so many of his enemies, also naming them, were drawn; that defendant had three cases pending for trial, and was therefore interested in the selection of the jury, and concluded with

a statement that it was a remarkable drawing, but that the jury were a list of good men and so the defendant did not care. By the use of scienter and innuendo the petition based on said publication was made to state a cause of action, and the defendant was required to answer. His defense consisted of an admission of the publication of the article, an allegation that it was true, and a denial of all of the allegations of the petition not expressly admitted. Upon the issues thus joined a trial was had, and at the conclusion of the evidence the plaintiff requested the court to instruct the jury that the publication in question was libelous *per se,* and to find a verdict for the plaintiff for at least some amount. The request was refused, and the court in paragraph 4 of his own instructions allowed the jury to determine whether the article, by giving its language a fair, ordinary and reasonable construction, would be understood by the ordinary reader as charging or intending to charge the plaintiff with official misconduct or misconduct in office. The jury returned a verdict for the defendant, and the plaintiff has brought the case here by appeal.

Appellant's first contention is that the court erred in refusing to instruct the jury that the article in question was libelous *per se.* It was conceded on the argument that the language of the publication in question is susceptible of two interpretations, one of which would not render it libelous *per se.* This being so, its nature and effect, considered in the light of the evidence, was properly submitted to the jury. Odgers, Libel and Slander, pp. *105, *106 and *108.

It is further contended that the answer was insufficient to constitute a defense, and therefore the instruction to find for the plaintiff should have been given. It appears from the record that plaintiff's counsel at all times treated the answer as sufficient. It was not attacked either by motion or demurrer, and a trial was had without objection on the issues raised thereby. In such cases we have frequently held that the sufficiency of an answer

cannot be successfully attacked for the first time in this court, and, where it has been treated as sufficient in the trial court, it will be so treated on appeal by this court. *Frederick v. Buckminster*, 83 Neb. 135; *Doering v. Kohout*, 2 Neb. (Unof.) 436.

Finally, it is contended that the evidence is not sufficient to sustain the verdict. We have read the bill of exceptions, and are satisfied that the evidence fully justifies the verdict and sustains the judgment.

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

AFFIRMED.

STATE OF NEBRASKA V. SWIFT & COMPANY ET AL.

FILED APRIL 24, 1909. No. 15,750.

Pure Food Law: VIOLATION. S. & Company, a corporation, cured hams and sides of bacon for food at its packing house in South Omaha. To preserve their value as food products, prevent shrinking by evaporation, and protect them from dust, dirt and insects, part of them were wrapped with cloth and paper, and each package was correctly branded as to contents. The packages were shipped to Lincoln, Lancaster county, Nebraska, and a ham and side of bacon were there sold by a distributing agent at their actual gross weight to a customer, who purchased them in that form in preference to purchasing unwrapped meats, which were also on sale at the same place, and for the same price. *Held*, That the transaction was not a violation of the provisions of chapter 63, laws 1907, commonly known as the "Pure Food Law," as it stood prior to the amendment of 1909.

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

F. M. Tyrell and *C. E. Matson*, for plaintiff in error.

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

BARNES, J.

The state prosecuted Swift & Company, a corporation, and William Huxtable in the district court for Lancaster county for a violation of the provisions of subdivision

3, sec. 8, ch. 63, laws 1907, commonly known as the "Pure Food Law." The information contained two counts. The first count reads as follows: "Frank M. Tyrrell, county attorney of Lancaster county, * * * gives the court to understand and be informed that Swift & Company, a corporation, and William Huxtable, late of the county aforesaid, on or about the 23d day of October, A. D. 1907, in the county of Lancaster and state of Nebraska aforesaid, then and there being, did then and there unlawfully sell, for use, in the state of Nebraska, one ham, in package form; said package not having been put up by a retailer, and said package being other than canned goods, and not having the weight or measure correctly stated on the outside of the package; said package contained an article of food, to wit, one ham." The second count was in all respects like the first, except that it charged the sale of one piece of bacon in package form. The defendants filed a written answer to the information, which contained a plea of not guilty and a general denial. It also contained other matters of defense which we omit from this opinion. A jury was impaneled, and at the close of all of the evidence they were instructed by the court to find the defendants not guilty. Thereupon such a verdict was returned, and the defendants were discharged. Exceptions were duly noted by the prosecuting attorney, who now brings the case to this court for review under the provisions of sections 483 and 515 of the criminal code.

It is contended that the district court erred in directing the jury to return a verdict for the defendants. This requires us to examine the evidence preserved in the bill of exceptions. It appears that E. C. Matson, the first witness for the state, identified the wrappings of the ham and bacon in question, and stated that the weight of those found on the ham was six ounces, and the weight of the wrappings of the bacon was five ounces. On cross-examination he testified that the wrapping on the ham was composed of two sheets of paper and a gauze cloth, called "cheese cloth"; that the cheese cloth was next to

the ham; that outside of this was the thicker sheet of paper, and outside of that was a harder and thinner sheet of paper, bearing a label on which appeared "Swift's Premium Skinned Ham. Swift & Company, U. S. A."; that there was also another label reading, "U S. A. Inspected and packed under the act of congress, June 30, 1906. Establishment, No. 3-B"; that there were similar labels upon the bacon, except that the word "bacon" was used instead of "ham." He further testified that the contents of the wrapper identified as exhibits A. 1, 2 and 3 were in fact ham, and that the wrappings had been on the ham and bacon before he weighed them; that they were weighed within two minutes after taking them from the meat. The second witness was one John Sandolovitch. He testified that he was a retail meat dealer in Lincoln; that he saw the wrappers in question at the market of Swift & Company in Lincoln, where he purchased the ham and bacon which were contained therein; that he paid 20 cents a pound for the bacon and 13 cents a pound for the ham; that the ham and bacon in question were sold to him by the defendant Huxtable, agent of Swift & Company, in Lincoln, Lancaster county, Nebraska; that at the time of his purchase the weight was not marked on the outside of either package, and that they were not canned goods; that Swift & Company are wholesalers, and not retailers. He further testified that the ham with its wrappings was not in package form; that it was just the form of the ham wrapped up. On cross-examination he testified that in buying the ham and bacon it was weighed to him, and the price which he paid was computed on the actual weight of the meat and wrappings. He further testified that the defendants carried both covered and uncovered meat for sale; that he has bought both kinds; that he preferred the wrapped meat; that the wrappings or coverings served to prevent shrinkage and kept the meat cleaner, more sanitary and more palatable. The foregoing is the substance of all of the evidence introduced by the state.

The defendants by their evidence explained the methods of wrapping and preserving meats practiced by Swift & Company; and by expert witnesses proved conclusively that it was not practicable to place the weight of a ham or piece of bacon on the outside of the wrapping because the natural shrinkage of the meat renders it impossible at any subsequent period of time to even give a correct estimate of its then net weight. Without further discussion of the evidence, it may be said that it was shown beyond question and without dispute that on the 23d day of October, 1907, the defendants sold one ham and one piece of bacon wrapped up with the material above described; and that upon the outside of the wrapping there was no statement whatever respecting the weight, but there was a true and correct statement as to the contents; that the two pieces of meat were actually weighed to the customer and sold by the pound, according to their actual weight, including the wrappings; that it was open to the customer to have purchased unwrapped goods if he saw fit; that the wrapping is useful for the protection and preservation of the meat against dirt, insects and deterioration through evaporation; that the quality of the meat is preserved by the process of wrapping, and the trade demands wrapped goods; that because of the shrinkage constantly going on, if hams and bacon are weighed separately immediately before wrapping and the net weight marked on the outside of the wrapper, that weight will not be correct at any time thereafter, and, in the event of a sale of the article at any subsequent time showing the branding placed thereon at the time of wrapping as the correct net weight of the contents, the dealer would thereby be guilty of a violation of the federal pure food law of 1906, which expressly provides that, if any weight is stated, it must be correct or the vendor is subject to penalty; that hams and bacon vary in their rate of shrinkage, and it is impossible for the vendor at the time of sale to make an accurate computation of the shrinkage from the date of wrapping based upon any fixed rate; that

it is impossible for the vendor at the moment of sale to weigh the meat and wrapping together, and then make a deduction of any fixed amount of the wrapping, and note the balance as the weight of the contents, because the different sheets of paper taken out of the same bale and of the same size vary in weight, and the amount of fat and moisture absorbed by the paper in a given time varies with different hams and with different papers; that the cost to the packer of the material and labor in the wrapping is an average of 15 cents a pound, whereas the prices at which the defendants sold in this instance were 13 cents a pound for the ham and 20 cents for the bacon.

It appears that the district court, finding no conflict in the evidence, was of the opinion that hams and bacon wrapped in the manner disclosed in this case are not "packages" within the meaning of that term as used in the statute; that the purpose of the act indicates that the term "package" was intended to apply to such articles of food as are put up in artificially determined sizes or quantities, each parcel intended to pass without weighing or measuring as of a given weight or quantity; and that, as ham and bacon wrapped as shown in this case are in natural rather than artificial sizes, necessarily varying in weight and quantity, and never sold as of any fixed weight or quantity, they are not packages within the meaning of the statute. It further appears that the trial court considered and commented on several other questions presented by the record, but his final disposition of the case was based on that part of his opinion above quoted. Now, if he was correct on this point, the exceptions of the state must be overruled.

The section of the act on which this prosecution was based reads in part as follows: "Section 8. The term 'misbranded' as used herein, shall apply to all drugs, malt, spirituous or vinous liquors, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or devise regarding such article, or the ingredients or substances

contained therein which shall be false or misleading in any particular, and to any food or drug product, * * * which is falsely branded as to the state, territory, place or country in which it is manufactured or produced. That for the purpose of this act an article shall also be deemed to be misbranded: * * * In the case of food, * * * if sold for use in Nebraska and in package form other than canned goods, contents, weight, or measure are not correctly stated on the outside of the package."

It must be conceded that the word "package" is at best a vague term, and liable to various interpretations. It is well known that many articles of food are packed, bound or put together in sizes determined by the manufacturer, and intended to pass in trade from hand to hand as of a given weight or measure. For example: Butter put up in bricks, intended to represent one pound each; strawberries packed in boxes, supposed to hold a quart each; teas and coffee put up in paste-board boxes, intended to pass as weighing one pound each, and so on through a great variety of foods. These are strictly packages within the meaning of the law. They are packed or put together, collected and made into forms and sizes convenient to pass in trade from hand to hand. It is not so with a ham or a side of bacon. Their forms, sizes and weights are determined by natural processes, such as the size, weight and condition of the animal slaughtered, which are not within the control of the packer. They are not collected or put together, nor have they ever been known to be sold as of a given size, quality or weight. For these reasons, it seems clear that the trial court was right in holding that the ambiguous term "package" was not intended to apply to a ham or a side of bacon, concerning which no custom has ever existed that it shall pass in trade as of a given weight or quantity.

It is well settled as a proposition of law that, where the words of a statute are of doubtful meaning, the purpose of the legislation may be considered as an aid to their interpretation; and we come now to consider that

question. It seems apparent that it was the intention of the legislature in passing the act in question to prohibit the various kinds of fraud and deceit which have too often been practiced in recent years in the manufacture and sale of food products. Indeed, the prosecuting attorney contends that such was the purpose of the legislature. It therefore seems clear that acts which have no tendency to cheat or defraud the purchaser or consumer of such products are not within the letter or spirit of the statute, and the recent amendment of the act clearly indicates that such was the opinion of the lawmakers.

As above stated, the processes employed by Swift & Company in preserving hams and bacon are resorted to for the sole purpose of enhancing their value as food products, and that by wrapping them in the manner detailed by the evidence no fraud or deceit is practiced upon the purchaser or consumer. He has his choice of purchasing wrapped or unwrapped meats. When he purchases the whole of a wrapped ham or side of bacon, it is weighed to him over the counter, and the price he pays is determined by its gross weight. He knows that he is not only paying for the ham or side of bacon, whichever it may be, but is also paying for the wrappings in which it is contained. Again, he may, if he so desires, purchase a less quantity of the same meat, and in such case the wrapping will be removed by the retailer, and the meat will be cut, weighed and sold to him in that manner. Finally, it appears that the parcels in question were properly branded as to contents, and hence no fraud or deception has been perpetrated by the acts complained of. Indeed, none could be practiced upon the consumer or purchaser by such a transaction.

We are therefore of opinion that the acts committed by the defendants were not violative of either the letter or spirit of the statute on which the prosecution was based. For the foregoing reasons, the state's exceptions are overruled, and the judgment of the district court is

AFFIRMED.

ROSE, J., took no part in this decision.

DEAN, J., dissents.

IN RE ESTATE OF SETH F. WINCH.
STELLA DICKINSON ET AL., APPELLEES, V. ELVIRA M. ALDRICH ET AL., APPELLANTS.

FILED APRIL 24, 1909. No. 15,972.

1. Wills: PROBATE: MENTAL CAPACITY: EVIDENCE. In a proceeding to probate a will where insanity is relied on as a defense, the capacity of a testator to make the will is to be decided by the state of his mind at the time it was executed; and, to shed light on that question, evidence showing the condition of the testator's mind long prior, closely approaching, and shortly subsequent to the execution of the will is competent, but such evidence should be admitted for no other purpose.

2. ———: MENTAL CAPACITY: DISCRETION OF COURT. On the trial of the issue of a testator's sanity, it is within the discretion of the judge to fix the limit of time after the making of the will within which evidence tending to show specific acts of unsoundness of mind on the part of the testator should be confined, and to exclude testimony outside of those limits.

3. ———: ———: ———. Record and bill of exceptions examined, and *held* that, in limiting the period of inquiry in this case, there was no abuse of judicial discretion.

4. ———: SENILE DEMENTIA. Where, in cases of senile insanity, the evidence fails to show that before or at the time of the execution of the will the testator was afflicted with that disease, the inquiry should be conducted according to the general rules applicable to other forms of insanity.

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

McGilton & Gaines, T. J. Nolan and *E. E. Thomas,* for appellants.

L. D. Holmes and *J. L. Kaley, contra.*

BARNES, J.

This action involves the validity of the will of one Seth F. Winch, which was executed in November, 1891. Probate of the will was resisted by the appellants, who are

the heirs at law of the testator, upon the ground that at the time of its execution Winch was insane, and was therefore incapable of making a valid will. The first trial in the district court resulted in a verdict and judgment for the contestants, which on appeal to this court was reversed and the cause was remanded for a new trial, 79 Neb. 198. A second trial resulted in a verdict and judgment for the proponents, and to reverse that judgment the contestants have appealed.

It was, and is, the theory of the contestants that Seth F. Winch at the time he made the will in question was afflicted with a mental disease known as senile dementia, and was thereby rendered incompetent to make a will, and to that issue the entire evidence was addressed. It appears that at the commencement of the trial the district court announced the rule that inquiry as to the mental condition and habits of the testator should not be confined to any particular time before the execution of the will, but would be limited to a period of two years after that date. No complaint was made of this order at the time it was announced; but, as the trial progressed, the contestants offered evidence of the mental condition, habits and conduct of the testator during the years of 1894, 1895 and 1896, which was excluded, and contestants excepted. For the rejection of this evidence, it is now contended that the judgment of the trial court should be reversed. The weight of authority seems to sustain the doctrine that in will contests the trial court may, in the exercise of its discretionary power, limit the inquiry to a comparatively short time after the execution of the will. *Howes v. Colburn,* 165 Mass. 385; *White v. Graves,* 107 Mass. 325; *Shailer v. Bumstead,* 99 Mass. 112; *Commonwealth v. Pomeroy,* 117 Mass. 143; *Lane v. Moore,* 151 Mass. 87; *Dumangue v. Daniels,* 154 Mass. 483. It follows that the only question for us to determine is whether, under the circumstances of this case, the district court was guilty of an abuse of its discretionary power which operated to the prejudice of the contestants.

It appears from the bill of exceptions that the appellants offered to show that Winch had been brought before the insanity commission of Douglas county in 1896, and, as a result of an examination, had been declared insane; that the contestants offered to show by a witness of the name of Moore, certain acts and conduct of Mr. Winch during the years 1894 and 1895, and the court directed the attention of counsel to the rule, which was stated as follows: "We are limiting the testimony to not later than November, 1893. Matters occurring after that you will omit from your statements." It further appears that the contestants sought to show that the deceased in 1895 had become violently insane, and threatened a Mrs. Steen with a butcher knife. Again, one Doctor Tilden was called by contestants, who attempted to show by him that, as a member of the insanity commission, he had examined Winch in 1896, and at that time he was afflicted with the disease known as senile dementia, and as a result thereof he was insane. These offers were excluded, and the contestants excepted.

The rule is well established that in contests of this kind the competency of a testator to make a will is to be decided by the state of his mind at the time the will was made; and, to shed light on its condition then, evidence showing the condition of his mind long prior to, closely approaching, and shortly subsequent to its execution is competent, but such evidence should be admitted for no other purpose. *Von DeVeld v. Judy,* 143 Mo. 348. In *Kinne v. Kinne,* 9 Conn. *102, it was said: "The question of testamentary capacity relates exclusively to the time when the will was made; and though evidence of the testator's conduct before and after that time is admitted, it is received only to show his state of mind *at* that time." In *Terry v. Buffington,* 11 Ga. 337, it was said: "The general principle will not be controverted that the state of mental capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will. For, notwithstanding his incapacity at

a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will was made, especially if the incapacity be subsequent to the execution of the instrument." The contestants do not attempt to controvert this rule, but insist that it has no application to the case at bar. It is argued that where insanity is the result of *senile dementia* which is once conclusively shown to exist, the inquiry as to his acts and mental condition should be extended to the time of the death of the testator. To support this argument, our attention is directed to the case of *Bever v. Spangler,* 93 Ia. 576. In that case it was held that, *senile dementia* being a progressive disease, it was not error to allow the inquiry as to the condition of the testator's mind to cover a period of six years after the execution of the will. That decision, however, does not hold that it would be error to limit the inquiry to a period of two years after the date of the will. We find that in treating of senile insanity one of our leading text-writers makes use of the following language: "Extreme old age, with its attendant physical and intellectual weakness, does not of itself incapacitate the testator, and therefore it raises no presumption of his not having a disposing mind.' It follows that in this kind of insanity, as in all others, the exact subject of inquiry is the state of mind at the time of signing and executing the will." 1 Wharton and Stille, Medical Jurisprudence, sec. 990. The text above quoted seems to be fortified by 28 Am. & Eng. Ency. Law (2d ed.), p. 86, *Browne v. Molliston,* 3 Whart. (Pa.) *129, and 1 Underhill, Law of Wills, sec. 117. In *Thompson v. Kyner,* 65 Pa. St. 368, it was said: "An abnormal condition of mind is never presumed when a testator makes a will, unless a previous aberration be shown of such a nature as may admit of a presumption of recurring unsoundness at any time." The weight of authority seems to be that in cases of senile dementia there is no uniform rule by which to determine the testamentary capacity of the testator. 1 Wharton and Stille, Medical Jurisprudence, sec. 994. In such

cases the question whether the testator has a mental disease that affects his or her capacity is one of fact to be determined by the jury according to the rules applicable to other forms of insanity. As we read the evidence in this case the contestants failed to show that, at any time before or at the date of the execution of the will, the testator was afflicted with senile dementia. While it is shown that he was eccentric, and at times his conduct and habits were somewhat peculiar, yet it seems reasonably clear at the time the will was executed he was a shrewd, successful business man; that he knew what property he had; that he was aware of its condition and extent; that he remembered all of the members of his family, and the natural objects of his bounty, and was thoroughly aware of the disposition he proposed to make of his estate. This being so, the fact that at a much later date he became a senile dement would not of itself invalidate his will. Again, it appears in *Howes v. Colburn,* 165 Mass. 385, that the court limited the introduction of evidence tending to show specific acts of unsoundness of mind on the part of the testator to a period from eight years before the date of the will to two and one-half years after its date. And it was held that this was a matter entirely within the discretion of the trial judge. A careful examination of the record satisfies us that this case is not within the exception contended for by counsel, but should be determined according to the general rules above stated, and that the district court was not guilty of an abuse of discretion in limiting the period of inquiry to two years after the execution of the will.

Finally, it appears from the bill of exceptions that all of the evidence excluded as too remote was embraced in the hypothetical questions propounded by counsel for contestants to their expert witnesses, who were allowed to state that in their opinions the testator was of unsound mind when the will was executed. Therefore it is difficult to see how the exclusion of specific acts of the testator occurring during the years of 1894, 1895 and 1896

could have had any prejudicial effect upon the rights of the contestants.

The record does not disclose any prejudicial error, and the judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

REESE, C. J.

I agree to the result reached in this case, but prefer to place my assent upon the ground that the order of the court was made at an early stage of the trial, and to which no objection was made and no exceptions taken. I think that, if it was the desire of contestants to have that order reviewed, they should have excepted to the ruling and order of the court, and thus preserved their rights. Offering no objections and taking no exceptions to the order must be taken as consenting thereto, and a waiver of any future right to question it or assign the subsequent rulings based thereon as error.

JOSEPH SUITER, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED APRIL 24, 1909. No. 15,426.

1. **Trial:** INSTRUCTIONS. An instruction must be pertinent to the evidence as well as relevant to some issue in the case; and, if the evidence does not tend to support an issue presented by the pleadings, that issue should not be submitted in the instructions to the jury.

2. ———: ———. It is not error to refuse to give an instruction, if the proper legal principle therein announced is included by the court in another instruction given to the jury.

3. ———: ———. If the court properly instructs the jury that the burden is on plaintiff to make out his case, but is silent as to the burden resting on defendant to prove an affirmative defense, and plaintiff does not request further instructions on said point, he

waives any error the court may have made in failing to instruct concerning the burden carried by the defense.

4. **Railroads:** DRAINS: EVIDENCE. Where the issue joined relates to the sufficiency of openings in a railway embankment for the escape of flood waters in a creek and its valley, plaintiff's testimony concerning statements made by him to defendant's officers charged with the duty of constructing said embankment, that in his opinion such openings were insufficient, is irrelevant and properly excluded.

5. **Trial:** DISCRETION OF COURT. The court in its discretion may permit jurors to take to the jury room plats and maps properly identified and admitted in evidence.

6. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. Where the court fairly submitted to the jury the issues and the evidence, the judgment will not be reversed for errors in unnecessary instructions given, if from a consideration of the pleadings and all of the evidence it is apparent that the jury was not misled and that the verdict returned is amply supported by the evidence.

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

L. W. Colby, for appellant.

M. A. Low, Hazlett & Jack and *J. H. Grimm & Son, contra.*

ROOT, J.

Action for damages from flood waters. Defendant prevailed, and plaintiff appeals.

Plaintiff in 1867 entered as a homestead and still owns 160 acres of land in the valley of Turkey creek southeast of, and close to, the city of DeWitt. Turkey creek is about 70 miles in length, flows in a general southeastern course, and joins the Big Blue river about two miles below plaintiff's farm. For about said distance the creek parallels the Blue river, which at said point is about one mile north of Turkey creek. The Burlington railway is between the Blue river and Turkey creek, and follows in a general way the course of said streams. In 1887 defend-

ant in constructing its railway from Lincoln to the southwest crossed said streams and bisected plaintiff's land. At the point where the railway crosses said creek the north bank of the stream is the higher, and the land south of said water course is low and flat for over 1,000 feet. Defendant's roadbed is elevated above the bottom land and passes over the Burlington tracks. Said roadbed is about 15 feet above the north and 22 feet higher than the south bank of Turkey creek. When the railway was first constructed, in addition to a bridge over said creek, defendant built an open trestle south of said stream, but in 1898 the trestle was replaced with an embankment of earth, so that the opening through the roadbed for the waters of said creek was limited to 174 feet in width. The distance from the lower girder of the bridge to the bottom of the creek bed is 30 feet. A wide ravine or draw heads many miles northwest of DeWitt, runs through said city in a course parallel with, and north of, Turkey creek, and joins said stream about a quarter of a mile east of defendant's roadbed. Said draw furnishes drainage for surface water, but for a considerable part of the year is dry. At the point where defendant's roadbed crosses the ravine it is 300 feet from bank to bank, but the walls slope gradually downward until they are close together in the bed of the draw. In defendant's first construction an open trestle was built across this ravine, but in 1900 a concrete culvert eight feet square (inside measurement) was placed in the bed of the ravine, and earth filled in so as to make a solid grade for defendant's roadbed. In constructing the railway across Turkey creek defendant excavated the land from the base of the grade to the exterior lines of its right of way on each side of the roadbed, thereby creating a ditch which extends on the west side of the railway from said ravine north to a graded highway which crosses the railway at right angles close to the Blue river. From the ravine the ditch extends south to the Burlington right of way, and from the south side thereof to within 20 feet of the north bank of Turkey

creek. Plaintiff has a private roadway on the north side of said creek and beneath defendant's bridge, and he inserted beneath said road a drainage pipe to carry the water from the ditch aforesaid into Turkey creek. In 1902 and also in 1903 the valley of Turkey creek was flooded, plaintiff's land submerged, and his growing crops destroyed. East of the railway quantities of sand, gravel and flood trash were cast upon and distributed over his pasture and grass land, and in places the fertile soil was washed away. Plaintiff alleges that defendant was negligent in not providing sufficient openings through its roadbed, where the same crosses said ravine and Turkey creek, for the passage of flood waters which were held back by said embankment and diverted through said ditch from the ravine and creek bed onto and over his land. The argument in the brief relates principally to alleged errors in the giving and refusing to give instructions.

1. Complaint is made that the court failed to instruct the jury relative to said ditch. Although this issue is presented by the pleadings, the evidence establishes without contradiction that the water attained a height greater than the top of the banks of Turkey creek and of said ditch, and that the ditch neither caused nor contributed to plaintiff's damages. The court very properly omitted that issue from the instructions. *Burnet v. Cavanagh,* 56 Neb. 190; *Hamilton v. Singer Mfg. Co.,* 54 Ill. 370.

2. The substance of the legal principle properly stated in instruction numbered 3, requested by plaintiff, *i. e.,* that it was the duty of defendant to anticipate and provide sufficient waterways through its roadbed for the passage of the waters that might reasonably be expected to flow down the creek and draw, was included in several instructions given by the court.

3. Instruction numbered 4, requested by plaintiff and assuming to define the term "act of God," was, as plaintiff argues, given in *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.,* 79 Neb. 854, and not condemned in this

court, but we did not hold that the court would have erred if it had not given that instruction, nor does it follow that it should have been given in the case at bar. The court fully instructed the jury that, if the flood waters which caused plaintiff damage might reasonably have been anticipated by defendant, it was charged in law with the duty of providing for their passage, and if it failed to do so, and thereby plaintiff was damaged, he could recover, and such is the law. *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co., supra.* An abstract definition of the aforesaid term was not necessary, nor the failure to give it prejudicial error.

4. Concerning instruction numbered 3, given by the court relative to the burden of proof, plaintiff insists that, by a plea that the flood waters were caused by an act of God, defendant confessed and tried to avoid, and therefore that the burden was upon it throughout the case, and cites authorities applicable to the destruction of merchandise in the hands of a common carrier. The cases are not analogous. A common carrier, with few exceptions, is an insurer of the safe carriage of freight. If property while in the carrier's possession is damaged, a presumption of negligence arises, and the burden is upon it to bring itself within the exceptions. In the instant case defendant did not insure plaintiff from loss or damage from water, and denied any negligence in the construction of its bridge. The mere fact that plaintiff's land was submerged did not make out his case, but the burden was still upon him to prove negligence as alleged in the petition, and he assumed that burden in the trial of the case. The instruction was correct as far as it went. Plaintiff did not request a more specific instruction than was given upon this branch of the case, and will not be heard to complain in this court. *Lampman v. Van Alstyne,* 94 Wis. 417.

5. Instruction numbered 10, given at defendant's request, is erroneous in submitting for the jurors' consideration the necessity of maintaining a roadbed in safe

condition for the transportation of persons and property. No evidence was introduced on this point.

In instruction numbered 11, the jurors were instructed that, if the flood in question "was of such unusual volume and violence as to surprise cautious and reasonably prudent men, then and in that case the flood is so large and unusual as not to be reasonably expected within the meaning of these instructions." The instruction was unnecessary, and does not meet our approval. Defendant was bound to anticipate, not only ordinary floods, but an occasional extraordinary one. In the 25 years next preceding the construction of the railway there had been three or four extraordinary floods in said valley, one of which nearly, if not completely, equaled the flood of 1902. Reasonably prudent men may have been surprised at the appearance of those freshets. While it may be implied, it is not stated, that the "reasonably prudent men" should have knowledge of the rainfall and extent of the floods in Turkey creek valley. While this instruction should not have been given, we do not think that it misled the jurors. Instruction numbered 17, requested by defendant and given by the court, while not erroneous, was unnecessary. Notwithstanding the errors referred to, we do not think that this case should be reversed. The evidence is undisputed that the flood waters in 1902 and 1903 covered the valley of Turkey creek on each side of defendant's grade. The high water marks on the north and south sides of the valley, both above and below the railway, were established by the testimony of disinterested witnesses. The elevations taken and surveys made prove that, commencing two miles above the railway, the fall to the bridge, using the surface of the water as a base line, was greater than below said grade, although no such disparity existed in the profile of the earth between said points. It also appears without contradiction that on July 9, 1902, the water from Turkey creek swept over the north bank thereof about two miles west of plaintiff's land and came down three feet in depth through the

streets of DeWitt, flowed east and south, and submerged plaintiff's premises. The jury would scarcely be warranted in finding that the flood waters would not have been as high as they were, or that plaintiff's land would not have been submerged, if defendant's roadbed had not been constructed. As to the draw, or so-called "old channel of the Blue," the evidence discloses that water backed up therein from Turkey creek and also flowed back east when the flood came down from the west, but there is not a scintilla of evidence, as we read the record, to establish that the dimensions of said culvert were responsible for any part of plaintiff's damage. The evidence does not disclose that with the recession of the flood the water was held on plaintiff's land west of the grade for a greater length of time than on the east side thereof. The covering of the grass land east of the grade with debris, sand and gravel was an incident of high water which no one could foresee or guard against.

The case was exhaustively tried, and but one complaint is made concerning the admission or rejection of evidence. The court instructed the jury practically as suggested in the instructions submitted by plaintiff that, if defendant had not made provision for the passage of such water as it might reasonably expect would come down the valley and for such freshets, high waters and floods as it should reasonably have anticipated, it would be liable for all damages resulting from such negligence, but that it would not be liable for flood waters that without its fault left the banks of the creek west of DeWitt and flowed down through said town and across plaintiff's property, or for any damages that would have resulted from water if the bridge and grade had not been built. In view of all of the facts and the record, we are constrained to hold that the errors committed were without prejudice to plaintiff. We do not say that, under every possible combination of circumstances that may arise, the embankments, culvert and bridge under consideration will be

found sufficient, but that upon this record the jurors were amply justified in finding for defendant.

6. Plaintiff sought to prove a correspondence with the vice-president of defendant about the time the bridge in question was constructed and the trestle work on the south side of the creek filled in with earth. In plaintiff's letter he informed said officer that in the writer's judgment sufficient way was not being provided for flood waters, and recounts his extensive experience in bridge building and intimate knowledge of the locality and of the valley of Turkey creek. We do not consider this evidence relevant. The issue was not what defendant was informed concerning the bridge or flood waters in the Turkey creek valley, but whether it had provided a sufficient passage for such waters. Defense was not made on the ground that defendant's engineers had inquired from and of, or had received information from, plaintiff or any other old resident in said valley, or from any person or persons concerning the flood waters in said valley, and had relied thereon, but that its provision for flood waters was suitable, and the proffered evidence would neither prove nor disprove that fact.

7. Complaint is made that the jurors were permitted over plaintiff's objections to take to the jury room the plats and maps introduced by plaintiff and defendant in evidence. The plats and the figures thereon were identified and testified to as correct by competent witnesses, the matter was within the discretion of the court, and the consideration of that evidence by the jury is not ground for a reversal of the judgment. *Mercer v. Harris,* 4 Neb. 77.

Upon the entire record we do not find prejudicial error, and the judgment of the district court therefore is

AFFIRMED.

REESE, C. J., dissenting.

I find myself unable to agree to the opinion in this case. Instruction numbered 11, given to the jury at the

request of defendant, referred to in the foregoing opinion, is as follows: "The jury are instructed that to constitute a flood, one which is so large and unusual as not reasonably to be expected, it is not necessary to show that such a flood has never occurred theretofore in the history of Turkey creek, nor is it necessary to show that it was caused by a cloudburst or waterspout. But you are instructed that, if the flood in question was of such unusual volume and violence as to surprise cautious and reasonably prudent men, then and in that case the flood is so large and unusual as not to be reasonably expected within the meaning of these instructions." It is conceded in the majority opinion that this instruction is erroneous. That such is the case must be patent to any legal mind. No argument need be made nor reason given, aside from that stated in the opinion. The material question here is: Was the giving of the instruction prejudicial, or could it reasonably be said to have the effect of misleading the jury? We must remember that all questions of fact were for the consideration of the jury. If all that was necessary for appellee's defense was to prove that the flood was sufficient to "surprise cautious and reasonably prudent men," then we have a new rule to be applied to such occurrences as have heretofore been considered as the act of God. I do not think it is for the court to relieve the instruction of its evil effects by saying that the flood was such as to be characterized as the act of God, and therefore the erroneous instruction could do no harm. Since the question of the extent and character of the flood was for the consideration of the jury, I cannot see how we can hold the instruction as being otherwise than prejudicial.

Instruction numbered 10, given at the request of defendant, is as follows: "The jury are further instructed that, in constructing its railroad across a stream, a railroad company is bound in law not only to provide in its roadbed openings sufficient for the unimpeded passage of all waters known or reasonably to be expected to pass in

said stream at such a point, but it is also bound to so construct its bridge and roadbed as to adequately provide for the permanence and safety of the same as a means of transportation of persons and property over its line. And you are further instructed that the defendant company, in constructing its roadbed over and across Turkey creek at the point in question, was only bound to so construct its roadbed and bridge as to leave sufficient opening for the unimpeded passage of all waters reasonably to be expected to pass in said stream at that point, and it also was bound to so construct its bridge and roadbed as to have the same reasonably permanent and safe as a means of transportation of persons and property. And you are further instructed that the defendant company would have no right, in constructing its bridge and roadbed, to render the same unsafe or dangerous for the transportation of persons and property over its line, in order to provide openings sufficient, not only for the unimpeded passage of waters reasonably to be expected to pass in said stream at said point, but also to permit the unimpeded passage of the waters of all floods so large and unusual as not reasonably to be expected to pass in said stream at said point."

While it might be said that the inclusion of the element of safety to passengers and property in this instruction did not tend to mislead the jury upon any material question involved in the case, yet the inevitable tendency of such an instruction would be to divert the attention of the jury from the real issues in the case, and it should not have been given. The closing portion is specially objectionable, not only on the ground last here stated, but as containing a misstatement of the law. The language falls short of stating the correct rule to be applied to the duty of defendant in protecting the property of plaintiff from high waters. Practically the same language occurs in the third instruction given on defendant's request.

The judgment of the district court should be reversed and the cause remanded for further proceedings.

FAWCETT, J., concurs in the dissent.

LORENZO L. HILE, APPELLEE, V. M. N. TROUPE, COUNTY TREASURER, ET AL., APPELLANTS.

FILED APRIL 24, 1909. No. 15,572.

1. **Forfeitures** are not looked upon with favor by the courts, and will not be enforced beyond the strict letter of the agreement.
2. **School Lands:** LEASE: FORFEITURE: REDEMPTION. A lessee of state school lands whose lease was executed pursuant to the act of February 24, 1883, agreed in writing that, "if default is made in the semiannual payments, in said lease described, I agree that this lease may be forfeited by said board without further notice to me or an action at law." *Held*, That the lessee did not thereby waive his right under the statute to redeem from the forfeiture.

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

W. T. Thompson, Attorney General, W. B. Rose and *Charles G. Ryan,* for appellants.

H. M. Sinclair, contra.

ROOT, J.

Our judgment on a former appeal of this case will be found reported in 77 Neb. 199. Upon the second hearing in the district court defendants produced a written agreement of the original lessee as follows: "This is to certify that I have leased from the board of educational lands and funds the land described in the above lease, upon the conditions in said lease mentioned; and I do hereby promise to comply with and faithfully observe all the conditions set forth in said lease. If default is made

in the semiannual payments, in said lease described, I agree that this lease may be forfeited by said board without further notice to me or an action of law." The court found for plaintiff, and defendants appeal.

It is argued by defendants that the agreement above quoted stripped the lessee and his assignees of all right of redemption from a forfeiture of the lease considered herein. As demonstrated in the opinion of Mr. Commissioner Ames, 77 Neb. 199, the lessee of school lands whose rights are measured by chapter 74, laws 1883, has a vested right to redeem from a forfeiture of his lease at any time before such lands are resold or released. Section 20, ch. 74, laws 1883, required the state to notify a delinquent tenant to pay his arrearages of rent within six months of the receipt of such notice. If the lessee failed to make such payment, the state through its proper officers might at the expiration of the six months forfeit his lease. Notwithstanding said forfeiture the tenant had the right at any time before the land was resold or released to redeem therefrom and reinstate his lease by the payment of all accrued interest and costs incurred by the state. The agreement does not purport to do more than waive the notice provided by statute and any possible legal action to establish a forfeiture. Mention is not made in the instrument of any relinquishment of the right of redemption. Forfeitures are not looked upon with favor by the courts, and will not be created by intendment, nor enforced unless the court is compelled upon the facts and law to do so. *Robinson v. Cheney,* 17 Neb. 673; *Hamann v. Nebraska Underwriters Ins. Co.,* 82 Neb. 429. Appellee, although tardy in action, has brought himself within the letter of the law, and was entitled to a judgment in his favor.

The judgment of the district court is right, and is

AFFIRMED.

ROSE, J., not sitting.

NICHOLAS RESS, GUARDIAN, APPELLEE, V. FREDERICK SHEPHERD, APPELLANT.

FILED APRIL 24, 1909. No. 15,629.

Guardian and Ward: ACCOUNTING: ATTORNEY'S FEES. The unlawful carnal knowledge of a feeble-minded or insane woman by an adult male person constitutes a felony, if the man has knowledge of the mental condition of the woman. If by virtue of such criminal intimacy the woman becomes pregnant and a suit in filiation is instituted, neither the county attorney nor his deputy is entitled to receive a fee for representing the woman therein, and the good faith of the attorney will not justify the guardian of the woman in paying such fee.

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

Shepherd & Ripley, for appellant.

E. C. Strode, F. M. Tyrrell, J. L. Caldwell and *B. C. Enyart, contra.*

ROOT, J.

1. This suit involves the account of a guardian of a feeble-minded woman, and the items challenged are attorney fees paid and expenses incurred in and about a suit for filiation and in the guardianship proceedings. The guardian was appointed after the termination of the former litigation, and settled with his ward's attorneys, one of whom was then county attorney for the county where the crime was committed, and the other deputy county attorney. The evidence establishes that the fees were reasonable and the result of the litigation fruitful. The guardian *ad litem,* however, insists that said counsel were disqualified from receiving any reward for their services. Emma Moegenberg is now confined in a hospital for the insane. Although physically strong, the woman has always been feeble-minded and not competent

to transact business or to judge wisely concerning herself. She was neglected and practically repudiated by her immediate family, and had been making her home with a farmer whose wife was related by affinity to the incompetent's brother, and while at said place she became pregnant. When her condition became apparent, she was sent away, and finally found refuge in a public institution at Milford. Friends of the young woman complained to the county attorney. He sent to Milford, and the matron brought said ward to the prosecutor's office. Bastardy proceedings were instituted by said attorney and his deputy against said farmer, who had disposed of all his property and left Lancaster county. The man was apprehended and brought to Lincoln, whereupon he at once settled said suit, although protesting his innocence.

Section 9554, Ann. St., 1907, is as follows: "No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend." In our judgment this statute as effectually prohibits a county attorney from becoming financially interested in civil suits depending on facts that might warrant the commencement of criminal prosecutions as in cases where such prosecutions have been commenced or concluded. The county attorney is the public prosecutor, and his office is *quasi* judicial. In the discharge of the functions of that office he is called upon to exercise a sound discretion to distinguish between the guilty and the innocent, and to refrain from prosecuting those persons whose guilt is so doubtful that in his judgment justice will not be subserved by prosecutions, and there should not be anything in the way of private interest to

possibly sway that judgment or to tempt him to depart from a disinterested and conscientious discharge of his duty. *Wight v. Rindskopf,* 43 Wis. 344. Section 200 of the criminal code provides a punishment of not less than three nor more than ten years for the conviction of any male person over the age of seventeen years who is guilty of the carnal knowledge of any insane or feeble-minded female other than his wife, if he knows the mental condition of the injured person.

With the possibility of a prosecution for felony at the hands of counsel for the plaintiff in the bastardy suit staring the defendant therein in the face, one may well imagine that he might willingly settle the statutory proceedings, although innocent, and the prosecutor, with a fee in hand for a successful termination of the suit in filiation, might be tempted to look with leniency upon the evidence as applied to a possible criminal prosecution. The case at bar is within the meaning of section 9554, *supra,* even though it may not fall within the exact terms thereof. Sutherland (Lewis), Statutory Construction (2d ed.), sec. 379; *Rice v. Ashland County,* 108 Wis. 189; *State v. Baushausen,* 49 Neb. 558. Independent of any statute, we are inclined to adopt in this case the language of Mr. Justice Williams in *Goodyear v. Brown,* 155 Pa. St. 514: "Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights whether of personal liberty or of private property which any citizen ought to feel, is against public policy." The subject matter of the cited case is not like that of the instant one, but the principle applies.

We do not hold that counsel were actuated by any improper motives in doing what was done, or that they agreed to forbear a criminal prosecution in consideration of the prompt payment of their client's claim, or that their official conduct was in any manner influenced by the fee that they received in the civil action; but that they

did not have a claim for fees that the law would have enforced against the woman. This being the case, the guardian was not entitled to credit in his account for the fee paid for services rendered in said action. Said attorneys paid out $65 for the benefit of the incompetent, and this they were entitled to recover, also for the value of the services rendered by them in the guardianship proceedings.

2. The guardian claims that he settled with said attorneys, relying upon the advice of the then county judge. It does not appear that the judge acted in his official capacity in giving such advice, and what he told the guardian is not a defense to the payment of an illegal claim against said estate.

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

REVERSED.

CAMPBELL BOTHELL, APPELLANT, V. HERMAN G. SCHWEITZER ET AL., APPELLEES.

FILED APRIL 24, 1909. No. 15,648.

1. **Bills and Notes:** ALTERATION. A written agreement modifying the terms of an accepted bill of exchange and securely glued thereto is a part thereof, and cannot be lawfully detached therefrom without the maker's consent.

2. ———: ———. If such contract be unlawfully detached from the note, an innocent holder of the bill in due course, may, under section 9322, Ann. St. 1907, recover according to the import of the entire contract, but no further.

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

Burkett, Wilson & Brown and *E. F. Snavely,* for appellant.

Morning & Ledwith, contra.

ROOT, J.

Action by an indorsee of an accepted bill of exchange. Defense that said instrument had been altered after its delivery by detaching therefrom certain material conditions. There was judgment for $20, the amount due according to the entire contract between the drawer and acceptor, and plaintiff appeals.

1. The evidence discloses that Converse, the payee of the bill, who was also the drawer, sold defendants, who are country merchants, a bill of cheap watches, and secured the instrument in suit payable five months from its date. At the same time Converse executed and delivered to defendants a written agreement that, if sufficient of the watches were not sold within five months to pay the entire bill, they might return the unsold goods and receive credit at the invoice price. One of the defendants testified that they refused to sign the bill of exchange until a copy of Converse's agreement was glued thereto, and that their reason for this requirement was that they did not want the bill to get into the hands of an innocent purchaser who might cause them trouble. Converse admits making the agreement with defendants, but denies that it was ever attached to the bill of exchange; but the evidence is sufficient to sustain the jury's finding in favor of defendants on this point. Plaintiff's deposition was taken, and, although he denied notice or knowledge of any equities in favor of defendants, he did not state that the bill of exchange when purchased by him did not have attached thereto the agreement, nor deny detaching it himself. It may be questioned whether plaintiff's testimony was sufficiently specific to negative guilty knowledge on his part. Conceding, however, that plaintiff did not participate in nor have knowledge or notice of the separation of the agreement from the note, we are satisfied that the judgment should be affirmed. The note and the agreement were parts of the same transaction, and together measured the rights of the

parties. The entire contract thus made did not absolutely bind defendants to pay the amount of the bill of goods, but only to pay in cash, at the end of five months, to the extent of the money received by them for the goods sold in the meantime, with the privilege of satisfying the remainder of the bill by the return in good condition of the watches then in their possession.

In *Palmer v. Largent,* 5 Neb. 223, although the case did not turn on that point, it was held that a memorandum written under a negotiable instrument, and qualifying it, is considered part of the contract, and, if fraudulently removed, will vitiate the note in the hands of a *bona fide* holder. In *Davis v. Henry,* 13 Neb. 497, it was decided that, if a contract referring to and qualifying a negotiable instrument is written on the same piece of paper with the note, and the former is detached without the maker's consent, the note will be void, even in the hands of an innocent purchaser. Professor Bigelow in his work on Bills, Notes and Cheques (2d ed.), p. 221, says that marginal terms, conditions and stipulations, which are intended to be part of the written contract, are treated by the better authorities as inseparable from the main writing to which the signature is given, and that no distinction is made by the better authorities between the alteration of the body of the note and detaching therefrom such marginal agreements. In either case the note is rendered void. See, also, *Gerrish v. Glines,* 56 N. H. 9; *Stephens v. Davis,* 85 Tenn. 271, more fully reported in 2 S. W. 382; *Scofield v. Ford,* 56 Ia. 370; *Wait v. Pomeroy,* 20 Mich. 425.

Plaintiff relies on *Yocum v. Smith,* 63 Ill. 321, which was cited with approval by Mr. Commissioner OLDHAM in *Humphrey Hardware Co. v. Herrick,* 72 Neb. 878. Plaintiff also argues that *Humphrey Hardware Co. v. Herrick, supra,* is controlling in the instant case. In the last cited case a negotiable instrument was signed and delivered to the payee with appropriate blank spaces

wherein, after such delivery, the rate and date of interest and place of payment were inserted. In the opinion of the court on the application for a rehearing the decision was properly based on the apparent authority given by the maker to the payee to fill in those blanks. But no such apparent authority was given Converse or any one else to detach the agreement from the bill of exchange. We do not think that this is a case where the rule applies that, if a person's negligence influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss.

In the case of *Scholfield v. Londesborough,* 45 Week. Rep. (Eng.) 124, it was held that the fact that some space intervened between the character £ and the figures 500 in an accepted bill of exchange did not render the acceptor liable for £3,500, the figure 3 having been fraudulently inserted between said character and the figure 5. It is held therein that men engaged in business transactions are not to anticipate that some one will commit a felony. In *Stephens v. Davis, supra,* a note had been executed, and conditions qualifying it were written upon a stub to which the note was attached. It was held that, although a perforated line separated the stub from the note, the maker was not bound to anticipate a forgery by the separation of the writings, and his conduct did not estop him from maintaining a defense of alteration when sued by an innocent holder of the detached note. There are authorities to the contrary, but we are satisfied with *Davis v. Henry, supra.* If the agreement, as testified to by defendants, was glued to the note, it could not have been detached except by deliberate, skilful and painstaking efforts, and for the purpose of defrauding the acceptors.

Under the provisions of section 123 of the negotiable instrument law (laws 1905, ch. 83; Ann. St. 1907, sec. 9322), plaintiff was permitted to recover upon the note according to its original terms. Defendants are willing

to deliver to plaintiff the unsold watches, and he does not have just cause for complaint.

2. Plaintiff argues that defendants should have returned the watches to Chicago on or before January 1, 1907, and, not having done so, are not entitled to the benefit of the agreement. Converse, however, in December, 1906, requested defendants to retain the goods until the succeeding March, and wrote them that he would then make satisfactory arrangements concerning the unsold watches. He thereby waived delivery according to the terms of the instrument. Plaintiff has refused to accept the watches, and will not be heard to say that they should have been tendered to Converse.

The judgment of the district court is right, and is

AFFIRMED.

JAMES S. MORRISON, APPELLEE, V. JOSHUA E. GOSNELL ET AL., APPELLANTS.

FILED APRIL 24, 1909. No. 15,660.

1. **Quieting Title.** The owner of a farm orally agreed to convey to a broker ten acres of land if he would secure a purchaser for the principal's farm. The broker fully complied with this contract, and was given possession of said ten acres, but the vendor refused to execute a deed therefor. *Held*, That a court of equity would quiet the broker's title to said land.

2. **Vendor and Purchaser:** BONA FIDE PURCHASER. If, while the broker is thus in possession, the principal sells and conveys the real estate to a third person who has actual knowledge that the broker claims an interest therein, the last vendee will take title charged with all equities existing in the broker's favor.

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

J. G. Thompson and *T. L. Porter*, for appellants.

John Everson and *R. L. Keester*, *contra.*

ROOT, J.

The nature of this action is fully explained in an opinion written on a former appeal to this court, 76 Neb. 539. We there held that the petition stated a cause of action. The appeal is now upon the merits. The court found for plaintiff, and defendants appeal.

The evidence, as might be expected, is contradictory, but it fairly appears that in 1900 Mrs. Drew owned 420 acres of land lying immediately north of plaintiff's farm. Prairie Dog creek separated an irregular track of about ten acres on the south side of the Drew farm from the remainder thereof. Mrs. Drew agreed orally to convey said ten-acre tract to plaintiff if he would find her a purchaser for the remainder of her farm. Plaintiff succeeded, and sold said real estate to a Mr. Roberts, who paid $1,000 down and agreed to pay the remainder in several payments satisfactory to his vendor, and Mrs. Drew delivered to Morrison possession of the ten-acre tract, knowing that he claimed it as compensation for securing Roberts as a purchaser for the remainder of the farm. Later the sale to Roberts was abrogated and the land sold by Mrs. Drew to the defendant Gosnell. The disputed tract was included in Gosnell's deed and never conveyed to plaintiff. Morrison has been in possession of the tract in dispute the greater part of the time since he took posession thereof, has cleared the brush and trees therefrom and placed it in cultivation. Mrs. Drew does not contradict the witnesses who testified to her statements that the farm had been sold and that plaintiff was to have the ten-acre tract for securing the purchaser. She claims that she let plaintiff into possession as a tenant, and that he was to have the use of the land for one year for clearing and cultivating it, but the cost of reducing the tract to cultivation was so disproportionate to the value of its use for one year that we are not inclined to credit her testimony on this point.

Defendant Gosnell claims to have been an innocent

purchaser, for value, without notice, but admits that he was told within a few moments after he had accepted the deed that he was buying a law suit. Mrs. Drew, his witness, was asked: "Q. What was said between you or your brother to Gosnell in regard to this claim of Morrison against the land at the time Gosnell purchased the land? A. We told him that we had heard that Mr. Morrison would enter suit against me for that piece of land, but did not think he would." Gosnell, therefore, is within the rule announced in *Lipp v. Hunt,* 25 Neb. 91. Although the agreement between the owner of the land and her agent was not in writing, his performance was a sufficient consideration to support her voluntary act in recognition of his services in delivering to him as owner the land in dispute. *Mohr v. Rickgauer,* 82 Neb. 398.

It is claimed that, as plaintiff filed a petition in the county court for a money judgment against Mrs. Drew for securing Roberts as a purchaser for her farm, he abandoned his right to the land. The petition recites the transaction, and states that the ten-acre tract Morrison was to receive was worth $500 and asks judgment therefor. The evidence discloses that process was never served on Mrs. Drew in that action, and that the petition was later withdrawn, and we are of opinion that thereby plaintiff did not waive his right to have his title to the land in dispute quieted.

While the evidence is conflicting, it sustains the findings of the trial judge, who had the advantage of seeing and hearing all of the witnesses, other than Mrs. Drew.

Justice seems to have been done, and the judgment of the district court is

AFFIRMED.

P. A. WELLS, EXECUTOR, APPELLANT, V. HERMAN E. COCHRAN, APPELLEE.

FILED APRIL 24, 1909. No. 16,055.

1. **Principal and Agent:** PROFITS. All profits made or advantage gained by an agent in the execution of his agency belong *prima facie* to his principal.

2. ———: ———: BURDEN OF PROOF. And if the agent justifies the retention thereof on the theory that his principal agreed thereto, the burden is on the agent to prove said defense.

3. ———: SALE OF PROPERTY: BURDEN OF PROOF. An agent cannot, directly or indirectly, lawfully have an interest in the sale of the property of his principal without the latter's consent freely given after full knowledge of all facts known to the former; and, if a contract is made in regard thereto after said agency is created, the burden of proof is on the agent to show the knowledge and consent of his principal.

4. **Appeal:** NEW TRIAL: DISCRETION OF COURT. The order of a district court granting a new trial at the same term a verdict is rendered will not be set aside, unless it clearly and unequivocally appears that there did not exist any tenable ground to support said order, but that the court thereby abused its discretion.

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

Lysle I. Abbott, for appellant.

A. C. Churchill, contra.

ROOT, J.

A statement of this case may be found in 78 Neb. 612. Upon the second trial the cause was submitted to a jury, and a verdict returned for $705.30 in favor of plaintiff, which was set aside on defendant's application. The case was again tried, and at the close of plaintiff's evidence the court directed a verdict in favor of defendant. Plaintiff appeals.

A bill of exceptions of the evidence offered and intro-

duced during each of said trials was preserved. Plaintiff requests, not only that the judgment in favor of defendant be set aside, but that the verdict returned at the preceding trial be reinstated and the district court directed to render judgment thereon.

1. Concerning the last trial, plaintiff complains because the court excluded proffered testimony tending to prove that, before defendant secured from Johnson, now deceased, a contract authorizing a trade of the Frontier county land for Hawver's South Omaha property, Cochran had a tentative arrangement whereby Hawver agreed to give $500 boot money, and that knowledge of said fact was withheld and concealed from Johnson by defendant. Plaintiff has not charged defendant with any such dereliction. His cause of action is based upon the allegation that defendant fraudulently concealed from Johnson the fact that Hawver had paid the boot money, and that defendant had converted it to his own use. The testimony should not have been received as part of the case in chief, and was properly excluded in the order in which it was offered. For the reason that no allegation was made with regard thereto, the court also properly excluded evidence tending to show that Hawver paid defendant a commission for bringing about a consummation of the trade referred to.

2. Defendant admitted in his answer that he was authorized by Johnson to consummate an exchange of the real estate referred to in the petition, but alleged that by a separate instrument Johnson agreed that the defendant might have, as compensation for his services, all that Hawver would give over and above the South Omaha property and a certain note and mortgage, and that he received from Hawver $471, to which he was entitled, and did retain, under said agreement as his compensation; that thereafter Johnson settled with him, and gave his note for about $40, the sum found due defendant. Plaintiff in his reply denied said allegations. On the trial it was shown that defendant during said transaction received

$471 cash from Hawver, and there is not a scintilla of evidence to show that a penny of this money was ever paid to Johnson. In fact Johnson, in company with Hawver, made a demand on defendant to account for the money received by him.

Defendant argues that the law presumes honesty and fair dealing; that the contract with Hawver entitled him, as Johnson's agent, to receive the $471; that the presumption is that whatever he retained was legally and rightfully withheld, and cites *Tarvin v. Timberlake,* 38 S. W. (Ky.) 491. Therein plaintiff sued his broker for a balance of money collected by the agent on a sale of plaintiff's real estate, and less a reasonable compensation for the agent's services, and the court, over defendant's objections, held that the burden was on plaintiff, and that he was entitled to open and close the case. The case is not officially reported, nor in point in the instant one.

Plaintiff and defendant in their respective pleadings agree that Cochran was authorized by Johnson to negotiate a transfer of the latter's land, and that nothing was said in the warrant of authority about boot money. They also concur in the fact that Johnson received at least $471 from Hawver as part of the consideration for that exchange. This was a profit arising from the transaction. It is elementary law that all profit made or advantage gained by an agent in the execution of his agency belongs to the principal, and it is immaterial whether that advantage is the result of the performance or violation of the agent's duty. *Gardner v. Ogden,* 22 N. Y. 327; Mechem, Agency, sec. 469. Defendant, to meet this phase of the case, has alleged in his answer, but totally failed to prove, that by a separate agreement Johnson agreed that Cochran might retain all boot money as commission for making said transfer. If at the time this contract for compensation was made, if made at all, a relation of trust and confidence, or that of principal and agent, or client and attorney, did not exist between Johnson and Cochran, defendant was justified in avail-

ing himself of his superior knowledge and in making the best terms possible for himself. If, however, any such fiduciary relation then existed between said parties, the burden would be on defendant to not only prove the execution of the agreement to retain the boot money, but that before it was made he made a complete disclosure of the facts within his knowledge to Johnson. *Tyler v. Sanborn*, 128 Ill. 136; *Lamb v. Fairbanks*, 48 Vt. 519; *Dunne v. English*, 31 L. T. R. n. s. (Eng.) 75.

Plaintiff, in the second and third trials, acted on the theory that proof of defendant's knowledge, before he secured authority to make the trade, that Hawver would pay the boot money was part of the case in chief, but such was not the fact under the issues tendered. Until defendant made at least *prima facie* proof of the facts essential to constitute his defense, the record should not have been incumbered with evidence concerning such knowledge on the part of Cochran. Sufficient, however, appears to demonstrate the error of the court in directing a verdict for defendant.

3. We do not think that we should order the first verdict reinstated. The verdict was set aside during the term it was received. The court was then vested with great discretion and may have acted for some proper reason not disclosed by the transcript or the bill of exceptions.

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

REVERSED.

FAWCETT, J., not sitting.

ORLANDO S. WOOD, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 24, 1909. No. 15,669.

1. **Street Railways:** INJURY: CONTRIBUTORY NEGLIGENCE. In a suit against a street railway company for personal injuries, plaintiff is chargeable with contributory negligence, and defendant is not liable for damages, where the petition shows plaintiff was standing between the rails at a street intersection on a cross-walk at night waiting for the car which struck him; that he was only required to take one step to prevent the impact; that the car was equipped with a headlight; that he saw it 30 feet away, and could have seen it a long distance; that there was nothing to indicate his inability to use his senses in avoiding danger; and that defendant stopped its car with the rear end at the cross-walk where he was standing, the motorman under such circumstances having the right to assume, until plaintiff's danger became apparent, that he would step off the track.

2. ———: ———: ———. A person who waits for a street car at a proper cross-walk, sees the car coming, and is struck and injured by it through his own negligence cannot recover damages on the sole ground that the motorman failed to sound the gong.

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

L. D. Holmes, for appellant.

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

ROSE, J.

An electric passenger car operated by defendant on its street railway in Omaha struck and injured plaintiff, and this suit was brought by him to recover damages in the sum of $10,000. A general demurrer to the petition was sustained by the trial court. Plaintiff refused to plead further, and stood upon his petition. A dismissal of the case followed, and plaintiff appeals.

The only question presented is the sufficiency of the

petition to state a cause of action. The allegations material to this inquiry are: "(1) The defendant herein is a corporation duly organized and engaged in the business of operating street cars in the city of Omaha and other places for the purpose of carrying passengers.

"(2) That on October 17, 1905, the plaintiff, desiring to take the electric car of the defendant going east on California street at the east side of Thirtieth street and at the intersection of said streets, passed from the north side of said California street south and across the tracks of the said defendant until he reached a point upon said crossing, as he supposed, south of the tracks of the said defendant; that the night was dark, and the ground was muddy, and he was unable to see the tracks of the said defendant or the said cross-walk, but was standing on said cross-walk, as he afterward ascertained, about six inches north of the south rail of the said south track of the defendant, while waiting for said car, instead of south of said track, as he intended and supposed; that, while he was so standing, one of defendant's electric cars approached from the west coming over the hill west of Thirtieth street, and was running at a very great rate of speed; that plaintiff could not and did not discover that he was inside of said track as above alleged until the car was within about 30 feet of the place where he was standing; that he then discovered for the first time that he was in a position of danger, and immediately sprang toward the south to escape the car, but it was running so fast that it struck him before he could escape danger, and the car ran the full length of itself after it had struck him, and knocked him down before it stopped. Plaintiff further alleges that said car was provided with a head-light, and the motorman could have seen this plaintiff from his station on the car a long time before said car reached the place where plaintiff was standing, and could have stopped the car after discovering plaintiff's peril and before it struck the plaintiff had he used reasonable diligence, but wrongfully neglected to ring the bell or

give any warning to this plaintiff, and wrongfully and negligently ran said car against this plaintiff. Wherefore the plaintiff says that said defendant wrongfully and negligently injured and wounded the said plaintiff without negligence on his part. Plaintiff further alleges that said car was running swiftly eastward at the intersection of Thirtieth and California streets, and the motorman carelessly and negligently caused said car to be running swiftly at that point, and wrongfully and negligently failed to have said car under his control, and thereby wrongfully and negligently caused said car to run against said plaintiff, and to bruise and wound him without negligence on his part."

In the argument to sustain the petition plaintiff insists that his being on the street railway track was not negligence as a matter of law, and that he did all a reasonably prudent person could do to protect himself from injury. The trial court took a different view of the controversy. The petition shows that plaintiff was standing between the rails of defendant's track. He was on the proper cross-walk waiting for an eastbound car on California street to approach from the west. The car that struck him came from that direction on the street named, and was provided with a headlight, which would necessarily shine in front of the car between the rails. There was nothing between him and the approaching car to prevent him from seeing the headlight, and for a long distance his view of the lighted car was unobstructed; otherwise he could not have alleged that by reason of the headlight the motorman could have seen him a long time before the car reached the place where he was standing. From where he stood the darkness would naturally heighten the effect of the approaching headlight. Under such circumstances, the failure to see the track on account of darkness and mud would ordinarily arouse a person to a sense of danger. In any event, it was plaintiff's duty under the facts pleaded to look for the approaching car. *Robinson v. Union R. Co.*, 106 N. Y. Supp. 203; *Harris*

v. Lincoln Traction Co., 78 Neb. 681. Though one equipped with a headlight was coming, he stood between the rails in front of it, and did not see it until it was within about 30 feet of him, when, as he alleges, it was too late to escape danger. His conduct amounted to negligence which contributed to his injury, and no other reasonable inference can be drawn from the facts stated in the petition.

Plaintiff also appeals for relief under the familiar doctrine of the last clear chance. He insists that, though he may have been negligent in remaining on the track, the motorman by the exercise of ordinary care could have stopped the car in time to prevent injury after he discovered or could have observed plaintiff's exposed position. The allegations that the car was provided with a headlight and that the motorman could have seen plaintiff a long time before he was struck warrant the inference that plaintiff could have seen the headlight of the approaching car. Under the facts pleaded, the motorman had a right to assume, until the danger of plaintiff's position became apparent, that he would step off the track before the car reached the cross-walk where he was standing. Plaintiff was waiting near the usual place to receive passengers, and there was nothing alleged to disclose any inability on his part to apprehend danger. These are circumstances under which a motorman may approach a person upon the assumption that he will step off the track before the car reaches him. *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 447, 450; *Duteau v. Seattle Electric Co.*, 45 Wash. 418; *Garvick v. United R. & E. Co.*, 101 Md. 239.

A street railway company is guilty of negligence if it fails to give proper warning that its cars are approaching public crossings, as held in *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97; but this rule does not relieve plaintiff in the present case from the consequence of his own negligence as disclosed by his petition which shows that he saw the car 30 feet away; that he was required

to take one step only to prevent a collision; that his view of the approaching car was not obstructed; that by keeping a lookout he could have seen the car a long time before it reached the cross-walk where he was standing; and that there was nothing to indicate his inability to care for himself or that there was a crowded condition of the streets. *Harris v. Lincoln Traction Co.*, 78 Neb. 681; *Garvick v. United R. & E. Co.*, 101 Md. 239; *McEntee v. Metropolitan Street R. Co.*, 97 N. Y. Supp. 476.

Notwithstanding plaintiff says in his pleading that the car was running at "a very great rate of speed," that it was "running swiftly," and that the motorman "wrongfully and negligently failed to have said car under his control," it is apparent from other allegations that defendant was not negligent in these respects. On this feature of the case the only reasonable inference to be drawn from all the facts stated in the petition is that the motorman was not negligent before the danger was apparent in failing to stop the car. The petition shows the car only ran the length of itself after it struck plaintiff. It is manifest therefore that it was stopped promptly with the rear end at the cross-walk, the proper and usual place for plaintiff and other passengers to board. It follows that the allegations do not show negligence on part of defendant in losing control of the car, in running it at a high rate of speed, or in failing to stop it after plaintiff's peril was discovered. *Harris v. Lincoln Traction Co.*, 78 Neb. 681; *Lindgren v. Omaha Street R. Co.*, 73 Neb. 628. In the latter case this court, by OLDHAM, C., said: "There is no testimony in the record admitted by the court as to the rate of speed at which the car was moving at the time of the impact. The only thing in the record from which a deduction might be made on this question is found in the evidence of witness Downs, who testified that the car ran about 20 or 30 feet after the impact before it was stopped. This standing alone we do not think sufficient to show a reckless rate of speed."

There is no error in the holding that plaintiff's petition

failed to state a cause of action, and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. UNION PACIFIC RAILROAD COMPANY.

FILED APRIL 24, 1909. No. 15,988.

ORIGINAL action by the state to restrain defendant from making any contract in violation of the statute as to rebates, the giving of passes, or the two-cent fare act. Defendant demurred. *Overruled.*

William T. Thompson, Attorney General, for the state.

Nelson H. Loomis and *Edson Rich, contra.*

FAWCETT, J.

This is an original suit in equity to restrain the defendant from entering into any contract, the effect of which is to violate the statutes as to rebates, the giving of passes, or the two-cent fare law. To this petition defendant has filed a general demurrer. The attorney general has filed an elaborate brief in support of the claim of the state for the above relief. We have not been favored with any brief by defendant. The importance of the questions involved is such that we do not feel disposed to decide the case without either a brief or argument on the part of defendant. The demurrer is therefore overruled, and leave given defendant to answer within 20 days.

DEMURRER OVERRULED.

ZEBULON S. BRANSON ET AL., APPELLANTS, V. ISAAC R. BRANSON ET AL., APPELLEES.

FILED APRIL 24, 1909. No. 15,638.

1. **Partition:** COSTS: ATTORNEY'S FEES. Where partition proceedings are not amicable, the fees of defendants' counsel are not taxable as costs.

2. **Costs:** STATUTES: CONSTRUCTION. The power to award and tax costs in legal proceedings being unknown at common law, statutes providing therefor are to be strictly construed.

3. **Appeal:** COSTS: ATTORNEY'S FEES: REVIEW. In partition, where fees of defendants' counsel have been allowed as costs in the form of a judgment, a motion for a new trial, and not a motion to retax costs, is the proper procedure to obtain a review of such allowance in this court.

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

Charles A. Robbins, for appellants.

Burr & Marlay, contra.

DEAN, J.

This is an appeal from the allowance of an attorney's fee in a partition proceeding, wherein the trial court, as part of its final decree, caused the following journal entry to be made: "It is further ordered that Burr & Marlay, attorneys, and appearing in this case on behalf of certain heirs, parties hereto, be allowed the sum of $500 as attorney's fees, the same to be paid by all of said heirs equally, and the same to be paid out of the proceeds of the sale of said property now in the hands of the referees." The plaintiff and three defendants appeal.

To obtain an understanding of the issues, the following summary of the record is submitted: The petition is in the usual form, and alleges that Rachel Branson, a widow, died intestate in Lancaster county on March 14, 1906, being the owner of certain real estate therein and in

Howard county, and that she left surviving her three sons and two daughters, her sole heirs at law, to wit, Zebulon S. Branson, Isaac R. Branson, Charles M. Branson, Emily B. Carter and Caroline B. Brown, and that each of the heirs upon the death of their mother became the owner of an undivided one-fifth interest in the lands; that defendant Isaac R. Branson is administrator of decedent's estate; that the time fixed by the county court for filing claims has expired, and no claim has been filed except one by Isaac R. Branson, administrator, which has not been approved or rejected; that there are no other debts or claims against the estate; that Isaac R. Branson has money and personal property in his hands as administrator sufficient to pay all costs and expenses of administering the estate and to pay his claim if it is allowed, except the sum of about $2,000; that plaintiff Zebulon S. Branson, as an heir of Rachel Branson, has given his bond with sureties, duly approved by and filed with the county judge, to secure the payment of his just proportion of the debts and expenses of the estate of Rachel Branson, and to indemnify the administrator.

Isaac R. Branson, by his attorneys Burr & Marlay, hereinafter called claimants, filed his separate answer in the partition proceedings on May 13, 1907, and alleged that, besides those mentioned in the petition, there are other and contingent claims named in the statutes that can and may be filed hereafter; admits he had filed a claim which, with interest, amounts to nearly $9,000; admits there are no other debts or claims filed against said estate at this time; alleges "there is no good reason why said estate should be partitioned at this time; but, if the court is of the opinion that the title would be good and satisfactory to the purchaser who would buy the same in these proceedings, that this answering defendant has no objections thereto, if said estate will bring its full and fair cash market value by forced sale under an order of this court"; admits he has money and personal prop-

erty in his hands as administrator in the sum of $5,575.30, but denies its sufficiency to pay the costs of administration, "together with said claim against said estate, if the same shall be allowed"; denies that Zebulon S. Branson has filed a good bond as alleged by him, and alleges "that this defendant has, or soon will, file his application in said court to require a good * * * bond * * * with sureties * * * to indemnify the administrator in said premises, and to save harmless said estate in the payment of all claims, including those now filed as well as any contingent claim that may be filed under the statute"; alleges a misjoinder of parties defendant, in that Emily B. Carter's husband, Dilworth Carter, who lives in Illinois, "is not only a proper, but a necessary, party, * * * and, if the court holds said action is not premature, then this defendant prays" for partition and sale of the property.

The record shows that on May 23, 1907, the partition proceedings were tried and "submitted to the court, and passed until May 31 for decree and further appearances," when Dilworth Carter, for whom no process had been issued, of his own motion entered his voluntary appearance and consented to the decree. On the same day the claimants, as attorneys for Isaac R. Branson, applied for an order requiring plaintiff and all the heirs, except their client Branson, to execute a bond "in the sum of $1,000 each before the partitioning of the property." In the decree the court ordered the referees to make return on or before August 15, 1907. On July 11, by agreement of attorneys, the time for the return of the referees was modified by an order of the district court so as to allow them to make their report on or before August 22, instead of on August 15, as originally made. On August 22 the referees reported a sale wherein was realized $16,447.70. On September 11 Isaac R. Branson, as administrator, by attorneys other than claimants, objected to the confirmation of the sale of two of the tracts of land because of inadequacy of the amount realized at the sale; that on

October 5 the plaintiff and all defendants, by their attorney, except Isaac R. Branson and his wife, moved for and obtained a confirmation of the sale of the land and distribution of proceeds. The objections, so far as the record discloses not being supported by any showing, were ignored.

On October 7 following, in pursuance of his contention, Isaac R. Branson, by the claimants as his attorneys, filed a motion objecting "to the payment of any money now in the hands * * * of the referees to Zebulon S. Branson, Charles M. Branson, Emily B. Carter and Caroline B. Brown * * * until first a good * * * bond is made * * * and delivered to the clerk * * * by them to indemnify * * * creditors of the estate in * * * at least $4,000 apiece," and objecting "particularly to the payment of any money to Charles M. Branson" because he "is indebted to said estate on his unsecured promissory note in the sum of $1,000," and more than two years' unpaid interest, which he is unable to pay; that said Charles M. Branson has no property above his legal exemptions; "and, for all the reasons set forth in the following affidavit, this applicant moves the court to require said heirs and each one of them to give bond in the sum of $4,000." The claimants in their brief invite an inspection of the numerous affidavits in the record, and among them we find one by Isaac R. Branson in support of the above motion, wherein he avers, in substance, that he is plaintiff in "a good and just cause of action" against the estate pending in the district court for Lancaster county, and the sum involved is about $10,000; "that it is absolutely unjust and inequitable * * * to pay out the moneys now in the hands of the court without absolute security to pay said indebtedness if affiant is successful in said law suit; that all of the real estate * * * has been sold * * * and the money is now in the hands of this court and subject to its order; that there is nothing of any consequence to pay affiant's claim in said law action if he is successful therein, save and

except some personal property, consisting of moneys not exceeding the sum of about $5,000"; that the expense of probate and of this action in this court will be large; "that his fees as administrator * * * must be taken into account; that Emily B. Carter lives at Fulton county, Illinois, and is outside the jurisdiction of this court; that it would be very expensive for affiant, in case he is successful in his law action, to recover back any portion from her; that both Zeb and Charlie Branson are pugnacious, litigious and stubborn, and will, in case affiant is successful in said suit, refuse to pay affiant without a lawsuit"; that Charles M. Branson's property, except his home which is exempt, stands in his wife's name; "that Charles M. Branson is now indebted to said estate on his unsecured promissory note in the sum of $1,000" and $125 unpaid interest, and that "he is financially unable to make said payment; * * * that affiant as administrator * * * has endeavored * * * to get him to pay said note and * * * interest, * * * and could not do so, and affiant is sure and positive that not only on said note there must be a struggle in the courts, but that, if he should win and be successful in his said law action, * * * he will have then a protracted and expensive litigation caused solely by the action of said other heirs in this estate."

The record discloses that claimants on their own behalf filed an affidavit on October 12, 1907, in pursuance of a motion theretofore filed by them, wherein they moved the court for an allowance "as attorneys' fees for services rendered in the above entitled cause, to be paid out of the fund now in the hands of the court subject to distribution." In their affidavit the claimants state, in substance, their employment by their client "to see to it that proper parties were made in this action; that proper bonds were given by all the heirs in these proceedings to secure alleged creditors of the estate whose claims have been filed and where suits are pending; that one creditor has a claim amounting to about the sum of

$9,000, and the same is for trial * * * at the present term; * * * to aid * * * in obtaining as large a price as possible for the land, and see to it that proper title was obtained for the purchaser, and to generally protect the interest and rights of Isaac R. Branson in this proceeding; * * * that the labor and services of affiants in these proceedings, as shown by the files in this court, are reasonably worth the sum of 10 per cent. of the amount realized in the sale of said property. (Signed) L. C. Burr, C. C. Marlay." On the same day the following affidavit was filed: "Charles A. Robbins, being first duly sworn, says that he is attorney for the plaintiffs herein and for all the defendants except Isaac R. Branson and Mida Branson; that, in addition to appearing in court on all proceedings had herein and to preparing all papers filed herein bearing his signature or indorsement, he has prepared all orders, decrees, judgments and journal entries and bonds made and filed herein, and all reports and notices made or filed herein."

From an inspection of the entire record we incline to the belief that the learned trial court, in allowing the fee complained of, did so upon the theory that attorney's fees in a partition proceeding extend to and include the services of attorneys in a contest over the distribution of the proceeds of the sale, and that such fees are properly chargeable as costs in the case. To this theory we cannot give our assent. To do so would be to open a door to a species of adventurous litigation that would in some instances terminate only with the entire absorption of the estate involved.

It is vigorously urged by claimants that the partition suit was amicable and their fee reasonable, and upon these grounds they urge the justice of their cause. The disposal of the first part of their contention absolves us from the necessity of discussing the reasonableness of their fee. Section 841 of the code is as follows: "All the costs of the proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the

parties in proportion to their interests, except those costs which are created by contests above provided for." This statute was construed in the case of *Oliver v. Lansing*, 57 Neb. 352, and in *Johnson v. Emerick*, 74 Neb. 303, and upon principle both cases sustain the contention of appellants. 11 Cyc. 24: "At common law costs were not recoverable *eo nomine*. Costs can therefore be imposed and recovered only in cases where there is statutory authority therefor. * * * The courts cannot make * * * rules or orders and impose costs thereunder, unless the power to do so is expressly given them by statute." The same author at page 104 says: "Attorney's fees are not allowable in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof." Bouvier says: "A party can in no case recover costs from his adversary unless he can show some statute which gives him the right. Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly." We are not aware of any case wherein this court has before had presented to it for determination the question of taxing fees as costs for the payment of an attorney who appears solely upon request and in behalf of a defendant in a partition proceeding presenting a record such as the one before us. All of the adjudicated cases upon this subject, to which our attention is called, discuss only the propriety of the payment of the fees of counsel for plaintiff in an amicable proceeding.

The real purpose of the appearance of claimants in behalf of their client in the partition proceedings we believe is disclosed in appellees' brief, wherein the claimants say they were employed "to generally protect the rights of Isaac R. Branson in these proceedings." Sufficient appears in the pleadings, motions and affidavits to convince us that the partition proceedings were not amicable in the sense to which this and other jurisdictions are committed in this branch of legal procedure, nor in the sense in which that term is ordinarily used. The answer ap-

pears to tender an issue and invite a contest upon the propriety of the time selected for partitioning the estate, wherein it is alleged "that there is no good reason why said estate should be partitioned at this time." This allegation is directly counter to the purpose of the commencement of the partition action, and opens up a field of controversial activity which we believe is not at all consistent with the generally accepted view of an amicable proceeding. In other respects, too, the answer appears to us to be belligerent in tone and defiant in attitude. This conclusion is borne out by other parts of the record, notably the affidavits.

The claimants contend that the action of the trial court in allowing the fees complained of is not properly reviewable because of failure to file a motion to retax costs. We do not believe this point is well taken. The claimants cite none, and we know of no authorities that will support their contention. We doubt if upon principle it can be maintained. The authorities generally hold, as pointed out by appellants' counsel in his argument, that a motion to retax costs is proper where the taxation is by the clerk, but that it does not apply where an allowance has been made by the court in the form of a judgment, as in the case at bar, the distinction being that the latter is the act of the court and reviewable on appeal, while the former is a ministerial act of the clerk which may be corrected by the court upon motion. The question is properly presented in the record by motion for a new trial. *Meade Plumbing, H. & L. Co. v. Irwin,* 77 Neb. 385; *Smith v. Bartlett,* 78 Neb. 359; *Ainley v. American Mutual Fire Ins. Co.,* 113 Ia. 709; *Ivey v. Gilder,* 119 Ala. 495.

Counsel for appellants contends that the trial court erred in rendering its judgment for the fees of defendants' counsel in the names of the attorneys, instead of in the name of the principal, and cites some authorities that uphold this doctrine, but the point is somewhat technical, and as we have disposed of the case upon other grounds

favorable to his contention it is unnecessary to consider or to determine this point.

After a careful examination of the record, we are convinced that the judgment of the district court must be, and it hereby is, reversed and remanded for further proceedings in accordance with law.

REVERSED.

REESE, C. J., did not sit, and took no part in this case.

LOUIS LESIUR, EXECUTOR, APPELLANT, V. HARMONY C. SIPHERD ET AL., APPELLEES.

FILED APRIL 24, 1909. No. 15,650.

1. **Wills:** CONSTRUCTION: JURISDICTION. The county court has jurisdiction to construe a will for the purpose of advising an executor in the execution of his office under the terms of the will.

2. ———: ———. In the construction of a will, the intention of the testator, as disclosed by the language used therein, considered in connection with surrounding circumstances, will govern, provided in so doing no rule of law is violated or sound policy disturbed.

3. ———: ———. A will contained the following provisions: "(2) I give, devise and bequeath to my beloved wife, Harmony C. Sipherd, all of my real estate and personal property of whatever kind and nature, to be used by her fully during her lifetime, and at her death the remainder is to be divided equally, share and share alike, among my three daughters, Mary Jane Hagedorn, Frankie H. Sipherd and Gertrude May Sipherd. (3) It is my request and I hereby direct my wife, Harmony C. Sipherd, that in case either of my daughters, Frankie H. Sipherd or Gertrude May Sipherd should get married, my said wife is to give each of them the sum of five hundred ($500) dollars cash as a dowry, the same to be taken out of any money in her hands belonging to the estate. This amount is not to be charged to them, but is a donation from their father." *Held*, the will does not create a trust estate, and that the widow takes all of the testator's property without restriction, and that such property as remains at her death vests in Mary Jane Hagedorn, Frankie H. Sipherd and Gertrude May Sipherd, share and share alike.

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

George A. Magney, for appellant.

H. Z. Wedgwood, contra.

DEAN, J.

John M. Sipherd died in Sarpy county leaving a will in which he named Louis Lesiur as executor. The deceased left surviving him Harmony C. Sipherd, his widow, and three daughters, Mary Jane Hagedorn, Frankie H. Wilson and Gertrude May Sipherd, who were his sole and only heirs at law. The will contained the following, among other formal paragraphs: "(2) I give, devise and bequeath to my beloved wife, Harmony C. Sipherd, all of my real estate and personal property of whatever kind and nature, to be used by her fully during her lifetime, and at her death the remainder is to be divided equally, share and share alike, among my three daughters, Mary Jane Hagedorn, Frankie H. Sipherd and Gertrude May Sipherd. (3) It is my request and I hereby direct my wife, Harmony C. Sipherd, that in case either of my daughters, Frankie H. Sipherd or Gertrude May Sipherd should get married, my said wife is to give each of them the sum of five hundred ($500) dollars cash as a dowry, the same to be taken out of any money in her hands belonging to the estate. This amount is not to be charged to them, but is a donation from their father." The estate, consisting of real estate in Sarpy county and some personal property, was valued at about $17,000, and a question arising among the beneficiaries of the will concerning the meaning of paragraphs 2 and 3, and the executor, being in some doubt about the construction to be placed thereupon, commenced an action in the county court of Sarpy county to obtain a judicial construction thereof. Upon the hearing that court decreed that the "executor, Louis Lesiur, pay over to the said Harmony C. Sipherd

all the property of John M. Sipherd, deceased, both real and personal, now in his hands for distribution, as such executor, for the term of her natural life, and at her death the remainder is to go to Mary Jane Hagedorn, Frankie H. Wilson and Gertrude May Sipherd in equal shares."

Mary Jane Hagedorn, the eldest daughter, was dissatisfied with this construction of her father's will, and appealed therefrom to the district court, where, upon hearing, the judgment of the county court was reversed, and the following judgment was rendered: "That the defendant Harmony C. Sipherd have, and she is hereby given, the use and income during her lifetime of all the estate and property, both real and personal, of which the said John M. Sipherd died seized and owned at the time of his death, and at her death the corpus or principal of said estate goes to and vests in the defendants Mary Jane Hagedorn, Frankie H. Wilson and Gertrude May Sipherd, share and share alike; that the possession of the real estate and specific chattels be forthwith delivered to the defendant Harmony C. Sipherd, and upon the execution and delivery by her to the county judge of said Sarpy county, within 20 days from the entry of this decree, of a good and sufficient undertaking, in an amount equal to 125 per cent. of the money and choses in action of said estate, conditioned for the preservation by said defendant and the forthcoming at her decease of said property, which undertaking is to be approved by the county judge of Sarpy county, Nebraska, then in that event said money and choses in action are to be by the plaintiff turned over and the possession thereof delivered up to her; but upon the failure of the said defendant to so give said undertaking within said time the plaintiff must continue as executor of said will and administer said money and choses in action during the lifetime of the defendant Harmony C. Sipherd, paying to said defendant the interest and profits derived therefrom as obtained by him, and he shall conserve, protect and hold the corpus or principal thereof intact for, and at the death of the said

Harmony C. Sipherd deliver up and turn the same over to, the defendants Mary Jane Hagedorn, Frankie H. Wilson and Gertrude May Sipherd, share and share alike." From this decree of the district court, reversing the judgment of the county court, the executor has brought the case here for review.

Counsel for Mrs. Hagedorn denies the right of the executor to maintain this action for the reason that he is not the real party in interest, and in support of his contention cites *Andersen v. Andersen,* 69 Neb. 565. This point is not well taken and is not supported by the *Andersen* case. On the contrary, this court, speaking by BARNES, J., in that opinion, holds in effect that the county court is clothed with jurisdiction to construe a will for the purpose of advising the administrator of the course to be pursued in the execution of his office under its terms. In the case at bar the executor sought and obtained a construction of the will in the county court. One of the beneficiaries, being dissatisfied with the action of the county court in the premises, appealed to the district court. Upon a hearing in that court it was sought to impose a burden upon the executor that was not imposed upon him by the terms of the will. It was sought to make of him a trustee under the terms of an instrument that does not create a trust relation. This it was not competent for the district court to do over the executor's objections, and he has appealed for relief to this court. The case is properly here for a final construction of the two paragraphs of the will in controversy.

To the mind of the court the terms of the will are not ambiguous. It appears to us that it was the intention of the testator to give to his wife all of the property named in the will without any restrictions of any sort whatever, except that such of the devised property as remains at her death is to be divided equally, share and share alike, among the three daughters of the testator. All the language of the will taken together implies that this was the intention of the testator. Had his intention been

otherwise, it would seem that he would have made other provisions than those made by him for the payment of "the sum of $500 cash as a dowry" that was to be paid to the girls in the event of their marriage. This provision clearly to our mind contravenes the contention of the appellee that the property of the testator should be placed in the hands of a trustee. There is no language in the instrument under consideration that indicates the purpose of the testator to create a trust, and it is not the province of the court to read an intent or a purpose into a will that is not clearly expressed by the language of the instrument itself. To do so would be to make the instrument the will of the court, and not that of the testator. It is a well-established rule of law that, in the construction of a will, the intention of the testator as disclosed by the words used in the instrument, in connection with surrounding circumstances, must be carried into effect, unless there is something in it contrary to law or that is in contravention of public policy. *McCulloch v. Valentine,* 24 Neb. 215; *St. James Orphan Asylum v. Shelby,* 60 Neb. 796; *Little v. Giles,* 27 Neb. 179.

In the event of an attempt on the part of a life beneficiary to waste or squander an estate, it would doubtless be competent, upon a proper showing being made, to obtain an order restraining such dissipation; but that question is not presented to us by the record and is not decided herein.

We have carefully examined the record, and conclude that the judgment of the district court must be, and it hereby is, reversed and remanded, with directions that a judgment be entered therein in conformity with the judgment of the county court of Sarpy county, directing Louis Lesiur, executor, to pay over to the said Harmony C. Sipherd all of the money and to deliver to her all of the property coming into his hands by virtue of his office and belonging to the estate of the said decedent, and that the judgment of the district court by its terms decree that upon the death of said Harmony C. Sipherd the

remainder of said property vest in the said Mary Jane Hagedorn, Frankie H. Wilson and Gertrude May Sipherd, share and share alike. It is ordered that such judgment, when entered in the district court, be certified to said county court for its direction in the premises.

JUDGMENT ACCORDINGLY.

JESSE CHAPPELL, APPELLEE, V. LANCASTER COUNTY, APPELLANT.

FILED APRIL 24, 1909. No. 15,667.

1. **Statutes:** CONSTRUCTION. A statute should be construed "in the light of all general laws upon the same subject in force at the time of its enactment."

2. **Insane Persons:** INQUEST: FEES OF JURORS. The fees of a juror called to serve as such in an insanity inquest in pursuance of the provisions of sections 454, 551 and 552 of the criminal code must be paid by the county in which the penitentiary is located.

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

F. M. Tyrrell and *Charles E. Matson,* for appellant.

Grant G. Martin, F. G. Hamer and *L. H. Blackledge, contra.*

DEAN, J.

This is an appeal from Lancaster county to determine the right of a juror to fees in a proceeding under sections 454, 551 and 552 of the criminal code. Jesse Chappell, plaintiff and appellee, filed his claim with the county board of Lancaster county for services as such juror. The claim was rejected, and he appealed to the district court. A demurrer was there filed to his petition, and was over-

ruled, and, the defendant electing to stand thereon, judgment was rendered against the county, from which it appeals.

The plaintiff's petition alleges, in substance, that one Frank Barker was convicted in Webster county of murder in the first degree and sentenced to capital punishment; that he was thereafter in pursuance of such conviction confined in the penitentiary under sentence of death awaiting execution; that his attorneys procured a suspension of the sentence pending an inquiry as to his sanity; that on July 9, 1907, the plaintiff was summoned by the warden of the penitentiary under an order issued by Honorable Lincoln Frost, one of the judges of the district court for Lancaster county, to appear in one of the district courtrooms of said county before the judge to serve as a juror in the insanity proceedings, and, appearing in obedience thereto, he was accepted as such juror and served in that capacity with eleven others for six days, when he was discharged.

Sections 454, 551 and 552 of the criminal code are as follows: "Section 454. A person that becomes lunatic or insane after the commission of a crime or misdemeanor ought not to be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person shall become lunatic or insane, then, in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all such cases it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impaneling, insane or lunatic."

"Section 551. If any convict under sentence of death shall appear to be insane, the warden shall forthwith give notice thereof to a judge of the district court of the county in which the penitentiary is situated, and shall

summon a jury of twelve impartial electors of the county, to inquire into such insanity at a time and place to be fixed by the judge, and shall give immediate notice thereof to the attorney general of the state and the county attorney of the county in which the conviction was had."

"Section 552. The judge, clerk of the court, and attorney general or his deputy, shall attend the inquiry, witnesses may be produced and examined before the jury. The finding shall be in writing and signed by the jury. If it be found that the convict is insane, the judge shall suspend the execution of the convict until the warden shall receive a warrant from the governor of the state directing such execution. The finding of the jury and order of the judge, certified by the judge and clerk, shall be transmitted to the clerk of the district court of the county in which the conviction was had, and shall be by such clerk entered upon the journal of the court."

The county attorney argues that the defendant county is not liable to the plaintiff because his services were rendered in a special proceeding for which no fee is fixed, and because the insanity proceeding was had before a judge as distinguished from a court, and that such proceeding may be had in vacation as well as in term time, and because the warden, and not the sheriff, summoned the jury. It is pointed out that the statute makes no provision in the proceeding under consideration for peremptory challenges, nor for the attendance of the sheriff and the clerk of the court. We have examined the record carefully and the law applicable thereto, and conclude that the objections of the county are not well taken, and that the judgment of the district court ought to be affirmed. By whatever name the proceeding in question may be called, the fact remains that it is in aid of the criminal procedure of the state and has been recognized as such by this court. *Barker v. State,* 75 Neb. 289; *State v. Barker,* 79 Neb. 361.

It is immaterial whether the proceedings are special or otherwise. The plaintiff served as a juror in pursuance

of a compulsory writ issued by one of the judges of the district court in a proceeding wherein the formalities of district court practice and procedure were generally observed, and, having performed the service, he is entitled to his fee. "Grand and petit jurors shall receive for their services two dollars for each day employed in the discharge of their duties." Comp. St. 1907, ch. 28, sec. 15. It will be observed that the fee of the petit juror is fixed at $2, regardless of whether such service is rendered in a civil or criminal case. Plaintiff's counsel point out that section 537 of the criminal code fixes the liability upon the county to pay the fees of a juror in a criminal case as other costs are paid, but that there is no statute which requires the county to pay such juror's fee in a civil case; and they argue that, after a practice by the county of paying for such service in civil cases that has prevailed ever since the organization of the state, it would not be seriously contended that, because of this omission by the legislature, therefore the county is absolved from the payment of fees to a juror called by compulsory process and compelled to serve in a civil case regularly tried in the district court. It would seem that if a juror's fee in a civil case may properly be paid by the county in the absence of a statute in the civil code directly providing for such payment, a juror ought to fare as well who serves under a compulsory process in pursuance of the provisions of the criminal code, wherein are found statutes providing generally for the payment of costs by the county in criminal cases. Sections 536 and 537 of the criminal code are sufficiently general in their scope to cover the proceedings in which were rendered the services of the plaintiff and to compel payment therefor by the defendant county. In the case at bar, the proceeding in which the plaintiff served as a juror having been brought under the provisions of the criminal statutes, it follows that the general provisions of the criminal code for the payment of costs arising out of criminal cases are applicable, and such costs, including juror's fees, should be

paid the same as in an ordinary criminal case. "It may safely be laid down as a rule of statutory construction that, where there is a general law prescribing and defining the powers, duties, and mode of procedure of a public board, and a special law is passed relating to a particular matter, coming within the general scope of the powers of the board, the two laws are to be read together, and the general law is applicable to the particular matter, except in so far as provision is made in the special law, conferring powers or prescribing duties or modes of procedure, differing from those mentioned in the general law." *Talcott v. Harbor Commissioners,* 53 Cal. 199. In the construction of statutes "every statute must be read in the light of the general laws upon the same subject in force at the time of its enactment." *United States v Trans-Missouri Freight Ass'n,* 58 Fed. 58. It is not probable a similar question to the one involved in this case will again arise, because the recent legislature has wisely provided for the payment of such costs and expenses as are incurred in such proceedings as are under consideration in this opinion by the county where the convicted person is tried, convicted and sentenced.

The judgment of the district court is right, and is in all things

AFFIRMED.

FRANK ANDERSON, APPELLANT, V. UNION STOCK YARDS COMPANY, APPELLEE.

FILED APRIL 24, 1909. No. 15,518.

1. **Appeal:** MOTION FOR NEW TRIAL. Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, motions addressed to pleadings, etc., need not be called to the attention of the trial court by motion for a new trial to make them available upon appeal.

2. ———: LAW OF CASE. On a former appeal from a judgment in favor of the plaintiff, the case was reversed on the ground that the verdict was not sustained by the evidence. On a second trial of the case, the evidence offered by the plaintiff was substantially the same as on the first trial, the plaintiff failing to adduce any new material testimony. The trial court directed a verdict for the defendant. *Held*, No error.

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

Weaver & Giller, for appellant.

Greene, Breckenridge & Matters, contra.

DUFFIE, C.

The plaintiff brought this action against the Union Stock Yards Company to recover for injuries received while engaged in switching the cars of the company in its yards at South Omaha. The case was once before appealed to this court, the opinion being reported in 77 Neb. 196. In his original petition the plaintiff charged negligence on the part of the defendant, in that the cars which he was engaged in switching were not equipped with automatic couplers, and, also, in allowing its roadbed or track to become in a condition dangerous to its employees. Prior to the first trial the court, on motion of the defendant, struck from the petition that part charging negligence on account of the cars not being equipped with automatic couplers, and the case was tried upon the remaining allegations of the petition. The plaintiff recovered, but the judgment was reversed, this court holding that the plaintiff had assumed the risks of the injuries of which he complained. On the case being remanded to the district court, the plaintiff filed an amended petition, again charging the defendant with negligence because of the want of automatic couplers on its cars, and, further, in maintaining at the edge of its roadbed a hole six or eight inches deep, into which he stepped, losing his

equilibrium, when he was caught between one of the cars and a platform adjacent to the roadbed, and thus received the injuries of which he complains. That part of the petition relating to the failure to equip its cars with automatic couplers was again stricken from the petition by the district court, and the case tried a second time upon the remaining allegations of the petition. On the conclusion of the plaintiff's testimony, the court on motion of the defendant directed a verdict in its favor, and from a judgment rendered thereon the plaintiff has appealed.

One of the errors assigned is the action of the district court in striking from the petition the charge of negligence in not equipping its cars with automatic couplers. The defendant insists that this assignment of error cannot be considered, as it was not assigned as one of the grounds of plaintiff's motion for a new trial. There are several cases in our reports indicating, if not directly holding, that an order of the trial court in sustaining or overruling a demurrer, a motion to strike or to make more specific, or other order made relating to the pleadings must, in order to be considered by this court, be included in the motion made to the district court for a new trial of the case. An examination of our statute relating to new trials and the constructions heretofore placed thereon in numerous cases establishes beyond any doubt the rule that orders of the district court which do not pertain to the trial of the case, such as rulings upon demurrer, motions addressed to the pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial to make them available on appeal taken to this court. *O'Donohue v. Hendrix,* 13 Neb. 255; *Farris v. State,* 46 Neb. 857; *Claflin v. American Nat. Bank,* 46 Neb. 884; *Scarborough v. Myrick,* 47 Neb. 794; *Deere, Wells & Co. v. Eagle Mfg. Co.,* 49 Neb. 385; *Hans v. State,* 50 Neb. 150; *Horton v. State,* 60 Neb. 701; *Slobodisky v. Curtis,* 58 Neb. 211, where our previous decisions are collated by Mr. Justice NORVAL. The latest expression of this court upon the question is found in

Walker v. Burtless, 82 Neb. 214. The syllabus is as follows: "If the consideration of a record of the district court does not require the examination of any issue of fact or error of law occurring at the trial, which could only be preserved by a bill of exceptions, a motion for a new trial is not a condition precedent to a review of that record in this court."

The question being fairly presented by the record, we cannot escape the duty of determining whether it was error to the plaintiff's prejudice in striking from the plaintiff's petition the statements relating to the want of automatic couplers upon the cars. We think it a question not open to controversy, both from his petition taken as a whole, and from his own testimony given upon the trial, that the want of the automatic couplers was not the proximate cause of the plaintiff's injuries. During the taking of evidence, some testimony relating to the character of the couplers was offered, and, on a protest from the defendant against the admission of such evidence on account of the matter in the petition relating thereto being stricken out, the court said: "This evidence is received, not for the purpose of showing negligence, but merely for the purpose of describing the manner in which the accident happened." It so happens, therefore, that the record contains the plaintiff's description of the couplers and their operation. His own version of the occurrence is, in short, as follows: Several of the defendant's cars stood on a track on one side of which was an ice platform, and on the other side the platform of the main building of one of the packing houses. The switching crew, of which the plaintiff was one, were ordered to couple several cars standing on another track to the cars standing between the two platforms. The cars which were to be coupled were backed in onto the track between the two platforms, the plaintiff riding on top of the moving car nearest those to which the moving cars were to be coupled. The approach was made on what is called a "reverse curve," and the coupling was not made on account of the drawbars not

being in proper position. The engineer, in compliance with a signal from the plaintiff, moved his engine until the car upon which plaintiff was riding was eight or ten feet distant from the car to which it was to be coupled, and the plaintiff got down from the top of the car, adjusted the coupling bars, and opened the knuckles of the coupler. What followed we give in his own language: "After I had the drawbars and knuckles adjusted, I stepped out and gave the signal to come ahead. I was going to get on the brakebeam, and hang with my right hand on the end ladder on the brakebeam, and hold the lever up with my left hand so that I could make the coupling. It was while I was in the act of doing this that I stepped into a hole and fell over against the platform, and I got hurt." Again he describes it in much the same manner: "Well, when I gave the signal to come ahead, I, of course, stepped out to give the signal so that they could see me, and I was reaching for the grab iron on the end of the car, and, as I stepped out to give the signal, I stepped into a hole and fell over against the platform, and the cars that was coming they rolled me between the car and the platform, and Mr. Hermes was following me, and seen me fall, and gave the signal to stop."

This testimony is conclusive that it was not a want of automatic couplers that caused the injuries. Cars equipped with automatic couplers must have their drawbars in proper position when the coupling is attempted on a curve in the track. The plaintiff had gotten down from the top of the car upon which he was riding, had opened the knuckles of the coupler, and adjusted the drawbars so that the knuckles would interlock. This was while the cars were from eight to ten feet apart. He then stepped outside the rail, signaled the engineer, and, in attempting, not to make the coupling, but to take hold of the grab iron on the car, and to step onto the brakebeam, lost his balance on account of the hole or defect in the roadbed, fell against the platform, and was caught by the car which he had signaled the engineer to move.

Again, cuts of the couplers which the plaintiff produced and exhibited upon the trial as similar to, although not exactly the same as, those with which the drawbars in question were equipped, make it quite evident, in connection with other testimony given by the plaintiff, that the cars were equipped with some kind of automatic couplers, and did not require the plaintiff to go between the ends of the cars to make the couplings. There is a bar or lever attached to the car extending out to within three or four inches of the side of the car, which is used to hold up the lockpin while the cars are coming together, after which the pin is released and the coupling effected. When asked why he did not get upon the platform after signaling the engineer to move the cars, he said: "It was because of holding the lever up there." Then this question was asked him: "Do you mean to say, Mr. Anderson, that it was necessary to make the coupling for you to hold up the lever to hold up the lockpin?" Answer. "Yes, sir." The platform was within a few inches of the car, and it was this platform that required him to ride, or attempt to ride, the brakebeam while handling the lever which controlled the lockpin while the cars were approaching. In the absence of the platform, the plaintiff would have walked beside the car while it was being moved toward the one to which it was to be coupled. We conclude from the plaintiff's own statements, not only that the character of the couplers with which the car was equipped had nothing to do with the accident, but also that the cars were supplied with couplers which did not require the plaintiff to go between them in order to couple them. Under the circumstances, the plaintiff was not prejudiced by striking from his petition the matter relating to the character of the car couplers.

A careful reading of the evidence and comparing it with the opinion written on first appeal discloses that no new or material evidence favorable to the plaintiff's case was introduced on this trial. This was also the view of the trial court, who said, in directing a verdict: "And,

inasmuch as the evidence on this trial is not substantially different from that received on the former trial, I am forced in compliance with the decision of the supreme court to instruct you to return a verdict for the defendant." It would be useless to again review the evidence. The principal facts are stated by Judge AMES, in the opinion written on the former appeal, and the plaintiff in his brief does not attempt to point out any additional evidence given on this trial which would require a holding different from the opinion filed on the first appeal.

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.

THOMAS C. ANDERSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED APRIL 24, 1909. No. 15,626.

1. **Appeal:** SUBMISSION OF CASE. It is error to submit a cause of action to the jury when there is no evidence to sustain it.

2. **Evidence of Value.** A farmer who is engaged in raising farm crops and live stock is competent to testify to the value of such crops and live stock.

3. ———. A farmer who has resided upon his farm for many years, and is actively engaged in agriculture, is competent to testify as to the value of his land and the crops raised thereon by him.

4. ———. A farmer actively engaged in agriculture, and who is acquainted with a particular tract of land, and has a knowledge of the value of lands in its vicinity, is competent to give an opinion as to the value of the particular tract.

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

James E. Kelby, Byron Clark and *Frank E. Bishop,* for appellant.

H. W. Short, contra.

GOOD, C.

Plaintiff brought this suit to recover on four separate causes of action. For his first cause of action he alleged that defendant negligently threw out sparks and coals of fire from a passing engine, and thereby started a fire which burned and destroyed certain crops and killed a part of a field of growing alfalfa. For his second cause of action he alleged the negligent starting of a fire in a similar manner which burned and destroyed a quantity of hay and a rake. For a third cause of action he alleged that the defendant negligently permitted its fence along its right of way to become out of repair and insufficient to turn stock, and in consequence plaintiff's hog went upon defendant's railroad track and was killed by a passing train. For a fourth cause of action he alleged that defendant negligently failed to keep open and unobstructed a certain ditch and culvert along its right of way and under its track, whereby the surface waters were collected, dammed up and thrown back upon plaintiff's land, which caused the destruction of certain crops and killed and destroyed several acres of growing alfalfa. The defendant admitted its corporate capacity, and denied all the other allegations of the petition. Verdict and judgment were for plaintiff, and defendant has appealed.

Defendant insists that there is not sufficient evidence to sustain the first and second causes of action and that it was error for the court to submit those causes to the jury. We have carefully examined the evidence, and with reference to the first cause of action there is nothing in the evidence from which it can be ascertained what quantity of hay or crops were destroyed or what amount of alfalfa was killed. With reference to the second cause of action, the evidence shows that there was a fire upon plaintiff's

premises which burned and destroyed certain hay and a rake. A witness testified that he observed the fire and that the hay was burning, but he did not know how the fire started or what caused it. He further stated "there was another fire on up the track just a little ways," and that a train had passed about that time. This is all the evidence relating to the origin of the fire which caused the damage sued for in the second cause of action. It is not shown whether the train passed before or after the fire started. It is not shown that the fire burned from the railroad track toward the hay, nor from what direction the wind was blowing, nor how far the hay was located from the railroad track. Under these circumstances, the evidence is wholly insufficient to warrant the finding that the fire was started by sparks or coals from defendant's engine. The evidence was insufficient to justify the submission of the first and second causes of action to the jury.

Defendant complains of the admission of certain evidence given by the plaintiff, wherein he testified to the value of the crops destroyed by fire and water, and also with reference to the value of the land before and after the alfalfa was killed by fire and water. Defendant insists that the witness was not competent to testify as to value. The record shows that the plaintiff was a farmer, had owned and resided upon the land for many years and was engaged in the raising of crops of the character of those destroyed. The owner of land who has resided upon and cultivated the same and is familiar with its value is a competent witness on the question of its value. *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205; *Chicago, B. & Q. R. Co. v. Shafer,* 49 Neb. 25; 17 Cyc. 115. The owner of chattels is qualified by reason of that relationship to give his estimate of their value. 17 Cyc. 113, 114. See, also, *Western Home Ins. Co. v. Richardson,* 40 Neb. 1. Defendant also complains of the admission of certain other testimony as to the value of certain crops destroyed, and the value of land before and after the destruction of the alfalfa by fire and water, on the ground that the witness

was incompetent. The record discloses that the witness was a farmer engaged in the business of agriculture and raising crops of a similar character, and had some knowledge of the value of lands in the vicinity of plaintiff's land, and was acquainted with that land. The general rule is that a farmer who is engaged in raising crops and live stock may, without other qualifications being shown, testify to the value of farm or domestic animals and farm crops. If a witness is shown to be acquainted with the value of land generally in that vicinity, he may testify as to the value of such land. 17 Cyc. 116, 117. The record brings the witness within the rule, and the evidence was properly admitted. Complaint is made of other rulings on the admission of evidence, all of which we have examined and find no prejudicial error in any of them.

On motion of the defendant, the court submitted to the jury the four several causes of action for special findings as to each. The return of the jury allowed plaintiff on the first cause of action $55.10; on the second cause of action $58.52; on the third cause of action $6, and on the fourth cause of action, $274.79, and returned a general verdict for $394.41. It appearing that the evidence is not sufficient to sustain the first and second causes of action, the judgment as to the amount covered by those two findings should be reversed. We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter judgment as of date October 16, 1907, in favor of the plaintiff, for the amount found by the jury upon his third and fourth causes of action, in the sum of $280.79, and to grant defendant a new trial as to plaintiff's first and second causes of action.

DUFFIE, EPPERSON 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 directions to the district court

to enter judgment as of date October 16, 1907, in favor of plaintiff, for the amount found by the jury upon his third and fourth causes of action, in the sum of $280.79, and to grant defendant a new trial as to plaintiff's first and second causes of action. It is further ordered that each party pay one-half of the costs in this court.

JUDGMENT ACCORDINGLY.

THOMAS B. KERR ET AL., APPELLANTS, V. WILLIS P. MCCREARY ET AL., APPELLEES.

FILED APRIL 24, 1909. No. 15,466.

1. **Mortgages**: FORECLOSURE SALE: TITLE OF PURCHASER. The purchaser at a judicial sale upon the foreclosure of a mortgage upon confirmation acquires the title of all the parties to the action, and nothing more.

2. ———: ———: ———. During the lifetime of the mortgage, it is a lien on all of the interest of the mortgagor possessed by him at the execution of the mortgage, and the purchaser at the judicial sale acquires such title only in the event that the mortgagor's grantee to whom the equity of redemption has been sold has been made a party to the action.

3. **Quieting Title**: EQUITY. Where the plaintiff brings an action to quiet title to real estate, and the defendant prays to be declared the owner and to have her right of possession confirmed, such prayer is a demand for affirmative relief and subjects the defendant to the operation of the maxim that he who seeks equity must do equity.

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

R. A. Batty and *H. F. Favinger,* for appellants.

John C. Stevens and *W. P. McCreary, contra.*

CALKINS, C.

In the year 1888 William Kerr, since deceased, being the owner of the land in controversy, two lots in the city of Hastings, conveyed the same to the defendant Willis P. McCreary, receiving therefor $1,500 of the purchase price in cash, and a mortgage signed by McCreary alone upon the same property to secure the remainder, $2,500. McCreary conveyed the property to one Stevens, and he conveyed to McCreary's wife, the defendant Mary B. McCreary. Her deed was recorded September 27, 1890. Default having been made in the payment of a part of the debt, the mortgagee on October 16, 1891, instituted an action in foreclosure against McCreary, prosecuting the same to judicial sale, at which the mortgagee was the purchaser. He secured an order of confirmation in which the sheriff was directed to execute to him a deed of the premises. A deficiency judgment was also obtained against the mortgagor, which was afterwards satisfied and released of record. In the petition for foreclosure, Mary B. McCreary was named in the title of the case as a defendant. Throughout the proceeding no other reference was made to her, and no relief was asked as against her. She was not served with summons, nor did she enter her appearance. This action was instituted by the plaintiffs, who are William Kerr's grantees, in which they allege that the sheriff's deed was duly executed and delivered, and that it was never recorded and has been lost. The plaintiffs further allege that they and their grantor entered into the possession of the property in March, 1893, the date of the confirmation, and that they have continuously thereafter remained in the open, notorious and adverse possession of the same under a claim of title. Plaintiffs prayed that the court decree them to be the owners of said property, and that the claim of defendants and each of them shall be removed, canceled and held for naught. The defendants filed separate answers, but we need to consider only that of Mary B. McCreary, who

alleged the facts above set forth regarding the foreclosure proceedings, and the obtaining by the plaintiffs of the title which was obtained by their grantor in the foreclosure proceedings.

Plaintiffs contend that the purchaser at a judicial sale receives whatever title the mortgagor possessed at the time the mortgage was given; that the purchaser upon confirmation was entitled to possession even as against the mortgagor's grantee, who was not made a party; and, further, by her deed from the mortgagor, Mary B. McCreary obtained only the equity of redemption, that is, the interest remaining after the incumbrance has been paid, and that her only right now, or at any time, has been to redeem from the mortgage; that, notwithstanding the fact that she was not made a party in the foreclosure proceeding, that proceeding is not void as to her; and that the title passed to the purchaser and to his grantees subject only to the rights of Mary B. McCreary to redeem. The contention has support in the decisions of many courts in jurisdictions presumably where a mortgage is held to convey the legal title. Such a rule is probably applicable also where one interested in the title and having the right to possession is properly made a defendant in the foreclosure proceedings, whereby upon foreclosure the purchaser acquires the right to possession. In such cases a subsequent lienor or perhaps the mortgagor's grantee has only a right to redeem.

Section 853 of the code provides that the sheriff's deed, conveying property upon foreclosure, "shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor and mortgagee and shall be an entire bar against each of them, and all parties to the suit in which the decree for such sale was made, and against their heirs respectively, and all persons claiming under such heirs." The decisions of this court firmly establish that in foreclosure proceedings the pur-

chaser at a judicial sale upon foreclosure of a mortgage acquires the title of all parties to the action, and nothing more. In *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276, it is said: "And we take it to be equally well settled that the rights of all persons not parties are wholly unaffected thereby (meaning by the judicial sale). Therefore the foreclosure of the mortgage, terminating in the sale, could only affect the rights of the parties to the action. The purchase of the property by plaintiff was only the purchase of the title of the mortgagor at the time of the execution of the mortgage, and his right to redeem, leaving unaffected the after-acquired rights of the defendant." The defendant had not been made a party to the foreclosure. It seems to the author that the phrase "at the time of the execution of the mortgage," appearing above, as explanatory to the title acquired by the purchaser, was inadvisedly used. Such language is proper when used with reference to title superior to that of the mortgagor at the time of the execution of the mortgage, or where the mortgagor did not own all the title to the land mortgaged. It is apparent from the decision in *Dodge v. Omaha & S. W. R. Co., supra,* that the purchaser did not acquire all the title owned by the mortgagor at the execution of the mortgage, as the after-acquired rights of the railroad company remained unaffected.

In *Monroe v. Hanson,* 47 Neb. 30, it is said: "It is the general rule that no person can be affected by any judicial proceedings to which he is not a party, and a judgment takes effect only between the parties and gives no rights to or against third persons. * * * So a foreclosure is only effectual against those interested in the title who were parties." The case last cited was a foreclosure of a mechanic's lien, but under our statute the rights of interested parties and the necessity of making all interested parties defendants are the same in the foreclosure of mortgages. See, also, *Green v. Sanford,* 34 Neb. 363. In *Eayrs v. Nason,* 54 Neb. 143, it was said: "Appellant's father was the owner of the legal title to the land upon

which the mortgage foreclosed in that suit was a lien, and was therefore a proper and a necessary party to that suit." The appellant as her father's heir was entitled to redeem and have the title quieted in her, because her father was not made a party to the foreclosure proceeding, which was held void as to him. We have recently held that a decree affecting the title to real estate is absolutely void as to an interested party not served with process. *Payne v. Anderson,* 80 Neb. 216; *Wagner v. Lincoln County,* 80 Neb. 473. In *Hayes County v. Wileman,* 82 Neb. 662, we said: "The owner of the equity of redemption is an indispensable party to the foreclosure of a tax or other lien. *Alexander v. Thacker,* 30 Neb. 614."

We quite agree with the plaintiffs that by her deed, so far as the mortgagee was concerned, Mrs. McCreary acquired only an equity of redemption. In other words, she obtained the title which her grantor possessed. But this carried with it all rights incident to such title. She therefore had the right to pay the mortgage, and that right continues until it is either exercised or barred. The only way to bar that right, except by her voluntary act, is a foreclosure of the mortgage by proceedings wherein she is a party. At the time she received her deed and continuously thereafter she had the right to possession. The foreclosure proceedings did not deprive her of this right. There are numerous decisions, some of which are cited by plaintiffs, pertaining to the rights of mortgagees in possession. Such decisions are not in point. They refer to cases wherein the mortgagee is rightfully in possession. And, unless by special agreement to the contrary, the mortgagor or his grantee has the right of possession until ousted by a sale in foreclosure proceedings in which the one owning the right to possession is a party. During the lifetime of the mortgage it is a lien on all the interest of the mortgagor possessed by him at the execution of the mortgage, and the purchaser at the judicial sale acquires such title only in the event that the mortga-

gor's grantee to whom the equity of redemption has been sold has been made a party to the action.

The defendant's prayer was that she go hence without day, and that she be declared the owner, and that her possession be confirmed, and that she have such other and further relief as may seem meet. This, we think, was tantamount to a prayer that the title to said premises be quieted in the defendant. The district court so regarded it, and rendered a judgment decreeing the title quieted in her, confirmed her right to the immediate possession of the premises, canceled the plaintiff's deeds, and dismissed the action.

The plaintiffs contend that the maxim that he who seeks equity must do equity should be applied, and that the defendant should be required, as a condition of any affirmative relief, to pay to the plaintiffs the amount bid by their grantor at the foreclosure sale. Against this contention it is argued that the defendant was not seeking affirmative relief; but the evidence, as we have seen, shows that at the time of the commencement of the action and for some four years prior thereto the premises had been in the possession of the plaintiffs and plaintiffs' grantors, and the effect of a judgment in accordance with defendant's prayer would be to quiet her title and eject the plaintiffs from the possession of the premises. This relief the court had power to grant; but in asking the same of a court of equity the defendant subjected herself to the rules governing the administration of relief in that jurisdiction. The meaning of the maxim invoked is said to be that, "whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy." 1 Pomeroy, Equity Jurispru-

dence (3d ed.), sec. 385. "This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies." 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 388.

It is further suggested that the statute of 1907 (Ann. St., sec. 10873) prevents the application of this maxim. The provisions of that statute are that, when any lien or apparent lien on any real estate shall not be enforceable by lapse of time, the owner of such real estate shall be entitled to have his title thereto quieted against such unenforceable lien or apparent lien. It will be observed from a reading of this statute that it does not in terms forbid a court of equity from enforcing the maxim under consideration in the cases mentioned therein, and it should not be construed to authorize a court of equity to cancel an apparent lien without regard to conditions usually imposed in granting such relief.

We therefore recommend that the judgment of the district court be modified so as to require the defendant, as a condition of the relief granted to her, to pay to the plaintiffs the amount bid at the foreclosure sale, with interest thereon from the date of said sale, except for the period during which the plaintiffs have had possession of the property.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify the decree so as to require the defendant Mary B. McCreary, as a condition of the relief granted to her, to pay to the plaintiffs the amount bid at the foreclosure sale, with interest thereon from the date of said sale, except for the period during which the plaintiffs have had possession of the property.

JUDGMENT ACCORDINGLY.

FAWCETT, J., dissenting.

I am unable to concur in the conclusion reached that defendant Mrs. McCreary, as a condition of the relief

granted to her, be required to pay to plaintiffs the amount bid at the foreclosure sale. I think she is entitled to the relief without any such condition, and that her right to that relief is fully shown in the statement of facts contained in the opinion, and amply supported by the authorities therein cited. It cannot be questioned that, under the facts recited in the opinion, Mrs. McCreary could have maintained ejectment against the plaintiffs without paying or offering to pay the amount of their bid at the foreclosure sale. Under the statements contained in the opinion, which are fully supported by the record, plaintiffs were not, as against Mrs. McCreary, mortgagees in possession. At the time of the commencement of the foreclosure suit, she was the owner of the property in fee, and, as such owner, was entitled to the possession. She was not made a party to the foreclosure suit, hence her right of possession had not been cut off, or in any manner barred. In the case at bar, plaintiffs were not seeking to foreclose their lien against her, but were asserting absolute ownership and right of possession, and asking to have their title and right of possession quieted and confirmed. To this action Mrs. McCreary had a right to interpose any legal defenses without offering to do equity. If plaintiffs were seeking to foreclose their lien against her, and she was asking any equitable relief, then the maxim, "He who seeks equity must do equity," would apply. But Mrs. McCreary is not asking any equitable relief. She is not asserting any right, or asking any relief which she could not properly assert and ask in an action in ejectment. The conclusion of the court is based upon the prayer of her answer: "That she may go hence without day, and that she be declared the owner, and that her possession be confirmed, and that she have such other and further relief as may seem meet." I am unable to discover any prayer for equitable relief in that language. She does not ask the court to find and adjudge anything more than she could have established and have had determined in an action in ejectment. She had alleged in her

answer, and the evidence clearly established the fact, that more than ten years had elapsed from the execution of the sheriff's deed in the foreclosure suit on March 22, 1893, prior to the commencement of the present suit. If plaintiffs had been attempting in the present suit to foreclose the lien of their mortgage against Mrs. McCreary, this lapse of time, under section 10873, Ann. St. 1907, would have given Mrs. McCreary a complete defense to such attempted foreclosure, and I do not think the court has any right to enlarge that section of the statute by construction so as to require her to pay the amount of plaintiffs' mortgage as a condition precedent to her interposition of that statute as a defense. The maxim, "He who seeks equity must do equity," when applied in a proper case, is wholesome, and should be adhered to. It is one of the tenets of our jurisprudence. But it is apparent from the wording of the maxim itself that, before one may be required to do equity, he must be seeking equity. This means that one coming into a court of equity, asking for affirmative equitable relief, will be required to do equity in all respects pertaining to the subject matter of the litigation. One who seeks affirmative equitable relief against a lien upon his premises, although the foreclosure of the lien is barred by the statute of limitations, may be required to do equity by paying whatever is in equity due upon the lien. But the maxim does not mean that the statute of limitations may not be pleaded as a defense against the foreclosure of the mortgage. In such a case the defendant may plead the bar of the statute to defeat the foreclosure; but, if he goes further and asks for affirmative relief against the lien, the maxim may be applied. The maxim does not mean that one may not resist the demands of his adversary by interposing whatever legal rights he may have as a defense, the purpose and effect of which will be to defeat the affirmative demands of the adverse party. Were it otherwise, the statute of limitations might never be successfully pleaded as a defense in foreclosure. In the case at bar, plaintiffs are not seeking to foreclose the

lien. They claim the fee title. But, as above shown, they have, as against Mrs. McCreary, neither the legal nor equitable title. At most, they have only a barred lien. By their pleadings they do not claim any lien. They seek to have the title quieted in them. Plaintiffs argue that, in the event the title cannot be quieted in them, defendant should not be granted the relief she asks without first paying the amount bid at the judicial sale, with interest thereon. But they ask no such relief in their petition. Surely the defendant may interpose her defense to plaintiffs' action, to the extent of showing that plaintiffs are not entitled to recover, without being required to pay the mortgage which had been foreclosed more than ten years prior to the commencement of this suit in a foreclosure proceeding to which Mrs. McCreary was not made a party. Mrs. McCreary did not file a cross-petition. She did not ask equitable relief. She pleaded and established her legal defenses, and prayed that she be declared the owner and that her possession be confirmed. This cannot possibly be construed into an appeal for equitable relief. The fact that the decree granted defendant more relief than she prayed cannot change the status of Mrs. McCreary to her disadvantage. In so far as the decree attempted to quiet her title, it is not supported by the pleadings, and is erroneous. The judgment of this court should be that that part of the decree of the district court which quiets the title of Mrs. McCreary to the property in controversy, and vacates the deed from William Kerr and Elizabeth Kerr to Thomas B. Kerr, and from Thomas B. Kerr to Elizabeth Kerr, be reversed, and that in all other respects the decree stand affirmed.

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

FILED MAY 7, 1909. No. 15,586.

OPINION on motion for rehearing. *Rehearing denied.*

PER CURIAM.

On the argument of the motion for a rehearing two propositions were vigorously discussed: First, that the occupation tax, which the plaintiff asks us to declare void, is double taxation; second, that the tax is void for want of uniformity.

Considering the first proposition, we are unable to say that the ordinance results in double taxation. It is claimed that it has that effect because, in assessing the property of telephone companies for the purpose of general state and municipal taxation, the value of the property of each company is fixed by taking into consideration its tangible property, such as poles, wires, instruments, office fixtures, etc., and the value of its franchise or intangible property, and in determining that value the gross receipts of the company may be taken into consideration. The evidence in this case does not clearly and conclusively show that the plaintiff's gross receipts were taxed as such for the purposes above mentioned, but rather that, in fixing the value of the plaintiff's franchise, its gross receipts were merely taken into consideration. It is probable that to some extent a consideration of this item may result in double taxation, but we must remember that as yet no system of raising revenue has been devised which will entirely eliminate the matter of double taxation, and in this instance such taxation does not necessarily follow the enforcement of the law. Therefore this contention cannot be sustained.

On the question of lack of uniformity, which is required

* Reported in 82 Neb. 59.

by our constitution, it would seem at first blush that plaintiff's objection is well founded; but a careful examination of existing conditions does not bear out that inference. It appears that, when the plaintiff applied to the city of Lincoln to obtain its franchise or charter, an ordinance was passed granting it the privilege sought, without exacting any payment on the part of plaintiff therefor. At a later period, when plaintiff applied for the privilege of laying its wires underground, it was agreed between plaintiff and the city that it should pay to the city the sum of $500 a year for that privilege. It further appears that, when its rival, which for convenience we will call the Lincoln Telephone Company, made application for its charter, the city had become aware of the fact that it had something valuable to sell, and therefore it required, first, that that company should pay yearly to the city $500 for its franchise, and in addition thereto 1 per cent. each year of its gross receipts for the first 5 years of its existence, 2 per cent. for the second 5 years, and after that, for the remaining period of 40 years, it should pay to the city 3 per cent. of its gross receipts. Matters stood in that condition until the ordinance in question was passed, which provides that all telephone companies doing business in the city of Lincoln shall pay an occupation tax to the city each year, amounting to 2 per cent. of their gross receipts. If matters had been left in that condition, it is plain to be seen that the Lincoln Telephone Company would have been required to pay to the city, by way of taxation, a much larger sum proportionately to its business transacted than would the plaintiff company. Therefore, instead of repealing so much of the former ordinance as provided for the payment to the city of 1, 2 and 3 per cent. of the gross receipts of the Lincoln Telephone Company, it was provided by the ordinance complained of that any sum required to be paid by way of taxation, based upon gross receipts, by any company under existing ordinances might be deducted from the amount of the occupation tax in

question. This provision has been construed by the city to operate as a repeal of so much of the former ordinance as required the Lincoln Telephone Company to pay 1, 2 and 3 per cent. of its gross receipts, and so both of said telephone companies, which are the only ones doing business in the city, are placed on an equal footing. As the ordinance is interpreted by the taxing authorities, each company now pays to the city $500 a year for its franchise or right to do business, and each company pays as an occupation tax 2 per cent. of its gross yearly receipts; so that the ordinance complained of, as thus interpreted, results, as a matter of fact, in a uniformity of the occupation tax. While the inhabitants of the city may be thus afforded a cause of complaint, we fail to see any discrimination against the plaintiff herein.

For the foregoing reasons, we are of opinion that the motion for rehearing should be overruled, and it is so ordered.

REHEARING DENIED.

LINCOLN TRACTION COMPANY, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MAY 7, 1909. No. 15,741.

Taxation. The decision of the supreme court in the case of *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59, involving principles similar to those involved in this case, approved and followed.

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

Clark & Allen, for appellant.

John M. Stewart, contra.

John L. Webster and *W. W. Morsman, amici curiæ.*

REESE, C. J.

This action was originally commenced in the district court for Lancaster county by the Lincoln Traction Company against the city of Lincoln. The pleadings are quite lengthy and cannot be set out here in full. They may be fairly summarized as follows: It is alleged in the petition that plaintiff is a corporation duly organized under the laws of the state, and defendant is a municipal corporation, a city of the first class having more than 40,000 and less than 100,000 inhabitants; that on the 10th day of December, 1906, the city council of defendant by a majority vote attempted to pass an ordinance entitled "An ordinance providing for and assessing an occupation tax upon all street railway companies operating and maintaining street railway systems in said city of Lincoln, fixing the amount thereof, providing for the enforcement and collection thereof and interest and penalty for non-payment when due and payable, and designating the funds to be credited with the amount so paid"; and that the mayor of said city approved said ordinance on the 13th day of the same month. Section 2 of said ordinance is set out in the petition as follows: "Section 2. That all street railway companies operating and maintaining a system or systems of street railway in the city of Lincoln are hereby required to pay the city of Lincoln as an occupation tax the sum and amount of five per cent. (5%) of the gross receipts of said company derived from its business as a common carrier of passengers and as a street railway company within the corporate limits of the city of Lincoln, payment thereof is to be made as follows: Beginning with January 1, 1907, said company or companies shall on the 15th day of each and every month thereafter pay the city of Lincoln five per cent. (5%) of the gross receipts of said company or companies for the preceding month as hereinbefore provided, as an occupation tax, and all deferred payments shall draw interest at the rate of one per cent. (1%) per

month, and after payment has been in default for six months a penalty of five per cent. (5%) shall be added thereto in addition to the interest charge and shall be paid by said company. *Provided, however,* that any and all companies required under existing ordinances or franchises to pay a certain per cent. of the gross receipts of such company or companies to the city of Lincoln shall be credited by the city treasurer with the amount so paid by such company or companies upon the occupation tax required to be paid by such company or companies under the provisions of this ordinance, and the same shall be deducted therefrom." It is alleged that the proviso that any per cent. of gross receipts paid under existing ordinances shall be credited upon the occupation tax was enacted for the benefit of a street railway corporation known as the "Citizens Railway Company," and which owns and operates a street railway sytsem in the city of Lincoln; that that corporation derives its franchise from an ordinance of the defendant passed February 20, 1905, and approved the 27th of the same month, the title of which is to authorize the sale and transfer to said Citizens Railway Company by the mayor and city clerk of the franchise and property of the Home Street Railway Company owned by the city, and to assign the city's title and interest in a decree of foreclosure in an action pending in the circuit court of the United States for the district of Nebraska, entitled *Fidelity Loan & Trust Company of Sioux City, Iowa, as Trustee v. Home Street Railway Company;* that it was provided in the ordinance that the purchase price should be $1,000 in cash and 1 per cent. of the gross receipts of the business for 15 years, and 2 per cent. thereafter; that there are only two street railway companies in the defendant city, and no other franchises have been granted to other companies; that the ordinance imposing the occupation tax was enacted with exclusive reference to them, and the proviso that the Citizens Railway Company should be allowed credit for the per cent. of gross receipts paid the city under the ordi-

nance of purchase was the inducement to the passage of the ordinance referred to, and without which it would have failed of passage; that the ordinance violates the fourteenth amendment to the constitution of the United States because it deprives the plaintiff of equal protection of the law; that it violates section 6, art. IX of the constitution of Nebraska, because it imposes a tax that is not uniform as to the class specified; that it violates section 1, art. IX of the same constitution, because it imposes a tax for revenue and the tax is not levied by valuation and in proportion to the valuation of plaintiff's property; that the ordinance is void for the further reason that it imposes a double tax on the property of plaintiff, in that it is, in effect, a tax on the franchise, the earnings being the principal basis of the value of the franchise, and the franchise of plaintiff having already been taxed for state, county and municipal purposes by valuation for the same year; that the gross receipts of plaintiff for the year 1907 is about $350,000, and the tax imposed will amount to $17,500; that the par value of the capital stock of plaintiff is $1,030,000, upon which it pays 5 per cent. dividends annually; that taxes of the state, county and city were levied upon its property at that valuation, and in the year 1906 aggregated about $16,000; that the ordinance more than doubles the total tax levied upon valuation, and is void as unreasonable and excessive, and, if enforced, plaintiff will be unable to keep its property in repair and pay reasonable dividends; that the ordinance by its terms requires monthly payments and imposes a 5 per cent. penalty for failure to pay for each month, and also that suit may be instituted for the amount of taxes due for each month, and defendant threatens to and will commence such suits against plaintiff unless restrained by injunction, and that the issuance of such injunction is necessary in order to avoid a multiplicity of suits; that the ordinance provides that, if plaintiff fails to report its gross earnings each month, the tax shall be $2,500 for such months, and that to prevent con-

fiscation of its property it is necessary to resort to a court of equity. The prayer is for an injunction restraining defendant from enforcing the ordinance.

The answer of defendant admits the corporate capacity of both plaintiff and defendant; that the ordinance imposing the occupation tax was passed and approved as alleged; and that the provisions of section 2 of said ordinance are correctly stated. It is alleged that said ordinance is a legal and valid exercise of the power vested by law in the mayor and council of the city, and that the tax is a legal and valid liability against plaintiff. The allegation that said ordinance violates any of the provisions of the constitution of the United States or of this state is denied, and a general denial of all averments of the petition, not admitted, is entered, and defendant prays for an accounting of the amount due, and for judgment against plaintiff for the amount thus found, and that said judgment be decreed a lien upon the property of plaintiff, and that the temporary injunction be dissolved and plaintiff's action be dismissed and for general relief. The cause was tried to the district court, the result being a dismissal of the case. The findings of the court are general, to the effect that the ordinance is valid and the tax a legal liability. The final order is the dissolution of the temporary injunction before that time issued; that plaintiff file with the city clerk of defendant a detailed statement as required by the ordinance, showing its receipts, and that plaintiff pay the tax and penalty in accordance with the provisions of the ordinance. From this judgment plaintiff appeals to this court.

We have thus stated the issues formed by the pleadings in order that the questions at issue may be clearly understood and for the purpose of avoiding the necessity of re-examining many of the questions presented. In the case of *Nebraska Telephone Co. v. City of Lincoln,* 82 Neb. 59, many, if not all, the questions here presented were passed upon in an opinion by Judge LETTON. That case has been thoroughly re-examined on motion for re-

hearing, submitted after elaborate arguments upon carefully prepared briefs, and we have been unable to find that the decision should be molested. This being true, we will be excused from traversing the whole ground again. It is not deemed necessary to here state the points and issues in that decision, as it can be readily referred to, when it will be found that, by substituting the names of the parties in this case for those in that, the legal propositions involved will apply to the one as well as the other.

The ordinance imposing an occupation tax of 5 per cent. of the gross receipts of street railway companies is objected to on account of the provision that companies required by existing ordinances to pay a percentage of their receipts shall be credited with the amount so paid upon the occupation tax. A provision similar to this in its terms was passed upon under a like contention in *Nebraska Telephone Co. v. City of Lincoln, supra,* and it was held that such a provision did not render the ordinance invalid. We consider the holding upon that question in that case decisive of this, as the principle involved is the same. As viewed by the writer, the provision was a legitimate method of equalizing the burdens imposed upon the street railway companies in the nature of an occupation tax and was entirely fair, and was in no sense a discrimination against plaintiff and of which it is in no position to complain. At any rate we adhere to the decision above referred to.

The authority and right of the city to impose an occupation tax for the use and occupation of its streets and the operation of a line of business thereon is also recognized in that decision, and the authority to measure the amount of the tax by the gross earnings of the person or corporation enjoying and making use of that privilege is also maintained, and it is held that the imposition of such occupation tax measured by the gross earnings of the company occupying and using the streets as such privilege, and which franchise is also taxed in connection with its tangible property according to its value as a going con-

cern, does not tax the same property twice, and both taxes were sustained.

An able and elaborate brief has been presented by a friend of the court, which we have perused with care, but do not think it necessary here to review and distinguish the many cases cited. We think there can be no doubt of the power or right of the city, under its charter, the constitution and former holdings of this court, to impose an occupation tax upon the business of a public service corporation within its limits; that the tax may be measured by the earnings of the business, and that such tax is not upon the property. In the telephone case above cited it is said: "A business tax measured by gross earnings is a tax upon the business which is actually performed, and is not a tax upon property in any sense, while a tax levied by valuation on the right to do business is a tax upon property, irrespective of whether or not any business or occupation has been carried on. It seems clear that a property tax based upon the value of the franchise and a business or occupation tax based upon the gross earnings of a public service corporation are in nowise identical as to the subject of taxation, and do not constitute double taxation in any sense." This being true, the occupation tax being based upon, limited and governed by the earnings of the corporation cannot be considered in connection with the property tax and is not objectionable for that reason. For the same reason the 5 per cent. tax upon gross receipts cannot be said to be excessive or confiscatory.

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

AFFIRMED.

ROOT, J.

I concur in the judgment of affirmance, but not in the approval of the proviso in the ordinance levying an occupation tax on street railways. The recitals in the records introduced in evidence disclose that prior to 1905

the city of Lincoln had granted franchises to several street railway companies whose rights vested in the Home Street Railway Company. By virtue of a foreclosure suit in the United States circuit court for the district of Nebraska, those franchises and the other properties, real and personal, of the last named company were sold to said city. In February, 1905, all franchises and other property, tangible and intangible, thus acquired by said city were sold by it to the Citizens Railway Company for the consideration of $1,000 cash and 1 per cent. of the gross receipts of said company during 15 years, and 2 per cent. of said receipts thereafter. It seems plain that the city did not exercise any legislative function in said transaction. It did not grant a franchise, because the franchises it transferred had been granted theretofore to the Home Street Railway Company, the North Lincoln Street Railway Company, the Capitol Heights Street Railway Company, the Lincoln Electric Railway Company and the Lincoln Rapid Transit Company, but as proprietor sold what it had theretofore granted, plus the added permission given by the electors of the city to said various companies to operate street railways therein.

In *State v. Citizens Street R. Co.*, 80 Neb. 357, it was held that said transaction was a sale of the property rights of the city. The provision for payment of a percentage of the gross receipts was unquestionably the chief consideration moving to the city. The $1,000 cash would not have paid the expense of the elections held whereby consent was given the original holders of the franchises to operate their lines of railway.

There is nothing in the title to, or body of, the ordinance to suggest that the council was exercising legislative power. If the obligation of the Citizens company to pay for said property is not contractual, then there is no legal power to prevent the council from amending the ordinance and thereby relieve said company from paying the consideration it agreed to pay. If said obligation is not contractual, then, if the legislature should repeal the

statute authorizing the council to levy and collect occupation taxes in the city of Lincoln, the city could not collect the purchase price of said property even though it were worth thousands of dollars. The logic of the chief justice does not satisfy the writer that the right of the city to its percentage of the receipts of the Citizens Street Railway Company rests on so unstable a foundation as the discretion of the city council or that of the legislature.

The title to the ordinance sought to be enjoined provides for the levy and collection of an occupation tax upon street railways in said city. The proviso can only apply to the Citizens company, and is an attempt to modify the contract between that corporation and the city. Such legislation is not expressed in the title to said ordinance, as required by section 73, ch. 13, art. I, Comp. St. 1905, and is, for that reason, if no other, void.

The remaining part of the ordinance is complete without the proviso, and capable of enforcement. While its burdens are considerable, they are not confiscatory, and the judgment of the district court is properly affirmed.

LETTON, J.

I agree with the foregoing opinion of Judge ROOT.

JAMES E. RIGGS V. STATE OF NEBRASKA.

FILED MAY 7, 1909. No. 15,912.

1. **Intoxicating Liquors:** STATUTES: CONSTRUCTION. Sections 20, 21, and 22, ch. 50, Comp. St. 1907, provide for two separate lines of prosecution in the same case—one a criminal action for the keeping of intoxicating liquors for the purpose of unlawfully selling the same, and the other for the destruction of liquors found to have been kept for such unlawful purpose.

2. ———: DESTRUCTION: PROCEEDINGS IN ERROR. When the examining magistrate is satisfied that the person charged is guilty of

the offense of keeping liquors for the purpose of unlawful sale, he shall hold the accused to the district court to answer said charge and enter an order for the destruction of the liquors, if any have been seized. In order to prevent such destruction, it is necessary for the accused to appeal from that order, which may be done without giving bond, although a recognizance is necessary to secure defendant's liberty pending the final disposition of said case.

3. ———: ———: VERDICT. On the trial of said case in the district court, the verdict of the jury should ordinarily be "guilty" or "not guilty" as the finding may be. If, however, the jury does not find from the evidence that all of the liquor seized was held by defendant for such unlawful purpose, they may state in their verdict of "guilty" the liquors unlawfully held by the defendant, and only such liquor will be subject to destruction upon the order of the district court.

4. ———: ———: HARMLESS ERROR. In a prosecution for keeping intoxicating liquors for the purpose of selling the same in violation of law, liquors of the value of about $2,000 were seized, some of which were in barrels and some in smaller vessels down to half pint bottles, there being 141 of such bottles. The jury found defendant guilty as he was charged in the second count in the information, "except as to the bulk liquors." The court ordered that the liquor in the half pint bottles and soda fountain bottles, stamped "Don't Care," should be destroyed, and the remainder in pint and quart bottles and in larger vessels should be returned to the owner, the proof as to all the liquor kept in the smaller vessels being the same. *Held*, That the error, if any, was without prejudice to defendant, and the judgment should be affirmed.

5. ———: KEEPING FOR UNLAWFUL SALE: VERDICT: EVIDENCE. On the trial the defense sought to prove that the liquors contained in the barrels and larger receptacles were kept for purposes of manufacture, and not for sale, but no evidence of the kind was offered as to the liquors in the small vessels and bottles. *Held*, That, as aided by the legal presumption contained in the statute, this was sufficient to sustain a verdict of guilty.

6. ———: CRIMINAL PROSECUTION: LIABILITY. The criminal prosecution was instituted against R. The proof showed that the business and stock belonged to the R. Pharmacy Company, of which R. was the principal and majority stockholder, president and general manager, and that he had charge of the business both in buying and selling, the remainder of the common stock being held by his wife and her sister. *Held*, That the prosecution against him could be maintained, and that there was no fatal variance between the allegations and the proofs.

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

Halleck F. Rose and *Wilmer B. Comstock,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

REESE, C. J.

This is a proceeding in error from the district court for Lancaster county. An information containing three counts was filed in that court, charging plaintiff in error with keeping for sale certain intoxicating liquors in violation of section 20 and following, ch. 50, Comp. St. 1907. The first count charged plaintiff in error with unlawfully keeping for sale certain malt and intoxicating liquors known as beer; the second count with keeping spirituous liquors for the unlawful purpose; and the third count with keeping for the same purpose certain vinous liquors. The proceeding was instituted in the police court of the city of Lincoln, and upon search a quantity of liquors of the value of about $2,000 was seized. Upon a hearing in that court the finding was that probable cause exixsted, and the plaintiff in error was held to appear before the district court. A trial was had in that court, which resulted in a verdict finding plaintiff in error not guilty of the charges contained in the first and third counts, and guilty of the charges contained in the second count. The verdict was in the following form, omitting the title of the case: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendant not guilty as he stands charged on the first and third counts, and guilty as he stands charged in the second count, except as to the bulk liquors." A motion for a new trial was filed, which, upon being overruled, judgment was rendered upon the verdict imposing a fine of $300. It

was ordered that the chief of police, in whose possession the liquors were held, "destroy the whiskies put up in half pint bottles and soda fountain bottles, stamped 'Don't Care,'" and that he return to plaintiff in error the other liquors taken from him. The liquors seized consisted of a number of barrels and half barrels of brandy, whiskey, etc., 141 half pint bottles of whiskey, and between 700 and 800 bottles of various sizes containing more than one half pint of different kinds of liquors. The 141 half pint bottles of whiskey were ordered destroyed.

Two questions are presented for decision. It is contended by plaintiff in error, first, "that the evidence is not sufficient to sustain a conviction"; and, second, "that the verdict is too indefinite and uncertain to sustain the judgment of the court, and that the verdict is void for uncertainty."

Consulting our own convenience, we will investigate the second contention first. It is contended that the language of the verdict, "except as to the bulk liquors," is too indefinite and uncertain to warrant the entry of a judgment thereon; that there is nothing in the verdict which designates what liquors are intended by the word "bulk"; that the quantity contained in each receptacle furnishes no guide; and that the ruling or order of the district court selecting those of the smallest quantity was simply substituting the opinion of the judge for that of the jury, and that the law does not clothe the court with power or authority to "guess" at what the jury meant, they having furnished no basis for the "guess" or the judgment of the court. There can be no doubt that the verdict is somewhat indefinite as to the quantity of liquors unlawfully held by defendant, and one is led to wonder why it was received in that form. However, it is before us and the question presented asks for solution.

The sections of the statute under which the prosecution in this case was instituted contain a dual penalty. It is provided by section 20 that "it shall be unlawful for any person to keep for the purpose of sale without license

any malt, spirituous, or vinous liquors, * * * and any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license in violation of this chapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined or imprisoned as provided in section eleven" of the chapter. A violation of section 11 renders the offender liable to a fine of not less than $100, nor more than $500, or imprisonment in the county jail. The result of the two sections is that the keeping of the prohibited liquors for sale without a license is a misdemeanor for which the penalties prescribed in section 11 may be imposed. Section 20 also provides for the search of the premises where the liquors are supposed to be kept, and their seizure, if found. Section 21 provides for the examination before the magistrate before whom the warrant is returnable, and, if such magistrate is satisfied that the accused had the liquors for the purpose of unlawful sale, the defendant shall be held for trial at the next term of the district court and the liquors shall be ordered destroyed, but "the defendant may appeal from said order to the district court, in which case the liquors shall abide the result of the trial of the defendant in the district court, and if there convicted he shall be fined or imprisoned as in this chapter provided in the discretion of the court, and the court shall further order said liquors destroyed as if the appeal herein provided for had not been taken." By the provisions of these sections, it will be seen that, if the accused is held to bail for his appearance before the district court, the liquors will be destroyed unless he appeals from the order requiring their destruction. In case he does so appeal, the order is suspended until after his trial. If acquitted, it is annulled. If convicted, a new order will be entered. In effect there are two cases pending, one depending upon the result in the other. Upon the return of a verdict of guilty, the order for the destruction of such liquors as were unlawfully kept for sale

must follow, but we are satisfied that the court should exclude from its order such of the liquors as the jury found were not unlawfully held by the defendant. Upon a general verdict of guilty as the defendant is charged in any one or more counts in the information, the order would be for the destruction of all the liquors therein described. If the verdict, however, either by specific description or words of exclusion, establishes that some of the liquors were not unlawfully held by defendant at the time the warrant was served, then as a matter of course defendant would be entitled to an order directing that such liquors be turned over to him.

It is claimed that the exception in the verdict is so indefinite that the court could not lawfully order any of the liquor destroyed or fine defendant for the possession thereof. The court, however, assumed that the words of exclusion applied to all of the liquor seized other than that contained in the half pint bottles and those labeled "Don't Care." Said bottles included the smallest containers seized by the officer under the writ, and thereby gave defendant the benefit of every doubt that might be conjured from the language employed. " 'Bulk' is said to be that which is neither counted, weighed, nor measured." 1 Words and Phrases, p. 903. In our judgment the court should have ordered all of the intoxicating liquors contained in the sealed bottles destroyed, and that only the liquor in the larger receptacles was exempt under the verdict of the jury. The error, however, was without prejudice to defendant. But what effect could this error of the court have upon the judgment imposing the fine? We cannot see that it would have any, since section 20, as above quoted, makes the keeping of "*any*" liquors for unlawful sale an independent substantive offense, declaring it to be "a misdemeanor" with fine or imprisonment as the punishment. We therefore hold that the verdict of guilty furnished a sufficient basis for the imposition of the fine if upon examination the evidence is found sufficient to sustain such verdict.

As to the contention that the evidence is not sufficient to sustain a conviction, an examination of the bill of exceptions satisfies us that the contention of counsel for plaintiff in error cannot be sustained. Were it not for the provisions contained in section 20, ch. 50, Comp. St. 1907, the question presented would be a serious one, the solution of which would probably require a reversal of the judgment of the district court. That section contains the provision that "the possession of any of said liquors shall be presumptive evidence of a violation of this chapter and subject the person to the fine prescribed in section eleven, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose." This clause has been under consideration by this court a number of times with invariably the same result. In *Durfee v. State,* 53 Neb 214, we held that the possession of liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose, and that the effect of the statute "was to cast the burden upon the person having intoxicating liquors in his possession to establish that they were not kept for sale in violation of law." This was followed by a similar holding in *Peterson v. State,* 63 Neb. 251; *Steinkuhler v. State,* 77 Neb. 331, and *Yeoman v. State,* 81 Neb. 252.

The testimony shows that a large quantity of prohibited liquors were found in plaintiff in error's place of business. Some of said liquors were in barrels, some in half barrels, and a great quantity in smaller vessels down to the 141 half pint bottles hereinbefore referred to. Considerable of evidence was introduced upon the defense for the purpose of showing that the business of plaintiff in error was that of a manufacturing pharmacist and druggist, and that the said liquors were kept in stock for use in manufacturing medicines, elixirs, extracts, etc.,

but was not kept for the purpose of illegal sale. This evidence cannot be applied to the liquors kept in small sealed bottles such as described. A manufacturing concern of the grade and extent of plaintiff in error's business and trade cannot be presumed to keep and maintain its stock of supplies in that way. Moreover, there was no evidence submitted by which it was sought to prove that fact. Those smaller vessels seem to have been practically lost sight of on the trial. It is true that plaintiff in error established the fact that prior and up to the 10th day of May, 1907, he had a druggist's permit to sell intoxicating liquors for the purposes specified in said permit. It was contended by him that the greater part of the liquors were purchased by and delivered to him during the existence of said permit, and that what liquors he purchased shortly before the expiration of his permit were purchased in the expectation that a new permit would be granted him from the date of the expiration of his then existing permit until the end of the year, which would be in April, 1908, but that the permit for 1907-1908 was refused, and he was left with the liquors on hand, which he refused to sell after the expiration of his permit. The evidence shows, however, that quite large consignments were received by him after the expiration of the permit expiring May 10, 1907, and it is claimed that they were stored in the basement of the drug store of plaintiff in error to be used for legitimate purposes, but not for unlawful sale. The evidence did not show any specific sales of spirituous liquors after the expiration of the 1906-1907 permit. While the prosecution must assume the burden of proving beyond a reasonable doubt that the liquors were in the possession of the accused, the proof of that fact casts the burden upon him to prove that they were not kept for the purpose of unlawful sale. It was within the province of the jury to consider all the facts shown by the evidence as tending to throw light upon the purpose for which the liquors were kept, and in so doing would necessarily have to consider

the manner in which the liquors were stored and kept. They could not close their eyes, as sensible and intelligent men, to the great number of small bottles, such as would be used in retail trade, found in the possession of plaintiff in error. To say that such bottled quantities were kept for manufacturing purposes would be to question the intelligence of the jury. The fact that none of that class had been sold, while tending to show an observance of the law, would not necessarily overcome the legal presumption that the *purpose* for which they were kept was unlawful. This was a question alone for the jury to consider.

It is further contended that the conviction cannot stand for the reason that the proof showed that the liquors were the property of the Riggs Pharmacy Company, and not of plaintiff in error. The evidence was conclusive that plaintiff in error was the owner of a majority of the stock of the company; that he was its president and general manager, had charge of its business, made contracts and purchases, and was the sole responsible person in charge and possession of the liquors as well as the general business of the house. His wife and her sister were with him the owners of all the common stock which controlled the business, all of which was under his constant care and supervision. This could not exonerate him.

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

AFFIRMED.

ROSE, J., not sitting.

STATE, EX REL. WILLIS D. OLDHAM, RELATOR, V. JAMES R. DEAN, RESPONDENT.

FILED MAY 7, 1909. No. 16,073.

1. **Constitutional Law:** AMENDMENTS TO CONSTITUTION: CANVASS OF RETURNS. Section 4 of the act of 1877 (laws 1877, p. 114), while in force, considered in connection with section 4, art. V of the constitution, required the canvass of the vote of the people upon the question of the adoption of proposed amendments of the constitution to be made by the speaker of the house of representatives in the presence of a majority of each house of the legislature, who were required to assemble in the hall of the house of representatives for that purpose.

2. ———: ———: RETURNS. Section 4, art. V of the constitution, requires the returns of every election for officers of the executive department of the state to be sealed up and transmitted by the returning officers to the secretary of state, directed to the speaker of the house of representatives. Section 4, ch. 3, Comp. St. 1907, requires the returns of an election upon proposed constitutional amendments to be made to the board of state canvassers, directed to the secretary of state.

3. ———: ———: CANVASS OF RETURNS. There being no specific provision for the canvassing of the returns of election on constitutional amendments and no provision for such returns to be transmitted to or lodged elsewhere than with the board of state canvassers, *held* it was the duty of said board to canvass the returns.

4. **Statutes:** ENACTMENT: EVIDENCE. "The enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of its due enactment." *State v. Frank*, 60 Neb. 327.

5. ———: ———: ———. "The silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law." *State v. Frank*, 60 Neb. 327.

6. ———: ———: ———. Act of April 5, 1895 (laws 1895, ch. 4), *held* to have been legally enacted, and "not invalidated because of silence of senate journal as to concurrency in a formal amendment by the house." *State v. City of Wahoo*, 62 Neb. 40. Said act repealed section 4 of the act of 1877, *supra*, and placed the duty of canvassing the vote on constitutional amendments with the board of state canvassers, and which act was in turn amended and repealed by the act of 1897 (laws 1897, ch. 5).

7. Elections: EXECUTIVE STATE OFFICERS: CANVASS OF RETURNS. The canvassing of an election for executive state officers imposed upon the speaker of the house of representatives is a duty especially enjoined upon him resulting from his office as such speaker, and is a ministerial duty to be performed by him in the presence of a majority of the members of each house. When such votes are duly canvassed by him, his duties are at an end.

8. Constitutional Law: AMENDMENTS TO CONSTITUTION: CANVASS OF RETURNS. The law does not permit the returns of election on proposed constitutional amendments to be removed from the office of the secretary of state, and does not confer upon the speaker of the house any authority or power to canvass such returns.

9. ———: ———: ———. A joint meeting of a majority of the members of each house to witness the canvass of votes by the speaker of the house possesses no legislative authority, and cannot create or impose duties or obligations upon executive state officers where none existed before, nor can it canvass election returns or declare the result.

ORIGINAL application in the nature of *quo warranto* to determine the right of respondent to the office of judge of the supreme court. *Judgment for respondent.*

T. J. Mahoney and *Joel W. West,* for relator.

Irving F. Baxter, James H. Van Dusen, C. C. Flansburg and *W. W. Morsman, contra.*

REESE, C. J.

This is an action in the nature of a *quo warranto,* instituted by the relator, Willis D. Oldham, and against the respondent, James R. Dean, for the purpose of testing the right of said Dean to the office of judge of the supreme court. Sufficient facts are alleged in the information and answer to show the eligibility and competency on the part of both relator and respondent to hold said office if legally appointed thereto, and the only question is as to which of the parties received the legal appointment. So far as the facts involved in the case are concerned, there is practically no dispute. It is

shown by the pleadings and the agreements of counsel made on the argument of the case at the bar of the court, as well as by the public history of the state, that the legislature of 1907 duly submitted to the electors of the state a proposition to amend the state constitution so as to increase the number of judges of said court from three to seven members. At the general election of 1908, held November 3 of that year, the amendments submitted by the action of the legislature were duly adopted by the vote of the people, the returns duly certified to by the several county clerks and forwarded to the state board of canvassers, and the said board, of which the governor was a member, canvassed the vote, the result being announced by proclamation by the governor, who, soon thereafter, appointed four members of the court, all of whom accepted and duly qualified and entered upon the duties of the office. One of the appointees resigned the next day after his qualification, and the respondent was appointed to fill the vacancy.

The amendment made it the duty of the governor making the appointment to appoint two judges for one year and two for three years. Doubts having arisen as to the authority of the state canvassing board to canvass the votes upon the subject of the adoption of the amendments, the joint convention of the legislature of 1909 made a demand upon the secretary of state that the returns sent the state canvassing board be submitted to that body in order that the vote be there canvassed, but which the secretary refused to furnish, claiming that the returns were required to be kept in his office as a part of the records thereof. A copy of the tabulated returns, as issued by his office in printed form, was procured with his certificate attached showing that it was practically a correct copy of the result of the vote as canvassed by the state canvassing board. A canvass was made by the joint convention, the result declared, and the newly elected governor issued his proclamation declaring the amendments adopted. He then appointed four members

of the court, two of whom were of those appointed by the former governor. The relator was appointed for the term of one year, who took the required oath and demanded the office of respondent. It will be seen, therefore, that it is conceded that the constitutional amendments were duly and legally adopted by the necessary majority of the votes cast at the election in November, 1908, and that the amendments submitted are now, and have been since the casting of the votes on election day, a part of the constitution. It is also admitted that the judges holding under the first appointment are, and have been since their qualification, officers *de facto*, and that their acts are not void; but it is claimed that while the office existed they were irregularly and illegally appointed, and relator, having received his appointment after the canvass in the joint convention, is now entitled to the office. The whole case turns upon the question as to which was the legal canvass, proclamation and appointment. During the year 1908 Honorable George L. Sheldon was the duly elected and acting governor of the state. At the November election of that year Honorable Ashton C. Shallenberger was duly elected to said office and entered upon the discharge of the duties thereof on the 7th day of January, 1909.

Section 1, art. XV of the constitution, provides that either branch of the legislature may propose amendments to that instrument, and, after due publication of the required notice, the same shall be voted upon at the next election for members of the legislature, and, if a majority of the electors voting at said election adopt such amendments, they shall become a part of the constitution. In the year 1877 the first session of the legislature after the adoption of the constitution passed an act entitled "An act to provide the manner of proposing amendments to the constitution, and submitting the same to the electors of this state." Laws 1877, p. 114. The provisions of that act followed those of the constitution, except that it dealt more in detail with procedure, and we are not

interested in its provisions, except as to the fourth and fifth sections thereof, which are as follows:

"Section 4. Public notice that the proposed amendment or amendments is, or are to be voted upon, shall be given in each county in the same manner as is or may be required by law regulating general elections, and the returns shall be made and the votes canvassed in the same manner and by the same officers as is or may be required by the law in the case of electing the executive officers of the state.

"Section 5. If a majority of the votes cast at the election herein provided for, be for the proposed amendments, the governor, within ten days after the result is ascertained, shall make proclamation, declaring the amendments to be part of the constitution of the state."

It will be observed that by section 4 it was provided that the votes upon a proposed amendment should be "canvassed in the same manner and by the same officers as is or may be required by the law in the case of electing the executive officers of the state." As the votes cast for such officers are canvassed by the speaker of the house in the presence of a majority of the members of each house, it is clear that by that section the votes cast upon the proposed amendment should be canvassed in the same way. Section 4, art. V of the constitution, requires the returns of every election for the officers of the executive department to be "sealed up and transmitted by the returning officers to the secretary of state, directed to the speaker of the house of representatives, who shall, immediately after the organization of the house, and before proceeding to other business, open and publish the same in the presence of a majority of each house of the legislature, who shall, for that purpose, assemble in the hall of the house of representatives." This provision of the constitution was elaborated by the act of 1877 (laws 1877, p. 143), and, so far as returns for election of state executive officers are concerned, was practically a restatement of the provisions of the constitution above quoted.

Section 4 of this act created the state canvassing board, consisting of the governor, secretary of state, auditor of public accounts, treasurer and attorney general, and provided that they should within 20 days next succeeding an election "proceed to open and canvass all returns directed to the secretary of state." The governor was made *ex officio* president of that board, and it became his duty to "open and publish the returns made, and the person having the highest number of votes cast for either of the offices voted for, shall be declared duly elected, and the governor shall immediately issue certificates of election to the persons thus elected." (Sec. 5.) So far as we are able to ascertain, the law remained unchanged upon these subjects until the year 1895, when Senate File No. 287, being "An act to amend section four (4) of chapter three (3) of the Compiled Statutes of Nebraska," was passed and, as claimed by respondent, became a law. As this act was intended as an amendment of section 4 of the act of 1877, above herein copied, we give the amendatory section in full.

"Section 4. Public notice that the proposed amendment or amendments are to be voted upon shall be given as provided in section 1 of article 17 (15) of the constitution of this state and the returns shall be made and the votes canvassed in the same manner and by the same officers as now required by law in the case electing of presidential electors, judges of the supreme court and district courts and regents of the state university." Laws 1895, p. 69.

As by the act of 1879 (laws 1879, p. 240), and which is still the law, the canvass of votes cast for presidential electors, judges of the supreme and district courts and regents of the university is to be made by the board of state canvassers, the act of 1895, if valid, took away from the speaker of the house the duty of canvassing the vote on constitutional amendments and cast it upon the state canvassing board. The section (Comp. St. 1893, ch. 3, sec. 4) was the same section as section 4 of the act of 1877.

It is contended by relator that the act of 1895 was not constitutionally passed by the legislature, and that therefore it was void, and the law of 1877 requiring the vote on constitutional amendments to be canvassed by the speaker of the house is still in force. The record of the passage of the act of 1895 may be briefly stated as follows: The bill (Senate File No. 287), entitled "A bill for an act to amend section four (4) of chapter three (3) of the Compiled Statutes of Nebraska," was introduced in the senate and regularly passed, the record showing all necessary steps to have been taken. It is conceded that up to that time the record is complete and regular. It was then certified to the house, where the usual formalities were observed until it came to the vote on its passage. At that time a motion was made that it be "recommitted to the committee of the whole for the purpose of adding a repealing clause of the section amended." The motion prevailed, and the house resolved itself into a committee of the whole house. The committee arose and reported back the bill, with the same title as before, with the recommendation that "it pass as amended." The bill was then regularly passed and returned to the senate. The message from the chief clerk of the house was as follows: "I am directed by the house to inform your honorable body that they have passed the following bills: Senate File No. 287, a bill for an act to amend section four (4) of chapter three (3) of the Compiled Statutes of Nebraska." We find no further record made by the senate until the report of the committee on engrossed and enrolled bills, which was: "We have carefully examined and compared Senate File 287, a bill for an act to amend section four of chapter three of the Compiled Statutes of Nebraska, and find the same correctly enrolled." The act was regularly signed by the presiding officers of each house and reported to the governor who gave it his approval.

The question here is: Does the failure of the senate journal to show any action by that body upon the amend-

ment by the house, adding the repealing clause, render the act invalid? It is said by the relator that "the decisions of this court have put beyond debate the following propositions: (1) The enrolled bill signed by the governor, and filed in the office of the secretary of state, is *prima facie* evidence of the legislative enactment. (2) The enrolled bill may be impeached, and the *prima facie* evidence furnished by it entirely destroyed, by the journals showing that the bill was not constitutionally enacted. (3) Where the journal is mutilated, or partially destroyed, or pages missing at such parts as would probably disclose the action of the legislature, evidence *aliunde* may be received to support the *prima facie* case made by the enrolled bill, and in such case, or if there is evidence of negligence in the manner of keeping the journal, the silence of the journal will not be accepted as conclusive evidence of the want of action by the legislature." It is also said in his brief that he finds no mutilation of the journal of either house, no carelessness in the manner in which they were kept, every step reported in its logical and proper order, the title of the bill always set forth in the same identical words and figures, and that everything about the journal indicates that it is a perfect record and speaks the absolute truth as to the proceedings of each house. It is therefore argued that this condition clearly shows that the senate took no action upon the amendment added by the house and did not concur therein, and therefore the bill was not legally passed and is void.

It is contended by the respondent: (1) That the mere silence of the senate journal upon the matter referred to, when considered in connection with the report of the senate committee on engrossed and enrolled bills, the signing of the bill by the presiding officers of the two houses and the approval by the governor raises no presumption that the bill was not legally passed, nor that this amendment was not concurred in by the senate, but that the well-recognized presumption growing out of

these facts, that the act was legally passed, must prevail. (2) That there is no law, constitutional or otherwise, requiring that the specific fact of such concurrence be shown by the record.

A brief review of the cases decided by this court discloses the following: In *State v. McLelland,* 18 Neb. 236, it was held that, where an act was passed by both houses providing that in counties of 15,000 inhabitants the office of register of deeds should be created, and the bill as enrolled and signed by the governor caused the change to be made in counties containing 1,500 inhabitants, the act was invalid because the bill signed by the governor had never been passed by the legislature, and the one passed had not been signed by the governor. The opinion is of considerable length and shows that at common law the bill as signed furnishes conclusive evidence that it was regularly passed, but that the provisions of the state constitution permit an investigation of the journals for the purpose of ascertaining if the requirements of that instrument have been complied with.

In *State v. Moore,* 37 Neb. 13, where a bill appropriating $15,000 for a specified purpose passed both houses, but by a clerical error of an enrolling clerk the figures were changed to $25,000, for the purpose named, and in that condition signed by the presiding officers of both houses and approved by the governor, it was held that the bill appropriated $15,000, and that the journals might be consulted for the purpose of ascertaining the facts, and that the enrolled and engrossed bills as signed by the presiding officers and the governor constituted *prima facie* evidence that they were duly passed in the condition in which they appear. In the opinion, while discussing the question of the right of the house to amend a bill which it had passed and which had been sent to the senate where it was amended and returned for concurrence, it is said: "We do not understand, however, that, as to the mere routine of parliamentary business, courts are required to interfere with legislative proced-

ure, where no substantive requirement of the constitution has been violated. The signature of the officers of the respective branches of the legislature, attesting the due passage of the bill in question, precludes an inquiry in that direction."

In *In re Granger*, 56 Neb. 260, it was held that it was not competent to impeach the proceedings of the legislature by contradicting the journals of the house and senate and the facts proper to be inferred from the approval of the governor and the attestation of the bill by the officers of both branches of the legislature, and, in writing the opinion, Commissioner RYAN quotes with approval the following from *State v. Francis*, 26 Kan. 724: "In our opinion, the enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. * * * If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid."

In *Webster v. City of Hastings*, 56 Neb. 669, Commissioner RYAN, in writing the opinion, reluctantly followed the rule theretofore adopted in this state that the certificate of the presiding officer of the house over which he presided is merely *prima facie* evidence of the fact, and that evidence may be received to ascertain whether or not the bill actually passed; but Commissioner IRVINE presented a strong dissenting opinion, concurred in by Judge SULLIVAN, holding that "the enrolled act deposited with the secretary of state and bearing the certificates of the presiding officers of the two houses and the approval of the governor is the final and unimpeachable evidence

not only of the terms of the act, but of the fact of its due enactment."

In *State v. Abbott,* 59 Neb. 106, it was held that the enrolled bill, authenticated by the proper officers of the house and approved by the governor, and the journals of the houses are the only competent evidence in a controversy in regard to the due passage of the bill. This precise question here does not appear to have arisen in that case.

In *Webster v. City of Hastings,* 59 Neb. 563, it was held that the due authentication and enrollment of a statute affords only *prima facie* evidence of its passage; that the legislative journals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution; that, if the entries found in such journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail; and that such journals kept in obedience to the command of the constitution are the best evidence of what affirmatively appears in them regarding the enactments of a law.

In *State v. Frank,* 60 Neb. 327, one of the questions presented was as to whether the silence of the journal was conclusive evidence of the non-existence of a fact which ought to be recorded therein regarding the enactment of the law, and Judge SULLIVAN, in writing the opinion, after citing the cases above referred to, says: "These cases hold that the records of the lawmaking body may be looked into for the purpose of ascertaining whether a statute has been constitutionally enacted; but they do not decide, or give countenance to the claim, that the silence of the journals, or either of them, is conclusive evidence of the non-existence of any fact which ought to be recorded therein. What they decide is that the journals are unimpeachable evidence of what they contain; not that their silence convicts the legislature of having violated the constitution. Every presumption is in favor of the regularity of legislative proceedings, and it is rather

to be inferred that the journals are imperfect records of what was done, than that the legislature failed to perform the more solemn and important duties enjoined upon it by the constitution. In *Ex parte Howard-Harrison Iron Co.,* 119 Ala. 484, 24 So. 516, cited in *State v. Abbott,* 59 Neb. 106, it is said: 'Of course the presumption is that the bill signed by the presiding officers of the two houses and approved by the governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So, here, it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate and were not concurred in by the house.' The enrolled bill has its own credentials; it bears about it legal evidence that it is a valid law; and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly, is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable. * * * Counsel for Frank insist that it is the duty of this court to take judicial notice of the legislative journals, and that a finding contrary to our judicial knowledge cannot stand. They also contend that, since the house journal does not show the yea and nay vote upon the final passage of the bill, we are bound to declare, without further inquiry, that the constitutional requirement was not observed, and that the law is, therefore, null. In other words, respondent's position is that we must look in the office of the secretary of state for a record of the vote, and, if we do not find it, must say that it does not exist now, and that it never did exist. We are not willing to go quite so far for the purpose of overthrowing a duly authenticated act of the

legislature." A rehearing was granted in that case, and the opinion thereon, by Judge NORVAL, is found in 61 Neb. 679, but no new light is thrown upon the question discussed in the first opinion, except a more complete demonstration, if possible, that the journals were so mutilated as to render them of no force in support of the contention that the bill had not been regularly enacted.

In *State v. City of Wahoo,* 62 Neb. 40, one of the questions presented was whether the silence of the senate journal upon the matter of the concurrence by that body, in an amendment by the house, would render the act invalid. The court, by Commissioner HASTINGS, say: "It is next asserted that the act of March 10, 1885, was not constitutionally passed, because it was amended in the house by inserting a repealing clause, and this was not concurred in by the senate. The journals of the house and senate are appealed to in order to sustain this contention. It is not claimed that the senate journal shows a non-concurrence in this formal amendment. It is merely claimed that an inspection of the journal fails to show a concurrence, and this is sought to be helped out by a showing that the message of the house to the senate stating the passage of the act calls attention to no amendment. We think that this condition of things hardly calls for a reversal of the lower court's finding. The holding in *State v. Frank,* 61 Neb. 679, is that the silence of the journal is not to be taken as conclusive that the act was not passed. The rehearing opinion rests that decision chiefly upon the doubtful and mutilated condition of the journal. *Hull v. Miller,* 4 Neb. 503, dwells upon the distinction between mere silence of the journals and an affirmative showing that the constitution has not been complied with. The evidence in this case certainly shows a degree of carelessness in the journals that would amply justify the court in refusing to take their mere silence against the affirmative evidence of the signed and certified acts."

In *Hull v. Miller,* 4 Neb. 503, referred to in *State v.*

City of Wahoo, supra, it was held that where a bill originated in and was passed by the senate, and was then passed by the house with amendments and returned to the senate who concurred therein, but the vote on concurrence was not disclosed by the journal, the act was valid. In the opinion it is said: "But it will be observed that the provision of the constitution above quoted (the taking and entering upon the journal of the yeas and nays) refers only to the vote on the passage of bills. There are numerous other votes necessary during the progress of a bill to its third reading, to which it has no sort of reference whatever."

In *Colburn v. McDonald,* 72 Neb. 431, it was held that the enrolled bill, signed by the officers of both houses and approved by the governor, as found in the office of the secretary of state, is *prima facie* evidence of its due enactment; that the journals may be looked into for the purpose of ascertaining whether the law was properly enacted, but the silence of the journals is not conclusive evidence of the non-existence of a fact which ought to be recorded therein regarding the enactment of a law; and that it must be made to affirmatively appear by such journals that the act did not pass. The same rule is clearly stated in *Stetter v. State* 77 Neb. 777, and in *Stratton v. State,* 79 Neb. 118, where it is said: "But, where the legislative journals are silent, this will not be taken as evidence that the constitutional requirements were not observed."

Other cases, no doubt, might be cited from the reports of this state, and many more from those of other states, but we deem it unnecessary to do so. From these cases we deduce the rule that the duly certified act of record in the office of the secretary of state raises the *prima facie* presumption that all steps required by the constitution in its passage have been duly observed and followed; that the journals of the houses may be resorted to for the purpose of showing affirmatively that such was not the fact, but that the mere silence of the journal, aside from

what the constitution specifically requires it to contain, is no proof that the action was not taken. As the constitution does not require that the fact of the concurrence of the senate in the house amendment shall appear of record in the journal, the act must be presumed to have been duly passed. We therefore hold that the act of 1895 became a valid law, and that, under it, it became the duty of the state canvassing board to canvass the returns of the vote on proposed constitutional amendments.

The law as it then stood was again amended in 1897, by chapter 5 of the laws for that year, and the act of 1895 was thereby repealed. By that act (1897) it was made the duty of the county clerks to make return of the vote on constitutional amendments to the board of state canvassers "provided for in section 53 of chapter 26 of the Compiled Statutes of 1895, in the same manner and within the same time that they are required to make return of votes cast for officers mentioned in said last-named section and all such returns shall be directed to the secretary of state and transmitted to him in a separate envelope from the one containing the abstract and return of votes cast for the officers named in said section. The returns from the election officers shall be canvassed by the county canvassing board which canvasses the other election returns in the county. The said canvassing board of the county shall foot up from the returns made by the judges and clerks of election, (1) the number of electors voting at the election, (2) the number of electors voting at said election for the amendment or amendments, (3) the number of electors who voted against the amendment or amendments, (4) the number of electors voting at said election who voted for senators, (5) the number of electors voting at said election who voted for representatives, (6) the number of electors voting at such election who voted for both senators and representatives, and shall enter their findings in the book wherein the canvass of other election returns is made and

from the findings so made the clerk shall make the returns to the state board of canvassers as hereinbefore provided." It will be observed that by this act its provisions are limited to the duties of the respective judges and clerks of election, county clerks and county canvassing boards, in the matter of the canvass of returns on constitutional amendments. Section 53 of chapter 26, referred to in the act, provides for the canvass of the returns of votes cast for presidential electors, judges of the supreme and district courts and regents of the university, by the board of state canvassers, consisting of the governor, secretary of state, auditor of public accounts, treasurer and attorney general, but no reference is made to the subject of canvassing the vote on constitutional amendments. The act of 1897, was amended by the act approved April 6, 1907 (laws 1907, ch. 1), but no change was made, with the exception of the elimination of the fourth, fifth and sixth requirements as to the duties of the election officers and county clerks upon the same subject. We find no specific provision anywhere for the state canvass of returns of votes upon the question of constitutional amendments.

The condition of the law is that the returns from the different counties upon the subject shall be sent to the state canvassing board, and from thence they go no further. There is nothing requiring them to be sent to the speaker of the house, as in the case of the executive state officers, members of congress and United States senators, and we find no provision requiring the secretary of state or other officer to forward them to him. They are required to be sent to the state canvassing board, and there they must rest. In this condition of the law, we are driven to seek the intention of the legislature, to be derived from what it has said as to the canvass of those returns and by whom. There can be no doubt but that it was intended that they should be canvassed by some one in order that the result of the election and choice of the people should be made known. The creation of the state

canvassing board was for the sole purpose of canvassing returns, although their specific duties were to canvass the returns mentioned in section 53 of chapter 26. The law required the returns to be sent to them. The governor was a member of that board. As we have seen, it is provided by section 4, ch. 3, Comp. St. 1907, that the returns are to be made "to the state board of canvassers" by the county clerks, and by section 5 of the same act it is the duty of the governor to issue his proclamation declaring the result of the election. When we remember that there is no other body or tribunal to whom those returns are to be transmitted, that they are required to be lodged with the state canvassing board, and not elsewhere, that they became a part of the records in the office of the secretary of state, and, so far as any provision of their removal is concerned, there they must remain, we are driven to the conclusion that it was the intention of the legislature to impose the duty of canvassing them upon that board, and that the canvass made by it was in all things legal and valid.

The claim of relator to the office in dispute is based upon the proceedings of the joint conventions of the two houses of the legislature held on the 6th and 12th day of January, 1909, and our attention is urgently directed to those proceedings. On the 6th of January (the first session) the following announcement was made by the president: "Gentlemen of the joint assembly: In accordance with the provisions of section 4, article 5 of the constitution of this state, we have met in joint convention to witness the opening and listen to the publishing by the speaker of the house of representatives of the returns of the votes cast at the general election held on the 3d day of November, 1908, for officers of the executive departments, members of Congress, railway commissioner and the vote on the constitutional amendments." Section 4, art. V of the constitution, is as follows: "The returns of every election for the officers of the executive department shall be sealed up and transmitted by the returning offi-

cers to the secretary of state, directed to the speaker of the house of representatives, who shall, immediately after the organization of the house, and before proceeding to other business, open and publish the same in the presence of a majority of each house of the legislature, who shall, for that purpose, assemble in the hall of the house of representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more have an equal and the highest number of votes, the legislature shall, by joint vote, choose one of such persons for said office. Contested elections for all of said offices shall be determined by both houses of the legislature by joint vote, in such manner as may be prescribed by law."

Just where or how the president obtained his authority for declaring that the convention had met for the purpose of listening to the opening and publishing of the returns of votes cast "on constitutional amendments," we are not informed. It is clear that no such authority is given in the section of the constitution referred to or elsewhere, and it must be equally clear that the declaration of the presiding officer could not confer such authority. The record recites: "Whereupon the speaker directed the secretary and chief clerk to open the seals of returns from the several counties of the state." It is plain that the returns of the vote on constitutional amendments were not then before the convention or in its possession, for one of the members offered the following motion: "I move that the secretary of state be required to forthwith lay before this joint convention the returns made to his office by the county clerks of the votes cast at the election in November, 1908, on the proposed amendment to the constitution of the state in reference to the judiciary." Another member moved to amend "by moving that we proceed to canvass the vote on state officers and congressmen." The convention then took a recess until 3 o'clock P. M. It reconvened at that hour, when the following amendment to the last motion was offered by another

member: "I move as an amendment that the joint convention proceed to canvass the votes for state officers and congressmen, at the election held November 3, 1908, and that the canvass of the vote on constitutional amendment relating to the judiciary be taken up and disposed of at a future joint convention of the two houses of the legislature, to be arranged for Tuesday, January 12, 1909, at 2 o'clock P. M., and, when the convention adjourn, it adjourn to that time." This substituted motion was declared carried. The original motion, as amended, was put to vote and declared carried. The secretary of state then presented the original abstracts of votes cast by the counties at the general election of November 3, 1908, for officers of the executive department and members of congress. "Whereupon the speaker directed the secretary and chief clerk to open the seals of returns from several counties of the state and on conclusion of the canvass the names of the state officers and congressmen shown to be elected by the returns." The joint convention then adjourned to Tuesday, January 12, 1909, at 2 o'clock P. M. On January 12 the joint convention reconvened, when the motion of a member requesting the secretary of state or his deputy "to forthwith lay before the joint assembly the returns made by the county clerks of the several counties to the state board of canvassers on the proposed amendments to the constitution, etc., was carried." "A letter from the secretary of state, in which he declined to grant the request of the joint convention until so directed by a court of competent jurisdiction was then read." From what follows in the record before us, we infer that there was then presented "the printed abstract of votes prepared by the secretary of state following the canvass made by the state board of canvassers," to which was appended the following certificate (with official seal attached): "I, Geo. C. Junkin, secretary of state, of the state of Nebraska, do hereby certify that the attached abstract of votes cast at the general election held November 3, 1908, is practically a true copy of the

abstract as canvassed by the state canvassing board, consisting of Governor Sheldon, Secretary of State George C. Junkin, Auditor of State E. M. Searle, Jr., State Treasurer L. G. Brian, and Attorney General W. T. Thompson."

A resolution was then offered which, notwithstanding its length, we here copy: "Whereas, the legislature of the state of Nebraska, in its thirtieth session, to wit, in the year 1907, submitted to the electors of the state two proposed amendments to the constitution of the state to be voted on by the electors at the election to be held on the 3d day of November, 1908, to wit; a proposed amendment to sections two (2), four (4), five (5), six (6) and thirteen (13) of article six (6) of the constitution of the state of Nebraska relating to judicial powers, which proposed amendment was made in a bill known as Senate File No. 386, and another proposed amendment to section nine (9), article eight (8) of the constitution of the state of Nebraska, relating to the investment of funds of the state for educational purposes, which last mentioned amendment was made in a bill known as Senate File No. 163, both of which bills were duly passed by said legislature, and said amendments thereby submitted to the electors of the state to be voted on at said election on November 3, 1908; and Whereas, said election was held and the said amendments voted on at said election and the canvass thereof made by the election officers in the several counties, and the county canvassing boards of the several counties canvassed the votes on said amendments in their respective counties, and the county clerks of the several counties transmitted the returns to the state board of canvassers as provided by law; and Whereas, said returns on said amendments are now on file in the office of secretary of state as required by law and are in his custody as such secretary of state; and Whereas, there was no authority in the state board of canvassers to canvass the returns of the votes on said two proposed amendments to the constitution of the state; and Whereas, this

joint convention of the thirty-first session of the legislature of the state of Nebraska has met in accordance with the provisions of the constitution and the laws of this state for the purpose of canvassing the vote on said two propositions to amend the constitution and has duly demanded of the secretary of state in whose custody the returns of the several county clerks aforesaid are, and the secretary of state has refused to produce to this convention the said returns; and Whereas, there has been produced before this joint convention a duly certified copy of the records in the office of secretary showing the number of electors who voted at said election, the number of electors who voted for the said amendments separately and severally, and the number of electors who voted against said amendments separately and severally, which certificate is under the hand of the secretary of state with the great seal of the state of Nebraska thereto attached; and Whereas, it appears from the returns made to the state canvassing board that the number of electors voting at said election at which said amendments were submitted, to wit, on the 3d day of November, 1908, was 271,491, and the number of electors at said election who voted for the proposed amendment first mentioned above, to wit, the amendment to section two (2), four (4), five (5), six (6) and thirteen (13) of article six (6) of the constitution of the state of Nebraska relating to judicial powers was 214,218, and the number of electors voting at said election against said last mentioned proposed amendment was 16,271; and the number of electors voting at said election for the proposed amendment to section nine (9) of article eight (8) of the constitution of the state of Nebraska was 213,000 and the number of electors voting at said election against said last named amendment was 14,395: Now, therefore, it is hereby declared, found and made of record in these joint proceedings by this joint convention from the records in the office of secretary of state relating to said election of November 3, 1908, and from the certified copy aforesaid,

that at said election 271,491 electors voted; that at said election 214,218 electors voted for the proposed amendment to sections two (2), four (4), five (5), six (6) and thirteen (13) of article six (6) of the constitution of the state of Nebraska, and that 16,271 electors voted against said last proposed amendment to the constitution; that at said election on November 3, 1908, 213,000 electors voted for the amendment proposed to section nine (9) of article eight (8) of the constitution of the state of Nebraska relating to the investment of funds of the state for educational purposes, and that at said election 14,395 electors voted against said last-mentioned proposed amendment to the constitution. And it is further declared that by virtue of the power reposed by the constitution and laws of this state in this joint convention of the house of representatives and members of the senate of the state of Nebraska, and the canvass by this joint convention of the election held on the 3d day of November, 1908, within and for the state of Nebraska, the proposed amendment to the constitution submitted to the electors of the state by Senate File No. 386 and relating to judicial powers was duly adopted by the electors of the state and has thereby become a part of the constitution of this state; and that the proposed amendment to the constitution of the state submitted in Senate File No. 163 aforesaid was at said election held on November 3, 1908, duly adopted by the electors of the state and that amendment has also become a part of the constitution of this state."

"The following motion was offered: 'I move the foregoing be entered of record as the judgment of this joint convention.' Upon request of representative Nettleton the roll was called. Twenty senators voted in the affirmative, thirteen in the negative. Fifty-four representatives voted in the affirmative and thirty-six in the negative. Ten members of the house were absent or excused. Mr. Taylor of Custer explained his vote as follows: 'The returns are not here. This canvass is not in accordance with section four (4) article five (5) of the constitution.

This is not a constitutional canvass. Therefore I vote, "No." W. J. Taylor.' There being seventy-four affirmative votes and fifty negative votes on joint ballot, the president declared Mr. Ransom's motion carried. On motion of Mr. Stoecker the convention adjourned."

These proceedings lead us to inquire as to the duties and powers of the joint convention. For this purpose we again refer to the section of the constitution above quoted. The whole duty of opening and publishing returns is devolved upon the speaker. The only obligation upon the members of the two houses, in so far as that duty is concerned, is that they (a majority of each house) shall be present. The person having the highest number of votes for either of said offices shall be declared duly elected; but, if two or more have an equal and the highest number of votes, the legislature shall, by joint vote, choose one of such persons for said office. This appears to be the sole active duty of the convention. It is the duty of the speaker alone to open and publish the returns. The act is especially enjoined upon him by law as a duty resulting from his office as speaker. It is a ministerial duty positively imposed by law, in regard to which he is vested with no discretionary power. The joint convention has no power or authority to postpone the discharge of his duty to another or later time. He can be compelled by mandamus to proceed at once to discharge the duty imposed upon him. These propositions are fully settled and determined in *State v. Elder,* 31 Neb. 169, and dispose of the contention that the act of opening and publishing the returns is legislative, and not ministerial. It is true that the conferring of the power or authority to open and publish the returns is legislative, that is, there must be some law first enacted by the people or legislature conferring that power, but that must be general in its application, and is no part of the opening and publishing of the returns, which all authority holds to be ministerial.

It must also be clear to every one who reads that the

joint convention has no legislative power. It cannot enact laws, nor create duties where none existed before. The resolution directing the secretary of state to produce the returns was a void act. That duty could only be imposed by a legal enactment introduced and passed as all laws are enacted. If the secretary of state refuses or fails to produce the returns which he is required by law to produce and submit to the speaker, he can be compelled by mandamus to perform the required act; but the joint convention cannot create the duty, nor canvass election returns or declare the result, as assumed in the foregoing preamble and resolution.

It must be conceded by all that the returns of the vote on the constitutional amendments were never in the hands of the speaker. If it had been the duty of the secretary of state to put them there, the courts were open, and the discharge of the duty could have been compelled. The evidence which the speaker had was a certificate of the secretary of state that the printed abstract of votes upon which the speaker acted was "practically a true copy of the abstract as canvassed by the state canvassing board." Not the returns, nor indeed a copy thereof, but *"practically"* a copy of the result of the work of the state board of canvassers. If their canvass was void, their abstract would be equally so and furnish no basis upon which the speaker could act. If the abstract was not void, it was because the board of canvassers had the right to make it, and their acts were legal. When the speaker had opened and published the returns which by law it was his duty to open and publish, and had declared the persons elected to the several executive offices, his duties were at an end, and nothing further was to be done. The adjournment at that time terminated the work of the convention.

For the reasons here stated, and many others not necessary to be here noted, we are forced to concede the truth of the statement of representative Taylor of Custer, when casting his vote, that the canvass was not in accordance

with the constitution, and that it was not a constitutional canvass. We therefore hold that the whole proceeding and all that followed thereafter and based thereon was without authority of law and void; that the proclamation and appointment of the governor following were of no validity; that the canvass by the state board of canvassers, the proclamation and appointments thereunder were valid; and that the respondent, James R. Dean, is entitled to hold the office of judge of the supreme court.

The relation is dismissed, and the judgment will be in favor of the respondent.

JUDGMENT FOR RESPONDENT.

ROSE and DEAN, JJ., not sitting.

CALVIN CHAPMAN, APPELLEE, V. ADA MEYERS, APPELLANT.

FILED MAY 7, 1909. No. 15,676.

1. **Fraud:** PLEADING. In an action to recover money alleged to have been obtained by misrepresentation, fraud, duress and deceit, the petition must set forth the facts showing such fraud, and a mere allegation of fraud or misrepresentation is not sufficient.
2. **Evidence** examined, its substance set forth in the opinion, and *held* not sufficient to sustain the judgment of the district court.
3. **Action:** ILLEGAL TRANSACTIONS. A court will not lend its aid to one who founds his cause of action upon an immoral or illegal transaction.

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

Edwin F. Warren and *Horace G. Leigh,* for appellant.

Logan F. Jackson, contra.

BARNES, J.

Action to recover money alleged to have been obtained by fraud and under a mistake of fact. The plaintiff had judgment and defendant has appealed.

The undisputed facts, as disclosed by the record, are that in May, 1899, the plaintiff was the owner of lots 3 and 4, in block 32, of South Nebraska City, on which there was due and delinquent a large amount of state, county and city taxes; that the lots had been purchased at delinquent tax sale by the county of Otoe, and on the 2d day of that month the county sold its claim therefor, and issued its two certificates of sale thereon to the defendant; that the plaintiff by and through his agent and attorney, William Moran, was in fact the real purchaser of said lots, and, without the knowledge or consent of the defendant, caused the certificates to be made out to and in her name, and thus, by fraud and deceit practiced upon the county officers, obtained said certificates for the face of the taxes, without paying either the interest, penalties or costs of advertising and sale due thereon. So it appears that the plaintiff succeeded in purchasing the certificates of tax sale upon his own lots for a much less sum than was due thereon, and thereby defrauded the state, city and county out of a portion of the taxes on his own property, which he ought to have paid. It further appears that the defendant prior to that time had, by and through her son-in-law and agent, one Dr. Nesbit, been engaged in the purchase of property at delinquent tax sale; that the plaintiff, knowing that fact, had procured the certificates above mentioned to be made out to her and in her name. An examination of the tax sale certificates shows that they were assigned, by a writing on the back thereof, to the plaintiff, and it is claimed that the defendant made such assignment. This she denies, and so one of the questions in dispute was whether or not she executed the assignment above mentioned. It further appears that the defendant had invested, from time to time, considerable money in tax sale certificates; that Dr. Nesbit has transacted all of that business for her, and that she had given it no personal attention whatever; that when Dr. Nesbit left Nebraska City he informed her that

she still had certificates of tax sales amounting to several hundred dollars, which he had left in Mr. Moran's safe. No record of the assignment of the certificates in question was ever made, and so it appeared from the county records that the defendant was the owner and holder thereof; that the lots had not been redeemed by the owner, and that she was entitled to demand and receive the amount of taxes, interest, penalties and costs due thereon. It transpired that in the early part of May, 1905, the defendant discovered, from a certain notice by publication in one of the Nebraska City newspapers, that William Moran was foreclosing certain tax certificates in her name. Never having employed him as her agent or attorney, and never having had any business transactions of that nature with him, it excited defendant's curiosity, and she thereupon sent for her attorney, one H. G. Leigh, and requested him to look the matter up, and ascertain what, if any, interest she had in any other property by reason of the business theretofore transacted for her by Dr. Nesbit. An examination of the county records disclosed that she was the owner of the two tax sale certificates above mentioned, and, supposing that the record stated the truth in regard to that matter, she directed her attorney to collect the amount which appeared to be due her from the plaintiff, or, in default of the payment thereof, to institute foreclosure proceeding. Her attorney thereupon had an interview with the plaintiff, and demanded payment of the money due on said certificates, which at that time amounted to about $1,200. The plaintiff insisted that at some time, or in some way, which he was then unable to state, he had paid the taxes in question, and asked for time in which to investigate the matter and find his tax receipts or certificates of purchase, which was granted. Other conversations took place between them from time to time, and, plaintiff being unable to find the tax certificates or any receipts for the payment of the taxes in question, such negotiations were finally had that he offered to pay $600 to the defendant in

full satisfaction of her tax lien. This offer she accepted, the money was paid to her, and she executed, at the plaintiff's request, an affidavit stating that she was the owner of the tax certificates, and that she had never assigned them to any one. Later on the plaintiff found the certificates, which it appears had at all times been in his possession, and as soon as he found them he demanded repayment of the $600 from the defendant, and, repayment being refused, this action was instituted.

The plaintiff's petition fairly states the foregoing facts, and in addition thereto alleges: "The said defendant had not at any time any interest in said certificates or any part thereof, and that the collection of the said funds from the plaintiff herein on or about the 18th day of May, 1905 was done by misrepresentation, fraud, duress, and deceit on the part of said Ada Meyers." This constitutes the basis of the plaintiff's action. The answer properly put in issue the averments of the petition, and the cause was tried upon the issues thus presented. At the beginning of the trial the defendant objected to the introduction of any evidence on the part of the plaintiff for the following reasons: "First, the petition does not state a cause of action in favor of the plaintiff and against the defendant; second, from the opening statement of counsel for plaintiff, which is to the effect that the money for which this action has been brought was paid by the plaintiff to the defendant to avoid a lawsuit, under a threat of litigation, it therefore is a voluntary payment and the plaintiff cannot recover in this case." The objection was overruled, and the cause was finally submitted to the jury upon the pleadings, the evidence, and the instructions of the court, and a verdict for the plaintiff was returned, upon which judgment was rendered.

It was claimed by the plaintiff on the trial that the defendant at the time of the settlement knew that she had no interest whatever in the tax certificates in question. This was denied by her, and in fact is the only question in dispute between the parties. The plaintiff testified

that, when he demanded the return of the money, defendant made use of the expression that she knew she had no interest in the transaction, and he is corroborated, to some extent, by the evidence of his attorney, Mr. Jackson. This the defendant denied positively and without equivocation, and her evidence is corroborated by that of her sister and her attorney, Mr. Leigh. In addition to this she testified that, from the fact of having been engaged in the purchase of delinquent taxes by and through Dr. Nesbit, and having been informed that she still had several hundred dollars invested in such transactions, and from what she learned from the county records, she believed in good faith that she was the owner of the tax certificates, and that she is still of the same opinion. The record contains a large number of assignments, among which we find that it is contended that the district court erred in not sustaining defendant's objection to the introduction of any evidence on the part of the plaintiff, in not directing the jury to return a verdict in her favor at the close of all of the plaintiff's evidence, and in not rendering judgment in her favor, notwithstanding the verdict. These contentions will be considered together. It is conceded by plaintiff in his brief that, "had Mrs. Meyers honestly thought * * * that she was the owner of the certificates in question, * * * it would be a difficult matter for Mr. Chapman to recover his money." It will thus be seen that the plaintiff was, and is, aware of the fact that, if the settlement by which defendant obtained the money in question was without fraud on her part, then the payment was a voluntary one, and he cannot recover, in other words, that the defendant must have been guilty of fraud in procuring such payment in order to render her liable.

It is a well-settled rule that in a charge of fraud and misrepresentation the facts showing such fraud must be pleaded, and a mere allegation of fraud or misrepresentation is not sufficient. *Johnston v. Spencer,* 51 Neb. 198; *Tepoel v. Saunders County Nat. Bank,* 24 Neb. 815; *Ault-*

man, Taylor & Co. v. Steinan, 8 Neb. 109; *Arnold v. Baker,* 6 Neb. 135; *Clark v. Dayton,* 6 Neb. 192. We think it may be said that this question is so well settled that it is unnecessary to cite any further authority in support of it. An examination of the petition in this case discloses that the only allegation relating to fraud contained therein is the one above quoted. That this is insufficient to state a cause of action based on fraud, misrepresentation, deceit, or duress seems clear. So we are of opinion that the petition in this case failed to state facts sufficient to constitute a cause of action. It is contended, however, by the plaintiff that the defendant will not be permitted to avail herself of this defect after verdict and judgment; that the petition should be liberally construed, and that, by so construing it, it is sufficient to sustain the judgment. If this view of the matter should be adopted by us, still we are satisfied that the evidence is insufficient to authorize a recovery. The main question in dispute between the parties is whether or not the defendant, at the time of the settlement, knew that as a matter of fact she had no interest in the tax certificates. Upon this point we have quoted all of the evidence, and to us it seems quite insufficient to show that the defendant was guilty of any fraud in the transaction. On the other hand, the clear weight of the evidence, supported by the facts and circumstances surrounding the whole transaction, amply justified her in the conclusion that she owned the certificates in question, and shows conclusively that she had no information to the contrary.

Again, there is another and more cogent reason why the plaintiff should not be permitted to recover in this action. The rule is well settled that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. Broom, Legal Maxims, p. 545. It appears by the pleadings and from the plaintiff's evidence in the case at bar that the whole foundation of his claim is based on the unlawful acts by which he purchased his own property from the county authorities at tax sale for

a less amount than was actually and lawfully due thereon, and by making such purchase in the name of the defendant, without her knowledge or consent. It appears that, after having made such unlawful purchase, plaintiff had the certificates, which had been taken in defendant's name, assigned to himself, and, instead of having the assignments made a matter of record, he held the certificates in his own possession secure in the belief that no effort would be made by any one to collect the taxes on his property or foreclose the lien evidenced by the certificates, and that he would thus escape the payment of a considerable portion of his taxes. It seems clear that, having embarked in this illegal transaction, when the defendant demanded a settlement of her apparent tax lien from him, it was necessary to either produce his tax receipts or the certificates in question, or settle with her in order to prevent a disclosure of his illegal conduct; that in order to carry out the transaction to its final conclusion he found it necessary to pay to the defendant the $600 which he now seeks to recover. It seems clear to us that under such circumstances a court of justice should render him no assistance. If he should be permitted to recover in this action, he would be enabled, by means of the judgment of a court of justice, to evade the payment of a portion of the taxes justly due from him to the state, county, and city, and receive a legal commendation of his unlawful act. We decline to sanction the plaintiff's conduct in any manner whatever.

The foregoing reasons are sufficient to require a reversal of the judgment, without considering any of the other assignments of error. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings in accordance with the views expressed in this opinion.

REVERSED.

NEBRASKA BITULITHIC COMPANY, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MAY 7, 1909. No. 15,678.

1. **Cities:** VOID CONTRACTS: LIABILITY. A municipal corporation by contract obtained the use of an asphalt plant for the purpose of repairing its paved streets. In making the contract the provisions of the city charter were not complied with, and the contract was therefore void. *Held*, notwithstanding that fact, that the city was liable for the reasonable value of the use of the plant while making such repairs.

2. **Evidence** examined, and found sufficient to sustain the judgment of the district court.

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

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

Carl E. Herring and *John O. Yeiser, contra.*

BARNES, J.

This action was brought in the district court for Douglas county to recover the reasonable value of the use of the plaintiff's asphalt plant in repairing the defendant's streets. The plaintiff had judgment, and the defendant has appealed.

It appears that in September, 1903, the streets of Omaha were in such a condition as to render their use unsafe and dangerous and a continuing menace to the traveling public; that there was no official newspaper in the city at that time in which notices for bids could be published as a basis for contracts for such work, and therefore no contract for that purpose could be lawfully entered into within a reasonable time for making such necessary repairs. In view of the situation, the city authorities determined to repair its streets by purchasing materials,

securing the use of a suitable plant, and hiring the labor necessary for that purpose, and to that end employed one John Grant, who was the vice-president and manager of the plaintiff company, to superintend the work and furnish plaintiff's asphalt plant for the purpose of repairing the streets paved with that material. A resolution authorizing such proceedings was passed by the board of public works, which later on was approved by the city council. The work was performed and the needed repairs were made, and in due time the city paid for the labor and material and other expenses incurred thereby, with the exception of the claim of the plaintiff for the use of its asphalt plant. As to that claim it appears to have been approved by the board of public works and allowed by the city council, and funds were provided for its payment, but the mayor vetoed so much of the appropriation bill as covered that item, because he thought the amount was exorbitant. Thereupon this action was brought, and the defense interposed was that the contract under which the plant was furnished and the work performed was illegal, it not having been entered into in the manner required by the provisions of the city charter. This is conceded by the plaintiff. It appears, however, that the so-called contract was ignored, and the action was brought to recover the reasonable rental value of the plaintiff's plant while it was used by the defendant city, and to that end the petition was framed to recover on a *quantum meruit*. That a recovery can be had in such cases in that form of action has been firmly settled by our former decisions.

In the case of the *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, it appeared that the village ordinance providing for the rental of water hydrants was void. It further appeared that under the provisions of the ordinance the plaintiff, the Lincoln Land Company, had furnished 15 hydrants for the use of the village, and had thus supplied water for its necessary use. The village refused to pay, and an action was brought to recover the reasonable

value of the water so furnished. It was held: "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." In *Rogers v. City of Omaha,* 76 Neb. 187, the decision in *Lincoln Land Co. v. Village of Grant, supra,* was followed and approved. Our last expression on this subject is found in the case of *Cathers v. Moores,* 78 Neb. 17. In that case we said: "Here we have a case where the city had the power to contract with persons to keep its streets clean and in proper repair. It also had the power to pay for the services rendered under such a contract, and while it may be said that its authority was so irregularly exercised as to render the proceedings illegal, still there was not an entire lack of power to perform the acts complained of."

We think the case at bar should be ruled by that decision, for it cannot be said that the city of Omaha had no power to enter into a contract to repair its streets. On the other hand, it certainly possessed such power, and it was its duty to exercise it. It appears, however, that it was impossible for the city at the time the repairs in question were made to comply strictly with the provisions of its charter by advertising for bids and contracting for the work with the lowest bidder, and therefore it may be conceded that the power which it possessed was irregularly and illegally executed, and that the contract which the city attempted to make with the plaintiff was void; but, having the power and being charged with the duty to properly repair its streets, the irregular exercise of such power cannot defeat a recovery for the necessary expenses incurred by the city in making such repairs. It follows that the defendant is liable in this action for the reasonable rental value of the plaintiff's asphalt plant.

This disposes of the main question, which is the plaintiff's right to recover. We come now to consider the amount of such recovery. We have carefully read the

bill of exceptions, and are satisfied that the evidence clearly supports the judgment of the trial court. The amount of the recovery appears to be the fair and reasonable value of the use of plaintiff's plant as shown by the weight of the evidence.

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

AFFIRMED.

MARTHA A. CRITES, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED MAY 7, 1909. No. 15,284.

1. **Evidence:** DEPOSITIONS. A party taking a deposition may offer in evidence and read the cross-examination of witnesses examined by him in chief, and may use exhibits produced by the witnesses and identified upon cross-examination.

2. **Beneficial Associations:** STATUTORY REQUIREMENTS. A fraternal beneficial association filed in the office of the auditor of state its original constitution and by-laws in printed form properly certified, and after each biennial meeting of its head organization filed copies of the same as amended. The printed books were divided into chapters and sections, and so indexed as to be easy of reference and comparison. *Held*, a substantial compliance with the statute.

REHEARING of case reported in 82 Neb. 298. *Judgment of reversal adhered to.*

LETTON, J.

The facts in this case are recited in the former opinion, 82 Neb. 298. A rehearing was granted upon the question as to whether there was competent evidence of the making of the amendment to the by-laws of the order in 1903. In the former opinion it was held that by cross-examining a witness of defendant whose deposition was taken, and by requesting a copy of the by-laws adopted by the Modern Woodmen in 1903 to be produced by the witness and attached to the deposition, the plaintiff had waived

objection to the competency of the proof. We have re-examined the record with reference to this point. The defendant proved by its head clerk the adoption of the original by-laws in 1895, and that these could only be changed at the sessions of its head camp, and proved successive biennial amendments at each head camp. The witness then identified the original record of the by-laws adopted at the head camp meeting in June, 1903, and further testified that exhibit "F" was a true and correct copy of the original by-laws as revised and adopted in June, 1903. Exhibit "F" was then attached to the deposition. Like testimony was offered and action taken as to exhibit "G," being the 1905 revision. On cross-examination the plaintiff was asked the following question: "Q. Have you a copy of the head and local camp laws of the Modern Woodmen of America, revision of 1903? If you answer that you have, the plaintiff asks that the notary identify it as an exhibit, and attach it to and make it a part of this deposition upon being identified by the witness. A. Yes." (See exhibit "E" hereto attached.) There is no exhibit "E" attached to the deposition. Reading the whole deposition, it is perfectly apparent that the reference to exhibit "E" is a typographical error and actually refers to exhibit "F." It is plain that the copy of the revision of 1903 is the exhibit referred to. A similar mistake was made by referring to exhibit "G" as exhibit "F." The plaintiff proved on cross-examination that the revision of the 1903 by-laws was filed with the auditor on September 30, 1903, and that of 1905 on January 31, 1906.

The plaintiff contends that, by merely asking a witness on cross-examination to produce a paper in his possession and to make it a part of the deposition, he is not precluded from objecting to the introduction of the same in evidence, and that this portion of the deposition was never offered or received in evidence; but the record shows that the entire deposition was offered and received in evidence without objection, other than objections made by each party to specific questions. No objection was

made by the plaintiff to the reading of the cross-examination by the defendant, and the statute (code, sec. 383) allows this to be done. *Ulrich v. McConaughy,* 63 Neb. 10. Having made the proof himself he cannot complain.

It is further objected that the filing of the entire body of the constitution, by-laws and rules as amended biennially at the head camp of the defendant association is not a compliance with the statute which requires each amendment to be certified and filed in the office of the auditor of state. We think this objection is purely technical. The printed body of the laws is divided into numbered chapters and sections, with catchwords and page heads, and is thoroughly indexed, and any change made can be readily ascertained by a comparison of the pamphlet with the last previously filed. We think this substantially complies with the statute.

We are satisfied that, while the former opinion contained a few verbal inaccuracies, the law laid down therein was sound and the conclusion proper. For these reasons, the former opinion is adhered to.

JUDGMENT ACCORDINGLY.

SAMUEL KATZ, APPELLANT, V. MARTHA M. ISH, APPELLEE.

FILED MAY 7, 1909. No. 15,646.

1. **Appeal in Equity.** While it is the duty of this court upon appeal in an equity case to pass upon the evidence and reach its own conclusion thereon, still, in ordinary cases, where the evidence is entirely oral and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the trial court is entitled to careful consideration.
2. **Evidence examined, and** *held* to sustain the judgment of the trial court.

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

Crane & Boucher, for appellant.

Byron G. Burbank, contra.

LETTON, J.

This case was begun as an action for breach of a covenant against incumbrances contained in a warranty deed of certain warehouse property in Omaha, conveyed to Samuel Katz by Martha M. Ish under a contract whereby she sold the property to him for the sum of $30,000, and took in exchange certain farm lands in Nance county valued at $15,000, $7,500 in cash, and the assumption by Mr. Katz of a mortgage of $7,500 on the warehouse property. The deed recited that the warehouse property was conveyed "subject to a certain lease which expires October 1, 1905." At the time of this conveyance the property had been leased to a tenant until the 1st day of October, 1906, with the privilege of renewing the lease for an additional term of two years. The tenant exercised this privilege, and held possession under the lease until October 1, 1908. This leasehold interest is the incumbrance of which plaintiff complains. The plaintiff pleads that the difference between the rent fixed by the outstanding lease and the actual value of the use and occupation of the premises is the sum of $200 a month, making a total damage to him for the period from October 1, 1905, to October 1, 1908, when the lease expires, of $7,200, for which he prays judgment.

In answer the defendant pleads that the property was exchanged subject to existing leases under the terms of a written contract; that by mistake at the time the contract was written it failed to provide that each of the parties took the land of the other subject to the leases then existing thereupon; that as soon as this omission was discovered it was called to plaintiff's attention, and that he thereupon wrote upon the contract: "I hereby agree to receive the property subject to lease, and deliver the farm subject to lease. Samuel Katz." It is further alleged

that, when the deed was delivered, a written assignment of the lease was also delivered, which stated the exact terms of the lease, and that plaintiff had been in possession of the written lease and knew its terms and conditions before the contract was executed. The answer prayed that the deed should be reformed so as to show that the property was conveyed subject to the terms of the lease as it then actually existed.

The reply pleaded that prior to the execution of the written contract it was mutually understood by the parties that the lease expired October 1, 1905; that the clause subsequently written in was written in great haste at the railway station, and by mistake omitted to state the time when the lease expired. It prayed that the contract might be reformed so as to read: "I hereby agree to receive the property subject to the lease which expires October 1, 1905, and to deliver the farm subject to the lease. Samuel Katz," instead of as it was actually written. The district court found for the defendant, and reformed the deed as prayed in the answer.

The question presented by this appeal is really one of fact, and its determination depends entirely upon the view taken of the evidence. It will be necessary, therefore, to review the same to some extent. Mrs. Ish is a woman of 72 years of age, having had considerable business experience, and Mr. Katz is a competent business man. She testifies that the first time she met Mr. Katz was by arrangement at the office of Mr. Buck a real estate agent, on the Thursday before the Sunday on which the contract was signed. She and her son, James Ish, both testify that they had with them on that occasion the lease of the warehouse and the abstract of title to the same; that the son read the lease at length to Mr. Katz, who said "it sounded all right, but he would like to take it home and read it over and study it," and that the lease and abstract were given to him for examination and taken away by him; that on the following Sunday afternoon at Mr. Buck's request she went to Mr. Katz's office; that he told her he had

received a telegram, and would have to leave for Europe that evening, and that the contract was all prepared; that the contract was read and signed at that time; that after she returned home she read the contract again, and saw that the statement regarding the lease was omitted, and that she and Mr. Buck immediately went to the railroad station and found Mr. Katz there; that she told him that she could not deliver the building, and that the lease was not named in the contract, and that Katz took his pen and wrote on the contract the agreement that each shall take subject to existing leases, at that time. She further testifies that the next time she saw the lease after Mr. Katz took it at Buck's office was in Mr. Burbank's office on the 17th of March, when the parties met to complete the transaction; that at that time Mr. Katz's son, J. B. Katz, produced the lease for the purpose of having her make a written assignment of it; that at this meeting there were present Mr. Burbank, the attorney for Mrs. Ish, James Ish, Mrs. Ish, Mrs. Katz, J. B. Katz, Mr. Buck and Mr. Zeigler, the attorney for Mr. Katz. She denies making any statement that the lease expired on October 1, 1905, and denies knowledge of such a provision in the deed. Mr. Katz denies unequivocally that the lease was read to him, or was ever in his hands, or that he knew of its real terms until he returned from Europe. As to what occurred at the meeting in Burbank's office there is a direct conflict in the testimony. Mr. Zeigler and Mr. J. B. Katz both testify that the only papers they brought to the meeting were the deed and abstract to the Nance county farm; that Mr. Burbank produced the deed to the warehouse property and the assignments of the several leases, which had apparently been prepared before the meeting. Mr. Burbank, Mrs. Ish and James Ish all testify that Zeigler brought the deed, the lease and the abstract to the warehouse property with him; that the assignments of the leases were dictated by Burbank, and written at the time of the meeting, and not prepared beforehand, and that Mrs. Ish signed the deed upon Mr.

Burbank's assurance that it was correct, and that Burbank did this upon the strength of Zeigler's statement that the deed was satisfactory to him. A peculiar circumstance is that each witness denies preparing the deed to the warehouse property, or bringing it to the place of the meeting, and each denies acquaintance with the handwriting. If all this testimony is true, the deed must have materialized from the absolute ether, then and there, which is a phenomenon it strains our credulity to believe took place.

The plaintiff contends that the decree of the court reforming the deed is not sustained by sufficient evidence, and that the evidence on behalf of Mrs. Ish must be clear, convincing and satisfactory to warrant the court in reforming the deed as she prays. The trouble with this argument is that it is equally applicable to the prayer of the plaintiff to reform the contract whereby he agreed to receive the property subject to the lease and deliver the farm subject to the lease. In this regard we think the parties stand upon an equality. We think no more clear and convincing evidence is required to reform the deed than would be required to reform the contract. This being the case, the question before us is whether the evidence justifies the conclusion at which the district court arrived. Our attention is called to a number of circumstances which the plaintiff asserts corroborate the testimony of his witnesses. On the other hand, the defendant calls our attention to the fact that the testimony of Mrs. Katz, who was present at the final transaction in Mr. Burbank's office, was not taken by the plaintiff, and to the further undisputed fact that the lease itself, which bore upon its face provisions inconsistent with the deed, and the written assignment which described the term as three years from October 1, 1903, were exhibited, delivered to and accepted by the plaintiff's attorney at that time without objection, and apparently without any attempt at concealment on the part of defendant or her attorney. It is conceded that full opportunity was then

given for examination, and that examination was made in behalf of the plaintiff. This case is peculiar in this: That while the initial negotiations took place between two principals, whom the testimony indicates were experienced in business affairs and apparently cautious in their dealings, and the transaction was concluded and the papers exchanged in the presence of and under the supervision of able and experienced counsel, yet there is such a controversy in matters of fact. It is impossible to reconcile the statements of the witnesses. The trial judge had the advantage of seeing them face to face and hearing them testify, and had a much better opportunity to form a proper judgment as to the truth or falsity of the respective statements than this court has. Whichever story we believe, it seems strange that a transaction involving property valued at $30,000 should have been conducted so carelessly, both by the principals and their agents.

A critical analysis of the testimony of each witness is impracticable with the time at our command, and we can only say that, while not entirely satisfied, we think the preponderance of the evidence is with the defendant, and that the district court was justified in so finding. Upon the evidence as it appears before us in the record, we agree with this conclusion and affirm the judgment.

AFFIRMED.

GOTTLIEB WENNINGER, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED MAY 7, 1909. No. 15,655.

1. Appeal: EVIDENCE. A verdict upon conflicting evidence will not be set aside, where there is sufficient evidence to support it.

2. Street Railways: NEGLIGENCE: QUESTION FOR JURY. Where there is evidence tending to show that the plaintiff was negligently driving at a trot across a street intersection without observing

a street car which was approaching at a right angle, that the motorman saw that the car would strike plaintiff's team unless stopped, and that he might have stopped the car by the exercise of ordinary care, it is not error to submit to the jury the question of the existence of negligence in thus failing to stop the car.

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

Clark & Allen, for appellant.

George A. Adams, Wilmer B. Comstock, and *Halleck F. Rose, contra.*

LETTON, J.

While the plaintiff was driving two horses attached to a cart across the intersection of "O" and Eleventh streets in the city of Lincoln, he was struck by a street car belonging to the defendant, and his horses and himself injured. It is charged in his petition that the collision was the result of the negligence of defendant in propelling the car at a negligently high rate of speed; that no proper lookout for persons or vehicles approaching the track was kept, and that proper diligence was not observed to stop the car after the motorman became aware of the plaintiff's perilous situation. The answer is a general denial, together with a plea of contributory negligence, which is denied by the reply. At the trial the district court submitted to the jury only two questions: Whether the car was being operated at a high and dangerous rate of speed, and whether the defendant observed proper care and diligence to prevent injury after discovering the dangerous situation of the plaintiff. There was a verdict for the plaintiff, and defendant has appealed.

While many witnesses testified, it is difficult to get a clear and definite idea of just what occurred at the time of the accident. The plaintiff testifies that shortly after 6 o'clock in the evening he was driving south on Eleventh street, across the intersection of "O" street with that

thoroughfare; that as he approached the intersection he saw a west-bound car approaching on "O" street on the street car track nearest him, and that his view toward any east-bound car upon the other track was cut off and obstructed by two large furniture vans which were passing; that as he drove across the intersection the car came from the west at full speed; that he could not get back because there were teams behind him, and he could not go forward because there were many people coming out of the stores and on the street at that hour; that the car struck the horses at a point a little west of the center of the street, knocked them down, and pushed them until they were over the crossing on the east side of the street. Another witness testifies he saw the car coming "at a pretty good gait"; that plaintiff was on the west side of the center of the street when struck, and the car knocked him over to the east side of the street. Other witnesses for the plaintiff testify substantially to the same effect in respect to the place where the horses were struck and the distance they were carried or pushed by the car before it stopped. Still another witness testifies that the car approached apparently "at a rapid gait—very rapid gait." The witnesses for the defendant substantially agree that there was no obstruction to the view at the intersection; that the plaintiff as he approached was driving at a trot, "a keen trot" one of the witnesses says, and that he was talking to a man who was riding with him in the cart; that the plaintiff might have seen the car approaching from the west as he drove southward if he had looked, and that he drove on the tracks directly in front of the approaching car; that the car was under control and was slowing down to stop at the east crossing of the street at the time the collision took place. A witness for defendant, who was a passenger on the car and was standing in the vestibule beside the motorman at the time the accident happened, testified on cross-examination as follows: "Q. You say you saw Wenninger when he got to Eleventh? A. Yes; we got to the crossing, the first I

noticed. Q. And you told the motorman you was going to collide with him? A. I said, if we did not stop, we would collide with him. Q. Then what did the motorman do? A. Why, I believe he cussed. Q. Cussed? A. Yes, sir. Q. Who did he cuss? A. Why, nobody in particular; just drivers in general. Q. Just general cussing? A. Yes; people. Q. He did that instead of putting on his brake? A. Oh, he did put on his brake. Q. Did put it on vigorously? A. He started to put on the brake, you know, like a man would stop his car at the other crossing. Q. But that was after you told him, if this man didn't stop, he would collide with him? A. He saw it at the same time I did. Q. You also told him about those words? A. Yes, sir. Q. That if this man don't stop, you will collide with him? A. Yes, sir. Q. What did he say? Just give the words as near as you can. A. I don't know just as particularly now just what he did say, it is so long ago. Q. No idea what he did say? A. No, except he answered me. He swore. Q. You don't remember what he said? A. Well, blankety blank, something. Q. What? A. I say it was blankety blank something. Q. And then did he tighten up his brake? A. He started to set the brake; yes; that is, started to tighten it. Q. Did he start that before he commenced to swear, or while he was swearing, or after he got through? A. It seemed to me he used it to emphasize his motions." This witness further testified that, as the plaintiff was approaching the track, he looked up, saw the car, pulled his horses to the left, and struck them with the whip, and was pulling them away from in front of the car when they were struck.

The court submitted the question of the existence of negligence and contributory negligence to the jury, and also an instruction based on the doctrine of the last clear chance. The defendant argues that there was not sufficient evidence, in regard to negligence on the part of the motorman in failing to stop the car after he became aware of plaintiff's position, to warrant submitting this ques-

tion to the jury. We cannot agree with this contention. While there is conflicting evidence upon this question, the testimony quoted shows that, before the car reached the intersection, a passenger saw what the probable result would be unless the car was stopped, and warned the motorman. If the car was proceeding as slowly as defendant's witnesses testify, the motorman could easily have stopped it between the intersection and the point near the middle of the street, where the horses were struck. There is no dispute but that the car crossed the entire width of the street, a distance of about 100 feet, before it stopped, and we think the jury were justified in finding that the motorman might have stopped it before the plaintiff was struck, after his attention was called to the manner and direction in which the plaintiff was driving. We think there was no error in submitting this question to the jury.

The question is: Did the motorman exercise ordinary care in attempting to stop the car after the danger became apparent? A recent case in Connecticut is somewhat similar to this in its facts, except that in that case an inexperienced motorman released the brake and caused the car to increase its speed, while in this case the motorman seemed to become angry, and, while tightening the brake to some extent, it would seem that he did not attempt to make a quick stop. In that case Baldwin, C. J., says: "If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled, by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the plaintiff's negligence no longer a proximate cause, and therefore not a bar to his recovery. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408; *Parkinson v. Concord Street R. Co.,* 71 N. H. 28; *Isbell v. New York & N. H. R. Co.,* 27 Conn. *393." *Smith v. Connecticut R. & L. Co.,* 80 Conn. 268, 17 L. R. A. (n. s.) 707.

The refusal to give instruction No. 9 is also complained of. Without discussing the doctrine of this instruction, a quotation of the latter part will show that it was not error to refuse it. By the latter clause the jury were instructed: "That if you believe from the evidence that the plaintiff could have seen the car by looking or heard it by listening, that he either did not look or listen for it or did not heed what he heard or saw, which would be negligence on his part." This instruction is defective and unintelligible, and it was not error to refuse it.

Complaint is made of the refusal to give several other instructions requested by the defendant. An examination of the whole charge of the court convinces us that the issues in the case were properly submitted to the jury thereby. One or two of the instructions, the refusal to give which is complained of, we think would have been erroneous if given. The others were unnecessary.

The main question in the case is a question of fact. Had the jury found a verdict in favor of the defendant, the evidence would have sustained it, but we cannot grant a new trial for that reason, since there is sufficient evidence, if believed, to support this verdict.

The judgment of the district court is

AFFIRMED.

NEBRASKA PLUMBING SUPPLY COMPANY, APPELLEE, V. J. A. PAYNE, APPELLANT.

FILED MAY 7, 1909. No. 15,681.

1. **Evidence:** ADMISSIBILITY. In an action to recover the contract price of a steam heating plant, where the defense is that the apparatus is worthless and not according to contract, hearsay testimony of an opinion expressed by a workman on the job, after the completion of the plant and its surrender to the defendant, *held* to be inadmissible.

2. **Sales:** WARRANTIES: INSTRUCTIONS. In such an action, the rule as to substantial performance applies, and the instruction set forth in the opinion is a correct statement of the law.

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

B. N. Robertson, for appellant.

Rich, O'Neill & Gilbert, contra.

LETTON, J.

This is an action for the contract price of a steam heating plant. The defendant admits the contract and the placing of the boiler, radiator and appliances, but avers that it was left unfinished, that it is useless and worthless and of no value, and pleads a number of specific defects which he alleges exist in the apparatus. He also filed a counterclaim for certain articles of material and labor furnished by him for the setting of the apparatus and for board of workmen. The jury found for the plaintiff, and we are of the opinion that the evidence fully sustains the verdict; in fact, as we read the record, we do not see how a jury of ordinary intelligence could have arrived at any other conclusion. Part of the things lacking of which the defendant complains, it was clearly his duty to himself supply, the other defects he could easily have procured to be remedied if he had in good faith intended to comply with his contract. The conclusion we draw from the testimony is that after he had bought the heating plant he changed his mind, rued his bargain, and therefore refused to accept it.

A number of errors are assigned with reference to the admission and rejection of evidence and with regard to the instructions, but under the evidence we do not think it necessary to notice more than one or two of them. The defendant offered to prove that on the day after the plant had been tested, and while one Greene, an employee, was again testing it, Greene said: "That the pump was not sufficient to relieve the pipes, and that the plant was impracticable and would not heat the house." This offer was objected to and refused. Greene had died before the

trial. The offered evidence was merely an expression of an opinion by an employee. It was hearsay testimony. There was nothing to show that Greene was more than an ordinary workman, or that he was in any way authorized to bind plaintiff. He was in the employ of Balfe, a steam fitter, who seems to have been employed by the plaintiff to do the work of installing the plant. The matter as to which it was sought to show that Greene expressed an opinion was the very point in issue in the case. The defendant was entitled to prove this by all the witnesses whom he could find willing and competent to testify to that effect, but it was not competent for him to prove by hearsay an opinion of one not in privity with the plaintiff, and not authorized to speak for it, as an admission against its interest; nor was it admissible as part of the *res gestæ*, as defendant asserts, because the plant had been finished and surrendered to Payne the day before, and Greene was left at Payne's request to show him how to operate it.

Defendant also complains of the admission of a letter written to Mr. Gradwohl, plaintiff's president, by R. C. Campbell, an attorney of Hamburg, Iowa. The defendant testified that he had Campbell write some letters for him, that he did not think he corresponded with Gradwohl, "but that he might have done so. The correspondence will show it. * * * I dictated the letters that he wrote. * * * I gave him the purport of the letter." The letter shows on its face it was written by Campbell to Gradwohl in relation to the heating plant. We think it clearly admissible under these facts.

The court instructed the jury: "If you find from the evidence that the plaintiff has substantially performed its contract in this regard, you should find for the plaintiff on this issue. And in passing upon this issue you are instructed that, if you believe the plaintiff in good faith substantially performed the terms of its contract, but that there are some slight omissions or defects which are not so essential as to defeat the object of the parties, but

could be readily remedied, then the plaintiff can recover the contract price less the damages occasioned by the omission or defect. Such damages are what it would have cost the defendant to remove the defect or omission, and thus give to the defendant what his contract called for." This instruction, with another of like tenor, is vigorously assailed, but we think it states the law correctly. 3 Page, Contracts, secs. 1385, 1387; *Shepard v. Mills,* 173 Ill. 223, (s. c.) 70 Ill. App. 72.

It is said this is not a building contract, and it is contended there was no actual attachment of the apparatus to the realty, but the evidence shows to the contrary. The subsequent negotiations for a settlement on the basis of its severance and removal cannot change the legal result of the contract and its execution.

We find no prejudicial error in the charge of the court nor in the amount of the verdict. We are also satisfied that the objections to jurisdiction were properly disposed of, and think that upon the whole record the defendant has no cause to complain. In fact, we are strongly impressed that he made no attempt to comply in good faith with the contract, and that the jury would have been derelict in its duty if it had rendered a verdict for the defendant under the proofs.

The judgment of the district court is

AFFIRMED.

ANNA W. SHEIBLEY, ADMINISTRATRIX, APPELLANT, V. GEORGE L. NELSON, APPELLEE.

FILED MAY 7, 1909. No. 15,364.

1. Libel: INSTRUCTIONS. If a defendant admits the publication of an article libelous *per se*, but alleges that his statements are true, it is error to charge the jury in effect that the burden is on plaintiff to prove malice and damages.

2. ———: PLEADING: EVIDENCE. If a defendant denies that he pub-

lished a libel of and concerning plaintiff, he will not be permitted to prove the truth of his publication.

3. **Hearsay Evidence**, tending to prove an issue, if admitted without objections, may sustain a verdict; its probative force being for the jury, and not the court, to determine.

4. **Trial:** INSTRUCTIONS. If any competent evidence concerning a material fact is introduced on the trial of a case, it is error for the court to instruct the jury that there is not any evidence on said point.

5. **Evidence:** RES GESTÆ. Where it becomes material to ascertain whether a woman was assaulted, and the identity of the person who attacked her, evidence of her appearance at the time she was fleeing from her assailant and seeking shelter in a neighbor's house, and her spontaneous declarations with regard to the transaction, is admissible as part of the *res gestæ*.

APPEAL from the district court for Cedar county: ANSON A. WELCH, JUDGE. *Reversed.*

W. E. Gantt, for appellant.

J. C. Robinson, J. V. Pearson and *J. J. McCarthy, contra.*

ROOT, C.

The pleadings in this case are referred to at length in an opinion of Mr. Commissioner DUFFIE on a former appeal to this court, 75 Neb. 804. Upon the second trial a jury found for defendant, and plaintiff again appeals.

1. In its fourth instruction the court informed the jury "that the burden of proof is on the plaintiff to prove by a preponderance of the evidence all the allegations of his petition which are not admitted by the answer"; and in its second instruction told them that the answer admitted the publication, but denied that it was published "falsely, wickedly or maliciously or with intent to injure or defame plaintiff," but charges that, in so far as it referred to plaintiff, the same was true. On the former appeal it was held that the article was libelous *per se*. Since that opinion was written section 46*d* of the criminal code,

which attempted to provide penalties for blackmail, etc., has been held void in *Greene v. State,* 83 Neb. 84, but section 46*a* of said code, defining blackmail, still exists. Independent of any statute, the popular definition of the word "blackmailer" describes an odious creature. We are still of opinion that to print and circulate a statement that one is a blackmailer, and has been guilty of circulating false, malicious and blackmailing stories of and concerning another person, is libelous *per se.* On the trial of the case plaintiff admitted that he had never resided in Cedar county, and had never affiliated with the fusion party. The term "fusionist" has a well-known meaning in Nebraska, and is descriptive of those individuals who support candidates for elective offices nominated by the joint action of electors of the democratic and people's independent parties, or their representatives. So much of the alleged libel as referred to the fusionists of Cedar county was therefore immaterial. There remained, then, for consideration the charges that plaintiff was a blackmailer, and had circulated false, malicious and slanderous stories concerning McCarthy. The justification is indefinite, so that it is extremely difficult, if not impossible, to say from an inspection of the pleadings what was admitted and what denied. The rule is well settled that a defendant may justify as to part of the charge, provided such part contains a distinct imputation which can be separated from the rest. Odgers, Libel and Slander (4th ed.), 180. Plaintiff did not by motion or demurrer test the sufficiency of the answer, and the trial proceeded on the evident theory that the parties and the court assumed that the answer amounted to a partial justification.

The alleged libel contains several charges, and defendant should have plainly indicated the part thereof he claimed was true. The Franz transaction referred to in the affidavit of McLean, and more fully detailed in Mrs. Franz' affidavit, seems to have been one of the slanderous stories referred to in the publication. Malice in law will be presumed from the publication of an article libelous

per se, and that presumption will become conclusive unless the truth of the libel is established. Such malice does not mean hatred or ill will, but the want of legal excuse for the publication. Damages will also be presumed from the publication of an article libelous *per se. Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713; *Sheibley v. Fales,* 75 Neb. 823; *Prewitt v. Wilson,* 128 Ia. 198; *Conroy v. Pittsburg Times,* 139 Pa. St. 334, 23 Am. St. Rep. 188; *Childers v. San Jose Mercury P. & P. Co.,* 105 Cal. 284, 45 Am. St. Rep. 41. If the defendant justified the publication of the charge that plaintiff was a blackmailer, or that he was guilty of circulating the aforesaid slanders, and failed in the proof, both defendant's malice and plaintiff's damage would be presumed. The record discloses that defendant did offer evidence to prove that plaintiff was guilty of circulating such stories, and the fourth instruction given was erroneous.

2. The learned trial judge in his eleventh instruction informed the jurors that "there is no evidence whatever in this case tending to prove the truth of such slanderous stories against McCarthy." Defendant himself, without any objection, introduced in evidence copies of the Franz, Ferber and Drager affidavits. While all of those affidavits were *ex parte* and the Ferber one hearsay, they were sworn to, and no question was made concerning the accuracy of the statements therein contained. J. H. Brown also testified in detail in his deposition that plaintiff told him about the Franz transaction, and that deposition was introduced in evidence and read to the jury. The tendency of all of those statements would be to induce some belief in the existence of the transactions therein referred to. Verdicts may result from hearsay testimony and be sustained where that evidence is permitted without objection to go to the jury; its probative force under those circumstances being for the jury, and not the court, to determine. 1 Elliott, Evidence (2d ed.), secs. 330, 331; *Damon v. Carrol,* 163 Mass. 404; *State v. Cranney,* 30 Wash. 594; *Goodall v. Norton,* 88 Minn. 1; *Lindquist v.*

Dickson, 98 Minn. 369. There being some relevant evidence concerning said fact, the court erred in taking that issue away from the jury. *Wiese v. Gerndorf,* 75 Neb. 826.

3. We are also of opinion that the spontaneous statements made by Mrs. Franz to Mrs. Sheibley and the appearance of the former woman at the time it is claimed that she came to the latter's home for protection were competent, and should have been admitted in evidence. 3 Wigmore, Evidence, secs. 1747, 1753; *Bow v. People,* 160 Ill. 438; *State v. Carter,* 106 La. 407. The other objections to the rulings of the court turn upon a construction of defendant's answer. In *Williams v. Fuller,* 68 Neb. 362, we held that one may not deny that he published an article of and concerning plaintiff, and be permitted to prove the truth of his publication. In the instant case it is not altogether clear what charge in the publication is justified, but, for the reasons heretofore stated, we do not think that we should hold that the answer is absolutely bad. *Sheibley v. Fales,* 81 Neb. 795. In the state of the record the court did not err in admitting evidence on the plea of justification.

For the errors referred to, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

FAWCETT and CALKINS, CC., concur.

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

REVERSED.

REESE, C. J., dissenting.

I cannot agree to this judgment for the reason that I do not believe the petition sufficient to constitute a cause of action.

JOSEPH E. HAIR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 7, 1909. No. 15,675.

1. **Railroads:** LICENSEE: DUTY OF LICENSOR. A railway company that maintains its station in a public highway in the center of its switchyards, and for years has permitted the public to use said yards as a footway, is bound to exercise reasonable care to avoid injuries to persons who are known or reasonably may be expected to be within those yards in the vicinity of said station.

2. **Negligence:** QUESTION FOR JURY. Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw diverse conclusions, are for the jury, and not the court, to determine.

3. **Appeal:** INSTRUCTIONS. If the trial court fairly instructs the jury concerning the law of a case, its judgment will not be reversed because of some slight ambiguity in the instructions, nor because they might lawfully have been stated more favorably to defendant.

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

James E. Kelby, Arthur R. Wells and *Frank E. Bishop,* for appellant.

Wilmer B. Comstock and *John R. Berry, contra.*

ROOT, J.

Plaintiff recovered judgment for personal injuries, and defendant appeals.

There is but little conflict in the evidence. It may fairly be said that three lines of defendant's railway converge at Ashland, a city of about 1,500 inhabitants, where defendant maintains a switchyard about 400 feet wide and 1,500 feet in length. The greater part of Ashland lies west of and some distance from said switchyard. Main street is 100 feet in width, and crosses said yards obliquely at a point about midway between the ends

thereof, and defendant's station, with the exception of the northwest corner of the building, is located in said street east of the main track and most of the side tracks, which run north and south. About a half mile north of the station the railway crosses Salt creek, and a half mile further the Platte river. None of the streets north of Main street are opened or traveled across defendant's railway, and people having occasion to cross the railway in said city, if they travel the highway, must come to Main street, and practically all of the individuals transacting business with defendant at Ashland are compelled to pass over the main track and side tracks to reach its agent or station. It also appears that for many years next preceding the date plaintiff was injured the public generally, with at least the tacit consent of defendant, has used the yard aforesaid as a footway in traveling north from said station to Salt creek and the Platte river.

1. Plaintiff in January, 1907, had been working in the neighborhood of Ashland, and on the first of February, in company with a friend, about 4 o'clock in the afternoon, went to defendant's station, and there ascertained that the north and east-bound train would arrive about 7 o'clock. Plaintiff left his suit case with defendant's agent, went back up town for supper, and returned with said friend a few minutes too late for the Omaha passenger. He then inquired of said agent concerning the west-bound passenger train, and was told that it was due about midnight. Plaintiff testified that he had intended to travel on said train to Lincoln, where his parents resided, and that he remained in the waiting room of defendant's station for that purpose, but it does not appear that he informed any employee of the company of his intentions, nor did he purchase or have a ticket or any other evidence of a right to transportation over defendant's railway. About 9:30 o'clock a trainman came into the station, and in speaking to another person stated that a freight train would soon depart for Omaha. Plaintiff's friend went out of the station and north into the yards

to ascertain if he could secure transportation on said freight, and plaintiff stepped outside of the station to bid his friend farewell and breathe the more invigorating air. The night was dark and cold, and snow was falling. While plaintiff was standing west of the station and upon its platform, his hat was blown from his head and northward through the yard. He looked each way and listened, and, not receiving warning of the approach of any car or locomotive, ran from 60 to 100 feet after his hat, and recovered it. The evidence does not inform us with much certainty whether plaintiff went outside of Main street or not, but the inference is that he did. In the meantime one of defendant's locomotives was backing a string of freight cars, at the rate of 10 miles an hour, south from the north part of the yard. The car nearest to plaintiff was a flat car. No warning by way of sound, light or person was given of the approach of the cars. As soon as plaintiff became aware of the movement of the cars, he attempted to get out of their way, but his foot was caught and crushed by the wheels of said flat car. The evidence shows without dispute that it was the custom of defendant when backing cars through said yard to station a brakeman upon the right-hand side of the rear car and to maintain a light thereon. Section 104, ch. 16, Comp. St. 1907, charged defendant with the duty of giving warning, by sounding the locomotive whistle or ringing the bell thereof, of the near approach of said cars to said street crossing.

Defendant insists that plaintiff was a trespasser, to whom it owed no further duty than not to wantonly injure him, and that he is in no more favorable light than was the plaintiff in *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272. Plaintiff relies upon *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, and also insists that he was injured in a public highway. Plaintiff also argues that the relation of passenger and carrier existed between the parties hereto at the time of the accident, but we are not willing to concede that fact. Plaintiff, however, was in

the station upon the implied invitation of defendant, and in departing therefrom, whether for temporary purposes or otherwise, would not go in the guise of a trespasser. Defendant's servants were reckless and grossly negligent. At 9 o'clock in the evening, although there would not be much travel across the yards by way of Main street, yet pedestrians and teams were likely to cross at any moment. Individuals desiring to send, or expecting to receive, telegrams might cross the yards to the station, and an occasional footman might be expected to walk north or northwest from the depot through the yards. This brings the instant case within the rule announced in *Chicago, B. & Q. R. Co. v. Wymore, supra,* and distinguishes it from *Shults v. Chicago, B. & Q. R. Co.,* aforesaid. In the first case and the instant one defendant was reasonably bound to anticipate that some one might be in the location where plaintiff was injured, and was charged with the duty of exercising at least ordinary care to give notice of the movement of the cars it was so swiftly propelling toward and across the public highway and across the traveled way to and from its station. *Sullivan v. New York, N. H. & H. R. Co.,* 73 Conn. 203; *Downing v. Morgan's L. & T. R. & S. Co.,* 104 La. 508; *Chesapeake & O. R. Co. v. Keelin's Adm'r,* 62 S. W. (Ky.) 261; *Johnson v. Lake Superior T. & T. Co.,* 86 Wis. 64. The jurors were instructed that plaintiff could not recover if guilty of negligence which contributed to his injuries, and that he was charged with the duty of a reasonable use of his senses to determine whether trains or cars were approaching. Reasonable men, we are satisfied, might draw differing conclusions from the testimony, and we do not feel that we should hold, as matter of law, as defendant argues we should, that plaintiff was guilty of contributory negligence. *Johnson v. Lake Superior T. & T. Co.,* 86 Wis. 64.

2. It is suggested that the tenth instruction given by the court permitted the jurors to return a verdict upon finding that defendant failed to maintain a fence be-

tween its station and the railway tracks, but we do not so understand the charge of the court. Plaintiff in his petition, as matter of inducement, alleged that such a fence was not maintained, but did not charge that defendant was negligent in that omission. The acts of negligence are later specifically stated in a separate paragraph of the petition, and the opening statement in the instruction, "In the event that you find from the evidence and under these instructions that defendant was negligent in some of the respects alleged as set out in the first paragraph of these instructions," etc., by reference to said paragraph, which is a summary of the petition, plainly restricts the grounds for recovery to the various specific alleged acts of negligence, and not to any part of the matter of inducement.

3. It would extend this opinion to an unprofitable length to refer to each instruction given and refused. We have examined all of them, and find that the charge of the court is a reasonable statement of the law of this case. The rulings of the court in admitting and rejecting evidence do not present any serious question for our consideration. The defendant did not produce as witnesses any of the train crew responsible for plaintiff's injury, nor any witness other than Mr. Bignell, its division superintendent. The facts testified to by plaintiff's witness are practically undisputed.

Defendant has had a fair trial, and the judgment of the district court is

AFFIRMED.

JOHN NIMIC, APPELLEE, V. SECURITY MUTUAL HAIL INSURANCE COMPANY, APPELLANT.

FILED MAY 7, 1909. No. 15,682.

1. **Insurance:** PAYMENT OF PREMIUMS. A by-law of a mutual hail insurance company organized by virtue of the laws of Nebraska providing that, if a member does not pay the premium on his policy by November 1 of the year in which he is insured, he will not be entitled to participate in the fund provided that year for the payment of losses, is a reasonable provision and will be enforced.

2. ———: ———. With such a by-law in force, if a member executes a promissory note for his premium, and before it becomes due the crops described in his policy are damaged by hail, he will not be permitted to withhold payment of his premium, even though his loss exceeds the amount of his note; and, if he fails during the entire year for which he is insured to pay said premium, the company will be released from all obligation on said policy, and he cannot two years later, by tendering payment of the note, create a liability on the policy.

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

Martin Langdon and *John A. Davies,* for appellant.

G. A. McCutchan and *A. H. Tingle, contra.*

ROOT, J.

Action upon a policy of hail insurance. Plaintiff prevailed, and defendant appeals.

Defendant is a mutual hail insurance company organized pursuant to section 114 *et seq.,* ch. 43, Comp. St. 1905. In June plaintiff made a written application for a policy in defendant company, and agreed that said application, together with the by-laws of the company, which were printed on the back of his policy, and the policy itself, should constitute his contract; that, if he did not pay any note given by him for premium when the same became due, defendant would not be liable for any

loss under the policy. The by-laws provide that a note given for such premiums is not to be considered as payment thereof, but, unless paid November 1 next succeeding its date, the policy-holder will not be entitled to payment for any loss under his policy; that no member shall be liable for any premium or assessment in excess of that stated in his policy, and that, if the losses in any year exceed the premiums available for the liquidation thereof, the fund shall be prorated among all members entitled to participate therein, and payment upon that plan will discharge defendant from all liability upon such policies; that, if a loss occurs, the member interested shall at once notify defendant, and, if they cannot agree upon the extent of such loss, that fact shall be settled by arbitration. The policy sued on was issued in June, 1905, and plaintiff gave his note due September 1, 1905, for the premium. In July he sustained a loss by hail, and defendant was notified of said fact. An adjuster was sent by defendant, but plaintiff was dissatisfied with the amount of loss fixed by said agent, and so notified the company, but did not demand arbitration. When the note matured, plaintiff was requested to pay it, but refused on the ground that his loss exceeded the premium. Nothing further was done until this suit was commenced two years later, and upon the trial plaintiff offered to pay said note, but defendant refused to accept the money.

We have not been favored by plaintiff with a brief, but we are satisfied that he is not entitled to recover. Defendant is a purely mutual concern without capital stock or resources other than the annual premiums paid by its members. The losses for each year must be satisfied from the premiums paid during that time. If by reason of excessive losses those premiums are insufficient to pay each policy-holder who has suffered a loss, defendant, in a sense, is insolvent for that period, and, under the statute as well as its by-laws, its available assets for that year must be prorated among those entitled to share in said fund. It is essential for the protection of those

suffering losses that premiums shall be promptly paid, and the mere fact that plaintiff claimed that his loss exceeded his premium would not justify him in refusing to pay his note. He, to the extent of his premium which he had promised to pay, owed a duty to all the other members in his situation. He was as much obligated to pay for their benefit as any of the other individuals were to pay for his, and he was not entitled to the set-off claimed. *Lawrence v. Nelson,* 21 N. Y. 158. The statute permits a mutual hail insurance company to adopt by-laws like those under consideration. As applied to mutual companies, such conditions in their contracts are reasonable and will be upheld. *Farmers Mutual Ins. Co. v. Kinney,* 64 Neb. 808.

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

REVERSED.

T. O'CONNER, APPELLANT, V. JOHN WITTE, ADMINISTRATOR, APPELLEE.

FILED MAY 7, 1909. No. 15,684.

1. **Appeal:** EVIDENCE. Where evidence is conflicting but fairly submitted to the jury, a new trial will not be granted if there is sufficient evidence to sustain the verdict, even though this court may differ with the jury as to the weight of that evidence.

2. ———: HARMLESS ERROR. If the evidence of a witness is erroneously excluded, but subsequently admitted, the cause will not be reversed because of said error.

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

Charles A. Robbins and *Bartos & Bartos,* for appellant.

J. H. Grimm & Son, contra.

ROOT, J.

Action upon a promissory note given in settlement of a physician's bill for medical services rendered the maker. The allegations in the petition would also support a verdict upon an alleged agreement independent of the note to pay for said services. Defense, that the note had been fraudulently forged and raised in amount. Verdict for the defendant, who is administrator of the estate of the payor, and plaintiff appeals.

1. The court instructed the jury to only consider the cause of action upon the note. Plaintiff did not except to the giving of, or refusal to give, any instruction, so that the verdict must stand if supported by the evidence, unless there was prejudicial error in admitting or excluding evidence.

It is argued that the verdict rests upon false testimony. It is sufficient to say that the testimony of the witnesses is conflicting, but the credibility of witnesses is for the jury and not this court to pass upon. If those triers of fact believed defendant's witnesses and rejected the testimony of plaintiff and his witness, their verdict is sustained by the evidence. The original note is in evidence, has been examined under a microscope by the writer of this opinion, and does not appear to have been altered. However, the "6" in the figures "160" is peculiarly formed, and this fact, in connection with the testimony of defendant's witnesses, lends support to the finding of the jury. The contradictory evidence is not so overwhelming as to justify us in setting aside the verdict. *Parlin, Orendorf & Martin Co. v. Albrecht,* 57 Neb. 99; *Elkhorn Valley Lodge v. Hudson,* 59 Neb. 672; *Kraus v. Clark,* 81 Neb. 575.

2. It is claimed that the court should have received evidence concerning the consideration of the note, because such evidence would have supported the second cause of action, and also give color to plaintiff's testimony that the note was for $160 when signed by Fred Witte. The

first theory is out of the case on the instruction to which no exception was taken, and plaintiff did testify that Witte owed him for 16 weeks' services at the rate of $10 a week. The fact that plaintiff made said claim is also shown by defendant's witnesses, so that the facts were all before the jury, and whatever error was committed in rejecting said testimony in the first instance was cured by its subsequent reception. *Deitrichs v. Lincoln & N. W. R. Co.,* 13 Neb. 361; *Farmers & Merchants Ins. Co. v. Malone,* 45 Neb. 302; *Shull v. Barton,* 58 Neb. 741.

The judgment of the district court therefore is

AFFIRMED.

GEORGE C. BOYER V. STATE OF NEBRASKA.

FILED MAY 7, 1909. No. 15,996.

1. **Criminal Law:** INSTRUCTIONS. If the court in its instructions purports to copy a section of the criminal code, the quotation should be correct; but if one word only of the statute is omitted, and the court in other instructions makes a correct concrete application of the law to the facts in the case, and it is apparent that the jury could not have been misled by the omission referred to, the error is without prejudice.

2. **Homicide:** INSTRUCTIONS. If, in a case of homicide, the court instructs the jury to consider whether defendant "struck the fatal blow unlawfully," the adjective "fatal" precludes the idea that the jury are to consider merely the blow, and not its consequences.

3. ———: ———. If a defendant in a homicide case testifies and does not state that he apprehended any serious injury from the deceased, it is not error for the court to refuse to instruct that apprehension of such injury need not be well founded in fact to justify one assailed or threatened in acting upon appearances, if all of the facts and circumstances produced a reasonable apprehension in defendant's mind of serious bodily injury from the deceased. Nor will this court in that state of the record scrutinize closely instructions submitting the law of self-defense to the jury.

4. **Criminal Law:** INSTRUCTIONS. It is not error to refuse an instruc-

tion where the proposition of law therein contained is substantially covered in an instruction given by the court on its own motion.

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

W. P. Miles, Wright & Wright and *J. L. McIntosh,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

ROOT, J.

Plaintiff in error was sentenced to imprisonment in the penitentiary for a term of three years for the crime of manslaughter, and appeals.

1. It is argued that the evidence does not sustain the verdict because the state did not prove beyond a reasonable doubt that the deceased died as a direct result of his encounter with defendant. Defendant's farm was separated from the farm of the deceased, Mr. Perlick, by a section line and public highway. It is admitted that the parties engaged in an altercation over certain posts which defendant and his son, who was 17 years of age, were setting, possibly, in said highway. The only eyewitnesses who testified to the tragedy were the accused and his son, and they agree that Perlick started the quarrel, and finally threatened to shoot defendant, whereupon the latter struck Perlick over the head with a piece of two by four, four feet in length, which defendant had been using to tamp the dirt around a post. Perlick became unconscious, and so remained until he died two days thereafter. Dr. Emmerson assisted in an operation performed on the skull of the deceased, and later participated in the autopsy, and testified that in his opinion a certain fracture of the skull and rupture of an artery of the deceased were caused by the fall upon the ground, and not as a direct result of the blow inflicted by defendant.

The distinction made by the witness is immaterial. In either case the blow was the proximate cause of the injury and of Mr. Perlick's death.

2. The information charged murder in the second degree, and the court gave an instruction which purported to be a copy of section 5 of the criminal code, which defines manslaughter, but omitted therefrom the adverb "unlawfully" next preceding the word "kill," and this evident inadvertence presents the most serious question for our consideration. It is argued that the jurors were thereby given to understand, that, if Perlick was killed by defendant, they should convict the latter, although he acted in self-defense. If the other instructions of the court indicated that such a theory was presented to the jurors, we would not hesitate to reverse the case, but such is not the fact. In the seventh instruction the jurors were informed that, to convict defendant of manslaughter, the state must prove beyond a reasonable doubt "that the defendant *unlawfully* killed the said Perlick without malice, either upon a sudden quarrel, or unintentionally, while he was in the commission of some unlawful act," and that, if the state failed to prove all of said allegations beyond a reasonable doubt, the defendant should be acquitted. In the tenth instruction the court said that, if the jurors believed from the evidence and beyond all reasonable doubt "that the defendant struck the fatal blow *unlawfully,* but without malice," etc., they should return a verdict of manslaughter. The court also instructed that the act was lawful if done in self-defense. Thus it will be noticed that, in each instance where the court made a concerte application of the law to the facts in the case, the jurors were informed that they could not convict unless the slaying was unlawful. We do not think it possible that the jury could have been misled upon a consideration of the entire charge of the court, nor that, as thus considered, the record presents the prejudicial error urged by counsel for the defense. *Satterwhite v. State,* 82 Ark. 64, 100 S. W. 70; *St. Louis v.*

State, 8 Neb. 405; *Debney v. State,* 45 Neb. 856; *Harper v. State,* 83 Miss. 402, 35 So. 572.

Counsel cite many authorities holding that the omission of the word "unlawfully" from an indictment renders the document defective, but in the instant case defendant was charged with *unlawfully* causing Perlick's death. Several decisions of this court are also cited. In *Thompson v. People,* 4 Neb. 524, the court in defining larceny omitted the element of felonious intent. It does not appear that the charge of the court taken together correctly stated the law, and the reversal was proper. In *Ballard v. State,* 19 Neb. 609, the court, in applying the law to the case before the jurors, incorrectly informed them that, if they were "satisfied from the evidence that the defendant was at the time of the killing insane, aside from being under the influence of liquor," they should acquit. There was some evidence to indicate that the defendant was insane, and it was properly held, with such evidence in the record, that the state was compelled to prove beyond all reasonable doubt the prisoner's sanity, and the instruction was erroneous. In *Beck v. State,* 51 Neb. 106, the court had erroneously instructed the jury that the burden of proving an alibi was upon the defense, and it was held that this improper application of the law to the case on trial was not cured by another instruction that, if the evidence concerning an alibi created a reasonable doubt in the jurors' minds, they should acquit. In *Henry v. State,* 51 Neb. 149, the instructions placed the burden on defendant of proving an alibi, and also that the alibi to avail must have been such that defendant could not possibly have committed the crime, and were held erroneous, although other instructions somewhat modified the errors referred to. In *Barr v. State,* 45 Neb. 458, the court had incorrectly stated the law as applied to the facts therein, and the judgment was reversed notwithstanding some of the other instructions given stated a contrary rule. In none of the cases cited, other than *Thompson v. People, supra,* had the court merely erred

in an abstract definition of the crime, but in each instance had erroneously instructed the jury in the application of the principles of law to the facts presented on the trial. We are of opinion that the judgment should not be reversed because of the omission of the word referred to.

3. Instruction numbered 10 given by the court, is criticised because it is alleged that the jurors were permitted thereby to convict defendant upon proof that he struck Perlick, without reference to whether death ensued as a result thereof. An instruction in the identical language was approved in *Savary v. State,* 62 Neb. 166, but it was given at the defendant's request, and therefore does not necessarily represent the judgment of the court as a proper exposition of the law in every homicide case where self-defense is claimed. The court might well have made the instruction more comprehensive, but it refers to the "*fatal* blow." The qualifying word "fatal" has been defined as causing death; deadly; or mortal; and the instruction must have conveyed to the jurors' minds not only the fact of striking the blow, but that as a result thereof Perlick was killed.

4. Witnesses testified that Perlick had twice threatened to shoot defendant, and that they had informed him of that fact before the homicide. It is argued that, therefore, defendant's second instruction should have been given. This instruction informed the jurors that, if defendant had information from reliable sources concerning said threats, they should consider that fact in determining whether defendant acted as a reasonable man would have done under the circumstances of this case. It is also urged that defendant's third and seventh instructions should have been given. The instructions may be a correct abstract statement of the law that threatened danger need not be actual to justify a person taking extreme measures for his protection, but that, if conditions are such as to create in the mind of the person threatened a reasonable apprehension of serious bodily harm to himself, he might act thereon, although he was not actually

in peril. The instructions are not relevant in the instant case. Defendant did not testify that he feared any bodily harm from Perlick or that he hit his victim in self-defense. Considerable criticism is made of the expression "necessary self-defense" as found in an instruction given, but any self-defense that was not reasonably necessary or apparently necessary to an ordinarily reasonable man in like situation with defendant would not justify him in striking his opponent over the head with a huge club, and the expression was a proper one to use. Wharton, Homicide (3d ed.), sec. 225. The eleventh and twelfth instructions, given by the court on its own motion, gave defendant the benefit of all the law that he was entitled to concerning self-defense.

The defense introduced witnesses to show that deceased bore a reputation in his neighborhood for being a quarrelsome man, and that he had threatened to kill defendant and his son. The evidence further shows that Perlick was a medium-sized man, 63 years of age, and so afflicted with chronic disease as to be practically harmless in an ordinary physical encounter. It also appears that defendant is but 42 years of age, is 6 feet in height, and weighs 190 pounds. At the time Perlick was killed he only wore a shirt and overalls, and did not have a weapon of any kind in his hand or on his person, but was standing between defendant and his son. The defense claims that Perlick cursed and said that he would kill defendant, and stepped back, at the same time making a motion with his hand toward his hip pocket, and that, before Perlick's hand reached the pocket, defendant hit him with the tamper. It is unreasonable to believe that Perlick would have attempted to put his hand in his hip pocket when there was nothing therein to aid him against defendant. It is also idle to say that, before he could have completed such a motion, defendant could have raised a club with both hands and hit the deceased over the head. Defendant testified and at no time stated that he feared any harm from Perlick or that he acted in self-defense. He did say

that he told Mrs. Perlick that her husband said that he was going to kill the witness, and that he hit Perlick with the club and hit him harder than he intended to, but he does not say that he told her the truth. His self-serving declarations will not be taken as proof of any fact therein referred to. The court was liberal under the circumstances in giving defendant the benefit of the law of self-defense. On the entire record we find that defendant had a fair trial, and that the jurors could not with regard to their oaths have acquitted him.

The court was merciful, and its judgment is

AFFIRMED.

THOMAS MCCOLLUM, APPELLANT, V. CITY OF SOUTH OMAHA, APPELLEE.

FILED MAY 7, 1909. No. 15,685.

1. **Cities:** DEFECTIVE SIDEWALKS: NOTICE. A dangerous accumulation of snow and ice on a sidewalk was a defect therein within the meaning of section 107, art. II, ch. 13, Comp. St. 1905, exempting South Omaha from liability for damages arising from a defective sidewalk, unless notice of the accident was filed with the city clerk within 20 days.

2. ———: ———: ———. The charter of South Omaha as it existed in 1906 exempted the city from liability for damages arising from a defective sidewalk, unless notice of the accident was filed with the city clerk within 20 days, and the fact that an injury deprived a person of consciousness during that time did not create an exception to the provisions of the statute or excuse him for noncompliance with its terms. *Schmidt v. City of Fremont*, 70 Neb. 577.

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

J. W. Eller and *Benjamin S. Baker*, for appellant.

S. L. Winters, contra.

ROSE, J.

February 16, 1906, plaintiff slipped and fell on ice and snow which had been allowed to accumulate on a sidewalk in the city of South Omaha, and brought this suit September 7, 1906, to recover resulting damages in the sum of $30,500 for personal injuries. In his petition he alleged that by his fall he was instantly rendered unconscious, and that he remained in that condition for more than 20 days. He failed to give the city notice of his injury within the statutory period of 20 days, and for that reason the trial court sustained a demurrer to his petition. Refusing to plead further, his action was dimissed, and he presents his case here on appeal.

1. The order of dismissal is said to be erroneous because notice was not required under the facts pleaded. At the time of the accident defendant's charter contained the following provision: "The city shall not be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within the city, unless a notice in writing of the accident and injury complained of is filed with the city clerk within twenty (20) days after the date of the injury." Comp. St. 1905, ch. 13, art. II, sec. 107. Plaintiff contends that the accumulation of snow and ice on the sidewalk was an obstruction, and not a defect, within the meaning of the statute quoted, and that therefore notice was unnecessary. In determining the meaning of "defective," the purpose of the enactment in which the word is used should be considered. The lawmakers in requiring prompt notice of claims for damages arising from defective sidewalks evidently had in mind the necessity of information and the opportunity of investigation at a time when knowledge of the facts relating to accidents can be ascertained. Information of this character is essential to the interests of the city in adjusting claims and in defending suits. Such notice and information are just as important in cases where accidents are caused by accumulations of ice and

snow on sidewalks as in other cases. There is nothing in the language of the act to indicate the word was used in a restrictive sense inapplicable to obstructions of ice and snow. In addition, many adjudications show that the word "defective" as applied to sidewalks and streets may include obstructions, and that it is not limited to inherent imperfections, as argued by plaintiff. In *Bliven v. Sioux City,* 85 Ia. 346, a dangerous bill-board between a sidewalk and abutting property was held to be a defect in the sidewalk. Obstructions and banners have been held to be defects in the streets. *Hume v. Mayor,* 74 N. Y. 264; *Champlin v. Village of Penn Yann,* 34 Hun (N. Y.), 33; *Davis v. Hill,* 41 N. H. 329; *Carpenter v. Town of Rolling,* 107 Wis. 559; *Whitney v. Town of Ticonderoga,* 53 Hun (N. Y.), 214; *Ring v. City of Cohoes,* 77 N. Y. 83; *Eggleston v. Columbia Turnpike Road,* 18 Hun (N. Y.), 146. Plaintiff's understanding of the word "defective" as used in the statute cannot therefore be adopted. In holding that the accumulation of ice and snow was a defect in the sidewalk within the meaning of the charter, the trial court did not err.

2. The fact that plaintiff's fall deprived him of consciousness for more than 20 days, as admitted by the demurrer, is urged as an excuse for his failure to give the statutory notice within that time. This question is not an open one. It was presented in *Schmidt v. City of Fremont,* 70 Neb. 577. In that case plaintiff insisted that, by reason of incapacity resulting from his injury, he was not required to give the notice within the statutory period, and invoked the rule that physical inability to comply with the law, without fault on his part, was a sufficient excuse for noncompliance. In an opinion by Commissioner AMES this court said: "The validity of the general rule is not doubtful, but we apprehend that it is available only as an excuse for the nonperformance of a legal duty by the party pleading it, but not to extend the time, or afford an opportunity, for the fixing of the statutory lia-

bility upon another." Other courts have held that the disability of infancy does not create an exception to a statutory provision requiring notice to a city of all claims for personal injuries. The effect of the holdings is that the legislature may fix a limitation applicable to all, and that exceptions omitted from the statute do not exist. *Davidson v. City of Muskegon,* 111 Mich. 454; *Morgan v. City of Des Moines,* 60 Fed. 208; *Donovan v. City of Oswego,* 42 N. Y. App. Div. 539.

There being no error in the record, the judgment is

AFFIRMED.

FAWCETT, J., dissenting.

The rule announced in the opinion is supported by the authorities cited. Nevertheless it is barbarous. To illustrate: The statute gives a right of action to anyone who, without fault on his part, is injured by reason of the negligence of a city in not using reasonable care to keep its sidewalks in reasonably safe condition for travel over them. At the same hour A is injured by a sidewalk on Fifth street and B on Tenth street. A has a finger broken. He notifies the city within 20 days, and recovers $100. B has both arms broken, and also suffers a fracture of the skull which renders him unconscious, and he so remains for more than 30 days. He is disabled for life, but he is not permitted to recover. Why not? Because as a result of the city's negligence he was so seriously injured that for more than 20 days he was totally unconscious and could not notify the city of its own wrong. Any rule of construction which will result in such flagrant injustice is so contrary to every instinct of humanity that it ought never to be permitted to disgrace the reports of the court of last resort of any Christian state. It is preposterous to say that the legislature ever intended to give a party a remedy for a wrong and at the same time deprive him of that remedy if he failed to perform some condition subsequent which the wrong of the

wrong-doer rendered it impossible for him to perform. "The law countenances no such wretched ethics. Its command always is to do justice."

CORA E. BUTTERFIELD, APPELLEE, V. CITY OF BEAVER CITY, APPELLANT.

FILED MAY 7, 1909. No. 15,672.

1. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury and judgment of the court.
2. **Instructions** given and refused examined, and *held* no error.
3. **New Trial:** NEWLY DISCOVERED EVIDENCE. "A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." *Cunningham v. State*, 56 Neb. 691.

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

Halleck F. Rose, Charles A. Robbins and *Ross J. Harper,* for appellant.

Perry & Lambe and *J. F. Fultz, contra.*

FAWCETT, J.

Plaintiff claims damages for personal injuries received by falling on a defective sidewalk in defendant city, which she alleges defendant had, with full knowledge and actual and constructive notice, permitted to remain in an unsafe and dangerous condition for at least 90 days prior thereto. The answer is a general denial, coupled with a plea of contributory negligence, which is denied in the reply. There was a verdict for plaintiff for $1,250, and, from a judgment thereon, this appeal is prosecuted.

It would serve no good purpose either to the parties or to the profession to enter upon any discussion of the law or to set out the evidence *in extenso*. The law of negligence and contributory negligence is definitely settled in this state, and well understood by the profession. The evidence clearly establishes the negligence of defendant, and utterly fails to establish the defense of contributory negligence.

It is urged that the damages awarded by the jury are excessive. The evidence fairly shows that plaintiff, who was 45 years of age, was strong and able-bodied prior to the time of her injury; that she had earned "from $1 a day to $3 and $4 a week," and on one occasion shortly prior to her injury $8 a week, and after the injury had been compelled to do lighter work for which she received $2.50 to $2.75 a week. Her physician and the city physician both testified that she ought to quit work and stop using her limb for many months, and neither of them would say that she would ever fully recover. They also both testified that at the time of the trial her ankle was weak and swollen; that she could not bear her weight upon the injured limb as upon the other; and that her limb above the ankle was showing distinct atrophy, and that use of the limb was undoubtedly painful at that time, nineteen months after the injury. In the light of such a showing we cannot say that $1,250 was an excessive allowance.

Defendant next contends that "the court erred in excluding evidence of the amount of a claim for damages filed by plaintiff against the defendant city." Defendant called the city clerk to the stand, and asked him if he had made any search for any reference to the claim of plaintiff in the record, to which he gave an affirmative answer. He was then asked if he had found any reference in the book of minutes or records of the council proceedings in regard to the plaintiff's claim. He answered that he had found two. Defendant then offered, and the court received in evidence, the two entries referred to,

which read as follows: On page 134, "Clerk read a notice of claim for damages against Beaver City by Cora E. Butterfield for injury from defective sidewalk. On motion the above claim for damages was laid on the table for one month." On page 136, par. 3: "In the matter of Cora E. Butterfield against Beaver City, claim rejected." The clerk was then asked if he had made a search among the files or papers in his custody to find the claim that had been filed, to which he gave an affirmative answer. "Q. Could you find it? A. No, sir. Q. Do you know where such claim or said claim is at this time? A. No, sir. Q. Was any such claim included in the papers or files that were turned over to you by your predecessor? A. I never seen any." He was then asked: "Q. Have you any knowledge, Mr. Leonard, as to the amount of that claim that was filed by Mrs. Butterfield? A. No knowledge of my own." Defendant then introduced Julius Greenwood, who, at the time inquired about, was a member of the council of defendant city, and interrogated him as follows: "Q. Was you on the board the time the claim was presented? A. Yes, sir. Q. What was the amount of the claim? Objected to as immaterial under the issues. Sustained. Q. Do you know the amount of the claim? Objected to as immaterial. Sustained. Q. Do you know the party who made the claim? Objected to as immaterial. Sustained. Q. Who was clerk of the board at that time, Mr. Greenwood? A. Mr. Phillips. Q. What action was taken on the claim? Objected to as immaterial. Sustained." There the examination ends. No offer was made by defendant, following these rulings of the court, to prove any of the matters called for by the questions propounded. That defendant cannot predicate error upon this has been settled by repeated decisions of this court. "Error cannot be predicated upon the refusal of the district court to permit a witness to answer a certain question, when there was made no offer of proofs which would be elicited if the desired answer was permitted to be made." *Alter v. Covey*, 45 Neb. 508.

It is urged that the court erred in entering judgment against defendant for costs, in the absence of proof that plaintiff had filed her claim with the council prior to the commencement of her action. This contention is decided adversely to defendant in *Nance v. Falls City,* 16 Neb. 85, and *Village of Ponca v. Crawford,* 18 Neb. 551. In *Nance v. Falls City, supra,* we held that "the word 'claims' in section 80 of the chapter (14) relating to cities of the second class applies alone to those arising upon contract, and not upon tort—as for the death of a person through the negligence of the city." Section 80, art. I, ch. 14, Comp. St. 1905, was still in existence, without amendment of any kind, at the time this action was commenced. On the trial, defendant tendered 30 separate instructions. The court, in an excess of generosity, gave 10 of them as asked, and one more with a slight modification. In those 11 instructions and those given by the court on its own motion all of the law applicable to the pleadings and the evidence was fully and fairly stated to the jury, and we find nothing in any of them, outside of their number, which we think is subject to just criticism. Defendant cannot complain of their multiplicity, as it was responsible therefor. We find nothing in any of the instructions refused by the court, applicable to the issues and the evidence, that is not fairly stated in the instructions given.

Defendant further insists that the court erred in not granting it a new trial on the ground of newly discovered evidence. If all of the evidence set out in the affidavits in support of this contention had been received, it could not possibly have changed the result. In addition to that, there is no showing of diligence on the part of defendant. There is no claim that any of the officers or the attorney of the defendant made any inquiry or investigation whatever among the neighbors and persons with whom the plaintiff had been employed, both before and after her injury, prior to the adverse result of the trial. One of the points is that plaintiff had complained of

rheumatism, and that the rheumatism may be partially responsible for the present condition of her limb; but defendant's counsel had that thought in mind during the trial, for he interrogated plaintiff on cross-examination and one of defendant's witnesses on direct examination on that point. Dr. Copeland's affidavit shows that he would not testify to anything positively, and hence he would in no manner contradict the positive testimony of the two physicians who had testified on the trial, one of whom was the defendant's city physician. Defendant complains that Dr. Copeland was not notified of the examination which was made of plaintiff the evening before the trial by Drs. Green and Cameron; but any failure to notify him of that meeting was as much the fault of the defendant as of the plaintiff; in fact, more so. Defendant knew that the two physicians named were going to make an examination, and, if it desired the presence of Dr. Copeland thereat, it was its duty to use reasonable diligence to ascertain when the examination was to be had, and to notify him of that fact. The rule is well stated in *Cunningham v. State,* 56 Neb. 691: "A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." Defendant has failed to bring itself within the rule, and the court did not err in holding adversely to it on this point. After a careful examination of the entire record, we have been unable to find any prejudicial error.

The judgment of the district court is therefore

AFFIRMED.