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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1909—JANUARY TERM, 1910.

VOLUME LXXXV.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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* Judge Sedgwick succeeded Judge Dean January 6, 1910.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Leander M. Pemberton.....	Beatrice.
		John B. Raper.....	Pawnee City.
Second.....	Cass and Otoe.	Harvey D. Travis. ..	Plattsmouth.
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		Lincoln Frost.....	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day.....	Omaha.
		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears.....	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
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		Benjamin F. Good...	Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck..	Fremont.
		George H. Thomas...	Schuyler.
Seventh	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
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Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel, Keith, Kimball, Lincoln, Logan, McPherson, Morrill, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1909.

STATE, EX REL. JOHN M. RAGAN, APPELLEE, V. GEORGE C. JUNKIN, SECRETARY OF STATE, APPELLANT.

FILED AUGUST 18, 1909. No. 16,274.

1. **Constitutional Law**: FREEDOM OF SPEECH: RIGHT OF ASSEMBLY AND PETITION. The legislative enactment in sections 1 and 10, ch. 53, laws 1909, that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticised on referred to in any manner by any political party, or any political convention or primary, or at any primary election," is a violation of section 5 of the bill of rights, declaring that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense," and of section 19 of the bill of rights, declaring that "the right of the people, peaceably, to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

2. ———: RIGHT OF ASSEMBLY: POLITICAL CONVENTION. A political convention is an assemblage within the meaning of the constitutional provision that the right of the people to assemble to consult for the common good shall never be abridged.

3. **Elections**: SELECTION OF CANDIDATES: CONSTITUTIONAL GUARANTIES. In prescribing a form of official ballot which limits the printed names of candidates for judicial and educational offices to nominees by petitions containing 5,000 names each and in depriving all electors except 500 in each county of the right to take part in nominating a particular candidate, chapter 53, laws 1909, violates section 22 of the bill of rights, declaring that "all elections

shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

4. Statutes: VALIDITY. Where it appears on the face of a legislative act that an inducement for its passage was a void provision, the entire act falls.

5. ———: ———. Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced.

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

William T. Thompson, Attorney General, Grant G. Martin and *Arthur F. Mullen,* for appellant.

John C. Cowin and *Charles O. Whedon, contra.*

ROSE, J.

Defendant is secretary of state, and as such was requested to place the name of relator on the primary ballot as a republican candidate for judge of the supreme court at the primary election to be held August 17, 1909, but refused on the ground that compliance would be a violation of the nonpartisan judiciary act passed at the last session of the legislature. Laws 1909, ch. 53. The controversy thus raised was submitted to the district court for Lancaster county, where the act in question was held void as being an invasion of the constitutional right of free assembly, of free speech and of a free ballot. A peremptory writ of mandamus was accordingly allowed, directing defendant to place relator's name on the primary ballot in compliance with the primary election law and in disregard of the nonpartisan judiciary act. From the order allowing the writ defendant appeals, and his record presents for review the correctness of the ruling of the trial court.

The first section of the nonpartisan judiciary act authorizes party nominations at conventions and primaries, and concludes as follows: "But candidates for the fol-

lowing offices, to wit, chief justice of the supreme court, judge of the supreme court, judge of the district court, county judge, regent of the state university, superintendent of public instruction and county superintendent of public instruction shall not be nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or primary, or at any primary election; and no party name or designation shall be given upon any ballot to any candidate, for any of said offices, and hereafter all candidates for all of said offices shall be nominated only by petition, and no candidate for any of said offices shall appear on any party ticket." Laws 1909, ch. 53, sec. 1. According to this provision candidates for judicial and educational offices cannot be "nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or primary, or at any primary election." Does the bill of rights forbid such an enactment? It declares: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Constitution, art. I, sec. 5. "The right of the people, peaceably, to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." Constitution, art. I, sec. 19. The first provision quoted protects every person in his right to speak, write and publish on all subjects, and the next permits him to assemble with others to consult for the common good. A political meeting or convention is an assemblage within the meaning of the constitutional provision that the right of the people to assemble and consult for the common good shall never be abridged. The right of a citizen to speak, write and publish on all subjects does not terminate when he enters a political convention or assemblage. With good motives and for justifiable ends the members of such a body may

jointly speak and publish the truth about candidates for office, and this right extends to aspirants for judicial and educational offices. Judge Cooley, in discussing the constitutional liberty of the press and of speech, said: "There are cases where it is clearly the duty of every one to speak freely what he may have to say concerning public officers, or those who may present themselves for public positions. Through the ballot-box the electors approve or condemn those who ask their suffrages." Cooley, Constitutional Limitations (7th ed.), p. 617. Delegates and members of political organizations not only take with them into their party councils the inalienable right to speak, write and publish on all subjects, but the full benefit of this privilege can only be obtained by united action. Political parties are the great moving forces in the administration of public affairs, and their influence in elections cannot be eliminated by the legislature as long as the right to assemble and speak the truth remains in the charter of our liberties. Published criticisms of candidates, officers and policies are potent factors in the struggle for civic virtue and cannot be suppressed by legislative enactment. The privilege of speaking and publishing the truth with good motives and for justifiable ends was not inserted in the bill of rights by accident. The doctrine that the truth as to a man's conduct is no justification for publishing it in the press originated in the Star Chamber, and was in high favor in that tribunal when printing became an effective means of disseminating what honest men said about the abuses of official power and the conduct and policies of public men. The hostility to such a restriction of free speech and of a free press resulted in the adoption of section 5 of the bill of rights. The nonpartisan judiciary act is void in so far as it declares that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or primary, or at any primary election."

The act under consideration prescribes the manner of nominating candidates for judicial and educational offices and the form of ballot to be used at the November election. In this connection the following provisions are assailed as unconstitutional: "Candidates for public office may be nominated otherwise than by convention, committee or primary meeting in the following manner: A certificate of nomination containing the name of the candidate for the office to be filled, stating the name, residence, business and post office address of the candidate shall be signed by electors residing in the district or political division in which the officers are to be elected and filed with the clerk of the village, city or county, or with the secretary of state as the case may be. The number of signatures shall not be less than five thousand; not more than five hundred of which shall be from one county, when the nomination is for chief justice or judge of the supreme court." Laws 1909, ch. 53, sec. 3. Under the provisions quoted only 500 electors in a county can lawfully sign the nominating certificate of a candidate for judge of the supreme court, though there may be more than 5,000 legal voters therein. In other words, 500 electors in a county may participate in nominating a candidate for judge of the supreme court, and when they do so the other voters in the same county are deprived of the right to sign a nominating certificate for the same candidate. In Adams county, where relator resides, nearly 5,000 electors voted at the general election in 1908. Only 500 of them, under the nonpartisan judiciary act, can take part in nominating him for judge of the supreme court, and this would be true if the entire electorate of 5,000 were a unit in demanding an opportunity to vote for him as a regular nonpartisan candidate at the November election. For want of the signatures of the supporters who are deprived of the right to sign the nominating certificate of the candidate of their choice he may not be nominated. In such an event his name would not be printed on the official ballot for the November election, and their right

to vote for him thereat as a regular nominee would be lost. Under these circumstances the empty privilege of writing on official ballots in blank spaces the names of persons who have not been nominated, with the prospect of having such votes classified in the election returns as "scattering," is not the full measure of an elector's rights within the meaning of the constitution. Electors who desire to vote for a particular candidate for judge of the supreme court at the November election should be allowed to take part in nominating him or in whatever preliminary step the law requires as a condition of allowing his name to be printed on the official ballot. This privilege is protected by the following section of the bill of rights: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Constitution, art. I, sec. 22. When the lawmakers enter the party caucus, the party convention, the party committee, and the primary to make regulations, they must act within the limits of the foregoing provision. The elective franchise may be invaded by such regulations, when they prescribe the forms of the official ballots to be used at the general election and establish the methods of making nominations. These forms and methods may be as effective to deprive the voter of his rights as direct legislation relating to the November election. Chief Justice HOLCOMB, in discussing a primary law, said: "It is a part of the election machinery by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances are interposed, would be a hollow mockery. The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise." *State*

v. Drexel, 74 Neb. 776. In the case cited Chief Justice HOLCOMB adopted the following language of Professor Wigmore: "Nominations for public office may be considered in two aspects. *First,* it involves the right of every eligible person to be voted for by any elector who desires to do so; *secondly,* it involves the right of each elector to exercise choice among all who are eligible. The two rights may be protected by the same legislation, but it is important to remember that there is involved not merely the right of an individual to be a candidate, but the right of every other person to select him for the office; practically the feasibility of independent political movements depends upon the second right." 23 American Law Review, 730. *State v. Drexel,* 74 Neb. 776, was cited with approval by the supreme court of Illinois in *People v. Board of Election Commissioners,* 221 Ill. 9, where the following language was used by that court: "When statutes are enacted which regulate the form of the ballot to be used, what shall appear upon the ballot, and how the candidates whose names shall so appear shall be chosen, the provision of the bill of rights applies to the new condition. The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law." The supreme court of Illinois in a later case said: "The power of the individual voter at the polls to cast his vote, untrammeled, for the candidate of his choice is no more sacred than the right of the individual member of a political party to express his choice for party candidates at a primary election." *Rouse v. Thompson,* 228 Ill. 522. In

depriving electors of the right to participate in nominating for judicial and educational offices the candidates of their choice, the nonpartisan judiciary act violates section 22 of the bill of rights.

The duty to uphold all valid legislation has led to an earnest effort to find some substantial basis for sustaining those provisions which are not directly inhibited by the constitution. This cannot be done, however, if either of the invalid provisions was an inducement to the passage of the bill. The void part of section 1 is repeated in section 10 with the legislative announcement that it is "declared to be the purpose of the people of Nebraska to remove all of said offices entirely from the domain of party politics." The leading provision for carrying into effect that purpose, the one disclosed by the act itself, is the void provision that candidates for those offices shall not be "nominated, indorsed, recommended, censured, criticised or referred to by any political party, or any political convention or primary, or at any primary election." It is true the legislature prescribed a form for a nonpartisan ballot and prohibited party designation of candidates thereon. This, however, did not prevent party activity in the election of judicial and educational officers. The legislative intention being to remove such offices from the domain of party politics, and the leading provision for carrying that purpose into effect being void, the bill necessarily shows on its face that the void part was an inducement to the passage of the act.

Even if the unconstitutional provisions were not the inducing cause of the legislation, the entire act must fall, unless the valid and invalid parts can be separated in such a way as to leave an independent statute capable of enforcement. The intention of the legislature must be expressed by written language. In segregating void provisions the language itself must be separated. "Where a part of an act is unconstitutional," wrote Chief Justice HOLCOMB, "because contravening some provision of the fundamental law, the language found in the invalid por-

tion of the act can have no legal force or efficacy for any purpose whatever." *State v. Insurance Co.*, 71 Neb. 335. It is equally true that what remains must express the legislative will, independently of the void part, since the court has no power to legislate. These propositions are elementary, and citation of precedents to support them is unnecessary. For the purpose of applying the rules stated, section 1 of the act is here reproduced: "Any convention or primary meeting, as hereinafter defined, held for the purpose of making nominations for public offices, and also voters of the number hereinafter specified, may nominate candidates for public offices, to be filled by election within the state; a convention or primary meeting within the meaning of this act is an organized assemblage of voters, representing a political party which at the last election before the holding of such conventions or primary meetings, polled at least one per cent. of the entire vote in the state, county, or other subdivision or district for which the nomination is made. A committee appointed by such convention or primary meeting, may also make nominations for public offices, and authorized to do so by resolution, duly passed by the convention or meeting at which said committee was appointed. A state convention of any political party may take action upon any constitutional amendment, which is to be voted upon at the following election, and said convention may declare for or against such amendment, and such declaration shall be considered as a portion of their ticket to be filed with the secretary of state and by him certified to the various county clerks. But candidates for the following offices, to wit, chief justice of the supreme court, judge of the supreme court, judge of the district court, county judge, regent of the state university, superintendent of public instruction and county superintendent of public instruction shall not be nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or primary, or at any primary elec-

tion; and no party name or designation shall be given upon any ballot to any candidate, for any of said offices, and hereafter all candidates for all of said offices shall be nominated only by petition, and no candidate for any of said offices shall appear on any party ticket." Laws 1909, ch. 53, sec. 1. In this section the void provision already described limits the operation of what precedes it. The first part of the section authorizes nominations by conventions and primary meetings. This portion, with the void part stricken out, would authorize partisan nominations of candidates for judicial and educational offices, which is exactly the opposite in that respect of what the legislature intended. With the qualifying and void part eliminated, therefore, the first part of the section does not express the legislative will. These observations apply also to section 10, where the void provision in the first section is repeated.

Section 3 makes provision for nominating candidates for judicial and educational offices by petition or certificate of nomination. This section contains the void provision which deprives all electors in a county except 500 of the right to sign the nominating certificate of a particular "candidate by petition." The petition described in section 3 is a substantive part of the legislation, and reference to it is repeatedly made throughout the act. With the void provision stricken out, the petition mentioned by the legislature in other parts of the bill would not be the petition to which the legislature referred. It is therefore clear that, with the unconstitutional provisions eliminated, the remainder of the act would not be what the lawmakers in fact enacted. There is no lawful way to separate the valid and invalid portions so as to leave an enforceable statute expressing the will of the legislature. It follows that no part of the act can be sustained.

The judgment of the district court is

AFFIRMED.

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

DEAN, J., dissenting.

I am unable to concur in the opinion of the majority of the court. From the arguments of counsel and the law applying to the facts it does not clearly appear that the act in question comes within the inhibitory provisions of the fundamental law that have been invoked to destroy it. The act is attacked solely on constitutional grounds, and thus the recognized rules of this and other jurisdictions, in cases involving constitutional construction, should be applied to determine the right of the act to take a place among the laws of the state.

Viewed from any point there is a delicacy surrounding the discussion of some features of the case that would be gladly avoided, but due regard for the performance of a public duty otherwise directs. The legislature has for many years been modifying the general election laws in response to public demand. It gave us the Australian ballot system, and events have proved its wisdom. It gave us the state wide primary law, and, while it may be defective in some respects, it is within the province of the legislature to amend it. In any event, it is not likely the people will surrender their power or that a return will be had to the convention system of nominating candidates for public office. The nonpartisan judiciary act, with but 7 negative votes in the senate and but 27 negative votes in the house recorded against it, is but an expansion of the general primary system. Its principle is not new to the statute books of five states or more. It is not an untried experiment.

In the preservation of the constitutional checks and balances of our system of government is involved the preservation of government itself. It is fundamental that the legislative, executive and judicial departments should each be free to perform their separate functions without interference from either of the others. Applying this principle to a legislative act, the validity whereof is attacked on the sole ground of being repugnant to the con-

stitution, a decent respect for the legislative and executive departments which have respectively passed and approved it inculcates an abiding desire on the part of the judiciary to refrain from disturbing it except for the most weighty reasons. An act of the legislature is presumed to be constitutional. This presumption continues until the contrary is affirmatively shown by the challenging party. The legislature is presumed to know, to interpret, and to make effective by competent legislative enactment the will of the people, and every act passed that is conformable to the constitution has all the power of that instrument behind it. All intendments of the law favor these presumptions. The judiciary is not the master of the constitution but merely its interpreter, and in the exercise of this prerogative it is not the court's duty to declare an act unconstitutional unless it clearly and beyond question contravenes some provision of the fundamental law, and every reasonable doubt will be resolved in favor of sustaining the act. By close adherence to this long familiar rule may the judiciary preserve itself from the imputation of even seeming to invade the legislative realm. It may thus avoid "bench legislation," an insidious judicial offense, and one which may in time, if indulged, imperil the perpetuity of our institutions. Cooley, Constitutional Limitations (7th ed.), p. 227; Professor Wigmore, 23 Am. Law Review, 719; *City of Topeka v. Gillett*, 32 Kan. 431; *Ogden v. Saunders*, 12 Wheat. (U. S.) *213; *Hoover v. Wood*, 9 Ind. 286; *Wellington, Petitioner*, 16 Pick. (Mass.) 87.

The majority opinion holds: "Political parties are the great moving forces in the administration of public affairs." That evil influences and impure motives should creep into the management of political parties are circumstances that have been long recognized and are everywhere deplored. But the act is not aimed at the destruction, or even the impairment, of an exercise of the legitimate functions of political parties. The relator's argument on this point indicates he is seized with this fear,

and in a manner his protest against the act is suggestive of John's protest at Runnymede. The nonpartisan act leaves the solution of political questions to political parties. It appears to be only a well-directed protest against the domination of nonpolitical departments of government by partisan political influence. Justice, in the proper application of its principles, is no respecter of party lines. No logical reason for the domination of our school system by the spirit of partisanship can be advanced. There is sufficient latitude in public questions and public problems, that are in their nature purely political, to absorb the legitimate attention of those whose guiding hands would direct the destinies of the political parties and thus indirectly, but none the less potently, the destiny of state and nation. In the departments sought to be affected, the legislature has the right within the bounds of the fundamental law to exert its power to the end they may be effectively removed by legislative enactment from the domain of partisan politics.

Who will question the propriety of legislation to the end the judiciary may avoid even the appearance of securing place and power at the hands of the cunning captains of political patronage? He was a wise writer who said: "A gift doth blind the eyes." Is the gift less seductive, and will it less effectually dull the eye of the magistrate to the iniquities of the giver because it takes the form of preferment in office? No one will question the propriety of giving added meaning to the vital truth expressed in the motto of our state, "Equality before the law." By what means may this result be the better maintained? Will it be by an immersion of the judiciary in the seething pool of partisan politics, or will it be by its separation from that stirring feature of political life in the manner pointed out by the act in question? The legislature, coming from the body of the people, and charged with legislative responsibility, solved the problem in a manner satisfying to itself by the passage of the nonpartisan judiciary act. Who then is to pass upon the wisdom or the un-

wisdom, the expediency or the inexpediency, that may be involved in its declared purpose? Not the judiciary, for it is not within its constitutional province, but the legislature alone in the exercise of its power to amend and its power to repeal. Will it be seriously urged that loyalty to party or to party leadership, because of past achievement or promise of future performance, or for any sane reason, is always and everywhere and regardless of all else the paramount duty of the citizen, whether in or out of office? It is to be deplored that in some instances in public history, in the exuberance of an intense partisan spirit, loyalty to party leadership seems at times almost to have overcome loyalty to all else. Political parties will be always with us. They are inseparable from our form of government, but danger lies in the direction of the exercise of a spirit of excessive and unreasoning loyalty to party or to party leaders. See Messages of the Presidents (Washington), p. 54; 1 Bryce, The American Commonwealth, p. 104.

The opinion holds in effect that because, under the provisions of the act in question, only 500 petitioners in Adams county, the home of relator, can take part in nominating him, he might thereby be prevented from receiving a nomination, and the electorate of his county, which contains about 5,000 electors, would thus be deprived the opportunity of voting for him. The point does not seem to be well taken. It does not appear reasonable to believe the enforcement of this feature of the act would be fraught with results so serious. There are eight counties contiguous to that of relator, having a population in each that is not much, if any, less than that of Adams county. Thus, in his own and in the eight neighboring counties, with one additional, the names of the requisite 5000 signatures might be obtained by the relator, or by any qualified candidate. In the state at large the entire vote amounts to approximately 250,000. Two per cent. of that number is the number of signatures required to place the name of relator in nomination. The most populous

county in the state has approximately 25,000 voters. Two per cent. of that number is the maximum number of signatures permitted by the act in any one county, so that upon a percentage basis, while it is true no percentage is named in the act, it is seen there is no distinction between the different portions of the state and no distinction as to the number of signatures required of candidates for position in the same class. The act seems to impose no unusual or unreasonable burden or restriction in the requirement that the signatures of 5,000 electors shall be obtained, with the limit of 500 in any one county. These are mere details of the law, regulations that are within the power of the legislature to prescribe. By the arrangement of the ballot provision is made that the voter may write in the names of such additional persons as may commend themselves to his choice. *Healey v. Wipf,* 117 N. W. (S. Dak.) 521; 23 Am. Law Review, 719; Paine, Elections, sec. 5.

The act is not obnoxious to the constitutional prohibition against class legislation because it includes all candidates for judicial position in courts of record, and all candidates for executive school position. It adds no new qualifications to the constitutional requirements respecting the position sought by relator. *State v. Hunter,* 38 Kan. 578; *State v. Township Committee,* 50 N. J. Law, 496, 14 Atl. 587; *City of Topeka v. Gillett,* 32 Kan. 431; *State v. Berka,* 20 Neb. 375; *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1. The majority opinion cites *State v. Drexel,* 74 Neb. 776. There a candidate for nomination was required, by the act there in question, to pay a sum equal to 1 per cent. of the salary of the desired office, for the term, to entitle his name to appear on the primary ballot. In brief, the act required him to purchase the right to submit his name to the electorate as a party candidate for nomination. The act was held to be clearly repugnant to the constitution, but it does not clearly appear that the rule there invoked applies to the facts in the case at bar. *People v. Board of Election Commis-*

sioners, 221 Ill. 9, and *Rouse v. Thompson,* 228 Ill. 522, are cited in the majority opinion. The soundness of all that is said in the cited portions of the cases may be conceded. For the most part they appear to show a connection between the primary election and the general election.

The opinion discusses two features that were not argued in the brief of relator. Reference is had to the feature limiting the number of signatures that may be obtained in any one county to 500, and to that other feature which discusses freedom of speech and the right to peaceably assemble. It is an established rule of this court that assignments which are not argued in the briefs of the party complaining are deemed to be waived and will receive no attention here. The reason for the rule and its application is sound. It is fair to all litigants, avoids surprise to counsel, and gives to each party an equal opportunity to be heard on contested matter. In *Brown v. Dunn,* 38 Neb. 52, the rule was applied by RAGAN, C.: "We will not examine errors alleged in a petition in error unless such errors are specifically pointed out and relied upon in the briefs filed in the case, under the rules of this court." In support of his ruling he cites *Phenix Ins. Co. v. Reams,* 37 Neb. 423. To the same effect are the following: *Peaks v. Lord,* 42 Neb. 15; *Madsen v. State,* 44 Neb. 631; *Blodgett v. McMurtry,* 54 Neb. 69; *Scott v. Chope,* 33 Neb. 41; *Glaze v. Parcel,* 40 Neb. 732; *Gulick v. Webb,* 41 Neb. 706; *Erck v. Omaha Nat. Bank,* 43 Neb. 613; *Johnson v. Gulick,* 46 Neb. 817; *Wood Mowing & Reaping Machine Co. v. Gerhold,* 47 Neb. 397; *Mandell v. Weldin,* 59 Neb. 699.

The majority opinion holds: "Where it appears on the face of a legislative act that an inducement for its passage was a void provision, the entire act falls," and that, "where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced." Even assuming that the portions of the act in question

are invalid which are pointed out by the majority opinion, yet it does not appear that they are so intermingled with the valid portions that they cannot be separated so as to leave an enforceable statute. The act in question would still be enforceable by omitting from its first section the following words: "Indorsed, recommended, censured, criticised or referred to in any manner." With these words omitted, the first section would provide that candidates for the judiciary and executive school offices "shall not be nominated * * * by any political party, or any political convention or primary, or at any primary election." Applying the same rule to the feature of section 3 of the act, which limits the number of signatures to 500 names in any one county, and with these words omitted, "not more than five hundred of which shall be from one county," the section would then read: "The number of signatures shall not be less than five thousand * * * when the nomination is for chief justice or judge of the supreme court." The limitation of 500 signatures to any one county is not essential to the practical operation of the act. With this feature omitted, 5,000 voters from any portion of the state would nominate, and thus the relator, by his own showing, would not be deprived of any substantial right. The act would then merely change the place of nomination from the floor of the party convention, or from the party primary, to the body of the people without regard to party affiliation.

Has a politcal party an inherent right to nominate party candidates for non-political offices? Are not all the people greater than a mere party subdivision of the people? Cooley, Constitutional Limitations (7th ed.), p. 247, concerning a legislative act, says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." In support of this view the author cites many authorities. The majority opinion contains a citation from *State v.*

Insurance Co., 71 Neb. 335. Fairly construed it reaffirms the rule laid down by Judge Cooley. *Blair v. Ridgely*, 41 Mo. 63: "Outside of society, and disconnected with political society, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering into the social compact subject to such qualifications as may be prescribed by the state or body politic." *People v. Barber*, 48 Hun (N. Y.) 198: "The elective franchise is not a natural right of the citizen. It is a franchise dependent upon law by which it must be conferred to permit its exercise. *Spencer v. Board of Registration*, 1 McArthur (D. C.) 169, 29 Am. Rep. 582."

That part of the act which provides that candidates for judicial and educational offices cannot be censured or criticised is evidently intended to be merely advisory. It will not be seriously urged that either judges or educational officers should be immune from deserved censure or criticism by any person who has, or thinks he has, just cause for complaint.

The inducement for the passage of the act is not expressed in its details, but is found in its broader language, which is expressive of a laudable desire to separate the judicial and the school system from partisan political control by nonpartisan nominations and nonpartisan elections.

In the belief that the judgment of the trial court should be reversed, and the act in question sustained, this dissent is submitted.

FILED AUGUST 28, 1909.

LETTON, J., dissenting.

While I agree with much that is said in the majority opinion, I must dissent from the conclusion reached. That opinion holds:

1. That the provision of the law under consideration which declares that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or

primary, or at any primary election" is void as being in violation of the provisions of the bill of rights protecting liberty of speech and the right of free public assembly. So far as the prohibition of free speech by citizens assembled together in conventions is concerned, this provision of the act is clearly and manifestly void. Its enforcement in this respect would be an assault of the gravest and most heinous character upon the liberty of the citizen, and one that no free people would long endure. It is opposed to that spirit of liberty which is our dearest heritage, and which should be most jealously conserved and strongly defended by legislature, courts and private citizen alike. It cannot be defended as a valid exercise of legislative power, and, indeed, counsel for respondent laudably has made no attempt to do so. But, perhaps recognizing its inability and the folly of attempting to curb and limit free speech and free assemblage in a land of liberty, the legislature wisely attached no penalty or punitive sanction to a violation of its commands in these respects. Since a disregard of this provision can meet no punishment, all that part of the act may be treated as surplusage. It may be considered as an indication of what the legislature would have liked to do if it had the power, or perhaps as advisory in its nature. But I cannot go so far as the majority in holding this whole provision void. Not all of it is obnoxious to or inhibited by any provision of the constitution. The regulation of primary elections is concededly within the province of the legislature, and that portion of this provision which prohibits the nomination of such candidates at any primary election is not in violation of any constitutional provision and is a proper regulation. The legislature may, as it did for many years before the passage of the Australian ballot law, leave the whole matter of the nomination of candidates and the preparation of ballots to be used at the general election to individual or party care; the only regulation at that time being that the elector should deliver in full view of the people assembled at

the polls a piece of paper with the name of the person voted for written or printed thereon and a pertinent description of the office (Gen. St. 1873, ch. 20, sec. 30); or it may take into its hands the entire control and direction of the nomination of candidates and the preparation and furnishing of official ballots. Its action in regard to these matters, where no constitutional right is assailed, is conclusive alike upon the courts and upon the citizen.

In this state the printing and furnishing of official ballots has for years been assumed by the state. No other ballots than those furnished by public authority can be used. The manner in which the names of candidates shall appear upon such official ballot, whether with or without party designation, is a matter entirely within the control and discretion of the legislature, provided only that in this respect no discrimination or partiality is shown which will defeat the constitutional requirements providing for "a free ballot and a fair count." Political parties may or may not be recognized by the legislature in regulating the form of ballots, and there is no constitutional requirement which compels their notice. The legislature has the option whether or not the ballots shall be "official" and printed at public expense, and whether party designations shall appear thereon, and it has the power to decide whether the names of candidates printed upon the "official ballots" shall be ascertained by petition, by convention, by primary election, or by any other manner which accomplishes the end sought, a reasonable limitation of the number of names necessary to print in order to afford every elector a fair opportunity to express his preference. While at the general election the elector may vote for whom he pleases by writing any name upon the ballot, it is manifestly impossible for the state to print in advance the name of every possible candidate, and the exercise of some method of selection is necessary to avoid needless expense and an unwieldy and cumbersome ballot. The state, too, has the right reasonably to classify offices, and to provide that candidates for certain offices

shall be selected by primary election and for others by petition. This state having heretofore adopted the primary system of nominations as to certain offices, it has the power to prohibit nominations at a primary election for such offices as to which it is provided nomination shall be by petition. In my judgment the prohibition of the nomination of candidates for judicial and educational offices at primary elections is a valid exercise of legislative power, but the prohibition of free speech and free assemblage contained in the act is not and ought not to be of more practical or legal effect than "sounding brass or a tinkling cymbal" or "the crackling of thorns under a pot."

2. Coming now to the provision limiting signatures to petitions for candidates for the office of supreme judge to not more than 500 in any one county: In its practical operation I seriously doubt whether this would hinder or obstruct any voter in the exercise of the elective franchise. Every one who has observed the degree of care and discrimination, or rather lack of these qualities, which the average man ordinarily employs before he affixes his name to petitions must come to the conclusion that, after obtaining 500 signers in a few counties in the more densely populated portion of the state, there would be little or no difficulty in filling the quota from the 80 or more counties left to canvass. But, however this may be, the possibility exists that the reputation of a candidate entirely fitted and qualified for, and who might adorn, the position may be so purely local that, unless the voters of his own immediate locality furnish the 5,000 names necessary under the law, thousands of voters in that locality would be placed at a serious disadvantage, as compared with voters in other parts of the state, by being compelled to write the name of their choice upon the official ballot, instead of its being printed thereon. The contingency is in my opinion remote, but it may happen. The unexpected often happens. It is the duty of the courts to preserve and uphold every constitutional safeguard thrown around the exercise of the elect-

ive franchise, and since the view taken by the majority is in the direction of promoting and preserving wider freedom of choice, and removes a hindrance or obstruction to the right of selection, I concur in the holding that this provision is discriminatory and void. But the limitation as to 500 signatures only applies to judges of the supreme court. No such provision is made as to other candidates, and this single provision certainly was not the inducement for the passage of the act. As to all other officers the majority opinion condemns the act upon one ground alone, that of the empty and forceless inhibition of free speech. I am firmly convinced that this alone is mere redundant matter, and is not of sufficient importance to justify setting the law aside.

This brings me to the question of what effect on the whole law is had by excising both of these provisions. It is a fundamental and elementary proposition that under our system of government what laws shall be passed, what political or governmental policy pursued, or what economic theory adopted in the affairs of government are matters with which the legislature is alone concerned, and for which it is alone responsible to the people of the state. It may be as well to say in this connection that whether the act was passed by a bare majority or whether it was unanimously adopted, whether the policy is new or whether ancient, whether its intent is wise or whether unwise, whether passed from partisan motives or not, and whether the result may prove to be good or evil are matters with which the court has no concern. Many laws, in fact most of great importance, have a partisan origin, and are obnoxious to many persons; but with this we have nothing to do.

Does the law, or do any of its provisions, violate the constitution? This is the sole question. If any portion of the act does so, is that portion such an essential and necessary element that its elimination leaves a law incomplete and fragmentary, and which does not accord with the legislative purpose and intent, and which is in-

capable of enforcement? It is the duty of the court to construe and interpret acts passed by the legislature so as to uphold them if their language reasonably admits of such interpretation, and not to set them aside unless they clearly contravene the constitutional limitations upon legislative power. All doubts must be resolved in favor of the statute, and all presumptions are that the legislature passed a valid act and kept within its constitutional powers. As a corollary, if a part of a statute fails as being obnoxious to the limitations of that instrument, if, after the elimination of the objectionable part, enough of the law remains so that the intention of the legislature may be carried out, and the desired end and purpose of the enactment accomplished, the act may stand. These propositions are so elementary that citation of authorities is needless; and, indeed, these are the canons recognized in the majority opinion. I agree with the language of Judge HOLCOMB, quoted in the majority opinion, that "the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever (*State v. Insurance Co.*, 71 Neb. 335)," and with the language of the majority opinion that "what remains must express the legislative will, independently of the void part, since the court has no power to legislate." Tested by this rule, does "what remains express the legislative will?" I am convinced that there is no difficulty with the law in this respect. After eliminating the prohibition of free speech and the provision limiting the number of signatures for the office of supreme judge, we find an act which, in substance, provides that candidates for judicial and educational offices shall be nominated by petition, and not at primary elections, prescribing the number of signatures to entitle the candidate to the printing of his name upon the official ballot, and providing that the names shall be printed thereon without party designation. I see no obstacle to the carrying out of these provisions.

I am of the opinion that since the entire control of the

printing of the official ballot has been placed in the hands of the public authorities, and since if any candidate should "be nominated, indorsed, recommended, censured, criticised, or referred to" by any political party or political convention, this could have no possible effect upon the printing of any name or party designation upon the official ballot, the declared end and purpose of the act—to remove the election of candidates for such offices from the domain of party politics—may be accomplished, so far as it may be done among a free people. The legislature cannot prevent free speech, but it can control and regulate the official ballot and the manner of selection of names of candidates to be printed thereon. It has the right to do so in such a manner as to remove, as far as it may consistent with constitutional rights, certain offices, or all offices, if it chooses, "from the domain of partisan politics," if in its judgment it believes it to be for the best interests of the state. It cannot abolish parties, nor prevent their formation, it cannot prevent the free and open discussion of the qualifications and fitness for office of candidates, either by newspapers, individuals or assemblages of citizens, whether in church, mass meeting or political convention; but it has the undoubted right to mitigate, if it can, any evils that it believes to flow from nominations by political parties, so long as it acts in such a manner that there shall be no infringment upon the requirement of the constitution (art. I, sec. 22) that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

I believe that, with the excision of the immaterial and unessential provisions mentioned, the law is still in accordance with the legislative purpose and intent, and with the constitution of the state; that these portions may be declared invalid, and the remainder of the statute upheld as a valid exercise of legislative power. For these reasons, I must dissent from the conclusion reached that the law is altogether void.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1909.

STATE OF NEBRASKA v. ADAMS EXPRESS COMPANY.*

FILED SEPTEMBER 25, 1909. No. 15,310.

1. **Constitutional Law: EXPRESS RATES: VALIDITY OF STATUTE: BURDEN OF PROOF.** Statutes fixing maximum rates which corporations, joint-stock companies or persons whose property is devoted to public use may charge and receive as compensation for their services are presumed to be constitutional; and the burden of proof is on one who challenges their validity to show by a preponderance of the evidence that the legislation complained of clearly contravenes some provision of the constitution.

2. ———: ———: ———: ———. When an attempt is made to strike down a rate statute, it is incumbent on the attacking party to make full, fair and complete disclosure of all of the revenue derived from the business, and the disbursement of the same for all purposes, including salaries paid to all of its officers, agents and employees, so that it may be determined whether such salaries and expenditures are necessary as well as reasonable in amount.

3. ———: ———: ———: ———. Before the courts are called upon to adjudge an act of the legislature fixing maximum rates for express companies unconstitutional on the ground that they are unreasonable and confiscatory, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management within the rates prescribed would secure to the company a reasonable compensation for the use of its property and for conducting its business.

4. ———: ———: ———. A court of equity ought not to interfere

* See *State v. Pacific Express Co.*, 80 Neb. 823.

with and strike down an act of the legislature fixing maximum express rates, before a fair trial has been made of continuing the business thereunder, and in advance of any actual experience of the practical result of such rates.

5. ———: ———: ———. Where it reasonably appears from a consideration of all the evidence that the rates complained of are not confiscatory, but afford the express company at least some measure of profit for carrying on its business, the courts will not interfere with the operation of the statute, but will require the party complaining to apply for relief to the rate-making power or the tribunal provided by the statute with power to increase such rates, if they are alleged to be unreasonable.

6. ———: ———: ———. A rate statute will not be declared unconstitutional on the ground that it provides drastic penalties for its violation, unless it appears that the penalty clause was the inducement for its passage, and, with that clause eliminated, the remainder of the act is incomplete and incapable of enforcement.

ORIGINAL action by the state to enjoin defendant from putting into effect charges or rates other than those established by law. *Judgment for state.*

William T. Thompson, Attorney General, for plaintiff.

Charles J. Greene and *Ralph W. Breckenridge, contra.*

BARNES, J.

This is an action in equity by which the state of Nebraska, as plaintiff, has invoked the original jurisdiction of this court to enjoin the defendant (the Adams Express Company) from charging or receiving for services between places in Nebraska any sum in excess of 75 per cent. of certain charges exacted by defendant under its schedule of rates in force on the 1st day of January, 1907. The reduction of rates in question was sought to be accomplished by an act of the legislative assembly of that year (laws 1907, ch. 91), which reads as follows:

"Section 1. All persons, associations or corporations engaged in the transportation of money or merchandise for a money consideration in cars other than freight cars

and on trains other than freight trains shall be deemed an express company within the meaning of this act.

"Section 2. Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907.

"Section 3. Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent. of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate.

"Section 4. Provided that nothing in this act shall be construed to change the prepaid rates on merchandise weighing one (1) pound or less, and provided further, that no provision of this act shall reduce any special contract rate in force for the transportation of cream, milk or poultry or any charge to a sum less than fifteen cents; and provided further, that nothing in this act shall abridge the authority of the railroad commission to make a reduction in any rate provided for in this act.

"Section 5. If any express company should fail to comply with the provisions and conditions of this act, they shall be fined on conviction a sum not less than ten dollars or more than one thousand for each offense.

"Section 6. The Nebraska state railroad commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act."

The act above quoted was passed by the legislature in the exercise of the power of the state to regulate defendant as a common carrier of express matter or articles of commerce between places in Nebraska. Defendant threatened to disobey the law, to prevent the state from controlling its internal commerce on defend-

ant's lines of transportation between places in Nebraska, and to charge and collect for intrastate services compensation in excess of the maximum rates fixed by the legislature. The attorney general thereupon commenced this action and obtained a restraining order preventing the defendant from carrying out its threat of disobedience. Early in the history of the litigation defendant challenged the jurisdiction of the court, and filed a petition and bond for removal. The record was thereupon lodged in the circuit court of the United States for the federal district of Nebraska, where the defendant was unable to sustain its contention, and the cause was remanded to this court. On proper pleas, and after a full hearing, the jurisdiction of the court and the right of the state to maintain the action were sustained. *State v. Adams Express Co.*, 80 Neb. 840; *State v. Pacific Express Co.*, 80 Neb. 823. Having finally adjudicated those questions, they will not again be referred to in this opinion.

After the settlement of the preliminary questions the defendant filed its answer, alleging, among other things: First, that a horizontal cut of 25 per cent. of its rates was impractical and unreasonable; that the rates thus fixed by the statute are confiscatory; that the defendant is thereby deprived of its right to a reasonable profit on its business and its property investment, and therefore the act is unconstitutional; second, that the penalties provided by the act for a violation of its provisions are so unreasonable, excessive and drastic as to prevent the defendant from securing a judicial inquiry into the validity of the statute without incurring a prohibitive risk, and that they therefore constitute a violation of the equality clause of the fourteenth amendment of the federal constitution. The allegations of the answer were controverted by a reply, and after the issues were thus joined the Honorable John J. Sullivan was appointed as a referee to take and report the evidence, together with his conclusions of facts and law, to the court, with all convenient speed. A large amount of

testimony was taken, which is now before us, together with the referee's report. His findings of facts were generally for the plaintiff, and his conclusions of law are as follows: "My conclusions of law are: First, that the Sibley act (which is the statute in question), so far as it affects the business of the Adams Express Company, is not confiscatory; second, that judgment on the merits should be rendered in favor of the state and against the defendant company." To this report the defendant has filed exceptions so voluminous that to quote them would extend this opinion to an unreasonable length; but such of them as are necessary to a correct disposition of the case, together with the particular findings of fact to which they refer, will be noticed, considered and decided under proper subdivisions. The case has been argued and submitted on its merits, and therefore, if the report of the referee is sustained, judgment must be entered for the state; while, on the other hand, if the exceptions are allowed, we may make such disposition of the case as we think the evidence requires.

Defendant first excepts to the report as a whole, and particularly to the findings of fact contained therein, "Because the same are not sustained by the evidence." The determination of the question thus raised requires a careful examination of the testimony taken by the referee. In making the investigation we start with the presumption that the statute in question is a valid and constitutional exercise of legislative power. *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *Ex parte Young*, 209 U. S. 123. The concurring opinion of Field, J., in *Ruggles v. Illinois*, 108 U. S. 526, 541; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *Davis v. State*, 51 Neb. 301. In the case last cited the rule is well stated as follows: "Every legislative act comes before this court surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the constitution." This rule places the burden of proof on the

defendant, and before we can strike down the statute it must show by a preponderance of the evidence that the rates fixed thereby are so low as to be clearly confiscatory. *Chicago, M. & St. P. R. Co. v. Tompkins,* 176 U. S. 167; *Ex parte Young, supra.*

The facts of this case, which are not in dispute, are that the defendant is a common carrier. It operates in 28 states and upon 34,862 miles of railroad and other lines of transportation. It is not incorporated, but is a joint-stock company. It has a capital stock of $12,000,000, divided into 120,000 shares, which are owned by 2,700 shareholders, whose identity is not disclosed. The territory in which it operates is divided into three departments. The western department, which includes Nebraska, is operated over 18,652 miles of transportation lines. The Nebraska mileage, all of which is upon the Burlington lines, is 2,514 miles. The company has 272 offices in this state, and about 450 employees. The value of the property employed in carrying on its entire business is not disclosed, but the estimated value of the portion devoted to the service in Nebraska is between $50,000 and $60,000. The gross revenues of the company upon all of its lines for the year ending December 31, 1907, were $27,822,738.23. Its operating expenses for the same period were $27,356,345.17, leaving a net profit of $466,393, or 1.6 per cent. of the gross receipts.

Assuming the burden of proof above mentioned as to the remaining facts, the defendant produced as witness Mr. Glenn, the auditor of the western department, and Mr. Waters, the general auditor of the company, and, as a summary of their evidence, has placed in the record its exhibit 5. This, after having been revised by counsel to correct errors, shows that the business of the company in this state for the year ending December 31, 1907, resulted in a net income of $12,689.94. Those witnesses were afterwards recalled, and an attempt was made to show by them that the terminal expenses properly chargeable to Nebraska business would reduce the net earnings

of the company for the year 1907 to approximately $8,216.03. The plaintiff, however, challenges the truth of this evidence, and claims by its construction of exhibit 5 that the net earnings of the defendant in this state for the year 1907 were in fact $14,336.29, or approximately 5 1-6 per cent. of its gross earnings. It will be observed by an examination of the original exhibit 5 that the defendant has built up an estimate of what it conjectures would have been the result on the business of 1907 had the statute in question then been in effect. By assuming that there would have been no increase in the business, that all of the general expenses and office salaries would have remained exactly the same, defendant contends that it would have lost $14,812.65 on the business of that year. In this calculation, however, no account has been taken of the money-order business, and it has been assumed that only $15,000 of the total revenue would have been unaffected by the rate reduction. It is further assumed that the new rate would not have added anything whatever to the gross revenue of the company. It is also erroneously claimed that the expenses would not be reduced or affected by reason of the reduction in rates. Again, it appears that the defendant made no deduction from the expenses charged to the Nebraska business for that portion of the general expense which it incurred in conducting its through business, business which neither originated nor terminated in Nebraska, and which is called its overhead business. By these devices the defendant has attempted to show that, if the statutory rates were in force for the year 1908, it would lose on its Nebraska intrastate business $15,812.65.

It may be conceded that by loading the Nebraska intrastate business with a sufficient amount of so-called terminal expenses, together with a proportionate amount of the expenses of administration, it is possible to show that the Nebraska business for 1907 was conducted at a loss, which loss would be increased for the year 1908; but the evidence introduced for that purpose is not con-

vincing. It must be borne in mind that prior to the passage of the Sibley act the defendant had, with a free hand, made its own rates and charges, and it is not to be believed that it had voluntarily made a rate under which it had been conducting its Nebraska business without profit for more than a generation. The findings of the referee that the defendant's business in Nebraska for the year 1907 was remunerative seems to be warranted by the evidence, accords with sound reason, and is therefore sustained.

Coming now to a consideration of defendant's Nebraska intrastate business for the year 1908, we find that the company has introduced in evidence a statement of its transactions for the month of June of that year, which it has used as a basis of its claim or contention that the rates fixed by the statute are confiscatory. We are of opinion, however, that this evidence does not furnish a satisfactory test of the effect of the act, and is not worthy of serious consideration. At the time defendant closed its testimony and rested its case the statute had been in force for at least 16 months, and the result of the rates fixed thereby could have been clearly and accurately shown; yet the company declined to make such a showing, and rested its case on conjecture, assumption and insufficient comparison. We are therefore of opinion that this showing does not meet the burden of proof which the law places upon the defendant.

On the other hand, the plaintiff has shown from the monthly reports made by the defendant company to the Nebraska state railway commission up to and including the month of October of the year 1908 that the reduction complained of has resulted in a large increase of defendant's intrastate business without a corresponding increase of expenses, and has produced a net income amounting to more than 4 per cent. of its gross receipts, exclusive of its money-order business. It also appears that if that item is added to the ordinary earnings of the company, and we agree with the referee that it should

be so added, its profits will be increased to about 5.5 per cent. Surely this is not confiscation, and the rate complained of is at least to a considerable extent remunerative.

It is claimed, however, that the referee has arrived at the foregoing results by an improper method of apportioning expenses to the intrastate business, and this seems to be the main contention between the parties. It appears that the referee has apportioned the expenses on a revenue basis, while the defendant insists that the only correct method of apportionment is the transaction or package basis. The referee has found, from an estimate for the year 1907, based on an actual count for the months of March and September, that there were, for that year, 1,698,752 handlings of domestic, and 1,003,648 handlings of interstate, transactions. In other words, that the handlings of domestic transactions were 62.8 per cent. of all of the handlings within the state. It is now contended by the defendant that the item of terminal cost ought to have been distributed according to the ratio which the domestic handlings bear to the interstate handlings. The referee has found, and this is not contested, that these items aggregate $146,231.91, which, distributed on the basis proposed, would result in charging the domestic business, which produced a revenue of $277,726.76, with $91,833.36, and the interstate business, which produced a revenue of $655,027.52, with only $54,398.28. This would make the terminal cost of the domestic business 33 per cent. of the revenue derived from it, and the terminal cost of the interstate business would be only 8.3 per cent. of the revenue received therefrom. As was said by the referee: "An apportionment according to this method shows that the defendant carried on its intrastate business in 1907 at a loss of approximately $12,000." This, to say the least, is incredible. The fact, as we have above stated, that the defendant, before the passage of the act in question, had been unrestrained in fixing its rates causes us to doubt the correctness of this method

of apportionment; and, while we do not hold that a fair distribution of expenses cannot be made on the package basis, we are of opinion, for many reasons, that the apportionment of expenses on a revenue basis affords the easiest and most practicable solution of this difficult question.

We also find from the evidence that the defendant has in many ways pursued and offered sanction for this method. Indeed, until this contention arose, it seems to have considered its business throughout the whole country as an entirety, and to have deducted its expenses, and calculated its profits, on the revenue basis. Again, it is a well-known fact that the expense of a particular transaction may not be, and often is not, the same at the point of shipment as at the point of destination. The amount paid by defendant to its agents at its different points for the same handling is not always the same. To illustrate, suppose a shipment originates at an office where the pick-up and delivery system is in operation, and terminates at a point where that method is not pursued, but where the consignee is required to visit the express office in order to obtain the consignment. In such a case to double the charge at either point would not produce the correct amount of terminal expense. For further illustration, suppose a package is shipped from an office where the agent receives as his compensation a commission of, say, 10 per cent. of the amount charged for the shipment, while the receiving office is in charge of an agent who receives a salary. In such a case it would be impracticable and incorrect to double the amount of the agent's commission at the shipping office to obtain the amount of terminal expenses of that transaction. It further appears that the largest item, to wit, $66,493.07 commission paid to agents, has no relation at all to the number of pieces handled, but is based entirely upon the revenue derived from the business transacted at their offices. It is also inferable from the evidence that agents' salaries, an item amounting to $8,582, are based to some extent

upon revenue. So we do not see how, upon this record, it can be held, as a matter of law, that terminal expenses must be distributed upon the package basis, and not otherwise. For the foregoing reasons, we are constrained to sustain the finding of the referee which adopts the revenue basis for a distribution of terminal charges.

In concluding the discussion of this question, it must be borne in mind that, where an attempt is made to strike down a rate statute, it is incumbent on the party complaining to make full, fair and complete disclosure. Now, while it appears from a careful reading of the evidence that in many, and perhaps most, things the defendant has made full and fair disclosure, still in some matters it has failed to do so. We find that there is a large sum charged to the intrastate business as expenses of administration. We are told that this includes the salaries of the defendant's general officers. It appears that the company has declined to state the salary of a single one of such officers, and we are wholly without any knowledge as to the amount, much less the reasonableness, of such salaries. Under a showing of this kind the defendant could, without danger of detection, or even adverse criticism, load the Nebraska state business with an expense which would render it so unremunerative as to require us to strike down the act in question. Again, it appears that the defendant is a joint-stock company, and it is fair to presume, in the absence of disclosure and proof to the contrary, that a majority of its stock is held and owned by its officers and directors. In such a case salaries could readily be made so exorbitant, unreasonable and excessive that by charging to the intrastate business a proportionate amount thereof that business would appear to be unremunerative.

Finally, the evidence shows that the amount paid to the Burlington railroad for transportation for the year 1907 was $159,727.76, or 57.5 per cent. of the gross receipts from domestic business. This appears to be a larger percentage than is paid to any other railroad for

like services. It may be an entirely proper charge, or it may be an unreasonable exaction, and there is no evidence in the record tending to establish either proposition. Counsel for the defendant assert that its contract with the Burlington railroad was the result of competitive bidding. This may be so, but it is not proved, and, if it were proved, would not establish *per se* the reasonableness of the charge. The public is entitled to have its commodities carried at fair rates, and cannot be subjected to excessive charges by any arrangement between the railroad and the express company. If a railroad farms out the express business, it must be on terms that will enable the express carrier to operate at a profit without imposing excessive charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void, in so far as it affects the rights of the public.

For the foregoing reasons, we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled.

Having sustained the report of the referee as to the main facts of this controversy, we come now to the consideration of his conclusions of law. It appears that a like question was before the federal supreme court in *Willcox v. Consolidated Gas Co.*, 29 Sup. Ct. Rep. 192, 212 U. S. 19, where it was held that a court of equity ought not to interfere by injunction with state legislation fixing gas rates, before a fair trial has been made of continuing the business under such rates; and the case must be a clear one before the courts should be asked to interfere by injunction with state legislation regulating gas rates in advance of any actual experience of the practical results of such rates. That case is an instructive one, and many of the questions involved in the case at bar were there litigated and determined adversely to the defendant's contention herein. Similar questions were

also before that court in *City of Knoxville v. Knoxville Water Co.*, 29 Sup. Ct. Rep. 148, 212 U. S. 1, and it was there said: "The courts should not enjoin the enforcement of a municipal ordinance fixing maximum water rates on the ground that such ordinance is invalid under U. S. constitution, 14th amendment, as confiscatory, unless the confiscation is clearly apparent." The case of *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, was one to test the validity of an act of the legislature of the state of Michigan, fixing a maximum rate of passenger fare. It was contended in that case that the rate was confiscatory. Mr. Justice Brewer delivered the opinion of the court, from which we quote as follows: "Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury and decline to assume that the effect is as claimed? There can be but one answer to these questions. If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided." Concluding the opinion, Judge Brewer said: "Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground

that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.' * * * The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In the case at bar counsel have devoted a considerable part of their brief to a eulogy of the ability, probity and integrity of their witnesses. By this opinion we do not intend to in any manner reflect upon the character of the officers of the express company, but confine ourselves to the belief that full disclosure has not been made.

We think our decision herein should be ruled by the principles announced in the foregoing cases, rather than by the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, which is cited and relied on by counsel for the defendant. In that case the service was rendered by the owners of property, in such a position that the public had simply an interest in its use, while in the present case the defendant has devoted its property to the discharge of a public service. It should also be remembered that

the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and the public. Judicial interference should never occur, unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulation, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use. This state of affairs cannot be said to exist in the case at bar, for it not only appears that the rates fixed by the statute are not confiscatory, but afford defendant a much greater percentage of income on its Nebraska intrastate business than that which, by its own testimony, it claims to receive upon its general business considered as an entirety. For the foregoing reasons, the referee's conclusions of law upon this point are sustained.

Defendant further contends that the act in question is unconstitutional because of the enormous fines which it imposes for a failure to comply with its terms, and it is thereby denied the equal protection of the law. It is a sufficient answer to this contention to say that the act does not in any manner deny the defendant the right to test its validity in the courts; and the reasonableness of the rates fixed thereby are now by this proceeding under judicial inquiry. It also seems clear that the penalty clause is not a necessary or inseparable part of the act, without which it would not have been passed. In such a case if, when the objectionable part of the statute is eliminated, the remainder is valid and capable of being enforced, the valid portion of the act will be upheld. *Willcox v. Consolidated Gas Co., supra.* This is a familiar principle which has been often announced by this court, and we do not hesitate to say that, in order to avoid striking down the act in question, we would, if necessary, elimi-

nate the penalty clause. *Scott v. Flowers,* 61 Neb. 620; *State v. Stuht,* 52 Neb. 209, and cases there cited.

It is also urged by counsel for the defendant that what its property is worth for taxation, or what its business produced for that purpose, must be considered or reckoned with when the inquiry is directed to the amount upon which a legitimate return may be claimed. This question was squarely presented and passed upon in the case of *Willcox v. Consolidated Gas Co., supra,* where it was said: "The assessed value for taxation of the franchises of a gas company furnishes no criterion by which to ascertain their value, when testing the reasonableness of gas rates as fixed by statute, where the taxes are treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount applicable to dividends can be ascertained." And further: "The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action."

Counsel for defendant complain of the failure of the referee to incorporate in his report their theory of the case, which they have designated the ultimate facts, and by motion have asked us to require him to make it a part of his findings. We are of opinion that this request should be denied. The statement so entitled is not in evidence. It is simply a summary of the conclusions of counsel as to what the evidence shows, and is properly made a part of their brief. It was used by them as a part of their oral argument; but, as its conclusions were repudiated by the referee, he properly refused to make it a part of his report.

Finally, upon a careful consideration of the whole case, we are of opinion that defendant's exceptions should be, and they are, overruled; and the report of the referee is sustained. This requires us to enter judgment for the plaintiff, and this we do without hesitation, because we are convinced from the evidence that the rates complained

of are not clearly shown to be confiscatory, but are, to some extent, at least remunerative. When this fact appears the courts should not interfere to strike down the statute, but should require the complainant, if the rates are deemed to be too low, to resort to the rate-making power, or the tribunal charged with rate regulation for relief. The statute in question clearly provides that the express companies, in case the rates fixed thereby are found to be unreasonable, may apply to the Nebraska state railway commission for relief, and that tribunal is given full authority to increase such rates.

For the foregoing reasons, judgment will be rendered for the state, and the temporary restraining order now in force herein is made permanent; but our judgment must be so construed as not to in any manner interfere with the right of the defendant company to apply to the state railway commission for a revision or an increase of rates, if in any case it shall deem them unreasonable; and the power of that tribunal to grant any and all proper relief is not to be affected thereby.

JUDGMENT ACCORDINGLY.

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

STATE OF NEBRASKA V. WELLS-FARGO & COMPANY.*
STATE OF NEBRASKA V. PACIFIC EXPRESS COMPANY.*
STATE OF NEBRASKA V. UNITED STATES EXPRESS COMPANY.*
STATE OF NEBRASKA V. AMERICAN EXPRESS COMPANY.*

FILED SEPTEMBER 25, 1909. Nos. 15,306, 15,307, 15,308, 15,309.

For a syllabus to each of the foregoing cases see *State v. Adams Express Co.*, *ante*, p. 25.

ORIGINAL actions by the state to enjoin defendants from putting into effect charges or rates other than those established by law. *Judgment for state in each case.*

William T. Thompson, Attorney General, for plaintiffs.

Charles J. Greene and *Ralph W. Breckenridge, contra.*

BARNES, J.

The foregoing cases were all tried at the same time and in the same manner as the case of *State v. Adams Express Co.*, *ante*, p. 25. The issues in all of them were practically alike, and the questions involved were the same as those decided in that case. The findings of the referee were substantially the same in all of the cases.

In *State v. Wells-Fargo Co.*, the defendant claimed and attempted to show by an estimate based on its business for the months of August, September and October, 1907, that it lost on its intrastate transactions in Nebraska for those months $13.85, and that by applying the Sibley rates to those months its loss for 1908 would be $112.64. This estimate, however, does not take into consideration the increase of business resulting from reduced rates, or the receipts of the company from its sales of money orders; which amounted to $153.70. This item the referee finds should have been included in the estimate, and we sustain his finding on this point. As stated in *State v.*

* *See *State v. Pacific Express Co.*, 80 Neb. 823.

Adams Express Co., the defendant's evidence and the estimate by which it attempted to show a loss in conducting its business are not convincing. On the other hand, the referee has found from the reports made by the defendant to the Nebraska state railway commission, which are in evidence and embrace the actual operation of the law in question, that the defendant's business in 1908 was conducted at a small profit, even if its expenses are apportioned according to the methods adopted by its witnesses. It appears, however, that by the method adopted by the referee in apportioning such expenses the company made, during the year 1908, a net profit of 11 per cent. on the gross income of its intrastate business. The exceptions to the referee's report are therefore overruled, and his findings are in all things sustained.

In *State v. Pacific Express Co.* it appears from the referee's report that the evidence introduced by the defendant fairly shows that its net profit on its Nebraska intrastate business for the year ending June 30, 1907, was 8.52 per cent. By an estimate of the effect of the operation of the statute in question for the year 1908 upon its intrastate business for the year 1907, and not including its money-order business or allowing anything for an increase of its business on account of the reduced rates, the defendant has attempted to show that its business for 1908 was conducted at a loss. On the other hand, it appears by actual test for the months of April, June and July, 1908, that defendant's profit on its gross revenue was 14.66 per cent., and whether the terminal cost be apportioned in accordance with the claim of the estate, or according to the method employed by the defendant, the net profit of the company upon its gross intrastate receipts, exclusive of the money-order business, was between 9 per cent. and 10 per cent, and, including that business, its net profit was between 10 per cent. and 11 per cent. The referee's findings in this case are therefore sustained.

The report of the referee in *State v. United States Ex-*

press Co. shows that the company claims to have lost, in 1907, upon its Nebraska intrastate business $227.17, or three-fourths of a cent upon each package carried, or 1.5 per cent. of its gross receipts; that by applying the Sibley rates to its 1907 business the company estimates that its loss under those rates for 1908 was approximately $1,616.89, or 14 per cent. of its gross receipts. Neither defendant's claim nor its estimate takes any account of receipts from sales of money orders, or increased business resulting from reduced rates. As opposed to this estimate, and the evidence upon which it is based, the state has shown that the Nebraska intrastate revenue of the company was $8,790.75; that, deducting the expense incurred in carrying on the business, its net profit was $223.19. Adding to this the net profit on its money-order business, which was $458.91, the referee has found that the total net profit for the period was $682.10, or about 7 per cent. of its gross receipts. We therefore sustain the finding of the referee in this case.

In *State v. American Express Co.* it appears from the report of the referee that the company claims that it lost in 1907 upon its Nebraska intrastate business $146.56, and by applying the Sibley rates to the business of that year its loss for 1908 was practically $10,758.54, or 9.7 per cent. of its gross intrastate receipts. This estimate, however, takes no account of increased business resulting from reduced rates. By the process of figuring used by the company, and taking its reports to the state railway commission for the months of April to September, 1908, inclusive, as an average six months, the referee has found that the defendant actually received a total revenue for its Nebraska intrastate business for the year 1908 amounting to $157,263.78; that its total expense chargeable to that business was $150,844.74, leaving a net income of $6,419.04, which is 4.8 per cent. of the gross income derived from that business. It thus appears that the finding of the referee that the Sibley rates as applied to the business of defendant are not confiscatory is correct.

In none of the foregoing cases is the value of the property devoted to the Nebraska intrastate business disclosed by the evidence, and, in the absence of any showing to the contrary, we must presume that it is so small in amount as not to affect the conclusions reached by the referee. His findings are therefore sustained.

We are of opinion that the foregoing cases should be ruled by *State v. Adams Express Co., ante,* p. 25, and a like judgment will be entered in each of these cases for the plaintiff. The restraining orders now in force are made permanent; but our judgment herein shall not in any manner affect the right of the defendants, or any of them, to apply to the Nebraska state railway commission for an increase of rates whenever it shall appear that those fixed by the statute are confiscatory, or so unreasonably low as not to afford them a fair measure of profits; and nothing herein contained shall abridge the right of the railway commission to grant the proper relief in such cases.

JUDGMENTS ACCORDINGLY.

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

CHARLES F. WESTLAKE, APPELLEE, V. HUGH MURPHY, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,756.

1. **Master and Servant:** LIABILITY OF MASTER. Workmen engaged in the ordinary occupation of unloading a railroad car under the direction of a common overseer, are fellow servants within the rule announced in *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127; and the master is not liable for an injury to one engaged in such occupation caused by the negligence of a competent fellow servant.

2. ———: ASSUMPTION OF RISKS. A servant assumes ordinary risks and dangers of the employment upon which he enters, so far as

they are known to him, and so far as they would have been known to one of his age, experience and capacity by the use of ordinary care; and he is bound to take notice of the ordinary operation of the familiar laws of gravitation, and assumes the risks necessarily incident thereto.

3. ———: DUTY OF MASTER. An air pump while being unloaded from a railroad car, and which is to be set up for use in a plant to be erected for the purpose of preparing material for street paving, is not an appliance within the meaning of the rule which requires the master to exercise reasonable care in furnishing his servants with reasonably safe appliances with which to carry on the master's business.

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

Strode & Strode, for appellant.

Tibbets & Anderson, contra.

BARNES, J.

Action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant. Plaintiff had a verdict and judgment, and the defendant has appealed.

The following facts may be considered established beyond dispute: The defendant was a contractor engaged in the business of constructing brick, concrete and asphalt pavements. In the year 1906 he had a contract with the city of Lincoln to construct a large amount of pavement on the streets of that city. Plaintiff was employed by the defendant as a common laborer, and at the time of the injury complained of he, together with several other fellow laborers, was engaged in the work of unloading a freight car which had been hauled from Omaha to the city of Lincoln, and which contained a large number of barrels of asphalt, cement, oil and certain pieces of machinery, together with other things commonly used in the paving business. Among the articles contained in the car was a large iron pump weighing about 1,000 pounds. Plaintiff was injured while assisting a fellow laborer in an attempt

to change the position of the pump, which fell upon and injured his leg. He alleged in his petition that the defendant negligently failed to provide a safe place for his servants to work; that the appliances furnished by the defendant were defective; that at the time of the injury the defendant's foreman was negligently absent from the car in which the work was being done. Defendant answered, denying negligence of any kind on his part, and alleging contributory negligence on the part of the plaintiff. The defendant pleaded as a further defense that at the time of the injury the plaintiff and his fellow servants were attempting to move the pump in question in direct disobedience of the foreman's orders, and, if there was any negligence in the handling of the pump, it was the negligence of the plaintiff himself or his fellow servants, for which the defendant was not liable.

Defendant contends that the verdict is not sustained by the evidence. In addition to the facts above stated, the plaintiff testified that all of the persons who were working with him at the time the accident occurred were fellow laborers engaged in the same work, for a common purpose, and under the instructions of the same master. Therefore they were all within the rule which exempts the master from liability for the negligence of competent fellow servants. There is no evidence in the record which shows or tends to show that the defendant was negligent in the employment of the plaintiff's fellow servants, therefore their competency must be presumed. Plaintiff also testified that, while the car which contained the pump in question was being unloaded, their foreman, Atchison, was supervising the work, and was dividing his time between the car and the plant which was being installed near another track about 150 feet from the car; that at the time of the accident he was not present, and had been absent from the car about an hour; that theretofore the foreman had assisted in moving the pump from the top of the barrels of asphalt to the floor of the car; that they were unloading the north end of the car when a fellow workman

by the name of Lewis attempted to move the pump, and asked him to steady it; that, while they were so engaged, the pump fell over on his leg and inflicted the injury complained of.

Plaintiff claims that the pump was placed in such a position that it was necessary to move it before the barrels of asphalt, which were in the north end of the car, could be unloaded; and that this, together with the absence of the foreman, constituted actionable negligence on the part of the defendant. On this point the testimony shows beyond question that after the pump was placed on the floor, and the south end of the car was unloaded, the workmen had been engaged for at least an hour in unloading the barrels of asphalt from the north end of the car; and plaintiff practically admits this, but insists that there was not sufficient room to get the barrels between the pump and the east side of the car. His witnesses, however, do not sustain him on this point. Even his principal witness, Stransky, says that they had been taking barrels from the north end of the car and rolling them out of the east door for about an hour before the accident occurred. On this point he testified as follows: "Q. And you worked out there an hour and a half while they were rolling barrels out of the north end of the car before Mr. Westlake got hurt, didn't you? A. Yes, sir." Defendant's foreman and the other workmen testified that there was plenty of room between the pump and the east side of the car to roll the barrels out of the east door. So it may be said that at most the moving of the pump was a matter of convenience and not one of necessity. We are therefore of opinion that there is nothing in the evidence which takes this phase of the case out of the rule that the master is not liable for the negligent acts of competent fellow servants. *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127; *Swadley v. Missouri P. R. Co.,* 118 Mo. 268, 24 S. W. 140; *Wright v. New York C. R. Co.,* 25 N. Y. 562; *Adams v. Iron Cliffs Co.,* 78 Mich. 271; *Justice v. Pennsylvania Co.,* 130 Ind. 321.

Again, plaintiff by accepting employment with the defendant assumed all the risks of injury caused by the negligence of competent fellow servants, by the dangers arising from the existing conditions, including machinery, appliances, etc., which were known or apparent and obvious to persons of his experience and understanding. This rule is well settled both by the laws of England and of this country. *Evans Laundry Co. v. Crawford,* 67 Neb. 153; *Fremont Brewing Co. v. Hansen,* 65 Neb. 456; *Haviland v. Kansas City, P. & G. R. Co.,* 172 Mo. 106; *Broderick v. St. Paul City R. Co.,* 74 Minn. 163; *Wahlquist v. Maple Grove Coal & Mining Co.,* 116 Ia. 720; *Mad River & L. E. R. Co. v. Barber,* 5 Ohio St. 541.

Plaintiff, however, insists that the defendant was guilty of negligence, in that he failed to furnish him with safe appliances and a reasonably safe place to work, and he introduced some testimony tending to show that the pump in question was insecurely fastened to the plank on which it rested, and as a result slid off and injured him. The pump while being moved was not an appliance furnished by the defendant for use by the plaintiff or any of his fellow servants within the rule which requires the master to furnish his servants with reasonably safe tools and appliances with which to perform their work. The pump was not to be used by the plaintiff or his fellow servants in the work in which they were then engaged. It, like the barrels of asphalt, and the other property and tools, was to be unloaded from the car. When taken out of the car and put in place for use, it would then become an appliance, and, while being used, any defect therein which the defendant by the exercise of reasonable care could have discovered, and which the plaintiff by the exercise of such care would not have discovered, might then be made the basis of an action to recover on account of the failure of the master to furnish reasonably safe appliances. To unload the pump was a part of the work of unloading the car. The asphalt barrels and the pump were a part of the materials to be unloaded. Neither of them were the tools,

instruments or appliances to be used by the plaintiff or his fellow servants in unloading the car. Therefore the rule with respect to safe appliances has no application to the facts of this case. It is true that the work of unloading the pump because of its weight and condition was more or less dangerous, but the plaintiff was charged with the knowledge of that danger. He was a man 45 years of age, and accustomed to that kind of work. He knew the condition of the pump, was aware that it was top-heavy, and liable to tip over and injure those engaged in moving it. He had assisted in loading and unloading it before, and was fully aware of all of the dangers incident thereto. It was not necessary for the master to instruct him as to that matter, and the law presumes that he knew as much about the dangers incident to that part of his employment as did the master himself. The fact that the negligent act of a fellow servant caused it to tip over and injure the plaintiff did not render the defendant guilty of actionable negligence.

Finally, it is claimed by the defendant that the plaintiff was injured while acting in direct disobedience to his master's orders, and therefore he cannot recover. This point is the only one on which there is any material conflict in the evidence. Considering the condition of the record, we think this question is not material, and therefore it will receive no further attention.

For the foregoing reasons, we find it impossible to sustain the judgment of the trial court. It is with much reluctance that we have reached this conclusion, for it is apparent that the plaintiff, by reason of the accident in question, has sustained much suffering and considerable damage; but, as the record now stands, we are unable to afford him any relief. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

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

ALBERT M. ENGLES, APPELLEE, V. HENRY MORGENSTERN, APPELLANT.

FILED SEPTEMBER 25, 1909. NO. 15,765.

1. **Action**: PRACTICE. "If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." Code, sec. 901.
2. **Justice of the Peace**: REVIEW. The right to review final orders of justices of the peace and other inferior tribunals still exists, notwithstanding the repeal of section 584 of the code.
3. **Contract**: VALIDITY. Contract set forth in opinion *held* not to be void on its face as against public policy or as in violation of section 1, ch. 91*a*, Comp. St. 1901.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

E. B. Quackenbush, for appellant.

H. A. Lambert and *C. O. French, contra.*

LETTON, J.

This action was brought in justice court for the rent of certain premises which had been used for a lumber yard. The defendant answered, admitting the allegations of the bill of particulars, but as a counterclaim set forth, in substance: That at the time of renting the premises he purchased from the plaintiff the business and stock of lumber in the yard; that the lease was for a term of five years, with an option for an additional five years, and that at the time of making the lease the defendant entered into the following agreement: "I, Henry Morgenstern, of Auburn, Nebraska, for and in consideration of the purchase of my stock of lumber and coal situated in Auburn, together with the good will of said business, do hereby agree with said A. M. Engles, that he the said Henry Morgenstern is not to again embark or engage, either

directly or indirectly, in the lumber and coal business in the city of Auburn, Nebraska, or in the vicinity thereof, while the said A. M. Engles or T. W. Engles is in said business in the city of Auburn, Nebraska. Provided, however, that if the said A. M. Engles should discontinue the lease of the Morgenstern lumber yard in Auburn, Nebraska, at the expiration of five years, then this contract is to be void, and the said Morgenstern shall have the right to re-enter said business in Auburn, Nebraska. Witness my hand this 11th day of October, 1900. (Signed.) H. Morgenstern. Witness: ———." That the agreement was broken by the plaintiff to the defendant's damage, concluding with a prayer for damages. The justice refused to admit this contract in evidence, dismissed the defendant's cross-bill of particulars, and rendered judgment for the plaintiff.

Defendant filed a petition in error, with a transcript of the proceedings before the justice of the peace, in the district court for the purpose of reviewing the justice's rulings upon the rejection of the contract. The plaintiff filed objections to the jurisdiction of the district court on the ground that there is now no authority of law for error proceedings from justice court to the district court. These objections were overruled, and a hearing had upon the petition in error. The court held that the justice erred in holding the contract void, and reversed the case, but retained it in the district court for trial as the statute provides. From this order the plaintiff has appealed.

1. The basis of plaintiff's contention as to lack of jurisdiction is that the legislature of 1905 repealed section 584 of the code (laws 1905, ch. 174), and thereby abolished the right of review of the judgments of justices of the peace by error proceedings. The argument is that the right given by section 580 to review judgments rendered or final orders made by a justice of the peace and other inferior tribunals is effective by the allowance of appeals, and that, there being now no code provisions governing the manner of prosecuting error from a justice court, the

manner of review must be by appeal alone, and the district court can have no jurisdiction of any proceedings in error. From an examination of all the sections of the code bearing upon the review by proceedings in error of final orders made by justices and other inferior tribunals, we find that the repeal of section 584 is the only change made by the legislature affecting such remedy. This section covered the proceedings both in the district and supreme courts, and provided for the filing of a petition in error. When in 1905 the change was made by which all civil cases brought for review to the supreme court must thereafter be brought in the form of appeals, and the formal "petition in error" was abolished in that court, the legislature evidently overlooked the fact that in this section was also embraced the manner of procedure applicable to proceedings in error brought to the district court. That this was an oversight is clear, for in no other respect was the right of review by error interfered with. See sections 599, 600 and 601 of the code. Indeed, it is a matter of legislative history that at its next session an act was passed to remedy the defect, but was vetoed by the governor during the closing rush. The right of review upon error exists now as it always has in this state since the adoption of the code, although the special form of procedure provided by section 584 has been abrogated.

Under our constitution the right to be heard in the court of last resort cannot be denied by the legislature. We have heretofore held that the right of appeal is a statutory right, which may be given or withheld as the legislature may deem best, provided always that in some other manner the recourse to a higher court is left. In *Moise v. Powell,* 40 Neb. 671, it is pointed out by Commissioner IRVINE that, while the statute provides that there shall be no appeals from justice court "in jury trials, where neither party claims in this bill of particulars a sum exceeding $20," the provision of section 24 of the bill of rights that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise,

shall not be denied," permits a resort to this court by error proceedings, and that the statute forbidding appeals in such cases is, therefore, not in violation of the constitution.

Section 901 of the code is, in part, as follows: "If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." As we have seen, the right of review upon error exists. If, as the plaintiff contends, this right cannot be enforced under the code, we are of opinion that "the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." While the writ of *certiorari* has been abolished by the code, it would seem that the proceedings calling the attention of the reviewing court to errors alleged to have been committed by an inferior court have necessarily followed along the lines of the old application for the writ; in other words, the specific errors which are complained of have been presented to the reviewing court for its consideration by means of formal allegations set forth in an application or petition. 6 Cyc. 781, 783, 784. Under the code this has been done by a "petition in error." In the present case an exception was taken to the ruling of the justice of the peace upon the exclusion of the contract, the ruling and exception entered upon the docket, and a petition in error setting forth the error complained of was filed in the district court. This, we think, was sufficient to give the district court jurisdiction under the liberal provisions of the code when viewed in connection with the constitutional right to review all cases in this court.

2. The next point made is that the contract is illegal and void as being in restraint of trade, and in violation of section 1, ch. 91*a*, Comp. St. 1901, entitled "Trusts." The making of the contract is contended to be a violation of section 1 of this act. The title of the act is "An act to de-

fine trusts and conspiracies against trade and business, declaring the same unlawful and void, and providing means for the suppression of the same, and remedies for persons injured thereby," etc. Section 1 defines trusts, and, in part, sets forth: "That a trust is a combination of capital, skill or acts by * * * two or more persons, or by two or more of them for either, any or all of the following purposes: (1) To create or carry out restrictions in trade. * * * (3) To prevent competition in * * * sale or purchase of merchandise, produce or commodities, * * * (5) * * * with the intent to preclude, or the tendency of which is to prevent or preclude, a free and unrestricted competition among themselves or others or the people generally in the production, sale, traffic or transportation of any such article of merchandise, product or commodity, or conducting a like business." We think it clear from an examination of the title and the body of this act that it is directed against combinations and conspiracies to interfere with the ordinary conduct of trade and business, and that it is no part of its object to condemn or render illegal such contracts in partial restraint of trade as have for many years been held valid by the courts of England and America. The law upon this subject has in recent years received consideration at the hands of other courts, and we think it unnecessary to examine and set forth the cases in their choronological sequence or historical relations, but will content ourselves with reference to a few cases in which the subject has been dealt with and a like conclusion reached. *Downing v. Lewis,* 56 Neb. 386; *Hitchcock v. Anthony,* 28 C. C. A. 80; *Brett v. Ebel,* 29 App. Div. (N. Y.) 256; *Booth & Co. v. Davis,* 127 Fed. 875. This latter case involved the consideration of a Michigan statute substantially the same as the Nebraska law. It was held that the law had no application to a similar contract. See, also, *Davis v. Booth & Co.,* 131 Fed. 31; *Gates v. Hooper,* 90 Tex. 563, 39 S. W. 1079.

It is urged that, in the absence of allegation and proof

of facts showing the reasonableness of the restraint imposed by such a contract, it is *prima facie* void, and we are referred to the opinion in *Roberts v. Lemont*, 73 Neb. 365, as upholding this view, and as being in accordance with the great weight of authority. We think the holding in that case sound law, but it is contracts in restraint of trade "without any limitation as to time and place" which are so stigmatized, and not such as afford only a fair protection to the interest of a purchaser and do not show an injury to the public interest. *Horner v. Graves*, 7 Bing. (Eng.) *735. It is apparent from a consideration of the contract in this case that the partial restraint of trade was only collateral to the main contract, which was that of the purchase of the business and stock of lumber and coal, and the leasing of the real estate upon which the business was conducted, and the duration of the restraint is limited to the time during which A. M. Engles or T. W. Engles is engaged in the lumber and coal business in the city of Auburn, with the proviso that, if A. M. Engles discontinues the lease of the yard at the expiration of five years, it shall then be void. We see nothing unreasonable in this contract on its face. It is possible that there may be some extrinsic circumstances affecting the relations of T. W. Engles to the transaction or to the business which may affect its validity, but, nothing of this kind appearing upon its face, we think the authorities cited are not applicable. It is said in the brief that T. W. Engles is another independent lumber dealer in Auburn, and it is strenuously insisted that, because the contract contains his name as well as that of A. M. Engles, the purchaser, it shows upon its face unreasonable restrictions with reference to a person not a party to the sale. There is nothing in the record to disclose this fact, or to show whether it is material or relevant, and, since the point we are now considering is whether or not the district court was justified in holding that the justice erred in excluding this contract as evidence, it is unnecessary to consider whether or not the contract may upon a

full consideration and disclosure of all the surrounding circumstances be found by the court to be within the ban of the statute. On this phase of the case we adopt the words of the master of the rolls in *Haynes v. Doman* (1899), 2 Ch. Div. (Eng.) 13: "The court ought not to hold a just and honest agreement void, even when to enforce it would be just, simply because the agreement is so unskillfully worded as apparently, or even really, to cover some conceivable case not within the mischief sought to be guarded against. Public policy does not require so serious a consequence to be attached to a mere want of accuracy in expression. To hold such an agreement wholly illegal and void is to lose all sense of proportion, and is not necessary for the protection either of the defendant or of the public." We think the contract should have been admitted in evidence, being properly within the issues raised by the defendant's cross-bill of particulars in that court.

Whatever the district court may in the light of all the surrounding circumstances eventually hold the purpose of the contract was, it was clearly right in finding that the justice court erred in its exclusion, and in reversing the judgment of that court and retaining the case for trial. We find no error in the judgment, and it is therefore

AFFIRMED.

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

WALTDO COOK V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1909. No. 16,153.

Rape: EVIDENCE. In a prosecution for rape upon a child, the fact of penetration may be proved by circumstantial evidence.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John M. Macfarland, for plaintiff in error.

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

LETTON, J.

The plaintiff in error was convicted of rape upon the person of one Hattie Rothholz, a child of between 8 and 9 years of age. The principal argument of plaintiff in error is that the evidence does not sustain the verdict.

We think it unnecessary to set out the details further than to observe that the only point upon which there was no direct evidence was as to whether penetration had taken place. The question then arises whether this fact may be proved by indirect or circumstantial evidence, and, if so, whether there is sufficient evidence of that nature to support a conviction. In the first place, it may be well to say that the slightest penetration is sufficient to constitute this material element of the offense. In *Regina v. Jordan,* 9 C. & P. (Eng.) 118, Williams, J., said: "I am also of opinion, as matter of law, that it is not essential that the hymen should be ruptured. * * * I also think that it is impossible to lay down any express rule as to what constitutes penetration. All I can say is that the parts of the male must be inserted in those of the female, but I cannot suggest any rule as to the extent." In *Regina v. Lines,* 1 C. & K. (Eng.) 393, Parke, B., said: "I shall leave it to the jury to say, whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for if it ever was (no matter how little), that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offense." In this country the rule is the same. 1 Wharton, Criminal Law (10th ed.), sec. 555; *Taylor v. State,* 111 Ind. 279. The slightest penetration, then, being sufficient, can this fact be proved by circumstantial evidence? Of this we have no doubt whatever. The fact of

penetration, like any other fact, may be proved either by direct or by circumstantial evidence. *Taylor v. State, supra; Bauer v. State,* 25 Wis. 413, which is a case very similar in some respects to this.

Is the evidence sufficient to sustain a verdict of guilty? It is shown that the girls were in Cook's room; that they attracted the attention of Mrs. Graham at the time; that Cook admitted their presence; and that he was seen by Beulah Graham lying upon the person of the child. It is further shown that he was then affected with the venereal disease from which the child was soon afterward found to be suffering. From these and other circumstances unnecessary to relate, we are of the opinion that the jury were fully warranted in finding that penetration had taken place, and that the defendant was guilty. The existence of a venereal disease in the victim has always been regarded as proper and material evidence where the alleged ravisher at the time of the assault was so infected. 3 Wharton and Stille, Medical Jurisprudence (5th ed.), sec. 181. It is true that the presence of such a disease is not always proof of sexual intercourse, since it may be communicated in other ways, but, when taken in connection with all the other facts testified to in this case, it is a circumstance which strongly corroborates the story told by the witnesses.

The exceptions to the instructions were made *en masse,* and, under the rule established by this court, if one of them properly states the law, the others will not ordinarily be examined. *Thompson v. State,* 44 Neb. 366; *Liniger v. State,* p. 98, *post.* However, we have considered them, and find that some of those complained of have, heretofore, been approved by this court, and that the others, while the form of expression perhaps might be better, are not erroneous.

We find no reversible error in the record, and the judgment of the district court is

AFFIRMED.

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

IN RE ESTATE OF JOHN MANNING.

THOMAS BONACUM, BISHOP, APPELLANT, V. JOHN MANNING, JR., ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. NO. 15,497.

1. **Wills:** CONSTRUCTION. A provision in the will of a testator who died prior to the enactment of chapter 49, laws 1907 (Ann. St. 1907, sec. 4901 *et seq.*), that his widow should "have her dower right in all property real and personal of which I die possessed," construed to mean that she had a right to the net income during her natural life from one-third of his estate.

2. ———: ———: POWER OF SALE. If a reasonable construction of a will clearly establishes that an executor is charged with the duty of dividing the testator's estate and to do so will necessitate a sale of real property, a power is thereby given the executor to sell and convey said realty.

3. **Executors and Administrators:** POWERS. In such a case, if the executor fails to qualify, or, after qualification, resigns his trust, and the will does not indicate that the testator reposed a special confidence in the executor, a power to sell and convey real estate will pass to, and vest in, any qualified administrator with the will annexed appointed by the court to administer said estate.

4. **Homestead:** ABANDONMENT: CONVEYANCE. "Neither the husband nor the wife can abandon the family homestead and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse." *Weatherington v. Smith*, 77 Neb. 369.

5. **Executors and Administrators:** ALLOWANCE TO WIDOW. "The widow of a testator is entitled, under subdivision 1, sec. 176, ch. 23, Comp. St. 1905, to the chattels therein specified, and also to $200 in cash from her husband's estate, and said property is not assets in the hands of the executor." *In re Estate of Fletcher*, 83 Neb. 156.

6. **Wills:** ELECTION. Prior to the enactment of chapter 49, laws 1907, the widow of a testator did not have the right by electing to take under the law, and not under the will of her deceased spouse, to inherit his personal property as though he had died intestate.

7. **Executors and Administrators:** ALLOWANCE TO WIDOW. If the widow during the time her deceased husband's estate is in process of administration is in the custody of the state in a hospital for the insane, and maintained by it without cost to her or his estate, it is within the discretion of the county court not to allow her anything for support during that period.

8. **Insane Persons: GUARDIAN AD LITEM.** It is the duty of a guardian *ad litem* of an insane defendant to submit to the court for its consideration every relevant fact involving the rights of his ward; but, if the guardian errs, it is the duty of the court to protect the rights of the incompetent, regardless of the conduct of the guardian.

REHEARING of case reported in 83 Neb. 417. *Judgment of district court reversed.*

ROOT, J.

An opinion written by Judge FAWCETT in this case may be found in 83 Neb. 417. Upon motion for a rehearing and a diminution of the record it appears that the cause originated in the county court upon application for an order distributing the estate of the deceased, and that an appeal was perfected to the district court from the order made in response thereto. The cause comes here upon the appeal of the bishop of Lincoln from the order of distribution made by the district court.

1. The evidence establishes that about 1871, the testator, by the exercise of a homestead or pre-emption right, acquired title to a quarter section of land within the present boundaries of Furnas county, and thereafter resided thereon with his wife as their home. In 1885 she was adjudged a proper person to receive treatment in a hospital for the insane, and was incarcerated, and ever since has remained in one of said institutions. Subsequently the husband sold and conveyed the farm, and became the owner of lots 9, 10, 11 and 12, in block 16, in the village of Arapahoe, and until his death resided thereon as his home, part of the time with a daughter and grandson. Manning, the testator, owned no other real estate at the time of his death, which occurred in June, 1902. In 1899 Manning made his last will and testament, containing the following provisions:

"Item I. Whereas my beloved wife, Ellen Manning, is at present time an inmate of the hospital for the insane

at Hastings, Nebraska, and has been pronounced incurable by competent medical authority; now therefore should it happen contrary to all expectation that the said Ellen Manning, my beloved wife, would be restored to her right reason, it is my will that she have her dower right in all property, real and personal, of which I die possessed.

"Item II. I hereby constitute and appoint Andrew Meyerle, of Gosper county, and state of Nebraska, the sole executor of this my last will and testament. He shall pay all my just debts, if I have any, as also the expenses of my last sickness and of my funeral.

"Item III. It is my will that the afore-mentioned Andrew Meyerle shall after my death take possession of all property of which I may die possessed real and personal wherever found and that he divide the said property into three equal parts. One part whereof I give and bequeath to the Rt. Rev. Thomas Bonacum, Bishop of Lincoln, Nebraska, and to his successors in office in trust in order to enable the said Rt. Rev. Thomas Bonacum and his successors in office to erect and maintain a Roman Catholic Orphanage at such a place in the state of Nebraska as the said Rt. Rev. Thomas Bonacum or his successors in office may determine.

"In consideration of the bequest herein made to the Rt. Rev. Thomas Bonacum and his successors in office and acting on his suggestion it is my will that a mass of requiem shall be said annually for all time for the repose of my soul, and the soul of my beloved wife, Ellen Manning, on the anniversary of our respective deaths, and acting further on the suggestion of the aforesaid Rt. Rev. Thomas Bonacum, Bishop of Lincoln, it is my wish that a memorial tablet be set or erected in the said orphanage to commemorate my benefaction. And the remaining two parts of my estate I give and bequeath to my children, John Manning, Margaret Manning, Frederick Manning and William Manning to be equally divided among them, share and share alike."

After considerable litigation, the appointment of a special administrator, and several administrators with the will annexed, the will was established and the estate settled. In 1904, upon the application of an administrator with the will annexed, a license was issued by the judge of the district court, and said lots 10, 11 and 12 were sold for $580. There was no necessity for said sale to secure money to pay claims allowed against the estate or the costs of administration. The will, however, plainly directs the executor to divide all of the estate, real and personal, among five, and possibly six, devisees in such proportions as to make it imperative that the lots be sold and their proceeds divided, and therefore a license from the district court was not necessary to vest the executor with a power already created by the will. *Chick v. Ives,* 2 Neb. (Unof.) 879. There being nothing in the will to suggest a special confidence in the executor, the power to sell and convey vested in the successive administrators with the will annexed. *Schroeder v. Wilcox,* 39 Neb. 136. In the county court the guardian *ad litem* for the insane widow purported to elect for his ward to reject the provisions of the will, and that she take under the law.

2. We have not been favored with a brief by counsel for the widow or children, but an oral argument in their behalf was made at the bar. The will is reasonably plain. It first provides that, should the widow regain her reason, she should "have her dower right in all property real and personal of which I die possessed." While a dower estate in personal property, money or choses in action is not recognized by the law, it is easy to understand that the testator desired his wife to have the use during her natural life of one-third of his estate, provided she should become sane. The intention of the testator being manifest, it is the duty of the courts to carry that intention into effect notwithstanding the improper use of technical words. Until the wife becomes sane or departs this life, one-third of the estate in question, after the payment of claims, the widow's allowance and the costs of administration, should be held

intact, in trust by some person, to the end that, should she cease to be demented, she shall enjoy the net income from said funds during her natural life. Two-thirds of said estate should be divided as follows: One-third part thereof to Right Reverend Thomas Bonacum, Bishop of Lincoln, Nebraska, or to his successors in office, in trust for the benefit of the orphanage referred to in the will, and two-thirds thereof in equal shares among the four children named in said will, or to the children by right of representation of those devisees who may depart this life before said division is made; the fund set apart for the widow and all unpaid increment thereof upon her death to be divided among the children and the bishop of Lincoln in trust in the same proportions as the two-thirds of the estate were distributed.

3. The learned trial judge found that the Arapahoe lots constituted the testator's homestead at the time of his death. If this were true, the will would only act upon the remainder, subject to the widow's life estate in two of said lots. Ann. St. 1907, sec. 6291. The license of the judge of the district court would not authorize a sale of the homestead. *Tindall v. Peterson,* 71 Neb. 160. The persons claiming title through John Manning to the Furnas county farm, heretofore referred to, are not before us, and we do not assume to say that they may not be in position to successfully defend their title to that property. We must, however, determine the homestead feature of this case upon the record before us, and hold, so far as the parties hereto are concerned, that this feature of the instant case is ruled by *Weatherington v. Smith,* 77 Neb. 369, wherein we held that "neither the husband nor the wife can abandon the family homestead and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse." If the homestead estate of an insane husband cannot be deraigned by the sane wife's abandonment of it and her subsequent execution of a deed purporting to convey it, for much stronger reasons the sole deed of the husband, made before he had departed from the home,

will not convey the homestead interest of the insane wife. The court therefore should have ignored all claim of a homestead interest, made on behalf of the widow, in the village lots, which sold for less than $600.

4. The guardian *ad litem* assumed to elect for the widow that she would take under the law, and not according to the will; and, while there is no separate affirmative entry of either court approving that election, the trend of the orders made indicates an approval of the guardian's action. In this we think there was error prejudicial to the property rights of the widow. The statute in force at the time John Manning died gave a widow the right to elect whether she would accept the provisions of her husband's will or recover dower in his lands, but did not vest her with the right to ignore the will and inherit his personal property as though he had died intestate. In the instant case the will preserved the widow's dower estate in the testator's lands and devised her the use during her natural life of one-third of his personal property, provided she recovered her reason. If she remained incompetent, it would be of but little moment to her whether she had the use of one-third part of the four lots, aggregating but little over $500 in value, or the use of all of said real estate. It was therefore to the widow's interest to take under the will, and not the law. It is the duty of a guardian *ad litem* to submit to the court all relevant defenses or legal claims his client may have, but courts will protect the rights of incompetents before them whether the guardian has proceeded wisely or not. *Andrews, Adm'r, v. Hall,* 15 Ala. 85; *Stark v. Brown,* 101 Ill. 395. A due regard for the widow's rights impels us to ignore the attempted election of the guardian *ad litem.*

5. The court was right in assigning to the widow $200 out of the personal property of her husband. She should also have been awarded the wearing apparel and ornaments of the deceased and all of the household furniture. None of said property is an asset in the hands of the executor, but is the absolute property of the widow. *In re Es-*

tate of Fletcher, 83 Neb. 156. During the settlement of the estate the widow was supported by the state without expense to the estate of either spouse, and therefore the court did not abuse its discretion in refusing to make an allowance for her support.

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

REVERSED.

WILLIAM H. LOOSING ET AL., APPELLANTS, V. FRED LOOSING ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. No. 15,576.

1. **Wills:** DEVISES: CONSTRUCTION. If an estate is devised to a person generally or indefinitely with a power of disposition, it carries the fee; but, if the testator gives the first taker an estate for life only with a power to dispose of the remainder to definitely described individuals, the express limitation for life will control the operation of the power and prevent it from enlarging the life estate to a fee.

2. **Powers:** IMPLIED GIFT. Where there is a power to appoint among certain objects and no gift in default of appointment, the law will imply a gift to the objects of the power.

3. ———: DISCRETION OF DONEE. Where the donee of a power is given discretion in making an appointment, that discretion will not be controlled by the court provided a substantial gift is made to each object of the power.

4. ———: ———: POWER OF COURTS. Should the donee depart this life without having exercised the power, the court cannot exercise the discretion vested in the donee, but will divide the property equally among the beneficiaries of the power.

5. ———: POWER IN TRUST. Where a testator devises to his wife a life estate in certain lands and lots with the power to "dispose" of or "distribute" the remainder as she sees fit, and later in the will there is a statement that the wife is to give two of their children out of the said remainder so much thereof "as she sees fit," and it appears from the will and all of the circumstances surrounding the deceased that it was his intention to devise all of his estate and not to permit any part thereof to vest in strangers to his blood, the widow takes a power in trust for the benefit of

the children referred to, and is not at liberty to exercise that power for the benefit of any one else.

6. **Wills:** DEVISES: CONSTRUCTION. Subsequent provisions in a will will not prevail to take from an estate in fee simple qualities that the law regards as inseparable from it, such as the right to incumber or convey. They are, however, operative to define the estate given, and may act to demonstrate that what without them would be a fee was intended to be a lesser estate; but, if a consideration of the entire instrument convinces the judgment that the estate first granted was intended to be a fee simple, then subsequent clauses restricting alienation and suggesting that the fee should descend to the devisees' children will not clog or denude the fee theretofore granted.

7. **Specific Performance:** FAMILY SETTLEMENT. A decree for the specific performance of a contract is not a matter of right, but rests in the sound discretion of a court, and, in such an action, where it appears that the defendant is an aged and illiterate woman, that the contract purports to distribute the estate of her late husband in violation of the terms of his will, and that at the time she signed the contract she did not know her legal rights, but was overreached by her children, the petition will be dismissed.

8. **Equity:** CANCELATION OF DEED. An undelivered deed signed by the donee of a power who was ignorant of her rights and privileges will be canceled in an equitable action involving a construction of the will creating said power, and of the rights of all devisees and legatees named therein.

APPEAL from the district court for Washington county: ABRAHAM L. SUTTON, JUDGE. *Judgment of district court vacated and judgment entered.*

Clark O'Hanlon, W. S. Cook, H. C. Brome and *F. Dolezal,* for appellants.

John J. Sullivan, John H. Grossman and *Louis Lightner, contra.*

ROOT, J.

William Loosing was born in Germany, but had resided in Washington county, Nebraska, 45 years next preceding his death, which occurred in November, 1905, and will be

referred to hereafter as the testator. Hannah Loosing, defendant herein, is the testator's widow. At the time of her marriage she was the mother of an illegitimate infant son, who thereafter resided with his mother and her husband until 29 years of age, in 1890. Six adult children also survived the testator, William H., Lena Moravec, Caroline Ruwe and Rosina Thompson, all of whom are married, and are plaintiffs herein, Louise, unmarried, but the mother of an illegitimate adult daughter, Ida, and Fred, who is also unmarried, defendants herein. In 1894 the testator executed a will devising and bequeathing to his wife all of his property. Possibly he made another will subsequent thereto and prior to 1904. In the last named year he made a will revoking all former wills by him made, and disposed of his property after payment of his debts as follows:

"(2) My will is that my beloved wife, Hannah Loosing, shall have the use and disposition of all my personal property, also the income as long as she lives off of the following described land:

"One hundred sixty acres in Nance county, Nebraska, all the land I own there. The east half of the northwest quarter (E ½ NW ¼) and the west half of the west half of the northeast quarter (W ½ W ½ NE ¼) in section twelve (12), township seventeen (17), range nine (9), Washington county, Nebraska, and the north half of the northwest quarter of section one (N ½ NW ¼), township seventeen, excepting thirteen rods along the east side of this (N ½ NW ¼ 1-17-9).

"Also the south half of the southwest quarter, and lot numbered two, all in section thirty-six (36), excepting thirteen rods along the east side of this (S ½ SW ¼ and lot 2) of said section thirty-six, township eighteen (18), range nine (9), Washington county, Nebraska, also all village lots as follows: Lots three and four in block 24, and lots three and four in block thirty-one, village of Arlington, Nebraska.

"I want my wife to dispose or distribute this property

which I have not devised, as she sees fit, or deems best in her judgment.

"(3) I bequeath to my son, William H. Loosing, the east half of the northeast quarter, and the east half of the west half of the northeast quarter (E ½ NE ¼ and E ½ W ½ NE ¼), all in section twelve (12), township seventeen, range nine, Washington county, Nebraska.

"(4) I bequeath to my son, Fred Loosing, the southwest quarter of the southwest quarter section thirty-one, township eighteen, range ten, the northwest quarter of the northwest quarter of section six, township seventeen, range ten, Washington county, Nebraska, and the north half of the northeast quarter of section one, township seventeen, range nine, and thirteen rods along the east side of the north half of the northwest quarter of said section one, township seventeen, range nine, and the south half of the southeast quarter and all of that portion of lot two in the north half of the southeast quarter, and thirteen rods along the east side of the south half of the southwest quarter, and thirteen rods along the east side of lot two in the south half of the southwest quarter, all in section thirty-six, township eighteen, range nine, Washington county, Nebraska. This my son Fred Loosing is to pay to my daughter Caroline Ruwe, six thousand dollars to be paid to her in four yearly payments of fifteen hundred dollars each.

"(5) I bequeath to my daughter, Louise Loosing, the home place where I now live, with the following described lands: The east half of the northwest quarter, and the west half of the west half of the northeast quarter, all in section twelve, township seventeen, range nine, Washington county, Nebraska.

"This daughter is not to have possession of this property until after the death of my wife. I want it distinctly understood that the property I have herein bequeathed to my two sons and one daughter that they shall not have the right to dispose or mortgage same, but it shall be handed down to their children.

"The remaining children which I have not mentioned in this will, I will leave it to my wife, to give them as she sees fit out of the property I left for her to dispose of. I want William H. Loosing and Louise Loosing to pay to my daughter Caroline Ruwe one thousand dollars each as soon as they get possession of the property."

The widow and children for a time were opposed to the 1904 will and conferred with a view to defeating it. At the same time the children were formulating a plan for the division of their father's estate regardless of the will, and called to their assistance two neighbors, Geissleman and Vogt, who seem to be honest, well-meaning farmer folk. The will had been deposited with the county judge, and he, in conformity with law, had given notice of a time and place for hearing evidence as to its execution. The estate is considerable, valued at about $100,000. William H. Loosing, Mrs. Thompson and Mrs. Moravec, who was then Mrs. Kruger, filed objections to the probate of the will. On the 26th of February, 1906, William, Louise and Fred Loosing and James Thompson, husband of Rosina Thompson, came to the widow's home, some of them before noon and others thereafter, with Messrs. Vogt and Geissleman. Mrs. Loosing in the meantime had consulted with at least two attorneys, and had been advised by one counselor that her interest under the will in certain real estate was a fee, and by the other that she would receive a life estate only therein. Mrs. Loosing cannot read English, speaks said language indifferently, and may be termed an illiterate woman. The testimony concerning what was said at the February, 1906, conference is conflicting. The widow and Louise each testified that the other children insisted that their mother should agree to a division of the estate; that the will should not control, and told her that, if she did not agree with them, they would be unkind to her; that she would be sent to the asylum should she attempt to testify in court; and that her character, the reputation of her daughter Louise, and that of the family would be ruined if the objections to the probate of the will

proceeded to a hearing. About 6 o'clock in the evening the children agreed among themselves, and their mother assented to their arrangement. Mr. Schoettger, a banker who speaks both German and English, was sent for, and wrote out a contract, which was signed by the widow and all of her children. The contract provided for an allowance to the widow of $1 an acre a year for all of the real estate owned by the deceased at the time of his death; that she should have the personal property of the estate, and the real estate was to be divided among the children according to their views, and not in conformity with the will. March 16, by agreement of all parties, the contract was modified so that the widow would receive 25 cents an acre more each year for the land. At the same time she signed a deed purporting to convey to Mrs. Thompson and Mrs. Moravec certain real estate subject to her life estate. During the March conference it was arranged that the will should be admitted to probate, and an action prosecuted in the district court to quiet each child's title to the real estate allotted him or her by the contract between them. March 23, 1906, the will was admitted to probate, and in May of the succeeding year this action for a specific performance of the contract was commenced. Ida Loosing, the illegitimate daughter of Louise, was not a party to the contract, but is impleaded as defendant herein. She asserts title to the land devised her mother, subject to the latter's life estate, and prays that her said title be quieted and confirmed. The other defendants charge fraud, coercion and duress, and that they signed the contract under a misunderstanding of the legal effect of the will. The widow prays that the aforesaid deed be canceled, and all ask for equitable relief. The district court found for defendants, dismissed the widow's action for a cancelation of the deed to her daughters, without prejudice to another action, confirmed Ida Loosing in the title claimed by her, and dismissed the petition. Plaintiffs appeal.

1. A careful consideration of the evidence fails to con-

vince us that the widow was coerced into signing the contract, but we are satisfied that she did not appreciate her rights. It is true she had taken counsel, but the advice given would becloud rather than clarify the situation, and there is not a shred of evidence to indicate that she was advised of the nature of the power vested in her. At the best, there was a great confusion of ideas as to the legal effect of the will and the rights of the respective parties. It will be observed that the second paragraph of the will gives the widow the use and disposition of all the testator's personal property; "also the income as long as she lives off of the following described land": One hundred and sixty acres in Nance county and certain real estate in Washington county, Nebraska. Subject to that life estate, part of the land devised to the widow for life is devised to the son Fred, part to Louise, and concerning the remainder the testator says: "I want my wife to dispose or distribute this property which I have not devised, as she sees fit, or deems best in her judgment," and in the fifth paragraph of the will further states: "The remaining children which I have not mentioned in this will (Mrs. Thompson and Mrs. Moravec), I will leave it to my wife, to give them as she sees fit out of the property I left for her to dispose of."

While cases are not lacking to sustain the proposition that a power of sale added to a life estate in real property vests the donee with an estate in fee simple, we think the weight of authority is to the contrary. 1 Sugden, Powers, ch. 3; 4 Kent, Commentaries (Rev. ed.), pp. *319, *536; *Fairman v. Beal,* 14 Ill. 244; *Walker v. Pritchard,* 121 Ill. 221; *Ducker v. Burnham,* 146 Ill. 9; *Burleigh v. Clough,* 52 N. H. 267; *Mansfield v. Shelton,* 67 Conn. 390; *Little v. Giles,* 25 Neb. 313. The New York decisions are controlled by statute, and are not, for that reason, authority upon the general proposition in other jurisdictions. The testator did not specifically designate in his will the methods to be pursued by his widow in executing the power vested in her by him, and she therefore is at liberty

to indulge her judgment or fancy by executing a deed or a will. *Proby v. Landor,* 28 Beav. (Eng.) 504; *Fairman v. Beal,* 14 Ill. 244; *Christy v. Pulliam,* 17 Ill. 59; *Burbank v. Sweeney,* 161 Mass. 490; *Cueman v. Broadnax,* 37 N. J. Law, 508.

2. A superficial examination of the will may suggest that the precatory words referring to Mrs. Thompson and Mrs. Moravec, being the children not named in the will, did not clothe them with any rights because they are not given a definite interest in any part of their father's estate, and the widow's discretion in the disposition of the aforesaid remainder seems absolute. It will be observed, however, that the testator recites in his will that he is disposing of all of his possessions of every kind and character, and that he does not make a gift over to any one other than his daughters Rosina and Lena in the event that the widow fails to make an appointment under the will. We must also consider that the testator and his wife's illegitimate son August parted in anger, and were never, so far as the record discloses, reconciled, and that August, in 1890, by threatening to sue his stepfather, collected from him about $1,300 for services rendered. The record is barren of any evidence to furnish a reason for the father's discrimination against his daughters Lena and Rosina, but, taking all of the facts into consideration, we feel justified in holding that the testator did not intend that any of his estate should go to strangers to his blood; that the power vested in the widow was created for the benefit of Mrs. Thompson and Mrs. Moravec, but that the donee is given a discretion in making the division between her daughters. Should the widow fail to act, no court could exercise the discretion lodged with her, and, in the event of her demise and failure to make an appointment, the daughters would take the real estate in equal shares. *Davy v. Hooper,* 2 Vern. (Eng.) 665; *Penny v. Turner,* 10 Jur. pt. 1 (Eng.) 768; *Longmore v. Broom,* 7 Ves. Jr. (Eng.) 124; *Re White's Trust,* Johns. Ch. (Eng.) 656; *Salusbury v. Denton,* 3 Jur. (n. s.) pt. 1 (Eng.) 740;

Reid v. Reid, 25 Beav. (Eng.) 469; *Withers v. Yeadon*, 1 Rich. Eq. (S. Car.) 324; *Cruse v. McKee*, 39 Tenn. 1, 73 Am. Dec. 186; *Millikin v. Welliver*, 37 Ohio St. 460; *Smith v. Floyd*, 140 N. Y. 337.

3. It is argued that the testator intended that William, Fred and Louise should have a life estate only in the land devised to them, and without the power to incumber or alienate, remainder to the surviving children of each devisee, and, failing such children, remainder to the surviving heirs at law of the testator or their heirs by right of representation. The intent of a testator must control, and will be ascertained from the language of the will aided somewhat by a consideration of the facts and circumstances surrounding the testator as reflected from the evidence, but that intent will not be inferred in flat contradiction to, and in violation of, well-established rules of law. We are committed to the principle that, if a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void. *Spencer v. Scovil*, 70 Neb. 87. We are satisfied with the principle stated in the cited case. The difficulty arises in applying the rule to the facts in the particular case. The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly. In other words, quoting Mr. Justice Strong in *Sheets' Estate*, 52 Pa. St. 257: "Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might

be a fee, was intended to be a lesser right." *Haldeman v. Haldeman*, 40 Pa. St. 29; *Shalters v. Ladd*, 141 Pa. St. 349; *Taggart v. Murray*, 53 N. Y. 233; *Eaton v. Straw*, 18 N. H. 320; 1 Jarman, Wills (6th ed.) *472. In Nebraska words of inheritance in a deed or will are not essential to transfer a fee simple title. The paragraphs of the will devising real estate to William, Fred and Louise, if considered by themselves, vest the devisees with a title in fee simple. When construed with the remainder of the will, it is apparent that part of the real estate is subject to the widow's life estate. The subsequent clause, which counsel claim explains and limits the force of the earlier ones in the will, does not indicate a purpose on the part of the testator to cut down the estate first granted, but that the children of the first taker shall inherit from their parents. If the testator intended that William, Fred and Louise should only take a life estate, a remainder could not descend or "be handed down" from them, and their children could not receive an estate, except from the testator and through his will, and he nowhere in that instrument devises anything to the children of his children. There is no residuary clause, and, if we construe the will as vesting the children with a life estate only, the remainder will vest under the statute relating to the estates of those dying intestate, and we do violence to the testator's introductory statement in his will that he is thereby disposing of all his estate. That the testator desired William, Fred and Louise to retain title to the farms devised to them, and that they should permit their children, if any they had, to succeed to that title, we do not question, but he has nowhere provided that such title shall proceed from himself. We conclude, therefore, from an examination of the entire will, that the estates devised to William, Fred and Louise were not cut down to a life estate by the subsequent statement that the land should be handed down to their children.

This being true, what force must be accorded the statement that the devisees shall not mortgage or dispose of the

land? In *Weller v. Noffsinger,* 57 Neb. 455, we held that a condition providing that property devised to trustees for years should not be aliened or incumbered by the beneficiary during that term was not invalid, and in *Albin v. Parmele,* 70 Neb. 740, we upheld such a restraint imposed upon a life estate. We, however, have never held, nor do we believe it to be sound law, that a general restraint against alienation may be successfully attached to an estate in fee simple. Such a limitation is repugnant to the estate conveyed, against public policy, and void. *Spencer v. Scovil,* 70 Neb. 87; 4 Kent, Commentaries (Rev. ed.) pp. *143, *144; 1 Washburn, Real Property (6th ed.), sec. 143; *Turner v. Hallowell Savings Institution,* 76 Me. 527; *Anderson v. Cary,* 36 Ohio St. 506; *Stansbury v. Hubner,* 73 Md. 228; *Kaufman v. Burgert,* 195 Pa. St. 274, 78 Am. St. Rep. 813. In the light of our decision the defendant Ida Loosing takes nothing under the will, and the court erred in decreeing to the contrary. The widow has not appealed from that part of the decree dismissing without prejudice her complaint concerning the deed conveying the remainder, heretofore referred to, to her daughters Rosina and Lena. Plaintiffs, however, request a consideration of all the issues raised by the respective pleadings; all of the parties are before us, and we think their rights, as far as may be, should be finally determined.

Plaintiffs also urge that family settlements should be upheld, and the contract between the widow and children of the deceased specifically enforced. While family settlements are at times desirable, litigants claiming title to an estate by virtue of such an agreement and against an aged, infirm and illiterate widow bear the burden of proving that the defendant understood the contract, and was not deceived by her active and aggressive children. *In re Estate of Panko,* 83 Neb. 145. So far as the widow is concerned, she may or may not receive as much under the contract as under the will, but the contract deprives her of the control of part of the land devised to her by her husband. Those responsible for the settlement were con-

cerned principally in advancing their own interests. There is evidence, which we do not care to specifically mention, that satisfies us that the widow was overreached in the transaction, and did not exercise a discretion in disposing of the remainder of the real estate under the power in the will. We are confident that she at no time knew or understood her rights in the premises, but was, possibly inadvertently, misled by those upon whom she had a right to lean for comfort and support. It is also doubtful whether she ever delivered the deed to Mrs. Thompson and Mrs. Moravec. The district court exercised a wise discretion in refusing a specific performance of the contract. The widow is advanced in years, and this litigation should end so far as she is concerned. What has been said here is without prejudice to the rights of the litigants should the probate court vacate its order admitting the will to probate and that instrument eventually be held invalid.

The judgment of the district court, therefore, is set aside, a decree will be entered in this court in conformity with this opinion, and taxing all of the costs in the district court and in this court to plaintiffs and Fred Loosing.

JUDGMENT ACCORDINGLY.

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

FRANK GROSS ET AL., APPELLEES, V. STEPHEN H. JONES, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,746.

1. **Eminent Domain:** FLOWAGE OF LAND: ABANDONMENT OF RIGHT. A petitioner in *ad quod damnum* proceedings who owns the land on each side of a watercourse at the point where he proposes to construct and maintain a dam does not by a judgment in his favor and payment of the damages assessed acquire the right in perpetuity to flow the lands of upper riparian owners, but secures a

privilege which may be lost by abandonment or nonuser for an unreasonable length of time.

2. **Waters:** FLOWAGE OF LAND: PRESCRIPTION. A miller may also by uninterrupted, continuous and adverse possession and user obtain said right of flowage.

3. **Eminent Domain:** FLOWAGE OF LAND: PRESCRIPTION. If the exercise of that privilege is commenced by virtue of *ad quod damnum* proceedings, possession and use alone, no matter how long continued, will not vest the miller with any title, privilege or right other than those acquired in said proceedings.

4. ———: ———: ABANDONMENT OF RIGHT. In a contest between upper riparian owners and the proprietor of a mill site over the latter's right to reconstruct a dam that has been washed away, the question of whether or not there has been a nonuser of a privilege acquired by condemnation proceedings for such a length of time as will amount to an abandonment of the right of flowage is one of fact, to be determined in each particular case upon the evidence before the court.

5. ———: ———: ———. In such an action the district court was justified in finding that the owner of the mill site had abandoned his right to flow the lands of the upper riparian owners for the purpose of maintaining a public gristmill, where it appeared from the evidence that the principal mill had been dismantled, and, with its machinery, removed from the mill site ten years next preceding the institution of the suit; that for eight of those years an occasional grist of a few bushels of buckwheat, rye, corn or oats had been ground in an ancient building on the premises; that the public was not served by the operation of said mill, which for months at a time was not used at all; that the owner of the mill site maintained the mill pond principally to procure ice therefrom; and that two years before the commencement of the suit the dam was washed away, and no steps whatever had been taken during that time to reconstruct it.

6. **Injunction:** CONSTRUCTION OF DAM. It was error, however, for the court to absolutely enjoin the owner of the mill site from constructing said dam, but the injunction should continue only until by *ad quod damnum* proceedings and the payment of damages assessed therein he had established his right to construct and maintain the dam.

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

J. H. Barry, for appellant.

Simpson & Good, contra.

ROOT, J.

In 1871 the then owners of a tract of land crossed by the Wahoo creek by *ad quod damnum* proceedings in the district court for Saunders county acquired the right to flow the lands of upper proprietors so far as might be necessary in constructing and maintaining a dam 20 feet in height across said stream and upon the land of the petitioners. A dam and gristmill were constructed, and the mill thereafter operated. In 1887 a flouring-mill with modern appliances was built upon said mill site, and subsequently operated; the original mill being used for grinding corn and oats. In 1893 the last mill constructed was dismantled, and, with the machinery, removed. Subsequently defendant became the owner of the mill site and the mill first constructed. At that time the dam had been washed away, but was rebuilt by defendant about 18 months after his purchase. Thereafter defendant occasionally operated the mill on a very small scale, and cut ice from the millpond for his ice business in Wahoo. In May, 1903, the dam was again washed away, and in May or June of 1905 defendant was preparing to reconstruct it, when this action for an injunction was instituted by the upper riparian owners. The court found generally for plaintiffs, and perpetually enjoined defendant from building, constructing and maintaining any dam across the Wahoo creek upon his said land, and he appeals.

1. While the condemnation proceedings were regular, they did not vest defendant or his grantors with the right of flowage in perpetuity, but merely the privilege of exercising that power until the easement was extinguished in some lawful manner. *Pratt v. Brown,* 3 Wis. 532; *Curtiss v. Smith,* 35 Conn. 156; *French v. Braintree Mfg. Co.,* 40 Mass. 216; *Nosser v. Seeley,* 10 Neb. 460. A right of flowage thus acquired may be lost by abandonment or non-

user for an unreasonable length of time. *French v. Braintree Mfg. Co., supra.* Whether the nonuser has continued for an unreasonable period in a particular case will be ascertained from the surrounding facts and circumstances. No arbitrary rule can safely be followed. If the right of flowage has been acquired by deed or adverse enjoyment, then it may be conceded that nonuser for less than ten years will not be held an unreasonable delay. *Agnew v. City of Pawnee City,* 79 Neb. 603. But a right or easement by adverse enjoyment will not be created unless the use has been adverse to the owner of the servient estate for ten continuous years. *Johnson v. Sherman County I., W-P. & I. Co.,* 63 Neb. 510. If the person enjoying the right or easement acquires it by condemnation proceedings, his possession in the first instance is in conformity with the terms of the judgment, and a continuation of that possession will not enlarge his estate, unless he intends thereby to acquire a greater interest, and knowledge of that intent is brought home to the owner of the servient estate. A defendant who pleads and proves possession by virtue of a legal title ought not to be considered an adverse occupant. *Tinkham v. Arnold,* 3 Me. 120. There is not a scintilla of evidence that defendant or any of his grantors ever, prior to the filing of the answer in this case, claimed to have other or greater rights in the premises than vested in Ray and Flor, the petitioners in condemnation. Defendant has never executed a specific release of his right of flowage nor indicated by any statement that he has abandoned it, and there remains but one question for consideration upon this branch of the case, and that is whether the facts taken altogether will justify a finding of such abandonment.

Defendant's grantors by the exercise of the power of eminent domain were granted a servitude upon the lands now owned by plaintiffs, to the end that a public gristmill operated by water power might be constructed and maintained. In the early history of this state, in common with like periods in the experience of sister common-

wealths, the law was construed liberally in the interests of the millers who manufactured foodstuffs for the community. With the evolution of transportation and steam power, the reasons underlying those decisions have largely vanished. Speculators who cling to the old mill sites and rickety, moss-covered dams to the detriment of acres of valuable, fertile land, made valueless by the overflow of water that has ceased to furnish power for the benefit of a community, must in good faith keep their franchises alive to hold the upper riparian lands in servitude. The payment of damages assessed for the benefit of the upper proprietors is not the sole consideration upon which the miller receives the right of flowage, but there is the further consideration that he shall construct, equip and operate a grist-mill for the benefit of the public. If he does not, the consideration for his grant fails, and the upper proprietors ought not to hold their lands in bondage to him.

The evidence proves to our satisfaction that defendant's real purpose in maintaining the millpond has been to furnish an ice field from whence he could procure ice for his trade. Defendant since he became the owner of the mill, and preceding the destruction of the dam in 1903, has not operated the mill with any regularity, but, on the contrary, during long and infrequent intervals of time has operated not to exceed three hours at a time. Months would pass during which the mill was not operated at all. Witnesses who frequently traveled the highway adjacent to the property testified that they never saw it in operation. One witness who passed the mill six days in the week for years only saw a team at the mill on two occasions. The infrequent grists ground consisted generally of but a few bushels of rye, buckwheat, corn or oats. The public did not patronize the mill. It is poorly equipped for practical work, and for years has ceased to be of any benefit to the public or the community in which it is situated. Taking all of these facts into consideration, and the further fact that defendant remained passive for over two

years subsequent to the loss of the dam in 1903, we are of opinion that the trial judge was justified in finding that defendant had abandoned the rights acquired by him from his grantors to overflow plaintiffs' land. The statute in force when this action was commenced (Comp. St. 1903, ch. 57, sec. 15) provided that if a miller who has acquired a mill site by condemnation does not commence to build his mill or dam within a year of the final judgment, or within two years does not commence to reconstruct his mill or dam, if either structure is destroyed, the mill site will revert to the original proprietor, and thereby indicates the then legislative idea of a reasonable time within which a miller must act to preserve his privileges acquired by condemnation proceedings. Defendant is not within the saving clause of the cited statute, nor the more liberal limits of the amendment thereto, laws 1905, ch. 101. The statute does not in terms apply to the case at bar, but it warrants a court in exacting the same degree of diligence on the part of the individual owning the mill site, if he asserts a right to flow the land of upper riparian owners.

2. The injunction is absolute, forbidding the reconstruction of a dam upon defendant's land. Defendant owns a mill, antiquated, but still constructed for the milling trade. He also owns the land on both sides of the creek where he proposes, and alleges that he desires, to construct a dam. He has a right to proceed under the statute to establish his right to construct and maintain the dam and operate the mill.

The judgment of the district court, therefore, is modified so as to enjoin defendant from constructing or maintaining a dam upon the land described in the petition until and unless he shall have again acquired the right so to do by *ad quod damnum* proceedings in the district court for Saunders county, and, as thus modified, the judgment is affirmed.

JUDGMENT ACCORDINGLY.

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

ROBERT JOHNSON, APPELLEE, V. FRED PETERSON, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,751.

1. **Eminent Domain:** HIGHWAYS. Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways.

2. ———: ———: INJUNCTION. If a road overseer attempts to enter upon the real estate of an individual to prepare a highway thereon for the use of the public, and the owner's damages for the appropriation of said land for that purpose have not been theretofore ascertained, and payment made or provided therefor, the landowner is entitled to an injunction restraining the overseer until such damages have been ascertained and paid, or payment provided for in accordance with law.

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

H. E. Oleson and *Claude A. Davis,* for appellant.

O. A. Abbott and *Clements Bros., contra.*

ROOT, J.

This is an appeal from a judgment of the district court for Valley county restraining the defendant, who is a road overseer in said county, from entering upon plaintiff's land or opening a public highway along and upon the section line between the northeast quarter of section 26, and the northwest quarter of section 25, in township 17, range 14, until such a time as plaintiff's damages shall have been ascertained in the manner provided by law for the taking of private property for road purposes. Defendant appeals.

1. Plaintiff asks that the appeal be dismissed because of an alleged settlement of the matters in litigation. We are satisfied that the judgment of the district court is

right, and shall not sustain the motion, but decide the case upon the merits, without determining the legal effect of the action of the county commissioners of said county in settling with plaintiff or their alleged reconsideration of that settlement.

2. A motion for a new trial was not filed in the district court, and we can only consider whether the findings and judgment are contrary to or supported by the evidence and the law. *Kemp v. Kemp,* 82 Neb. 794. In 1884 a petition was filed with the then county clerk of said county praying for the location of a public road, which, if established, would include the land in dispute and other lands. For the purposes of this case, we shall assume that the petition was sufficient, and that due notice was given of the time and place when and where the county commissioners would act thereon. The evidence of the proceedings of the county commisioners is meager, but it sufficiently appears that condemnation proceedings were not had to ascertain the damages that would accrue to the then owners of the land in controversy, which now is the property of plaintiff. The evidence establishes that, with the exception of a few yards in length north from the southwest corner of plaintiff's land, none of the real estate in dispute was ever occupied or used for road purposes, and the part thus traveled has been abandoned for many years. There is no evidence whatever that any of said land was worked by the public authorities, or dedicated by the owner thereof for road purposes. The public authorities in Nebraska cannot take possession of land and use it for a highway without assessing and paying damages to the owner therefor or providing for such payment. *Kime v. Cass County,* 71 Neb. 677, 680. The burden rests upon the authorities in such cases to not only initiate condemnation proceedings, but perform all necessary acts to ascertain the damages above referred to, unless the owner by some unequivocal act shall have waived his right to compensation. *Kime v. Cass County, supra; Hogsett v. Harlan County,* 4 Neb. (Unof.) 310; *Hodges v. Board of*

Supervisors, 49 Neb. 666; *Propst v. Cass County,* 51 Neb. 736; *Lewis v. City of Lincoln,* 55 Neb. 1. There is no evidence that any owner of said land ever waived the right to compensation for its appropriation to public use, and defendant, upon whom the burden rested, did not prove an easement in the public by condemnation or otherwise. Plaintiff, in 1884, did not own part of the land now in controversy, but that fact does not prevent him from demanding compensation for the land now claimed by the public authorities as a road, which they have not purchased nor provided funds to pay therefor. *Hogsett v. Harlan County, supra; Ashley v. Burt County,* 73 Neb. 159.

The argument that plaintiff is estopped from claiming damages because he appeared before the commissioners in 1884 and signed a stipulation with relation to a part of the proposed road about two miles distant from the land in controversy is not convincing, and will not avail to reverse the judgment of the district court.

The evidence amply sustains the findings of the district court, and the judgment is not contrary to, but in conformity with law, and is

AFFIRMED.

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

JOHN W. BASSETT, APPELLEE, V. FARMERS & MERCHANTS INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,752.

1. **Insurance Contract: ENFORCEMENT.** "A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject matter of the contract." *Stanisics v. Hartford Fire Ins. Co.,* 83 Neb. 768.

2. ———: ———. In 1906 a husband by virtue of the marital relation only had no insurable interest in his wife's real estate.

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

Wilmer B. Comstock and *A. L. Chase,* for appellant.

Wilmer W. Wilson, contra.

ROOT, J.

In 1902 John W. Bassett, plaintiff herein, purchased a farm in Otoe county and procured the conveyance therefor to be made to his wife. In 1904 defendant insured plaintiff for five years against loss by fire of the dwelling house on said farm. In 1906 the house was totally destroyed by fire. Defendant denied liability upon its policy, and returned the premium received by it from plaintiff, which he retained some months, and then sent back to defendant. Defendant tenders plaintiff the amount of said premium.

1. The most important question raised by the defense is that under the facts plaintiff did not have an insurable interest in the property destroyed, and for that reason cannot recover. Without an insurable interest plaintiff ought not to prevail. *Stanisics v. Hartford Fire Ins. Co.,* 83 Neb. 768. At the time the policy was issued, excepting only her homestead, a married woman in Nebraska could dispose of her real estate without her husband's assent, and by her sole deed convey title thereto freed from his interest inchoate or otherwise therein. The farm under consideration was not a homestead. Not only may the wife thus convey her real estate, but during her lifetime the husband has no right to its possession or control, nor to any part of the rents and profits issuing therefrom. Cases may be cited to sustain the proposition that the husband's estate by the curtesy initiate is an insurable interest; but an examination of those cases will disclose that they are based upon laws giving the husband more than a mere expectancy in the wife's land. In jurisdic-

tions where the lawmaking power has completely emancipated a married woman's property from the control of her husband, the possibility that he will receive a benefit from the real estate of which she may die seized is not considered an insurable interest during her lifetime. *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373; *Traders Ins. Co. v. Newman*, 120 Ind. 554; *Planters Mutual Ins. Co. v. Loyd*, 71 Ark. 292. Plaintiff argues that, if the holder of the property insured will suffer a loss by its destruction, he has an insurable interest therein. An examination of the cases cited upon that point will disclose that the assured in each instance had some substantial interest in the subject insured, an interest that would be recognized and protected by the courts. If plaintiff were enjoying the possession of a house rent free, without any contract with the owner and under such circumstances that the latter might dispossess the former any time, it would hardly be contended that he had an insurable interest in the dwelling. So far as the proof goes, plaintiff holds possession of the farm by sufferance of his wife, and not by force of any lawful or equitable right. Counsel argue that Mrs. Bassett has only a dry, naked, legal title to the farm, and that the beneficial one is in plaintiff, but the difficulty is that the proof does not sustain that assumption. Mrs. Bassett did not testify, nor has plaintiff stated that there was any arrangement between himself and wife, oral or otherwise, by which he was to have a life estate in the farm. Nor is there any proof that the deed to Mrs. Bassett does not convey the title in just such form as plaintiff desired. In *Redfield v. Holland Purchase Ins. Co*, 56 N. Y. 354, cited as in point, the wife had agreed orally that her husband should have the use during his natural life of the property conveyed to her at his instance. He was in possession of the land, and the court held that there had been complete performance by the husband of the oral agreement so as to take it out of the statute of frauds, and that he had an equitable title to the real estate. But in the case at bar the proof merely discloses that plaintiff

purchased the land and directed the vendor to convey direct to his wife, and, in conformity with his instructions, she received a warranty deed therefor. He testified that he desired her to have the land without administration if she survived him, and, should she predecease him, he would inherit from her. It may be that the facts will justify a court finding that there was an arrangement between the husband and wife, entered into before the deed was made to her, that he could have the use of the land during his lifetime, but there is no evidence in the record of those facts. Upon the proof plaintiff is in the same situation as though he had taken possession of his wife's separate property and leased it for his own benefit. The wife could oust him any time she saw fit. In the state of the record, there is a failure of proof upon a vital fact in issue. *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670.

2. For the reasons just stated, the case must be reversed, and it is not necessary to examine the defense of a forfeiture because of the alleged concealment and misrepresentations by plaintiff concerning the title, nor to go into the alleged fact that defendant's agent was cognizant of the facts when he solicited the insurance and took plaintiff's application therefor. The agent did not testify in the case, and it may be doubted whether proof of his statements and admissions made subsequent to taking the aplication will bind defendant. Furthermore, the court would be greatly assisted in a solution of the differences between the parties upon this point if it were made clear whether or not, when Mr. Butt, defendant's agent, acted as an intermediary between Mrs. Bassett's vendor and herself, he was then defendant's agent, and whether or not at the time he took plaintiff's application he had in mind the facts incident to the transfer of said title, and, if so, whether by oversight or otherwise he failed to correctly fill out the application.

There is not a scintilla of evidence to indicate that the fire was of incendiary origin, and we dislike very much to reverse the judgment before us, but the failure of proof

referred to is clear and our duty imperative. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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

DANIEL HIGGINS AND THOMAS R. EDWARDS, ADMINISTRATORS, ET AL., APPELLEES, V. WILLIAM A. VANDEVEER, ADMINISTRATOR, ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1909. No. 15,760.

1. **County Courts: JURISDICTION.** The county courts of this state are not vested with authority to adjudicate disputes between the surviving husband of a testatrix and her devisees concerning his right to an estate by the curtesy in her lands.

2. ———: ———. The county court does have jurisdiction to enter an order requiring administrators or executors appointed by it to deliver to a surviving husband lands in Nebraska, which came to their possession as such officers, where the only difference between said parties is one of law arising out of the construction of a will that has been admitted to probate by said court.

3. **Wills: CONSTRUCTION: JURISDICTION: PROBATE: REVOCATION.** A district court on appeal from an order of the county court in such a proceeding has like power to construe a will, but in such proceedings neither court has jurisdiction to revoke in part the probate of said will.

4. **Courts: JURISDICTION.** The county court or the district court on appeal in such proceedings is without power to decide whether the husband has an estate by the curtesy in land situated in a sister state, or to direct that he recover possession thereof, and, if it attempts to do so, its findings and judgment to that extent are void and of no effect.

5. **Judgment: CANCELATION.** If a court spreads upon its records a judgment void in part because not responsive to the pleadings, or not pertaining to subjects within its jurisdiction, a party against whom the judgment is directed or whose property rights it assumes to influence is entitled to have canceled and expunged from the records of the court so much of the judgment as is void.

6. ———: ———: LIMITATIONS. And the statute of limitations does

not present a bar to the right and power of the court to clear its its records of unauthorized and illegal entries therein.

7. **Equity: CROSS-BILL.** In an equitable action, a cross-suit must be germane to the original bill, and the issues thus introduced are limited to such as are necessary for the court to consider in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which plaintiff demands relief.

8. ———: ———. In a suit to vacate certain orders made by a county court and the district court upon appeal, construing a will to the effect that a surviving husband is entitled to an estate by the curtesy in the lands of his deceased testate wife, and revoking in part the will and its probate, wherein the heirs and legal representatives of the husband, who departed this life subsequent to the entry of the judgment attacked, and a grantee of said husband are made defendants, a cross-bill filed by said husband's representatives charging that said grantee procured his deed from the deceased husband by fraud is not germane to the bill, and will be stricken from the record on application of said grantee.

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

J. H. Broady, George W. Cornell and *E. B. Quackenbush,* for appellants.

H. A. Lambert and *E. Ferneau, contra.*

ROOT, J.

In 1894 Eliza M. Kimberly, a childless widow, married Absolom Vandeveer, and continued in said wedlock until February 6, 1895, upon which day she died testate and childless, a resident of Nemaha county, Nebraska, the owner of real estate, a part whereof is in Nebraska and a fraction thereof in South Dakota. Mrs. Vandeveer acquired her real estate and made her will before said marriage. On the petition of the executor the will was admitted to probate in the county court of Nemaha county in March, 1895. July 15, 1895, Absolom Vandeveer, who survived the testatrix, filed a petition in said court,

wherein he stated his relation to the deceased, her seizin and death without issue, asserted that he was tenant by the curtesy of her lands, and prayed "that he may recover and hold said premises during his natural life as tenant by curtesy, and for such other and further relief as equity may require." The administrators with the will annexed and the beneficiaries named in the will all appeared by counsel, and separately answered that the land referred to was the sole property of the deceased, and had been devised by her last will and testament, which had been duly probated and never revoked or canceled. In reply the petitioner admitted that the land was the separate property of his late wife; that she received none of it from him, and denied the other allegations in the answer. By the consideration of the county court Absolom Vandeveer was defeated.

In the district court, upon the identical issues presented in the county court, a motion by defendant for judgment on the pleadings was sustained, and Vandeveer's petition dismissed. On appeal, December 6, 1899, we reversed the judgment of the district court. *Vandeveer v. Higgins,* 59 Neb. 333. The estate of Mrs. Vandeveer has not been settled, but is still under the control of the administrators. All of said devisees and legatees are nonresidents of Nebraska. Subsequently, the exact date not being shown by the evidence, but evidently in January, 1900, the representatives of the estate acquiesced in the claim of the surviving husband, paid him the accumulated rents for the Nebraska real estate, and surrendered possession thereof to him. Vandeveer retained such possession and enjoyed the rents and profits until his death, which preceded the commencement of this action. The mandate of this court was filed with the clerk of the district court in October, 1902. During the December, 1902, term of said court, and on the 8th day of that month, a judgment was entered in the journals vacating the judgment appealed from, and decreeing generally that Vandeveer was entitled to the estates of curtesy and homestead in the lands of his de-

ceased wife. On the 3d of January, 1903, during the same term of court, another judgment was rendered upon said mandate, and entered in said journal, again vacating the judgment appealed from, and finding specifically that the marriage of the testatrix revoked her will so far as it interposed any obstacle to her surviving husband's estate of curtesy, and adjudged that to that extent said will and the probate thereof be revoked and held for naught; that Mrs. Vandeveer died without issue and seized in fee simple of specifically described tracts of real estate in Nebraska and South Dakota; that the petitioner was testatrix' surviving husband, and, further, directed that a transcript of said findings and judgment be certified to the county court to the end that said judgment might be carried into execution. In the meantime, in September, 1902, the defendant Cornell, who was then a practicing attorney at law residing in Auburn and counsel for Absolom Vandeveer, procured from his client a deed for the South Dakota lands. July 18, 1904, the county court acted upon said transcript, and modified its judgment so "that the said will of Eliza M. Vandeveer is revoked to the extent of the interest of the plaintiff, and that the said will and the probate thereof is void as to the plaintiff (Absolom Vandeveer) in so far as it would affect his said right, title and interest in and to the real estate therein devised and in said transcripted judgment of the district court particularly described, the same as if the said Eliza M. Vandeveer had died intestate."

This action was commenced October 16, 1907, by the administrators with the will annexed of the estate of the testatrix and her devisees, against the said Cornell and the heirs of Absolom Vandeveer, deceased. It is alleged that the decree rendered January 3, 1903, was procured fraudulently and is void, being controlled by the judgment rendered in December, 1902; that the county court did not have jurisdiction over the subject matter involved in the proceedings before it upon Vandeveer's application, and that all orders made therein, and the subsequent judg-

ments of the district court and of this court on appeal, were also absolutely null and void; that, by reason of the premises, the title of the beneficiaries in the will to the South Dakota land is clouded, and their progress to recover their rights therein impeded. Plaintiffs pray that all of said orders and proceedings be canceled as null and void, and for equitable relief. The defendant Cornell practically enters a general denial coupled with a plea of the statute of limitations. His codefendants filed a like pleading, and as a cross-petition against said Cornell alleged that he procured the deed from Vandeveer for the South Dakota lands by fraud and deceit, and prayed that the petition be dismissed; that said deed be canceled, and Cornell decreed to reconvey said lands to them, or that they recover from him $6,000, the alleged value thereof. On Cornell's motion the cross-petitions were dismissed without prejudice to another action, and replies were duly filed. On a consideration of all of the evidence, the court found for plaintiffs, except on the charge that the decree rendered January 3, 1903, by the district court was procured fraudulently, and canceled and held for naught its judgment in the case of Vandeveer against the representatives of Eliza M. Vandeveer, deceased. All of the defendants appeal, and the representatives of Absolom Vandeveer appeal from the order of the district court dismissing their cross-petitions.

1. Plaintiffs argue that the county court is without jurisdiction to assign an estate by the curtesy, that the judgment, in so far as it revoked the will and the probate thereof, did not respond to any allegation in Vandeveer's petition, and that the several judgments and orders are void so far as the Dakota land is concerned. The tenant by curtesy consummate has the right of possession during his natural life, and may maintain ejectment therefor. *Moore v. Ivers,* 83 Mo. 29. Counsel for defendant argue that an estate by the curtesy is analogous to dower, and, as the county court has jurisdiction where there is no issue of fact to determine to set off and assign the last

named estate, good logic dictates that we should hold the same power to exist under like circumstances in that tribunal for the recovery of the other interest; that in either event the county court will be taking a necessary step in the settlement of an estate, a field wherein it has exclusive original jurisdiction. In *Swobe v. Marsh*, 73 Neb. 331, it is clearly demonstrated that the assignment of dower does not pertain to the settlement of the estates of deceased persons, and that the county court's jurisdiction of the subject arises solely by virtue of section 8, ch. 23, Comp. St. 1905. No mention is made in that statute of the estate of curtesy, nor has the legislature by any other act vested the county court, so far as might be done under the constitution, with power to set off or assign estates by the curtesy, a fact that clearly indicates the legislative will not to extend the widow's remedy to the surviving husband. *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858. It does not follow, however, that the judgments referred to herein are void.

The Nebraska land was in the possession of the administrators as officers of the county court. Vandeveer's claim required a construction of the will in the light of the facts alleged and admitted, and a decision as to whether the life estate asserted by the surviving husband in the Nebraska land devolved by virtue of the statutes or was cast by the will; and, for the purpose of advising the executors of their duty in the premises if they preferred to submit the question of possession to that forum, the county court had ample jurisdiction. *Andersen v. Andersen*, 69 Neb. 565; *Dundas's Estate*, 73 Pa. St. 474; *Otterson v. Gallagher*, 88 Pa. St. 355. Whether there was jurisdiction of the subject matter so far as the devisees and legatees are concerned is immaterial. The estate has not been closed at this late day. The possession of the land and the disposition of the rents and profits therefrom were proper subjects for the court's consideration in view of the fact that the administrators had that possession and collected the rents by virtue of their office. The devisees

did not in any manner question the courts' jurisdiction over the subject matter of the litigation, and it was not incumbent upon the judges of the respective courts to doubt a jurisdiction invoked by all of the parties in the case. The subject of the litigation was well understood in the district court and by ourselves. Two questions only were presented: (1) Could a married woman by will cut off her suriving husband's estate of curtesy in lands of which she might die seized? (2) Would a marriage subsequent to the making of a will by a single woman revoke that instrument entirely or at all? We declined to consider the first query, and answered the second one. Speaking through the then chief justice, we held that by virtue of the marriage the will was rendered void so far as the surviving husband's estate by the curtesy was concerned, and reversed the judgment of the district court for further proceedings in harmony with our opinion. Counsel did not in their written or oral arguments discuss the revocation of the probate of the will, and we did not consider that question, nor do we understand that the pleadings presented any such issue of law or of fact. The will had been duly probated, after due notice to all concerned as the record recites, a statement binding on the entire world until overcome by proof to the contrary, and none such was introduced in evidence in this case. The probate court was without jurisdiction in admitting the will to probate to construe its legal effect. The inquiry was confined to ascertaining whether the testatrix signed the proffered instrument, and, if so, whether she was at that time of full age and sound mind, and whether the document was signed and attested in conformity with the law of wills. Further than that it could not proceed at that time. *Lusk v. Lewis,* 32 Miss. 297; *Hawes v. Humphrey,* 9 Pick. (Mass.) 350; *Cox v. Cox,* 101 Mo. 168; *Bent's Appeal,* 35 Conn. 523; *Waters v. Cullen,* 2 Bradf. Sur. (N. Y.) 354; *Estate of Murphy,* 104 Cal. 554; *Graham v. Burch,* 47 Minn. 171; *Evans v. Anderson,* 15 Ohio St. 324; *Hegarty's Appeal,* 75 Pa. St. 503; *Craft's Estate,* 164 Pa. St.

520. For much stronger reasons, in hearing an application which called only for a construction of the will for the benefit of the executors, the court did not have power to revoke the probate of that instrument. As we understand the record, the administrators in Nebraska did not have possession of the Dakota land, but Mrs. Vandeveer's will was admitted to probate as a foreign will, and ancillary administration of the estate is pending in the proper court of that state. The laws of South Dakota control the descent, alienation and transfer of land within the boundaries of that commonwealth, and the effect and construction of instruments intended to convey it. The probate courts of Nebraska are not authorized to adjudicate the rights of rival claimants to the succession of real estate situated in a sister state, and so much of the judgment of the county court of Nemaha county and that of the district court on appeal as purports to adjudicate that the surviving husband is entitled to an estate by the curtesy, or any other estate, in the South Dakota lands is an absolute nullity. *Fall v. Fall,* 75 Neb. 120; *Rober v. Michelsen,* 82 Neb. 48; *McCormick v. Sullivant,* 10 Wheat. (U. S.) *192; *United States v. Fox,* 94 U. S. 315; *Brine v. Insurance Co.,* 96 U. S. 627.

The litigants have introduced in evidence sections of the South Dakota statute which provide that a will executed by an unmarried woman is revoked by her subsequent marriage; that the estates of dower and curtesy are abolished; that, if a deceased wife leaves no issue, one-half of her real estate descends to her surviving husband; and that foreign wills may be probated in that state, and recognizing a foreign probate thereof. Just what application the courts of South Dakota will make of the law of that state, statutory or otherwise, to the facts relating to the estate and will of the late Mrs. Vandeveer, we do not know, but we feel certain that complete justice will be done in the premises, and, if it were otherwise, the judgments of the courts of this state would not mend matters. So much of the judgment as purports to revoke in part

the probate of the will and decree that Absolom Vandeveer was seized of an estate by the curtesy in the Dakota land is extrajudicial and void; but, as the remainder of the judgment does not depend upon the illegal part, the valid fraction may be sustained and the remainder rejected. The invalid part could be safely ignored by the individuals against whose interests it purports to operate. *State v. Evans,* 176 Mo. 310. Upon appeal the judgment would have been corrected. *Jarmine v. Swanson,* 83 Neb. 751. The litigants may ignore the invalid part of a judgment, or attack it by direct proceedings or collaterally. *Jarmine v. Swanson, supra; Banking House of A. Castetter v. Dukes,* 70 Neb. 648, and authorities cited, p. 652 *et seq.* of the Report. So much of the judgment as is invalid should be vacated, and not permitted to incumber the record. *Hayes County v. Wileman,* 82 Neb. 669. And the statute of limitations presents no obstacle to an action or proper proceedings having that end in view. *First Nat. Bank v. Grimes Dry Goods Co.,* 45 Kan. 510.

It is not necessary to consider the lack of jurisdiction of the county court to assign Absolom Vandeveer an estate by the curtesy in the Nebraska lands, over the opposition of the devisees named in Mrs. Vandeveer's will, because their right of possession of the real estate has never been invaded by virtue of the order complained of, and they have joined with the administrators in a joint petition against the representatives of Absolom Vandeveer for relief which cannot be given to the extent of the demand made by the administrators. In short, all that was settled by the strenuous litigation between Absolom Vandeveer on the one part, and the administrators of the estate, and the devisees under the will of Mrs. Vandeveer, on the other, is that as between those administrators and Absolom he was entitled during his natural life to the possession and rents and profits of the land in Nebraska of which she died seized.

2. The cross-petitions of the representatives of Absolom Vandeveer must be denied. Their complaint is not ger-

mane to the cause of action set forth in plaintiff's petition, and the defendant Cornell cannot, over his objections, be compelled in this action to litigate the charges therein made against him. *Armstrong v. Mayer,* 69 Neb. 187.

The judgment of the district court is therefore reversed, with instructions to enter a decree in harmony with this opinion.

REVERSED.

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

LEONARD LINIGER V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1909. No. 16,010.

1. **Criminal Law:** JOINT ASSIGNMENT OF ERRORS. A joint assignment in a motion for a new trial in a criminal case, criticizing a group of instructions, will be overruled unless all of the instructions are erroneous.

2. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. Where certain evidence claimed by defendant to be material for his defense became known to his counsel after the case had been submitted and the jury had retired to deliberate, but before they had agreed upon a verdict, and the witnesses by whom such proof could be made were in the court room at that time, it was the duty of counsel to immediately call the court's attention to said evidence, and request that the jury be recalled and the evidence submitted to them. If counsel fail so to do, the trial court in its discretion may properly overrule a request for a new trial based on the discovery of such evidence.

ERROR to the district court for Pierce county. ANSON A. WELCH, JUDGE. *Affirmed.*

A. I. Smith and *Douglas Cones,* for plaintiff in error.

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

ROOT, J.

Plaintiff in error was convicted of assault with intent to inflict a great bodily injury, and from a sentence of two years' confinement in the state penitentiary appeals to this court.

1. It is argued that the court erred in its charge to the jury. The assignment in the motion for a new trial, with relation to the instructions, is joint, and under the well-settled law in this state, if one of the instructions given is correct, the assignment is bad. *Thompson v. State,* 44 Neb. 366. Speaking for himself alone the writer views the decision with disfavor, but it was announced 14 years ago, the legislature did not thereafter amend the statute concerning motions for a new trial in criminal cases, and the rule probably must be adhered to. In the instant case the charge taken altogether is fair. While some paragraphs thereof may be subject to criticism, we do not think that the jurors were misled thereby, and the judgment ought not to be reversed because of the alleged errors in said instructions. Some of the instructions referred to in the motion for a new trial unquestionably state the law clearly and succinctly, and for that reason, upon the authority of *Thompson v. State, supra,* the assignment considered must be overruled.

2. It is urged that a new trial should have been granted because of newly discovered evidence. The complaining witness and defendant were in a saloon in the village of McLean on the afternoon of December 14, 1907. They engaged in a card game, worked a slot machine, and pulled "square holds." Some ill feeling was engendered, but their relations seemed harmonious at midnight when the resort was closed. Synder started home in his buggy, and defendant rode with him out of the village. While on the highway Snyder was beaten, as defendant testified, in a mutual combat growing out of a remark made by Snyder at the saloon that he had a boy at home that could whip the defendant. Snyder testified that he was assaulted and

robbed by defendant, then assisted back into his buggy, and that Liniger unbuckled the reins from the bridle bits, and, while standing on the ground, started the team off on a run. Snow to the depth of about two inches had recently fallen, and the sheriff and county attorney, the morning after the assault, examined the highway at the point where they claim Snyder told them that he had been assaulted, and were unable to find any indications that a team had been driven outside of the beaten path, or that any struggle had occurred on either side of the road at said point, or for a mile and a half east thereof. Defendant's counsel resided in Iowa, and evidently was not acquainted with the residents of Pierce county, but he had interrogated the sheriff and county attorney generally about the case, and they did not disclose to him that they had made said search or the results thereof until after the jury had retired. It is claimed that this evidence was vital, and that defendant was not guilty of laches in the premises. One of the jurors has made an affidavit that, had that evidence been before the jury, the verdict returned would not have been rendered. The assignment is not well taken. Defendant's counsel was informed of the facts while the jurors were deliberating. Both the sheriff and county attorney were present in the courthouse, and counsel should have moved the court to recall the jury, to set aside the submission of the case, and to permit the introduction of this evidence. Failing to do so, defendant must abide the result. *Oakes v. Prather,* 81 S. W. (Tex. Civ. App.) 557. The evidence is not of particular importance for the reason that Snyder's testimony given on the preliminary examination and upon the trial of this case fixes the location of the assault west of the southwest corner of section 24, whereas the sheriff and county attorney commenced to search some rods east of that point, and continued their examination eastward, and not to the west. Snyder's testimony is not altogether consistent, and there are some facts and circumstances tending to contradict him in other immaterial particulars, so that defendant's

counsel were not deprived of material upon which to base an argument to the jury. The juror's affidavit will not be considered seriously, as it was undoubtedly given after reading affidavits made by the sheriff and county attorney that did not disclose that the affiants had not viewed the place where Snyder testified that he was attacked by defendant, but, on the contrary, stated they had examined the exact location of the alleged assault, and did not find any evidence of a struggle. We suggest in passing that, if the county attorney believed that the information given defendant's counsel after the jury retired was material, he should have made the disclosure when asked by defendant's representative about the case. Public prosecutors and peace officers owe no greater obligation to the public than to a defendant charged with crime, and they should as zealously protect the one as the other.

The record warrants the belief that Snyder and Liniger were intoxicated during the night of December 14, 1907, to such an extent as to render their testimony concerning their conduct that night of doubtful value in many particulars, but defendant admits that he assaulted and subdued Snyder. The jury has said that the assault was made with the intent to inflict a great bodily injury. The wounds penetrated through hair and scalp to Snyder's skull, and furnished convincing proof of the savage character of that attack. The penalty is severe, but it was within the province of the jury to find and the court to sentence, and upon the record we do not find just cause for interference.

The judgment is therefore

AFFIRMED.

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

ROBERT MCGUIRE, APPELLANT, V. HUGH G. CLARK ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. No. 15,679.

Deeds: DELIVERY. On a record showing that the owner of a government homestead, for the purpose of apparently divesting himself of title in furtherance of a design to preempt a tract of government land, signed, acknowledged and registered a deed to his brother without the latter's knowledge, a finding that there was no delivery of the deed was *held* proper, where grantor never intended to deliver it, kept it in his own hands, and retained possession of the homestead.

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

Robert A. Moore, for appellant.

C. L. Gutterson and *Sullivan & Squires, contra.*

ROSE, J.

This is an action to quiet plaintiff's title to a quarter section of land in Custer county. Patrick McGuire, a brother of plaintiff, acquired the land as a government homestead, having obtained the final receipt September 10, 1886, and the patent April 11, 1889. Plaintiff's claim to title rests on a warranty deed from Patrick McGuire. It was dated November 1, 1886, and recorded June 19, 1888. The county records show a reconveyance from Robert McGuire to Patrick McGuire December 23, 1889, but plaintiff alleged it was a forgery, and that in his absence from the state Patrick McGuire induced some one to impersonate plaintiff, and to execute, acknowledge and deliver the forged instrument. Plaintiff further averred that Patrick McGuire, on the strength of the apparent title based on the forged deed, borrowed money and mortgaged plaintiff's land to secure the loan; that the mortgage was foreclosed, and that defendants, with full knowl-

edge of the forgery and of plaintiff's ownership, bought the property and claim title through mesne conveyances from the purchaser at the foreclosure sale. Plaintiff also alleged he first learned of the forgery, of the mortgage, and of the foreclosure proceedings, in February, 1906.

Defendants denied plaintiff's alleged ownership and title, and averred that Patrick McGuire, without plaintiff's knowledge and without consideration, signed, acknowledged and registered the deed under which plaintiff claims title. They also alleged that the deed was never delivered; that it was never the intention of Patrick McGuire to deliver it, or by means of it to divest himself of title, or to convey the land to plaintiff; that grantor kept the deed and retained possession of the land; and that the deed was made for the purpose of ostensibly divesting the title of grantor in furtherance of a design on his part to preempt a tract of government land near his homestead. Defendants also pleaded mesne conveyances from the purchaser at the foreclosure sale and the defense of adverse possession. In addition, they denied knowledge of the alleged forgery. On all the issues raised by the pleadings the trial court found in favor of defendants and dismissed the suit. Plaintiff appeals.

Thirty-one errors are assigned, but the sum of all of them is that the judgment is not sustained by the evidence. Plaintiff relies on his deed from the patentee, shows he did not reconvey the land, and argues his title has never been divested. To justify the dismissal of the suit, defendants argue that plaintiff's deed was never delivered to him, and that, therefore, he never had any title to the land in controversy. They also rely on adverse possession as a defense, and insist that the finding in their favor on that issue is sustained by the evidence. The first question presented by the record, therefore, is: Do the proofs show a delivery of the deed from Patrick McGuire to his brother Robert McGuire? There was no actual delivery or formal acceptance, but plaintiff insists the deed was signed and acknowledged by the grantor and recorded pursuant to his

order. These acts, according to plaintiff's view of the law, amounted to a delivery and transferred to him grantor's title to the land. Delivery was a question of fact for the determination of the trial court, and registration of the deed was *prima facie* evidence thereof. *Gustin v. Michelson,* 55 Neb. 22. On this issue the trial court found: "The said Patrick McGuire on November 1, 1886, made a deed to said premises and inserted therein the name of his brother, Robert McGuire, as the grantee thereof. Whereupon the said Patrick McGuire procured said deed to be recorded in the office of the county clerk of Custer county, Nebraska, *ex-officio* register of deeds of said county, paid the recording fee therefor, and had said deed returned to him, the said Patrick McGuire, who always thereafter retained the possession of said land. The court finds that said deed was never delivered by the said Patrick McGuire to Robert McGuire; that the said Robert McGuire paid nothing therefor, and that there was no consideration for the same; that the said Patrick McGuire did not intend when he executed and recorded said deed to convey the title to said premises to the said Robert McGuire; but, supposing that, under the federal law, he could not remove from the homestead, while the title thereto still remained in him, to a preemption, for the purpose alone of apparently vesting the title in his brother, the plaintiff, he executed said deed and at the same time made said preemption entry; that the said Patrick McGuire thereafter, and some time during the years 1894 and 1895, died; that the said Robert McGuire never knew anything of said transaction, and never knew anything about said deed or the fact that the same had been made and recorded until long after Patrick McGuire had died, and some time during the year 1898. The court finds that the said Robert McGuire never claimed to own said land, never was in possession thereof, never ratified and approved any conveyance thereof to himself, and never ratified, approved or accepted said deed of the said Patrick McGuire prior to the year 1906."

In determining whether these conclusions were properly drawn from the evidence, the entire record has been examined. Registration of the deed is the only evidence of delivery. Other proof of an intention on part of grantor to deliver the deed is entirely wanting. There was no evidence that the parties had previously made a contract of sale, or that grantor was indebted to plaintiff, or that the latter's creditors were asserting liens. On the other hand, there is proof that grantee had recently come from Ireland with money furnished by grantor, and that the money had been refunded. Both parties were unmarried. In acquiring the property for himself, grantor had endured the hardships of a frontier life. After registration of the deed, he mortgaged the land to procure funds for his own benefit. The testimony of the grantee himself shows that he never saw the deed; that he did not know it was placed on record or who caused it to be recorded; that it was not delivered to him personally by his brother or by any one else; and that he paid his brother nothing for it. There is also testimony that grantor kept the deed in his own possession after it was recorded; that he retained possession of the premises thereafter; and that it was not his intention to convey the premises to his brother. Grantee was never in possession of the land. He did not attempt to incumber or convey it. No creditor of his attempted to subject the property to the payment of debts. In addition, witnesses testified, in effect, that grantor said his purpose was to acquire more land, and not to part with what he already had.

This court is committed to the rule that actual delivery and formal acceptance of a deed are not essential to its validity, where grantor placed it on record for the purpose and with the intent of transferring the title pursuant to a valid agreement between the parties. *Fryer v. Fryer*, 77 Neb. 298. In the case cited, and in other cases announcing a similar doctrine, the intention to transfer the title is a material element. In the present case such an intention is entirely wanting. While registration is evi-

dence of delivery, as held in *Gustin v. Michelson*, 55 Neb. 22, the mere recording of an acknowledged deed, without an intention to deliver it, does not operate as a delivery or as a transfer of title to grantee. *Samson v. Thornton*, 3 Met. (Mass.) 275; *Barns v. Hatch*, 3 N. H. 304; *Derry Bank v. Webster*, 44 N. H. 264; *Wiggins v. Lusk*, 12 Ill. 132; *Hawkes v. Pike*, 105 Mass. 560; *Chess v. Chess*, 1 Rawle, P. & W. (Pa.) 32; *Herbert v. Herbert*, Breese (Ill.) 354, 12 Am. Dec. 192; *Union Mutual Ins. Co. v. Campbell*, 95 Ill. 267; *Babbitt v. Bennett*, 68 Minn. 260; *Hooper v. Vanstrum*, 92 Minn. 406; *Hogadone v. Grange Mutual Fire Ins. Co.*, 133 Mich. 339; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390; *Triplett v. Scott*, 12 Ill. 137. In holding that a recorded deed, without an intention on part of the grantor to deliver it or to divest himself of title, was not effective as a conveyance, the supreme court of the United States, by Mr. Justice Field, said: "The evidence offered, so far as appears by the record, showed that the grantor never parted with its possession, except as may be inferred from the fact of its registry. And the grantee testified that he never knew of its existence until after the death of the grantor, among whose papers it was found; and that he never claimed any interest in the property. Yet the court instructed the jury that, as there was no contest of creditors against the deed, the instrument was binding, whether delivered or not. In this instruction there was also clear error. The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was of course made without the assent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey al-

ways remained in the possession and under the control of the grantor." *Younge v. Guilbeau,* 3 Wall. (U. S.) 636. That a deed may be inoperative where it was signed, acknowledged and recorded for a purpose other than to transfer title was announced by the supreme court of New Hampshire in the following language: "It is not now to be questioned that a delivery is essential to the existence of the deed. It is not necessary that the deed be delivered by the grantor into the hands of the grantee; it may be delivered to a third person for the use of the grantee; it may be delivered absolutely or conditionally; but there must be a delivery. * * * And we are of opinion that the sending of the instrument in this case to be recorded, coupled with the declaration that it was made to prevent the land from being taken to pay an unjust debt, does not amount to a delivery. There was nothing said or done, in this case, which shows a delivery." *Barns v. Hatch,* 3 N. H. 304.

Cases involving the acts of grantors in leaving deeds with magistrates or recording officers for delivery are distinguishable from the present case. In those cases the intention to deliver the deed or to transfer the title is shown by proof or inferred from circumstances. Here a different purpose is fairly established under the rule that delivery is a question of intent, as announced in *Brown v. Westerfield,* 47 Neb. 399. In *Samson v. Thornton,* 3 Met. (Mass.) 275, Chief Justice Shaw said: "A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it. *Maynard v. Maynard,* 10 Mass, *456. This is distinguishable from the case of *Hedge v. Drew,* 12 Pick. (Mass.) 141, where the father proposed to the daughter to execute a deed to her, and to leave it with the register for her use, and she expressed her assent to, and satisfaction with, the arrangement. She thereby made the register her agent to receive the deed."

Under the law applicable to the proofs in the present

suit, the deed from Patrick McGuire to Robert McGuire was never delivered, and through it grantee acquired no title to the land in controversy. The trial court was right in so holding, and it follows that plaintiff's suit was properly dismissed. It is therefore unnecessary to discuss the question as to adverse possession.

AFFIRMED.

DEAN, J., having been of counsel below, not sitting.

EDWIN E. ARNOLD, APPELLANT, V. ALBERT W. DOWD ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. No. 15,766.

Contracts: RESCISSION. The right to rescind a contract for fraud must be promptly exercised upon discovery of the ground therefor.

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

John Everson, for appellant.

J. T. McCuistion and *O. H. Scott, contra.*

ROSE, J.

Plaintiff agreed with defendants to exchange his 320-acre farm in Harlan county for their store and stock of general merchandise at Hubbell. Before the bargain was made, defendants viewed plaintiff's land, and plaintiff inspected the goods in defendants' store and aided them in making an invoice of their stock. Later he deeded his farm to them, took possession of their store, operated it as his own for about five months, sold the stock on hand, brought this action to rescind for fraud the contract under which he parted with his farm, and prayed to have his title thereto restored. The district court found the issues

in favor of defendants and dismissed the suit. Plaintiff appeals.

The fraud denounced by plaintiff consisted chiefly in the making of an invoice through which defendants are charged with misrepresenting the quality, quantity and value of their stock of merchandise. Within a month or two after plaintiff took possession of the store, according to his own testimony, he learned through agents of wholesalers that the invoice was wrong. Afterward he treated the store as his own, and took from the stock for his own use groceries and dry goods without making any account thereof. After such knowledge of the alleged fraud he managed the business for two or three months, and finally sold the entire stock. It is elementary that he is not entitled to rescission under such circumstances. The right to rescind a contract for fraud must be promptly exercised upon discovery of the ground therefor. By treating the goods as his own, after learning of the alleged fraud, he ratified the contract of which he complains. It was too late to rescind. *Pollock v. Smith,* 49 Neb. 864; *American Building & Loan Ass'n v. Rainbolt,* 48 Neb. 434; *Gallagher v. O'Neill,* 78 Neb. 671. The case was properly dismissed, and the judgment below is

AFFIRMED.

HENRY SEELE V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1909. No. 16,130.

1. **Criminal Law:** INSTRUCTIONS. In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, there was no reversible error in an instruction that defendant was responsible for the acts of his servants, where the record clearly showed he was not prejudiced by it.

2. **Intoxicating Liquors:** SALE TO MINORS: DEFENSES. In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without any intent to violate the law.

3. **Criminal Law**: INSTRUCTIONS. Where the trial court by proper instructions submitted to the jury the credibility of all the witnesses who testified, there was no error in refusing an instruction referring alone to the credibility of one of them.

4. ———: REVIEW. On cross-examination of a witness, a ruling of the trial court in refusing to strike out an answer to a question to which there was no objection will not be reversed except for an abuse of discretion.

5. ———: HARMLESS ERROR. On examination of a witness, error in overruling an objection to a question is not a ground of reversal, where the answer is favorable to the complaining party and in no way prejudices his rights.

ERROR to the district court for Johnson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

S. P. Davidson, for plaintiff in error.

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

ROSE, J.

For the offense of selling intoxicating liquors to Henry Southard, a minor, defendant Henry Seele, a licensed saloon-keeper at Sterling, was fined $25 and costs, and brought the case to this court as plaintiff in error. Complaint is made of the sufficiency of the evidence to sustain the conviction, but a careful examination of the record shows that the jury in that particular were justified in finding defendant guilty.

1. A new trial is demanded on the ground that the court below erred in giving the following instruction: "The court instructs the jury that in the sale of intoxicating liquors to minors the owner or keeper of the saloon is responsible for the acts of his servants and employees; and a sale by a servant or employee of a saloon-keeper is in law a sale by the saloon-keeper himself." The doctrine stated does not appear to be in harmony with what was said by this court in an opinion by Chief Justice SULLIVAN in *Moore v. State*, 64 Neb. 557, where the following lan-

guage is found: "It was conclusively proved that the defendant was a licensed vender of intoxicating drinks, doing business in the village of Anselmo, and that the illegal sales charged in the information were made in his saloon by his bartender. The evidence given on behalf of the defendant shows the sales were made without his knowledge, in violation of express instructions, and during his absence from the village. Do these facts acquit the defendant of criminal responsibility? This is the decisive question in the case, and it is the only question counsel have discussed. The statute does not assume to make masters liable for the conduct of their servants, but only for their own conduct." In *In re Berger,* 84 Neb. 128, this rule was adopted: "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." In *Pulver v. State,* 83 Neb. 446, the second paragraph of the syllabus is as follows: "Where a licensed saloon-keeper is prosecuted for the violation of a city ordinance forbidding him to keep his place of business open after 11 o'clock P. M., and such act is shown to have been committed by an agent in charge of such business, it is unnecessary to show any guilty intent on the part of the owner, such prosecution being in the nature of a civil action to recover a penalty." In *Williams v. Phillips,* 83 Neb. 105, this court held: "Where on the hearing of a remonstrance against the granting of a liquor license it is satisfactorily proved that the applicant has within a year sold or given to a minor malt or spirituous liquors, he is not entitled to a license, and his application should be denied." In the same case the court said: "Where intoxicating liquors are unlawfully sold by the agent of a saloon-keeper, the principal as well as the agent may be prosecuted. *Martin v. State,* 30 Neb. 507."

Was the instruction quoted from the record prejudicial to defendant? He and a number of his bartenders testified that no sale to Southard had been made, as charged in the

information or as stated in the proofs on behalf of the state. According to Southard, the first sale was made at defendant's saloon July 4, 1908. The name of the person who made it was not disclosed by the state's proofs. Defendant testified he went to the saloon between 5 and 6 o'clock in the morning of July 4, 1908, remained until 11 o'clock at night, and was behind the bar all day, having eaten his meals there. He told the jury he paid particular attention to minors that day, and did not allow them to come into the saloon. In answer to one question he replied: "I simply stayed distinctly on that minor business, so there were no minors allowed to come in." The fair import of his proofs is that he was in the saloon all day in presence of his bartenders and other servants, where he assumed personal responsibility for keeping minors out, and where each employee was subject to personal direction. There is no proof of the violation of any order of defendant, or that he was unable to keep Southard out or to prevent sales to him. Southard testified he also bought intoxicating liquors at defendant's saloon July 12, 1908, and October 1, 1908. He said, however, that on both occasions he bought the liquor from defendant personally. Except on the three dates named there was no evidence of any sale to Southard. Under the circumstances disclosed, the giving of the instruction that a saloon-keeper is responsible for the acts of his servants was not a prejudicial error.

2. Defendant insists the judgment below should be reversed for error on the part of the trial court in giving the following instruction: "If you find from the evidence beyond a reasonable doubt that a sale of intoxicating liquor was made by the defendant to Henry Southard, minor, as alleged in the complaint, then it is not necessary for the state to prove the intent or motive of the defendant in making such sale; neither is it necessary for the state to prove that such sale was made to the minor knowingly. A liquor dealer is bound to know that the person he sells liquor to is not a minor, and ignorance of the age of the

person to whom the liquor was sold is no excuse, and, irrespective of good faith and honest intention, the mere fact of selling liquor to a minor constitutes the entire offense." This direction to the jury is assailed on the ground that it permits a conviction, though defendant in making the sale acted conscientiously in ignorance of the minor's age and without any criminal intent or purpose to evade or disobey the law. The statute violated by defendant is a police regulation. It is a part of the legislation enacted for the purpose of keeping the traffic in intoxicating liquors under surveillance and of averting the evils growing out of sales to minors. The intent with which such sales are made is no part of the offense defined by law. The statute declares: "Every person licensed as herein provided, who shall give or sell any malt, spirituous and vinous liquors, or any intoxicating drinks to any minor, apprentice, or servant, under twenty-one years of age, shall forfeit and pay for each offense the sum of twenty-five dollars." Comp. St. 1909, ch. 50, sec. 8. Sales made to a minor in ignorance of his age and without any intention to disobey the law are not excepted from the operation of the statute. A licensee is not authorized to sell intoxicating liquors indiscriminately. The responsibility of complying with the terms of his license and with the provisions of the law under which he becomes a saloon-keeper is on him. Under the statute quoted, he must ascertain at his peril whether the purchaser is a minor. In enforcing a statute which prohibited sales to minors, the supreme court of Wisconsin said: "The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. Indeed, if this were not so, it is plain that the statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched. To guard against such results, the legislature has, in effect, pro-

vided that the saloon-keeper, or other vender of intoxicating liquors or drinks, must know the facts, must know that the person to whom he sells is a *qualified drinker,* within the meaning of the statute; and, if not, he acts at his peril in disobeying the requirements of the law." *State v. Hartfiel,* 24 Wis. 60. The same doctrine was announced in *State v. Bruder,* 35 Mo. App. 475, and in *Commonwealth v. Uhrig,* 138 Mass. 492. Other courts have taken the same view, which is adopted as correct, though some cases state a different rule.

3. Complaint is made of the refusal of the trial court to give at the request of defendant an instruction relating to the credibility of Southard as a witness. The objection is without merit, since the credibility of all the witnesses was by a proper direction left to the jury.

4. Paul Barnhouse, also a minor, was a witness for the state. After testifying he was in defendant's saloon with Southard July 4, he was asked if he purchased liquor there at that time, and answered: "Yes." Though defendant made no objection to the question, he moved to strike out the answer after another question had been asked. The court overruled the motion, saying: "You did not object to it." This ruling is also attacked. There is nothing to show that defendant was prevented from making a proper objection when the question was asked. According to correct procedure, a party should not wait for a favorable reply to a question, and subsequently move to strike out the answer in the event that it disappoints him. To hold there was prejudicial error in refusing to strike out the answer under consideration would be an unwarranted interference with the discretion of the trial court in controlling its own proceedings.

5. Defendant was a witness in his own behalf. After stating on cross-examination that Barnhouse, a minor, was in the saloon July 4, defendant was asked: "Now, he purchased liquor there, did he?" An objection to this question was overruled, and this too is assigned as error. The question called for testimony as to whether defendant

had sold liquor to the minor Barnhouse, an offense not mentioned in the information. The objection is based on the general rule that "it is incompetent for the state in a criminal prosecution to prove that the prisoner at some other time committed an offense similar to the one with which he stands charged." *Palin v. State,* 38 Neb. 862. When the objection to the question was overruled, the witness answered: "Not to my knowledge, as I know of." This answer was not proof of another offense. The testimony was favorable to defendant, and shows on its face that he was not prejudiced by the ruling assailed. Defendant has not pointed out a prejudicial error, and the judgment against him is

AFFIRMED.

FAWCETT, J., not sitting.

BRIDGET A. WIRTH, APPELLANT, V. REGINA WEIGAND ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. No. 15,764.

1. **Insane Persons:** JUDGMENT, VACATING. Where a judgment or decree has been entered against an insane defendant through perjury or fraud on the part of the prevailing party, such defendant may proceed by an original suit in equity to impeach such judgment or decree, and have leave to answer and defend the same, and is not obliged to wait for that purpose until his incompetency has been removed, but may proceed at any time through his legally appointed guardian.
2. ———: SUIT BY GUARDIAN: CAPACITY TO SUE. Facts alleged in the petition, and admitted by the demurrers, *held* sufficient to show plaintiff's legal capacity to sue.
3. ———: PLEADING. Petition examined, and *held* to state a cause of action.

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

Pitzer & Hayward, for appellant.

E. F. Warren, D. W. Livingston and *A. P. Moran, contra.*

FAWCETT, J.

This action was commenced in the district court for Otoe county by J. Robin Bonwell, as guardian of the estate of plaintiff Bridget A. Wirth. The controversy involves the title to certain lands in said county. The defendants severally demurred to plaintiff's petition. Their demurrers were sustained and plaintiff's action dismissed. Plaintiff appeals.

The points made by the two demurrers are: That plaintiff has no legal capacity to sue; that the court has no jurisdiction of the subject matter; that there is another action pending in which the title to the property in controversy in this action can be settled; that the action was prematurely brought; that the petition does not state facts sufficient to constitute a cause of action.

The petition alleges substantially that plaintiff is the same person who was made defendant in an action commenced against her in the same court on March 25, 1899, by her husband, Valentine Wirth; that the record in said cause shows that at the time said action was instituted plaintiff was insane; that she has ever since said time been and is now insane and confined in the hospital for the insane at Lincoln; that no general guardian was ever appointed for her until on or about March 27, 1907, when the said Bonwell "was duly appointed guardian of her estate, and that he thereupon duly qualified as such guardian, and is now duly qualified and acting guardian of her estate. Letters of guardianship so issued out of and upon and by the judgment and order of the county court of Otoe county, Nebraska." These allegations are sufficient to show plaintiff's capacity to sue.

The record before us shows the following facts, admitted by the demurrers: That plaintiff became the owner

and obtained title to the property in controversy August 23, 1875; that she and her husband lived upon said premises from that time until November 21, 1892, when she was committed to the hospital for the insane, where she has ever since remained; that at the time she became the owner of said property, and for more than ten years thereafter, she was sane; that on March 25, 1899, the said Valentine Wirth commenced suit against her in the district court to establish his ownership of said property and to quiet his title thereto on the ground that he furnished the money for the purchase of said property and was the equitable owner thereof; that said cause was called up for trial at a time when the guardian *ad litem* of his wife was not only absent from the court, but absent from the city where the court was being held; that on the trial of said cause no competent evidence was offered to establish the material allegations of said Wirth's petition; that the only evidence given was the testimony of the said Wirth himself, which was not only incompetent, but untrue, and that it was upon the strength of such testimony that the court on May 11, 1899, entered a decree which divested the defendant in said suit, who was then insane and in an insane asylum, of all title and interest in and to her estate, and invested said title in her husband; that no exceptions were given to the defendant in said suit, nor was any bill of exceptions preserved or settled in order to enable her, or those who might legally thereafter represent her, to prosecute an appeal from the judgment entered therein; that the said Valentine Wirth died on or about the —— day of December, 1905, testate; that his will was thereafter admitted to probate in the county court of Otoe county; that said estate has been fully administered, and an order of distribution entered; that by said last will and testament the said Valentine Wirth devised all of his real estate to the defendants Weigand, a niece, and Wirth, a nephew, subject to the dower interest therein of plaintiff as the widow of said Valentine Wirth; that on April 27, 1907, defendant Wirth filed in said court against

plaintiff and the defendant Weigand his petition, praying for a partition of the lands in controversy; that in said action an answer has been filed by Thomas F. Roddy as guardian *ad litem* of plaintiff, denying any title or interest in the said Wirth or Weigand to said lands, and an answer to the same effect has been filed in said cause by plaintiff through her general guardian; that her defenses to said action of her said husband, which were neither pleaded for her nor made for her upon the trial, were:

"1. That at the time of the purchase of said lands by her, upon August 23, 1875, she was not of unsound mind, nor did she become so for more than ten years thereafter.

"2. That the said plaintiff, Valentine Wirth, did not furnish the purchase price for said property, and that his possession thereof as alleged in said petition was not adverse to her interests, but was with her consent for the purpose of cultivation.

"3. That the taxes thereon during the time alleged in plaintiff's petition to have been paid were paid from the income and produce derived from said lands as the result of the labors of both the said Valentine Wirth and herself.

"4. That the statute of limitations had run against any claim of ownership either in law or in equity in said lands by the said plaintiff, Valentine Wirth.

"5. That by laches all claim or any interest in said lands by the said plaintiff adverse to the interests of this petitioner had been barred.

"6. That said petition failed to state a cause of action and was insufficient to support a decree thereof because of the fact that, as appears upon the face of said petition, the trust estate therein claimed was not evidenced in any manner in writing signed by this petitioner, and his estate therein as claimed was void under and because of the statute of frauds."

The prayer of the petition is that all proceedings in the action begun by Florian Wirth for partition of said estate be stayed until the final determination of this action, and that in the action commenced by Valentine Wirth the

judgment and decree entered therein upon May 11, 1899, be set aside and vacated, and that such orders and proceedings be then had and made as will reopen the said action and revive or continue the same in such manner and so entitled that plaintiff will be enabled to make her defense thereto as alleged and set out in her petition, and for such other relief as may be just and equitable.

That an appeal from the decree complained of would, had a proper record been preserved, have been successful is clear. It was the duty of the court, as well as of the guardian *ad litem,* to see that the interests of the insane defendant in that suit were fully preserved in every respect. The fact that the guardian *ad litem* was guilty of laches cannot be imputed to the insane person whom he was supposed to represent. Under the circumstances alleged, the guardian *ad litem* should, at least, have preserved a bill of exceptions, and filed the same with the clerk of the court. In such case, if he failed to prosecute an appeal, the plaintiff could, within the statutory time after recovering from her insanity, if she ever did so recover, prosecute the appeal, or her legal guardian could do so in her behalf. Such precautionary steps not having been taken in her behalf, she is now remediless if an action such as is here being prosecuted in her behalf will not lie. A court of equity is invested with the inherent power to grant relief under such circumstances. But it is insisted that the action was prematurely brought; that, conceding that plaintiff would be entitled to have the judgment complained of opened up and be permitted to defend in the event of her again becoming sane, no such action could be maintained prior to that time. This contention is based upon section 17 of the code, which provides: "If a person entitled to bring any action mentioned in this title, * * * be, at the time the cause of action accrued, * * * insane, * * * every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be removed." Commenting upon this section of the statute,

counsel for appellees say: "That is to say, Mrs. Wirth, if she recovers her reason, can bring an action to enforce her rights (if any she have) within the period allowed by law, in this instance two years (sec. 609). If she remain insane to the end of her life, possibly her heirs can maintain an action—we do not discuss that, it is immaterial—but no provision is made whereby an insane person can bring such action *while the disability exists.* Hence, this action cannot be maintained." This construction of the statute cannot be sustained. *Finney v. Speed,* 71 Miss. 32; *Ralston v. Lahee,* 8 Ia. 17, 74 Am. Dec. 291. That a judgment may be vacated and a new trial awarded for the perjury of the successful party, either by a proceeding under section 602 of the code, or by an independent suit in equity, is fully settled in this state. *Munro v. Callahan,* 55 Neb. 75; *Barr v. Post,* 59 Neb. 361.

The point that there is another action pending in which the title to the property in controversy can be settled is not well taken. The pleader doubtless has reference to the partition suit instituted by defendant Wirth. In that suit defendants here are both claiming as devisees of Valentine Wirth, and resting their claim upon the decree entered in favor of their devisor on May 11, 1899. That judgment being regular upon its face could not be assailed collaterally in the partition suit. If plaintiff can prove the allegations in her petition, the decree entered against her on May 11, 1899, in the suit of her husband, Valentine Wirth, against her, should be opened up, and she should be permitted to answer and make her defense thereto.

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

REVERSED.

LEVI L. DAVIS, APPELLANT, V. FLOYD B. STERNS ET AL., APPELLEES.

FILED SEPTEMBER 25, 1909. No. 15,742.

1. **Parol Evidence: NOTES: CONSIDERATION.** It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note.

2. ———: ———: ———. A and B purchased a tract of land and some personal property jointly. A obtained from B the latter's negotiable promissory note for $6,500 merely to show, in event of death or other casualty happening to B, that the interest of A in the property so purchased was of the amount of $6,500. *Held*, in a suit by A against B to recover on the note its face value with interest, that B could properly show the purpose for which the note was given, and that it was executed without consideration.

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

J. H. Broady, A. M. Morrissey and *F. M. Walcott*, for appellant.

C. L. Gutterson and *Sullivan & Squires, contra.*

DEAN, J.

Levi L. Davis, plaintiff and appellant, commenced this suit to recover on a promissory note against the defendants, who are husband and wife, for an alleged loan of money. The execution and delivery of the note sued on was admitted by defendants. Following is a copy of the note: "Hyannis, Neb., June 23, 1902. Six months after date, for value received, we jointly and severally promise to pay to the order of L. L. Davis, six thousand five hundred dollars, with interest at 6% per annum from date until paid. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of payment that may

be given by the holder or holders, to them or either of them. F. B. Sterns, Minnie A. Sterns. Payable at the Bank of Hyannis, Hyannis, Neb. $6,500. Due ——. Hyannis. Col. No. 6177. Hyannis, Neb." The case was tried to a jury. The defendants recovered a verdict and judgment of dismissal, and plaintiff appeals.

The petition is in the usual form employed in declaring upon a promissory note. The defendants answered separately. Floyd B. Sterns for his answer alleges, in substance, that it was agreed between the plaintiff and himself that they would jointly purchase a ranch in western Nebraska, each to pay one-half of the purchase price, defendant to have the management and to reside on the ranch, and that each of the parties should have the right to run an equal number of cattle thereon; that the defendant was to have $50 a month as manager, one-half to be paid by plaintiff; that in February, 1902, they together went to Cherry county, and decided upon purchasing the Stansbie ranch or range, together with the horses, machinery, household goods and fences on adjoining lands belonging to the ranch; that the ranch consisted of 1,120 acres of deeded land, at the agreed price of $13,000, of this $8,000 was to be paid in cash and $5,000 to be a deferred payment evidenced by a note secured by mortgage on the ranch, to be given when title was perfected by Stansbie; that $500 was paid to Stansbie at the time of purchase, the remainder of the cash payment to be made when the title was completed by Stansbie; that the parties jointly and as partners took possession of the property on May 2, 1902, and it was then agreed each should have an undivided one-half interest in the property; that in June, 1902, plaintiff and Floyd B. Sterns agreed with Stansbie that $8,000 and the note and mortgage should be placed in escrow awaiting the completion of title; that for convenience, and because plaintiff's wife was in Richardson county, it was agreed the defendant Floyd B. Sterns and his wife should make the note and mortgage for $5,000, take title in defendant Floyd B. Sterns, and afterwards

convey to plaintiff an undivided one-half interest; that, in pursuance of the agreement, plaintiff deposited $6,500 in the bank at Hyannis in escrow, being his share of the purchase price, and Floyd B. Sterns deposited $1,500 in escrow, with the agreement that, when the title should be perfected, Sterns would execute a mortgage to Stansbie for $5,000 on the ranch; that Stansbie should then convey the ranch to Sterns; that after the mortgage was recorded the defendants were to convey to plaintiff an undivided one-half interest in the land; that, in pursuance of the agreement, defendant moved to the ranch with his family, and plaintiff and defendants took possession of the land; that plaintiff shipped over 100 head of cattle to run on the ranch in April, 1902, and afterwards by agreement came to the ranch, and purchased more horses to be used thereon, and stayed on the ranch with defendants, and made lasting improvements thereon; that he remained on the ranch until June 23, 1902, on which date the note in controversy was executed; that the plaintiff was then suddenly and unexpectedly called to return to Humboldt on urgent business affairs; that just prior to his departure he requested, and the defendants gave him, the note in suit as evidence of his interest in the ranch and other property; that Stansbie had not on June 23, 1902, yet procured complete title to all the land, and was therefore not in position to convey it; that the $6,500 deposited by plaintiff for his share of the purchase was yet in the bank awaiting completion of title; that plaintiff assured defendants he would surrender the note as soon as the title was perfected; that on or about June 27, 1902, the title being perfected, Stansbie and wife executed conveyances thereof to Sterns, and the defendants at the same time executed a note and mortgage on the ranch for $5,000 to Stansbie, and also executed and acknowledged a deed conveying to plaintiff his undivided one-half interest in the ranch, and immediately notified him thereof by letter, stating that they were ready and willing to deliver the deed to him; that about this time plaintiff became dissat-

isfied with the purchase; that plaintiff did not answer defendants' letter of notification, but remained silent until October, 1902, when he returned to the ranch, at which time the defendants again tendered to him a deed to his undivided one-half interest in all the property, and demanded a surrender of the note in suit; that plaintiff refused to accept the deed and refused to deliver to defendants the note sued on; that defendants are not liable for the note or any part thereof, and allege willingness to deliver to plaintiff a deed to an undivided one-half interest in all of the property.

The defendant Minnie A. Sterns alleges that she never had any estate of her own; that she signed the note merely as surety, not intending thereby to bind her separate estate; that the debt was not hers, and that she received no benefit or consideration for signing the note. She avers the statements of her codefendant are true; that all the conditions for the giving of the note to be performed by defendants have been performed; that the plaintiff procured the note through fraud and deceit; that at the time of its execution he intended to repudiate the agreement and to hold the note as an obligation against defendants, all of which was then unknown to them; that the defendants believed and relied on the statements of plaintiff, since discovered to be false; that he wanted the note solely to protect himself and his estate against loss in event of the death of defendants or anything unforeseen happening to prevent defendants from performance of their part of the agreement. Plaintiff's reply denied generally the allegations of new matter in the answers.

The weight of testimony fairly supports the material allegations of the defendants. The plaintiff is shown by the proof to have taken an active interest in the purchase of the ranch. He went with the defendant Sterns from Humboldt, where they both resided, in February, 1902, to the property, and together they examined it. He then returned to his home, and about May 1 plaintiff again went to the property, taking with him a large num-

ber of cattle to run on the range. He remained there until the 23d of June, when he was unexpectedly called to his home on urgent business. While he was on the ranch, from about May 1 until June 23, the proof shows he took an active part in the work and in the management of the property. He joined with the defendant in plans for remodeling the house and improving the property. The testimony fairly indicates he had a proprietary interest in the ranch. On April 14, 1902, a bill of sale of the personal property was made by the former owner from whom the ranch was purchased, which by its terms conveyed it to plaintiff and Sterns. The note in suit was executed by the defendants on June 23, immediately after plaintiff received the message calling him home, and the defendants testify it was executed solely to show plaintiff's interest in the property.

Witness Record, cashier of a bank at Hyannis in 1902, testified that about the 1st of June he assisted Stansbie in closing up the negotiations with plaintiff concerning the sale of the ranch, which were afterwards acquiesced in by Sterns. Witness Nickels wrote the deed from Stansbie to Sterns, and testifies his recollection is that plaintiff told him to name Sterns as grantee. Mr. and Mrs. Sheldon, who live near the ranch, testify that plaintiff stopped over night at their place when he was taking his cattle to the ranch in the spring of 1902, and that he then told them that he and the defendant Sterns were negotiating for the purchase of the Stansbie ranch. Mr. Unkefer, a real estate agent at Hyannis, who went with plaintiff and Sterns to the ranch, pending the purchase, testified that they seemed to be equally interested in its examination, and that the plaintiff made particular inquiry with reference to many features and details concerning the property. It is established that the defendants on two separate occasions tendered a deed to an undivided one-half interest in the ranch to plaintiff, and demanded the return of their note, and that he refused the tender and retained the note. The plaintiff on rebuttal denied much of

the testimony of defendants with respect to his deposit of $6,500. He testifies it was a loan made to defendants jointly.

In April, 1902, plaintiff wrote a series of letters to Sterns that appear to corroborate the testimony of the defendants and their witnesses. The letters are as follows:

"Humboldt, Neb., 4-11-92. Floyd, I think $13,000 would be enougf for the ranch but you can use your owe judgment you did not say anything about the horses and machinery, or whether it was to be surveyed or not, I think it should be surveyed and the government corners marked so we could tell what they were by the number. L. L. Davis."

"Humboldt, Neb., 4-12-92. Mr. Floyd Sterns, Hyannis, Neb. If the house is whare it is on the plots it is to far north to take in but 80 acres of the hay valley where the house is. I should think it would proper to have it surveyed and the government corners marked, then we could tell if the deeds covered the plot. You can get him to come down as much as you can. And let me know what it is. by all means be shure the deed covers the valleys he showed us. no guess work about it. do not sign a contract till you are certain. if it is surveyed you must take the numbers of the government corners and send them to me if it comes out all right I think we had better make a deal. All for this time. L. L. Davis."

"Humboldt, Nebr. 4-14-92. Floyd. I did not get your letter till after train time. I think it would have been better to have the deal made and a little money paid if he Allen was to scrip the valley as you wrote. * * * I expect you will have the surveying dun before I could get up there. if you think I had better come let me know and I will come. if you have made the deal and want some money joust you say so I will forward it promptly. Yours Res. L. L. Davis."

"Humboldt, Nebr. 4-22-92. Floyd. I thought I would write you in regard too the price you think we will charge for keeping cattle by the year. also for the summer seson.

How many do you think we had better take. Did you get anny out there. Do you think of being responsible for strays or stole. can you get the branding irons made out there, if there is no blacksmith in Hyannis I can get them made. You name how you want them made. I do not think of buying anny more cattle at present. You might invest in some. Yours Resp., L. L. Davis. Will we charge more for cows than we do for steers."

Much more testimony was adduced by defendants tending to still further fortify their contention, but no good purpose will be subserved by extending this opinion in its review.

The plaintiff argues that the trial court erred in permitting oral testimony to be introduced by the defendants to contradict the terms of the note sued on. It is elementary that an attempt to contradict, vary or change the terms of a written instrument by oral testimony, in the absence of fraud, accident or mistake, is not ordinarily permissible. But that is not the question before us. On this feature of the case the defendants merely sought to establish by oral testimony the real purpose for which they executed the note in suit. The trial court properly permitted them to do so. This court has long been committed to this salutary rule, and we can see no good reason for departing from it. *Walker v. Haggerty,* 30 Neb. 120, is in point. In that case the defendants offered testimony to show the consideration for which the note was given. This was held to be permissible. The court, speaking by NORVAL, J., said: "While parol testimony cannot be received to contradict the terms of the note, it was clearly admissible to show the true consideration for which it was given." A like principle was announced by MAXWELL, J., in the early case of *Collingwood v. Merchants Bank,* 15 Neb. 118. To the same effect are the following: *Cortelyou, Ege & Vanzandt v. Hiatt,* 36 Neb. 584; *Norman v. Waite,* 30 Neb. 302. See, also, *Morrow v. Jones,* 41 Neb. 867. In *Gifford v. Fox,* 2 Neb. (Unof.) 30, the court, speaking by DAY, C., held: "While parol testimony may

not be received to vary or contradict the terms of a promissory note, yet the consideration for which it was given may be established by parol testimony."

Plaintiff cites *State Bank v. Belk,* 56 Neb. 710, but the rule there announced is not properly applicable to the facts before us. There the note sued on in direct terms stated the purpose and the consideration for which it was given, an element that is lacking in the note sued on herein. In view of our uniform holding, we therefore conclude no error was committed by the trial court in permitting testimony to be introduced on the question relating to the purpose for which the note was given. From all the evidence it seems clear to us that the note in suit was given by defendants merely for the purpose of showing plaintiff's interest in the property, and that the jury were justified in finding that defendants received no consideration for the execution of the note. The facts in dispute were fairly submitted to the jury, and the verdict is abundantly sustained by the testimony. We find no error in the record, and no reason for disturbing the verdict can be discovered.

It follows, therefore, that the judgment of the district court must be, and it hereby is, in all things

AFFIRMED.

ANNA VRANA, APPELLEE, V. MATEJ VRANA ET AL., APPELLEES; BARBARA THEGE, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,747.

1. **Appeal:** DISMISSAL. An appeal will be dismissed where the record does not disclose the rendition of a final order or judgment.
2. ———: FINAL ORDER. A judgment awarding partition and apportionment of shares of the respective parties is not a final order or judgment from which an appeal may be prosecuted.
3. ———: DISMISSAL. Where an appeal in partition is prosecuted to this court before the trial court has acted on the report of the referees, such appeal will be dismissed.

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

J. H. Barry and *F. Dolezal,* for appellant.

Simpson & Good, contra.

DEAN, J.

This is an action in partition. In April, 1885, Joseph Kodesch died intestate, being the owner of a quarter section of land in Saunders county, which both parties agree was then worth about $10 an acre. He left surviving him as his only heirs at law his widow, Anna Kodesch, and two married daughters, Anna Vrana and Barbara Thege, and eight children of a deceased daughter. Anna Vrana, who is plaintiff and appellee, joined as defendants the surviving widow, Anna Kodesch, and plaintiff's sister, Barbara Thege, and the children of the deceased sister, Mary Svatos, who have all reached their majority, and the spouses of Joseph Kodesch's children and grandchildren. At the time of his death, and for some time prior thereto, Joseph Kodesch and his wife both resided on the land as their home, and the widow has resided there continuously ever since. The record shows that the plaintiff and the defendant Barbara Thege in the trial court were each decreed to be the owner in fee simple of an undivided one-third part of the land described in the petition, and that the other defendants, who are the children of the deceased daughter, Mary Svatos, are entitled to an undivided one-third interest in the land, and that the plaintiff and the defendants are the owners of the land subject to the homestead and the dower interest of the defendant Anna Kodesch, and that Anna Kodesch, or the defendant Barbara Thege, as her guardian, has a homestead and dower interest in the land, being the life estate of Anna Kodesch, and that the plaintiff is entitled to partition. The decree shows that a referee was appointed to make

partition of the estate subject to the dower and homestead interest of Anna Kodesch, with directions to report to the court. To the above decree the defendants Barbara Thege and Anna Kodesch each took exceptions, and they bring the case here for review.

Upon a careful examination of the record, we conclude it does not disclose such a final order or judgment as is recognized by this court as being sufficient to entitle the action to be reviewed here. Code, sec. 582: "A judgment rendered or final order made by the district court, may be reversed, vacated, or modified by the supreme court, for errors appearing on the record." *Mills v. Miller*, 2 Neb. 299, is an action in partition where the above section of the code was construed. The same section was again construed in a partition case in *Skallberg v. Skallberg*, 84 Neb. 717. In both cases we held that, where an appeal in partition is prosecuted before the trial court has acted on the report of the referee, such appeal must be dismissed for the reason it is not such a final order or judgment as will entitle an aggrieved party to have his cause reviewed. One reason for the rule is that, if an appeal is allowed before a final adjudication in the trial court of all the issues, another appeal might be prosecuted after the case is returned and finally disposed of on the merits. The rule is meritorious, and we are disposed to adhere to it. Every question involved in the present case can as well be heard and disposed of after an adjudication of all the issues if at that time an appeal may be considered necessary by either party. There are a number of questions raised in the present case, but it is needless to discuss them here because, no final order or judgment having been rendered, the appeal is prematurely brought.

On the authority of the above cases and the authorities therein cited, the appeal herein must be, and it hereby is,

DISMISSED.

REESE, C. J., not sitting.

WILLIAM T. YOUNG, APPELLEE, V. LAMBERT C. KINNEY, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,767.

1. **Appeal:** EVIDENCE. It is not error to exclude evidence of a fact that is not disputed, and has been proved by other uncontradicted evidence.
2. ———: ———. The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed.
3. ———: EVIDENCE AT FORMER TRIAL. Where a court has rejected all certificates attached to a document purporting to be a bill of exceptions, it is not error to refuse counsel permission to read therefrom the testimony of a witness.
4. ———: QUESTIONS OF FACT. Where, in an action at law, the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient to justify the conclusion reached.

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

Wilcox & Halligan, for appellant.

J. J. Kinney and *Wright & Wright, contra.*

DEAN, J.

This is an action in replevin involving the ownership and the right of possession of a horse valued in plaintiff's affidavit at $45. The court costs now amount to about $600. This is the second appeal of the case. The opinion on the first appeal is reported in 79 Neb. 421. In the first trial the plaintiff recovered verdict and judgment. On appeal the case was reversed on two grounds, one of them being that the plaintiff on cross-examination was asked if he had not testified at the trial in the county court that the first time he saw the animal in question to remember it was when it was between two and three years old, and that he answered he did not remember.

The defendant then called the county judge, and offered to prove by him that at the trial in the county court the plaintiff so testified. The denial of the offer was held to be error. Another assignment in the first trial was to the effect that the argument of plaintiff's counsel was somewhat inflammatory, and tended to prejudice the jury against the defendant and his witnesses, and this was likewise held to be erroneous. On its second trial the county judge was permitted to testify on the disputed point. Finding no exceptions in the record to the argument of counsel for defendant, we assume that he commendably repressed his emotions in the particular complained of in the first trial. The second trial resulted as before, and the defendant again appeals. He assigns 20 grounds of error. In the typewritten brief of errors there are many assignments, but in the printed brief complaint is only made concerning certain rulings relative to the evidence. We have examined the record carefully, and conclude there is no reversible error shown.

As stated in the former opinion, the identity of the horse in question is the principal matter in controversy. On this point many witnesses were examined on both sides, and the testimony was conflicting, but there is an abundance of evidence to support the verdict of the jury, and, under the rule long established and adhered to by this court, we are not disposed to disturb it. In *Holbert v. Chilvers,* 58 Neb. 665, speaking for the court, SULLIVAN, J., says: "Where the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient to justify the conclusion reached." *Upton v. Levy,* 39 Neb. 331. The defendant introduced many witnesses to prove that the horse in question, when a colt, was branded by him with a hatchet brand on the jaw, and that it was to some extent discernible ever afterwards. Almost, if not quite, an equal number of witnesses testified on the part of plaintiff that no such brand could be discovered. The rights of the litigants turn to some extent upon the existence or absence of defendant's

hatchet brand upon the horse when it was a colt. Several witnesses who were jurors at the first trial testified that by permission of court at the former trial the horse was examined by them, being thrown for that purpose, and his jaw closely examined and the hair removed, and no such brand was discovered. On this point the testimony seems to preponderate in favor of the plaintiff. At the last trial, on request of defendant, the jury were by the court permitted to view the animal, but when leave was asked by the jury to clip the hair at the place where the defendant said the horse was branded, in order that a closer inspection might be made, the defendant interposed an objection, which was overruled and the request of the jury granted.

During plaintiff's cross-examination he denied testifying upon the former trial to certain facts, and to contradict him defendant's counsel offered part of the bill of exceptions of the testimony given on that trial. This testimony was excluded, and defendant assigns error. Preceding the offer of the testimony counsel offered the certificate of the reporter, the filing marks on the bill, the certificate of the trial judge, and the certificate of the clerk of the district court, which stated, among other things, that the document was the original bill of exceptions in that case. The court excluded the offered evidence on the ground that it had not been identified in the manner provided by law. Whether the court was right or wrong we need not determine because the printed brief makes no complaint concerning this ruling. *Brown v. Dunn*, 38 Neb. 52; *Peaks v. Lord*, 42 Neb. 15; *Madsen v. State*, 44 Neb. 631; *Blodgett v. McMurtry*, 54 Neb. 69; *Gulick v. Webb*, 41 Neb. 706; *Mandell v. Weldin*, 59 Neb. 699. With the certificates excluded, strictly speaking, there was not sufficient foundation laid for the introduction of the evidence offered, and hence there was no error in excluding the evidence. We have not overlooked the stipulation of counsel, but it did not go to this evidence, and, again following closely the rules of evidence, we are con-

strained to hold that it was properly excluded. But, in any event, the refusal of the trial court to admit the testimony thus offered by the defendant did not conclude his right in this respect. The record shows the presence of the jurors at the former trial as witnesses at the second trial, and the impeaching testimony, if true, might have been established by them. The defendant was not limited in this respect to the record testimony offered by him and denied by the court.

The defendant brought to the courthouse other horses owned by him, and requested that the jurors examine the brands upon those horses, to the end that a comparison might be made of the disputed mark or brand with the undisputed ones. If the court was satisfied that the circumstances surrounding the branding of the disputed horse, if it ever was branded with the hatchet brand, and those connected with the marking of other horses were so nearly alike that the results ought to be identical or nearly so, in its discretion it might receive the evidence. It is largely in the nature of experimental evidence and is relevant. 2 Moore, Facts, sec. 1209; 1 Wigmore, Evidence, sec. 460; *Davis v. State,* 51 Neb. 301. The ruling of a trial court in the exercise of the discretion confided to it in rejecting or receiving collateral evidence, unless abused, will rarely be overruled in this court. *Fitch v. Martin,* 84 Neb. 745. For the same reasons the fourth and sixth assignments of error argued in the briefs are overruled.

The complaint that the court erred in refusing to permit defendant to testify in answer to certain questions that he was the owner of the hatchet brand is without merit. The fact is conceded all through the case. It is undisputed, and was specifically testified to by defendant in answer to other questions.

The court with propriety might have received defendant's testimony concerning the effect of branding a horse afflicted with distemper; that is, that the brand would likely blotch; but the error, if any, in rejecting that evi-

dence is without prejudice in the present case. The brand, if brand it was, was blotched beyond question.

We feel impelled in this case to affirm the judgment because plaintiff has twice prevailed on a question of fact. The jurors in each instance inspected the horse in question, and doubtless a majority of them had as much expert knowledge concerning the appearance of brands and wire cuts on horses, and have as much ability to decipher the disputed mark, as any expert produced on the stand. That most important evidence from its nature was not and could not have been included in the bill of exceptions, and we feel that none but the most glaring errors ought to work a reversal of the judgment of the district court. The testimony is somewhat conflicting throughout, but the law has imposed upon the jury, as triers of fact, the task of determining the credibility that is to be accorded to the witnesses and the weight that is to be given to the evidence.

The record shows that the trial court was liberal in the range of inquiry that was permitted to both sides. The case has been long drawn out and thoroughly sifted. The county judge testifies that it was pending in his court "pretty near all summer." From the record before us, we conclude that sufficient of the material facts with reference to the identity, ownership and right to possession of the animal in question have been presented by the plaintiff to sustain the verdict, and that, in the particulars complained of, the trial court committed no reversible error.

The judgment of the district court therefore must be, and it hereby is in all things,

AFFIRMED.

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

THOMAS M. WILKINSON, APPELLANT, V. JOSHUA S. LORD, TREASURER, APPELLEE.

FILED SEPTEMBER 25, 1909. No. 16,031.

1. **Constitutional Law:** STATUTES: PRESUMPTIONS. In passing on the validity of the act which provides a four-year course of free high school instruction for pupils residing in districts where that privilege is denied, permits them to attend properly equipped schools in other districts, and makes the home district liable for payment of tuition at the rate of 75 cents a week for each pupil, it will not be assumed without pleading or proof that the tuition fixed by the legislature will fall below or exceed the cost of educating a nonresident pupil.

2. **Schools and School Districts:** TAXATION: CONSTITUTIONAL LAW. In directing the county superintendent of public instruction to furnish the county clerk with the necessary data for a levy, when a school district refuses to vote taxes for free high school purposes, the free high school act of 1907 does not delegate to that school officer a taxing power committed exclusively to school districts under the constitutional provision that "all municipal corporations may be vested with authority to assess and collect taxes." Const., art. IX, sec. 6.

3. **Constitutional Law:** STATUTES: TITLES. A title declaring a legislative purpose to provide a four-year course of free high school instruction for pupils residing in districts where that privilege is denied, is broad enough to cover taxation for the purpose stated and legislation to prevent school districts from defeating the act by refusing to vote taxes.

4. **Statutes:** VALIDITY: CONSTITUTIONAL LAW. The free high school law of 1907 (laws 1907, ch. 121) is an independent act, and its validity must be tested by the rule that changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the constitution, relating to the amendment of statutes. *De France v. Harmer*, 66 Neb. 14.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

A. E. Gantt and *Reavis & Reavis*, for appellant.

R. C. James, contra.

DEAN, J.

The only question presented in this suit is the constitutionality of the free high school act of 1907. Comp. St. 1907, ch. 79, subd. 6, secs. 5-8*b*; laws 1907, ch. 121. The purpose of the act is to provide a four-year course of instruction at a free high school for the benefit of pupils residing in school districts which do not afford that opportunity. To make the legislative purpose effective, a properly equipped high school in any district in the county is authorized to admit such pupils from other districts in the same county, and the home district is made liable for payment of their tuition at the rate of 75 cents a week for each pupil. All districts liable for tuition are authorized to vote taxes enough to meet the obligations thus incurred, and, if they fail to do so, the school board or county superintendent of public instruction is empowered to furnish the county clerk with the data for a levy which the latter is authorized to make. Plaintiff owns 40 acres of land in school district 42, Richardson county. Three pupils residing therein are entitled to free high school instruction in another district under the provision of the free high school law. On account of their tuition the obligation of their home district is $81, but the tax authorized by the statute was not voted. On information furnished by the county superintendent the county clerk, to raise the sum stated, made a 15-mill levy on all the taxable property in the district containing plaintiff's 40 acres of land. Plaintiff's share of the burden is 75 cents, and he brought this suit to enjoin defendant, as treasurer of Richardson county, from collecting the tax. The suit is also brought on behalf of other taxpayers similarly situated. The district court sustained a demurrer to the petition, held the free high school act valid as against plaintiff's attack, and dismissed the action. Plaintiff appeals.

1. In addition to provisions for educating at any properly equipped high school in the county all duly qualified

pupils residing in districts which have not established a four-year high school course of study, the statute declares: "Every public school district granting free public high school education to nonresident pupils under the provisions of this act shall receive the sum of seventy-five cents for each week's attendance by each nonresident pupil from the public school district in which the parent or guardian of such nonresident pupil maintains his legal residence. Such public school district is hereby made liable for the payment of such tuition." Comp. St., ch. 79, subd. 6, sec. 6. In attacking the statute from which the foregoing excerpt is taken, plaintiff argues that the legislation contravenes the following provisions of the constitution: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." Const., art. IX, sec. 1. "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Const., art. IX, sec. 4. "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uni-

form in respect to persons and property within the jurisdiction of the body imposing the same." Const., art. IX, sec. 6.

Plaintiff's principal objection to the free high school act is that the arbitrary sum of 75 cents a week for the tuition of each nonresident pupil will fall below or exceed the cost of his instruction, and that in either event the enactment contravenes the foregoing constitutional provisions, to the effect that the legislature must adopt a system or revenue under which every person shall pay a tax in proportion to the value of his property; that the legislature shall have no power to release or commute taxes; and that all taxes for municipal purposes shall be uniform in respect to persons and property within the taxing district. Plaintiff reasons that tuition at the fixed rate of 75 cents a week, when excessive, will impose an unlawful burden on the district in which the pupil resides, and that it will impose a like burden on the school district wherein the nonresident pupil is instructed when it falls below the cost of his high school education. Plaintiff therefore concludes that the act cannot be enforced without violating the rule requiring uniformity in the burdens of taxation and forbidding commutation of taxes. In this position plaintiff relies on *High School District v. Lancaster County,* 60 Neb. 147. In that case the court held that the free high school act of 1899 (laws 1899, ch. 62) was void. Under the terms of section 3 thereof, the county was required to pay to certain school districts maintaining high schools tuition at the rate of 75 cents a week for each nonresident pupil. The ground on which the enactment was assailed is stated in the opinion as follows: "It is argued that inasmuch as a taxpayer inside the high school district must, under this act, pay the difference, if any, between the cost of tuition of nonresident pupils and the seventy-five cents per week allowed by section 3 of the act to be paid out of the general fund of the county, and must also pay his proportionate share of the seventy-five cents per week, with the other taxpayers of the county, in

addition to bearing the whole of the expense of educating those pupils resident within the limits of the high school district, the law violates sections 1, 4 and 6 of article IX of the constitution."

What the court decided is stated in two paragraphs of the syllabus as follows:

"1. The constitution of this state requires not only that the valuation of property for taxation, but the rate as well, shall be uniform.

"2. Sections 1 and 3, ch. 62, laws 1899 (Comp. St., ch. 79, subd. 6, secs. 5 and 7), which provide that pupils residing without the limits of high school districts in the state may attend such schools free of charge to them, and that an arbitrary sum shall be paid out of the general fund of the county, as compensation to such high school district for such tuition, which sum may, in any case, fall below, or exceed, the cost of such tuition, contravene sections 1, 4 and 6, article IX of the constitution, which declare, among other things, that the legislature may provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises; that the legislature shall have no power to release or commute taxes; and that all taxes for municipal purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

A critical examination of the opinion will show that the constitutionality of the act of 1899 was tested by two assumptions. The first was that 75 cents a week was insufficient to meet the expenses of educating a nonresident pupil. On the fact thus assumed the consequence is stated in the opinion as follows: "It is plain this difference must be made good by levying and collecting taxes on the property of the taxpayers resident in the school district, and this difference cannot be collected from taxpayers of the whole county. Then the taxpayers within the school district will pay a greater proportion of these taxes than

would those residing within the county, but outside the school district, and while the valuation of the property of those within the school district and those without it might be uniform, yet the rate of taxation, for the same purpose, would be higher on the property within than upon that without the school district." The second assumption was that 75 cents a week exceeded the cost of educating a nonresident pupil. On the fact assumed the result is stated in the opinion as follows: "The excess would accrue to the high school districts, and the taxpayers thereof would profit at the expense of those outside the limits of the high school district, and, in either case, the rule of uniformity prescribed in section 6 of said article of the constitution would be violated."

What would have been the effect of the free high school act of 1899, if the court had assumed the legislature was correct in estimating the cost of educating a nonresident pupil at 75 cents a week, is nowhere stated in the opinion. In considering the bearing of the case cited on the present inquiry, it is pertinent to remark that the act of 1907 contains no provision for a county tax, for a county liability, or for drawing money from the county treasury. The unit of taxation is the school district, which is required by law to educate its own pupils, and no provision is made for taxing people in other taxing districts. Plaintiff's petition shows that under the provisions of the existing law all the property in school district 42, Richardson county, was subjected to a 15-mill levy. No burden was imposed except what was necessary to educate three resident pupils at the rate of 75 cents a week for each. If this legislative estimate is accurate, it is perfectly apparent that the taxation authorized does not violate the rule that the valuation of property as well as the rate must be uniform. The burden rests on all property alike within the jurisdiction of the taxing district. This fully meets the constitutional requirement as to uniformity. *Pleuler v. State,* 11 Neb. 547. It is equally clear that, if 75 cents a week is a correct estimate of the cost of educating a

nonresident pupil at a high school, neither the people of the district in which the tax is levied nor the people of the district in which the high school is situated are assessed to pay obligations of another taxing district, and that the rule forbidding commutation of taxes has not been violated. From what has been said it will be observed that *High School District v. Lancaster County*, 60 Neb. 147, is not a precedent for holding the present law invalid, except on the assumption that the legislative estimate of 75 cents a week for educating nonresident pupils is incorrect. On a careful reconsideration of the question we are unwilling to assume without pleading or proof that tuition at the rate of 75 cents a week, as fixed by the present law, will fall below or exceed the expense of educating a nonresident pupil. An enactment of the legislative department of government should not hang in the judicial department by such a slender thread. Legislative acts are presumed to be valid. Burdens imposed by statute are presumed to be reasonable. Courts should never assume that the lawmakers will deliberately attempt to spoliate one community for the benefit of another or pass laws without knowledge of existing conditions. In absence of proof to the contrary, courts ought to assume that the legislature acted with full knowledge of the facts upon which the legislation is based. The burden of proving that a statute contains unlawful or unreasonable terms rests upon those assailing it. The legislature has power to investigate any subject for the purpose of legislation. To ascertain the facts the resources of the government are at its command. It can explore the offices of the executive department and other repositories to ascertain conditions relating to any subject of legislation. For these reasons, the trial court was correct in holding that tuition of 75 cents a week would not, as a matter of law, exceed or fall below the cost of educating a nonresident pupil at a high school.

2. The next point argued by plaintiff is stated in his brief as follows: "The act is void as a delegation of the

taxing power vested in the legislature to the county superintendent, contrary to the express provisions of our state constitution, which limits the grant of such power to none but the corporate authorities of municipal corporations; and school districts come within that designation." By section 3 of the act of 1907 the legal voters at the annual school district meeting are authorized to vote the amount of taxes required for free high school education during the coming year. If they fail to perform that duty, section 4 authorizes the school board to furnish the county clerk with a proper estimate of the necessary revenue. For failure of the school board to perform that duty, the following remedy is created by section 5: "If the district board or board of education of any public school district wherein there are pupils entitled to and desiring free high school education as in this act provided neglect or refuse to make and deliver the required estimate as set forth in section 4 of this act, the county superintendent of the proper county shall make and deliver to the county clerk of each county in which any part of such public school district is situated, not later than the first Monday in August following the annual school district meeting, an itemized estimate of the amount necessary to be expended by such public school district during the ensuing year for free high school education. It shall be the duty of the county clerk to levy such tax on all the taxable property of such school district the same as though such tax had been voted by the annual school district meeting." Laws 1907, ch. 121.

Plaintiff argues the power thus delegated to the county superintendent is a violation of the following provision of the constitution: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within

the jurisdiction of the body imposing the same." Const., art. IX, sec. 6. The amount of money to be raised by taxation for high school instruction depends on the number of pupils. The liability of the school district is fixed at 75 cents a week for each pupil. By these provisions the amount to be raised by taxation is definitely fixed by legislation, and depends on facts which the county superintendent by virtue of his office may readily ascertain. He is required to furnish facts, but not to make a levy. In the first instance the legal voters of the district are directed to obtain the necessary information and vote taxes accordingly. If they fail to do so, the school board may make and forward to the county clerk an estimate of the funds necessary for high school education. If both are derelict in the performance of their duties, the right to free high school instruction under the law is not lost, since the legislature has empowered the county superintendent to furnish the county clerk with the necessary data for a levy. When provision is made by law for free high school education, children should not be deprived of that right by the contumacy of electors or officers of a school district. The right of the legislature to provide free instruction includes the power to create a remedy when electors and school officers disregard their obligations to the public. The best results of a free government can only be obtained by an enlightened citizenship. This is recognized by the constitutional provision which requires the legislature to provide "for the free instruction in the common schools of all persons between the ages of five and twenty-one years." This command of the supreme law is not defeated by the provision that "all municipal corporations may be vested with authority to assess and collect taxes." The electors and school board in district 42, Richardson county, cannot within their jurisdiction put an end to the free instruction required by the constitution on the ground that the sole power to levy taxes for school purposes has been committed to them as a "municipal corporation." Judge Cooley expressed him-

self on this subject as follows: "Wherever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build schoolhouses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the legislature would be at liberty to choose its own method for compelling the performance of the local duty." 2 Cooley, Taxation (3d ed.), p. 1299. In any event, this court by a long line of decisions, some of which are cited in *Magneau v. City of Fremont*, 30 Neb. 843, is committed to the doctrine that the section of the constitution containing the provision, "all municipal corporations may be vested with authority to assess and collect taxes," is not a limitation on the power of the legislature. It is therefore unnecessary to discuss contrary holdings in other jurisdictions. In declining to adopt plaintiff's interpretation of the constitution on this point, the trial court did not err.

3. Plaintiff's next objection to the act is that it violates the constitutional provision relating to titles of bills. The title in question is: "An act to provide four years of free public high school education for all the youth of this state whose parents or guardians live in public school districts which maintain less than a four-year high school course of study, and to repeal all acts and parts of acts in conflict herewith." Laws 1907, ch. 121. This is challenged as insufficient within the meaning of the following provisions of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed

in its title." Const., art. III, sec. 11. The operation of the act beyond the scope of the title, as understood by plaintiff, is described in his brief as follows: "It amends considerable of the existing laws. It makes a peculiar process for the raising of revenue not provided for by the title. It provides the farce of the voters of the district to vote on a proposition, and then, as a nullity of the wants or desires of the inhabitants of the district, finally commands the superintendent to impose the taxes without any representation of the taxpayers." The title declares a legislative purpose to provide a four-year course of free high school instruction for the benefit of pupils residing in districts where that advantage is denied. In making provision for free high school education the power of the lawmakers to classify subjects for the purpose of legislation was not exceeded. The legislation relates alone to the class described in the title. Raising funds by taxation was within the purpose announced. The means devised to prevent electors and officers from evading the law was also within the purview of the title. There is no surreptitious legislation anywhere in the act. All provisions in the bill "are comprehended within the objects and purposes of the act as expressed in its title," in compliance with the rule announced in *Affholder v. State,* 51 Neb. 91, and in *Alpherson v. Whalen,* 74 Neb. 680. The trial court so held, and the ruling was correct.

4. When the high school act of 1907 was passed, a statute then in force required each school district to determine the amount of money required for the maintenance of schools during the coming year, and made provision for raising the necessary funds by taxation, but limited the amount to a 25-mill levy. Comp. St. 1907, ch. 79, subd. 2, sec. 11. Plaintiff finally argues the effect of the new act is to increase by amendment the statutory limitation of 25 mills in violation of the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

The point does not appear to be well taken. The later act extends a four-year course of free high school instruction to pupils residing in districts where that privilege was denied. To carry out the purpose of the legislature a new class is created. The law applies alone to pupils within that class. The 25-mill limitation imposed by the former act did not apply to educational facilities applicable to the new class. The present law is on its face an independent act covering the new subject of legislation, and must be tested by the doctrine that "changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the constitution." *De France v. Harmer,* 66 Neb. 14; *Eaton v. Eaton,* 66 Neb. 676. The rule invoked by plaintiff is therefore inapplicable, and this case is not controlled by *Board of Education v. Moses,* 51 Neb. 288, wherein the high school act of 1895 was held void.

There being no error in the rulings of the district court, the judgment is

AFFIRMED.

ROSE, J., not sitting.

JOSEPH TARNOSKI, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED SEPTEMBER 25, 1909. No. 15,591.

1. **Trial**: DIRECTING VERDICT. Where the evidence upon a question of fact material to the issue is conflicting, and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict. *Gillis v. Paddock,* 77 Neb. 504, followed.

2. **Master and Servant**: APPLIANCES: ASSUMPTION OF RISK. A servant does not assume the risk of injury arising from his master's having negligently furnished him an unsafe and defective working place, unless the servant knew of the unsafe or defective condition,

or ought by the exercise of reasonable care to have known of such unsafe or defective condition.

3. ———: ACTION FOR INJURY: DEFENSES: ASSUMPTION OF RISK: BURDEN OF PROOF. In an action for damages for personal injuries by a servant against his master grounded upon the latter's negligence, assumption by the servant of the risk of the injury other than that usually and ordinarily incident to his service is an affirmative defense, the burden of establishing which rests upon defendant.

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

Greene, Breckenridge & Matters, for appellant.

Lambert & Winters, contra.

GOOD, C.

Plaintiff sued to recover for personal injuries sustained while employed by defendant as a painter in its South Omaha packing house. He alleges that defendant negligently assigned him to a certain dressing room wherein to change his clothes mornings and evenings; that the floor of said dressing room was rotten, unsafe and dangerous, and that he was injured by said floor giving way and precipitating him into a hole therein. Defendant denied negligence, and alleged that it was unnecessary for plaintiff to use that part of the premises where he was injured; that the unsafe and dangerous condition of the premises was open, obvious and known to defendant; that defendant assumed the risk of the injury, and was negligent in his use of the premises. The affirmative allegations of the answer were traversed by the reply. Plaintiff had judgment, and defendant has appealed.

From the record it appears that plaintiff was employed as one of a gang of painters in defendant's packing plant; that it is necessary, or at least desirable, before commencing work in the morning that the painters change their ordinary clothing for other clothing suitable for their work, and to again change at the close of their day's work.

A certain part of the premises was assigned to the plaintiff and the other painters as a dressing room. This so-called dressing room was located over certain machinery which was inclosed or boxed in. The top of the box arrangement inclosing the machinery formed the floor of the dressing room. This room was perhaps 20 to 25 feet from east to west and 30 to 40 feet long from north to south. Just above the floor of the dressing room and passing from east to west were certain pipes and beams. A number of the painters had boxes or lockers in this dressing room in which they stored their clothing and lunches. A part of these were on the north side and part on the south side. It also appears that they usually ate their noonday meals in this so-called dressing room. Plaintiff usually changed his clothes and ate his lunch on the north side of the room. There were no windows in the dressing room. The only natural light was afforded by a combination ventilator and skylight, but the glass in this had become smoky and dirty, and afforded but little light. There were electric lights suspended from the ceiling of the main room, but most, if not all, of these lights were lower than the floor of the dressing room, and afforded but little light therein. On the morning of November 5, 1906, after plaintiff had been employed by defendant for about six weeks, he changed his clothing as usual on the north side of the dressing room, and started to leave the dressing room, and was in the act of passing from the north side over the pipes and beams to the south side when some of the boards of the floor gave way and precipitated him into a hole, whereby he received the injuries complained of.

Defendant contends that the undisputed evidence shows that the floor on the north side of the dressing room was rotten, weak, full of holes, and was openly and obviously unsafe and dangerous; that plaintiff had been warned not to use the north side of the room or to go on the north side because of its unsafe condition; that he knew of the unsafe and dangerous condition of the floor on the north side on the morning of November 5, when he was injured.

and that plaintiff thereby assumed all risk of the injury in using that side of the dressing room under the circumstances. It is undisputed that the floor was in an unsafe and dangerous condition, and there is evidence tending to show that plaintiff had been warned and knew of the unsafe condition and the danger in using that part of the dressing room, and that the unsafe and dangerous condition was obvious to a person of ordinary intelligence. Upon the other hand, there was evidence which tended to show that, by reason of the lack of light, the dangerous and unsafe condition of the floor was not obvious and was not readily discernible, and the defendant denies that he had ever been warned not to use the north side of the dressing room, and claims that he had never been informed and did not know that it was dangerous or unsafe. There was a conflict in the evidence, and the question was properly for the jury. It was therefore proper for the trial court to refuse to direct a verdict for the defendant.

Defendant complains of the refusal of the trial court to give the sixth instruction requested by it. The material part of the instruction is as follows: "The Cudahy Company may permit the use of a portion of its premises to be used by the painters' gang as a dressing room, and if the dangerous or defective condition of such place was known by plaintiff, *or if he had an opportunity to ascertain such condition,* the defendant could not be held liable." This does not correctly state the rule. The question is not properly whether the plaintiff had an opportunity to ascertain the defective and unsafe condition, but whether he knew of such condition or by the exercise of reasonable care ought to have known of such condition. The correct rule was given by the court in the fifth paragraph of its charge.

Defendant complains of the fourth instruction given by the court on its own motion. The part of the instruction complained of is as follows: "But the burden of proof is upon the defendant to satisfy you by a preponderance of the testimony that the said Tarnoski knew, or by

the exercise of reasonable care ought to have known, of the dangerous condition of said premises." Defendant appears to insist that the risk was incident to plaintiff's employment, and under a general rule, well established by this and other courts of last resort, the risk of injury was assumed by the plaintiff. There is no question as to the rule contended for, but we do not think it applicable in the instant case. The rule is well established that the master must use reasonable care to provide a reasonably safe working place for his servants. A servant assumes the ordinary risks and danger incident to his employment, but he does not assume the risk of danger due to his master's negligence in his failure to furnish him a reasonably safe place to work. *Grimm v. Omaha Electric L. & P. Co.*, 79 Neb. 387. If plaintiff's evidence is worthy of credence, and the jury found that it was, he had no knowledge or information that the floor was defective or dangerous, and he had no reason to expect or anticipate that he was in any danger from using the north side of the dressing room, and he did not by reason of his employment assume the risk of injury by reason of the unsafe and defective condition of the floor which was unknown to him. Defendant contends that the burden of proof was upon the plaintiff to show that he did not know, or that by the exercise of reasonable care he ought not to have known, of the dangerous and defective condition of the floor. Whatever the rule may be in other jurisdictions, it is not the rule in this state. The injury did not arise from a risk usually and ordinarily incident to plaintiff's service. In an action by a servant against his master, if the latter for a defense relies upon an assumption of a risk that is not usually and ordinarily incident to the plaintiff's service, the master must specially plead assumption of risk. *Maxson v. Case Threshing Machine Co.*, 81 Neb. 546. It follows that, if the defendant must plead the assumption of risk, then the burden of proof rests upon him to establish it. In *Grimm v. Omaha Electric L. & P. Co., supra,* it was held that a servant by his contract of

employment assumes the ordinary risks and dangers incident thereto, but that he does not assume the risk of dangers due to his master's negligence, and in the opinion it is said that the burden of proof is upon the defendant to establish such defense. See, also, *New Omaha T.-H. E. L. Co. v. Dent*, 68 Neb. 674; *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

The defendant also complains that the court erred in refusing to give the second and third instructions requested by it. An examination of the court's charge to the jury discloses that the substance of these instructions was included in the third paragraph of its charge. The same instructions having already in substance been given to the jury, it was not error to refuse those requested.

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.

THOMAS W. CAVETT, APPELLEE, V. H. M. GRAHAM, APPELLANT.

FILED OCTOBER 9, 1909. No. 15,496.

Landlord and Tenant: ACTION FOR RENT. "In order to maintain an action to recover for rent due, the relation of landlord and tenant must have existed between the parties, either by express agreement or by implication." *Janouch v. Pence*, 3 Neb. (Unof.) 867. See, also, *Skinner v. Skinner*, 38 Neb. 756.

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

C. L. Gutterson and *Hainer & Smith*, for appellant.

N. T. Gadd, contra.

REESE, C. J.

This action was instituted in the district court for the purpose of collecting rental or damages for the use and occupation of the north half and the southeast quarter of section 36, township 18 north of range 25, in Custer county. It is alleged in the petition, in substance, that plaintiff's right to recover is based upon certain leasehold interests conferred by the state in leasing the land to plaintiff's assignor. The answer, in addition to a general denial, alleges that the defendant has been in possession of the land for more than 21 years prior to the filing of the answer, and that he came into such possession by virtue of a lease made by the state to one Loomis, and which lease was assigned to defendant in the year 1884 or 1885, and that he took possession thereunder, and has held the uninterrupted possession ever since, residing thereon. It is stated that one I. C. Clark and plaintiff had an assignment of a lease made to them by one G. M. Flock, a lessee under a lease made subsequent to the one under which he took possession; that the assignment was made to them jointly; that on or about August 25, 1902, Clark and plaintiff, for a valuable consideration, assigned their interest therein to defendant, and that defendant has since said assignment paid to the state all rentals as they matured. The statute of limitations is also presented as a defense. The reply is a general denial. The cause was tried to the court without the intervention of a jury, the trial resulting in a finding and judgment in favor of plaintiff, and from which defendant appeals.

The evidence introduced upon the trial is meager in some respects, owing to the fact that much of the written portion thereof has been lost. Enough is shown to establish the fact that during the time in which defendant

occupied the land under the leases assigned to him he failed to pay some of the rentals as they became due; that the state released to plaintiff's assignor; that the assignment to plaintiff was made to "I. C. Clark and Thomas W. Cavett"; that Clark made the assignment to defendant; that defendant paid part of the purchase price in cash, and gave his promissory note payable to I. C. Clark and Thomas W. Cavett for the remainder; and that the note was indorsed by both, and delivered to a bank, where it was paid by defendant. The assigned lease was delivered to defendant by Clark, and it has not since that time (August 25, 1902) been in plaintiff's possession. Plaintiff testified that he sent about $10 to Mr. Clark to pay his half of the rental due up to the time Clark made the transfer. While his testimony is indefinite, it may be that he assisted in paying the taxes due at that time. However, we think it is reasonably clear that he sent only the $10 referred to above. There seems to have been no objection made by plaintiff to the delivery of the leases to defendant by Clark and the retention thereof by defendant, which with the unexplained indorsement of the note by plaintiff is quite persuasive that he must have known of the assignment by Clark, and that the purchase price was for the whole interest. However, that may not be decisive, as plaintiff testified, in opposition to both defendant and his wife, that he had never informed defendant that Clark had authority to sell his interest. He also testified that Clark had no such authority. It was shown by his testimony that Clark resides in this state, but no effort appears to have been made to secure his evidence. It is very clear that plaintiff knew of the assignment by Clark, of the delivery of the leases by him to defendant, and of the defendant's possession of the property during the whole time, claiming the exclusive right thereto.

There is no proof that any contractual relation ever existed between plaintiff and defendant as to defendant's occupancy of the land, or that the relation of landlord and tenant was ever created, either by express or implied agree-

ment, but that during the whole time of defendant's possession he held and claimed the same as the owner of the leasehold estate. Plaintiff never was in either the actual or constructive possession of the property. We fully agree with counsel for plaintiff that, in order to permit a recovery for use and occupation, the relation of landlord and tenant may be implied from the circumstances and conduct of the parties, but think that there must be something in the way of agreement or action from which that implication may arise. We have searched the record in vain for proof of any circumstance or action which can by any system of reasoning sustain such a relation, or a presumption that it existed. It appears to be the well-settled law of this country that, in the absence of the existence of that relation, or that the occupant was a disseizor without right, the action for use and occupation cannot be maintained. Defendant was never at any time wrongfully in possession. Even if plaintiff's theory as to his continued ownership of the one undivided half interest in the property be correct, yet defendant's possession was not wrongful. At the time of the transfer and delivery of the leases by Clark he was in possession as owner, claiming the exclusive right under the lease from the state which he held, notwithstanding it may not have been in force. He continued in possession after the transfer under the same claim of right, to the exclusion of all others. There is not shown to have been at any time any kind of recognition or acknowledgment of any right of plaintiff in or to the property. Under these circumstances, it would seem that the action for rent or use and occupation could not be successfully maintained without the prior establishment of plaintiff's right to an accounting for mesne profits. This doctrine is recognized in *Phillips v. Reynolds,* 79 Neb. 626, where a recovery was permitted on the ground that there was a contract of lease, but under a law of congress the lease was void because not sanctioned or approved by the officers of the interior department. See, also, *Skinner v. Skinner,* 38 Neb. 756; *Janouch v. Pence,*

3 Neb. (Unof.) 867. The cases upon this point are pretty thoroughly collated in 12 Ency. Pl. & Pr. 844 *et seq.*, and it must be deemed sufficient to refer thereto. It is true that many of the cases there cited were decided in states where the common law rules of procedure were in force, but it is equally true that the rule is recognized in states not governed by those rules.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

DEAN, J., having been of counsel in the trial court, did not sit, and took no part in this decision.

IN RE ESTATE OF LIZZIE O'SHEA.

JOHN J. O'SHEA, APPELLEE, V. HENRY J. BREUNIG ET AL., APPELLANTS.*

FILED OCTOBER 9, 1909. No. 15,670.

Executors and Administrators: WILLS: ALLOWANCES TO SURVIVING SPOUSE. Under the provisions of section 176, ch. 23, Comp. St. 1907 (Ann. St. 1907, sec. 4903), "all the wearing apparel and ornaments and household furniture," and other personal property, not exceeding $200 in value, of a deceased wife or husband vest in the survivor, as well when such survivor receives provision made in the will of the deceased as when the deceased died intestate, and the survivor cannot be deprived of the allowance thereof by the will of the deceased, nor can the survivor be required to elect whether he or she will accept other provisions of the will in his or her behalf before demanding the property described in the above section.

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

* Rehearing denied. See opinion, p. 521, *post.*

P. E. McKillip and *Albert & Wagner,* for appellants.

John J. Sullivan, James G. Reeder and *Louis Lightner, contra.*

REESE, C. J.

The appellee, O'Shea, is the surviving husband of Lizzie O'Shea, who died testate. He was her second husband, she having been previously married to C. D. Murphy, deceased. She had one son, Cyril Eugene Murphy, by her first husband. There was no issue of the second marriage. While there is nothing in the record disclosing the extent of her estate, the will, a copy of which is in the record, would seem to indicate that she died possessed of a considerable estate in her own right. She devised to her husband 200 acres of land in Boone county, and the undivided three-fourths of two quarter sections of land in Platte county in fee. She also bequeathed to him certain specified articles of personal property consisting of a part of her household goods and wearing apparel. Her piano and folding-bed she gave to the Franciscan Sisters of Charity of Humphrey, Nebraska. To the sisters of her former husband, Maggie and Nora Murphy, she bequeathed a diamond ring given her by him. To her sister, Maggie Anslme, she gave a specified ring, and to her niece, Isabel Breunig, another ring. To her son, Cyril Eugene Murphy, she left a portrait of his father, C. D. Murphy, a crayon portrait of his aunt, Nellie Murphy, and a specified oil painting. The ninth paragraph of the will provided: "All the rest of my household furniture, furnishings, carpets, chinaware, silverware, cutglass and paintings, I give and bequeath to my brothers and sisters (named in another paragraph of the will) to be divided equally amongst them," each to select the articles desired, but, if they were unable to agree as to the division, the executors were directed to divide the property into seven parcels of practically the same value, and lots should be cast for the same, respect-

ively. All the residue of her estate, real and personal, was devised and bequeathed to her son, Cyril Eugene Murphy. The husband was appointed as the guardian of Cyril, and was also nominated as an executor of the will with Henry Breunig. The will was admitted to probate in Platte county. The executors qualified and entered upon the duties of their appointment. O'Shea accepted the provisions of the will in his behalf. He then filed a complete inventory and appraisement "of all the wearing apparel and ornaments and household furniture and other personal property left by the deceased" which he claimed was allowed to him by law as the surviving husband, and the sum of $200 in money, amounting to a total of $1,996.50, and asked the county court to assign the same to him under the provisions of section 4903, Ann. St. 1907 (Comp. St. 1907, ch. 23, sec. 176). This included all the property specifically bequeathed to others. The county court rejected the claim, and O'Shea appealed to the district court, where the decision of the county court was reversed and the allowance made as claimed. The legatees appeal.

The law under which this claim is made is found in the first clause of the section referred to, which is as follows: "When any person shall die possessed of any personal estate or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows: *First,* the surviving husband or wife, if any, and, if there be no surviving husband or wife, then the child or children, if any, of the deceased shall be allowed all the wearing apparel and ornaments and household furniture of the deceased, and all the property and articles that was or were exempt to the deceased at the time of his or her death, from levy or sale upon execution or attachment, and other personal property, to be selected by her, him or them, not exceeding two hundred (200) dollars in value, and this allowance shall be made to such surviving husband or wife or child or children, if any, as well when he or she or they shall receive provision made in the will of the deceased as when the deceased dies in-

testate." O'Shea accepted the provisions of the will by which the land and specific personal property was given him, and it is claimed by the legatees that those provisions placed it within his election to take under the law or under the will, and that, having taken under the will, he could not demand all the personal property specified in the inventory submitted in addition; that it was clearly in contemplation of the testatrix that he should not have both, as the personal property—all of it—was specifically bequeathed to the legatees; and that, having elected, he is bound by his election and must abide by it. This contention is not disputed by appellee as a general proposition of law uninfluenced by legislative action, but it is insisted that the closing portion of the clause above quoted changes the rule, and, in effect, deprives a testator of the right or power to dispose of the property by will otherwise than as the law provides; that the provision that the allowance shall be made "as well when he * * * shall receive provision made in the will of the deceased as when the deceased dies intestate" precludes all idea of election and confers title as a legal right notwithstanding the other provisions of the will in his behalf.

There can be no doubt but that it was the intention of the testatrix that the provision made for her husband in the will was all that he should have of the estate. This is made doubly certain, if possible, by the specific bequests to her son, her sister, and relatives of the former husband of the enumerated articles. The only question, therefore, is as to her power to so dispose of her property. As we read the will, and observe that it confers upon the sisters of the deceased husband the ring given the testatrix by him, and to the son the portrait of his deceased father, the mind and conscience revolt and turn away from allowing the effort of appellee to thus ignore the expressed will of his deceased wife from whom he received such liberal provision. The will was, no doubt, made in the firm belief in the integrity of the husband and that he would respect her last wishes, and either decline to accept the provisions

made for him and take what the law gave him, or accept those provisions as made. However, this seems to be one of the cases where the provision of the statute may be made to work a hardship and injustice, for there appears to be no escape from the language of the statute. Many cases are cited by appellants holding that where one entitled to a benefit under a will must, if he claims such benefit, abandon every right the assertion whereof would defeat, even partially, any of the provisions of the instrument, and that it is a maxim not to permit the same person to hold under and against a will, and those rules are recognized and enforced in *Godman v. Converse*, 43 Neb. 463, but in no case do we find the decision made in the face of a statute similar to the one under consideration. Our attention is called to section 4907, Ann. St. 1907, but we see nothing in that section which would or could modify the clause in section 4903, above quoted. That section simply provides for election, we think, where the testator has the power to dispose of the property, and the section must be read in connection with section 4903 and the two construed together. By so doing, the property to be allowed the survivor is excluded from section 4907. Taking section 4903 as it reads, and we cannot take it otherwise, it seems to have been the purpose of the legislature to deprive a testator of the right or power to dismantle the home or any part thereof without the consent of the survivor. The case of *Brichacek v. Brichacek*, 75 Neb. 417, while not decided with reference to the sections under consideration, might shed some light upon the views of the court upon a similar contention. In that case the wife was the owner of two 80-acre tracts of land, one of which was the family homestead. By her will she devised the homestead to her children and the other tract of land to her husband. He accepted the provisions of the will, and claimed his homestead right of a life estate in the home and the fee title to the other tract. We held that he was entitled to both, as the law gave him his homestead right of which he could not be divested except by his own act, and that there was

no requirement that he should elect, and that his acceptance was not an election. The principle involved in the two cases is practically the same.

It follows that the judgment of the district court will have to be affirmed, which is done.

AFFIRMED.

ROOT, J., concurring.

I concur in affirming the judgment of the lower court for the reasons hereafter stated. O'Shea was claiming property that descended absolutely to him upon the death of his wife, notwithstanding her will. Ann. St. 1907, sec. 4903. Section 5065, Ann. St. 1907, directs executors as well as administrators to make a separate and distinct inventory and appraisement of the household furniture and other personal property, which may be allowed the widow, pursuant to the provisions of the chapter on decedents, and provides that such chattels shall not be considered assets in the hands of those officers of the court. Preceding 1901 the surviving wife, and not the husband, was given the wearing apparel, ornaments, household furniture, etc., of the deceased spouse. In 1901 the surviving husband and wife were placed on an equality with respect to said property (laws 1901, ch. 27), and the legislature in 1907 (laws 1907, ch. 49) continued that policy. Section 5065, Ann. St. 1907, is identical with section 200, ch. 14, Rev. St. 1866, and has never been amended. The fact that the legislature has not amended the last cited statute so as to specifically mention the surviving husband as well as the wife does not make it inapplicable to the husband's case. O'Shea, therefore, did not depend upon the will for title to the property in dispute. *In re Estate of Fletcher*, 83 Neb. 156. The cited case was decided with reference to the statute in force prior to the amendment of 1907, *supra*, but it is somewhat in point.

Counsel for appellants argue with commendable learning the doctrine of election, but that principle does not

apply to the record in this case. O'Shea filed his separate inventory enumerating the articles and the $200 claimed by him under section 4903, *supra.* Appellants objected to the surviving spouse receiving that property because it had been bequeathed to other legatees by his deceased wife, and claimed that, as O'Shea had accepted the land devised to him by that instrument, he had elected to take thereunder, and must renounce all claim to the chattels. O'Shea stands in the same light as though he had owned the disputed chattels at the time of his wife's death. In that event, as in the instant case, by asserting title to the chattels under the law, he would be claiming against, not under, the will. In cases like the one at bar the doctrine of election is actually that of compensation. 1 Pomeroy, Equity Jurisprudence (3d ed.), secs. 467, 468, 469; 2 Story, Equity Jurisprudence (13th ed.), secs. 1085, 1086; *Rogers v. Jones,* 3 Ch. Div. (Eng.) 688; *Bigland v. Huddleston,* in note to *Freke v. Barrington,* 3 Brown Ch. (Eng.) *274, *286; *Carper v. Crowl,* 149 Ill. 465; *Williams v. Williams,* 5 Gray (Mass.) 24.

Judge Story, in 2 Equity Jurisprudence (13th ed.), sec. 1079, and note, p. 426, refers to the principles of the civil law which do not permit the beneficiary in a will to receive any advantage therefrom if he takes against it. Mr. Swanston in his note to *Gretton v. Haward,* 1 Swan. Ch. (Eng.) 409, 444, comments upon the difficulties that may arise in cases of election where a bequeathed chattel may possess a value peculiar to the individual because of associations, but concludes that, unless the difficulty is unsurmountable, the doctrine of compensation will apply.

To the writer it seems that O'Shea, in asserting his legal rights to the enumerated property and the $200, has irrevocably elected to take against the will, and to hold the land devised to him, in trust, as far as may be necessary to compensate the other legatees for their disappointment in not receiving said chattels and money. It goes without saying that a county court is without jurisdiction to declare and make that trust effective with relation to real

estate. There is nothing upon which the decree of the county court can operate to satisfy the appellants, unless it has the power to divert the husband's title to the chattels and vest it in the complaining legatees. I agree with the Chief Justice that the policy of this state, as evidenced by the will of the legislature, forbids that assumption of authority.

The decree of the district court reversing that of the county court and directing the delivery to O'Shea of the disputed chattels should be affirmed, but without prejudice to any proper action by appellants for compensation.

LETTON, J., concurs in these views.

FAWCETT, J., dissenting.

The statute under which O'Shea claims the right to hold the picture of his deceased wife's former husband, and the wedding ring which her former husband gave her, and other ornaments bequeathed by her to her personal relatives, is section 4903, Ann. St. 1907. It reads as follows: "When any person shall die possessed of any personal estate or of any right or interest therein, *not lawfully disposed of by his last will,* the same shall be applied and distributed as follows: First, the surviving husband or wife, if any, and, if there be no surviving husband or wife, then the child or children, if any, of the deceased shall be allowed all the wearing apparel and ornaments and household furniture of the deceased, and all the property and articles that was or were exempt to the deceased at the time of his or her death, from levy or sale upon execution or attachment, *and* other personal property, to be selected by her, him or them, not exceeding two hundred (200) dollars in value, *and this allowance* shall be made to such surviving husband or wife or child or children, if any, as well when he or she or they shall receive provision made in the will of the deceased as when the deceased dies intestate." A careful study of the above provisions of the statute satisfies me that the legislature

intended to recognize the right of any person to dispose of all of his personal property by will, but that, in the event of his failing so to do, the surviving husband or wife should be permitted to take and hold, as against the heirs at law, "all the wearing apparel and ornaments and household furniture of the deceased, and all the property and articles that was or were exempt to the deceased at the time of his or her death, from levy or sale upon execution or attachment." Down to that point in the section of the statute quoted I am satisfied that the legislature intended the articles of personal property thus enumerated to go to the surviving husband or wife *only* when the same had not been disposed of by will. Then, realizing that upon the death of the party the surviving husband or wife might be left without immediate means of support, it further provided: "And *other* personal property to be selected by her, him or them, not exceeding two hundred (200) dollars in value." By "*other* personal property" it is clear that the legislature meant personal property *other* than wearing apparel, ornaments and other articles of personal property previously enumerated in the section. The word "other" means that, or it is meaningless. Having decided to give the surviving husband or wife other personal property not exceeding $200 in value, in order to make it absolutely certain that such survivor should be entitled to such $200, the legislature added: "And *this allowance* shall be made to such surviving husband or wife or child or children, if any, as well when he or she or they shall receive provision made in the will of the deceased as when the deceased dies intestate." It is clear to my mind that the legislature intended the words "*this allowance*" to apply only to the "*other* personal property," and that it never was the intention of the legislature that it should apply to the ornaments, wearing apparel, etc., first enumerated in the section under consideration. The "other personal property," it will be observed, is not to be selected from the ornaments and wearing apparel, because by the word "other" it is distinctly separated therefrom.

This $200 worth of personal property it is evident the legislature intended might be selected from personal property outside of what had just been described in the act, such as horses, cattle, moneys, notes, mortgages, and the like; and, in order that neither heirs at law nor creditors might deprive the survivor of that $200 worth of property by any rule of construction such as election or the like, the legislature added the words: "And *this allowance* shall be made to such surviving husband or wife or child or children, if any, as well when he or she or they shall receive provision made in the will of the deceased as when the deceased dies intestate." "In the construction of statutes, a limiting clause is to be restrained to the last antecedent." *Cushing v. Worrick*, 9 Gray (Mass.) 382; Sedgwick, Construction of Statutory and Constitutional Law (2d ed.) p. 226; *Pearce v. Bank of Mobile*, 33 Ala. 693; *School District v. Coleman*, 39 Neb. 391.

That the legislature intended to apply the exception in the case of one dying testate to the $200 worth of other personal property is a reasonable construction is borne out by the fact that that clause of the section under consideration designates the only property which would provide support for the survivor during the time consumed in the administration of the estate and prior to the time when the bequests in the will would become available to the beneficiaries. It being just as necessary that a survivor should have means with which to buy bread when the deceased dies testate as when he or she dies intestate, there is good reason why the exception should have been inserted. This is the thought which runs through all of the authorities. They are quite uniform in holding that it is beyond the power of a testator to deprive his widow or children of means of support during the pendency of probate proceedings and prior to the time when the bequests in the will become available. To my mind, there is no escape from the conclusion that the act under consideration was designed to provide means by which a survivor could obtain immediate temporary support, and that it

was not the intention of the legislature to take away from the owner of personal property his right to dispose of the same by will, but to simply burden the personal estate coming within the exception referred to, to the extent of providing such immediate, temporary support for the survivor. If I am right in this construction of the statute, then Mrs. O'Shea had a perfect right to bequeath the specific articles of personal property set out in her will, as was done, including her former husband's picture and the wedding ring which he had given her; and appellee must be satisfied with taking the lands devised to him by the will, and "other personal property"; that is, property other than the ornaments, jewelry, etc., to the extent of $200.

If I am right in this, it is not necessary to either overrule or distinguish *Brichacek v. Brichacek*, 75 Neb. 417, which could be easily done, or to discuss the doctrine of election, which could also be invoked to defeat a recovery by appellee in this case, which is so utterly without merit as to call forth the language of the Chief Justice in his opinion and which for emphasis I here repeat: "As we read the will, and observe that it confers upon the sisters of the deceased husband the ring given the testatrix by him, and to the son the portrait of his deceased father, the mind and conscience revolt and turn away from allowing the effort of appellee to thus ignore the expressed will of his deceased wife from whom he received such liberal provision. The will was, no doubt, made in the firm belief in the integrity of the husband and that he would respect her last wishes, and either decline to accept the provisions made for him and take what the law gave him, or accept those provisions as made." Appellee should not be permitted to "thus ignore the expressed will of his deceased wife from whom he received such liberal provision." Being unwilling to deal justly with the estate left by her, and with the son whom she committed to his care, the court should compel him to do so.

ARTHUR WILSON ET AL., APPELLANTS, V. BARTUS WILSON, APPELLEE.

FILED OCTOBER 9, 1909. No. 15,422.

1. **Deeds:** VALIDITY. A deed to real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey the land described therein, with the exception of the homestead of the grantor.
2. ———: DELIVERY. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the finding of the district court that the deed in question was in fact delivered to the grantee.
3. **Former Opinion Modified.** Former opinion, 83 Neb. 562, modified, and our former judgment adhered to.

REHEARING of case reported in 83 Neb. 562. *Affirmed as modified.*

BARNES, J.

Our former opinion in this case will be found in 83 Neb. 562, to which reference is made for a comprehensive statement of the facts. It was contended on the rehearing that the deed from Charles Wilson, deceased, to Bartus Wilson, the defendant herein, which was witnessed by no one but the wife of the grantor, was void, because she was incompetent to act in that capacity, and that we erred in our former opinion by holding that her certificate of acknowledgment to that instrument subsequently made rendered it a valid conveyance of the real estate in question. Upon a careful reconsideration of this case, we find that the authorities are somewhat divided upon that question; but, as the judgment of the trial court must be affirmed upon other grounds, we express no opinion on this point. It will be observed that this is an action at law to obtain an order of partition. During the progress of the trial it was found that the homestead of the deceased was included in the deed, and it was conceded that as to that

part of the premises the conveyance was void. Thereupon, in order to proceed with the trial, the parties stipulated that the 40 acres on which the family dwelling house was situated at the time the conveyance was made should constitute the homestead and at the conclusion of the trial the court found that the plaintiffs were entitled to have the homestead partitioned, but that the remainder of the premises was conveyed by the deed in question to the defendant, Bartus Wilson, and judgment was rendered accordingly.

Counsel first claims that the deed is void for want of proper acknowledgment. We think that this contention cannot be sustained. In *Harrison v. McWhirter*, 12 Neb. 152, it was said: "A deed of real estate, executed, witnessed and delivered, is effectual to pass title, though not lawfully acknowledged or recorded." In *Horbach v. Tyrrell*, 48 Neb. 514, we held that the functions of an acknowledgment are twofold: First, to authorize the deed to be given in evidence without further proof of its execution; and, second, to entitle it to be recorded. And unless the real estate conveyed or incumbered is the homestead of the grantors, an acknowledgment is not essential to the validity of the conveyance. This rule was followed and approved in *Holmes v. Hull*, 50 Neb. 656; *Linton v. Cooper*, 53 Neb. 400; *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133; *Morris v. Linton*, 61 Neb. 537. "As between the parties, in the absence of any statutory provision making the acknowledgment an essential part of the instrument, the title passes immediately upon the execution and delivery of the instrument; and, as against the grantor, his heirs and devisees, such instrument is as valid without an acknowledgment as with one. In other words, there is no necessity for acknowledgment as between the parties." 1 Cyc. 514. This rule is supported by many cases decided by this court. There is no statute in this state requiring acknowledgment of a deed to real estate which does not convey the homestead, except to entitle it to be recorded, and we are of opinion that the district

court upon this point properly held that the deed in question was sufficient to convey all of the premises described therein, except the homestead of the grantor.

It is next contended that the wife of the grantor was an incompetent witness to the execution of the deed in question, and, as it was witnessed by her alone, it is void, and conveys no title to the defendant. Whether the wife of the grantor was a competent witness to the execution of the deed need not now be determined. In *Prout v. Burke,* 51 Neb. 24, it was held that a mortgage, not on the homestead, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed. In *Holmes v. Hull,* 50 Neb. 656, it was said: "A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagors, is valid between the parties and those having knowledge of its existence, although not lawfully acknowledged or witnessed." In *Pearson v. Davis,* 41 Neb. 608, we held that a deed to real estate, executed, acknowledged and delivered by the grantor, is valid between the parties, though not witnessed. We think, therefore, we may safely say that an unacknowledged and unwitnessed deed, if executed and delivered, is sufficient to convey title; that its validity cannot be questioned by the parties or their heirs at law, and we have no hesitancy in applying the rule in this case, because the plaintiffs are none other than the legal heirs of the grantor.

Plaintiffs' further contention is that, the deed being void as to the homestead, it is void as to the remainder of the land described therein. Upon this point it was said in our former opinion: "Thompson, Homesteads and Exemptions, secs. 476, 477, announces the rule adopted by a great majority of the courts that a deed or mortgage executed by the husband alone, which conveys the homestead and other property, is void only as to the homestead estate, and operates as a good conveyance of property in excess of the homestead. This is the view seemingly taken by this court in *Whitlock v. Gosson,* 35 Neb. 829." This rule was again recognized in *Teske v. Dittberner,* 70 Neb. 544,

113 Am. St. Rep. 802. We therefore adhere to the rule announced in our former judgment upon this point.

Plaintiffs also contend that the district court erred in finding that the deed in question was delivered by the grantor to the defendant Bartus Wilson. It is conceded that the possession of a deed by the grantee, in absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption (*Roberts v. Swearingen,* 8 Neb. 363; *Brittain v. Work,* 13 Neb. 347); but it is insisted, however, that the circumstances disclosed by the record in this case overcome the presumption. The circumstances relied upon are the confidential relation between the parties, and the fact that at the time the deed was executed the defendant and the grantor, who were father and son, were living together in the same house, or as one family, and the opportunity was thus offered to the defendant to surreptiticusly, and without the knowledge of the grantor, obtain possession of it. An examination of the record, however, discloses that at or about the time of the execution of the deed the defendant made a life lease, to his mother, of the premises in question. It also appears that a part of the consideration for the conveyance was the agreement of the defendant to care for, support and maintain his father and mother so long as they should live; and it is not claimed or contended that he did not fully and properly perform his part of the agreement. Again, it will not be presumed, in the absence of any evidence, that the defendant would commit an unlawful act by abstracting from his father's papers a deed which had never been delivered, and publish the same as the genuine deed of his father. It must also be borne in mind that the deed in question was executed on the 6th day of May, 1891; that the defendant from that time until the death of his father and mother continued to reside upon the premises in question, and thereafter exercised all his rights of ownership and dominion over the same; that his mother died in 1894; and that he remained in undisturbed possession thereof with-

out claim of ownership on the part of the plaintiffs until the 30th day of December, 1904, when this action was commenced. It further appears that the plaintiff, Arthur Wilson, since the execution of the deed in question, has rented the premises from the defendant and paid him the rent therefor, thus tacitly acknowledging his ownership. He also testified on the trial that he saw the deed some time after the month of October, 1893. Finally, we find from the record that James Wilson, who was made a party plaintiff in this case without his knowledge or consent, testified upon the trial that when the estate was probated, which was some time in the fall of 1893, he had a conversation with one of the plaintiffs, in which his assistance was solicited to obtain a share of the property. His testimony is as follows: "He wanted me to go down. He said that Bart claimed to have a deed for the place, and said he thought that we should all have an equal share in the place, and he wanted me to go down and help them out. I told him that I thought Bart had earned the place then, and that, as far as I was concerned, I was willing he should have it; that I would have nothing to do with it." It therefore seems clear that the finding and judgment of the district court that the deed was in fact delivered to the defendant are amply sustained, not alone by the ordinary presumption of delivery, but also by sufficient competent evidence.

For the foregoing reasons, our former opinion, as modified herein, is adhered to, and the judgment of the district court is

AFFIRMED.

HARM B. HESPIN, APPELLANT, V. JOHN F. WENDELN ET AL., APPELLEES.

FILED OCTOBER 9, 1909. No. 15,757.

1. **Specific Performance: EVIDENCE.** Direct evidence that a testator made an oral contract with his stepson that he should remain in the family, assist in managing the testator's business, carry on the work of the farm, and perform the duties of a son until he should become 21 years of age, on condition that at that time he should receive a team, harness and wagon, and at the death of the testator share equally with his own children in his estate, if clear and satisfactory, will entitle the plaintiff to a decree for specific performance where it is apparent that he has fully performed the contract on his part.
2. **Evidence** examined, and *held* sufficient to require a finding and judgment for the plaintiff.

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

Pitzer & Hayward, for appellant.

S. P. Davidson and *Corydon Rood, contra.*

BARNES, J.

This action was brought in the district court for Otoe county to enforce the specific performance of an alleged verbal contract between the plaintiff and one John A. Wendeln, deceased. The trial resulted in a finding and judgment for the defendants, and the plaintiff has appealed. This brings the case before us for a trial *de novo*, and we are required to make our finding and form our conclusion from the evidence contained in the record, without particular regard to the findings and judgment of the trial court.

It appears that the plaintiff was born out of wedlock as the natural son of his mother about nine years before her marriage to John A. Wendeln. The contract sought to be enforced and the facts on which plaintiff bases his claim

are set out in the petition, in substance, as follows: The plaintiff's mother and John A. Wendeln were married in Etzel, Germany, when plaintiff was nine years of age, and moved immediately after their marriage to Otoe county, Nebraska, where they lived to the time of their respective deaths; that after their removal to America the plaintiff remained in the family of his mother and stepfather, and worked upon the farm where they lived, without wages, until after he became of age; that about a year after that time he received from his stepfather a team, harness and wagon. It is further alleged that the plaintiff never knew his father; that his mother received from his own father a considerable sum of money, at least $200 in amount, to be used for plaintiff's benefit, and to assist his mother in caring for him; that she worked out and provided for herself, and upon her marriage to John A. Wendeln this money was used in bringing the family to America, and to start them in farming; that from the time of their arrival in America the plaintiff took his stepfather's name, and was known by that name during his boyhood, at home, at school and generally among the people of the community where he lived; that he habitually called his stepfather "Pa," and was called by him "My Harm, my son, and my child"; that the plaintiff after coming to America was permitted to attend school a few months, and learned to speak and write the English language readily; that he was kept at work almost constantly in assisting his stepfather in breaking out land purchased, in bringing the same into a state of cultivation, and in the farm work generally; that not only in this way did he assist his stepfather, but he also assisted him in business matters and in the management of the farm, so that his stepfather was dependent upon him and trusted him as his own son. The petition further alleged that during the year 1878, when plaintiff was 16 years of age, he was offered employment in a drug store in the village of Syracuse, on terms such as would enable him to attend school, complete his education, and make a living for himself; that he desired to

accept this offer, and his mother was willing he should do so for his own good, but his stepfather insisted that he could not get along without him, and, in requesting plaintiff to remain with him, promised plaintiff and his mother that, if he would remain upon the farm and help him as he had theretofore done until he should reach the age of 21 years, he would then give him a team, harness and wagon to enable him to begin farming for himself, and that plaintiff should share equally with his own children, who are defendants herein, in whatever property he should have at the time of his death; that, relying upon this agreement, the plaintiff gave up the employment mentioned, and continued to work on the farm with and for his stepfather without wages; that from that time on plaintiff did a large part of the management and work of the farm until he was nearly 22 years old, at which time his stepfather gave him a team, harness and wagon according to the terms of his agreement, and in part fulfilment of his contract; that thereafter, and up to the time of his death, his stepfather continued to rely upon the plaintiff for assistance and advice, and frequently expressed to him and to others his regard for plaintiff as his own son, and his intention to so treat him in the division of his property at the time of his death; that their relations and mutual obligations to each other and his stepfather's dependence upon him formed a part of the inducements for making the agreement set out and the consideration therefor. The petition further alleged that the property left by John A. Wendeln at the time of his death was largely accumulated as a result of the labor and assistance given him by plaintiff in the early times when the land to which they had come and the country where they lived was new. Full and complete performance was alleged on the part of plaintiff, together with a failure to perform on the part of the deceased. Plaintiff prayed for specific performance of the contract, and a decree setting apart to him one-fourth of the assets of the estate, and for general equitable relief.

John F. Wendeln, Anna S. Wendeln and Metha Juilfs, together with Theodore Frerichs, the executor of the estate of the deceased, are the defendants. By their answers they deny both generally and specifically all of the allegations of the petition. They further plead the statute of frauds, in that no writing of any kind was ever made or signed evidencing any such contract, and allege want of consideration. It is further alleged by the answers that all of the property in question above the amount and value of $1,200 was accumulated by the defendants and their father after plaintiff became of age; and that the team, harness and wagon mentioned in the plaintiff's petition were given to him by his stepfather as an act of kindness, gratuitously performed, to aid the plaintiff in starting in life for himself. The reply admits that there was no writing evidencing the contract alleged, but denies each and every other allegation contained in the answers.

An examination of the record discloses that there is no controversy as to the following facts: John A. Wendeln died in Otoe county, Nebraska, in July, 1906, leaving an estate, consisting of real and personal property, of the value of $25,000, incumbered by an indebtedness of $1,008; that the defendants John F. Wendeln, Anna S. Wendeln and Metha Juilfs are the children of John A. Wendeln and his wife, the plaintiff's mother, and therefore the plaintiff is the stepson of the deceased, and half brother of the above named defendants; that the plaintiff was born in the year 1862 in the village of Etzel, Germany, and bears his mother's maiden name, she being unmarried at the time of his birth; that the defendants above named, together with Theodore Frerichs, the executor of the estate, are the only persons interested therein; that by the last will and testament of John A. Wendeln division of his property was made among his own children, with a legacy of $300 only to the plaintiff; that plaintiff's mother and John A. Wendeln were married in May, 1871, in Etzel, Germany, when the plaintiff was nine years of age, and, together with plaintiff, removed immediately to Otoe

county, Nebraska; that plaintiff remained in the family of his mother and stepfather, and worked upon the farm where they lived, without wages, until he became of age, and after that time he received from his stepfather a team, harness and wagon, as alleged in the petition.

It further appears that the only question about which there is any serious controversy is whether or not the contract relied on by the plaintiff was made as stated in his petition. The evidence on that question is, in substance, as follows: One William Kronsbein testified in effect that about the first of June, 1878, he made a trip with John Wendeln, his brother Herman, and the plaintiff to the village of Syracuse; that while there he heard Mr. Green, who was the proprietor of a drug store in that village, offer the plaintiff a place in his store. The witness said: "I heard all this talk in the drug store, and I told John Wendeln on the street that Harm (meaning the plaintiff) was going to leave, and that was all that was said at first. And then on the road John commenced talking to Harm. He says, 'Well, Harm, Bill told me you was going to leave.' 'Well,' Harm says, 'Yes, I am going to work for Green.' The old man says, 'Harm, if you leave me I am lost'; and then he made the agreement with him. He says, 'I give you a team, wagon and harness, and start you out, if you stay with me until 21 years old.' And I told him, 'It is better to write it out in black and white.' And John says, 'That ain't necessary, we got two witnesses. You be a witness and my brother Herman.' That was all that was said at first. Then we crossed the creek, and on the other side he says, 'Well,' he says, 'I do better, Harm. If you stay with me, and work like you always did, you get the same as them other children. You are my boy, as good as them others.' That was all that was said on the road. Now, the next morning, well, he says that Harm would stay. He told his wife just the same as he told it on the road. And George Wilke asked me if he made that agreement with Harm about the wagon and harness and the rest, and I told him, 'Yes.' * * * And John Wendeln

come in himself, and we talked it over, and he says, now Harm was going to stay just the same, team, wagon and harness and his share."

A witness by the name of Fritz Pahde testified that subsequent to the year 1878 he had a talk with John A. Wendeln, in which the witness said: "This Harm ain't your boy." And Wendeln replied: "Yes, it is my boy, even if I am stepfather to him. I call him my boy anyhow." "'Well,' he says, 'I call him my boy, and he is just as good as any of my other children.' He says, 'Whenever he is around he is just as any of the rest of them, and he will get just as much as any of the rest of them.'"

One John Badberg testified that he had a talk with Wendeln about Harm Hespin. He said: "He told me, 'That boy works hard, and I couldn't get along without him.' And he says, 'I never forget him, when I get good luck, and something left when I die, he gets his part just as the other ones.'"

John Henrichs testified that, in a conversation with the deceased about Harm Hespin, the deceased said: "He wanted Harm to live there yet, and Harm was a good boy, he treat him all the time good, and Harm get his share just the same as other people. That is what he told me." On cross-examination the witness said: "Well, he told me that Harm was a good boy, and he like to give him just the same as them other ones."

The plaintiff was himself permitted to testify over objections, in substance, as follows: "I heard a conversation between my father and my mother. Father told her I was going to leave home, and that they couldn't spare me. He said, 'I have made Harm an offer, and I think it is good enough. It is the best I can do. What do you think about it?' She says, 'What is it?' He says, 'I have offered him a team, harness and wagon, and if he will stay until he is 21, and if there is any property after you and me are dead and gone, I told him he could have an equal share with the rest of the childen.' Mother then came to me and talked to me, and said, 'Harm, we can't very well get along

without you. We are now making money, making good headway, and I think father has offered you a good thing here. I would like to have you stay with us.' And I says, 'All right, I will do so.'" The plaintiff also testified, over objections, that he heard a conversation between one Stromer and his stepfather as follows: "Mr. Stromer was standing on the sidewalk in there, and drank a glass of beer. We generally drank a glass of beer when we went to town. We walked up to him, and Mr. Stromer says, 'Are you sick, John.' Father says, 'Yes, I am not feeling well.' 'Well,' he says, 'John, why don't you quit work. You don't have to work, you got plenty.' 'No,' father says, 'I got to work. I have got to get some more.' Stromer says, 'You have got those three children, you got enough for them.' Father says, 'No, I have got four children. This boy is just the same as the rest of my children, and after I die he gets the same as the rest of my children.' That was the conversation."

It appears that the trial court refused to consider this testimony because he thought it was incompetent. However, in addition to the evidence above set forth, there were several facts and circumstances testified to by other witnesses which tended in a measure to corroborate the evidence of Mr. Kronsbein as to the making of the contract in question, and there is nothing in the record which shows or tends to show that the foregoing testimony was false or unreliable in any particular. As shown by the record, nearly all of the witnesses were Germans, and, although they could not speak the English language correctly, yet their evidence bears the stamp of truth, and is convincing in its effect. We are therefore of opinion that it meets the requirement of the rule that to establish such a contract the evidence must be clear and satisfactory.

In *Kofka v. Rosicky*, 41 Neb. 328, 25 L. R. A. 207, it appeared that a girl about 17 months old was given by her parents to her uncle and aunt under an agreement that they would adopt her and rear, nurture and educate her; that she was to be as their own child, and at their death

she was to receive or be left all the property which they might own. She lived with them until they died some 10 years afterward, took their name, did not recognize or know her own father or mother in the true relation, but knew them as, and called them, uncle and aunt, and knew and recognized her uncle and aunt as father and mother. They died possessed of real estate in the city of Omaha which they did not by will leave to her. It was held that she was entitled to a decree giving her the title to the property by way of specific performance of the contract.

In *Harrison v. Harrison,* 80 Neb. 103, it appeared that one James Harrison owned a quarter section of land in York county, Nebraska; that he was a widower, and the father of William A., Hattie E., and Frederick J. Harrison; that in the spring of 1893 the father and Frederick J. moved upon the farm in York county, and lived there until 1898; that Frederick J. married, bringing his wife to the farm; that at the time they moved to the farm in question Frederick J. had a position in Denver, where he was doing well; that, in order to induce him to abandon his position and live with him upon the farm, the father agreed to give him the farm at the time of his death. After the father's death Frederick J. and his wife continued to live on the farm, and claimed to own the same by reason of his having complied with the terms of the agreement. Suit was brought by his brother and sister to quiet their title to two-thirds of the land and partition the same. It was held that, by having complied with the terms of the contract, Frederick J. became the owner of the land, and his contract was specifically enforced.

In *Peterson v. Bauer,* 83 Neb. 405, it appeared that one John H. Bauer adopted Sarah Matilda Nix when she was eight years of age under an agreement with her father that he would take her as his own child, care for her, school her, and at his death she should share his estate equally with his son. She lived with Bauer and his wife, was baptized in his name, faithfully performed the services of a daughter, and remained with them until she was

about 26 years of age, when, with Bauer's consent, she married a man by the name of Peterson. Bauer failed to carry out the agreement on his part, and after his death she brought an action for specific performance of the contract. It was held that she was entitled to recover one-half of Bauer's estate.

After a careful examination of the evidence we are satisfied that the facts of this case are brought well within the rule announced by the foregoing decisions. We therefore find that the contract in question was made in form and substance as alleged in the plaintiff's petition.

It is urged, however, that there was not sufficient performance on the part of plaintiff to take the contract out of the statute of frauds. We do not so view the evidence. The plaintiff in this case was not bound to live with, or render any services to, his stepfather. He was at liberty, if he saw fit, to abandon the home and seek employment and advancement elsewhere. It appears, however, that he lived with the deceased as a member of his family, and performed all the duties of a son; that his stepfather relied on him in a large measure to manage his business; that the plaintiff worked on the farm and contributed materially to the accumulation of the property in question; that, in consideration of the agreement, he refrained from entering a congenial and profitable employment, one in which he could have obtained a business education, and which offered him every opportunity for material advancement; that he practically carried on the work of the farm until he was 21 years of age; that, after the death of his mother, he returned again to live with, and assist, his stepfather, who insisted that he could not get along without him, where he remained for about a year. In fact, we are unable to see what more the plaintiff could have done to have fully performed the agreement in question on his part.

We therefore find upon the issues joined generally for the plaintiff, and that he is entitled to a specific performance of the contract, as prayed for by his petition.

The judgment of the district court is therefore reversed and the cause is remanded, with directions to that court to enter a decree in favor of the plaintiff, as prayed for in his petition, and in accordance with the views expressed in this opinion.

REVERSED.

ROOT, J., not voting.

LETTON and FAWCETT, JJ., not sitting.

HARVEY M. DUVAL ET AL., APPELLEES, V. ADVANCE THRESHER COMPANY, APPELLANT.*

FILED OCTOBER 9, 1909. No. 15,464.

Pleadings: CONSTRUCTION. Under the rule that pleadings will be construed most strongly against the pleader, the pleadings in this case examined, and the action *held* to be upon a contract for commissions. *Held*, further, that as to instalments of commission not due no recovery can be had at this time.

REHEARING of case reported in 83 Neb. 593. *Judgment modified and remittitur ordered.*

LETTON, J.

The only question in the case is whether the judgment is supported by the pleadings, no bill of exceptions having been preserved. The action is to recover commissions alleged to be due upon an agency contract for the sale of certain machinery. The petition alleges the contract of agency, the sale of goods by the plaintiffs for the defendant thereunder, payment for the goods by the purchaser, and the refusal of defendant to pay the commissions due, and declares that there is now due the sum of $504.05. The amended answer, upon which the case was

* See opinion on second rehearing, p. 184, *post*.

tried, admits the employment of the plaintiffs under a written contract of agency which is set forth, pleads that under the contract commissions were only payable when the goods were fully paid for, denies that plaintiffs made the sale, pleads that the sale was made in disregard of certain provisions in the contract, alleges that the notes taken for the goods have not been paid, and denies that the defendant is indebted to the plaintiffs in any sum whatever.

The allegations of the answer, denying that plaintiffs made the sale, and alleging that the commission is not due because the notes taken for the sale have not been paid, are inconsistent and contradictory. Under the rule that pleadings should be construed most strongly against the pleader, this answer amounts to an admission of the agency, the sale of the goods by the plaintiffs at less than the contract price, and a plea that the action is prematurely brought for the reason that the notes taken for the goods have not been paid.

The reply alleges that under the contract it was agreed that nonnegotiable commission certificates were to be issued by the defendant and delivered to the plaintiffs, representing commissions upon each instalment of purchase money, payable upon payment of the instalment, and that defendant refused to carry out this agreement, for the alleged reason that plaintiffs had not assisted in the sale. The reply further alleges that "all notes now due on said sale have been collected and paid, and there has been paid three instalments of the sum of $830.50, more than one-third of the total."

Upon the former hearing the pleadings were examined, and the action held to be upon the contract, and, since the recovery was in excess of the amount shown to be due by the pleadings, the judgment was reversed. At the present hearing it is strongly contended by the plaintiffs that the allegations in the reply with reference to the refusal of the defendant to issue commission certificates for each instalment to fall due pleaded a breach of the

entire contract, for which plaintiffs were entitled to recover damages, and therefore supported the judgment. It is probable that in a proper action the whole amount of damages recoverable for a breach of the contract might be recovered without waiting for each instalment of commission to become due, since the plaintiffs, having executed the contract on their part, would be entitled to recover whatever damages might accrue from the defendant's failure to perform. In such case the measure of damages would be the actual value of the commission certificates. This is as far as the cases cited by plaintiffs go. However, it is unnecessary to decide this point, for the reason that, according to the rule which we have just applied against the defendant with reference to the answer, the inconsistent allegations of the reply must also be construed most strongly against the pleader, and thus construed, and in accordance with the issue made by the petition and answer, the reply is an admission that the defendant's liability is on the contract, and not for a breach of it, and an allegation that only $830.50 has been paid upon the sale.

In the former opinion no mention was made of the averments of the reply with reference to the refusal to deliver commission certificates, yet, in the view we take of the pleadings, this allegation was properly disregarded, and the holding that the whole amount was not recoverable at the time the action was brought is the only one which is permissible as the pleadings stand. We think, however, that the plaintiffs were entitled to recover and the pleadings will support a judgment for the amount then due, being the agreed commission upon $830.50, which is $116.10, with interest from the time of the beginning of the action, amounting in all to $170.45.

The former judgment is therefore modified so that it will be affirmed without prejudice to future actions for the commission instalments when they become due, upon the condition that the plaintiffs within 30 days file a remittitur of $346.80, with interest from the date of the

judgment, with the clerk of this court; otherwise, the judgment of the district court is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

The following opinion on second motion for rehearing was filed December 14, 1909. *Former judgment modified:*

Appeal: REMITTITUR. Where this court compels a judgment creditor to remit part of his judgment as a condition to an affirmance of his case, and it is made to appear that the judgment has been executed, the creditor will be compelled to make restitution of the money he has collected in excess of the amount to which he is entitled, or, failing to do so, the entire judgment will be reversed.

PER CURIAM.

Defendant has filed a second motion for a rehearing, and a motion for a modification of the opinion and judgment of this court should a rehearing be denied. A supplemental transcript has been filed, and we are therein advised that the garnishee paid to the clerk of the district court $514.15, and plaintiffs received therefrom $473.20. Defendant suggests that, if we do not grant a rehearing, we should compel plaintiffs to pay the clerk for its use the amount of the remittitur. Plaintiffs argue that since defendant is a nonresident of the state, and subsequent to the entry of the judgment in district court collected $1,100 of the purchase price of the machinery referred to in this case, whereby further commissions became due them, if they are not permitted to retain defendant's money they cannot collect their dues. Plaintiffs also show that they are solvent. To the extent of the remittitur imposed by us and filed by plaintiffs, the judgment of the district court is vacated. To the extent that plaintiffs' property was taken to satisfy the sum remitted from the judgment, it was wrongfully taken and defendant is entitled to restitution. *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320. Had the facts been brought to our attention upon

the former hearings, we would have imposed that further condition in the order last made. We shall go no further, however, than to direct plaintiffs to pay to the clerk of the district court the money collected by them in excess of the $170.45 to which they are entitled. That defendant is a nonresident, that plaintiffs may be solvent, and have a further unliquidated claim against defendant does not, in our judgment, work an exception to the rule.

Our judgment is therefore further modified so that, unless plaintiffs shall pay to the clerk of the district court in this case on or before January 15, 1910, $302.75, the motion for a rehearing will be granted, the judgment of the district court reversed and the cause remanded for further proceedings; but, if said money is thus paid, and the certificate of the clerk of the district court filed with us showing said fact, the motion for a rehearing will be overruled; defendant to pay the costs taxed in this court on the motion herein considered.

JUDGMENT ACCORDINGLY.

ALBERT JONES V. STATE OF NEBRASKA.

FILED OCTOBER 9, 1909. NO. 16,139.

Questions of fact are for the jury, and a verdict or finding by them on a question of fact, where the testimony is conflicting, will not be reviewed.

ERROR to the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

F. A. Berry, for plaintiff in error.

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

LETTON, J.

Plaintiff in error was convicted of operating an automobile in the city of Wayne at a rate of speed in excess of the statutory limit. His principal contentions in this court are that the verdict is not sustained by sufficient evidence, that the court erred in refusing to strike out the testimony of certain witnesses, and that the verdict of the jury was the result of prejudice.

The evidence for the prosecution is not very satisfactory to the mind of the writer of this opinion, but it was sufficient to satisfy the jury that the statute had been violated, and, if there is sufficient evidence to sustain the verdict, it must stand, whatever the opinion of this court might be upon the same testimony if it were its duty to pass upon the facts. The testimony of the complaining witness, Brown, was direct and specific that the rate of speed was 15 miles an hour or more, and he qualified himself as being competent to express his opinion upon this point. The evidence as to the rapid running of the automobile is corroborated to some extent by other witnesses.

It is said there is no testimony that the *locus in quo* was within "the close built up portion" of the city of Wayne. Mr. Brown testified, however, that the place where he saw the defendant was in the city of Wayne, and gave other testimony showing that at and near the locality the street was closely built up with buildings used for business and residence purposes. This testimony is uncontradicted.

The testimony on the part of the defense was that the rate of speed was within the statutory limit of 10 miles an hour. The evidence would sustain a verdict either of conviction or acquittal, depending entirely upon which set of witnesses the jury found most worthy of credit.

It is said that the court erred in refusing to strike out the evidence of certain witnesses. This evidence, in substance, was that at the time and place charged the auto-

mobile was going at a rapid rate of speed, though the witnesses were unable to estimate the number of miles an hour. It was no error to refuse to strike this testimony, since it was of some slight probative value.

It is argued that the verdict is the result of the prejudice of the jury against the use of automobiles. It is not impossible that the verdict is unjust and the result of prejudice, but we cannot so declare when there is sufficient evidence to support it and no extraneous facts shown which cast any reflection upon the good faith or impartiality of the jury.

The judgment of the district court is right, and must be

AFFIRMED.

STATE, EX REL. DON L. LOVE, APPELLANT, V. P. JAMES COSGRAVE, COUNTY JUDGE, APPELLEE.

FILED OCTOBER 9, 1909. No. 16,281.

1. **Statutes:** CONSTRUCTION. In order to determine the meaning of the language of an act of the legislature, it is proper to examine the course of legislation upon the same general subject, and to consider in what connection and with what context it has theretofore been employed.

2. **Cities:** ORDINANCES: POWER TO ENACT: CONSTRUCTION. Where power has been granted by the legislature to a municipal corporation to enact ordinances for certain purposes and the city acts within the limits of that power, its action will be of equal force within the corporate limits as if taken by the legislature itself. And the same principles will apply in the construction of such an ordinance as if it were a special statute upon the same subject.

3. ———: CITY COUNCIL: QUESTION OF ELECTION OF MEMBERS. An act of the legislature giving the city power by ordinance "to decide contested elections" does not make the city council the sole judge of the election of its own members.

4. **Quo Warranto:** CONCURRENT REMEDIES. Under the constitution and laws of this state, the remedy of contest of elections and *quo warranto* are cumulative and concurrent. *State v. Frazier*, 28 Neb. 438.

5. **Statutes:** GENERAL AND SPECIAL ACTS. While a special act upon a subject usually modifies a general act on the same subject, still, if a remedy provided by the later act is not incompatible with the remedy provided by the earlier and more general law, both acts may stand.

6. **Elections:** CONTESTS: CUMULATIVE REMEDIES. Where a new remedy is provided by statute for an existing right, and it neither denies an existing remedy, nor is incompatible with its continued existence, the new remedy should be regarded as cumulative, and the person seeking redress may adopt and pursue either remedy at his option.

7. ———: ———: ———. The right to contest the election of a city officer before the city council of Lincoln under an ordinance of that city and the right given by the general election law to contest the election of city officers in the county court are cumulative remedies, and the contestant may elect to proceed in either manner.

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

Flansburg & Williams, for appellant.

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

LETTON, J.

At the general municipal election held in the city of Lincoln on the 4th day of May, 1909, Don L. Love, relator, and Robert Malone were candidates for the office of mayor of the city of Lincoln. As a result of the canvass of the returns of the election made by the mayor and council as a canvassing board, it was declared that the relator had been duly elected to the office of mayor of the city, and a certificate of election was issued to him by the city clerk. He thereupon took the oath, entered upon the possession of the office and is still acting in that capacity. On the 14th day of May, 1909, Robert Malone filed his petition in the county court of Lancaster county, before P. James Cosgrave, county judge, seeking to contest the election of the relator to the office of mayor. A petition was filed, and summons issued and served upon the relator, who

objected to the jurisdiction of the court on the ground that the determination of the right to the office of mayor was vested exclusively in the mayor and council of the city of Lincoln, and that their decision declaring him entitled to the office was conclusive. This objection to the jurisdiction was overruled, and the cause retained for trial, whereupon the relator brought this action in the district court for Lancaster county, praying that a peremptory writ of mandamus be issued directed to the respondent, P. James Cosgrave, as county judge, commanding him to dismiss said contest of Robert Malone against Don L. Love for want of jurisdiction, and to proceed no further in the case.

The petition alleged that prior to the election there was in full force an ordinance of the city prescribing the manner of contesting elections for city officers before the city council, and providing that the certificate of election should be withheld until the matter was finally determined by that body, when it should be issued to the party found to be entitled thereto; that Malone was present at the canvass of the vote, made no objection thereto, and gave no notice of any intention to contest the election. It further alleges that the court was without jurisdiction to determine the contest after the certificate of election had been issued to the relator; that the hearing, if had, will extend over a long period of time, will require the examination of upwards of 8,000 ballots and over 50 poll-books and the examination of many witnesses, and will cause much useless expense; that, the court being without jurisdiction, no valid judgment for costs could be rendered in his favor, and that the proceedings in all particulars would be void. The answer of the respondent substantially admits the allegations of the petition, except those with respect to want of jurisdiction, which, it pleads affirmatively, rests alone in the county court. Upon these issues the district court found that the county court had jurisdiction, and dismissed the proceedings, from which judgment this appeal has been taken.

By the provisions of section 129 of the act under which the city of Lincoln is now governed, the city is granted power by ordinance "to appoint judges and clerks of election provided by ordinance for the election of city officers, and prescribing the manner of conducting the same, and the returns thereof, and for deciding contested elections, and for holding special elections for any purpose herein provided, and to fix a compensation for all officers of election." Laws 1901, ch. 16, sec. 129, subd. 48; Ann. St. 1907, sec. 8076. A similar provision was included in the charter act which was in force in 1895. In the latter year an ordinance was adopted by the city, which is set forth in relator's brief, as follows: "That whenever any candidate for any office, or any elector, chooses to contest the validity of an election of any officer, he shall, within two days after the closing of the polls give notice in writing to the person whose election he intends to contest of his intention so to do, a copy of which notice shall be filed with the city clerk before the time fixed for the canvass of the returns as hereinbefore provided for; and the said council shall, immediately after the canvass of the returns, or at a subsequent time to be fixed by them, and before the result of said canvass is declared, proceed to hear the contestants, as hereinbefore provided. All such contests before the city council shall be governed by and conducted in accordance with the general statutes of the state of Nebraska relating to contests of election, and when the mayor and council shall receive notice of any contest, they, together with the city clerk, shall withhold the certificate of election until the matter shall be finally determined by the council, when the certificate of election shall be issued in accordance therewith." Section 71 of the general election law (Comp. St. 1907, ch. 26) provides: "The county courts shall hear and determine contests of all other county, township and precinct officers, and officers of cities and incorporated villages within the county." It is contended by the relator that the act of 1887, providing for the organization of the government of cities, and con-

ferring power upon the council to pass ordinances for "deciding contested elections," which power was exercised by the passage of the ordinance above referred to, constituted a repeal, within the corporate limits of the city of Lincoln, of the general law providing for contests of election of city and village officers, and that the jurisdiction thereby conferred upon the city council is exclusive, while the respondent contends: First, that the ordinance itself evinces no such purpose; second, that it is beyond the legal power of a city to repeal by ordinance a general law of the state.

In order to determine the meaning of the language used by the legislature, it is proper to examine the course of legislation upon the same general subject, and to consider in what connection and with what context it has been theretofore employed. The exact language we are considering, first appears in the legislative history of this state in an act entitled "An act to incorporate cities of the second class," approved March 1, 1871, by which act the city was given power to enact ordinances "to appoint judges of all elections provided by ordinance for the election of city officers, and prescribing the manner of conducting the same, and the return thereof, and for deciding contested elections, and for holding special elections for any purpose herein provided." Laws 1871, p. 26, art. III, sec. 13. In March, 1879, a new act was passed (laws 1879, p. 193), omitting the provision giving power to the council to decide contested elections, and at the same session the present general election law was passed (laws 1879, p. 240), which confers upon the county court the power to hear and determine contests of the election of officers of cities and incorporated villages within the county, and which further provides the method of procedure in the courts. At the end of this session of the legislature, therefore, the power to decide contested elections as to city officers had been taken from the city council and vested in the county court. In the act of March 1, 1883, which provided for the organization and government of cities

containing between 10,000 and 25,000 inhabitants, the language of the earlier act was again inserted (laws 1883, ch. 16, sec. 52, subd. 12), and in 1887 an act providing for the government of cities of more than 25,000 and less than 60,000 inhabitants was passed (laws 1887, ch. 11, sec. 68, subd. 26), containing the identical language used in the acts of 1871 and of 1883. No change in this respect has since been made.

Up to the time of the passage of the general election law in 1879 no tribunal was provided by statute in which a contest for the election of city officers could be had, unless one had been established by the city council under the general power to enact ordinances "to decide contested elections." In 1879 this power was withdrawn, but in 1883 it was again conferred, and, in our opinion, still exists.

It is said, however, that it is beyond the power of the city to repeal by ordinance a general law of the state. There is no doubt that this is true with reference to some general laws, but it is not true as to all. Penal statutes passed under and by virtue of the police powers of the state may not be limited or cut down in their operation by ordinances passed by municipal corporations under the police power. It could never be the intention of the legislature to grant powers which might be used to abrogate and nullify the existing general laws upon such subjects, though it has been held the city may impose additional penalties. But as to such matters as might be, and have in the past been, committed to the control of the corporate authorities, but as to which the state has later assumed control, an act reconferring the power upon the municipal authorities is not inconsistent with the general law, and an ordinance passed in pursuance of such power will have the same effect within the limits of the city as if it had been passed by the legislature itself. 1 Smith, Modern Law of Municipal Corporations, sec. 522; Ingersoll, Public Corporations, p. 236; 28 Cyc. 365, 366. If the ordinance is repugnant to the general law, the general law

will yield, or, if not repugnant, the general law may be modified. This is upon the recognized principle that general legislation upon a particular subject must give way to special legislation upon the same subject. *State v. Mayor,* 33 N. J. Law, 57; *State v. Clarke,* 25 N. J. Law, 54; *In re Snell,* 58 Vt. 207; *Goddard, Petitioner,* 16 Pick. (Mass.) 504, 28 Am. Dec. 259; *Village of St. Johnsbury v. Thompson,* 59 Vt. 301, 59 Am. Rep. 731. From this view of the history of the legislation, and following the principle that, where power has been granted by the legislature to a municipal corporation and it acts within the limits of that power, its action will be of equal force as if taken by the legislature itself, we have no hesitation in holding that the city council by the passage of the ordinance in question, exercised a power granted to it by the legislature, and that it has jurisdiction to consider and decide contests relating to the election of city officers.

But respondent contends that the language "To appoint judges of all elections provided by ordinance for the election of city officers, and prescribing the manner of conducting the same, and the return thereof, and for deciding contested elections" should be construed to apply only to elections provided by ordinance for the election of city officers other than those whose election is required by statute, and that, since the charter permits the creation of other city officers who may be elected, the provisions of the act and of the ordinance apply only to them, and not to city officers whose election is prescribed by statute. But we find no authority in the statute given to the council to provide by ordinance for the election of any officers other than those named therein, and by the provisions of section 26, ch. 16, laws 1901 (Ann. St. 1907, sec. 7925), it is provided that "the mayor shall have power by and with the consent of a majority of the council to appoint all officers that may be deemed necessary in the administration of the city government, other than those provided for in this act." We think, therefore, this construction is unwarranted.

The main argument of the relator is that, while the language of the statute does not say so in express terms, yet its effect is to make the city council the sole judge of the election and qualification of its own members, and therefore that its determination is final and conclusive. In one of the first acts passed in this state incorporating cities it was expressly provided that the council should "be judges of the election, returns and qualification of their own members" (laws 1869, p. 41, sec. 27), but this act was repealed, and, so far as the writer has been able to find this language has never been used in a subsequent act. We think the language now used comes far from implying that the council shall be the *sole* judge of the election of its own members, and that, if the legislature had so intended, it would have so said. Relator cites in support of his contention: *Stearns v. Village of Wyoming,* 53 Ohio St. 352; *Weston v. Probate Judge,* 69 Mich. 600; *Naumann v. Board of City Canvassers,* 73 Mich. 252; *Commonwealth v. Leech,* 44 Pa. St. 332; *Linegar v. Rittenhouse,* 94 Ill. 208, and other cases.

The respondent, on his part, contends that the remedies by *quo warranto* and by contest before the county court under the statute still exist, even conceding that the power is also possessed by the city council under the ordinance. He cites as upholding his contention the following cases: *State v. Kempf,* 69 Wis. 470, 2 Am. St. Rep. 753; *Ex parte Heath,* 3 Hill (N. Y.) 42; *Commonwealth v. Allen,* 70 Pa. St. 465; *State v. Gates,* 35 Minn. 385; *Carter v. Superior Court,* 138 Cal. 150. It would extend this opinion to an unnecessary length to examine and compare these cases. It is enough to say that there is a conflict of authority upon the question as to whether a provision making the city council the judges of the election and qualifications of its own members operates to deprive the courts of their jurisdiction by *quo warranto,* or whether the statutory right of contest only affords a cumulative remedy to that furnished by the common law procedure. Perhaps the better rule is that, unless it is clear and certain that the

legislature intended to deprive the courts of their jurisdiction, the remedy by *quo warranto,* and perhaps of contest also, will still exist. Mr. Dillon says in 1 Municipal Corporations (4th ed.), sec. 202: "It is not unusual for charters to contain provisions to the effect that the *common council or governing body of the municipality 'shall be the judge of the qualifications,'* or *'of the qualifications and election of its own members,'* and of those of the other officers of the corporation. What effect do such provisions have upon the jurisdiction of the superior courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the state on the subjects of contested elections and *quo warranto.* The principle is that *the jurisdiction of the court remains* unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not ordinarily have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one." Under the constitution and laws of this state relating to *quo warranto,* there is no question but that the remedies by contest and *quo warranto* are cumulative, and that the legislature would have no power to take away the right to apply to the courts to inquire by what right the incumbency of an office is held. *Kane v. People,* 4 Neb. 509; *State v. Frazier,* 28 Neb. 438; *State v. Frantz,* 55 Neb. 167. In this respect we agree with the supreme court of Wisconsin in *State v. Kempf,* 69 Wis. 470, and other courts adhering to the same doctrine.

The question remains whether it was the intention of the legislature to put it within the power of a city council to take away from the county court the jurisdiction in contested election matters conferred upon it under the general election law. The remedy provided by the ordinance is a summary one. The contestant must file his notice of contest within two days after the polls close, and before the returns have been canvassed. Within such a short time after the closing of the polls it might, under certain

circumstances, be well-nigh impossible for him to acquire any accurate and definite knowledge of what may have occurred at each and all of the many polling places within the city. There are many conditions which may arise which, for the public interest, require a speedy determination of the question as to the person who is entitled to the certificate of election. Where the controversy over the election is confined to a narrow range, or the facts which may determine the contest may readily be ascertained, the summary remedy provided by the ordinance would probably prove effective for the ascertainment of the actual fact and the settlement of the question. Where a contestant believes that the facts showing his right to the office are so clear and positive that the necessary effect of the summary procedure will be to make his title certain, it is to his benefit, as well as to that of the community at large, that the matter should be promptly settled before the issuance of the certificate of election; but where the determination of the question requires the examination of many witnesses, the counting of a large number of ballots, and the settlement of purely legal questions as to the residence of voters and to the right to vote, it is evident that a court is a much safer and more competent tribunal to sit in judgment than the city council would be. The right of appeal from an adverse decision to the district and supreme courts is also given to the contestant before the court, while the determination by the council, if relator is correct, is final.

Repeals by implication are not favored; and, where a later enactment is not repugnant to a former one, it does not repeal the same by implication. While a special act upon the same subject usually modifies a general act, still, where the remedy provided by the later act is not incompatible with the remedy provided by the earlier and more general law, both acts may stand and be enforced. In the case of *State v. Craig*, 100 Minn. 352, the facts were that a city council was given power by ordinance to canvass the result of votes cast in a city election and declare the result,

and was made the judge of election and qualifications of its own members. A later statute permitted such a contest to be made in the district court. The court held that the later act did not deprive the city council of jurisdiction over the election contest, but that the remedies were concurrent. The conclusion reached in that case is in accordance with the principle that, where a new remedy is provided by statute for an existing right, and it neither denies an existing remedy nor is incompatible with its continued existence, the new remedy should be regarded as cumulative, and the person seeking redress may adopt and pursue either remedy at his option. *Feuchter v. Keyl*, 48 Ohio St. 357; 7 Ency. Pl. & Pr. 373, and cases cited.

We can see nothing incompatible in the concurrent existence of these remedies. The summary remedy provided by the council may be complete and adequate in many instances, while the longer period of time within which to ascertain the facts and to prepare and present the legal questions involved, and the opportunity to submit the controversy to the deliberate and impartial judgment of the courts may, in other instances, prove the only possible means of eliciting the true facts and administering justice. We are of the opinion that the contestant Malone had the option to avail himself of the summary remedy provided by the city ordinance, or, if he deemed the statutory remedy better suited to the ascertainment and determination of the question involved, he had a right to adopt that method of procedure instead of the other. This makes inevitable the conclusion that the county court was not deprived of its jurisdiction by the provisions of the charter and by the enactment of the ordinance relied upon by the relator as giving the city council exclusive power to determine the contest.

The judgment of the district court denying the writ is therefore

AFFIRMED.

BARNES, J., dissenting.

I dissent from the conclusion announced by the majority opinion. I am in accord with so much of the opinion as holds that the city council has jurisdiction of the election contest in question in this case. I am of opinion that such jurisdiction is exclusive, and that the writ prayed for by the relator should issue.

NIELS RASMUSSEN, APPELLANT, V. AUGUST BLUST ET AL., APPELLEES.

FILED OCTOBER 9, 1909. No. 15,514.

1. **Waters: PUBLIC LANDS: IRRIGATION RIGHTS: SUBSEQUENT ENTRIES.** One who has constructed upon the vacant public lands of the United States a system of reservoirs and ditches for the distribution of water appropriated by him for irrigation purposes, and has secured the approval of his plan and appropriation by the state board of irrigation, and was using his said reservoirs and ditches for the storage and distribution of such waters before said lands are entered, has a vested and accrued right within the meaning of sections 2339, 2340, Revised Statutes of the United States.

2. ———: ———: ———: ———. If such improvements have been made with the tacit or express consent of the entryman upon lands of the United States that have been entered as a homestead, and the entryman thereafter relinquishes his entry or it is canceled by the United States, and the said improvements are in actual use by the irrigator under the authority and with the approval of the state board of irrigation, a subsequent entryman takes said lands subject to a right of way for said ditches and the use by the irrigator of the land covered by the reservoir.

3. ———: ———: ———: **FAILURE TO FILE MAP.** The failure of the irrigator to file a map in the land office and to secure the approval of the secretary of the interior in accordance with the act of congress approved March 3, 1891, entitled "An Act to repeal timber-culture laws, and for other purposes," and the acts supplementary thereto do not destroy the privileges protected by sections 2339, 2340, Revised Statutes of the United States.

4. ———: ———: ———: SUBSEQUENT ENTRIES. A deed executed by an entryman before he is entitled to a receiver's final receipt and purporting to vest the grantee with a right of way over, and the privilege of constructing and maintaining a reservoir upon, the lands of the entryman, will not vest the grantee with any right against a subsequent entry of the land under the acts of congress unless such grantee, before the last entry, shall have constructed said improvements and was using them under such circumstances as to entitle him to protection under the laws of this state.

REHEARING of case reported in 83 Neb. 678. *Reversed.*

ROOT, J.

This case is submitted on rehearing. Our former opinion is reported in 83 Neb. 678. The cause was submitted to the district court upon the pleadings, the affidavits of witnesses, and copies of public records. A bill of exceptions containing the original evidence adduced is before us. It is a difficult undertaking to sift the conflicting statements, and, without the aid of cross-examination, establish the controverted facts. Were it not for the public importance of the questions of law involved, we would affirm the judgment because of the condition of the record. The land in controversy is in Dawes county and in water district No. 2. Comp. St. 1909, ch. 93*a*, art. II, sec. 3. Rasmussen, the plaintiff, has resided in said county and has owned real estate therein for many years next preceding the institution of this suit. In 1898 or 1899, he appropriated the waters in the Big Cottonwood creek and in the south branch of the Cottonwood creek for the irrigation of lands in sections 18, 19, 28, 29 and 33, town 33, range 51, in said county, and other lands, and his appropriation was duly approved by the state board of irrigation August 3, 1899. In September, 1899, he made a further appropriation for the benefit of said lands, adding six storage reservoirs to his scheme, and specifically referred to flood waters as a source of supply. This appropriation was approved by the state board of

irrigation February 21, 1900. Plaintiff also joined with one Carlson in appropriating water from Sand creek for the benefit of lands not above described, but included in Rasmussen's irrigation system. In the prosecution of the work involved in the construction of said plant, plaintiff has dug and continuously extended necessary ditches and has constructed at least two of said reservoirs. The state board of irrigation has extended the time fixed by it for the completion of said irrigation system, so that upon the institution of this suit Rasmussen was not in default in complying with the exactions of said board. In 1900, when Rasmussen commenced said work, there was but little, if any, land along the route of the main ditches that had not been entered under the homestead law. The northeast quarter of section 32, town 33, range 51, was vacant at said time. The northeast quarter of section 29, involved in this suit, had been entered as a homestead, and said entry was canceled June 17, 1904. The southeast quarter of said section had been entered under the homestead act by Isabella Ihrig, who thereafter married Cephas Ross. Her homestead entry was canceled April 14, 1904. John F. Howard entered the southwest quarter of said section 28 in 1890, and filed a relinquishment of his claim in January, 1904. In February, 1900, Mrs. Ross, *née* Ihrig, and husband conveyed to plaintiff a right of way for his irrigation ditches across, and the right to construct and maintain a reservoir upon, the southeast quarter of said section 29. In July, 1904, defendant, August Blust, entered the east half of said section 29 under the "Kinkaid act" (33 U. S. St. at Large, ch. 1801, p. 547), and thereafter released the southeast quarter of the southeast quarter thereof. The defendant, Anton Blust, thereafter entered said 40 acres in connection with the northeast quarter of section 32, and the southwest quarter of said section 28, under said act of congress. August Blust for years had owned, and still owns, the northwest quarter of section 28. Plaintiff's right to maintain ditches across all of the aforesaid tracts of land and to construct and maintain reservoirs thereon is in-

volved in this suit. In February, 1901, Rasmussen prepared a map, showing his proposed irrigation system, and filed it in the United States land office at Alliance, so that he might secure the benefits of the act of congress of March 3, 1891 (2 U. S. Comp. St., ch. 561, p. 1570, sec. 18). The evidence indicates that this application was forwarded to the commissioner of public lands, and by that official was returned for corrections. Plaintiff attempted to make the necessary alterations, and on the 9th day of April, 1902, refiled the application and map. June 13, 1902, the documents were returned to the land office as unsatisfactory and incomplete. Rasmussen testified that he was not notified of this fact, but the officers of the land office seem to have been satisfied that Rasmussen had notice, and, as he did not comply with their requisitions, his application was treated by the land department as abandoned.

1. Upon the facts just related, our former opinion held that plaintiff never secured any rights in the premises that could be enforced against the subsequent entrymen. Counsel for plaintiff still insists that, under the act of congress approved March 3, 1891, *supra,* and the facts in the instant case, his client secured, and still retains, an easement in the lands described. We are entirely satisfied with our former opinion upon this point. By the express terms of the statute a right of way can only be acquired over vacant government lands upon the approval of applicant's map by the secretary of the interior. The interior department has held that the filing of a map of location for a reservoir site does not reserve the land described therein, but affects only such lands as were vacant at the date of the approval of the map. *Highland Supply Ditch Company,* referred to in *Hamilton v. Pope,* 28 Land Dec. 402; *United States v. Rickey Land & Cattle Co.,* 164 Fed. 496. The map has never been approved, and none of the land is now vacant.

2. When August Blust and Anton Blust made their respective entries, the land, necessarily, was vacant. The preceding entries had been relinquished by the entrymen, or canceled by the government, and that condition had ex-

isted for several weeks. The evidence in the record satisfies us that in July, 1904, Rasmussen had completed, and had been for some time operating, his low line ditch across the northeast quarter of section 29, and that he had a right of way across the northwest quarter of section 28.

The legislature has declared that the unappropriated waters in every natural stream within the state are public property, dedicated to the use of the people of the commonwealth, but subject to appropriation according to the terms of the statute. Comp. St. 1909, ch. 93*a*, art. II, sec. 42. The legislature has further provided: "All ditches constructed for the purpose of utilizing the waste, seepage, swamps, or spring waters of the state shall be governed by the same laws relating to the priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; *Provided*, that the person upon whose lands the waste, seepage, swamp, or spring waters first arise shall have the prior right to the use of such waters for all purposes upon his lands." Comp. St. 1909, ch. 93*a*, art. II, sec. 44. To the state board of irrigation, an administrative body, has been committed the power to determine, in the first instance, between individuals or corporations and the state their respective rights to use the waters aforesaid. Under an unrevoked permit from said board, an applicant, who thereafter by virtue of that permit applies public waters to a beneficial use within the meaning of the irrigation law, obtains a vested right recognized and protected by the laws of Nebraska. Sections 2339 and 2340 of the United States Revised Statutes provide: "Section 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and con-

firmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Section 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."

In *Broder v. Water Co.*, 101 U. S. 274, it was held that the last cited statute merely acknowledges pre-existing rights, and that the owners of a ditch located on public land and in actual use will be protected against subsequent entrymen. The federal government does not by said act grant any estate, but merely recognizes such vested and accrued rights as "are recognized and acknowledged by the local customs, laws, and the decisions of courts." If the appropriator is first in time with reference to possession and use as compared with the date a homestead entry is made upon the real estate, the rights of the homesteader are junior and inferior. *Brosnan v. Harris*, 39 Or. 148; *Smith v. Hawkins*, 110 Cal. 122; *Maffet v. Quine*, 93 Fed. 347, 95 Fed. 199. The irrigator will be protected in his possession and application of the water so long as he conforms to the local law regulating his rights, but he has no contract with or grant from the government, federal or state, with respect to his privileges. *Mohl v. Lamar Canal Co.*, 128 Fed. 776.

The act of congress approved March 3, 1891 (2 U. S. Comp. St., p. 1570, sec. 18), extends to those in possession of public lands the benefit of that legislation, but, in our judgment, does not supersede the earlier statute. The act of 1866 recognizes rights created independent of the acts of congress, whereas the later acts confer rights upon certain named conditions. If the individuals or corporations who have appropriated and are applying public waters for beneficial purposes choose to avail themselves of the bene-

fits of the act of 1891, they may acquire a right of way 50 feet in width across vacant public lands, whereas under the act of 1866 a mere possessory right of way is recognized. Under the later act a record is made of the right of way and reservoir sites. The applicant under the act of March 3, 1891, need only survey the route for his proposed ditches and the sites for his reservoirs and file in the local land office a map of those surveys with certain other data. If the secretary of the interior approves the map, a base or determinable fee vests in the applicant in advance of possession and the making of improvements, and without reference to any local laws or customs.

In *Lincoln County Water Supply & Land Co. v. Big Sandy Reservoir Co.*, 32 Land Dec. 463, Mr. Secretary Hitchcock said: "While the clause above quoted from section 20 of the act of March 3, 1891, extends the benefits of that act to all canals, ditches or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches and reservoirs, and secure the approval of the secretary of the interior thereof, yet the rights of claimants under section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps."

Concerning the southeast quarter of section 29, the evidence establishes that Rasmussen relied upon the deed from Mrs. Ross, *née* Ihrig, to protect his right of way for the high line ditch across, and his reservoir site upon, that tract. At the time August Blust entered that land under the Kinkaid act, plaintiff had not constructed either of said improvements. Rasmussen did not secure any rights by virtue of the Ross deed as against the subsequent entryman, but he must either purchase or condemn if he concludes to extend his ditches across, and locate a reservoir upon, that land.

The evidence in the record concerning the feasibility of the high line ditch is irrelevant. The state board of irrigation has passed upon that feature of the dispute, and

the district court, in the first instance, has no jurisdiction of the subject. In our former opinion we failed to give plaintiff the benefit of sections 2339, 2340, Revised Statutes, *supra*. Upon more mature deliberation we are satisfied that the evidence does not sustain a judgment dismissing the petition. If the case is again tried, the evidence adduced may justify more comprehensive relief for plaintiff than we have indicated in this opinion; on the other hand, defendants may be completely exonerated.

The former opinion and judgment of this court are set aside, the judgment of the district court is reversed and the cause is remanded for further proceedings, and all taxable costs incurred up to the date of filing a mandate in the district court are taxed to plaintiff.

REVERSED.

FREDERICK A. FROMHOLZ ET AL., APPELLANTS, V. GERTRUDE H. MCGAHEY ET AL., APPELLEES.

FILED OCTOBER 9, 1909. No. 16,126.

1. **Appeal: JURISDICTION: TRANSCRIPT.** To clothe this court with jurisdiction to review a judgment or a final order of the district court, the appellant must within six months of the rendition of such judgment or final order file with the clerk of this court a certified transcript of the judgment or order appealed from.
2. ———: ———. If the transcript filed for the purpose of such an appeal is not authenticated by the clerk of the district court, this court is without power, after six months from the rendition of such judgment or final order, to permit the appellant to add the clerk's certificate to said transcript.

APPEAL from the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Dismissed.*

M. Whitmoyer, L. S. Hastings and *A. M. Post,* for appellants.

W. E. Atkinson and *C. W. De Lamatre, contra.*

ROOT, J.

The affidavits and other documents on file in this case indicate that a judgment adverse to plaintiffs was rendered in the district court for Platte county in November, 1908. In March, 1909, an unauthenticated transcript of the pleadings in the case and of the judgment appealed from was filed in the office of the clerk of this court. April 1 defendants by their attorneys filed their voluntary appearance herein, reserving, however, the right to object to the jurisdiction of this court. About August 10, and shortly after plaintiffs had served a copy of their brief on defendant's counsel, the defendants requested us to dismiss plaintiffs' appeal. September 16 plaintiffs asked leave to withdraw said transcript so that it might be certified by the clerk of the district court. The affidavits established that defendants did not know until subsequent to the service of plaintiffs' briefs that the transcript had not been attested by the clerk.

We do not have original jurisdiction of the issues litigated in the district court. The legislature in the exercise of its constitutional power has provided the conditions upon which cases like the one at bar may be reviewed by us. Section 675 of the code controls, and is as follows: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the supreme court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for new trial in said cause; the filing of such transcript shall confer jurisdiction in such case upon the supreme court." We have uniformly held that filing an unauthenticated

transcript of a judgment of the district court did not give us jurisdiction of the controversy, but that the terms of the statute must be observed and a *certified* transcript of the judgment filed within the time limited by law. The authorities upon this point were reviewed in *Moore v. Waterman,* 40 Neb. 498, and again in *Snyder v. Lapp.* 59 Neb. 243. See, also, *Smith v. Delane,* 74 Neb. 594.

Plaintiffs, however, argue that in none of the cases referred to was a request made for permission to amend the transcript, and that section 144 of the code commands the courts to permit amendments in the interest of justice to be made either before or after judgment; and that the defect in the instant case does not go to the substance, but the form of the statutory conditions. Four decisions of this court and the case of *Second Nat. Bank v. Moderwell,* 59 Ohio St. 221, are cited in support of plaintiffs' argument. In *Rudolf & Co. v. McDonald & Co.,* 6 Neb. 163, an affidavit without a venue had been filed to obtain an attachment, and was attacked after judgment in the main case. It was held that the objection came too late. In *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68, a transcript from an inferior court had not been filed in the district court within the time fixed by statute, but the parties had joined issues and tried the case in the district court. That court had original jurisdiction to try the case, and, as the parties did not object until after trial, it was immaterial whether the issues were presented on appeal or in the first instance to said court. In either event, after a trial, the defeated litigant could not question the power of the court to enter judgment. The same facts existed in *Coleman v. Spearman, Snodgrass & Co.,* 68 Neb. 28. In *Moss v. Robertson,* 56 Neb. 774, the plaintiff in error had within the time fixed by statute filed a duly authenticated transcript containing a copy of the judgment and part of the pleadings. More than one year after the judgment, and before the case was submitted in this court on its merits, we permitted the plaintiff to amend the transcript. In the instant case, if the plain-

tiffs had only filed a certified transcript of the judgment sought to be reviewed, we would have authority, under the present statute, to permit an amendment by adding copies of the pleadings or of any part of the proceedings other than the judgment, but the essential and jurisdictional certificate is missing.

In addition to the cases cited, we held in *Whitcomb v. Chase,* 83 Neb. 360, that an objection first made on appeal to this court that a transcript from a county court to the district court had not been certified came too late for consideration. In *Second Nat. Bank v. Moderwell,* 59 Ohio St. 221, a transcript of the pleadings and proceedings had been filed, but the pleadings only were authenticated, and permission was given to correct the certificate. In that case Mr. Justice Bradbury suggests that, if there had been nothing upon which the amendment could rest, none could be made; but the certificate existed, although defective in form, and the amendment was proper. It may be pertinent to suggest that the Ohio statute does not provide in so many words that a transcript on appeal shall be certified, and Judge Bradbury suggests that probably the filing of an unauthenticated transcript would give the supreme court jurisdiction. In the instant case the clerk has not signed nor attached his seal to the transcript, and therefore there is nothing in the way of a certificate to be amended.

We have examined the other cases cited by counsel, but do not consider that they are in point, and will not extend this opinion by further reference to them. A due regard for the code and the former decisions of this court impels us to overrule plaintiffs' and sustain defendants' motion, and it is so ordered.

DISMISSED.

JOHN M. SENNETT, APPELLANT, V. JAMES H. MELVILLE ET AL., APPELLEES.

FILED OCTOBER 9, 1909. No. 16,175.

1. **Vendor and Purchaser: OFFER: ACCEPTANCE.** A written offer to sell real estate does not become a binding contract until the vendee accepts the tender according to its terms; nor will an offer to purchase real property bind the owner of the land involved, unless he unconditionally accepts the bid.
2. **Specific Performance: DISCRETION OF COURT.** "Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed to a great extent, by the facts and merits of each case." *Morgan v. Hardy*, 16 Neb. 427.

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

Sullivan & Squires, for appellant.

Silas A. Holcomb and *Kirkpatrick & Schwind, contra.*

ROOT, J.

This is a second appeal of this case. Our first opinion may be found in 76 Neb. 690. Upon a second trial some additional evidence was adduced and a judgment entered for defendants. Plaintiff appeals.

The action is for a specific performance of an alleged contract for the sale of real estate. A consideration of the evidence sustains the trial court in finding that the parties did not make a contract prior to March 25, 1902. EPPERSON, C., held that the plaintiff did not accept Melville's offers contained in the letters of March 25 and August 29, 1902. The letters written by plaintiff's agent, Brown, are now before us. The first offer authorized Brown to deliver the deed and an abstract for the land to plaintiff upon payment of $500 plus exchange. This offer was not accepted, but the title as evidenced by Melville's

abstract was criticised by Brown, and suggestions were made by him to said defendant that an attorney should be employed to remedy the defects. August 29 Melville wrote to Brown that an attorney had advised the writer that his title to said land was good, and that, "If Mr. Sennett thinks the title not good, you had better return the deed to me, but if he wants to take it as it is, we will return you the abstract so the deal can be closed up at once." September 2 Brown replied to defendant's last communication: "I think if you will send the abstract, and with this letter you have written me, that Mr. Sennett will accept the deed if you will return it at once. I think Mr. Sennett will be in the last of this week." It seems clear that to this point the minds of the litigants had not met with a common intention. Melville was only offering to sell without further perfecting title, and plaintiff, through his agent, merely indicated a probability that the offer might be accepted. Melville testified that thereafter, and prior to September 27, he wrote Brown to return the deed. On the last named date Melville wrote to Brown a letter containing this statement: "Some time ago I wrote you to return me the deed you held for me. You have not done so, but write me that Mr. Sennett will close the deal as it stands. He should have done this last spring, not stand me off until now. I have been to quite an expense and trouble in looking up the title and in the meantime land has advanced in price and I cannot afford to close the deal at this date for the price agreed upon last spring. But if Mr. Sennett wants the land for $600, return the deed to me and I will close up at once. If he does not want it, return the deed at once." Brown received the letter, and subsequently wrote Melville, claiming that Sennett was entitled to the land for $500. Melville denied the assertion. Brown does not unequivocally deny that intermediate September 2 and September 27 he received a letter from Melville demanding a return of the deed. If such a letter was sent and received, the offer to sell was withdrawn prior to September 27. In any event, Melville

withdrew from the negotiations on the last named date, and prior thereto plaintiff had not absolutely accepted the terms proposed by said defendant for a sale and transfer of the title to said land. Brown's conduct, independent of his letters, indicates that Sennett had not accepted Melville's offer, and that Brown, as such agent, had not done so prior to September 27. If the offer had been accepted, it would have been incumbent on Sennett to have remitted to Melville, or at least to have deposited for his benefit with Brown the $500. This was never done. Sennett had an open account for about $500 in the bank wherein Brown was cashier. No part of this money was ever set apart for Melville's benefit, nor was a check drawn thereon for him. The district court, upon the record in this case and in the exercise of a sound legal discretion, was justified in refusing to decree a specific performance of the alleged contract. *Morgan v. Hardy*, 16 Neb. 427; *Lopeman v. Colburn*, 82 Neb. 641.

It is argued that Brown was plaintiff's agent, and that the deed was delivered at the time the former became custodian of that instrument. Brown, although Sennett's agent, was also Melville's representative for the purpose of holding the deed until plaintiff complied with the conditions by him to be performed. *Sennett v. Melville*, 76 Neb. 690. Until Sennett assented to the conditions, mere possession of the deed by Brown could in no manner prejudice Melville, nor perfect that instrument by delivery.

The judgment of the district court is

AFFIRMED.

CHARLES WINKLER, APPELLEE, V. CITY OF HASTINGS, APPELLANT.

FILED OCTOBER 9, 1909. No. 15,456.

1. Cities: LEGISLATIVE POWERS: DETACHING TERRITORY. The power to prescribe the conditions on which territory may be detached from a city is legislative.

2. ———: ———: CONSTITUTIONAL LAW. Where legislative power to detach territory from a city has been delegated by statute to the mayor and council, an appeal from the action of that body in refusing to disconnect particular tracts cannot be made the means of transferring such power to the district court.

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

John M. Ragan and *W. F. Button,* for appellant.

R. A. Batty, contra.

ROSE, J.

Several parcels of plaintiff's agricultural land, each containing more than five acres, were detached from the city of Hastings by decree of the district court, and this is defendant's appeal therefrom.

In severing the land from the municipality the trial court assumed to exercise a power conferred by section 4 of the Hastings charter. Comp. St. 1901, ch. 13, art. III, sec. 4. When the legislature convened in 1903 that section was in this form: "The corporate limits of such city shall remain as heretofore, and the mayor and council may by ordinance include therein all the territory contiguous or adjacent which has been by the act, authority or acquiescence of the owners subdivided into parcels containing not more than five acres, and the mayor and council shall have power, by ordinance to compel the owners of lands so brought within the corporate limits to lay out streets, ways, and alleys to conform and be continuous

with the streets, ways and alleys of such city (and they may vacate any public road heretofore established through such land), when necessary to secure regularity in the general system of its public ways." Comp. St. 1901, ch. 13, art. III, sec. 4. To the foregoing statute the following provisions were added by amendment in 1903: "The mayor and council may by ordinance exclude from the corporate limits of such city any tract of land consisting of not less than five acres, which is used exclusively for agricultural or horticultural purposes, and which is now, or hereafter may be included within the corporate limits of such city, upon the application of any owner or owners of any such tract or tracts of land, setting out a full and complete description of such land, and the extent to which it is adjacent to the corporate limits of such city, and praying for its disconnection therefrom, being filed with the city clerk of such city, which application shall be read at large at the next regular meeting of the council of such city, and a day fixed by the mayor and council of such city for a hearing thereon, at not less than ten days from said regular meeting and within reasonable time thereafter. Upon such hearing if by a two-third vote of all the members elected, the council shall determine to disconnect such lands, therefrom, such lands shall thereafter be without the corporate limits of such city. If the council of such city deny the prayer of such application an appeal will lie to the district court of the county in which such city is situated as in cases of appeal from the board of commissioners. Provided further, that the right of such owner or owners of such tract or tracts of lands to make application in the first instance to the mayor and council of such city shall not be lost or waived, because of any delay in making such application." Laws 1903, ch. 18, sec. 1. Comp. St. 1907, ch. 13, art. III, sec. 4.

The original section contained no provision for disconnecting territory, and the amendment supplied that feature. Pursuant to its terms plaintiff asked the mayor and council to sever the lands in question from the cor-

porate limits of Hastings. His application was overruled, and he appealed to the district court, where the relief denied by the city was granted. Defendant in its answer challenged the jurisdiction of the court on the ground that the amendment is unconstitutional, and this is the only question presented here. Briefly stated, the principal objection to the amendment is that by it the legislature attempted to transfer to the district court by appeal legislative power delegated to the city council. The enactment in unambiguous terms confers upon the mayor and council power to detach from the city any five-acre tract used exclusively for agricultural or horticultural purposes. The method of exercising the power delegated is also prescribed by the act. Under its terms territory must be detached by ordinance, the method usually employed by cities in exercising legislative functions. The legislature has not provided in specific terms that every tract of five acres or more shall be disconnected upon a finding that it is used exclusively for agricultural or horticultural purposes, but the city was clothed with authority to legislate on that subject; the grant being that "the mayor and council may by ordinance exclude from the corporate limits of such city any tract of land consisting of not less than five acres, which is used exclusively for agricultural or horticultural purposes." In other words, when the amendment came from the lawmakers, it was not a perfect enactment that all tracts of land consisting of five acres or more shall be excluded from the city limits, if they are in fact used exclusively for agricultural or horticultural purposes. The legislature did not exercise its power to pass such a law, but delegated it to the municipal lawmakers. The authority thus granted to the city has never been affirmatively exercised in regard to lands owned by plaintiff within the city limits. On the other hand, his demand on the city for such legislation was denied. Did the legislature by authorizing an appeal from the mayor and council confer on the district court authority to disconnect plaintiff's

land from the city? The power of the legislature to make provision by general law for the incorporation of cities and for extending boundaries or detaching territory has been recognized by this court. In *State v. Dimond,* 44 Neb. 154, an opinion by Judge POST contains the following language: "We do not doubt the unlimited power of the legislature, in the absence of constitutional restriction, with respect to the boundaries of municipal corporations."

In municipal affairs the authority to extend boundaries is derived from the same source as the power to detach territory. In the opinion in *City of Wahoo v. Dickinson,* 23 Neb. 426, Judge MAXWELL said: "It will be conceded that an arbitrary annexation of territory to a city or town, where the benefits to be received by the territory annexed are not considered, can only be accomplished by legislation, either by the legislature itself, or by a tribunal clothed with power for that purpose, and that a court under our constitution could not be invested with such legislative power." In *City of Hastings v. Hansen,* 44 Neb. 704, the following appears in an opinion by Commissioner RAGAN: "The power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative powers; and it has been doubted if the legislature can pass a valid act giving the courts jurisdiction to disconnect by decree any part of the territory of a municipal corporation of the state merely at the suit of the owner thereof." The power of the legislature to prescribe the conditions on which municipal boundaries shall be extended or restricted is recognized in the recent case of *Bisenius v. City of Randolph,* 82 Neb. 520, where the decisions of this court on a kindred subject are discussed by Judge ROOT.

In the form in which the act amending section 4 of the Hastings charter was passed in 1903, the grant conferring upon the mayor and council authority to detach territory by ordinance was legislative. In attempting to confer the same power upon the district court by direct appeal from the action of the mayor and council, if

they refuse to pass an ordinance detaching territory on demand of a landowner, the legislature did not observe the following provisions of the constitution: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Const. art. II, sec. 1. This section of the constitution prohibits the judicial department from exercising any power properly belonging to the legislative department, and the effort to confer upon the district court legislative authority to sever agricultural and horticultural lands from the city of Hastings in the manner described invalidates the amendment to section 4 of the Hastings charter. This conclusion is not at variance with former holdings to the effect that courts may be clothed with power to inquire into and determine the existence of conditions under which lands may be annexed to or detached from a city, pursuant to the terms of a statute; nor does it conflict with the rule that one whose lands were illegally included within the boundaries of a city may in a proper case obtain redress in a proceeding in the nature of *quo warranto*.

The judgment of the district court is reversed, and the appeal from the action of the mayor and council dismissed.

REVERSED AND DISMISSED.

REESE, C. J., not sitting.

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

FILED OCTOBER 9, 1909. No. 15,471.

1. **Wills: BEQUEST: CHARGE ON REALTY.** A provision in a will that the amount of a bequest to testator's daughter shall remain in the "home place," with interest payable annually, in the event of her being married at the time of testator's death, *held* to be a charge upon the realty described, though further provision was made for the sale of the property and for payment of the legacy, if the legatee should become a widow.

2. ———: CONSTRUCTION. In giving effect to a bequest the entire will should be examined to ascertain the intention of the testator.

3. ———: LEGATEE: ACCEPTANCE OF LAND: LIABILITY. A legatee by exercising an option to take testator's land at its appraised value under the will, *held* not to have obligated himself to pay other legatees more than the amount of the appraisement.

REHEARING of case reported in 84 Neb. 167. *Reversed.*

ROSE, J.

Plaintiff commenced this suit in the district court for Thayer county to establish a lien on 160 acres of defendant's land in Thayer county for the amount of a legacy under her father's will, and to require defendant, who took the land under it, to account to her for her share of the estate. Joseph Keim, the father of both plaintiff and defendant, formerly owned the property, and disposed of it by a will containing the following provisions:

"(1) I give and bequeath to my beloved wife, Mary Keim, the sum of $200 in money and all personal property which she is entitled to under the laws of the state of Nebraska and the use of two rooms, of her own choosing, in my dwelling house, so long as she shall occupy the same, and the interest on the sum of $3,000 during her natural life. I direct that my executors hereinafter named shall leave said sum in my home place, when they shall sell the same, and the same shall remain a lien thereon and the purchaser thereof shall annually pay to

my said wife the interest thereof at the rate of seven per cent. per annum during her natural life.

"(2) I give and bequeath to each of my children, as follows: To my son, William Keim, the sum of $254; to my son, Jacob Keim, the sum of $654; to my son, Harrison Keim, the sum of $200; to my daughter, Mary Bates, the sum of $404; to my daughter, Annie Hay, the sum of $522; to my daughter, Eliza Bender, the sum of $340.

"(3) I give and bequeath to my daughters, Catharine Fauber and Cerilla Bender, as follows: To my daughter, Catharine Fauber, the sum of $1,817, and to my daughter, Cerilla Bender, the sum of $373, upon the following conditions, however: In case either or both of them are married at my death the aforesaid sums are to remain in my home place and be a lien thereon, and the interest thereon to be paid annually to them, according to their respective shares; but in case either or both of them become widows, my executors are to collect said money and pay it to them, according to their respective shares; but in case the husbands of either or both of them survive them, said sum or sums is to be paid to their heirs.

"4. I direct that my executors have my home place appraised by six disinterested freeholders to be appointed by the county court of Thayer county, who shall appraise the same and after the same is so appraised my son, Harrison, is to have the refusal thereof at the appraised value, and in case he does not elect to take it, then my son Jacob is to have the refusal; and in case he does not elect to take it, then my son William is to have the refusal thereof; and in case he does not so elect, then my executors are to sell the same at either public or private sale as they shall deem to the best interest of my estate, and execute a deed to the purchaser thereof, whoever the same may be.

"5. I further direct my executors to sell all my estate both real and personal and pay my debts and the aforesaid legacies and in case there is a surplus, after the payment of the debts and the aforesaid legacies, the same shall be equally divided between my children subject,

however, to the same conditions and restrictions as to Catharine Fauber and Cerilla Bender."

Among other things, it is disclosed by the record that Joseph Keim died in June, 1888, and that his will was probated in July following. His widow, Mary Keim, died in January, 1903. At the time of testator's death plaintiff was a married woman, and her husband is still living. The "home place" mentioned in the will is the land in controversy. In the manner described by testator it was appraised at $5,000 and accepted by defendant. When the will was executed, October 17, 1887, it was incumbered by a mortgage for $3,300. In the answer it is alleged, in substance, that the estate of Joseph Keim had been settled, and that after payment of the debts there remained only enough to pay 20 per cent. of the legacies; that plaintiff had received the interest on 20 per cent. of the amount bequeathed to her; that 20 per cent. of the other legacies had been paid to the legatees entitled thereto, and that the executors had been discharged. Upon a trial in the district court the action was dismissed, and plaintiff appeals.

One of plaintiff's objections to the judgment is that it deprives her of a lien on defendant's land for the amount of her legacy under the terms of her father's will. She has asserted this right in her pleadings, and defendant in his answer has denied that "she has any lien or claim against the real estate described in the petition." On the record presented the district court had jurisdiction to determine the issue thus raised. Since she is not a widow, she can only collect under the will at present the interest on her legacy. If it is not a lien, defendant may sell the land without regard to her interests. The dismissal of her suit was an adjudication that she was not entitled to a lien to secure the amount of the bequest, or the interest thereon. The decision on this point must be controlled by the intention of testator as disclosed by his entire will. The bequest to plaintiff contains these words: "I give and bequeath to my daughters, Catharine Fauber and

Cerilla Bender, as follows: To my daughter, Catharine Fauber, the sum of $1,817, and to my daughter, Cerilla Bender, the sum of $373, upon the following conditions, however: In case either or both of them are married at my death the aforesaid sums are to remain in my home place and be a lien thereon, and the interest thereon to be paid annually to them, according to their respective shares; but in case either or both of them become widows, my executors are to collect said money and pay it to them, according to their respective shares; but in case the husbands of either or both of them survive them, said sum or sums is to be paid to their heirs." The conditions on which she was entitled to a lien under the specific terms quoted were present. These terms were not annulled by other legacies or by provisions relating to the sale of the land or by any other direction of testator. It follows that there was error in denying to plaintiff her right to a lien, since defendant concedes the estate was sufficient to allow her 20 per cent. of the amount bequeathed to her, and that he paid her interest on that basis.

Another point argued by plaintiff relates to the amount of defendant's liability. As already shown, the farm was appraised in the manner described in the will at $5,000, and defendant accepted it under the appraisement pursuant to the option authorizing him to do so. The land was incumbered by mortgage to the extent of $3,300. The contention is that defendant took the realty subject to the mortgage and to the legacies in favor of plaintiff, Cerilla Bender, and testator's widow is liable for the full amount of the items named and must account to plaintiff accordingly. On the other hand, defendant insists that by exercising his option to take the land at its appraised value he only obligated himself to pay the amount of the appraisement. The entire will must also be considered in determining this question. The provisions relating to liens, to the appraisement, to the payment of the debts, to the option permitting one of the sons to take the land at its appraised value, and to its sale in the event of the fail-

ure of any of the sons to exercise the option indicate there was no intention on the part of testator to require payment of more than the amount of the appraisement as a condition of acquiring title. The bequests and the amount of the mortgage greatly exceeded the appraised value of the land. No one could be induced to accept it on conditions requiring him to pay incumbrances and legacies greatly in excess of its value. Such a construction, if understood, would prevent a sale, and to that extent defeat the purpose of testator. It is not warranted by the language of the instrument. By taking the land under the will defendant did not bind himself to pay more than its appraised value. In his formal acceptance, however, he did insert the words, subject to all incumbrances, but did not thereby obligate himself to pay for the farm more than its value, as appraised under the specific terms of the will, or to create and distribute a greater estate than that possessed by his father at the time of his death.

For the error already pointed out, the cause must be remanded for further proceedings, but in the present condition of the pleadings and proofs it is deemed inadvisable to discuss other questions argued.

REVERSED.

AMELIA RIEGER, APPELLANT, V. CARRIE SCHAIBLE ET AL., APPELLEES.

FILED OCTOBER 9, 1909. No. 16,127.

1. Appeal: LAW OF CASE. "The determination of questions presented to this court in an appellate proceeding becomes the law of the case, and, ordinarily, will not be reexamined when the cause is again brought up for review." *Leavitt v. Bell*, 59 Neb. 595.

2. New Trial: NEWLY DISCOVERED EVIDENCE. "A new trial will not be granted a litigant on the ground of newly discovered evidence when it appears that such evidence was not produced at the trial of the case because the litigant had forgotten its existence." *Upton v. Levy*, 39 Neb. 331.

3. ———: ———: DILIGENCE. "To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative. It must further appear that the applicant for the new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial." *Smith v. Hitchcock*, 38 Neb. 104.

4. Appeal: CONFLICTING EVIDENCE. "Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached." *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

C. Gillespie and *E. Falloon*, for appellant.

Reavis & Reavis, contra.

FAWCETT, J.

This is the third time this case has been before us for consideration. The result of our deliberations on the first two occasions will be found in 81 Neb. 33, 58. After the case was remanded the district court evidently proceeded upon the theory that the law of the case was settled by the two opinions just referred to. In this the district court was right. *Leavitt v. Bell*, 59 Neb. 595. Upon the trial the court called a jury to determine the questions of fact in controversy. The case was submitted to the jury upon instructions which are not excepted to by any of the parties. Two special findings were submitted and answered by the jury, viz.: "(1) Was the contract which was entered into between Henry Rieger and Amelia Lawler entered into before or after the marriage of said parties? Ans. Before marriage. (2) Was the general purport of the contract understood by Amelia Lawler at the time she signed it? Ans. Yes." The jury also returned a general verdict in favor of the defendants. A motion for a new trial was filed, and subsequently a second motion for a new trial on the ground of newly discovered evidence was submitted. Both motions were over-

ruled, and judgment entered in favor of defendants, from which this appeal is prosecuted. No formal assignment of errors was filed in this court, and no errors in the admission or exclusion of evidence is argued in appellant's brief. The only error of law which can be considered as expressly reserved by appellant is under the fifth subdivision of their brief, which concludes with the statement that it was error for the trial court to deny the motion for a new trial on the ground of newly discovered evidence.

It follows from what has been said that the only questions for consideration now are: (1) Did the court err in overruling the motion for a new trial on the ground of newly discovered evidence? (2) Is the judgment of the court sustained by sufficient evidence? Without determining the question as to whether or not the evidence of the newly discovered witness would have been competent, which we regard as doubtful, we think it is clear that no such diligence was shown as would entitle plaintiff to a new trial upon that ground. The witness whose testimony they desired to present makes affidavit to the fact that she was present at the time the antenuptial agreement was signed by the principals thereto; that she saw it signed, and heard statements made by the parties at the time. If this is true, then plaintiff knew of her presence. That she did know of her presence is not negatived by plaintiff in her own affidavit. She simply alleges that "by reason of her age and the lapse of time she was unable to recollect all that took place in said store at the time said so-called antenuptial agreement was signed, nor could she, for the reason above stated, recollect who all were present, and she did not recollect at the time she testified, or at any time she may have consulted her attorneys, that Kate Rieger was in said store, and she only learned that Kate Rieger was in said store at the time said agreement was signed from her attorney, Edwin Falloon, who told her in his office some time after the rendition of the judgment in this case, and after the 18th day of October, 1908." She further states that "since the controversy

arose all the defendant heirs in this action have been bitter partisans, and she naturally inferred from that fact that the newly discovered witness, the wife of one William M. Rieger, would be hostile to her interest and would refuse to tell her anything, even if she knew anything, and, she not believing that she knew anything about this case, she never so much as asked or inquired of her what knowledge she may have had of it." The affidavit of Mr. Falloon, senior counsel for plaintiff, was also filed, in which he states: "That at one time he asked Kate Rieger, wife of William M. Rieger, the newly discovered witness, what she knew about this case. To which she replied that she did not want to be drawn into the controversy, and declined to discuss the matter with this affiant. That at the time this conversation took place this newly discovered witness was a client of this affiant, and both she and this affiant were attempting to effect a reconciliation between this newly discovered witness and her husband, William M. Rieger, and, out of consideration for the feelings of this newly discovered witness, this affiant forebore to pursue the inquiry any further, believing at the time that she knew nothing of any importance, and that the further inquiry on the part of this affiant would not only be insolent, but in a measure a breach of the confidential relations that existed, as attorney and client, between affiant and said newly discovered witness." We think this showing not only fails to establish sufficient diligence on the part of plaintiff and counsel, but affirmatively shows a failure to make diligent inquiry at a time when it might have elecited the desired information. The relation of attorney and client then existing between counsel and Kate Rieger did not preclude counsel's pushing his inquiry of Mrs. Rieger as to the transactions concerning the execution of the antenuptial agreement in controversy. We think the statement in his affidavit that Mrs. Rieger at that time said to him "that she did not want to be drawn into the controversy, and declined to discuss the matter" with him,

was notice of the fact that she had some knowledge of the matter about which he was inquiring. If she had had no knowledge, she would not have hesitated to say at once that she knew nothing about the matter. Without pursuing the subject further, we think the trial court did not err in overruling the motion for a new trial. *Upton v. Levy*, 39 Neb. 331; *Smith v. Hitchcock*, 38 Neb. 104.

The question of the sufficiency of the evidence was fairly submitted to the jury under instructions which, as we have said, were not excepted to. As the jury were acting in an advisory capacity only, possibly it was not necessary to note exceptions to the instructions; but, even if the jury were acting in such capacity only, the court seems to have been satisfied with their findings of fact in the case, and to have adopted the same and rendered judgment thereon. These findings, whether they be considered as by the jury or the court, are based upon conflicting evidence, which possibly would have sustained a finding and judgment either way. In such a case this court cannot interfere. *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.

The question as to whether or not plaintiff should be permitted to revoke her election in the county court and take under the will, and the further question as to plaintiff's rights, if any, in the homestead of her deceased husband have no place in the case before us and are not considered.

We are urged to overrule our former judgment in 81 Neb. 33, and to adhere to the decision in *Fellers v. Fellers*, 54 Neb. 694. *Fellers v. Fellers* was fully considered and deliberately overruled in 81 Neb. 33, and upon a reconsideration the decision in 81 Neb. 33 was adhered to (81 Neb. 58). We must therefore decline to further consider *Fellers v. Fellers*.

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

AFFIRMED.

PENNINGTON COUNTY BANK, APPELLANT, V. ANTON BAUMAN, JR., SHERIFF, APPELLEE.

DODGE COUNTY BANK, APPELLEE, V. FRANCIS MCGIVERIN, APPELLEE; PENNINGTON COUNTY BANK, INTERVENER, APPELLANT.

FILED OCTOBER 9, 1909. No. 16,237.

1. **Replevin: JUDGMENT: CONCLUSIVENESS.** A judgment in replevin determines the right of possession at the time of the commencement of the action, and it is not inconsistent with the right of the party defeated to afterwards assert a right of possession under changed conditions.

2. **Judgment: RES JUDICATA: REPLEVIN.** In an action of replevin, where judgment is rendered in favor of the defendant solely upon the ground that plaintiff's petition does not state a cause of action, such judgment is not a bar to a subsequent proceeding by the plaintiff therein to establish his right of property or right of possession, or to establish any lien he may have upon the property in controversy.

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

F. Dolezal, for appellant.

Courtright & Sidner, contra.

FAWCETT, J.

For a statement of the transactions leading up to the present action, reference is made to *Pennington County Bank v. Bauman*, 81 Neb. 782. Subsequent to the affirmance of that case in this court, plaintiff, Dodge County Bank, brought this action upon the replevin bond given by defendant, Pennington County Bank, and Francis McGiverin, its surety thereon, and by agreement of parties the two actions were consolidated and trial had in the district court for Dodge county. The trial resulted in judgment for plaintiff, Dodge County Bank, and defendant, Pennington County Bank, appealed. On the

trial of the present action defendant, Pennington County Bank, by cross-petition set up the chattel mortgage upon which it relied in the former action, and alleged that since the commencement of the replevin action the mortgage had matured; that it is now entitled to the possession of the property, and that it has a lien thereon by virtue of its said mortgage. This defense was met by the plaintiff, Dodge County Bank, with the claim that the former action is *res adjudicata* as to all the matters in controversy herein. The first action referred to was affirmed in this court upon the sole ground that the petition did not state a cause of action, in that it did not allege facts showing any right of possession in the plaintiff in that action. In the trial of that action in the district court the cause was submitted to the jury upon the one question only of defendant's damages by reason of the wrongful taking of the property in controversy. The jury found that the damages by reason of the wrongful taking of the property by plaintiff therein was the sum of $1,191. Plaintiff in that action did not except to the instruction given by the court as to the measure of damages, nor did it assign any error in the giving of the same in its motion for a new trial; and, the judgment in that case having been affirmed, plaintiff, Dodge County Bank, now insists that defendant cannot question the amount so found by the verdict of the jury upon which the court entered judgment; that the fact that the judgment was affirmed upon the sole ground that the petition did not state a cause of action did not affect the judgment rendered for the value of defendant's possession. Defendant's contention, in brief, is that, if the petition in the former action did not state a cause of action, the court was without jurisdiction to enter any kind of a judgment, and that the judgment for $1,191 is a nullity. We think that is the main question in this case, and that it is controlled by *Campbell v. Crone,* 10 Neb. 571; *Rodgers v. Levy,* 36 Neb. 601; *State v. Letton,* 56 Neb. 158; *Reid, Murdoch & Co. v. Panska,* 56 Neb. 195. While the writer would have been disposed to

have aligned himself with SULLIVAN, J., and RAGAN, C., in their dissents to the two last above cited opinions, the question must now be considered as foreclosed in this court.

That the judgment in the former case in favor of defendant in the replevin action solely upon the ground that the petition did not state a cause of action is not a bar to a suit by the Pennington County Bank to establish the validity of its lien under its chattel mortgage, which at the time of the former action was not due, but which has since matured, is settled in *State v. Cornell,* 52 Neb. 25; *McFarlane v. Cushman,* 21 Wis. 401; *Gassert v. Black,* 18 Mont. 35, 44 Pac. 401.

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

REVERSED.

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

FILED OCTOBER 22, 1909. No. 15,779.

1. **Eminent Domain: APPEAL: ELECTION OF REMEDIES.** A railroad company which had leased its road to another company instituted proceedings in the county court for the purpose of condemning the real estate of a landowner for right of way purposes. The landowner appeared and contested the jurisdiction of the court upon the ground that the company seeking to exercise the right of eminent domain was not the real party in interest. His objection was overruled, and the report of the appraisers awarding $2,700 was confirmed. He then appealed to the district court, alleging the same facts, and averred that his damages were $7,000. He also sought to enjoin the proceedings, alleging the want of jurisdiction. The injunction being denied, he then amended his petition, claiming the increase of damages as demanded in his first petition. *Held,* That his proceeding to defeat the condemnation was not such an election of remedies as would prevent him from litigating as to the amount of damages.

2. ———: DAMAGES. In a proceeding to condemn real estate for the

purposes of right of way for a railroad company, "the landowner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof." *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94.

3. ———: ———. In an inquiry whether and how much the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, it is proper for the jury to consider the liability of stock being killed, and the danger from fire from passing trains. See *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381.

4. ———: INSTRUCTIONS: HARMLESS ERROR. The trial court instructed the jury that, if the amount of damages found by them did not exceed $2,700, no interest should be allowed, but, if it exceeded that sum, they should compute interest on the amount. The giving of the instruction was excepted to for the reason that, by inference, it informed the jury of the sum awarded by the appraisers. Defendant offered another one, which directed the jury to find damages and interest separately and unadded, which instruction was refused. *Held*, That while the instruction refused might, under the circumstances, have been the better, yet the giving of the one submitted would not require a reversal of the judgment.

5. **Jury**: VERDICT: SETTING ASIDE: MISCONDUCT OF JUROR. After the rendition of the verdict, affidavits of a number of jurors were filed, showing that during the deliberations of the jury one of their number stated that another railroad company had constructed its road across his land, and that he knew the inconvenience of it, and that his vote was for a larger sum than that returned by the verdict. It being shown that substantially the same statement was made by the juror on his *voir dire* examination, it is *held* that defendant cannot be heard to complain, there being no showing that it could not have excluded him. The question of the propriety of receiving such affidavits for the purpose of impeaching the verdict is not decided.

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

James E. Kelby, Byron Clark and *F. E. Bishop*, for appellant.

Field, Ricketts & Ricketts, contra.

REESE, C. J.

This is an appeal from the judgment of the district court for Lancaster county in a proceeding by defendant

to condemn a portion of the land of plaintiff for right of way for the railroad track of the defendant. The principal question involved is the amount of damages plaintiff is entitled to receive. The verdict of the jury was for more than that appraised by the commission appointed by the county court. Preliminary to this, however, is the contention by defendant that the district court was without authority or jurisdiction to inquire into the question of damages for the reason that the appeal was not from the judgment of the county court awarding damages, but from the order of that court in taking any action in the matter. The appeal was filed in the district court in due time. A petition was filed by plaintiff in which he contested the right of the defendant to condemn his land for right of way purposes for the reason that it was not the real party in interest, it having leased its line of road to another railroad company. The petition set out the proposed line, and contained averments of facts showing the injury to the property, with the allegation that the damages sustained would be the sum of $7,000, which was more than the amount awarded by the appraisers. He also instituted an action in injunction seeking to restrain the defendant from proceeding with the condemnation of a portion of his land. That suit was finally decided against the contention of plaintiff, the case being reported in 79 Neb. 89. Plaintiff, over the objections of defendant, filed his amended petition, claiming damages in the amount named in his former petition. Defendant filed its answer controverting plaintiff's right to try the question of damages, "because plaintiff has not appealed from the award of damages made by the commission in the condemnation proceedings, but filed objections to the jurisdiction in said condemnation, and in the original petition filed in this proceeding has prayed for the dismissal of said condemnation." The answer also denied that plaintiff had been damaged for the land taken in any greater sum than $1,400. Plaintiff replied by a general denial.

It is claimed by defendant that, plaintiff having elected

to appeal on the question of jurisdiction, he is bound by that proceeding, and should not be permitted to shift his appeal to one involving the question of damages. In other words, he is bound by his election. We cannot agree with defendant in this contention. Plaintiff's first petition not only questioned the jurisdiction of the court, but specifically raised the question of damages. But, had he not done so, we would still have to hold that the appeal transferred the whole case to the district court, and the fact that plaintiff questioned its jurisdiction could not have the effect of depriving him of the right to question the amount of damages awarded him, his attack upon the jurisdiction failing. In so far as the subject of damages was concerned, no new pleadings were necessary. *Fremont, E. & M. V. R. Co. v. Meeker,* 28 Neb. 94. The jurisdiction of the court having been sustained, the cause was pending for trial on its merits. The rule that a party cannot shift his contention to the prejudice of another has no application here. There has been no change in plaintiff's attitude as to the question of damages, or on any fact upon which his claim therefor was based.

A number of questions propounded to plaintiff and his witnesses were objected to, the objections overruled, and to which defendant excepted. To discuss them separately would extend this opinion to an unwarrantable length. The legal propositions presented will be noticed. It was conceded that the land taken comprised 7 acres in a strip 150 feet wide through plaintiff's quarter section, leaving 12 acres on one side of the track and 141 on the other, 12 acres having been previously taken for right of way for another track. Plaintiff sought to prove the value of the 7 acres actually taken and the diminution of the value of the remaining land; the whole being a farm in one compact body. To this defendant objected. Its contention is that the valuation of the 7 acres should be based upon the average acreage value of the farm. There was evidence that the 7 acres was of the best portion of the land, and hence the most valuable. In addition to proving the value

of the land actually taken, the court permitted evidence tending to show the value of the whole 148 acres immediately before the condemnation proceedings and after. This ruling was afterwards corrected, and the witness then testified as to the value of the 141 acres before taking, excluding the 7 acres taken. However, this did not materially change the situation, as the testimony of the witness relating to values was practically the same. He had estimated the value of the whole 148 acres at $75 to $80 an acre before the location of the road, and in his subsequent testimony stated that he thought the 141 acres was worth $80 an acre before the construction of the road. To the mind of the writer the contention of defendant is a little difficult of comprehension. From the adoption of our present constitution in 1875 to the present time the uniform holding of this court has been that, in the exercise of the right of eminent domain by the condemnation of real estate for purposes of right of way, the landowner was entitled to the value of the land actually taken and the diminution in value of the land not taken as his damages. *Fremont, E. & M. V. R. Co. v. Whalen,* 11 Neb. 585; *Republican V. R. Co. v. Arnold,* 13 Neb. 485; *Republican V. R. Co. v. Linn,* 15 Neb. 234; *Blakeley v. Chicago, K. & N. R. Co.,* 25 Neb. 207; *Chicago, K. & N. R. Co. v. Wiebe,* 25 Neb. 542; *Fremont, E. & M. V. R. Co. v. Meeker,* 28 Neb. 94; *Burlington & M. R. R. Co. v. White,* 28 Neb. 166. The instructions of the court on the trial followed this rule. Had the court adhered to the rule adopted in the early stages of the trial, there might be ground for complaint, yet, as to this, we are not certain, in the light of former decisions. However, since the rule contended for by defendant was finally adopted by the court, there is no ground for complaint.

It is next contended that there was error in the instructions given to the jury. The eighth is too long to be here copied. The different elements of damage to the land not taken were stated with exactness, at least in part, "the liability of stock to be killed, the danger of fire

from passing trains, and all other circumstances caused and produced by the location of defendant's right of way over and across plaintiff's farm in the manner which the evidence shows it to have been located," forming a portion thereof, and to which exception is taken. Were this an open question in this state, we would be strongly inclined to hold with the earlier decisions that the giving of the instruction above quoted, without the limitation to the use of the road without negligence on the part of defendant, was prejudicial error, as the law gives ample remedies when stock is killed or fires started by the negligent use of trains, but not where negligence is absent. However, the principle of the instruction has been approved in *Fremont, E. & M. V. R. Co. v. Bates,* 40 Neb. 381, *Omaha S. R. Co. v. Todd,* 39 Neb. 818, *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Neb. 90, and *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, and cannot now be departed from.

The court instructed the jury that, if their finding of damages did not exceed the sum of $2,700, no interest should be allowed, but that, if they found above that sum, interest should be computed by them at the legal rate. The criticism of this instruction is that, by inference, it informed the jury of the amount found due by the appraisers, and was, in effect, a suggestion which might induce them to find for more than that sum in order to give plaintiff interest. It is possible that such might have been the effect of the instruction, and yet we cannot see that it was reversible error. In *Bolar v. Williams,* 14 Neb. 386, an attorney, in trying a case before a jury in the district court, stated that the cause had been tried in justice court, giving the result. No exception was taken, and the question was not presented for review, but the remark was referred to as "a gross breach of propriety," etc. There is no contention in this case but that the rule given was correct, but it is claimed that it should have been given in another way. For the purpose of obviating this difficulty, defendant asked an instruction directing

the jury to find the damages and interest separately and unadded. This instruction was refused. It is probable that the plan suggested by defendant would have been the better method, but it is not thought for that reason the judgment should be reversed. It would be by inference alone that the former finding could be surmised by the jury. From the instruction given, the jury might seek a reason for it and might arrive at the correct solution, but such is not shown by the record to be the fact. Other instructions were asked, and the refusal to give them is assigned for error, but we find nothing in the action of the court in that behalf to the prejudice of defendant.

After the returning of the verdict, affidavits of jurors were filed, stating, in substance, that one of the jurors who desired to return a larger verdict than that rendered had stated in the jury room during their deliberations that another railroad company had constructed its road across his land, and that he knew the inconvenience of it, and that his vote was from $3,500 to $4,200. The verdict was for $3,659.32, including interest at 7 per cent. for the one year and six months, making the damages found about $3,300. The question is raised as to the propriety of filing and considering such affidavits for the purpose of impeaching the verdict; but, as it is shown that substantially the same statement was made by the juror on his *voir dire* examination, it is not deemed necessary to notice the matter further, as the defendant could not be heard to complain, there being no showing that it could not have excluded him.

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

AFFIRMED.

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

FILED OCTOBER 22, 1909. No. 15,600.

1. **Justice of the Peace: PROCEEDINGS IN ERROR.** In order to give the district court jurisdiction in a proceeding in error to reverse a judgment of a justice of the peace, the plaintiff must file a transcript, a petition in error in the district court, and cause a summons in error to be issued thereon against the defendant within six months from the date of the rendition of the judgment complained of, which summons must be served upon the defendant in error or his attorney of record.

2. ———: ———. After the expiration of six months from the date of the judgment, the district court cannot obtain jurisdiction to reverse the same by issuing what is called a *nunc pro tunc* summons in error and directing the service thereof to be made upon the defendant, and a judgment reversing the judgment of a justice of the peace upon such service is void.

3. **Courts: JURISDICTION.** Ordinarily the district court has the power to determine the question of its own jurisdiction; but, where the jurisdiction of the court does not depend upon a question of fact, and is simply one of law, no finding or declaration of the court, if made in disregard of plain statutory provisions, will give it jurisdiction.

4. ———: ———. The test of jurisdiction is whether the tribunal had the power to enter upon the inquiry, and not whether its methods were regular, its findings right, or its conclusions in accordance with the law.

5. **A void judgment is in reality no judgment. It is a mere nullity.** It is supported by no presumption, and may be impeached in any action, direct or collateral.

REHEARING of case reported in 84 Neb. 143. *Reversed and dismissed.*

BARNES, J.

Our former opinion in this case (84 Neb. 143) affirming the judgment of the district court, contains a detailed statement of the facts to which reference will be made in this opinion.

Oral argument was ordered on appellant's motion for a rehearing, and the case has been reargued and again submitted for our consideration. Counsel both for and against the motion have so ably presented the questions involved in this controversy as to render further argument a work of supererogation, and we will therefore dispose of the case without further delay.

It is proper at this point to state that on the 24th day of May, 1904, the appellant recovered a judgment against the appellee in justice court of Saline county; that soon thereafter he caused a transcript of that judgment, together with a petition in error, to be filed in the district court, but no summons in error was issued thereon until more than eleven months had elapsed, when by a motion, he asked the court to issue what he called a *nunc pro tunc* summons in error as of the date of the filing of his transcript, and an order for service thereof. His request was granted; and, when the so-called summons was served, appellant, by special appearance, challenged the jurisdiction of the court. Her challenge was overruled, she elected to stand upon her special appearance, and made no other or further appearance in the case. Some time thereafter the court reversed the judgment of the justice of the peace, and rendered a judgment on the merits against appellant, from which she has appealed to this court.

We held in our former opinion, first, that the district court had no jurisdiction to issue what is called the *nunc pro tunc* summons in error, and direct that it be served upon the appellant more than eleven months after the rendition of the judgment in her favor in justice court, and that the district court was therefore without any jurisdiction to reverse that judgment. We are satisfied that thus far our former judgment was correct. *Bemis v. Rogers*, 8 Neb. 149; *Rogers v. Redick*, 10 Neb. 332; *Benson v. Michael*, 29 Neb. 131; *Stull v. Cass County*, 51 Neb. 760. We then decided that, by failing to appear or prosecute error from the judgment of the justice until

after the case had been set down for trial and a judgment had been rendered against her on the merits, appellant could not question the jurisdiction of the district court to render such judgment. We are now of opinion that this ruling was wrong and cannot be sustained by either principle or precedent. Appellee contends, however, that the district court had the power to determine the question of its own jurisdiction, and, as no bill of exceptions was preserved upon the order of the court awarding the issuance and service of the so-called *nunc pro tunc* summons in error, the ruling upon that question, although it was erroneous, was not void, and that order or judgment cannot be reviewed. This would undoubtedly be true if any question of fact upon which jurisdiction depended had been investigated and determined by the district court. *Perrine v. Knights Templar's and Masons' Life Indemnity Co.*, 71 Neb. 267. But in this case there was no disputed question of fact. Everything relating to the question of jurisdiction fully appeared on the face of the record, so that the question of jurisdiction was simply one of law. In such a case no finding or declaration of the court, if made in disregard of plain statutory provisions, will give it jurisdiction. A court cannot act *sua sponte*. "Some person must in some legal way invoke its action." 11 Cyc. 670. The test of jurisdiction is whether the tribunal had power to enter upon the inquiry, not whether its methods were regular, its finding right, or its conclusions in accordance with the law. *Johnson v. Miller*, 50 Ill. App. 60.

The provisions of our statute by which the district court was at that time given jurisdiction of proceedings in error from a judgment of a justice of the peace required the filing of a transcript, a petition in error in the district court, and the issuance of a summons within six months from and after the rendition of the judgment complained of, which must have been served upon the defendant in error. In the case at bar those provisions were never complied with, and therefore the district court had no

power to enter upon any inquiry in relation thereto, and any order or judgment made therein was absolutely void. So it may be said that up to the time the final judgment on the merits was rendered against appellant, the proceedings of the district court were *coram non judice* and void. *Eayrs v. Nason,* 54 Neb. 143; *Cavanaugh v. Smith,* 84 Ind. 380; *Wood Harvester Co. v. Dobry,* 59 Neb. 590. If this be true, then the court had no jurisdiction to render the last named judgment, and all of the proceedings were void, and such judgment may be assailed either directly or collaterally. *Johnson v. Parrotte,* 46 Neb. 51. In that case it was said: "A void judgment is in reality no judgment at all. It is a mere nullity. It is supported by no presumptions, and may be impeached in any action, direct or collateral." Indeed, upon this question there seems to be no conflict of authority. Upon the argument counsel for the appellee tacitly acknowledged the force of this declaration by contending that appellant at some time or place in the proceedings voluntarily entered her general appearance therein, and our attention is specially directed to a paper filed in the district court on the 5th day of December, 1904, which is claimed by counsel to be a general appearance, and which reads as follows (omitting title): "Comes now the defendant and appears specially and objects to the jurisdiction of the court over the person of the defendant herein for the following reasons: (1) Because the proceedings in error were not commenced and perfected herein within six months from and after the judgment which it is sought to have reversed, as required by law. (2) Because no summons in error was issued out of this court nor served within the time provided by law. (3) Because no summons in error has been issued herein, and more than six months have elapsed since the rendition of the judgment sought to be reversed, nor has summons in error or other notice of this proceeding been served or given defendant or her attorneys. (Signed) Mary Radil, Defendant, by F. W. Bartos, her attorney." That this does not amount to a general appearance con-

ferring jurisdiction on the district court seems clear. It directs the attention of the court to its want of jurisdiction, and should have been, and must be, treated simply as a special appearance. It is proper to state that we have searched the record and are unable to find anything therein which even resembles a general appearance on the part of the appellant, while, on the other hand, it appears that she at all times and places challenged and denied the jurisdiction of the court, and stood and relied on her special appearance.

We are therefore of opinion that the district court was without jurisdiction of the so-called proceedings in error, and all of its orders and judgments therein are void.

For the foregoing reasons, our former judgment is vacated, the judgment of the district court is reversed and the proceedings therein are dismissed.

REVERSED AND DISMISSED.

SETH K. HUMPHREY, APPELLEE, V. OLIVER M. HAYS ET AL., APPELLANTS.

FILED OCTOBER 22, 1909. No. 15,787.

1. Taxation: VOID DECREE: CONSTRUCTIVE SERVICE. A decree foreclosing a tax lien based upon service by publication, where the owner of the land is a resident of this state upon whom personal service of summons could have been made, and the affidavit for service contains no statements which would authorize constructive service upon the land against which the taxes were assessed, is void; and such a decree may be attacked in an action to redeem the premises from the lien for taxes and remove the cloud created thereon by such void decree.

2. ———: ———: REDEMPTION. In such a case the plaintiff should be allowed to redeem upon the payment of the tax lien, the taxes subsequently paid on the premises, together with the interest thereon, and the value of the permanent improvements, if any,

made upon such premises by the purchaser or those claiming under him.

3. Quieting Title: TAXATION: EQUITY. In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants. *Payne v. Anderson*, 80 Neb. 216.

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

E. D. Kilbourn, for appellants.

Jackson & Kelsey, contra.

BARNES, J.

Action to quiet title to the southwest quarter of section 7, township 24, range 8 west, in Antelope county, Nebraska. Plaintiff had judgment, and the defendant has appealed.

It appears that on and prior to the 8th day of September, 1899, the Stapleton Land Company, a corporation duly organized under the laws of the state of Nebraska, having its principal place of business in Douglas county, was the owner of the land in question; that taxes for the years 1893, 1894, 1895, 1896, 1897 and 1898 had been assessed against the land and at that time were due and delinquent; that on the date first above mentioned the county of Antelope filed its petition in the district court to foreclose its tax lien thereon; that a decree was rendered in said action and the land was sold thereunder to Emmett Hays, one of the defendants herein, who received a sheriff's deed therfor; that thereafter he conveyed the premises to his codefendant Oliver M. Hays. It further appears that the Nebraska Farm Land Company, successor to the Stapleton Land Company above mentioned, took over all of the real estate of the former company and became the owner thereof, and in October, 1904, sold

and conveyed the premises in question to the plaintiff herein; that thereafter plaintiff commenced this action for the purpose above mentioned, and alleged in his petition, among other things, that at the time the action was commenced the then owner of the premises was a corporation organized and existing under the laws of the state of Nebraska, having its principal place of business in Douglas county, Nebraska, where for many years both before and after the commencement of the action it was carrying on its business and maintaining an office where personal service of summons could have been had and made in said foreclosure suit in the manner provided by law; that notwithstanding that fact, which was well known to the plaintiff in the tax foreclosure suit, no service was had or made upon the then owner of the land, the principal defendant therein, and that the only service of summons in said case was by publication; that the affidavit for such service was insufficient to authorize service upon the land as an action *in rem,* and that because of the fact of its insufficiency, and because the plaintiff in that action could have obtained personal service of summons upon the then owner of the land, which was a Nebraska corporation, and whose place of business at that time was in Douglas county, in said state, the court never acquired any jurisdiction to enter a decree foreclosing the lien of Antelope county for the taxes which had theretofore been assessed against the premises; that said judgment and decree under which the land in question was sold to Emmett Hays was void, and that he acquired no title to the premises thereby.

There seems to be no dispute as to the truth of the foregoing statements. It is claimed, however, on the part of the defendants, that the service by publication above mentioned was not void; that the proceedings in the foreclosure suit were regular, and transferred the title of the land in question to the defendants herein. In support of this contention *Loney v. Courtnay,* 24 Neb. 580, is cited.

That was a case to quiet title and redeem from what was alleged to be a void foreclosure sale. There, as here, it was claimed that there was no service other than by publication. There, as here, the owner of the premises, who was made a party defendant, was a resident of the state and summons could have been served upon him therein. A decree was rendered for the plaintiff without requiring him to pay the amount due upon the mortgage. On appeal to this court, the decree of the district court was modified so as to require the plaintiff to pay to the defendant the unpaid balance of the mortgage debt, together with the interest thereon, within 90 days, and, as thus modified, the judgment of the district court was affirmed. Cases are cited by counsel for the defendant on plaintiff's other objections to the service, but, as this case must be determined upon the point first above mentioned, it is unnecessary to consider them.

In *Eayrs v. Nason*, 54 Neb. 143, the precise question here presented was determined. That was a suit to quiet the title to certain real estate belonging to the plaintiff which had been sold under a decree of foreclosure where the only service made was by publication. It appeared that the owner of the equity of redemption was made a party, and when constructive service was made on him he was a resident of the state, and actually present therein. It was held that the plaintiff, who was the heir at law of the defendant in the foreclosure suit, might show that the averments of the affidavit to procure constructive service upon his ancestor—that he was then a nonresident of the state, and that service of summons could not be had on him in the state—were false; and, upon such proof having been made to the satisfaction of the court, it was declared that the sheriff's deed held by the defendant was void. It was thereupon canceled as a nullity and a cloud upon plaintiff's title, and he was allowed to redeem the real estate from the lien of the mortgage.

In *Wood Harvester Co. v. Dobry*, 59 Neb. 590, it was held that a summons served constructively on a resident

of the state, who has neither absconded nor concealed himself with intent to defraud creditors or avoid service of process, does not confer jurisdiction over the person of the defendant, or justify a rendition of a judgment condemning his property.

In *Hayes County v. Wileman,* 82 Neb. 669, it was said that a judgment rendered on service by publication against a resident of this state on whom personal service might have been had is absolutely void. In that case it appeared that Hayes county had obtained a decree foreclosing its tax lien upon the premises in question. After decree and sale the owner of the land filed a motion to set aside the judgment and the deed executed by the sheriff upon the sale of the premises thereunder, and asking that he be allowed to redeem from the tax lien. The trial court refused the relief asked for, and upon appeal to this court the judgment was reversed, the owner was allowed to redeem, and his title was quieted upon his payment of the amount of taxes and interest due upon the land. Such has been the uniform holding of the court upon that question.

It is claimed, however, by the defendants that the plaintiff's petition in this case was insufficient, in that, there was no proper offer or tender of the payment of the taxes included in the foreclosure decree. In *Payne v. Anderson,* 80 Neb. 216, it was held that a judgment or decree affecting the title to land owned by a resident of this state where the only notice is by publication is void where no appearance was made by or for such resident; that, in an action to quiet title as against a sale for taxes made under a void decree of the court, an offer to pay such sum as the court may find due defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendant. The petition in this case contained such an offer, and it follows that our former rulings upon the question involved in this suit require us to affirm the judgment of the district court, which is accordingly done.

AFFIRMED.

HUGH THOMPSON V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1909. No. 16,276.

1. **Criminal Law: EVIDENCE.** Where, in a criminal prosecution, the evidence of the state, if believed by the jury, is sufficient to sustain the verdict, the fact that the evidence is somewhat conflicting will not require the supreme court to set aside the judgment.
2. ———: WITNESSES: CREDIBILITY: QUESTION FOR JURY. Conflicting statements made by a witness at different times are matters to be considered by the jury in determining his credibility, and are not for the consideration of the court.
3. ———: INSTRUCTIONS. It is not error to refuse to give an instruction stating a proposition of law which is substantially covered and included in an instruction already given.
4. ———: ———. Where the evidence shows that the accused is either guilty of the offense charged, or not guilty of any offense whatever, the trial court is not required to give an instruction on the lower degree of crime included in the definition of such offense.

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

J. E. Leyda, for plaintiff in error.

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

BARNES, J.

Hugh Thompson, hereafter called the defendant, was convicted of the crime of robbery from the person, and was sentenced by the district court for Richardson county to serve a term of three years in the state penitentiary. To reverse that judgment he has prosecuted error to this court.

1. His first contention is that the verdict is not sustained by sufficient evidence. We have read the bill of exceptions with great care, and find that the testimony of the complaining witness is clear as to the fact of the

robbery, and that he positively identified the defendant as the man who robbed him. It also appears that he is corroborated by one John Hoppe, who was with him at the time the robbery occurred. The evidence for the prosecution discloses that the prosecuting witness and his companion Hoppe, at about the hour of 11 o'clock P. M. of the day of the robbery, were on their way to Hoppe's home in Falls City, where they intended to spend the night; that they were approached by the defendant and another, and after some conversation they all started to the Burlington and Missouri depot; that on the way the prosecuting witness asked for a match with which to light his pipe; that the defendant produced a match, and held his coat as a wind shield, and the witness placed his head inside the shield to light his pipe, when he was struck on the head by the defendant, was knocked down, and two silver dollars, which he had exposed to the defendant's view when he took out his pipe and tobacco, were taken from him. While it appears that all of the parties had been drinking intoxicating liquor to some extent, and that Hoppe was somewhat intoxicated, yet he and the complaining witness both seemed to have a pretty clear comprehension of what occurred. It was also shown that the defendant wore but one coat, which was an overcoat, although it was then the latter part of December; that he had a mark or abrasion on his face which was quite noticeable. These were matters which were observed by several witnesses, who were thus enabled to identify him. Other witnesses testified that they saw the defendant and his companion at a restaurant, about the saloons, and on the streets of Falls City on the evening in question shortly before and soon after the robbery occurred. This evidence, if believed by the jury, was sufficient to sustain the verdict. On the other hand, the defendant and his companion denied the robbery, testified that they did not see the prosecuting witness prior to the time he complains of having been robbed, and did not see him or know him at all until the following day,

and after they were arrested and confined in jail on the charge in question. They also testified that they did not arrive in Falls City until about 9 o'clock P. M. on the day the offense was committed; that they boarded a freight train at about 12 o'clock that night and went to Hiawatha, Kansas, returning the next morning to Falls City. It will thus be observed that, according to their own statements, they were in Falls City when the robbery was committed, and so the only conflict in the evidence relates to the question of the identity of the person who committed the offense. The jury having resolved that controversy against the defendant, the verdict should not be set aside for want of evidence to sustain it.

2. It is strenuously contended that the evidence of the prosecuting witness is not to be believed for the reason that on the preliminary examination he stated that he first saw the defendant in Falls City about 4 o'clock in the afternoon, or before dark, on the day of the robbery, while on the trial in the district court he testified that he first saw the defendant late in the evening of that day. The answer to this contention is that these apparently conflicting statements were for the consideration of the jury in determining the credibility of the witness, and do not authorize the court to set aside the verdict.

3. It is further insisted that the effect of the evidence of the complaining witness is destroyed by his statement that the defendant held a match for him in his left hand, and struck him on the right side of the head with his right hand. It appears from the record that the witness did not see just how or by whom the blow which knocked him down was delivered. This was also a question affecting the credibility of his testimony which the jury alone had the right to determine, and is not a matter for the consideration of the court.

4. Defendant also assigns error for the refusal of the trial court to give the following instruction: "You are instructed that, if you believe any witness has wilfully sworn falsely to a fact in respect of which he cannot be

presumed liable to a mistake, you may give no credit to any alleged fact depending upon his statement alone." It appears from the record that the court instructed the jury on this point as follows: "The jury are the sole judges of the credibility of witnesses, and, if the jury find that any witness has testified falsely as to any material fact in the case, you are at liberty to reject and disbelieve all of his testimony." This instruction is, in substance, the same as the one refused, and therefore the refusal was not prejudicial error.

5. Defendant further contends that the trial court erred in failing to instruct the jury on the question of an alibi. It is a sufficient answer to this contention that no such defense was interposed by the defendant, and there is no evidence in the record tending to sustain such a defense.

6. Finally, it is urged that the district court erred in failing to instruct the jury that they might find the defendant guilty of larceny only. To our minds this did not constitute error. In this case the defendant was either guilty of the crime charged, or not guilty of any offense whatever. No facts were shown and no evidence was introduced which would justify the court in giving such an instruction. Where, in a criminal prosecution, there is no evidence tending to prove the commission of a lower offense than the one charged, and the testimony shows that the accused is either guilty of the higher offense, or not guilty of any crime, it is unnecessary for the court to instruct on a lesser offense which may fall within the definition of the crime charged. 12 Cyc. 640.

After a careful examination of the record, we find ourselves unable to reverse the judgment without invading the province of the jury. While it is to be regretted that so severe a punishment must be inflicted for so small an offense, one which may have been committed by the defendant while he and his companions were, to some extent, under the influence of intoxicating liquor, yet that is a matter for executive clemency, and for which the courts are powerless to grant relief.

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

AFFIRMED.

ELI BINGAMAN, APPELLEE, V. ANNA BINGAMAN ET AL., APPELLANTS.

FILED OCTOBER 22, 1909. No. 15,776.

1. Evidence, Preponderance of. While it is the rule in this state that a preponderance of the testimony is all that is required to sustain a finding in a civil case, still what constitutes a preponderance may vary largely according to the circumstances of each case.
2. Cancelation of Instruments: PRESUMPTIONS: EVIDENCE: FRAUD. Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. *Peterson v. Estate of Bauer*, 76 Neb. 652, 661.

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

E. J. Clements and *J. H. Grimm & Son*, for appellants.

Hastings & Ireland, contra.

LETTON, J.

This is a case to set aside and cancel a conveyance of 80 acres of land in Saline county on the ground that it was fraudulently obtained. The plaintiff and defendant are husband and wife. The plaintiff is a man 68 years of age. In 1865 he entered 160 acres of land in Saline county under the United States homestead law, of which tract the 80 acres in controversy form a part. In 1882 plaintiff,

who was a widower with one son, lived upon his homestead, and the defendant Anna Bingaman at that time was living on her farm near-by. She was then a young widow named Chyba, 24 years old, with several children. They were married in 1882, and lived together upon the plaintiff's homestead for 13 years, when, the health of both failing, they went to Texas, and have lived at various places in the south from that time until a short time before the beginning of this action; both, however, looking upon plaintiff's 160-acre farm as their family homestead, and living upon the rents derived from that land, the rent from 160 acres owned by the defendant, and from the plaintiff's pension of $12 a month. The testimony shows that their married life was full of discord and quarrels, although they had their peaceful intervals as well; and that they had separated and lived together again. When Mrs. Chyba married the plaintiff and moved to his home, the house was built upon the farm and the orchard planted, but most of the other improvements have been made since that time, a number of them from the income from the rent.

The defendant testifies that before the marriage of Bingaman, as an inducement to her to marry him, he promised to convey to her the 80 acres in controversy, but this is denied by the plaintiff. They both testify that soon after the marriage, and continuing for a long time, she kept insisting that he make her a conveyance of the land, but that he as regularly refused to do so. She finally became tired, she says, and stopped asking him to carry out this alleged agreement, until in 1906, after the plaintiff's only son had been killed in a railroad wreck, she again began to urge him to make the conveyance. They spent the summer of 1906 at Crete near the farm; during that summer she advertised 80 acres of her land in section 4 for sale. Upon one occasion the plaintiff accompanied her to the office of one James Schmelir, a notary public, in Crete. She testifies that at that time Schmelir wrote the deed conveying the 80 acres to her son James Chyba for

the purpose of transferring the title to her; that at this time she offered to pay plaintiff $500 if he would execute the deed; that it was read to him by Schmelir, but that he became angry, refused to make the deed, and said to her: "You will get it, not now, but soon." The plaintiff admits substantially that this conversation was had, but testifies that the deed was not read to him, and that he did not see it then. In the fall of that year they returned to Hot Springs, Arkansas. After they went south the unexecuted deed was sent by Schmelir to the defendant, and the evidence shows that the plaintiff was aware of this fact.

The plaintiff's story as to what afterwards occurred is about as follows: That defendant told him she wanted him to join with her in making a deed to her son of the 80 acres of her land in section 4 that she had been trying to sell while they were in Nebraska; that on the morning of November 23, 1906, she induced him to go to the office of a notary in that city for the purpose of signing and acknowledging the deed; that she read the deed to him before they went to the notary's office as if the land was in section 4, the N. W. of the S. W. ¼ of section 4; that when they went to the notary's office that officer read it over again just the same as she did, as if the land was in section 4; that no consideration was paid for his signature; that there was no one in the office at the time but he and his wife and another woman; that a Mr. Lafevre came in, in response to a telephone call, and signed the deed as a witness, though he also says that they left before Lafevre came; that his wife told him she was selling the land for $5,000, and was going to divide this up between her children and herself, and that, as she read it to him, the consideration named was $5,000. He further testifies that he did not know that his land had been conveyed until a lease was sent from one Eckert, a real estate agent at Crete who had found a tenant, and the lease was in Mrs. Bingaman's name; that he first had his wife write, and that Mr. Eckert said it was all right, but that afterwards

he had a lawyer write Eckert, but Eckert would not answer; that he soon afterwards received a newspaper clipping showing the deed had been filed for record, and that this was the first definite knowledge he had that the land had been transferred; that his wife then had $200 of his money, but that he could not get any money from her, but waited till he got his pension, when he came to Crete, and began this action in November, 1907; that the rent for 1906 and 1907 has been collected and paid to him, the 1907 rent being paid him by John Chyba, his wife's son; that he is unable to read writing, although he can write his name, and is unable to read the English language, except to pick out a few words when he reads a newspaper; that he has paid the taxes from the rent money, and is now in possession of the land.

On the other hand, the defendant's story is: That on the day before the deed was executed she had been urging him to carry out his promise and deed her the 80 acres; that she told him she would pay him the $500 which she promised in Schmelir's office; that he said he would consider it until next day; that in the morning he said he had made up his mind that he would let her have it. She also says she agreed that the land should not be sold so long as he lived. That they went to a butcher shop that morning, and asked the proprietor, Mr. Lafevre, with whom they were both acquainted, whether he would witness the deed; that after dinner they went down town to look for a notary; that they saw Mr. Alford's sign, went into the office, and asked him to acknowledge the deed; that he then asked whether they knew some one who could identify them; that they told him of Mr. Lafevre, and Mr. Alford then telephoned him to come down for the purpose of witnessing the deed; that before they left home the plaintiff asked her to read the deed aloud, which she did; that Mr. Alford again read the deed aloud to them before Lafevre came in, and that after Lafevre came in the deed was again read aloud by him, and then signed, witnessed, acknowledged and delivered to her; that the next day she

gave plaintiff five $100 bills from her cash box, money received from rents; that the deed was afterwards recorded, but not until she had procured a reconveyance to her from her son John, and this was the reason for the delay in recording. She further says that she had never met Mr. Alford before, and that her only acquaintance with Lafevre was from purchasing meat at his butcher shop. She agrees with plaintiff that they had to wait about one-half hour for Mr. Lafevre to come, because his clerk was out, and he could not leave his shop, and further says that she had never had any conversation with Alford, except at that time in her husband's presence. Her testimony in regard to the transaction in the office is corroborated both by Mr. Alford and by Mr. Lafevre. These men both identify the original deed, which was offered in evidence, testify that it is unaltered, and each testifies that he read the description aloud to both of them exactly as it was written in the deed, although they could not tell from memory alone what section the land was in.

In rebuttal, the plaintiff again denied being paid any money for the land, and said that it was his wife who asked that Lafevre be sent for. He denies the making of an agreement that she should not sell the land as long as he lived. Plaintiff also in rebuttal offered the testimony of Mr. and Mrs. Lowrey, who had associated somewhat intimately with the parties when they lived at Hot Springs and Little Rock, Arkansas. Lowrey testified that in October, 1907, defendant told him her husband had found out about the land being deeded away, and he accused her of fooling him out of the land; that she further said that she had taken advice, and that her attorneys said no payment was necessary, and that her title was good without it. But Lowrey also testifies that he frequently heard defendant say to the plaintiff that he ought to deed the land to her as a recompense, and his response was: "Do you want me to die? You will get the land some time"—and that these conversations were between the 15th and the last of October, 1907. His wife testifies that in July,

1907, defendant told her that she had been trying to get her husband to deed 80 acres of land to her, and that he always says, "Do you want me to die?" That she also said that Bingaman gave her some land when they were in Hot Springs a year ago, and that he now says, "I fooled him, that he did not give it to me." This evidence, however, is subject to the same infirmity that inheres in all testimony of the kind.

The original deed is in the record and bears no traces of any change or alteration in the description of the section. Schmelir, who wrote the body of it, is dead, and his testimony has not been taken. It is possible that the plaintiff's story of the fraud perpetrated upon him by his wife and by the notary is true, but we think the evidence is overwhelmingly against him on this point. There is absolutely nothing in the record which tends to cast any sinister light upon the conduct of either Alford or Lefevre, and both appear to be entirely disinterested witnesses.

While it is the rule in this state that a preponderance of the testimony is all that is required to sustain a finding in a civil case, still what constitutes a preponderance may vary largely according to the circumstances of each case. Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. *Peterson v. Estate of Bauer,* 76 Neb. 652, 661; *Doane v. Dunham,* 64 Neb. 135; *Topping v. Jeanette,* 64 Neb. 834; *Williams v. Miles,* 68 Neb. 463.

The plaintiff's main contention is that, while the deed upon its face describes the plaintiff's land in section 3, yet

it was read to him as if it described the defendant's land in section 4, but this is denied by the defendant, by the notary and by the witness, and there is absolutely no evidence in the record which even remotely suggests any collusion or conspiracy or any concert of action between these parties.

With the exception of the testimony of the plaintiff and defendant, that relating to the transactions at the time of the execution of the deed, and to conversations thereafter in Arkansas, was taken by deposition. The advantage, therefore, that personal observation of the witnesses usually gives to the trial judge does not exist as to these absent witnesses, and this court is in as favorable a position to judge of their credibility as was the trial court. We must refuse to cancel and set aside this conveyance upon this testimony; but, while we cannot grant the plaintiff all the relief he asks for, there is a general prayer for equitable relief in his petition.

The defendant testifies that, according to her agreement with the plaintiff, the land was not to be sold until after his death, and we think her conduct since the conveyance bears this out. The rent collected by her son since the conveyance has been paid to the plaintiff, and she has never been in actual possession, claiming in opposition to his right to the rents and profits. We are of the opinion from the evidence that plaintiff never intended to part with the possession or use of his land so long as he lived, and that the conveyance, while absolute in its terms, was not intended to give to the defendant the whole estate until after the plaintiff's death. He testifies he never meant to part with the land while he lived; and, while he denies making the agreement, the record as a whole convinces us that in all probability the deed was made in recognition of an invalid antenuptial agreement and upon her admitted promise. The son took title only as an intermediary; hence, the agreement was not effected by the deed to him. We are of the opinion that the right of possession of the plaintiff during his lifetime should be pro-

tected by the court, even though he has failed to pray specifically for such relief.

For these reasons, the judgment of the district court is reversed and the cause remanded, with instructions to that court to enter a decree finding and declaring that the plaintiff, or his grantees or assigns, is entitled to the occupancy and possession of the land described in the conveyance for and during the term of his natural life, subject, however, to the usual obligations of a tenant for life; and, as to other matters, finding for the defendant.

JUDGMENT ACCORDINGLY.

SECURITY STATE BANK, APPELLANT, V. WATERLOO LODGE ET AL., APPELLEES.

FILED OCTOBER 22, 1909. No. 15,782.

1. Mortgages: TENDER: DISCHARGE: OFFER TO CONFESS JUDGMENT. As a general rule the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien, and thereafter the only liability is upon the note. An offer to confess judgment in such a case after action is brought is sufficient to relieve the defendant from costs and interest accruing thereafter without paying the money to the clerk of the court at the time the offer is made.
2. ———: ———: INTEREST. A court of equity will not be diligent in seeking for reasons to permit a creditor to recover interest when the debtor has tendered the full amount due, and when the creditor has by his own conduct lost the right to recover interest.
3. Tender: SUBSEQUENT DEMAND. If a creditor prevents payment by wrongfully refusing to accept the amount due when tendered by the debtor and some time afterwards demands it, the debtor is entitled to a reasonable opportunity to comply with the demand.

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

John C. Wharton and *Byron G. Burbank,* for appellant.

Baldrige, De Bord & Fradenburg, J. I. Negley and *T. A. Hollister, contra.*

LETTON, J.

This is an action to foreclose a mortgage. The note to secure which the mortgage was given was made by the Waterloo Lodge No. 102, A. F. & A. M., for the sum of $2,000, dated August 19, 1902, and due five years after date, with interest at 6 per cent., and was payable to the Citizens State Bank of Waterloo, or order, at its banking office in Waterloo, Nebraska. The mortgage securing the note contained an agreement that the mortgagor "may pay one hundred dollars or any multiple of that sum at any interest pay day." The annual interest was paid to August 19, 1905. The 19th day of August, 1906, fell upon Sunday. On the 18th of August Mr. Wilkins, master of the lodge, went to the office of the Citizens State Bank of Waterloo and tendered to Mr. H. B. Waldron, the cashier, $2,120 in full payment of the note and interest, under the provision allowing the payment of $100 or any multiple upon any interest pay day. Mr. Waldron refused to receive the principal, giving as a reason that the note was not due for a year, but he accepted the $120 interest. On Monday, the 20th, the $2,000 principal was again tendered at the same place with 35 cents as accrued interest. This was also refused. Mr. Waldron was then informed that the money would be placed on deposit at the Bank of Waterloo subject to the order of the Citizens State Bank, and this was immediately done. The money remained on deposit until August 19, 1907, when it was withdrawn, and again taken by Mr. Wilkins to the office of the Citizens State Bank and tendered to Mr. Waldron. At this time Mr. Waldron refused it, saying that the amount was insufficient. He was again notified that the money would be on deposit at the Bank of Waterloo as before, and it

was so placed. On October 28, 1907, the panic of that year occurred. The evidence shows that banks all over the country stopped payment in money, especially in small sums, and the evidence further shows that the daily transactions between the Citizens State Bank and the Bank of Waterloo were carried on by means of cashier's checks, which in sums of over $100 were usually made payable through the Omaha clearing house and with the Omaha clearing house funds. Shortly before 4 o'clock in the afternoon of October 30, Mr. Waldron went to the Bank of Waterloo and said to the cashier that certain money had been left there by the Masonic lodge in payment of a note payable to the Citizens State Bank, and said: "I want to make a demand for this money." The cashier handed him a draft upon the First National Bank of Omaha for $2,000.35. He refused the draft and demanded legal tender currency. The cashier said: "Mr. Waldron, are you paying your customers in legal tender currency these days?" To which he replied: "That has nothing to do with the case." After his refusal the bank immediately telephoned to Omaha and procured $2,000 in gold, which arrived in Waterloo the next day about 5:30 P. M., and after banking hours. The next day, during banking hours, Mr. Wilkins took $2,001.15 in gold to the Citizens State Bank and tendered it to Mr. Waldron, who refused to receive it. This action was begun that day. On November 14, Mr. Wilkins again tendered to Mr. Waldron at the bank $2,019.49 in currency. This included $7.74 interest, $9.25 costs, and $2.50 for good measure. An offer to confess judgment for the same sum was also made and filed in court that day. Before the maturity of the note it had been indorsed and delivered to the Security State Bank of Washington, Nebraska, of which bank Mr. H. B. Waldron, the cashier of the Citizens State Bank of Waterloo, was president. At the trial the district court found substantially the foregoing facts. It further found "that it was a physical impossibility for

the Bank of Waterloo to make payment of the sum of $2,000.35 on October 1, 1907, in legal tender currency." It further found that, by virtue of the tenders made, the mortgage lien was satisfied and discharged, and that the plaintiff was not entitled to recover any interest, except as included in the offer to confess, or any costs other than the amount so included, and rendered a decree that the defendant should pay to the clerk for the plaintiff the sum of $2,019.49; and, this having been done, ordered that the petition of the plaintiff be dismissed, and that a release and satisfaction of the mortgage be delivered, or, in lieu thereof, that the decree so operate. From this decree plaintiff has appealed.

1. Appellant first contends that the tender of August 18, 1906, was premature because the interest pay day was August 19. The refusal to accept the money, however, was not made for this reason, and the plaintiff, having accepted the interest upon the 18th, cannot now say that, while the tender as to the interest was not premature, the tender as to the principal was. Moreover, the 19th was on Sunday, and the tender was renewed on Monday.

2. The next point made is that the tender of November 2 was of no effect because made after the suit was commenced. There is nothing in the record to show at what hour on November 2 the petition in this case was filed or summons served.

3. The next contention is that the tender of August 20, 1906, was not kept good. The money tendered on August 20, 1906, was immediately deposited in the Bank of Waterloo to the credit of the Citizens State Bank, and was there at all times ready for the plaintiff until on and after October 28, 1907, when a financial panic occurred and nearly every bank in the United States suspended payment of actual money, except in small amounts. Taking advantage of this condition of affairs, the president of the plaintiff bank demanded the deposit from the Bank of Waterloo within an hour before the close of banking hours, and at a time when it may safely be presumed he

had reason to believe that a bank in a small country town would be unlikely to have that amount of currency on hand, and at such an hour in the day as probably to make it impossible to procure the money from some other place before the close of banking hours. The money was procured, but it reached Waterloo after banking hours next day, and was again tendered within what, under all the circumstances, was a reasonable time after demand. The question is presented whether, under such circumstances, the defendant was bound to have legal tender currency or gold in such a position that immediately upon demand it was required to produce the same or lose the benefit of the lawful tender made by it at the proper time and place. A court of equity will not be diligent in seeking to find reasons to permit a creditor to recover interest when the debtor has attempted to pay, and when the creditor has by his own conduct lost the right to interest, and more especially in a case where he seeks to take advantage of peculiar circumstances to enforce a demand which, if made, might have been satisfied at any time for 14 months preceding that particular day. In a case where an assignee failed to put his assignment on record, or to give the debtor notice of the assignment, or of his residence, or of the place where payment could be made, Chancellor Walworth said: "A court of equity, however, will not permit the mortgagee, or his assignee, to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party." *Noyes v. Clark,* 7 Paige Ch. (N. Y.) 179. The same principle is applied in another case under somewhat like circumstances, and the court say: "By wrongfully refusing to take the money, the creditor violates his own contract and the debtor's right. By such a wrong, he cannot put upon the debtor an unreasonable burden of keeping the tendered money. There is other money as good as that. If the creditor prevents payment by wrongfully refusing to accept it, and afterwards demands it, the debtor is en-

titled to a reasonable opportunity to comply with the demand." *Strafford v. Welch*, 59 N. H. 46. *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Sharp v. Todd*, 38 N. J. Eq. 324. Even in an action at law the same principle is applied. *Town v. Trow*, 24 Pick. (Mass.) 168.

4. The principal point argued in the appellant's brief is that the use of the money tendered by the Bank of Waterloo defeats the tender, and it is insisted that, since the money was deposited with the bank as a general deposit, commingled with the general funds of the bank, and not kept as a special deposit, the tender was not kept good. Assuming that it was necessary to keep the tender good, we think there is no merit in this contention. All that the creditor could ask for after his refusal of the tender was that the debtor should have the money ready to pay over to him upon demand, or within a reasonable time thereafter. The identical currency which had been tendered did not become the property of the creditor upon his refusal to accept the tender. It was unnecessary, therefore, to make a special deposit of it with the bank. If the defendant had used this money, and been unable to meet the demand within a reasonable time, the result would be different, but this was not the case here. It is clearly shown that the defendant received no interest or advantage from the deposit of the money. It was subject to the creditor's demand at any time up until October 28, the day the evidence shows banks generally suspended payment in gold or currency. The fact that the money was in the bank as a general deposit in nowise prejudiced the plaintiff or interfered with its rights. It could have had the money any day for 14 months, and it was only when in all probability its officers knew it could not be brought forth immediately that it manifested an inclination to accept it. *Davis v. Parker*, 14 Allen (Mass.) 94; *Cheney v. Libby*, 134 U. S. 68; *Kerr v. Moore*, 6 Cal. App. 305, 92 Pac. 107; *Shields v. Lozear*, 22 N. J. Eq. 447; *Dickerson v. Simmons*, 141 N. Car. 325.

5. It is next insisted that the tender was not kept good by bringing the money into court. The whole amount due had been repeatedly tendered and refused. Within a few days after the action was brought an offer to confess judgment for the principal, the accrued interest since the date of the last tender, and the costs then incurred was made, and on the same day this amount was tendered to the plaintiff's president at the Citizens State Bank, and again refused, and at the trial this amount was actually produced in court and paid to the clerk of the court. It is a general rule, to which it is possible there may be exceptions under special circumstances, that the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien, and, whether there are any exceptions to this rule or not, we think this case does not afford room for doubt. When the amount actually due was tendered on the "law day," which in this instance was the day when by the terms of the agreement the debt was payable if the debtor exercised his option, the lien of the mortgage was discharged, and thereafter the only liability was upon the note. *Tompkins v. Batie,* 11 Neb. 147; *Moyer v. Leavitt,* 82 Neb. 310; *Musser & Co. v. King,* 40 Neb. 892; *Gould v. Armagost,* 46 Neb. 897; note to *Moynahan v. Moore,* 77 Am. Dec. 468, 489 (9 Mich. 9); *Dickerson v. Simmons,* 141 N. Car. 325; *Exchange Fire Ins. Co. v. Norris,* 26 N. Y. Supp. 823; *Parker v. Beasley,* 116 N. Car. 1, 33 L. R. A. 231, and note.

This being so, under the provisions of the code the offer to confess judgment was amply sufficient without paying the money to the clerk of the court at the time the offer was made, and defendant was relieved from all costs and interest accruing thereafter. It is true that in actions to redeem, in actions of ejectment against the mortgagee in possession, and like proceedings, it has frequently been held that the amount due must be brought into the court with the filing of the bill or of the petition, but this is a case of a different character, and the cases cited by the

plaintiff upon this branch of the case, we think, are inapplicable.

We are of opinion that the offer to confess judgment and the tender made that day were ample in amount to cover all that plaintiff was entitled to recover.

The judgment of the district court was right, and is

AFFIRMED.

JAMES W. DORSEY, APPELLEE, V. CHARLES A. WELLMAN ET AL., APPELLANTS.

FILED OCTOBER 22, 1909. No. 15,773.

1. **Trial:** MOTIONS TO DIRECT VERDICT: EFFECT. Where each party to a trial by jury requests the court to direct a verdict in his favor, he waives the right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and apply the law thereto.

2. **Appeal:** ACTION AT LAW: FINDING BY COURT. A finding of fact made by a court in the trial of an action at law is entitled to as much respect as the verdict of a jury, and, if there is competent evidence to support the finding, it will not be disturbed on appeal.

3. **Notes:** NEGOTIABLE INSTRUMENT ACT. Chapter 41 of the Compiled Statutes, the negotiable instrument act, does not apply to actions based upon instruments executed before that statute became effective.

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

John C. Stevens and *John W. Parish,* for appellants.

Charles T. Dickinson, contra.

ROOT, J.

This action was brought upon a negotiable promissory note payable to bearer, by a second indorsee thereof. The answer is somewhat prolix, but, in substance, charges that

the instrument was secured by one Sullivan, who falsely represented himself to defendant to be a physician duly licensed to practice medicine in Nebraska, and that he was the manager of a corporation engaged through its employees in the practice of medicine in this state. Defendant further stated that his wife was afflicted with disease, and that, relying on Sullivan's statements and believing them to be true, he executed the note in consideration of medical treatement to be given her, and the further representation that she should be cured or that the note need not be paid. Defendant also testified that medicine was sent and administered to his wife, but that it was valueless and did not cure or relieve her. There are other allegations in the answer not essential for an understanding of this case. Plaintiff replied by way of a general denial. Upon the trial plaintiff introduced the note, and rested. Defendant thereupon asked for a peremptory instruction in his favor, which request was denied. Defendant then testified and introduced other evidence sufficient to establish the truth of the allegations in his answer relative to Sullivan's statements and the falsity thereof. Plaintiff's deposition and the indorsements on the note were also received in evidence. Each litigant at the close of the evidence requested the court to instruct the jury to find in his favor. Plaintiff's motion was granted, and defendant's overruled. Defendant appeals.

1. Defendant argues that a jury, and not the court, should have passed upon the issues joined, and that by the action of the court he was deprived of his constitutional right to a jury trial. The difficulty is that by asking for a peremptory instruction at the time plaintiff made his request at the close of the evidence defendant waived his right to a verdict by the jury. *Segear v. Westcott,* 83 Neb. 515.

2. Defendant urges that the evidence does not establish that plaintiff is a *bona fide* purchaser for value of the note in suit. By requesting a peremptory instruction

each litigant admitted the truth of all of his opponent's relevant evidence and all just inferences that might be drawn therefrom. Plaintiff testified that he purchased the note in November, 1902. It matured in December of that year. Plaintiff also testified that he had no knowledge of the facts concerning the history of the note at the time he acquired it, nor any of the facts surrounding the execution of the instrument; that he purchased it with other notes, and could not state the exact consideration paid for the identical bill; that "I did not inquire into the consideration upon which this note was based, I had no knowledge at the time what the consideration was. I had the money, and I desired to invest it and did invest it in this note and others which I speak of." The evidence proves that money was paid for the note, and negatives that plaintiff bought with knowledge of the facts surrounding its execution. There is no evidence to show that plaintiff believed there was a defense to the note, or that he acted dishonestly or in bad faith. Under this state of facts, he is entitled to recover even though the facts and circumstances surrounding his purchase ought to have excited suspicion in the mind of a prudent man. *Dobbins v. Oberman,* 17 Neb. 163; *Myers v. Bealer,* 30 Neb. 280; *First State Bank v. Borchers,* 83 Neb. 530. The evidence sustains the judgment of the district court.

3. Defendant contends that the negotiable instrument law, ch. 41, Comp. St. 1909, imposes a greater burden upon plaintiff than existed with respect to plaintiffs in like actions before the passage of that act. The act was passed in 1905 (laws 1905, ch. 83), subsequent to the execution of the note in suit. Section 193 of the act provides that the statute shall not apply to negotiable instruments made and delivered prior to the taking effect of said act. Hence the argument falls.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

L. D. SPALDING, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

FILED OCTOBER 22, 1909. No. 15,784.

1. Pleading: DEMURRER. A litigant who stands upon a general demurrer to a pleading thereby admits all of the material facts well pleaded, and must take the consequences which result from such an admission.
2. Jury: COMPENSATION. A juror drawn for three weeks' service in the district court for Douglas county who appears and serves as a juror in said court during that period is entitled to recover for all of the days of said term, Sundays excepted, unless excused from such attendance by the court.

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

James P. English and *George A. Magney,* for appellant.

H. H. Bowes, contra.

ROOT, J.

Plaintiff sued defendant for compensation as a juror, and alleged in his petition that he was duly summoned as a juror for the first three weeks of the May, 1908, term of said court; that he reported for duty May 4, 1908, and was in the discharge of his duties as such juror during all of said three weeks and three days in addition; that he was discharged May 27, 1908, "being in attendance upon said court for twenty-one days"; that compensation for two days claimed by him was denied by the commissioners "for the reason that said two days were Saturdays and the court was not on said two days engaged in the trial of jury cases." The county filed a general demurrer, which was overruled. Defendant elected to stand upon its demurrer, and judgment was rendered in favor of plaintiff. Defendant appeals.

Defendant has evidently accepted the benefits of sections 668*a*-668*n* of the code. Under the provisions of those sections of the statute, the clerk of the district court, in

the presence of the county clerk and one of the judges of the district court, is required at least twenty days preceding the first day of every term of said court to draw from a box or wheel the names of 30 residents of the county for jury service during three weeks. From those veniremen 24 are retained for service. A like number of jurors are provided for each one of the judges should more than one of them be engaged in the trial of jury cases. By identical proceedings the panel is renewed every three weeks, and provision is made for extra jurors for the trial of felony cases.

Section 668*d*, *supra*, among other things, provides: "All jurors on the regular panels shall serve during the weeks or term for which they were drawn and until discharged from the case in which they may be serving, if any, at the expiration of such time, unless sooner excused by the court." Section 15, ch. 28, Comp. St. 1909, provides: "Grand and petit jurors shall receive for their services two dollars for each day employed in the discharge of their duties, and mileage at the rate of five cents for each mile necessarily traveled." The demurrer admits all of the allegations of fact well pleaded in the petition. It is therefore an admitted fact that plaintiff was in attendance on the district court for Douglas county as a juror for 21 days. While it was argued at the bar that he was excused for two Saturdays during that period, and therefore was not discharging his duties as a juror, it is not so stated in the petition. Sections 668*a*-668*n* of the code have a limited application in the state, and contemplate service by jurors in attendance on the district court during a term of three weeks, unless sooner excused by the court. Plaintiff was not excused from service as a juror, but, on the contrary, the demurrer admits that he was in attendance during all the days for which he claims compensation.

Under the admitted facts defendant was liable, and the judgment of the district court is

AFFIRMED.

J. A. JOHNSON, APPELLANT, V. SETH TERRY ET AL., APPELLEES.

FILED OCTOBER 22, 1909. No. 16,316.

1. **Habeas Corpus**: COUNTY COURT: JURISDICTION. Neither a county court nor the judge thereof has authority to issue a writ of habeas corpus to be served in an adjoining county for the purpose of bringing before said court or judge an infant under the age of 18 years, not a resident of the county, to the end that a judgment may be entered to determine whether the custodian of said child shall be deprived of the possession thereof.

3. ———: CUSTODY OF CHILD: DUTY OF COURT. If a county court has thus acted in excess of its jurisdiction, and the father has sued out a writ of habeas corpus in the district court to recover possession of his child, and the respondents in their return to said writ plead sufficient facts to authorize the court, under article II, ch. 20, Comp. St. 1909, to make an order divesting the parent of such custody, it is the duty of the district court or its judge to proceed with all reasonable dispatch to try the issues joined, and make an order in the premises for the best interests of the child.

3. ———: ———: JUDGMENT: CONCLUSIVENESS. If a final order has been entered in favor of the father, in a preceding habeas corpus case between the same parties, awarding him the custody of his child, the court, in a subsequent proceeding between the same parties, under chapter 20, *supra*, should only consider evidence concerning the facts that have occurred since the execution of the former judgment.

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

W. H. Kelligar, E. Ferneau, Hall, Woods & Pound and *Hazlett & Jack,* for appellant.

Rinaker & Kidd, F. O. McGirr and *Mengo W. Terry, contra.*

ROOT, J.

This litigation involves the right of relator to the custody of his infant daughter, Effie Johnson, who is under the age of 14 years. Many of the facts essential to a

proper understanding of the case are related in *Terry v. Johnson,* 73 Neb. 653, and *Terry v. State,* 77 Neb. 612. As a result of the litigation reported in those cases, the relator became the custodian of his daughter, and continued to act in that capacity until the latter part of June, 1909. On the 23d day of that month Seth Terry, one of the respondents herein, who was also a respondent in the preceding litigation, applied to the county judge of Gage county for a writ of habeas corpus, and alleged that the relator and two of his sisters in Douglas county were illegally depriving Effie Johnson of her liberty. Thereupon the county judge issued his writ commanding the sheriff of Gage county to release Effie Johnson from her illegal restraint and bring her before said judge in Gage county to abide the orders thereafter to be made by that official. The writ was executed in Douglas county by the sheriff of Gage county, and the child produced before the county court of Gage county. Mr. Johnson thereupon procured a writ of habeas corpus from the district court for Gage county to recover possession of his daughter. The facts from relator's standpoint are stated in the petition, and the details of the antecedent litigation between the parties, including the various orders and judgments made therein, minutely set forth. A writ was issued against Seth Terry, Laura Terry, his wife, and against Menzo Terry and Edgar Terry. The two last named respondents disclaimed any interest in the proceedings or control over the child, and their connection with the litigation need not be further considered. The other respondents, who are the grandfather and grandmother, respectively, of Effie Johnson, justify under an alleged appointment of Seth Terry by the county court of Gage county as guardian of said child. They also allege that the relator herein has neglected his daughter and permitted her to come in contact with persons unfit to associate with a minor child; that respondents are able and willing to properly rear, educate and care for their grandchild; that it is for the best interests of the child that her

custody be changed; and, finally, that the county court, by virtue of the aforesaid proceedings, first acquired, and therefore has, exclusive jurisdiction of the subject matter of the litigation. Relator admitted the institution and pendency before the county judge of the habeas corpus proceedings as alleged, and thereupon the district court refused to try the case upon its merits, but dismissed relator's petition. Relator appeals.

The arguments and briefs of counsel are devoted largely to a consideration of the jurisdiction of county courts and county judges to issue writs of habeas corpus under any state of facts, and, whether, if that jurisdiction exists, such writs may lawfully run beyond the limits of the county. The arguments are not devoid of merit, but we do not find it necessary to pass upon the questions thereby presented.

In 1905 the legislature passed "An act to regulate the treatment and control of dependent, neglected and delinquent children." Laws 1905, ch. 59. This act, with some slight amendments made in 1907, is published as article II, ch. 20, Comp. St. 1909. It provides that a child who does not have proper parental care or guardianship, or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care the child may be, is an unfit place for such infant, is a neglected or dependent child within the meaning of the statute. The district courts of the several counties in the state, and the judges thereof in vacation, are given original jurisdiction of all cases coming within the terms of the act. The county court is given jurisdiction concurrent with the district court, but is not permitted to exercise that power unless the district judge is absent from the county. Any reputable person, a resident of the county, having knowledge that a dependent or neglected child is within that county, may file with the clerk of the court having jurisdiction of the matter a verified petition stating the facts, and thereupon the clerk shall issue a summons commanding the person having custody of said

child to appear with said infant before the court within 24 hours after service of the writ. The parents or guardians of the child, if known, shall also be notified of the pendency of said proceedings. A summary hearing is provided for, and the judge is authorized to release the child from the possession of its custodian and commit the infant to the charge of some reputable citizen of good moral character, or to the control of accredited institutions for the care of infant children, or, in extreme cases, to a state industrial school. The court, having acquired jurisdiction of the child, may subsequently make such further and other orders as may be proper for its best interests. The act provides for probation officers and a complete procedure for the prompt dispatch of proceedings instituted by virtue of the statute. The act is complete in itself, and repeals by implication all other prior legislation inconsistent therewith. If, before the passage of this act, the county court of Gage county had jurisdiction to issue a writ of habeas corpus in cases like the one at bar, and we do not so decide, that authority was repealed by the enactment of article II, ch. 20, *supra*. Such being the case, what disposition should be made of the pending litigation?

Counsel for relator argue that we should direct the respondents to return Effie Johnson to Douglas county. If the order to be made affected relator and respondents only, the argument would be pertinent, but we are to consider first the welfare of the infant. There is a strong presumption that the father should have the custody of his child. *State v. Porter*, 78 Neb. 811. This assumption is reinforced by the orders and judgments of this court, and those of the district court, in the preceding litigation between the parties, but it is not conclusive. Relator, by his conduct subsequent to the termination of said litigation, may have forfeited all right to the further custody of his child, and the court should determine that fact by reference to the events that have occurred subsequent to the date relator received the custody of his daughter.

That child is within the jurisdiction of the district court for Gage county and of its judges, under the provisions of article II, ch. 20, Comp. St. 1909, and the pleadings are probably sufficient to bring to the court's attention every fact necessary for a final determination of the controversy between the parties hereto. It will be the duty of the district court, if in session, otherwise of one of the judges thereof, upon a reversal of this case to try it with all convenient speed and determine whether relator has forfeited his right to continue as the custodian of his daughter, and, if so, then to commit her to the charge of some reputable person able and willing to care for and educate her. Inasmuch as respondents have secured custody of said child by the execution of void process, an order should be made depriving them of that possession pending a determination of this case; and during that time the child should either be placed in charge of her father, upon his giving security for her production, to abide the orders of the district court or judge, or given in charge of some reputable person. Unless the evidence establishes that relator's influence is detrimental to his daughter's welfare, the final order of the court, in any event, should permit him to visit his child at all proper times and places. We do not hold that article II, ch. 20, Comp. St., *supra,* has in any manner circumscribed the authority of the district courts to issue writs of habeas corpus according to the law and practice existing before the enactment of that statute.

The judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED.

J. I. CASE THRESHING MACHINE COMPANY, APPELLANT, V. JONATHAN EDMISTEN ET AL.; JONATHAN HIGGINS, APPELLEE.

FILED OCTOBER 22, 1309. No. 15,774.

Judgment: REVIVOR: JURISDICTION. A district court in which the transcript of a judgment of another district court has been filed is without authority to revive the judgment by the statutory method of revival created by section 473 of the code, such power remaining in the court of original jurisdiction.

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

R. A. Moore, J. F. Fults and *O. A. Abbott*, for appellant.

Perry & Lambe and *J. G. Beeler, contra.*

ROSE, J.

This is a proceeding in the district court for Furnas county to summon Jacob Betz and others as garnishees, and to subject property of Jonathan Higgins in their hands to the payment of a judgment in favor of plaintiff. The judgment which plaintiff is thus attempting to enforce was rendered against Higgins and others in the district court for Nemaha county, Nebraska, November 20, 1878, for the sum of $799.19, and a transcript of the record thereof was lodged in the district court for Custer county September 2, 1889, where an order of revivor as to Higgins was rendered February 14, 1908, plaintiff having pursued the statutory method created by section 473 of the code for the revival of judgments. A transcript of the record on file in the district court for Custer county and a copy of the order of revivor there entered were filed in the office of the clerk of the district court for Furnas county March 12, 1908, and plaintiff alleges an execution was subsequently issued from that court against Higgins and returned unsatisfied. After the garnishees had been

served with process the case was submitted to the district court for Furnas county on a motion by Higgins to quash the garnishment. This motion was sustained, and plaintiff appeals.

One reason for releasing the garnishees is stated in the motion as follows: "The said original judgment, if any was rendered, was so rendered in Nemaha county, Nebraska. The attempted revivorship proceeding was had in Custer county, Nebraska, and not in the said county where the original judgment was rendered, and is therefore void and without any authority of law." Plaintiff's lien in Custer county had expired long before there was any attempt to revive the judgment there. It was dormant before the revivor as to Higgins was entered. If the order renewing the lien was void, as asserted by Higgins in his motion, there was no foundation for the garnishment and it was properly quashed. Had the district court for Custer county authority in a proceeding under section 473 of the code to revive the dormant judgment transferred from the district court for Nemaha county? Plaintiff answers this question in the affirmative, and cites the following section of the code to sustain his position: "That the transcript of a judgment of any district court in this state may be filed in the office of the clerk of the district court in any county, and such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed, in like manner as in the county where such judgment was rendered, and execution may be issued on judgment obtained by such transcript, as on the original judgment; *Provided,* that such transcript shall at all times be effected and be in the same plight as the original judgment." Code, sec. 429*a*.

The purpose of the transfer being to enforce the original judgment, plaintiff argues that the district court for Custer county as a preliminary step had authority to make an order of revivor. Some Pennsylvania decisions were mentioned in the oral argument in support of this

doctrine, but an investigation will show that a statute of that state permitted the removal of a judgment from one common pleas court to another by exemplification, and that the statutory transfer included the power of revivor. *Nelson v. Guffey,* 131 Pa. St. 273; *Knauss's Appeal,* 49 Pa. St. 419; *Kendig & Lauman v. North,* 7 Del. Co. Rep. (Pa.) 574. The Nebraska statute upon which plaintiff relies authorizes an execution, but not a revivor. It does not make the jurisdiction of the district court for Custer county the same as that of the district court for Nemaha county. It leaves the court of original jurisdiction in complete control of its own judgment. That court has power to renew the lien, to cancel it for any lawful reason, to make orders respecting parties, to direct satisfaction in case of payment, and to perform any other judicial act essential to the rights of any party to the suit. Orders made in the exercise of such power affect transcripts in other jurisdictions in the manner described in the proviso to section 429*a* of the code. The jurisdiction of the court to which the judgment is transferred is not the same as that of the court rendering the judgment, unless made so by statute. The powers are derived from different sources. The court of original jurisdiction adjudicates the matters in controversy and gives vitality to the obligations or liabilities involved in the litigation. In rendering and in enforcing its judgment, it acts under general authority conferred by the constitution and statutes. When the transcript enters another jurisdiction, the office of the transfer is the enforcement of the judgment, and in the new sphere of operation the statute makes provision for a lien and for execution, but not for a revivor. The statute authorizing the transfer confers the power under which the court acts in enforcing the judgment in new territory. In this state the statutory method of reviving judgments supersedes the writ of *scire facias. Broadwater v. Foxworthy,* 57 Neb. 406. The general rule is that a *scire facias* to revive a judgment is a continuation of a former suit, and that the venue must be laid in the county in

which the action was originally commenced. *McGill v. Perrigo,* 9 Johns. (N. Y.) *259; *Funderburk v. Smith,* 74 Ga. 515; *Gibson v. Davis,* 22 Vt. 374; *Griffin v. Spence,* 69 Ala. 393; *Masterson v. Cundiff,* 58 Tex. 472; *Wilson v. Tiernan,* 3 Mo. 577; *Tindall v. Carson,* 16 N. J. Law, 94; *Boylan v. Anderson,* 3 N. J. Law, 119. Plaintiff's forum for the purposes of revival is the district court for Nemaha county, and not the district court for Custer county. *Carnes v. Crandall,* 4 Ia. 151; *Thompson v. Parker,* 83 Ind. 96; *Conner v. Neff,* 2 Ind. App. 364. Having exceeded its powers in attempting to revive the transferred judgment as against Higgins, the order of revivor rendered by the district court for Custer county is void. *Berkley v. Tootle,* 62 Kan. 701. This conclusion does not conflict with the rule that a judgment rendered by a justice of the peace may be transferred to the district court and there revived. *Furer v. Holmes,* 73 Neb. 393. The distinction is apparent. A judgment of a justice of the peace can only be made a lien on realty after a transcript has been filed in the district court. A revival by the inferior tribunal would not create such a lien. The territorial jurisdiction of both courts is the same. The district court in civil matters may exercise practically all the jurisdiction of a justice of the peace, and, in addition, has the power of review. The statute which authorizes the filing of a transcript of a judgment of a justice of the peace in the district court contemplates a lien having the same effect "as if the judgment had been rendered in the district court." Code, sec. 562.

Plaintiff's order of revivor was void. In declining to impound property in the hands of the garnishees to satisfy a dormant judgment the trial court made no mistake.

AFFIRMED.

DEAN, J., having been of counsel, did not sit.

EDWARD BETTLE, JR., ET AL., APPELLEES, V. JOHN F. TIEDGEN ET AL.; JOHN REIMERS, APPELLANT.

FILED OCTOBER 22, 1909. No. 16,169.

1. **Appeal:** LAW OF CASE. On appeal to the supreme court, the determination of a question becomes the law of the case, and ordinarily will not be reexamined on a subsequent appeal in the same case.
2. **Mortgages:** ASSIGNMENT: PAYMENT: ESTOPPEL. Where a mortgagee assigned the mortgage as collateral security, and afterward received payment of the debt, but failed to turn it over to the assignee, the landowner who made the payment with constructive notice of the assignment cannot defeat foreclosure, on the ground that the assignee is estopped to deny mortgagee's agency for the purpose of collecting the debt, without proving the agency or facts constituting an estoppel.

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

A. M. Post and *O. A. Abbott,* for appellant.

Francis A. Brogan, contra.

ROSE, J.

This is a suit to foreclose a mortgage for $3,200 on 320 acres of land in Madison county. The Omaha Loan & Trust Company was mortgagee. As collateral security for its debentures, it assigned the mortgage and the note secured thereby to its trustee, the Boston Safe Deposit & Trust Company, and the trustee sold them to plaintiffs under the terms of the contract creating the trusteeship. Defendant John F. Tiedgen was mortgagor. Subject to the mortgage lien, defendant John Reimers acquired title to the land, and pleaded and proved that he paid the amount of the debt and interest to the original mortgagee. The latter, however, soon became insolvent, and the payment never reached the holders of the note and mortgage. The district court entered a decree of foreclosure, and the controversy is presented on an appeal by Reimers. The

case was here before, and the facts are more fully stated in a former opinion. *Bettle v. Tiedgen*, 77 Neb. 799.

It is conclusively shown that mortgagee formally assigned the mortgage to the Boston Safe Deposit & Trust Company, and that the assignment was duly recorded in the office of the register of deeds in Madison county before appellant made the payment on which he relies as a defense. He nevertheless insists he had no actual notice of the assignment, and that he is not bound by the notice imparted by the public record mentioned. An adverse ruling announced in two earlier opinions is now the law of the case. *Bettle v. Tiedgen*, 77 Neb. 795, 799. Having procured on his former appeal a decision that he is bound by constructive notice of mortgagee's assignment, that question is not now open to controversy. *Porter v. State*, 73 Neb. 792.

Appellant also argues that mortgagee, for the purpose of collecting the debt, was the agent of the owner of the mortgage, and that plaintiffs and their assignors are estopped to deny such agency. These doctrines were invoked by appellant on former hearings on the first appeal, and it was held that neither agency nor estoppel was pleaded in the answer. When the cause was remanded, however, appellant had an opportunity to plead the facts constituting those defenses and to support them by proof. After the answer had been amended, the testimony admitted at the first trial, with some additional proofs, was considered at the second trial. In considering this appeal, all the evidence adduced at both trials has been carefully examined. The contract showing the nature of the business relations betwen the two trust companies appears in the record. Officers and employees of both were interrogated in relation to the course of business between the two companies, and testified to the transactions involved in this suit, but there was proof of no fact which would justify a finding that an agency existed for the purpose of making collections or that plaintiffs were estopped to deny such agency. On the contrary there is convincing

proof that the Omaha Loan & Trust Company was not permitted to withdraw any of its collateral until after it had furnished the Boston Safe Deposit & Trust Company an equivalent in other securities or money. In entering the decree of foreclosure, therefore, the trial court pursued the only course open to a court of equity.

It follows that the judgment must be

AFFIRMED.

NICHOLAS MCCABE V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1909. No. 16,199.

Intoxicating Liquors: TRIAL: EVIDENCE. In a prosecution in the district court for selling and for keeping for sale intoxicating liquors in violation of law, a county judge's search-warrant under which defendant's premises were searched and liquors seized is not admissible as independent evidence, where it recites that complainant, who was not a witness at the trial, stated under oath that defendant was guilty of the offenses charged in the information.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

J. G. Beeler and *Wilcox & Holligan,* for plaintiff in error.

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

ROSE, J.

Nicholas McCabe, a practicing physician who owned a drug store at North Platte, was prosecuted in the district court for Lincoln county for selling and for keeping for sale intoxicating liquors in violation of law. The information contained eight counts. A jury found him guilty on the fifth count of selling a bottle of whiskey to Peter Klinefelter March 17, 1908; on the sixth count of selling

a bottle of brandy to Peter Klinefelter March 21, 1908; on the seventh count of keeping brandy, gin and whiskey for sale March 23, 1908, without a license or physician's or druggist's permit; on the eighth count of keeping port wine, angelica and sherry wine for sale without a license or physician's or druggist's permit. For each of the offenses described defendant was fined $100, or $400 in all, and now presents the record of his conviction for review by petition in error.

By virtue of a writ issued by the county judge of Lincoln county, the sheriff searched defendant's drug store March 23, 1908, and the same day returned the writ with an indorsement showing he had found and seized whiskey, port wine, gin, angelica, sherry and brandy. At the trial of the present case the search-warrant and the sheriff's return were admitted in evidence over the objection of defendant, and this ruling of the trial court is assailed as a prejudicial error, for which the conviction should be reversed. These documents were read to the jury and appear in the record as independent evidence of defendant's guilt in violation of a rule announced in two former decisions. Following *Nelson v. State,* 53 Neb. 790, it was held: "In a prosecution under section 20, ch. 50, Comp. St. 1905, for unlawfully keeping intoxicating liquors with the intent to sell the same without a license, it is prejudicial error to permit the introduction in evidence, over objection, of the search-warrant under which the premises of the defendant were searched and the liquors seized." *Weinandt v. State,* 80 Neb. 161.

In the present case defendant was convicted on two counts for violating the section cited. There is, therefore, no escape from the conclusion that, under the rule quoted, the search-warrant was not admissible as independent proof that defendant kept liquors for sale in violation of law, as charged in the information. The error also extends to the convictions for unlawful sales, since those infractions of the statute are recited in the search-warrant as being supported by the oath of the complainant in

the county court. The attorney general, however, has made an earnest appeal for an affirmance of the judgment on the ground that the error is not prejudicial. The search-warrant shows that in the county court David B. Loudan on oath charged defendant with the offenses of which he was convicted in the district court in this case. The complainant's statements as to the sales were made in positive terms. In addition, the process indicates on its face that the county judge, under his hand and seal, gave credence to the charges by directing the sheriff to search defendant's drug store for intoxicating liquors. The finding of liquors strengthened complainant's charges. With the exception of the search-warrant, the convictions on the counts relating to sales rest alone on testimony that the liquors were sold by an employee who managed defendant's drug store. The only proof that defendant personally made the sales is found in the search-warrant. By means of the writ erroneously admitted in evidence Loudan's statement under oath that defendant committed the offenses charged reached the jury. Loudan did not testify orally as a witness, and there was no opportunity for cross-examination. Defendant was not permitted to meet him face to face as a witness, a privilege guaranteed by section 11 of the bill of rights. There was no instruction by the court directing the jury to disregard the search-warrant as independent evidence. For anything that appears in the record, complainant's sworn statements in a different proceeding in another court may have appealed to the jury as convincing proof of defendant's guilt. Under the circumstances stated, it cannot be definitely determined that the error was without prejudice. There was also error in admitting copies of freight bills describing packages of liquors without a proper foundation for their introduction.

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

REVERSED.

JAMES H. BERRYMAN, APPELLANT, V. G. F. SCHALANDER ET AL., APPELLEES.

FILED OCTOBER 22, 1909. No. 15,768.

1. **County Commissioners: POWERS.** A county board or board of county commissioners are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law.
2. ———: ———: **EXPENSES OF COUNTY ATTORNEY.** The matter of allowing a sum to the county attorney to cover actual necessary expenses incurred while investigating and prosecuting criminal cases and defending cases brought against the county is within the sound discretion of said board, and said board may, in the exercise of such discretion, lawfully allow and reimburse the county attorney for such expenditures.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Reversed.*

James H. Berryman, pro se.

P. H. Peterson and *J. F. Green, contra.*

FAWCETT, J.

The petition alleges substantially: That from January 5, 1905, to the present time plaintiff has been and now is county attorney of Knox county; that said county contains two cities of the second class, eight incorporated villages, and one village not incorporated, about 1,500 Indians and one Indian reservation; that said county is 42 miles long and about 26 wide; that three of the villages of said county are not accessible by rail, and the county seat is located 14 miles from the nearest railroad station; that during the term of plaintiff's incumbency he has prosecuted about 200 criminal cases, about two-thirds of which have been for offenses committed in parts of said county 15 to 30 miles from the county seat; that in order to try said cases in the neighborhood where the offenses

were committed it was necessary for plaintiff to do a large amount of traveling and pay his traveling expenses in cash; that by pursuing such course he saved a large expenditure in sheriff's and witnesses' fees, for which the county would be liable in all such cases; that, if he had procured the arrest of such offenders and subpœnaed such witnesses and brought them to the county seat, the county would have been put to several times the expense incurred by plaintiff in the course pursued; that soon after entering upon his office as county attorney he submitted the above condition of things to the county board of said county, and advised said county board that from $1,000 to $2,000 per annum could be saved to the county by the course above indicated, and that since said time the system of the county's paying the traveling expenses of the county attorney in enforcing the criminal laws of the state has been followed in said county; that during the January meeting of the board each year, including 1907, the board made an estimate of the amount of money necessary to be raised by taxation for the then current year, as required by law, for all county purposes, and in each of said estimates provided for $1,200 per annum for salary and expenses of the county attorney, being $1,000 per annum for salary and $200 for traveling expenses and necessary disbursements connected with the county attorney's office; that at the July meeting of 1907 the board provided for a levy of that character for said purpose, and no objections thereto were made; that the plaintiff's claim for $21.84, covering expense of the class indicated for the months of April, May and July as per bill attached to plaintiff's petition was presented to the county board at said July meeting and was by said board duly allowed; that thereupon one Jerome Sharp, a resident and taxpayer of said county, appealed from the allowance of said claim to the district court, and filed in said court a transcript of said proceedings and a cost bond. Plaintiff further alleges that said claim has no connection with his salary as county attorney, but is to

reimburse him for money expended in said sum in the discharge of his duties as county attorney in the enforcement of the criminal laws of the state, and prays for judgment in said sum of $21.84 and costs. To this petition the said Sharp filed a general demurrer. The district court sustained the demurrer and dismissed plaintiff's petition. Plaintiff appeals.

The only question involved in this action is the power of the county board to allow plaintiff's claim. That the course pursued by the board and plaintiff has resulted in a great saving to the county is evident. That plaintiff was not bound to travel about the county in the manner indicated is clear. He could have filed his complaints at the county seat, and have placed warrants for the arrest of offenders and subpœnas for witnesses in the hands of the sheriff for execution, a course which would have been many times more expensive than that pursued. This system was not only of great advantage to the county in the saving of expense, and of great disadvantage to plaintiff in loss of time and labor and exposure of travel, but undoubtedly resulted in a more vigorous, prompt and efficient enforcement of the criminal laws of the state. That such action of the county board should be sustained unless clearly prohibited by express statute is too plain to require discussion. We know of no statute which prohibits it. A similar question was submitted to the attorney general's office during the incumbency of Honorable C. J. Smythe. The opinion by his deputy, Ed P. Smith, Esq., meets with our approval. The inquiry in that case was "whether or not the county is liable for livery hire engaged by the county attorney while investigating and prosecuting criminal cases and defending cases brought against the county." In the opinion it is said: "You are advised that it is the opinion of this office that the matter of allowing a sum to the county attorney to cover these expenses is wholly discretionary on the part of the county board. If the bill were filed with the county board for expenses necessarily incurred and actually paid, the county board might in its

discretion allow and pay the same." Report of Attorney General, 1897-1898, p. 29.

Section 4440, Ann. St. 1907, in defining the powers of a county, gives the county power "to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." In construing this provision of the statute and determining the meaning of the word "necessary" therein, in *Lancaster County v. Green,* 54 Neb. 98, we held: "(1) A board of county commissioners, in addition to the powers specially conferred by statute, has such other powers as are incidentally necessary to enable such board to carry into effect the powers granted. (2) The word 'necessary' considered, and, in respect to the implied powers of boards of county commissioners, *held* to mean no more than the exercise of such powers as are reasonably required by the exigencies of each case as it arises." In the opinion (p. 103) we said: "The county commissioners, therefore, are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law. It was not practicable in advance to enumerate all the powers which the board of county commissioners might be permitted to exercise. To cover all contingencies very general language was employed, and from this consideration it necessarily results that the question whether or not the board has exceeded its powers must be determined upon the circumstances of each case as it arises."

We do not think the question of the power of the county board to contract in advance for expenditures of the kind in controversy is involved here. The simple question involved is: Did the board have the power to pay the necessary expenses of the county attorney incurred while prosecuting the business of his office in a manner which was saving to the county large sums of money each year? To hold that it did not have such power would not only be a strained construction of the statute, but would, we

think, be against public policy. The action of the board in allowing plaintiff's claim, the reasonableness of which is not questioned, was a lawful exercise of the discretionary powers of such board, regardless of any prior agreement in that behalf.

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

REVERSED.

STATE OF NEBRASKA V. JOHN S. GIPSON.

FILED NOVEMBER 9, 1909. No. 16,210.

ERROR to the district court for Lancaster county: LINCOLN FROST and WILLARD E. STEWART, JUDGES. *Dismissed.*

John M. Stewart, T. F. A. Williams, C. C. Flansburg and *Leonard Flansburg,* for plaintiff in error.

Greene & Greene, contra.

T. J. Doyle and *E. C. Strode, amici curiæ.*

PER CURIAM.

So far as can be ascertained from the record in this proceeding, no complaint was ever filed before any county judge, justice of the peace, police judge or other examining magistrate against the defendant in error. No warrant was ever issued or served on him, and no *bona fide* prosecution was maintained against him. It appears that no information was ever filed in the district court for Lancaster county against Gipson by the county attorney, or any other person authorized by him or by law to prosecute the defendant. Criminal code, sec. 579. But a so-called complaint or information was verified and filed by a private person, which, to say the least, is unique in that it invites a demurrer as to its sufficiency. The attorneys for the defendant entered his voluntary ap-

pearance and demurred to the so-called complaint. The district court sustained the demurrer and dismissed the proceeding. Thereupon a stipulation was entered into by which it was provided that the transcript should be filed in this court, that the cause should be advanced, and an immediate hearing was requested. It thus appears that our opinion is sought as to the validity of rule 27 of the excise board of the city of Lincoln in what we think may be fairly said to be a proceeding of which it appears the district court never acquired jurisdiction. Rule 12 of this court based upon the statutes and our former decisions reads as follows: "Only questions involved in matters of actual litigation before the court will be entertained or judicially determined; and no opinion will be filed in answer to any merely hypothetical question."

It follows that, without violating the above rule and departing from the course which we have heretofore pursued in relation to such matters, we cannot render such an opinion. It is therefore ordered that the proceeding be

DISMISSED.

JOSEPH WIRUTH, APPELLANT, V. WILLIAM D. LASHMETT ET AL., APPELLEES.

FILED NOVEMBER 9, 1909. No. 15,291.

1. **Appeal: VERDICT: PLEADING.** "A verdict in order to sustain a judgment must respond to the issues made by the pleadings, or to the allegations of the successful party." *Cannon v. Smith*, 47 Neb. 917.
2. ———: ———: **REVIEW.** Ordinarily, "objections to the form and terms of a verdict should be made in the court below at the time of rendition, in order to be available on error to this court" (*Roggenkamp v. Hargreaves*, 39 Neb. 540), but this rule does not apply where the true issues in a case are ignored and the verdict is incomplete or seeks to dispose of matters not submitted to the jury, and where the verdict itself affords no sufficient basis for a judgment upon the merits of the cause.
3. ———: ———: **SUFFICIENCY.** In an action for damages for fraud in the exchange of land, it was alleged in the petition that plaintiff had been damaged in a stated sum, and for which he de-

manded judgment against the defendants. It was recited that, as a part of the purchase price in the exchange, plaintiff executed his promissory notes for the sum of $1,400, which was admitted by the answer. The cause was submitted to the jury by an instruction that, if they found for the plaintiff, their verdict should be for the difference in the value of the property received and that given in exchange to the defendants. The jury returned into court the following verdict: "We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the Plaintiff and we fix the amt. of his recovery to-wit: cash for damge $250.00 one promisary note $400.00 (Four Hundred) dollars—one promisary note $1000.00 (one tousand) dollars—one promisary note $600.00 (Six Hundred) dollars with intrest at 8% pr. A. from date this notes were given by Joseph Wiruth to Samuel H. Fritzinger it is understood that the School land leases for N. E. ¼ of S. 36 T. 13 N. of R. 4 in Butler Co. Neb. to be assighned to S. H. Fritzinger." *Held*, That the verdict was a nullity, and that no judgment could be legally rendered upon it.

REHEARING of case reported in 82 Neb. 375. *Judgment of district court reversed.*

REESE, C. J.

This cause is now before the court on rehearing. The former opinion is reported in 82 Neb. 375. The essential facts are stated in that opinion and need not be here repeated.

It is contended by defendants that the two instructions referred to and set out at length in the opinion correctly stated the law, but, even if erroneous, the error was without prejudice, as they related only to the right of plaintiff to recover, and the verdict was in plaintiff's favor upon the issues involved, and therefore he cannot complain. *Hankins v. Majors*, 56 Neb. 299, is cited in support thereof and sustains the contention of defendants. It is true, we think, that the instructions were incomplete, or probably erroneous, but the error, if any existed, was cured by the verdict which was in plaintiff's favor for at least $250, if we assume that the verdict in its entirety could furnish a basis for the judgment. As the judgment will have to be reversed for reasons hereinafter stated, it

is assumed that proper instructions will be given in case another trial is had, and the subject need not be further noticed.

The perplexing question in this case is as to the ability of a court to render a proper judgment on the verdict returned by the jury. It is as follows: "We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the Plaintiff and we fix the amt. of his recovery to-wit: cash for damge $250.00 one promisary note $400.00 (Four Hundred) dollars—one promisary note $1000.00 (one tousand) dollars—one promisary note $600.00 (Six Hundred) dollars with intrest at 8% pr. A. from date this notes were given by Joseph Wiruth to Samuel H. Fritzinger it is understood that the School land leases for N. E. ¼ of S. 36 T. 13 N. of R. 4 in Butler Co. Neb. to be assighned to S. H. Fritzinger." Why the court and the counsel for plaintiff permitted such a verdict to be accepted and filed is not easily understood. We fully recognize the rule so well established in this state that objections to the form and terms of a verdict should be made in the court where it is returned at the time of its rendition, in order to be available in this court, as held in *Roggenkamp v. Hargreaves,* 39 Neb. 540, *Brumback v. German Nat. Bank,* 46 Neb. 540, and *Cervena v. Thurston,* 59 Neb. 343, and, ordinarily, the objection would have to be considered as waived. But, if no judgment could be legally entered, this rule could not be applied. The motion for a new trial was overruled and a judgment was rendered in favor of plaintiff for $2,684.43, the amount being arrived at by a computation made by the court of the principal and interest of the promissory notes referred to in the verdict as having been executed by plaintiff to defendant. The action was at law for damages. The only verdict which the jury could rightfully have rendered would have been for a lump sum. No other question was submitted to them. The court instructed the jury that, if they found in favor of plaintiff, the measure of his damages would be the difference between the actual value of

the property the plaintiff received at the time he received it and the actual value of the property turned over to the defendants at the date the same was so turned over. It is fundamental that a verdict must respond to the issues in the case on trial, and, where it does not do so, it is error to receive it. *Cannon v. Smith,* 47 Neb. 917. But, when received, even without objection, if no judgment can be legally rendered upon it, the motion for a new trial should be sustained. In addition to the verdict for $250 "cash for damge," the jury, without computing interest, recited: "One promisary note $400.00 (Four Hundred) dollars—one promisary note $1000.00 (one tousand) dollars—one promisary note $600.00 (Six Hundred) dollars with intrest at 8% pr. A. from date this notes were given by Joseph Wiruth to Samuel H. Fritzinger." It appears to be conceded that the note for $600 was never delivered to defendants, and was not a legal obligation against plaintiff, and, in fact, had no connection with the transaction out of which this suit arose, and is not referred to in any way in the petition.

In entering up the judgment, the court seems to have taken the place of the jury, entered its findings, computed the interest, and ascertained the amount the verdict should have been for, and entered the result as the judgment. That portion of the entry is as follows: "This cause coming on to be heard by the court upon the verdict and for judgment, the court finds on the verdict that there is due the plaintiff in cash $250.00, $1,706.43 the amount due on the two notes given by plaintiff on April 16, 1904, one being for $400.00, and the other being for $1,000.00, together with interest on each at 8% per annum from their date to this date, being $306.43, and making the total sum due on said two notes $1,706.43, also a note of $600.00 given by plaintiff, with interest on the same at the rate of 8% per annum from its date, May 11, 1904, in the sum of $128.00, and making the total sum of $728.00, and the total several sums as follows: $250 cash; $400

note dated April 16, 1904; $1,000 note dated April 16, 1904; $306.43 interest on said two notes April 15, 1904, to Jan. 11, 1907, 8%; $600 note dated May 11, 1904; $128 interest on same May 11, 1904, to Jan. 11, 1907, 8%; $2,684.43, total amount found due plaintiff from defendants under verdict. The court further finds under the evidence that the leases of N. E. ¼ 36-13-4 from the state have been canceled and it is impossible for plaintiff to assign the same and that the same was without the issues in this case, and the verdict in that respect is invalid and held to be surplusage. To all of which plaintiff excepts. It is considered and adjudged by the court that plaintiff have and recover from the defendants the total sum of $2,684.43; $250 of said sum to bear interest at the rate of 7% from this date, and $2,434.43 to bear interest at the rate of 8% from this date, and that plaintiff recover the costs of this action taxed at $118.58. To all of which plaintiff excepts."

It is probably true that, had the action been founded upon the promissory notes referred to in the verdict, the court could have made the computation of interest and entered judgment for the correct amount and the judgment have been legal (*Corcoran v. Halloran,* 20 S. Dak. 384), but that is not this case. None of the notes are set out in the petition. The execution of the notes for $400 and $1,000 are mentioned as having been given as part of the purchase price for the leases transferred to plaintiff, but, as we have seen, no reference is made to the note for $600, nor do we find any reference to the northeast quarter of section 36, township 13, range 4, referred to in the verdict. There is no demand based upon any of the notes. No copies of the notes are attached to or in any way made part of the petition. None of them were introduced in evidence, nor are they found in the record by copy or otherwise. The answer admitted that the two notes for $400 and $1,000, respectively, formed a part of the purchase price, but nothing further was said about them in the pleadings.

"A general verdict is that by which they (the jury) pronounce, generally, upon all or any of the issues either in favor of the plaintiff or defendant." Code, sec. 292. "When by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." Code, sec. 295. It seems to be the rule that if an action is founded upon a promissory note or other evidence of indebtedness, if the jury find the amount of the principal debt and it is shown by the verdict that interest is to be computed, the court may, in aid of the verdict, compute the interest and render judgment for the amount due, but in doing so the court cannot go outside of the verdict. If in making the computation the court would have to look into the evidence for its basis, it cannot make the computation. In other words, the verdict alone must fix the basis. *Fryberger v. Carney,* 26 Minn. 84; *Bruck v. Mausbury,* 102 Pa. St. 35; *Fries v. Mack,* 33 Ohio St. 52; *Cates, Adm'r, v. Nickell,* 42 Mo. 169; *Poulson v. Collier,* 18 Mo. App. 583; *Fromme v. Jones,* 13 Ia. 474; *Watson v. Damon,* 54 Cal. 278; and other cases cited in 29 Am. & Eng. Ency. Law (2d ed.), 1018, note 1; *National Cash R. Co. v. Price,* 41 Ind. App. 274; *Pressed Steel Car Co. v. Steel Car Forge Co.,* 149 Fed. 182; *Wootan v. Partridge,* 39 Tex. Civ. App. 346. We have been unable to find any case in this state where this identical question has been passed upon, but in construing and applying the section of the code above quoted this court has, seemingly, been inclined to hold that computation of interest is for the jury alone. *Wiseman v. Ziegler,* 41 Neb. 886. See, also, *Bowers v. Rice,* 19 Neb. 576; *Lamb v. Briggs,* 22 Neb. 138.

Since the jury failed to pass upon the issues submitted and returned a verdict upon which no judgment could be legally rendered, the judgment of the district court is reversed and the cause is remanded to the said court for further proceedings.

REVERSED.

GEORGE F. BOYD, APPELLEE, V. GALLAWAY FLOUR MILL & ELEVATOR COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 9, 1909. No. 15,785.

Highways: TOWNSHIP OFFICERS: POWERS. In counties under township organization, the care and maintenance of public highways devolves upon the township and road officers. Where a public road had been duly established and traveled by the public for 18 years, and a part thereof crosses low land which is liable to be overflowed by reason of water being backed by a milldam, the roadway being graded up, it is within the power and authority of the proper officers, in the interest of public safety and convenience, to remove culverts in such grade and close the opening, thus preventing the flowing of the water through and destroying the grade.

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

Weaver & Giller and *O. A. Williams,* for appellants.

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

REESE, C. J.

From the pleadings and evidence in this case it appears that defendant, the Gallaway Flour Mill & Elevator Company, is the owner of a flouring mill at Oakdale, Nebraska; that its machinery is propelled by water power created by the construction of a dam across a stream; that the water of said stream has for many years at irregular intervals been backed up and caused to overflow the land of plaintiff; that a public highway established in 1888 passes over plaintiff's land between the stream and that portion which is flooded as aforesaid; that, for the purpose of rendering the road passable for the public, it has been necessary to elevate the grade by grading up the roadbed; that during a portion of the time the grade has been carried entirely across the depression, so as to prevent the inflow of water when the stream was high, and

at other times a bridge or culvert has been maintained, so as to allow the water to collect upon the land of plaintiff, thereby forming a reservoir, which was of advantage to defendant's mill. It is conceded that no legal steps have ever been taken by *ad quod damnum* proceedings or otherwise to render the overflow rightful, or give the defendant the legal right to occupy the property with the surplus water, but it is insisted that by user and occupancy for more than 10 years defendant has obtained the right by limitation. It was claimed by plaintiff that, prior to the commencement of this suit, the water had so injured and damaged the roadway by washing and cutting through the culvert as to render the road unsafe and dangerous, and on the 24th of March, 1906, the township board, then in session, made the following order: "Oakdale, Neb., March 24, 1906. Special meeting of the township board of Oakdale township. Board met pursuant to call at the clerk's office, and adjourned to the office of Geo. F. Boyd, and held a special meeting for the purpose of considering the closing of culvert and repairing road No. 10 south of outlots No. 5 and 6. Members present Warner, Rohanon and Cooper. Matter of repairing said road came up for discussion and hearing, and it appearing from the evidence and facts adduced that the culvert on said road just south of outlots No. 5 and 6 caused said road always to be in a bad state of repair and causes the water running through to saturate the road on both sides, that it will make, unless attended to at once, the road to become in bad shape and render it unfit for traffic to the safety of the public. Wherefore the board finds that said culvert is unnecessary and dangerous to the traffic, and that to put said road in proper repair it will be necessary to take out and fill said culvert. It was therefore moved, seconded and carried unanimously to take out and fill said culvert, and that the same be done forthwith, and that the road be put in a good state of repair, said road to be put in as good or better condition as it was prior to the time of putting in of said culvert. There being no further business, meet-

ing was adjourned." It appears that for some reason the township officers closed the culvert on a Sunday night. Whether this was to prevent injunction proceedings is not shown; but on Monday morning the culvert was found to be closed. Plaintiff, the landowner, instituted this suit to enjoin defendants and officers of the township from making an opening in the roadway and allowing the water to flow back upon his land. A restraining order was issued at or about the time of the commencement of the suit, and upon the trial a perpetual injunction was awarded.

A number of questions are presented by the briefs and arguments, but it is believed that one question must control the decision. The care and maintenance of public highways devolves upon township and road officers. The highway has been in constant use since its establishment in 1888, and it was within the power of the township officers to close the culvert and extend the grade or fill in as they might think expedient and for the public good. There can be no claim that the statute of limitation had run against the public, as it was stipulated that the road had been in constant use as a public highway since its establishment, a period of 18 years.

As the proper highway officers found it necessary to remove the culvert and close the embankment, which had been done on occasions before that time, we think this forecloses the question of the right of any one to interfere. It may be doubtful as to the right of plaintiff to maintain the action at all had the township officers defended. Instead of doing so, they made default and allowed the decree to go against them. They cannot complain even if dissatisfied. The decree of the district court was in the interest of the public, and will not be disturbed.

AFFIRMED.

EMMA HOSKOVEC, APPELLEE, V. OMAHA STREET RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 9, 1909. No. 16,177.

1. **Questions of fact** on conflicting evidence are for the determination of the jury.

2. **Evidence:** PROVINCE OF JURY. Where the evidence is conflicting, it is within the province of the jury sitting at the trial to consider all proved physical facts and conditions attending the main fact for the purpose of arriving at the true solution of the question presented. They are not bound by the number of witnesses testifying, if in the exercise of reasonable judgment they are convinced that the truth is shown by the side producing the smaller number of witnesses.

3. **Appeal:** EVIDENCE: HARMLESS ERROR. A witness was called by plaintiff whose testimony suported the theory of plaintiff. On a subsequent trial her testimony was directly opposite that previously given by her, and sustained the theory of the defense. At the time of the trial from which this appeal is taken she was not within the jurisdiction of the court, and plaintiff read her testimony given in the first instance, including her cross-examination by defendant. The cross-examination and reexamination took a wide range, including statements the witness was claimed to have made to an agent of defendant, and tended to show that by improper solicitation the agent had sought to persuade her to change her version of the transaction constituting plaintiff's cause of action. The reading of a part of the cross-examination and all of the reexamination was objected to and the objection overruled. During the presentation of defendant's evidence it introduced and read the contradicting testimony of the witness given upon the later trial. *Held*, First, that the ruling of the court permitting the cross-examination to be read was not such error as would call for the reversal of the judgment; and, second, that the introduction of the testimony given during the later trial rendered the reading of the cross-examination and reexamination admissible, and that, having been introduced out of its proper order, although irregular, was not reversible error.

4. ———: ———: ———. The admission of irrelevant evidence which could have no bearing or effect upon the issues in the case, while erroneous, but without benefit to either party, will not require the reversal of a judgment.

5. **Instructions** given and refused, set out in the opinion, *held* not to be erroneous.

6. **Trial:** INSTRUCTIONS: DISCRETION OF COURT. The giving or refusing to give cautionary instructions, such as that the jury are not to allow their sympathy for either party to control or affect their finding, to some extent is within the discretion of the presiding judge, depending upon the exigencies of each particular case. The refusal to give such an instruction will not, usually, require reversal of a judgment, there being no question of law presented thereby.

7. **Damages.** Plaintiff received the personal injury complained of in the suit when she was 22 years of age. From that time until the trial of the cause, six years thereafter, she suffered continually from the effects of the injury. Her mental and physical faculties were impaired. She had at no time been able to engage in her usual avocations, and during portions of the time she was unable to care for herself. The undisputed and convincing evidence was that no recovery could follow, but that she was thus injured for life. *Held*, That the sum of $12,750, which included medical attendance, was no more then compensatory.

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

John L. Webster and *W. J. Connell*, for appellant.

Weaver & Giller and *Frank T. Ransom, contra.*

REESE, C. J.

This is the second appeal in this case. The opinion on the former hearing is reported in 80 Neb. 784. The judgment of the district court upon that trial was in favor of defendant. The cause was remanded to the trial court, and, upon the last trial being had, the verdict of the jury was in favor of plaintiff, upon which a judgment was rendered, and the cause is appealed by defendant.

The case is elaborately briefed and has been ably argued at the bar of the court, the discussion covering a wide range of alleged errors, but it is thought the questions presented may be properly decided without an extended discussion of the propositions separately. As shown by

the recitals contained in the former opinion, as well as by the record now before us, plaintiff was a passenger on one of defendant's street cars on the evening of September 22, 1902, and that, in alighting from the car at the intersection of Thirteenth and Dodge streets in the city of Omaha, she was thrown or fell upon the pavement and received serious and permanent injuries. There is little, if any, dispute as to the character or permanency of the results of the accident, but the main contention upon the trial was as to the manner in which the injuries were inflicted or received. It is alleged by plaintiff that, as the car upon which she was a passenger was approaching Dodge street on Thirteenth, she informed the conductor that she desired to alight at Dodge street; that the car was stopped at the proper place for that purpose; that she stepped upon the running-board at the side of the car, the car being an open one, and when the car stopped she caught hold of the stanchion, or appliance prepared for the purpose, with her left hand, with her face toward the front, and as she was in the act of stepping upon the pavement the car was given a sudden jerk forward in the act of being started, and she was thereby thrown upon the pavement and received the injury complained of; that the unexpected and negligent starting of the car by the employees of defendant was the cause of the accident. Plaintiff's testimony supported these allegations. She fell upon her face, striking her chin, the most serious injury being the dislocation of her under jaw upon the right side. Her chin showed the force of her fall, as there was a bruise and abrasion thereon. There were other minor injuries inflicted upon other portions of her body.

The defendant insists that, upon arising to step off the car, she, without waiting for the car to stop, took hold of the support with her right hand, and with her face to the rear stepped off, and that her fall was the result of her own negligence in so alighting before the car was brought to a stop and by stepping off with her face to the rear, instead of the front, as she should have done. This con-

tention of defendant was supported by the conductor of the car and three passengers. It will be seen that there was a sharp conflict in the evidence.

Another witness, a negro woman by the name of Busch, who was upon the car at the time of the accident, was called by plaintiff on two of the former trials. Upon the first her testimony supported that of plaintiff, and upon the second that of defendant. She was not called as a witness upon the trial from which this appeal is taken, but, being out of the jurisdiction of the court at that time, her former testimony was read to the jury, that given the first time by plaintiff, and that given on a later trial by defendant. Under these circumstances one may assume that the jury ignored all she had said, and properly treated her as wholly unreliable and untruthful.

The contention of both parties was supported to some extent by physical conditions or other witnesses. It was and is insisted that, as all the injuries received by plaintiff were on the front part of her body, the inference was necessarily and properly drawn by the jury that she must have been standing on the running-board with her face to the front, or, if otherwise, as claimed by defendant, she would have fallen backward, instead of upon her face. Practically the same conflict existed as to the time when plaintiff stepped off the car. She testified that the car had stopped. The four witnesses referred to maintained with equal positiveness that the car had not stopped, but was still in motion at that time, and the stop was made soon after plaintiff fell. Either by inferences which might be drawn from the facts proved, or by the testimony of the witnesses, each side might be said to have received some support. The whole of the evidence has been read with care, and, while it might be that we would have come to a conclusion different from that arrived at by the jury upon this part of the case, yet, the jury being the sole judges of the weight of the evidence and of the credibility of the witnesses, we cannot interfere with their decision.

Referring again to the witness Mrs. Busch, it appears that upon being called as a witness the first time her testimony was all unequivocally in favor of plaintiff as to the manner in which the injury occurred. Upon her cross-examination she was interrogated as to a statement she had made to a claim agent of defendant who had interviewed her soon after the accident. As shown by this cross-examination, her statement, or what purported to be such, was written down by the claim agent, but not signed by her. She made many statements as to what had occurred at that interview which reflected upon the claim agent. The cross-examination took rather a wide range and became something of a contest between the attorney and the witness, the attorney being apparently willing that she should exhibit her partisanship to the fullest extent, and in this he was, to some degree at least, successful. This occurred in one of the early trials, probably the first. The inference drawn by plaintiff was that at that interview defendant's agent sought by improper solicitations to influence the witness to abandon or change her statement as to what occurred at the time of the accident. She was called as a witness for plaintiff during subsequent trials of the case, probably the second, third, fourth, fifth and sixth. On one occasion she remained in the courtroom until near when the time her testimony was needed, when she disappeared, and was brought in by attachment. When placed upon the stand the last time she was personally examined in the presence of the trial jury, and her testimony was to a great extent squarely contradictory of that to which she formerly testified. Upon the last trial she was without the jurisdiction of the court, and plaintiff offered her testimony formerly given, including the whole both in chief and on cross-examination, in evidence, and the defendant offered her testimony given at the subsequent trial. Both were received and read to the jury.

The principal contention on the part of defendant here is that the district court erred in allowing plaintiff to

read all the cross-examination of the witness by defendant upon her former cross-examination. It is claimed that defendant had the right to pursue the course taken in the cross-examination, and would in no sense be bound by the remarks and reflections of the witness. This is in a sense true. It might be, however, competent to show that an improper effort had been made in the first instance to tamper with the witness, and that the proof of the fact was brought out on that cross-examination. In that event the evidence might be admissible. After plaintiff had closed her case, the defendant, as we have seen, offered the later testimony of the same witness taken upon one of the later trials. The witness was examined and her testimony originally taken by plaintiff. There was no cross-examination by defendant, the evidence being all in its favor and no cross-examination necessary. We think that, had plaintiff not introduced in chief the cross-examination by defendant and reexamination in the first trial, it would have been competent to read it in rebuttal. If so, the question arises: Does the fact that it was introduced out of its proper order, if such were the case, require the reversal of the judgment? We are inclined to think not. It cannot be necessary for us to inquire as to which of the stories told by the witness was true and which false. They could not have both been true. That the witness at some time committed perjury must be apparent. That she was not entitled to any credit must, we think, be conceded. Her conflicting stories having been submitted to the jury, an explanation would naturally be sought by counsel, the court and the jury. While the explanation was not shown to the satisfaction of any perhaps, yet that cross-examination might shed some light upon the question and be left to the jury for its consideration. There was nothing reflecting upon the action of any of the attorneys appearing in the case. Counsel for defendant have presented a separate brief upon the law as believed to have a bearing upon the question, but we find no case which antagonizes the view here expressed. We are led

to the opinion that there was no such prejudicial error in the rulings of the trial court upon this subject as would, of itself, call for a reversal of its judgment.

A somewhat similar question is presented concerning the ruling of the court in overruling objections made to the testimony of one of plaintiff's attorneys which detailed the oral proceedings in the trial court on the former trial in procuring the attachment for the witness referred to. According to plaintiff's theory of the case, it might have been entirely proper to show that in the later trial it was necessary to procure the compulsory process of the court to secure the attendance of the witness, but we are unable to see how this detailed inquiry could possibly be material, nor how it could have had any bearing upon the case. True, it might be proper to show that it was necessary to make use of the compulsory process to bring in the witness, but what the judge, sitting as the court, may have said, or the fact that he indorsed the allowance of the issuance of the writ upon any of the files of the case, there being nothing said or done having any bearing upon the issues involved, was of no consequence whatever, nor could it work any prejudice to defendant. The proof of the facts as detailed was simply time and energy wasted.

Objection is made to the ruling of the court upon objections to a part of the testimony of plaintiff. The whole case, in so far as it shows the effect of the injury upon the after life of plaintiff, is quite convincing that she suffered a permanent injury, one from which she could never recover. The injury was received about the 22d day of September, 1902. The trial was entered upon on the 19th day of October, 1908. The lapse of time was quite sufficient to give a correct idea of the probabilities as to recovery, to say nothing of the opinions of the physicians who had treated her and had examined her at various times. She was asked what she had done since the accident, and, upon her statement that she had done nothing, she was asked *why* she had done nothing. Objection to this was overruled, and she answered that it was

on account of her inability to labor. Objection was then made to the answer as the conclusion of the witness. This objection is urged here. We can see no merit in this and other objections of a similar kind. It was certainly competent for her to testify as to her health and inability to labor as resulting from the injury. That the method of calling for the fact might have been improved upon is probably true, but the evidence was competent and did not call "for the conclusion of the witness."

The contention, strongly made and urged, that the verdict is not sustained by the evidence has probably been sufficiently noticed above. Under the evidence and circumstances as shown, both as to the act of plaintiff and the nature and location of the injuries, we cannot say that the verdict was wrong.

No complaint is made of any instructions given the jury by the trial court, but it is insisted that the court erred in refusing to give the ninth and eleventh instructions asked by the defendant. The ninth is as follows: "You have no right, gentlemen of the jury, to throw out or disregard the testimony of any witness who appears to be fair and honest, and who is in a position to know the facts about which he or she testified, and whose statements are consistent with the truth, and who is corroborated by other reputable witnesses." It may well be doubted if this instruction should be given in any case where the evidence is conflicting. It often occurs in human experience and observation that persons of known truth and probity may receive different impressions as to facts and transactions occurring in their presence. A, a truthful and honest witness, testifies to the transaction according to the impressions made upon his mind, or as his memory retains it; B, just as truthful and just as honest, testifies to it as he saw and remembers, and yet their testimony differs widely. There may be, and often is, a direct conflict. It devolves then upon the trier of fact, in the consideration of both stories, to seek the truth by weighing all the probabilities of the case to be drawn

from the proved and known conditions surrounding the event or transaction. If the conclusion is that one is mistaken, however honestly, his testimony must be disregarded, no matter how "fair and honest" he may appear, or what his "position to know the facts" may have been, or how much he may be "corroborated by other reputable witnesses." It is believed that instruction numbered 9, given by the court upon its own motion, was sufficient upon this point. It is as follows: "(9) You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance is, you should take into consideration the opportunity of the witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved or admitted on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence."

We cannot see that the court erred in refusing to give the eleventh. It is here copied: "(11) You are instructed that, in the consideration of this case and in the determination of any of the issues or questions involved, you should not be influenced or actuated in any degree by sympathy or by the fact that the plaintiff is an individual or the defendant a corporation, but you should determine such issues and questions the same as if this action was between two individuals of equal standing." We are not cited to any authority holding or indicating that the refusal to give this instruction was erroneous. We have examined all the instructions given to the jury, and, while we find nothing covering the proposition presented, the instructions appear to have been a full and fair statement of the law by which the jurors should be governed in their deliberations. All the issues in the case were well and

properly presented, and there appears to have been no misdirection. Just what was meant by the words "of equal standing" at the close of the instruction is not clear. Taken in connection with the context, it might be construed to be the equivalent of natural persons, or, possibly, of persons of equal standing financially or socially. While we do not attach much importance to the phrase, yet it must be conceded that its meaning might be doubtful when considered by the jury. We are not aware of any serious objection to cautionary instructions of the kind here presented, yet they are not always given, and we think the giving or refusing of instructions of this kind must be left to the sound discretion of the court. The whole conduct of the trial is under the supervision of the court, and phases are presented which do not appear in the record on review. If the necessity for such an instruction arises, it might become the duty of the court to give one properly guarded bearing upon the subject, while in other cases, based on similar issues and evidence, such an instruction is not necessary. No question of law growing out of the issues is presented, and the necessity, or absence thereof, for such an admonition rests to a great extent in the judgment and discretion of the presiding judge. Error in refusing the instruction does not affirmatively appear.

It is next contended and urged, with no slight degree of energy, that the verdict of the jury is excessive. The amount returned by the jury was $12,750. That this is quite a large sum of money is apparent; but that it is excessive, when considered in connection with the injury received, is not so clear. At the time of the accident plaintiff was an unmarried young lady 22 years of age, of good health, and in the enjoyment of all the hopes and aspirations of one of her age and station in life. As testified by her physician and abundantly supported by other evidence, she is a partial mental and physical wreck, and that condition is permanent. She has remained unmarried, and is a continual and permanent sufferer with-

out any hope of recovery. She is, and must always remain, unable to engage in any avocation. Her nervous system is to a great extent impaired. She is unable to take the nutritive food which the human organism demands, and at times unable to care for herself. It is said, in support of this contention, that the verdict is more than three times as large as any verdict formerly rendered in her behalf, and this fact is urged as proof that the verdict last rendered is the result of sympathy, passion or prejudice. However, when we reflect that the trial was had and the verdict rendered six years after the receipt of the injury, its permanency is made more apparent, and the hope that by lapse of time nature would provide relief is banished. The amount of the verdict and judgment, which included the cost of medical attendance, cannot be said to be more than compensatory.

We discover no error in the record which requires a reversal of the judgment of the district court, and it is therefore

AFFIRMED.

FAWCETT, J. I am unable to concur in the third paragraph of the syllabus, or in the reasoning of the opinion in support thereof.

LETTON, J. I agree with Judge FAWCETT.

JOHN B. STANSER, APPELLEE, V. CHARLES F. CATHER ET AL., APPELLANTS.*

FILED NOVEMBER 9, 1909. No. 15,793.

1. **School Lands: LEASES: APPRAISEMENT.** A lessee of educational land, commonly called school land, whose lease was executed under the laws in force in 1879, is entitled during the existence

* Rehearing denied. See opinion, p. 313, *post*.

of his lease to have a voice in the selection of the appraisers called to revalue the land described therein. But after the expiration of his lease he is not entitled to that privilege, and if he desires to renew it he must do so under the terms of the act of 1883 (Laws 1883, ch. 74, sec. 19), providing for the manner of appraising leased lands.

2. ———: EXPIRATION OF LEASE: RIGHTS OF LESSEE. After a lessee has allowed his lease to expire by limitation without making an application to renew the same, the only right preserved to him thereby and by law is that he will not be required to compete for contracts, and the rate of rental will remain the same as that stipulated in his old contract, based, however, on an appraisement of the land made under the provisions of the present statute.

3. ———: LEASES: APPRAISEMENT. A lease of educational lands executed after the passage of the act of 1883 does not entitle the lessee to a voice in the selection of the appraisers called upon to revalue the land for lease purposes, although such a provision is inadvertently allowed to remain in the printed portion of the lease.

4. Contracts: VALIDITY. The commissioner of public lands and buildings has no power to bind the state by a contract contrary to or in conflict with the statutes in force at the time of its execution.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

William T. Thompson, Attorney General, and *Bernard McNeny,* for appellants.

L. H. Blackledge, contra.

BARNES, J.

Action to quiet title as lessee to certain educational land, commonly called school land, situated in Webster county, and to confirm plaintiff's right to release and retain possession thereof as against a subsequent lessee. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

It appears that two separate 40-acre tracts of land leased at different times and under different statutory

provisions are involved in this controversy, and they will be considered separately in this opinion.

There are no disputed facts in this case, and it appears that on the 11th day of March, 1879, John B. Stanser, the plaintiff below, leased from the state the northwest quarter of the southeast quarter of section 21, township 1, range 10 west, under the provisions of the statutes then in force. Among other things, the law then provided that school lands leased under its provisions should at the expiration of five years from the date of the lease, and every five years thereafter, be reappraised by three persons, one to be appointed by the county clerk of the county in which the lands were situated, one by the lessee, and the third to be appointed by the other two appraisers. Each new appraisement was to be the basis of rental value for the succeeding five years after the next first day of January. Laws 1877, p. 174. At the time the land above described was leased to the plaintiff it was appraised at the sum of $50 for the whole 40-acre tract, and the lease provided for the payment of an annual rate of 8 per cent. upon that valuation semiannually in advance, so that the amount which the plaintiff was required to pay for the land in question was $4 a year. The land was not reappraised until after the passage of the act of 1883, which took from the lessee all choice in the selection of appraisers. Laws 1883, ch. 74, sec. 19. It was reappraised under the provisions of that act in the year 1903, and was valued at $7 an acre, or $280 for the entire tract. The plaintiff refused to pay his rent based on the new valuation, and the commissioner of public lands and buildings, yielding to his contention that he should only be required to pay the rate of rental provided in his lease until its expiration, accepted such payments until January 1, 1904, at which time the lease expired. Plaintiff was then notified that, if he desired to renew his lease, he would be required to pay a rate of rental based on the new appraisement of $7 an acre. This he refused to do, and insisted that no legal appraisement of the land had

ever been made, claimed the right to appoint one of the appraisers himself, and refused to pay any amount of rent greater than that provided for by his lease until a reappraisement should be made under the provisions of the law which were in force at the time it was executed; that is to say, until the land should be again appraised by three persons, one to be appointed by the county clerk, one by himself, and the third by the other two appraisers. After considerable correspondence, and after the plaintiff had refused to release the land under any other terms or conditions than those above stated, and some two years after the expiration of his lease, the land was finally leased to the defendant Charles F. Cather on his bid of $7.30 an acre, and the plaintiff thereafter commenced this action for the purposes above stated.

It thus appears that the question to be determined is whether or not the plaintiff is entitled to ignore the provisions of the existing law relating to the appraisement of school lands, and demand from the state a new lease under the provisions of the statute recited in his old lease. It is plaintiff's contention that there has been no valid appraisement of the land in question, and, until such appraisement is made, he has the right to demand and receive a new lease based on the same rental as that provided in his old lease, which has long since expired. In support of this contention he cited *State v. McPeak*, 31 Neb. 139, and *State v. Thayer*, 46 Neb. 137. In those cases it was held that, under a lease contract authorized by the statute, the legislature could not deprive the lessee of the right to select an arbitrator to act in conjunction with one selected by the state to appraise the rental value of the land for the succeeding five years. We are in full accord with this rule, but are of opinion that it has no application to the facts of this case. There the lease had not expired. Here plaintiff's lease expired long before any attempt was made to lease the land in question to the defendant Cather. With the expiration of his lease the only right reserved by its terms to plaintiff was that of

releasing the land without competitive bidding. It is provided by section 16, ch. 80, Comp. St. 1909: "The holders of lease contracts executed prior to July 9, 1897, are hereby given the right, at the expiration of said contracts, to make application for and receive new lease contracts upon said lands, as provided in the preceding section; except, that they will not be required to compete for the contracts and the rate of rental will be the same as stipulated in the old contract; *Provided,* that all of the rental due on the old contracts has been paid." This statute was evidently enacted to promote permanency of interest on the part of the lessee, and to encourage him to improve his leasehold. It gives him a substantial advantage over all strangers to the land. It permits him to renew his lease without competition at the rate of interest he had been paying, while strangers must subject themselves to competitive bids; and the expression "rate of rental" is synonymous with the rate of interest. The testimony discloses that, had the plaintiff made an application in 1904, the commissioner would have gladly executed to him a lease conditioned on his bidding 8 per cent., which was his old rate of rental on an appraisement of $7 an acre. This the plaintiff would not do. If, as contended by him, the appraisement of 1903 was invalid, that fact did not entitle him to release the land at the original appraisement of $50. During the 25 years which elapsed from 1879 to 1904 the land had greatly increased in value, and this plaintiff recognized by bidding for it at auction on a valuation of $2.50 an acre. The commissioner, after offering him every opportunity to again lease and retain possession of the land, finally leased it to defendant Cather, who bid therefor an amount greater than the value fixed by the appraisement of 1903.

By his conduct in thus refusing to comply with the provisions of the law, plaintiff forfeited all of his rights to the tract of land in question, except such as relate to the improvements which he has placed thereon. This question, for lack of evidence, cannot be determined on

this appeal, but may be ascertained in a proper proceeding for that purpose. It follows that the judgment of the district court, so far as it relates to the 40 acres of land above described, must be reversed.

The other tract of land is the northeast quarter of the southeast quarter of section 21, township 1, range 10, and adjoining the 40 acres first above described on the east. It appears that plaintiff leased this 40 on the 8th day of July, 1884, which was after the act of 1883 went into effect, by which it is provided: "During the year 1883, and every five years thereafter, the board of educational lands and funds shall cause all educational lands under lease which in their judgment are appraised too low to be reappraised." Laws 1883, ch. 74, sec. 19. The appraised value of this particular tract of land at the time it was leased was $50 for the whole 40 acres, and the rate of rental which he agreed to pay was 6 per cent. per annum on that valuation. So that he was required to pay as rental for the entire 40 acres the sum of $3 per annum. The record discloses that in the year 1903 the land was reappraised in the manner designated by the board, and was valued at $7 an acre. To this appraisement the plaintiff objected, and refused to pay rent based on that valuation. He tendered the amount of rent based on the appraisement in force when he leased the land, but this the commissioner refused to accept, and, after much correspondence and considerable delay, gave plaintiff notice of the intention of the board to forfeit his lease in case he refused to pay rental based upon the new appraisement. Something over six months after the giving of the notice above mentioned, the board declared the lease forfeited, and later on leased the land to the defendant Cather on a valuation of $7.30 an acre, which was the amount bid by him as the rental basis for his lease.

It appears that at the time plaintiff obtained his lease the commissioner of public lands and buildings was using the old form of lease, which gave the lessee a voice in the selection of the appraisers, and failed, by mistake or in-

advertence, to make the lease conform in that respect to the provisions of the act of 1883, which was then in force. It is now contended by the plaintiff that, the commissioner having executed and delivered to him a lease which contained the provisions of the law which had been repealed by the act of 1883, the state is bound by the contract, and he is entitled to have the land valued for rental purposes by three appraisers, one to be selected by himself, one by the county clerk, and the third by the other two appraisers. We do not see how this contention can be sustained. At the time plaintiff leased the land there was no provision of law which granted him the right to have a voice in the selection of the appraisers called upon to revalue the land described in his lease, and there was no authority vested by law in the commissioner of public lands and buildings to make a contract with the plaintiff granting him such a privilege. Therefore the state is not bound by that part of the agreement.

It is a well-established principle that, if a public officer in performing his ministerial duties acts beyond the express authorization of the law, his acts will be held to be void. The rule is that, where an officer exceeds his powers in the performance of his ministerial duties, "the body for which he acts, whether the state, municipal corporation, or other public organization, is not bound by his acts; and every person dealing with an officer must, at his peril, ascertain the extent of his powers." Throop, Public Officers, sec. 551. In Mechem, Public Officers, sec. 829, it is said: "Every person, therefore, who seeks to obtain, through the dealings with the officer, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer." In section 830 of the same work it is further said: "The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implication, and such

is the well-established rule. There can be no occasion or excuse in such a case for indulging in presumptions or relying upon appearances, but the authority must be traced home to its source and must be shown actually to exist." After the passage of the law of 1883, the board of public lands and buildings required the county commissioners where leased lands were situated to reappraise them for leasing purposes, and the commissioner had no power or authority to agree with the plaintiff upon a different method of appraisement. The fact that a contrary provision was left in the plaintiff's lease by the commissioner through a mistake or inadvertence conferred upon him no right which would nullify plain statutory provisions. The law entered into and became a part of the contract, and the plaintiff will not be permitted to nullify the statute in the manner attempted in the case at bar. *Morgan v. Hog Raisers Mutual Ins. Co.*, 62 Neb. 446. The record discloses that the board of educational lands and funds was slow to forfeit the plaintiff's lease. He was often urged to comply with the law and the terms of his contract by paying his rent on the basis of the new appraisement. This he persistently refused to do, and stood upon his supposed right to have a voice in the selection of the appraisers who should be called upon to reappraise the land for lease purposes. Finally, as a last resort, the board forfeited plaintiff's lease, and leased the land to the defendant Cather. It therefore follows that the judgment of the district court as to plaintiff's right to retain possession of the last named tract of land must also be reversed.

We are also of opinion that the defendant Charles F. Cather is entitled to the possession of all of the land in question under and by virtue of the leases executed and delivered to him by the state through its commissioner of public lands and buildings. The judgment of the district court for Webster county is therefore reversed and the cause is remanded to that court, with directions to render a decree in accordance with this opinion, preserving to

the plaintiff whatever rights he may have in, or by reason of, the improvements, if any, which he has placed upon the premises.

JUDGMENT ACCORDINGLY.

ROSE, J., not sitting.

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

PER CURIAM.

Plaintiff, in moving for a rehearing, suggests that the court has misunderstood the record, and has not accurately stated the facts. Complaint is made of so much of the opinion as declares: "The commissioner, * * * after much correspondence and considerable delay, gave plaintiff notice of the intention of the board to forfeit his lease in case he refused to pay rental based upon the new appraisement. *Something over six months after giving the notice* above mentioned, the board declared the lease forfeited."

A careful reexamination of the record discloses that, owing to the multiplicity of notices contained therein, the writer of the opinion was mistaken in stating that the forfeiture was made something over six months from the date of the notice. However, we do not think the mistake a material one, or of sufficient importance to require a rehearing. Our decision did not turn on that point, but was based on the ground that the commissioner could not, either purposely or inadvertently, bind the state by a contract which, in effect, would abrogate the plain provisions of the law relating to the matter of appraisement.

We are satisfied that a rehearing would not change our decision, and it is therefore

DENIED.

PETER YOUNGERS, JR., ET AL., APPELLANTS, V. EXETER CEMETERY ASSOCIATION, APPELLEE.

FILED NOVEMBER 9, 1909. No. 15,803.

Cemetery Associations: APPOINTMENT OF RECEIVER. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the findings and judgment of the district court.

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

F. B. Donisthorpe, for appellants.

Charles H. Sloan, F. W. Sloan and *J. J. Burke, contra.*

BARNES, J.

This action was commenced in the district court for Fillmore county by Peter Youngers, Jr., and 19 others against the Exeter Cemetery Association, a private corporation, to require the defendant to disclose the names of its different officers, for the appointment of a receiver to take charge of its property until a competent person or persons could be appointed to manage its affairs, to require an accounting, and to compel it to turn over to the receiver, or such new trustees as should be appointed by the court, all of its real estate and money arising from the sale of lots, and also to enjoin the corporation from selling any of its real estate not already platted until the further order of the court, and for general equitable relief. The petition set forth the organization of the defendant, together with its articles of incorporation, and alleged that after its organization it purchased from the Burlington railroad a 40-acre tract of land, and thereafter platted 10 acres of it into lots to be sold and improved for burial purposes; that the land platted is now insufficient in extent for the accommodation of the public residing in the neighborhood of the cemetery; that nearly all of the lots already platted have

been sold, and that it will be necessary to plat at least another 10 acres of the 40-acre tract above mentioned in order to furnish sufficient accommodations for burial purposes. It was further alleged that the defendant association, seeking to gain a large amount of money for its own use from the sale of the lots, has been demanding an exorbitant price for the same, charging as high as $20 for a single lot; that the defendant association deliberately transferred by deed to one L. T. Mead a piece or parcel of said land as platted, 78 rods long and 4 rods wide; that the defendant association has neglected to set out trees on the cemetery grounds, and to beautify and improve the same; that it has failed to secure a sufficient supply of water necessary for the care of said grounds, and that, after lot owners have tried to beautify and adorn their lots by the planting of trees and shrubbery thereon, the defendant association negligently leased said ground to parties for cutting grass to make hay, and that the trees and shrubbery so planted have been thereby cut down and destroyed; that no proper fence has been placed and maintained around said platted cemetery grounds for the protection of the same, and the defendant association has wholly failed to apply the funds coming into its hands from the sale of burial lots as required by the statute, but has converted the same to its own private purposes. It is further averred in the petition that the officers of the defendant association are incompetent, improper and unsuitable persons to maintain the cemetery, or care for the ornamentation of said grounds, or sell the lots thereof, and account for the proceeds therefrom. To this petition the defendant interposed an answer containing both general and special denials, together with affirmative matters of defense, sufficient in form and substance to put in issue all the averments of the plaintiffs' petition. The plaintiffs filed a reply in the form of a general denial, and upon the issues thus joined a trial was had which resulted in a judgment for the defendant, and the plaintiffs have appealed.

It thus appears that the only question presented for our determination is one of fact. The evidence discloses without conflict that in the month of April, 1873, certain persons residing in or near the village of Exeter organized themselves into a cemetery association, adopted articles of incorporation, together with a constitution and by-laws, which were filed with the county clerk of Fillmore county; that, after perfecting their organization, they entered into negotiations with the Burlington railroad to purchase the tract of land in question, which seems to have been the most suitable site for a cemetery in that vicinity. It was ascertained, however, that the railroad company would not sell a less quantity of land than 40 acres, and this was the reason that so much land was purchased. After having entered into a contract for the purchase of the land, and after obtaining possession of the same from the railroad company, the corporation procured the services of a surveyor, and at a considerable expense laid out and platted 10 acres of the 40-acre tract for cemetery purposes, and caused the plat to be recorded in the manner provided by law; that it fixed the price of burial lots at $10 each, and any one who paid that amount was entitled to one share of the corporate stock. It further appears that some 44 shares of stock were sold, but for one reason or another a number of the subscribers forfeited their contracts, so that the outstanding stock numbers only 28 shares. The money received from the sale of stock was not sufficient to carry out the object for which the association was formed, and thereupon assessments were made upon the stockholders from time to time, and the price of lots was increased to $20 each. Trees were purchased and planted, and the cemetery ground was laid out into avenues and properly fenced, and from that time on the business has been conducted by the original incorporators or their successors in office for and on behalf of the association until the present day. It further appears without controversy that the 10 acres of land laid out and platted for cemetery purposes have never been taxed, but

that the association has paid taxes upon the remaining 30 acres of land each year without objection, and has used the same for farming purposes, and has never claimed that it was exempt from taxes.

Coming now to consider the evidence introduced by plaintiffs, we find that some of their witnesses testified that the fence around the cemetery has at times been out of repair; that the roads or avenues running through the cemetery and extending from the village of Exeter to the entrance of the cemetery grounds are somewhat rutty, but they frankly admitted that they were safe for travel, and had been constantly in use, and that no complaint was ever made by them to the officers of the association in regard to the condition of the roads. Some of plaintiffs' witnesses also testified that the association permitted certain persons to mow the grass in the inclosure, and receive the hay that they were able to obtain thereby as their compensation for the work; and there is some evidence in the record that in mowing the grass and raking it up some slight injuries have occurred to trees and shrubbery set out by lot owners, but such injuries seem to have been almost infinitesimal; but they all admitted that it was proper and necessary to cut and remove the grass in order to avoid damage by fires and to keep the premises in a sightly condition. It appears that, since the commencement of this action, a prairie fire came from the north and ran over the cemetery, doing some damage to the fences, shrubs and trees, and to some of the inclosures around the graves. It was not shown, however, that the fire was caused by the negligence of the corporation, or that it could have been prevented by any of its officers or agents. There was no evidence introduced by the plaintiffs which showed or tended to show a lack of water necessary to suitably preserve and care for the growing trees, shrubs and flowers planted in the cemetery. On the other hand, it was shown that, when the question of water supply was raised, the association immediately

constructed a well in the center of the grounds which had since proved amply sufficient to furnish water for all necessary and proper purposes connected with the maintenance of the cemetery. It clearly appears from the testimony of the witnesses called by the defendant that, before this action was commenced, arrangements had been made to construct a new and suitable fence around the grounds; that a sufficient number of trees of different and suitable kinds were growing thereon to beautify the cemetery and give it an attractive appearance. It also appears that there is a large number of unsold lots, and no necessity now exists or will exist in the near future for platting any more of the ground belonging to the association for burial purposes. As to the tract of land alleged to have been deeded to one Mead, it appears without dispute that this land was given to Mead in exchange for another tract of exactly the same length and breadth in order to obtain a better, more suitable and more convenient road from the village of Exeter to the cemetery than the one which had theretofore existed.

In conclusion, we find from a preponderance of the evidence that officers and members of the association have performed their duties to the public by caring for and maintaining the cemetery in question in a suitable and creditable manner. In fact, the witnesses practically agree that the cemetery is as well maintained as any cemetery in or near any village of similar size and surroundings as the village of Exeter in that part of the state. It is also satisfactorily shown that the men in charge of the affairs of the corporation are capable and efficient business men, and there is no evidence which would justify a court in removing them from their positions, and the appointment of a receiver or any other persons to take charge of the affairs of the defendant association. In short, if the plaintiffs' petition was sufficient to state a cause of action, they have completely failed to establish any of its material allegations. The district

court arrived at the proper conclusion in this case, and, for the foregoing reasons, its judgment is in all things

AFFIRMED.

MARY M. SAMPSON, APPELLEE, V. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 9, 1909. No. 15,771.

1. **Appearance.** Where a defect in the service of process appears upon the face of the record, and a special appearance questioning the jurisdiction is overruled, if the defendant answers over to the merits, he thereby enters a general appearance in the action.
2. **Evidence.** A certificate of a public officer that his books show certain facts is not the best evidence of the contents of the books, and, in the absence of a statute authorizing such proof, is not competent evidence of entries therein.
3. **Accord and Satisfaction.** The receipt of money by a creditor, when accompanied by a letter giving the debtor's views as to the amount of his liability, and its application on the amount the creditor claims to be due, without the creditor in any manner assenting to the debtor's claim, is not an accord and satisfaction.

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

A. W. Crites, for appellant.

A. M. Morrissey, contra.

LETTON, J.

This action was brought to recover upon a contract of insurance entered into by the Odd Fellows Annuity Association of Iowa, the obligations of which the plaintiff alleges were assumed by the defendant, the Northwestern National Life Insurance Company of Minnesota, in consideration of the transfer to the defendant of all the assets and obligations of the Odd Fellows Annuity Association. The defendant filed a motion to quash the service of summons on the ground that the state auditor, upon whom the service was made in Lancaster county, was not

authorized to receive or accept such service. This motion was overruled. The same matter was pleaded in the answer. The answer further denies that the defendant ever entered into a contract with the Odd Fellows Annuity Association, and denies that there was any reserve fund or assets belonging to the said association. It alleges that it entered into a contract of reinsurance with the Annuity Life Association for the benefit of the members of said association, whereby it agreed to reinsure the members of such association upon certain terms recited in the contract, one of which conditions was that it should only be liable to such members in an amount proportionate to the amount which the premium actually paid bore to the full premium rate, according to a table of rates specified in the contract and shown on the face of the new policies which were issued by defendant to reinsure such members. It further alleges it became liable to the plaintiff in the sum of $270 under the new policy which was issued by it and delivered to the assured who thereafter paid the amount specified as premium on said policy, and that it had paid all of said sum to the plaintiff, except $10.10, which it was ready and willing to pay. It denies any liability to the plaintiff, except as under said reinsurance.

1. Defendant contends that the court erred in overruling the motion to quash the service of summons. The record shows a copy of a summons indorsed: "Received April 20, 1907, 3 P. M., E. M. Searle, Jr., Auditor of Public Accounts." Also the original summons, with a return showing that a true and certified copy was served by "being delivered in person to E. M. Searle, Jr., Auditor of the State of Nebraska, agent for service and attorney in fact for such company." There is further in evidence a certified copy of a power of attorney executed by the defendant on the 25th day of February, 1905, appointing the auditor of public accounts of the state of Nebraska its attorney upon whom process may be served, and agreeing that "this authority shall continue in force so long as any liability remains outstanding against the company in

this state." There is also an affidavit of the president of the company to the effect that the company has not been authorized to do business in Nebraska since January 31, 1906; that it has no agent in this state, and that the cause of action sued on was not an existing liability of the company on that date. The defendant argues that the action does not appear to have arisen in Dawes county; that the defendant had retreated from the state before the action was begun; that the service was made in another county upon an unauthorized person, and that consequently no jurisdiction was obtained by the district court for Dawes county. We think it unnecessary to pass upon this point, since the defendant has waived it. An action to recover upon an insurance policy is not a local but a transitory action, and may be brought wherever the defendant may be found. *Insurance Co. v. McLimans & Coyle,* 28 Neb. 653; *Nebraska Mutual Hail Ins. Co. v. Meyers,* 66 Neb. 657. The fact that the only service was upon the auditor of public accounts in Lancaster county was apparent on the face of the record. When the defendant answered over on the merits, it made a general appearance in the action. *Grand Lodge, A. O. U. W., v. Bartes,* 64 Neb. 800; *Linton v. Heye,* 69 Neb. 450.

2. The defendant's answer is devoted mainly to a plea of certain conditions in a contract made with the Annuity Life Association for the benefit of James T. Sampson. It also denies that it assumed the obligations of plaintiff's contract with the Odd Fellows Annuity Association, and denies that it was ever liable to the said plaintiff or to any person for the performance of any terms, conditions, conveyances and obligations set forth in such contract. But in another portion of the answer we find an allegation that the plaintiff had a membership certificate for $1,000 in the Odd Fellows Annuity Association, and that "it (the Odd Fellows Annuity Association) contracted with this defendant to reinsure the life of said James T. Sampson, and thereupon at the home office of the defend-

ant, at said Minneapolis, another contract of insurance was made for the benefit of James T. Sampson, which the defendant supposes is the contract referred to in the petition herein; but this defendant says that the covenants and agreements in said contract to be performed by the defendant are not truly portrayed and set forth in said petition." This admission simplifies the issues. The plaintiff's petition is based upon the theory that the defendant became possessed of all assets of the Odd Fellows Annuity Association, was its successor, and assumed its obligations; that it received the benefit of the payments of premium by the assured, and thereby became liable to pay the death loss as successor to the property and business of the former company. The defendant denies its succession, and claims that its liability to the plaintiff is measured by the terms of a new policy issued by defendant and accepted by the assured, and that it has fulfilled the obligation.

3. To sustain the plaintiff's theory it was necessary to prove that the defendant became possessed of the assets of the former company and assumed its liabilities. To maintain this issue the plaintiff offered in evidence a certificate of the auditor of state of the state of Iowa to the effect that the Annuity Life Association had on deposit in his office on the 12th day of April, 1902, securities to the amount of $6,700, and that his books further showed that these were withdrawn from deposit by the Northwestern National Life Insurance Company on April 15, 1902. The reception of this certificate in evidence was objected to by the defendant as incompetent, and as "stating what the books show, rather than a copy of the books themselves in relation to the matter in controversy." This objection was overruled and exception taken. This certificate was clearly incompetent. We have held that a certified copy of a letter written by an officer stating what the records of his office disclose is not competent evidence of the facts. *Moore v. Parker*, 59 Neb. 29. The certificate offered was a mere statement by the officer of what the

books contained, and was not the best evidence. The question whether or not defendant acquired the property of the former association was a vital one under plaintiff's theory of the case, and this proof could only be supplied by competent evidence. The admission of this evidence was erroneous; and, since it was the only evidence showing the transfer of securities to the defendant, it was decidedly prejudicial.

It is contended, further, that the court erred in rejecting defendant's exhibits 6 to 10, inclusive, being receipts for premium payments on the new policy, found among the papers of the insured. We think there was sufficient foundation laid for the admission of these receipts. They were produced by the plaintiff from among the papers of the deceased, were postmarked at Minneapolis, and were upon a printed form of the defendant, and addressed to James T. Sampson, at Chadron, Nebraska.

Defendant maintains that the proofs show an accord and satisfaction. This claim is based upon the fact that after the death of the assured a letter was written by defendant to plaintiff containing a computation of the amount admitted to be due her based on the contract of reinsurance and the new policy which it issued, which, together with a check for $50, being the first instalment due, was sent to the plaintiff and received by her. This was followed by other instalments until the sum of $250 had been paid. The evidence does not show, however, that the plaintiff did anything more than receipt for the money as it was paid to her. The payments were not made upon condition, or by way of compromise. We think that the plaintiff had the right to accept such money and apply it on the amount she claimed to be owing her, without thereby agreeing that she would make no further claim.

For the errors with respect to the admission of evidence, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

EMMA L. IVES, APPELLANT, V. JAMES A. BOYCE, APPELLEE.

FILED NOVEMBER 9, 1909. No. 15,791.

1. **Gaming**: GAMBLING TRANSACTIONS. A contract to operate in stocks to be adjusted according to the difference in the market value thereof is a contract for a gambling transaction.

2. ———: GAMBLING DEVICES. Transactions in a "bucket-shop," consisting of fictitious contracts of sale or purchase for future delivery of stocks with the intention that there should be no delivery, but a settlement by paying the difference of prices, are not "a game of hazard," and a telegraph wire, blackboard and ticker used by the broker in obtaining and publishing the rise and fall of prices in the New York market are not a "gambling device" under section 214 of the criminal code.

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

Weaver & Giller, for appellant.

M. O. Cunningham, contra.

LETTON, J.

This is an action to recover the sum of $1,500 on account of losses sustained by the plaintiff in a "bucket-shop" operated by the defendant. The plaintiff pleads that the defendant operated certain gambling rooms, wherein, by reason of certain gambling devices, wagers and bets were made on the future prices of stocks; that as a part of the gambling device defendant had wire connections with New York, and that a blackboard upon one side of the gambling room, upon which the defendant marked and wrote the quotations for the benefit of his customers, and a "ticker" were also used as other parts of the gambling device; sets forth the ordinary method of stock dealing on "margins"; that the transaction between the plaintiff and defendant "was a bet or wager by means of the aforesaid devices; that it was well under-

stood by the plaintiff that no actual sale of stocks was in contemplation by either of the parties, and that none was in fact made; that the losses or amounts were to be adjusted on either side as determined by the future changes of the price of stocks on the New York City market, and that plaintiff's losses were so adjusted." A general demurrer was filed to this petition, which was sustained by the district court, and the action dismissed.

Plaintiff maintains, first, that she is entitled to recover in this case under the common law, for the reason that, having deposited her money with the defendant to make purchases of stock with the understanding that the difference between the contract and market price be settled in money without delivery of the stocks, in that event, she could revoke the authority to enter into the illegal contract and recover back the money. She bases this contention upon the decision in *Munns v. Donovan Commission Co.*, 117 Ia. 516. In that case, however, the facts were that the plaintiff claimed that the money was deposited for the purpose of making purchases upon the board of trade, while the defendant's contention was that no purchases were to be made, but that the transaction was merely a bet upon the rise and fall of commodities. Upon this state of facts the court held that the minds of the parties never met, and that, "upon the discovery of the mistake before defendant had done more than enter the transaction on its books, the plaintiff might refuse to proceed farther and insist upon the return of his money." In that case, also, the petition was for money had and received, and the defense set up the illegal contract. The distinction between the instant case and that case, and similar cases cited in the opinion of the Iowa court, is obvious. The petition in this case set forth at length the illegal character of the transaction. It is elementary that no recovery can be had under the common law upon such transactions. The courts will leave the parties where it finds them. *Rudolf v. Winters*, 7 Neb. 125; *Sprague v. Warren*, 26 Neb. 326; *Rogers & Bro. v. Marriott*, 59 Neb.

759; note to *Crawford v. Spencer*, 1 Am. St. Rep. 745, 758 (92 Mo. 498).

Plaintiff next contends that, even if not entitled to recover at common law, she has a good cause of action under section 214 of the criminal code, citing in this connection *Perry v. Gross*, 25 Neb. 826, in which it was held that under this section the plaintiff might recover the amount lost in betting upon the result of a horse race. At the time of that transaction, however, the statute was more general in its terms than now. It then provided: "If any person shall lose any money * * * on any bet or wager, such person may recover the money * * * from the person or persons with whom said bet or wager was made (criminal code 1885, sec. 214)." If the statute had remained as it then was, we think there could be no doubt of the plaintiff's right to recover, since we have uniformly held such a transaction was of the nature of a wager; but in 1887 (laws 1887, ch. 108) this section was amended to read as follows: "Section 214. Every person who shall play at any game whatever for any sum of money or other property of value, or shall bet any money or property upon any gaming table, bank, or device, prohibited by law, or at or upon any other gambling device, or who shall bet upon any game played at or by means of any such gaming table, or gambling device, shall, upon conviction, be fined in any sum not less than one hundred dollars, and not exceeding three hundred dollars, or be imprisoned in the penitentiary not more than one year, and upon a second or any subsequent conviction shall be fined in any sum not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not more than two years: *Provided*, that if any person or persons who shall lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard of any kind, such person, the wife or guardian of such, his heirs, legal representatives, or creditors, shall have the right to recover the money or the amount thereof, or the

property or the value thereof, in a civil action, and may sue each or all persons participating in the game, and may join the keeper of the gambling house or other place in the same action, who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind, and no title shall pass to said property or money, and in an action to recover the same no evidence shall be required as to the specific kind or denomination of money, but only as to the amount so lost."

Plaintiff seeks to bring the action within the scope of the above proviso by alleging that the telegraph wire, the blackboard and the ticker constituted a "gambling device," but we think this would be a forced and strained construction of the statute. The appliances mentioned may be and are used for legitimate purposes, and are no more "gambling devices" than many other instrumentalities of trade and commerce. A Missouri statute made all notes, "where the consideration is money or property won at any game or gambling device," void. In an action involving the validity of a note given for "margins," the supreme court of that state held that the note did not come under the provisions of the statute. *Crawford v. Spencer,* 92 Mo. 498, 1 Am. St. Rep. 745. To the same effect are *Dows, Jr., & Co. v. Glaspel,* 4 N. Dak. 251; *Boyce v. O'Dell Commission Co.,* 109 Fed. 758; *Sondheim v. Gilbert,* 117 Ind. 71.

But we are not without a previous construction of this amended section by this court. In *Bowen v. Lynn,* 73 Neb. 215, it was held that the legislature intended to confine the operation of the above proviso to such forms of gambling as were previously made mention of in this section, and it is said: "But at all events the proviso affords a civil remedy to such persons only as shall 'lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard.' Now it seems to us that this statute is aimed especially and almost exclusively at two things

which are absent, or substantially so, from the record in the case at bar, namely, a gambling house or place and a game at cards or other device or some game of hazard. In other words, what the legislature had prominently and principally in mind, in drafting this section, was the unlawful game or amusement and the place where it should be carried on."

We are clearly convinced that the petition does not describe a "game of hazard," and, in fact, the plaintiff does not seriously contend that the transaction described constituted "a game" of any kind. The right to recover in cases of this nature depends so closely upon the exact language of each particular statute that cases from other states are of little avail as authority unless the language of the statute is identical with that of this state. For this reason, the cases cited by plaintiff seem inapplicable.

We are of opinion that the transaction described in the petition does not come within the provision of the statute, and that the district court properly sustained the demurrer. Its judgment therefore is

AFFIRMED.

CITIZENS BANK OF MCCOOK, APPELLEE, V. J. H. WARFIELD ET AL., APPELLANTS.

FILED NOVEMBER 9, 1909. No. 15,795.

1. Cross-examination must be confined to the facts and circumstances connected with the matters stated by the witness in his direct examination, and to questions tending to affect his accuracy, veracity, or credibility.
2. Appeal: EVIDENCE: DISCRETION OF COURT. The reception of evidence collateral to the main issue which may throw some light upon facts in dispute is ordinarily within the sound legal discretion of the trial court, and unless prejudice appears it is no ground for reversal.

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

S. R. Smith, for appellants.

Morlan, Ritchie & Wolff, contra.

LETTON, J.

This action was brought by the Citizens Bank of McCook against J. H. Warfield and A. D. Warfield to recover a balance due upon their promissory note for $220. The defense was a denial of the execution and delivery of the note. The case was tried to a jury, which returned a verdict for the plaintiff, and defendants have appealed.

Defendants insist that the verdict is not supported by the evidence, which they contend decidedly preponderates in their favor. A reading of the record does not produce this impression upon the mind of the court. The evidence is conflicting, but, if the case were submitted to us for decision upon the facts, we would be compelled to agree with the jury and to find that the note was executed and delivered by them.

Defendants further complain of errors in the exclusion by the court of certain testimony sought to be drawn out upon the cross-examination of Mr. Franklin, the president of the bank, who had testified that he was present at the time the note was signed and that he saw each defendant sign it. These questions had reference to the manner in which the amount of the note was arrived at, whether there were other notes against Mr. Warfield in the bank at that time, and the time when the note of which this is a renewal was purchased from the original owner. The direct examination of the witness had been confined to proof of the only fact denied by the answer, which was the execution and delivery of the note. None of the points covered by the excluded questions were relevant to the direct examination of Mr. Franklin, and they were not proper cross-examination. The consideration for the note was not material under the issues, and, hence, this evidence was neither relevant to the issue nor proper cross-

examination. *Dillon v. Darst,* 48 Neb. 803. Further than this, the witness was allowed to testify on cross-examination that the note was given to take up a prior note that the defendants had signed and given to one Penny, and that it was a renewal of that note and others.

Defendants also complain of the admission in evidence of their original answer in the county court, which was a plea of payment. We think there was no error in this, as it tended to show the defendants' belief at the time it was filed. They further complain of the refusal of the court to permit the introduction in evidence on their behalf of the entire transcript of the proceedings in the county court, which showed that an amended answer was filed changing the issue from that of payment to a denial of the execution and delivery of the note. We think the entire record was properly excluded. It contained much matter which was entirely immaterial and which might have been seriously prejudicial to the plaintiff. Defendants afterwards offered, and were permitted to introduce, in evidence the amended answer in the county court, so that the fact that a change of issues had been made was before the jury. If any explanation of the reason for the change was desired, it might have been offered by the defendants.

One Lehn was permitted to testify to the fact of picking up a note for $200 upon the streets of McCook, which was signed by J. H. Warfield, payable to the Citizens Bank, and giving it to Mr. Warfield. It is insisted that this evidence was not proper rebuttal, had no bearing upon the issues, and tended to confuse the minds of the jury. Upon the cross-examination of J. H. Warfield, he gave in detail his recollection of the various promissory notes that he had given to J. R. Penny and to the Citizens Bank, his renewals of the same and sundry payments thereon. The fact of this $200 note being in existence, and in defendants' possession, while collateral, was not entirely irrelevant, and we think it was within the sound legal discretion of the court whether it should be admitted in evidence or not. It certainly had some bearing as to the

credibility of Warfield's testimony upon cross-examination, and also might throw some light upon his accuracy of memory in regard to his promissory notes. We cannot see that it prejudiced the defendants. We find no prejudicial error in the record.

The judgment of the district court is

AFFIRMED.

PETER E. OLSON, APPELLANT, V. NEBRASKA TELEPHONE COMPANY ET AL., APPELLEES.

FILED NOVEMBER 9, 1909. No. 15,574.

1. **Master and Servant:** INJURY TO SERVANT: CITY ORDINANCES. An employee of a telephone company directed by his master to fasten a cable to an overhead messenger wire 30 feet above a pavement, unless warned to the contrary by his master or by obvious conditions, is justified in relying upon an ordinance of the city forbidding the maintenance of wires carrying an electric current for light or power purposes within five feet of telephone wires, and commanding that all such electric light wires be insulated and defects therein repaired at once.

2. ———: DUTY OF MASTER. Notice to an employee that a master does not and will not inspect poles, cross-arms, wires or implements used by a lineman, but that the duty to make such inspection is cast upon the servant, that he must satisfy himself of their safety before climbing upon or about poles or working with such wires, and that it is his duty to report any defect therein, does not relieve the master from the duty he owes said servant to exercise reasonable care to furnish him a reasonably safe place, independent of such poles, cross-arms and wires, to work in, the nature of the work to be performed being considered.

OPINION on motion for rehearing of case reported in 83 Neb. 735. *Former opinion modified and rehearing denied.*

ROOT, J.

This cause has been submitted upon briefs and oral arguments supporting and resisting defendants' application

for a rehearing. We are satisfied that a rehearing ought not to be granted, but our former opinion will be modified.

1. The statement of facts heretofore made is correct, but will be extended somewhat as we proceed with the case. Defendants except to the first paragraph of the syllabus and the discussion in regard thereto. They argue that the printed notice given by the telephone company to plaintiff at the time he entered its employ is not a contract exempting the employer from liability for its negligence, but a notice advising plaintiff of the risks he would likely encounter if he entered its employ, and that he must inspect for himself the conditions under which the work would be performed. The writing is as follows: "The Nebraska Telephone Company. To all linemen, trouble inspectors, and all other employees whose duties require them to work upon or about poles: The duties of a lineman are, among other things, to test and inspect poles; reset old poles; set new poles; rebuild old pole lines; build new pole lines; climb poles; paint poles; gain poles; cross-arm poles; take down old wires; string new wires; pull slack; knock out crosses; trim trees; straighten up cross-arms on poles that have been pulled out of shape; replace defective cross-arms with new ones; string and hang cables; put up guy wires; set and reset guy stubs; and in fact do everything necessary to keep pole lines, cross-arms, wires, exchange cables and subscribers' wires in perfectly safe condition and working order. All linemen and other employees of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms, and wires, and must know that they are safe to work with, or upon, before climbing or going upon such poles and cross-arms. The company does not employ other persons to make such inspection, but relies upon its linemen and such other employees to make such inspection themselves at the time, and to know that the poles, cross-arms and wires are safe for them to work upon. They must be constantly on the

lookout for trouble, and at once, upon discovery, report to the manager or foreman (in writing) any trouble or defect on lines or poles that they cannot at once repair. As the occupation is a more or less hazardous one, those engaged in that line of work must at all times be on their guard and careful for their own safety as well as the safety of those engaged in working with them and of the general public."

We have again examined the document, and conclude that it is irrelevant and immaterial in the instant case. The first paragraph describes the duties of linemen. The second division informs plaintiff that all employees "whose duties require them to work upon or about poles" are charged with the duty of inspecting all implements with which they work, and all poles, cross-arms and wires, and must know that they are safe to work upon before going upon such poles and cross-arms; that the company does not employ other persons to inspect such implements, wires, poles and cross-arms, and that the employee must be on the lookout for defects on "lines or poles" and report the same. Plaintiff was not injured while working upon or about the poles or cross-arms; neither does he claim damages because of any defects in the telephone company's wires. So much of the statement as informs the employee that "the occupation is a more or less hazardous one" is indefinite, and cannot amount to a defense in this case. The evidence is undisputed that the saddle furnished plaintiff is the ordinary and usual implement provided for the work in which he was engaged at the time he was injured, and that it was not out of repair. If the telephone company is liable to plaintiff, it is because the master did not exercise ordinary and reasonable care in constructing and maintaining its cable and messenger wire within five feet of the live wires of the electric light company and in negligently directing plaintiff to work in that dangerous locality without using reasonable care to warn him of the situation. The danger was not an incident of the business in which plaintiff was engaged. He

would be justified in believing that his master would obey the ordinance, and that, if the telephone company strung its wires within a few inches of the wires of the electric light company, the last named conductors would be dead and not charged with an electric current; or that, if his master for any reason was constructing its cable and wire, in violation of the ordinance, in close proximity to the dangerous electric light wires, it would exercise reasonable care to warn him of the danger. *Barto v. Iowa Telephone Co.*, 126 Ia. 241. The notice does not refer to any such situation as the facts establish in the instant case, and should not have been received for any purpose. The vice of this error cannot be restricted to the defense of the telephone company, but infects the entire case and calls for a reversal of the judgment as to each defendant. The first paragraph of the syllabus and so much of the opinion as refers thereto are withdrawn.

2. The rule announced in the second paragraph of the syllabus is also assailed as a departure from the law announced in preceding decisions of this court. A reconsideration of the record convinces us that the evidence is not so conclusive upon the issue of defendants' negligence as to justify a peremptory instruction in plaintiff's favor. It is true that the evidence establishes that the wires of the light company crossed Twenty-fourth street diagonally about 14 inches beneath the cable of the telephone company, and that the insulation upon the electric light wires immediately below the cable was worn and displaced. It further appears that the light wires were not carried in a trough or box across the telephone wires. It cannot be reasonably inferred from the evidence that plaintiff was misled in calculation or judgment because the wires did not cross the street at right angles, nor that, if they had, the accident would not have occurred. The evidence does not show when the electric light wires were placed in position across Twenty-fourth street, nor when the telephone company strung the wires or cable attached to its cross-arms and poles. It is possible to infer from

the discolored condition of the light wires where insulation was lacking that they had been in position for some time; and, from the fact that the cable and messenger wire had evidently been constructed but a short time before the accident, that the electric light company was first in point of time in occupying Twenty-fourth street. It is highly improbable that the telephone company and light company combined to violate the ordinance, but it is probable that one of the defendants by prior permission of the municipal authorities and earlier construction secured a superior right to the zone of five feet on either side of its wires. *Nebraska Telephone Co. v. York Gas & Electric Light Co.,* 27 Neb. 284. It would not necessarily follow that the light company would be excused by proof that the telephone company was the junior occupant of Twenty-fourth street. The ordinance is mandatory that the light company cover all its wires designed for carrying light or power currents with "a substantial high grade insulation not easily worn by friction, and whenever the insulation becomes impaired it must be renewed at once." Although the senior occupant of the street, it may have known, or conditions may have been such that it ought to have known, that telephone wires had been strung above its light conductors at the point where plaintiff was injured. In such a case it ought to have known that failure to keep its wires properly insulated might result in an injury to an employee of the telephone company. *Heaven v. Pender,* 11 L. R., Q. B. Div. (Eng.) 503; *Mitchell v. Raleigh Electric Co.,* 129 N. Car. 166, 55 L. R. A. 398. The jury should be permitted to say under proper instructions whether plaintiff's injury was caused by the negligence of one defendant or the combined negligence of both; whether there was but one proximate cause, or several for which the defendants were separately responsible but all contributing to the accident, without which the injury would not have occurred. In the first case only the defendant responsible should be held, in the other event the jury might return a verdict against either

or both of the defendants, provided plaintiff was not guilty of contributory negligence. *Electric R. Co. v. Shelton,* 89 Tenn. 423, 14 S. W. 863; *McKay & Roche v. Southern Bell Telephone Co.,* 111 Ala. 337. The second paragraph of the syllabus in our former opinion and the argument upon that point are withdrawn.

We are of opinion that the reference in the fourth paragraph of the court's instructions to extraordinary and unusual conditions ought to be omitted. The evidence is undisputed that plaintiff was employing usual and ordinary methods for securing the cable of the telephone company, and, if the light company had created an unusual condition in constructing or maintaining live wires in violation of the city ordinance, it ought not to receive any special consideration because of such facts.

3. The evidence submitted at the trial of this case is unsatisfactory concerning many material facts; that is to say, the date that telephone lines were first constructed at the point where plaintiff was injured, the time when electric light wires were first strung across Twenty-fourth street at the intersection of Grant, and the facts concerning notice, actual or constructive, to the light company of the condition of its wires with reference to the wires of the telephone company at said point. We find little, if anything, in the record to prove whether plaintiff before he was injured knew of the presence of the electric light wires in question, or, if he had such knowledge, whether or not he believed, or had a right to believe, that the light wires were dead or alive. In short, the record almost justifies an affirmance because of the lack of evidence, notwithstanding the errors committed.

We have given mature consideration to this phase of the case, and conclude upon the entire record that the judgment of reversal should be adhered to, but our former opinion should be modified as herein indicated. It is so ordered, and the motion for a rehearing is

OVERRULED.

ALICE BRIDGET SCHNITTER, APPELLEE, V. MARY KATHERINE MCMANAMAN, APPELLANT.

FILED NOVEMBER 9, 1909. No. 15,770.

1. **Wills:** CONSTRUCTION. If possible without violating well-settled rules of law, effect must be given to every word in a will.
2. ———: ———: EXECUTORY DEVISE. If a will contains an executory devise of real estate after the death of the first taker without issue, the limitation should be construed to mean a definite failure of issue, if capable of that construction.
3. ———: ———: ESTATE DEVISED. Subsequent provisions in a will will not prevail to cut down an estate in fee simple previously given. They are, however, operative to define the estate devised, and may demonstrate that what without them would be an absolute fee was intended to be an inferior estate.
4. ———: ———: ———. A father devised real estate to a son "to have and to hold forever. In the event of the death of John (the son) without lawful issue born, the property herein bequeathed to him shall immediately become the property of my daughter Mary." The son was not authorized by the will to dispose of any part of the estate, and he died unmarried and without issue subsequent to his father's demise. *Held*, That, since the property could not vest "immediately" in the daughter unless the son survived his father, the will refers to the event of the son's death subsequent to his father's dissolution. *Held, further*, that the will vested the son with a base or determinable fee, and, under the foregoing facts, the daughter Mary took an estate in fee simple immediately upon the death of her brother John.

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

T. J. Doyle and *G. L. DeLacy*, for appellant.

Field, Ricketts & Ricketts, contra.

ROOT, J.

This is an action to quiet in plaintiff title to an undivided one-half of certain real estate in the city of Lincoln. John Barrett, the litigants' parent, died testate seized of

the real estate in dispute, and his will has been duly probated. The second, third and fourth paragraphs of the will are as follows:

"I give and bequeath to my beloved daughter, Mary Katherine McManaman, the sum of fifteen hundred ($1,500) dollars. In case of the death of Mary Katherine McManaman, the money above bequeathed to her shall be paid to her children in equal amount.

"I give and bequeath to my daughter, Alice Bridget Schneider, the sum of five ($5) dollars.

"I give and bequeath to my beloved son, John N. Barrett, all property of which I shall die siezed or possessed, whether real, personal or mixed, not hereinbefore bequeathed, that is to say, after the payment of said sum of fifteen hundred ($1,500) dollars to my daughter Mary Katherine McManaman, and said sum of five ($5) dollars to my daughter Alice Bridget Schneider, all of the remainder of my property of every description I give and bequeath to my son John N. Barrett, to have and to hold forever. In event of the death of John N. Barrett without lawful issue born, the property herein bequeathed to him shall immediately become the property of my daughter Mary Katherine McManaman."

Subsequently John M. Barrett, who is referred to in his father's will as John N. Barrett, died testate, unmarried, and without issue born, and his will has been duly probated. In his will, after making some minor bequests, he devised the residue of his estate in equal shares to his sisters, the litigants herein. If the elder Barrett's will vested his son with title in fee simple to the real estate, plaintiff should prevail, and the decree of the district court should be affirmed. On the other hand, if John M. Barrett's title was defeasable upon his death without issue born, defendant is entitled to a decree in her favor. Section 124, ch. 23, Comp. St. 1909, provides: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly

appear, by the will, that the devisor intended to convey a less estate." Section 49, ch. 73, Comp. St. 1909, provides: "The term 'heirs' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." This statute applies to wills as well as to deeds. *Little v. Giles,* 25 Neb. 313. Section 52, ch. 73, *supra,* states: "Estates may be created to commence at a future day." And section 53, ch. 73, *supra,* is as follows: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

We are called upon "to sit in the seat of the testator" and construe his will, yet the litigants are content to submit their case upon the will and a statement that the senior Barrett was a widower at the time he executed his will and so continued until he died; that the litigants and John M. Barrett constituted the sole and only heirs at law of their father, and that John M. Barrett died childless and unmarried. The subject of executory devises has not received extensive consideration in this court. In *Little v. Giles,* 25 Neb. 313, it was held that a devise of real estate to a widow, with a power to sell and convey so long as she did not remarry, vested her during widowhood with the power to convey the real estate and transfer title in fee simple. The will in the cited case provided that all of the estate bequeathed, "or whatever may remain" at the remarriage of the first taker, should go to the testator's children. All of the real estate devised was sold and conveyed by the widow before her second marriage, so that the court did not determine whether the devise over would be valid in any event. In *Spencer v. Scovil,* 70 Neb. 87, it was held that a devise in fee simple cannot be cut down by a subsequent clause in the will purporting

to devise over so much of the estate as the first taker had not alienated during her lifetime. In *Yoesel v. Rieger*, 75 Neb. 180, reference is made to an executory devise; but title did not vest by virtue of the devise over, so that the opinion is not pertinent in the instant case. In *Sheets' Estate*, 52 Pa. St. 257, it is held that subsequent provisions in a will are at times operative to define an estate given, and to show that what without them would be a fee was intended to be a lesser estate. The opinion is cited with approval in *Spencer v. Scovil, supra.*

If an examination and comparison of all of the parts of the will satisfies the reason that the testator vested the primary devisee with a title in fee simple and thereafter attempted to control that title upon certain contingencies, then the rule of law intervenes and renders nugatory the devise over. *Loosing v. Loosing, ante,* p. 66. The rule is reasonable and well calculated to advance the administration of justice. It must be admitted that the devise of real estate to the testator's son "to have and to hold forever," considered in the light of the statute, is sufficient to vest the devisee with all of the interest the testator possessed in the property referred to. Does the subsequent clause, "in the event of the death of John N. Barrett without lawful issue born, the property herein bequeathed to him shall immediately become the property of my daughter," etc., clearly indicate that the testator devised to his son less than an estate in fee simple, and do those words create a devise over to the defendant? A devise to one in fee, and in the event of his death to another in fee, refers to death during the testator's life, because the event cannot be said to be contingent, and it seems more compatible with reason to say that the testator by the use of the words was providing a substitute for the first taker, should that devisee not survive the testator. When, however, the death of the first taker is coupled with other circumstances which may or may not ever occur, a devise over has been upheld by many eminent courts. *Pells v. Brown,* 3 Cro. (James, Eng.) 590; *O'Mahoney v. Burdett,*

7 L. R. H. L. (Eng.) 388; *Britton v. Thornton,* 112 U. S. 526; *Glover v. Condell,* 163 Ill. 566; *Parish's Heirs v. Ferris,* 6 Ohio St. 563; *Niles v. Gray,* 12 Ohio St. 320; *Hutchins v. Pearce,* 80 Md. 434; *Marshall v. Marshall,* 42 S. Car. 436; *Gibson v. Hardaway,* 68 Ga. 370. On the other hand, courts of high standing hold to the contrary. *Benson v. Corbin,* 145 N. Y. 351; *Coe v. James,* 54 Conn. 511; *Mickley's Appeal,* 92 Pa. St. 514; *Harris v. Dyer,* 18 R. I. 540; *Baldwin v. Taylor,* 37 N. J. Eq. 78; *Fowler v. Duhme,* 143 Ind. 248; *Lovass v. Olson,* 92 Wis. 616; *Meacham v. Graham,* 98 Tenn. 190; *Wilson v. Bryan,* 90 Ky. 482. The rule that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise. 1 Underhill, Law of Wills, sec. 348. If the first taker is unmarried when the will is executed, it is said that the testator contemplated the primary devisee's future marriage and birth of issue, and that the devise over should be construed as an attempt on the testator's part to keep the estate in his family by cutting off the first taker's power to alienate the property. *Hutchins v. Pearce,* 80 Md. 434.

In the instant case the testator has indicated by bequeathing to plaintiff but $5 that, for some reason best known to himself and not in any manner reflected from the evidence, he did not desire her to receive any substantial part of his estate. By stating that, "in the event of the death of John N. Barrett without lawful issue born, the property herein bequeathed to him shall *immediately* become the property of my daughter Mary," it seems plain to us that the testator did not contemplate that his son would predecease him. The estate could not vest *"immediately"* in the daughter unless the son survived the father. We therefore hold that the will refers to the son's death without issue subsequent to the father's dissolution. It is conceded that issue was never born to the son, so

that it is unnecessary to determine whether issue must have survived the primary devisee to bar the executory devise. The intent of the testator having been ascertained, is there any such repugnancy between the estate devised to the son and the devise over as to destroy the last named estate? We think not. We find nothing in the will either by its express terms or by reasonable intendment to indicate that power or authority is given the son to convey the real estate or to consume the proceeds of a sale of the land; nor, considering the entire instrument, does it seem reasonable to hold that the testator intended to vest an indefeasible estate in fee simple in his son. It is argued that to hold that the will creates a valid executory devise is to say that the son received a mere life estate, and that, if such an estate were intended, the testator would have used words to express that intention. The vice of this argument is that the devise over does not cut down the first taker's estate to one for life. John M. Barrett's title was a base or determinable fee, which is defined by Kent as "an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent." 4 Kent, Commentaries (Rev. ed.) p. 9. If the son had conveyed the real estate subsequent to his father's death and the contingency had not occurred upon which the title was to be cast over, the grantee would have an estate in fee simple. If, however, the son had conveyed and had died without issue born, the grantee's estate by the subsequent facts would terminate. We are satisfied that, when all of the provisions of the will are read together, there is no repugnancy between them, and that it is our duty to carry out the testator's clearly expressed intent by upholding defendant's contention that she is the sole owner of the real estate in dispute.

Considerable space is given in the brief, and an instructive argument was presented at the bar, to sustain the proposition that the reference in the will to death without

issue born created an indefinite failure of issue and violated the rule against perpetuities. We do not think that we should so construe the will. The devise over is to one in life at the time the will was executed, and it does not seem reasonable to us to say that the testator contemplated that his daughter Mary might live so as to receive the estate upon an indefinite failure of her brother's issue, even though that enjoyment might be thereby postponed beyond the life of untold generations. *Parish's Heirs v. Ferris,* 6 Ohio St. 563; *Taylor v. Foster's Adm'r,* 17 Ohio St. 166; 2 Jarman, Wills (6th ed.) p. 463 *et seq.*

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

REVERSED.

PHILANDER L. HARPER, APPELLEE, V. RICHARD B. RUNNER; DANIEL REAGAN, APPELLANT.

FILED NOVEMBER 9, 1909. No. 15,796.

1. **Landlord and Tenant:** OPTION TO PURRCHASE: CONSIDERATION. A provision in a lease granting the lessee an option to purchase the property during his term "at any price offered by a third party satisfactory to said Runner" (the lessor) is supported by the consideration paid for the lease, and cannot, without the lessee's consent, be revoked during the period granted for the exercise thereof.

2. ———: ———: SPECIFIC PERFORMANCE. And, if the lessor during the term sells the land to a third person without first giving the lessee an opportunity to purchase, the latter's right to a specific performance of his contract will not be destroyed by his demand for an abstract and a suggestion that the deed be delivered and the purchase price paid at the lessee's residence.

3. ———: ———: NOTICE TO SUBSEQUENT GRANTEE. If a vendee is informed, preceding his purchase, by a lessee in possession that the tenant claims to own the real estate, the purchaser will stand in the shoes of his grantor, and may be compelled to convey, precisely as his vendor would have been coerced to perform if the conveyance had not been made.

4. **Specific Performance: TENDER.** When the owner of real estate expressly repudiates and refuses to perform his contract for a sale thereof, a formal technical tender is not a condition precedent to a suit for specific performance.

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

Albert Muldoon, for appellant.

Wilcox & Halligan, contra.

ROOT, J.

This is an action for the specific performance of a contract for the sale of a quarter section of land in Lincoln county. A subsequent purchaser was joined with the original obligor as defendant. Plaintiff prevailed, and the subsequent purchaser appeals.

Defendant Runner, who resides in Kentucky and owned the land, in March, 1906, executed a written lease to plaintiff therefor. The contract provided: "Said Harper (plaintiff) has the option to purchase said land during the term of this lease at any price offered by third party satisfactory to said Runner." Plaintiff inclosed the land with five other quarter sections, and was using the tract as a pasture for his cattle in April, 1906, when defendant Reagan, who resides in Colorado, called upon plaintiff with a view to examining the latter's ranch. Harper and Reagan drove over the land in controversy. The litigants do not agree concerning their conversation during that trip. Plaintiff testified that he told Reagan that he owned by deed or contract all of the land in the inclosure; whereas Reagan says that plaintiff spoke generally about the land in two pastures, saying that he owned part of the real estate, leased a fraction thereof, and had no right to the remainder. The price demanded by plaintiff was unsatisfactory to Reagan, and he conferred with Runner's agent and purchased the land for $400 less than plaintiff asked for it. Subsequently plain-

tiff learned of the transaction, and wrote to Runner, reminding him of the option in the lease, stating, among other things: "Now that you have an offer for $800 and are willing to accept it, I claim my option and will pay it to you in full on the delivery of your warranty deed and abstract showing perfect title in said land except my lease. You may send the deed and abstract to the First National Bank at North Platte, Neb., our county seat, where I deposit the money to be paid to you when they are found correct." Runner answered at once that he had sold the land without giving thought to the option, and did not know what he could do, but that he wanted to settle and had written "to some of the other parties." Plaintiff conferred with Reagan, who said that the lease is "not worth anything, that if he had an agreement it was against Mr. Runner and not me, and if he wanted to test the merit of the case to go ahead and do it." July 9, 1907, this suit was instituted.

1. Reagan argues that the option is collateral to the lease, did not create an estate in the land, and that the tenant's possession was not constructive notice of the right asserted in this suit. The district court found "that defendant Reagan, at the time of and prior to his purchase, knew of plaintiff's possession of the land in question, but did not know of his option to buy," and that plaintiff's possession put Reagan upon inquiry to ascertain Harper's rights. We are of opinion that the findings should be expanded. The evidence is satisfactory that, while plaintiff did not state that he held an option to purchase the land in suit, he did say that he owned it. It seems reasonable and probable that plaintiff told Reagan just what Harper testified that he did say. When Reagan knew that the quarter section he inspected and proposed purchasing was in Harper's possession under a claim of title, it was incumbent upon Reagan to inquire of Harper concerning the nature of that title or equity. Reagan does not claim that he understood or was told that Harper was a mere tenant and that he was misled thereby. Reagan's

reticence and failure to make inquiry under the facts disclosed by the evidence, assuming that he has told the truth, are circumstances tending strongly to impeach his good faith. Having been told by Harper that he claimed to own the land, Reagan cannot shield himself by asserting that Harper's possession as tenant was not constructive notice of the option. The option is part of the lease, and every provision in that instrument is supported by the identical consideration that vitalized all other parts thereof. *Hall v. Center,* 40 Cal. 63; *Frank v. Stratford-Handcock,* 13 Wyo. 37, 77 Pac. 134. An option based upon a sufficient consideration for the purchase of real estate during a definite period cannot be withdrawn before the expiration of that time, but vests the legal holder thereof with a right to acquire an interest in the land. *Gustin v. Union School District,* 94 Mich. 502, 34 Am. St. Rep. 361; *Mueller v. Nortmann,* 116 Wis. 468, 96 Am. St. Rep. 997; *McCormick v. Stephany,* 61 N. J. Eq. 208; *Cunningham v. Pattee,* 99 Mass. 248. A subsequent purchaser who buys with knowledge that the occupant claims to have a contract for the purchase of the land is bound by the terms of that agreement, whether it is an option or an executory contract equally binding each party thereto. *Daniels v. Davison,* 16 Ves. Jr. (Eng.) *249; 2 Sugden, Vendors, p. 123; *Anderson v. Brinser,* 129 Pa. St. 376, 6 L. R. A. 205; *Cummins v. Beavers,* 103 Va. 230, 106 Am. St. Rep. 881; *McCormick v. Stephany, supra; Lipp v. South Omaha Land Syndicate,* 24 Neb. 692.

2. Reagan contends that, as Harper's acceptance was conditional, he rejected the option; that a tender has not been made, and that this action cannot be maintained. The option was not an offer to be accepted unconditionally in order to complete an executory contract, but it gave Harper a completed right to a conveyance if he elected to pay the amount of the third party's bid. That privilege continued during the term of the lease, and a counter proposal by Harper did not destroy the right he had theretofore paid for. Runner had not notified Harper of Reagan's

bid, nor did he wait to learn whether plaintiff would pay $800 for the land before completing his contract with Reagan. When the proposition was made to Runner, he had disabled himself from complying with his contract, and did not suggest that he would deliver a deed in Kentucky to Harper for $800. *McCormick v. Stephany, supra.* It appears that shortly after the lease was executed Runner's brother informed plaintiff that he could have the land for $700, and the offer was refused for the alleged reason that the land was not worth the price named. This fact is immaterial because plaintiff had a right under his contract to wait until a third person had offered to buy the land at a price satisfactory to Runner. Harper evidently preferred to lease the land and to buy as a last resort to preserve his ranch. A tender under the circumstances would have been a vain thing. Neither defendant would have accepted the money, and both of them opposed plaintiff's demand. *Johnson v. Higgins,* 77 Neb. 35.

It is argued that Harper ratified the transaction by offering to trade Reagan other land for the real estate involved herein. The offers, we are satisfied, were made for the purpose of compromising the conflicting claims of the litigants, and cannot be considered as a defense to this suit.

The judgment of the district court is right, and is

AFFIRMED.

JOHN J. KANE ET AL., APPELLANTS, V. WALTER F. BOWDEN, APPELLEE.

FILED NOVEMBER 9, 1909. No. 15,804.

1. **Waters, Diversion of.** Water flowing in a well-defined watercourse, whether swale or creek in its primitive condition, may not, except in the exercise of the power of eminent domain, lawfully be diverted and cast upon lands of an adjoining proprietor where it was not wont to run according to natural drainage.

2. ———: RIGHTS OF ADJOINING LANDOWNER. A person may not, except in the exercise of the power of eminent domain, lawfully concentrate surface waters and discharge them through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage.

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

A. R. Oleson, for appellants.

Hunker & Krake, contra.

ROOT, J.

This is an action to enjoin the overflow of plaintiffs' lands. Defendant prevailed, and plaintiffs appeal.

Plaintiff Thompson owns land in the north half of the southwest quarter of section 33. Defendant owns all of the north half of said section. Plaintiff Kane owns the northeast quarter of the southeast quarter of section 32. All of this land is flat, and situated in the valley of, and close to, the Elkhorn river. Sand creek, a natural watercourse draining considerable territory, runs in a general southeast course with well-defined banks until it crosses the north line of said section 32 about midway between the northeast and northwest corners thereof. At this point the banks disappear, and the flowing water spreads out, but proceeds in a general southeast and easterly course through a shallow swale, thence northeast for a space, and thence southeast until it empties into the Elkhorn. At about the center of section 33 the banks of the stream reappear and continue to the mouth of the creek. In the north half of section 32 there is a pond about one-half mile in length and one-sixth of that distance in width. In dry seasons water ceases to flow in Sand creek, but after heavy rains flood waters overflow the land south of the swale referred to, and fill said pond. It clearly appears from the evidence that water flows over the bank near the northeast shore of the pond and into the swale. After excessive rains, or coincident with high water in the Elkhorn, all

of the land is submerged, but the greater part thereof is valuable pasture and hay land. During the past 20 years many attempts have been made to drain the lands herein described. Ditches have been constructed east and west and southeast and then east, but the proof establishes that all of them, except the Mansfield ditch and the drain in dispute, are filled with flood trash and silt, and for all useful purposes are obliterated. Some time in the early part of 1906, the exact date not appearing in the record, Mr. Mansfield, who owns the north fourth of section 32 and a considerable part of section 29, and Mr. Spoering, who owns the northwest quarter of the northeast quarter of section 32, constructed a ditch in the swale above referred to. The path of this drain is southeast to a point in the north line of the northwest quarter of the northeast quarter of section 32, and thence continues eastward to the section line. In June, 1906, defendant commenced to dig a ditch from the last named point directly south. Plaintiffs warned him not to proceed, but he completed the ditch to the half section line, banked the excavated soil on the east side of the channel, and constructed a dam across the eastern end of the Mansfield ditch. The greater part of the water in the Mansfield ditch was thereby diverted from its eastern and northeastern course south into the ditch constructed by defendant, and thence over and across plaintiffs' lands. The evidence establishes that this water destroyed tame grass and blue stem that theretofore grew luxuriantly upon plaintiffs' lands, interfered with hay making, and seriously damaged said litigants. The instant case is within the principles announced in *Roe v. Howard County*, 75 Neb. 448, and *Gregory v. Bush*, 64 Mich. 37. That is to say, that water flowing in a well-defined watercourse cannot be lawfully diverted and cast upon the lands of an adjoining proprietor where it was not wont to run in the course of natural drainage, and that a person may not lawfully concentrate surface water and discharge it through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage.

Defendant argues that the maps in evidence, prepared by the county surveyor, demonstrate that the natural drainage of the territory referred to is southeast; that the Mansfield ditch diverted water east to and across defendant's farm, and that the drain in question merely returned such water to the territory where it would have appeared but for the former ditch. The maps were prepared from surveys taken while part of the territory was covered with ice, and the elevations indicate the surface of the ice or of the ground according to conditions existing at that time. The elevation of the north shore of the pond, where the overwhelming preponderance of the evidence establishes that water did escape and flow east and northeast into the swale and over defendant's land, is not indicated on the maps. It is quite probable that the Mansfield ditch and the earth taken therefrom intercept water that otherwise would spread out and flow south, and that said drain accelerates the flow of water eastward to defendant's farm, but plaintiffs are not responsible for that condition. The fact that Mansfield and his associates are unlawfully diverting water to and over defendant's land will not justify him in deflecting and pouring it onto plaintiffs' farms.

It is suggested that plaintiffs' petition refers to a dyke and an embankment, but is silent concerning the ditch; that the north and south ditch, and not the embankment, diverts water from the Mansfield ditch; that the allegations in the petition and the evidence adduced do not correspond, and therefore plaintiffs are not entitled to a judgment in this case. A dyke in ordinary language refers to a ditch or channel dug for water as well as to a bank, mound or wall. The allegation is sufficient.

A careful consideration of the record convinces us that plaintiffs are entitled to relief. The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment as prayed for in plaintiffs' petition.

REVERSED.

FRANK DINUZZO V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1909. No. 16,330.

1. **Statutes:** AMENDMENT: CONSTITUTIONAL LAW. Chapter 82, laws 1909, an act declaring by its title a purpose to amend section 14, ch. 50, Comp. St. 1907, and making it unlawful to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., is germane to the amended statute, which prohibited the sale of intoxicating liquors on days of election and on Sundays, and the amendment did not violate the constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III, sec. 11.

2. ———: ———: ———. In enacting chapter 82, laws 1909, an act amending section 14, ch. 50, Comp. St. 1907, by inserting therein a provision making it unlawful to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., the legislature did not amend other laws delegating to municipalities the power to regulate the traffic in intoxicating liquors within the meaning of the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

3. **Criminal Law:** PENALTIES. Section 14, ch. 50, Comp. St. 1909, making it unlawful for a licensed saloon-keeper to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., is not invalidated by reason of a provision therein which authorizes a fine of $100 and a forfeiture of the license upon conviction of the licensee for violating the law.

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

Weaver & Giller, for plaintiff in error.

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

L. D. Holmes, amicus curiæ.

ROSE, J.

The question for determination in this case is the validity of the daylight saloon act. In a prosecution by the

state in the district court for Douglas county, defendant Frank Dinuzzo, a licensed saloon-keeper in the city of Omaha, was convicted of selling and giving away malt and spirituous liquors after 8 o'clock P. M., July 10, 1909, in violation of the act mentioned. For that offense he was sentenced to pay a fine of $100, and he now presents the record of his conviction for review by a petition in error.

Defendant assails the sentence of the trial court on the sole ground that the daylight saloon law under which he was convicted is unconstitutional and void. Before that act was passed the general statutes regulating the sale of intoxicating liquors, namely, chapter 50, Comp. St. 1907, contained the following: "Section 14. Every person who shall sell or give away any malt, spirituous, and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday, shall forfeit and pay for every such offense, the sum of one hundred dollars." This section was amended at the last session of the legislature. The amendment contains the daylight saloon act, and reads as follows: "Every person who shall sell or give away any malt, spirituous or vinous liquors or any intoxicating drinks on the day of any general, special or primary election, or at any time during the first day of the week, commonly called Sunday, or at any time upon any week day, after the hour of eight o'clock P. M. and before the hour of seven o'clock A. M. of the following day shall forfeit and pay for every such offense, the sum of one hundred dollars, and his license shall be forfeited and canceled by the board granting the same, forthwith, whether such person convicted shall appeal therefrom or not." Laws 1909, ch. 82; Comp. St. 1909, ch. 50, sec. 14.

Defendant admitted by demurrer the truth of the charge that he sold and gave away malt and spirituous liquors in violation of the amendment quoted, but insists the amendatory act is void, and for that reason prays for a reversal of the judgment imposing the fine. The validity of the act is challenged on the ground it contravenes the

constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III, sec. 11. The title of the amendatory act is as follows: "An act to amend section 14, chapter 50, Compiled Statutes of the state of Nebraska for the year 1907, and to repeal said original section." Laws 1909, ch. 82. Defendant insists this title confines the new legislation to the subject of the original section, which, according to his conception thereof, is limited to sales of intoxicating liquors on days of election and on Sundays, and that the amendment prohibiting sales after 8 o'clock P. M. on other days is a different subject within the meaning of the constitution. The fallacy of this argument is in the assumption that the subject of the original section is limited to sales on days of election and on Sundays. Section 14 in its original form was part of the general statute regulating "the license and sale of malt, spirituous and vinous liquors." That law was passed in 1881, and with few changes has since been in force. The subject of section 14 must be determined by its relation to the entire statute as well as by the import of its own provisions. Chapter 50, Comp. St. 1907, contains no limitation on the time of giving away intoxicating liquors or of making sales thereof, except that found in section 14, which, as originally enacted, prohibited gifts and sales on days of election and on Sundays. The only purpose of section 14 was to impose that limitation and make it effective. To that extent it qualified and limited other provisions. It contained no legislation on any other subject, and no other restriction of a similar nature can be found anywhere in the statute in which it was inserted. Other sections authorized licenses and sales, but restrictions as to time of sales are found alone in section 14. By confining the limitation therein to days of election and Sundays the lawmakers did not exhaust their power to legislate on the time of closing saloons. The daylight saloon act restricts still further the time of trafficking in

intoxicating liquors and that subject is certainly germane to the original section. Being the only provision limiting the time of making sales, it was natural for the lawmakers to amend it when extending the restrictions. It was evidently selected for amendment because it was the section which placed limitations on the time of operating saloons. Considered in this light the amendment is not surreptitious legislation. Its passage in its present form and its effect on other laws are not evils which the constitutional provision was intended to avert. Defendant's interpretation of the subject of the original section cannot be adopted. Such a doctrine would interfere with legislative amendments to an extent never contemplated by the framers of the constitution or by the people who adopted it.

The daylight saloon law is also attacked on the ground it violates the constitutional provision that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Const., art. III, sec. 11. In pointing out statutes thus amended defendant refers to the following enactment: "The corporate authorities of all cities and villages shall have power to license, regulate and prohibit the selling or giving away of any intoxicating, malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village." Comp. St. 1907, ch. 50, sec. 25. Reference is also made to a number of city charters which confer upon cities power to regulate the traffic in intoxicating liquors without restriction as to the time of making sales. Other provisions are also included in defendant's list of statutes amended by, but not contained in, the daylight saloon law or repealed by it. He argues that the act, though purporting on its face to amend no legislative enactment except section 14, ch. 50, Comp. St. 1907, in fact amends also section 25 of the same chapter, and other statutory provisions, and consequently passes the bounds of the constitutional limitation quoted. In discussing the effect of the amendment on the power delegated to cities and county boards, he said in his argument:

"By this act the power conferred has been partially taken away from the various corporate authorities. It is necessary now to read into section 25 of chapter 50 the amendment known as the daylight saloon bill. It is now necessary to say, so far as section 25 is concerned, that the corporate authorities of all cities and villages shall have power to regulate and prohibit only between the hours of 7 in the morning and 8 in the evening, because by the act in question there is an absolute prohibition of all sales between 8 P. M. and 7 A. M. of every week day. It is also necessary to read into the charter of every city and village in the state that the power to regulate and prohibit is limited to the hours between 7 A. M. and 8 P. M. of every week day. It is also necessary to read this amendment into the power granted county commissioners with reference to the regulation and prohibition of the sale of liquors within their respective jurisdictions."

It is the duty of the court to consider as a whole and harmonize, if possible, all valid legislation on the subject of intoxicating liquors. A construction making all provisions valid should be adopted, if it can be done without violating a limitation fixed by the constitution. For the same reason, a construction which would make an act unconstitutional should be avoided, unless there is a plain violation of the supreme law. When these canons are followed, it is not necessary to hold the daylight saloon act invalid on the ground that it amends other laws without referring to them. The police power to restrict by law the time when intoxicating liquors may be sold is within legislative control. By section 14 of the original act the legislature exercised such power to the extent of prohibiting sales of intoxicating liquors on the days of election and on Sundays, and still retains it unless it has since been delegated to the municipalities by exclusive grants, which can only be found in explicit declarations construed in connection with other legislation on the same subject. Police power is usually retained by the legislature to be exercised for the general welfare, and a contrary purpose

should not be inferred from doubtful language. *Territory v. Webster,* 5 Dak. 351. A text-writer says: "In some of the states the legislative policy has been to confide the regulation or prohibition of the sale of liquor exclusively to the authorities of the municipal corporations. The grant of such power, while undoubtedly valid, is not to be presumed. Nothing short of an explicit declaration of the legislative will in that behalf will suffice to endow the municipalities with entire control over the subject, to the exclusion of all other authorities." Black, Intoxicating Liquors, sec. 226.

The provisions by which the legislature delegated to cities power to regulate or prohibit the liquor traffic do not warrant the conclusion that the grants were exclusive to the extent of preventing the enactment or amendment of a general law limiting the business hours of licensees. The nearest approach is found in the Lincoln charter, which declares: "The excise board shall have the exclusive control of the licensing and regulating the sale of malt, spirituous, vinous, and intoxicating liquors in such city." Comp. St. 1907, ch. 13, art. I, sec. 64. In Lincoln control in such matters had been transferred from the mayor and council to the excise board, and the words "exclusive control" were intended to emphasize the complete jurisdiction of the excise board to the exclusion of the mayor and council. The nature of the delegation of power conferred upon the city of Lincoln by its charter has already been considered by this court. In an able opinion by Judge NORVAL it was said: "While the excise board has the exclusive authority to license the sale of liquors in the city, it is required to exercise its power subject to the limitations and restrictions imposed by general law. * * * We agree with the trial court that the word 'exclusive' was used by the legislature to bar all claim of authority over the subject of granting license by the body from which control had been taken, and that the exclusive control given the excise board over the matter is subject to the restrictions contained in the general law."

Sanders v. State, 34 Neb. 872. The power to license, regulate or prohibit the traffic in intoxicating liquors, as delegated to cities by section 25, ch. 50, Comp. St. 1907, and by other enactments, is subject to the limitations and restrictions imposed by general law. That this was the intention of the legislature appears on the face of the general statute. The municipal power conferred by section 25 is limited by the following proviso in the same section: "In granting license or permits such corporate authorities in cities and villages and the board of fire and police commissioners in such other cities shall comply with and be governed by all the provisions of this act in regard to granting of license and all the provisions and penalties contained in this act shall be applicable to such licenses and permits and the persons to whom they are granted." Comp. St. 1907, ch. 50, sec. 25. Section 64 of the Lincoln charter contains the following limitations on the power of the city authorities: "All the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." Comp. St. 1907, ch. 13, art. I, sec. 64. The charter of cities of the second class and villages contains the following provision on the same subject: "Such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses." Comp. St. 1907, ch. 14, art. I, sec. 69, subd. 9. All other city charters, with the possible exception of that of the city of Omaha, contain provisions of like import. City authorities and licensees, therefore, are not only restricted by general law, but are bound by valid amendments thereof. The opinion is unanimous that the daylight saloon act does not amend any other statute within the meaning of the constitutional limitation invoked by defendant.

It is finally contended that the provision authorizing a fine of $100 and a forfeiture of the license upon conviction of a licensee for violating the law, "whether such person

convicted shall appeal therefrom or not," invalidates the amendment. The objection to the legislation is that it inflicts cruel and unusual punishment, deprives defendant of his license without a jury trial, and denies the right of appeal. This position is clearly untenable. The penalties are both usual and lawful, and the right of appeal is not denied. In an opinion by Chief Justice REESE these conclusions were announced: "There is no *vested* right in a license to sell intoxicating liquors, which the state may not take away at pleasure.

"Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful.

"They are subject to the direction of the government, which may revoke them as it deems fit, and may be abrogated by the adoption of a municipal ordinance prohibiting the sale of liquors." *Martin v. State,* 23 Neb. 371.

No sufficient reason for holding the daylight saloon act invalid has been suggested, and the judgment of the district court upholding it is

AFFIRMED.

EDWARD CURLEE, APPELLEE, V. REEVES & COMPANY, APPELLANT.

FILED NOVEMBER 9, 1909. No. 15,790.

1. **Appeal:** WITNESSES: PROVINCE OF JURY. The jury are the judges of the credibility of the witnesses; and the mere fact that the testimony of a party to a suit on the second trial of a cause is different from that given by him at a former trial is not sufficient to warrant the appellate court in setting aside the verdict.
2. **Evidence** examined and set out in the opinion, *held* sufficient to sustain the verdict of the jury.
3. **Instructions** examined and set out in the opinion, *held* not erroneous.

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

Morlan, Ritchie & Wolff, for appellant.

Perry & Lambe and *Starr & Reeder, contra.*

FAWCETT, J.

This case is before us for the second time. On the first trial in the district court the plaintiff had judgment, which judgment on appeal to this court was reversed on the ground that the evidence was not sufficient to sustain the verdict. *Reeves & Co. v. Curlee,* 76 Neb. 55. In the opinion on the former hearing Mr. Commissioner AMES pointed out the weakness in plaintiff's evidence. On a retrial in the district court plaintiff strengthened his case by furnishing testimony covering the point indicated by the commissioner. This additional testimony was furnished by plaintiff himself and by his brother. Plaintiff again had judgment, and defendant again appeals.

It is now urged by defendant that plaintiff should not be permitted to reap the benefit of this new evidence. Counsel for defendant argue that it would be "playing" with the court to permit a party to try his case and then after suffering defeat, and after the court had indicated the weakness in his case, to permit him on a second trial to "change his testimony" so as to meet the views of the court. On the former trial the evidence was very weak on the one important point in the case, viz., that the plaintiff had solicited or was instrumental in bringing about the trip of Perry Ginther, of Ginther Brothers, to Lincoln for the purchase of the machine, for sale of which plaintiff claims commission. On the last trial plaintiff testified unqualifiedly that he not only suggested, but urged, Mr. Ginther to take the trip to Lincoln to purchase a new machine. In this he is corroborated by his brother. A careful examination of the testimony taken upon the first trial, which is again in evidence, fairly sustains plain-

tiff's contention that the reason such testimony was not given at that time was because he was not specially interrogated in reference thereto. However that may be, the jury were the judges of the credibility of the witnesses and of the weight to be given their testimony. They saw the witnesses upon the stand and heard the testimony given. The trial judge also had that advantage over us. The jury evidently believed the testimony of plaintiff and his brother, and the trial judge, by overruling the motion for a new trial, approved their verdict. Their testimony, as now presented, is ample to sustain the verdict returned, and, under the well-settled rule in this court, we cannot disturb it on appeal.

It was argued at the bar that, even if plaintiff was entitled to a verdict, the verdict was excessive, but no such error was assigned in the motion for a new trial, nor is any such error assigned in the brief of the defendant filed herein, hence that question cannot be considered.

It is argued that the court erred in refusing to give instruction No. 1 requested by the defendant. This was a peremptory instruction to find for defendant, and the court did not err in refusing it. It is also urged that the court erred in giving instructions 2 and 3 given by the court on its own motion. If there had been a verdict for defendant, plaintiff might have predicated error upon instruction No. 2, but there certainly was no error in that instruction of which defendant can complain. Instruction No. 3 reads: "The word 'solicit,' as used in the contract sued upon, means to seek for, to endeavor to obtain. It is therefore incumbent upon the plaintiff to prove, by a preponderance of the evidence, that he sought for and endeavored to obtain as purchasers from the defendant, the said Charles Ginther, John Ginther and Perry Ginther, or some one of them. It is not necessary for the plaintiff to show that the purchasers of the engine made a trip to Lincoln solely upon the solicitation of the plaintiff; but, if you find from the evidence that the sale of said engine was made by the defendant to the Ginther

brothers on account of the former dealings of the defendant with the said Ginther brothers through their Bartley agency, and that the plaintiff aided and assisted in bringing the buyer and seller together, and encouraged or endeavored to induce the purchasers or one of them to make a trip to Lincoln to the place of business of the defendant, then this would constitute a solicitation on the part of plaintiff, and would entitle him to commission on said sale, provided he afterwards complied with the conditions of the contract." Defendant seems impressed with the idea that the court in this instruction told the jury that they might find for the plaintiff if they found from the evidence that the sale of the engine was made by the defendant to the Ginther brothers "on account of the former dealings of the defendant with the said Ginther brothers through their Bartley agency." If this language had been followed with the disjunctive "or," there might have been force in the argument; but, instead of the disjunctive, we find the the conjunction "and" connecting the clause first quoted with the clause immediately following: "and that the plaintiff aided and assisted in bringing the buyer and seller together, and encouraged or endeavored to induce the purchasers or one of them to make a trip to Lincoln," etc. We think this instruction imposed upon plaintiff every burden resting upon him on that branch of the case.

An examination of the record convinces us that the case does not present any ground for relief by this court. The judgment of the district court is therefore

AFFIRMED.

ELMER C. HAMMOND, APPELLANT, V. EVERETT PATTERSON ET AL., APPELLEES.

FILED NOVEMBER 9, 1909. No. 15,671.

1. **Vendor and Purchaser: FRAUD: RATIFICATION.** If a person, induced by fraud to purchase and agree to pay for real estate, subsequently, with full knowledge of the facts, treats it as his own and authorizes his vendor to act as agent for the sale thereof, he thereby ratifies the transaction and will be remitted to his action for damages.

2. ———: **SUIT AGAINST VENDEE: RELIEF.** And in an equitable action by the owner of negotiable promissory notes given by the vendee for the unpaid purchase price of land, it is error to refuse plaintiff any relief if defendant's answer admits that his cash payments on the land do not amount to its value.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

Flansburg & Williams and *Leonard A. Flansburg*, for appellant.

O. A. Williams, contra.

DEAN, J.

The plaintiff, who is appellant here, began this action, as assignee and owner of the instruments sued on, to foreclose two real estate mortgages dated July 2, 1904, by their terms purporting to have been given by Everett Patterson and his wife, Hattie, to secure the payment of their two promissory notes in the principal sum of $1,500. He alleges the notes and mortgages were regularly executed, acknowledged and delivered by Patterson and wife to his assignors, and that they were purchased by plaintiff in good faith, for value, before maturity, and in the usual course of business and without knowledge of defenses. He also alleges failure to pay the first interest instalment, and that by the terms of the instruments sued on the whole debt thereby became due.

The defendants Patterson and wife answered jointly,

pleading failure of consideration and fraud in the procuring of the notes and mortgages, and alleging, in substance, as a defense that plaintiff is not a *bona fide* purchaser; that defendants purchased the tract of land in suit from the Button Land Company, hereinafter called the company, in pursuance of a contract of purchase entered into on January 28, 1904, between the company and Everett Patterson, and for which he agreed to pay $3,680, in payments as follows: $500 cash, $500 on or before March 1, 1904, and a deferred payment of $1,780 to become due in five years, and which was to be secured by a second mortgage on the land; that this deferred payment is represented by three notes dated January 28, 1904, which by their terms became due in five years, one being for $280, one for $500, and one for $1,000, the two last mentioned being the only notes involved in this action. The contract also provides that the purchaser is to assume and pay as a part of the purchase price one-half of a $1,800 mortgage then existing against the premises; that Patterson paid the $500 cash payment required by the terms of the contract to be paid on the date of its execution, and also the $500 that was due March 1, 1904; that when Patterson purchased the land the ground was frozen and covered with snow, and it was impossible to examine the soil, and he was therefore compelled to and did rely on the statements of Button, as agent of the owner, who went to the premises with him for the purpose of exhibiting the tract; that while on the premises Button told Patterson the land was worth more than $3,680; that it was good soil and would raise good crops; that Patterson, in reliance upon the statements of Button, purchased the farm and with his wife signed the written contract; that Button's statements concerning the value of the land were false and untrue, and were made with the sole purpose of deceiving Patterson and to induce him to purchase the land at an exorbitant price; that afterwards the defendants, on discovering the true value of the farm, refused to execute notes and mortgages

for the remainder of the consideration, and none were executed until July 2, 1904, when Button came to the home of defendants, at which time the latter informed him they were dissatisfied with their purchase, and that Button then offered to effect a resale of the place for them, and pretended to fill out and to produce for the signatures of the defendants a contract for the sale of the premises by Button, as agent and broker, and that when the defendants attempted to read the instruments so prepared Button succeeded by trickery in preventing them from doing so, and by falsehood and deceit fraudulently obtained the signatures of both Patterson and his wife to the mortgages in suit, under a pretense and upon representations made to them by Button that the instruments they were signing, and which they allege they afterwards discovered to be the mortgages sued on, were contracts for a resale of the premises by the company; that no signatures were ever witnessed or acknowledged; that plaintiff took part in all the dealings in and about the closing up of the sale of the land to the defendants, and knew at the time the notes and mortgages were taken that defendants had a good defense thereto; that the true value of the land when purchased was $1,900, and not $3,680; that the defendants have been defrauded by the false and fraudulent statements of Button and damaged in the sum of $1,780. The plaintiff's reply denied all the material allegations of new matter in the answer. The defendants had judgment of dismissal and a decree canceling the mortgages, and plaintiff appeals.

The evidence is in sharp conflict. Accepting the testimony of Patterson and his brother-in-law, Sackett, and rejecting that of the witness Button, there is sufficient support for the finding that the contract of January 28, 1904, was secured by false representations made by Button to Patterson concerning the character and quality of the soil on the farm in question. Plaintiff denies making the statements, and argues that, if they were made, they amount to opinions merely, and not statements of fact,

and, if untrue, their falsity was plainly evident when made. It appears, however, that the land at the time was frozen and covered with snow ten inches in depth, and therefore Patterson could not ascertain the quality of the soil.

In June, 1904, Button and the plaintiff appeared at the farm and secured the mortgages sought to be foreclosed in this action. If Mr. and Mrs. Patterson told the truth, the documents were secured by artifice and representations that they only authorized Button to sell the land for defendants for a greater sum than they had agreed to pay therefor. Plaintiff is related by affinity to Button and acknowledged the mortgages as a notary public. He now claims the benefit of the principle announced in *Dobbins v. Oberman,* 17 Neb. 163. It seems to us that the court would have been justified in finding for plaintiff upon this issue, but we cannot say that there is no evidence to uphold its finding that plaintiff is not an innocent purchaser of the notes in suit. Defendants contend that the deed to them for this land has not been delivered; but, if such is the fact, the contract is still in existence and secures the payment of whatever may be justly due the owner and holder of the notes in suit. The defendant Everett Patterson has only paid $1,500 cash for the land. In his answer he admits that the farm is worth $1,900 and it may be more valuable. The evidence upon this point is exceedingly unsatisfactory, so much so that we do not care to make a finding upon the issue. In any event, according to the pleadings, there is $400 of the purchase money unpaid if defendants are allowed to recoup their total claim for damages against the unpaid purchase price. The court therefore ought not to have dismissed the petition without finding the amount still due and making that sum a lien on the premises.

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

REVERSED.

ALPHIA M. SHEVALIER V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1909. No. 15,987.

1. **Perjury**: EVIDENCE: MATERIALITY. To sustain an information charging perjury, the alleged false testimony must be in respect to matter material in the action in which it is given.

2. ———: ———: ———. Where, in a prosecution for perjury, the defendant is shown to have testified falsely, but on matter not material to the issue, such false testimony being in respect to collateral matter is therefore immaterial.

3. ———: ———: ———. In an information for perjury the allegations, in substance, charge that the defendant appeared as a petitioner in a certain judicial proceeding pending in the county court; that she asked the court to set a time for proving an alleged will of one Helen A. Horn, deceased; that she asked that said will be probated; that she was sworn on the hearing of said petition by the judge of said court, and in a matter material to said cause wilfully, corruptly and feloniously deposed and swore that she, the said defendant, in answer to certain interrogatories put to her as to whether she found certain clothing in the house of the said Helen A. Horn, and as to whether she found any furs, a sealskin coat, diamonds or money in said house, answered that she did not. The answers of defendant, which the information charges are false, *held*, in the absence of evidence showing its materiality either directly or on a collateral issue, to be immaterial to the proceedings in which it was alleged the false testimony was given.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Charles O. Whedon and *Minor S. Bacon*, for plaintiff in error.

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

DEAN, J.

Mrs. Alphia M. Shevalier, plaintiff in error, hereinafter called the defendant, was convicted of the crime of perjury and sentenced to serve a term of five years in the

penitentiary. Her counsel designates 93 assignments of error. The information consists of 15 counts, and in respect to the points discussed by the state and the defendant they are all similar in form. Following is the third count, that being the one mainly argued by the respective parties: "And Frank M. Tyrrell, county attorney aforesaid, upon his oath aforesaid, gives the court to understand and be informed that the said Alphia M. Shevalier, late of the city, county and state aforesaid, on or about the 3d day of January, 1908, in the county last named and within the corporate limits of the city of Lincoln, then and there being, in a certain judicial proceeding then and there pending in the county court of Lancaster county, Nebraska, said court having jurisdiction of the probating and proving of wills, wherein Alphia M. Shevalier was petitioner and was asking the court to set a time for proving the alleged will of one Helen A. Horn, deceased, and was asking that said will be proved and probated, the said Alphia M. Shevalier did then and there appear in said cause in said court while the same was open and transacting business, and being then and there duly sworn upon the hearing on said petition by the Honorable P. James Cosgrave, the judge of said court, as required by law, did then and there in a matter material to said cause wilfully, corruptly and feloniously depose and swear certain matters to be true in regard to said petition and judicial proceedings, as follows, to wit: That she, the said Alphia M. Shevalier, in answer to certain interrogatories put to her as to what clothing she found in the house of the said Helen A. Horn, and as to whether she found any furs in said house, answered, 'No,' whereas, in truth and in fact, said Alphia M. Shevalier did find a fur garment, an article of wearing apparel, in said house of the said Helen A. Horn, she, the said Alphia M. Shevalier, then and there well knowing that the said matter then as aforesaid testified to, deposed and declared by her to be true was then and there false, contrary to the form of the statutes in such case made and

provided, and against the peace and dignity of the state of Nebraska."

The statute under which the prosecution is brought is as follows: "If any person having taken a lawful oath, or made lawful affirmation in any judicial proceeding, or in any other matter where, by law, an oath or affirmation is required, shall upon such oath or affirmation wilfully and corruptly depose, affirm, or declare any matter to be fact, knowing the same to be false, or shall in like manner deny any matter to be fact, knowing the same to be true, every person so offending shall be deemed guilty of perjury, and shall be imprisoned in the penitentiary not more than fourteen years nor less than one year." Criminal code, sec. 155. The defendant argues that the facts stated in the information do not constitute an offense punishable by the laws of this state. It is fundamental that, to sustain this charge, the alleged unlawful swearing must be with reference to a matter that is material in the action in which the testimony which is alleged to be false is given. In 3 Coke's Institutes, 164, the offense is thus defined: "Perjury is a crime committed, when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsely in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." *Rex v. Gricpe,* 1 Ld. Raym. (Eng.) 256: "False evidence if immaterial is not perjury." *Hood v. State,* 44 Ala. 81: "Perjury is a corrupt, wilful, false oath taken in a judicial proceeding in regard to any matter or thing material to a point involved in the proceeding." *People v. Collier,* 48 Am. Dec. 699 (1 Mich. *137): "Indictment for perjury must show on its face that the false allegation was material to the matter in question. * * * Innuendo in indictment for perjury is bad when there is nothing previously stated to which it can refer." *State v. Anderson,* 103 Ind. 170: "An indictment for perjury, * * * predicated upon an affidavit for a continuance of a pending cause, must show by a specific

averment or by the statement of the facts that the swearing was touching matters material to the point in question." *State v. Hayward,* 1 Nott & McC. (S. Car.) 546: "Where there has been a conviction for perjury, and the words stated in the indictment do not, from the face of the indictment, appear to be material by averment, or by the context of the indictment, or by their own import, judgment will be arrested." See, also, *State v. Peters,* 57 Vt. 86; *State v. Flagg,* 25 Ind. 243. *Dilcher v. State,* 39 Ohio St. 130: "Perjury may be assigned on falsely swearing to the fact in issue in an action; to any circumstance which tends to prove or disprove such fact; to any circumstance or matter which tends to corroborate or strengthen the testimony upon such issue or which legitimately affects the credit of the witnesses giving such testimony. In an indictment for perjury, it is sufficient to charge generally that the false testimony was in respect to a matter material in the action in which it was given." 30 Cyc. 1435: "It is sufficient to charge generally that the false testimony was in respect to a matter material to the issue, without setting out the facts from which such materiality appears. If, however, the facts are also stated, and it clearly appears that the testimony was not material, a formal allegation of materiality will not save the indictment." The first point of the syllabus in *Gandy v. State,* 23 Neb. 436, is as follows: "In an information for perjury, it is sufficient to charge generally that the false testimony was in respect to a matter material in the action in which it is given." In that case the same objection was urged to the indictment as in this case. The same allegation was made that the testimony was given "in a matter material to said action," and it was said: "It is quite probable that there is sufficient alleged in the complaint to meet the requirements of the authorities cited by plaintiff in error, but without discussing that question, we think it must be held sufficient to charge generally that the false testimony was given in respect to

a matter material in the action in which it was given." See, also, 2 Bishop, Criminal Procedure (3d ed.), sec. 921; 2 Chitty, Criminal Law (5th Am. ed.) *307; *Regina v. Bennett,* 3 C. & K. (Eng.) 124; *State v. Sutton,* 147 Ind. 158; *People v. Brilliant,* 58 Cal. 214; *Kimmel v. People,* 92 Ill. 457; *Roberts v. People,* 99 Ill. 275.

In the present case the information charges the defendant with being a petitioner in the county court and asking that tribunal to set a time for proving the alleged will of one Helen A. Horn, deceased. She is also charged with asking that said will be proved and probated, and it is alleged she appeared in said cause in said court and, on being sworn upon the hearing of said petition by the judge of said court, then and there in a matter material to said cause wilfully, corruptly and feloniously testified that certain matters were true in regard to said petition and judicial proceeding. The information then specifically alleges that the defendant testified that she did not find any clothing or any furs in the house of the said Helen A. Horn, deceased. This testimony of the defendant, as has been shown, the information alleges is false. In other counts she is charged in substantially a like manner with having testified that she did not find a sealskin coat and some diamonds and over $5,000 in the said house, and that she did not have them in her possession. The information also alleges this testimony of the defendant to be false. The main facts that were before the county court had to do merely with the question of setting a time for proving the alleged will of Helen A. Horn, and in asking for its probate. These facts alone, as shown by the information, were the facts immediately in issue. None of the testimony of the defendant, which it is alleged by the information was false, is in any way material to that issue so far as appears from the face of the information, and considered apart from the general averment of materiality. Our court and other jurisdictions as well have defined the nature of the proceedings in which the information alleges the false testimony was given by the de-

fendant. *Pettit v. Black,* 13 Neb. 142, 151: "Probate of a will is defined to be: 'The proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.' 2 Bouvier Law Dict. 378. In other words, probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof, was of sound mind." *McCay v. Clayton,* 119 Pa. St. 133: "The probate of a will is a proceeding to establish its validity." In *In re Spiegelhalter's Will,* 1 Pennewill (Del.) 9, and defining the term "probate," the court say: "In contemplation of law it is solely an inquiry as to the validity of a certan paper writing, whether it is or is not the last will and testament of the decedent; and the judgment or decree in such case is either that it is or is not such will." *In re Lamb's Estate,* 122 Mich. 239: "To probate involves only a determination that the will was duly signed and published, and that the testator was competent to make it. It simply establishes the validity of the will."

The state contends that matters affecting the character or credit of a witness are material, and in its brief argues: "It will be borne in mind that at the hearing upon the probate of the last will and testament of Helen A. Horn, deceased, the defendant swore that she knew nothing of any sealskin coat, diamonds, or money belonging to deceased. It seems that her testimony was false in this respect. It afterwards developed that she had purloined the various articles including the money that she was questioned about and of which she denied all knowledge. It cannot be doubted that it would have affected her credibility if the court had known that before the will had been probated she had surreptitiously taken possession of thousands of dollars' worth of personal property belonging to the estate. Her testimony in

which she denied all knowledge of the sealskin coat, diamonds and money was therefore material." In support of its contention the state cites *Washington v. State,* 22 Tex. App. 26, wherein it is held: "Perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness." But the reasoning in that case we do not believe applies to the present case because the witness whose credit is there referred to testified on a material matter, and the court merely held that, where false statements were adduced for the purpose of affecting the credibility of the state's witnesses and were calculated to have the effect of impeaching, or at least casting suspicion upon, such testimony, such false swearing will sustain the charge of perjury. In that case the testimony upon which the charge of perjury was based was not itself directed to matter that was material to the main issue, but was collateral only in the sense that it was directed to, and introduced for the purpose of, discrediting a witness who testified to material facts. The rule there announced cannot be said to apply to the facts in the present case because the evidence adduced at the trial fails to show that the alleged false testimony given by the defendant, and on which the charge of perjury is based, was material to the issues which the information alleges were involved in the proceedings in the county court. The state also cites *Dilcher v. State, supra,* wherein it is held that perjury may be assigned on falsely swearing to any matter which tends to corroborate or strengthen the testimony upon the main issue or which legitimately affects the credit of the witnesses giving such testimony. *State v. Strat,* 1 Murphey (N. Car.) 124, is also cited. It holds: "Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned to his answer." *People v. Courtney,* 94 N. Y. 490, holds in effect that, in order to assign perjury upon false

testimony that goes to the credit of a witness, the assignment must be with respect to a witness who has given material testimony on the trial. To substantially the same effect are all the citations of the state on this point. We concede the correctness of the rule as announced in the state's citations as applying to the facts therein discussed, but we do not believe the rule is applicable to the facts in the case at bar. The authorities clearly distinguish between the false testimony of a witness who testifies with respect to material matter and one who testifies falsely concerning matter that is not material. We therefore conclude from the record before us that the false testimony ascribed to the defendant was not material to the questions involved in the proceedings in the county court so far as the testimony shows. It is probable that the state may be able to show by the circumstances and by the connection and relation which this testimony bore to other testimony at the hearing upon the probate of the will that it became and was material in that proceeding, but, as the record now stands, there is no evidence to show that the testimony was material on such issue, and it therefore fails to support the general allegation of materiality in the information.

The defendant also points out and argues at length that "it must appear from the information that the alleged oath was administered by one having legal authority; otherwise there is no perjury if false testimony be given under it." This is no doubt true. If the indictment or information fails to show upon its face that the oath was administered by one having legal authority, it does not state an offense and would be subject to demurrer. 1 Russell, Crimes, p. 297. Under the statute of 23 George II, c. 11, which statute section 422 of our criminal code follows in substance, it was necessary to aver that the court or authority had full power to administer the oath. By a later act this averment was made unnecessary. Speaking of the earlier statute, in *Queen v. Dunning,* 1 L. R. C. C. *290, it was said by the court for crown cases reserved:

"After that statute the question treated by the courts in every case was whether the indictment contained the averments mentioned in the statute or their equivalents. If it did, it was good without more." It would probably be better in all cases to follow the language of the code and aver specifically that the court or authority had full power to administer the oath, but on principle it would seem sufficient to allege the essential elements of the offense showing that the oath was taken in a judicial proceeding in a court of competent jurisdiction, and that after being sworn the witness wilfully gave false testimony in a matter which became and was material to the issues upon trial. It may be said, also, that the crime charged is that described in section 155 of the criminal code, and the information follows very closely the language of the statute. This is usually sufficient. Moreover, the information sets forth the court in which the oath was administered, the matter at issue on the hearing, the testimony which is said to be false, and the time and place where the criminal act is said to have been performed. Section 412 of the criminal code provides: "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected: * * * *Third* * * * nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged, * * * nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." While we are of opinion that the information might better have been drawn with more particularity of averment, we think it is sufficient to charge an offense under the statute. But we are also of opinion that, there being no evidence produced to show that the alleged false testimony was material upon the issue as to whether or not the will produced was the last will and testament of Helen A. Horn, deceased, or to show that defendant had given any material testimony in the case as to which her credibility

might be assailed, the evidence does not sustain the verdict.

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

REVERSED.

REESE, C. J., having been of counsel below, did not sit, and took no part in this decision.

STATE OF NEBRASKA, EX REL. WILLIAM T. THOMPSON, RELATOR, V. THOMAS J. MAJORS ET AL., RESPONDENTS.

FILED NOVEMBER 15, 1909. No. 16,167.

1. Statutes: AMENDMENTS: TITLES OF ACTS. The title to chapter 78, laws 1881, establishing a system of public instruction for the state of Nebraska, is broad enough to cover any and all necessary provisions relating to that subject, and whatever might have been originally made a part of that law may, at any time, be ingrafted upon it by legislation professing to be amendatory if germane to the section or sections amended.

2. ———: ———. The provisions of the amendatory act of 1909 (laws 1909, ch. 125), relating to the qualifications and the manner of appointing the members of the normal board of education, are germane to the subject of section 1, subd. XIII, as contained in the act of 1881 (laws 1881, ch. 78), establishing a system of public instruction, and are properly made a part thereof by amendment.

3. ———: ———. House roll No. 286, laws 1909, ch. 125, violates the provisions of section 11, art. III of the constitution, in that it amends and by implication repeals section 22, subd. XIII, ch. 79, Comp. St. 1907, and does not contain the section as amended, or purport to repeal the same.

4. ———: ———. Two separate and distinct acts adopted at different sessions of the legislature cannot be amended by an act which purports to amend only one of them.

ORIGINAL action in *quo warranto* to determine the rights of respondents to office as members of the board of education of state normal schools. *Writ allowed.*

William T. Thompson, Attorney General, and *E. C. Calkins,* for relator.

W. D. Oldham and *Clark & Allen, contra.*

BARNES, J.

This is an action in *quo warranto,* commenced in this court, attacking the validity of house roll No. 286, passed by the legislative assembly of 1909, approved by the governor on the 1st day of April of that year, and to oust the respondents from exercising the powers, rights, duties and franchises of members of the board of education of the state normal schools. The information sets forth the law as it existed before the passage of the amendments contained in the act above described, the statutes as amended thereby, the passage and approval of the amendatory act, the appointment of the respondents by the governor thereunder, and their confirmation by the senate, and challenges the constitutionality of the amendatory act for the alleged reason that it was passed in violation of section 11, art. III of the constitution of this state. It also sets forth the ineligibility of the respondent Majors to become a member of the board, because at the time of his appointment he was a member of the legislature which passed the amendatory act in question, and concludes with the usual prayer of ouster against all of the respondents. A demurrer was filed to the information on two grounds: First, that the facts stated therein are not sufficient to constitute a cause of action; and, second, that two causes of action are improperly joined. The cause has been submitted on the demurrer, and, it being the desire of the relator to test the validity of the amendatory act, that question will be first considered.

It appears that in 1881 the legislature passed an act (laws 1881, ch. 78) entitled "An act to establish a system of public instruction." This entire act was by the compiler carried into the successive Compiled Statutes as

chapter 79. In 1903 there was passed an act to establish junior normal schools, and provide for the maintenance of the same. Laws 1903, ch. 91. In preparing the Compiled Statutes of 1907, section 3 of the last mentioned act was inserted therein by the compiler and designated as section 22, subd. XIII, ch. 79 of that publication. Section 1, subd. XIII of the act first mentioned, before the adoption of the amendments in question, read as follows: "The state normal school shall be under the direction of a board of education, consisting of seven members, five of whom shall be appointed by the governor for a term of five years each, and the state treasurer and the state superintendent of public instruction shall by virtue of their office be members of said board: *Provided,* that the present appointed members of the board shall continue to hold their several offices till the limit of the time for which they were appointed. All vacancies occurring in the board shall be filled by appointment by the governor." Section 22 of the subdivision of the chapter above mentioned, as found in the Compiled Statutes of 1907, reads as follows: "The organization and management of said junior normal schools shall be under the jurisdiction of the state superintendent of public instruction, and he shall select the principals and instructors for said schools, and shall make and complete all other arrangements for the successful operation of said schools." By the amendment to section 1 there was created a board to be known as the "Normal Board of Education," which, it is declared, shall have control and direction of the normal education of the state, including normal schools and junior normal schools, which board shall succeed to, and take the place of, and exercise the powers of the former board of education. It is further provided that the normal board of education shall be composed of seven members, five of whom shall be appointed by the governor, by and with the advice and consent of the senate, and that the state treasurer and state superintendent of public instruction shall by virtue of their office be members of said board. The

amendatory act also provides for the details of such appointments, and the time of the expiration of the term of office of each of the appointees, together with their qualifications, which are as follows: "The persons to be appointed as members of such board shall be such as are known to be men of standing, education and integrity. They shall be so selected that the board shall not be composed wholly of persons who are members of or affiliated with the same political party or organization. No person appointed as a member of such board by the governor shall hold any office under the government of the United States or any other state. No member of said board shall serve on or under any committee of any political party." Section 22, as amended, reads as follows: "The organization and management of said junior normal schools shall be under the jurisdiction and direction of the Normal Board of Education and said board shall select the principals and instructors for such schools and shall make and complete all other arrangements for the successful operation of said school." The title to the amendatory act reads as follows: "An act to amend sections 1 and 22 of subdivision 13, chapter 79 of the Compiled Statutes of Nebraska for 1907, and to repeal the said original sections as they now exist, and to provide for an emergency."

The relator's first contention is that the title to the bill is insufficient; that it violates the provisions of section 11, art. III of the constitution, which reads as follows: "Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." It is argued that, where the title to the bill is to amend a particular section of an existing law, no amendment is permissible which is not germane to the subject matter of

the original section. In *Richards v. State,* 65 Neb. 808, it was said: "Whatever might have been originally made a part of a law may at any time be ingrafted upon it by legislation professing to be amendatory." It will be observed that the title to the original act is a comprehensive one, and is broad enough to include any provisions relating to the subject matter of education. It will scarcely be contended that this title was so restricted that the legislature could not have created a normal board of education thereunder, defined the qualifications of its members, and, if thought advisable, cover the whole ground of legislation relating to the general subject of education. Therefore, under the rule above quoted, it seems clear that the legislature could by amendment to section 1 change the name of the board, provide for the manner of its appointment, and define the qualifications of its members. Again, the word "germane" means pertinent to, or related to, and it seems self-evident that in an act to create a board of officers there could properly be included provisions touching their qualifications. If these are not related subjects, then we fail to comprehend the meaning of that term. If provisions descriptive of persons eligible for appointment to an office are not germane to an act creating such office, then, as was said by counsel on the argument, "an adjective is not related to a noun." We are therefore of opinion that this contention cannot be sustained.

It is further insisted that the amendatory act contains two subjects; that it changes the name of the board, and places the junior normals under its control. It appears that the original act of 1881, in which no mention is made of junior normal schools, was supplemented by the act of 1903, which provides for schools of that kind, and makes them a part of our system of public instruction; and it would therefore seem to be not only competent, but entirely proper, for the legislature to place them under the supervision of the normal board of education by an amendment to the proper section of that act, for the junior

normal course of instruction, as defined by the statute, is one of the regular normal courses, to wit, the elementary course, and is therefore related to the general subject of normal education.

The relator also insists that the act in question, in effect, amends 16 other sections of subdivision XIII, ch. 79, as found in the Compiled Statutes of 1907; that the sections so amended are not included therein, and said sections are not repealed, and it is therefore violative of the clause of the section of the constitution above quoted. In *Farrell v. State,* 54 N. J. Law, 421, it is said: "The effect of an amendment of a section of the law is not to sever it from its relation to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as a harmonious entirety, with its several sections and parts mutually acting upon each other." Now, it is apparent that sections 2 to 16 do not require, nor have they suffered, any change by the amendments. Now, as before the amendment, they refer to the board created by section 1. As the act amends the section which created an educational board, and places the normal schools under its control, it must be presumed that the legislature merely intended to amend the name of the existing board. The original section did not purport to give the existing board a specific name. It is merely referred to as the board of education. It would have been proper, as above stated, to give it the name of normal board of education in the original section, and the rule laid down in *Richards v. State, supra,* would allow the legislature to give it this name by the amendment. Had the original section conferred upon the board the name of "Normal Board of Education," no change in the language of sections 2 to 16, inclusive, would have been required. Those sections do not purport to create the board or give it a name. They merely enumerated the powers possessed by the board as created by the first section. Any language indicating that the board upon which the powers were conferred is the board mentioned in the

first section would be sufficient. It seems to us neither necessary nor desirable to substitute the name "Normal Board of Education" for the words "said board" where they occur in the above named sections. If the language with reasonable certainty indicates what board is referred to, and we think it does, nothing more is required. We think this sufficiently disposes of the relator's contention so far as sections 2 to 16 are concerned.

It appears, however, that prior to 1909 it was the policy of the legislature to commit to the state superintendent of public instruction the location and complete management of the junior normal schools. To that end section 21 of the statute as it stood before the passage of the act in question located schools at Alliance, McCook and Valentine, respectively, and the state superintendent of public instruction was specifically authorized to locate not to exceed five, nor less than two, additional schools at such places in the state as might seem proper to him. That section, preceding the amendment of 1909, also provided: "At each place where a junior normal school is established the public school buildings, text-books and apparatus of the public school district shall be placed at the service of the state, without cost, under the jurisdiction of the state superintendent of public instruction. In each county where a junior normal is established not less than three-fourths of the entire institute fund shall be used by the state superintendent of public instruction toward defraying the expenses of such junior normal schools." Section 22 provided: "The organization and management of said junior normal schools shall be under the jurisdiction of the state superintendent of public instruction, and he shall select the principals and the instructors for said schools, and shall make and complete all other arrangements for the successful operation of said schools." The legislation as originally enacted was harmonious and placed the state superintendent in complete control of every detail of the operation of junior normal schools. Now, the amendatory act of 1909 does

not refer to section 21, *supra,* but amends section 22 by substituting the board created by the first section thereof for the superintendent of public instruction. If the act is valid, the state superintendent has sole authority to locate from two to five of the junior normal schools, also to control all of the buildings, and the manner and kind of books and apparatus to be used by the teachers and scholars. The superintendent is also commanded to expend part of the county institute fund in defraying the expense connected with the junior normal schools, while section 22, as amended, purports to place the management of those schools under control of the new board. That there is a conflict in authority between the superintendent and the board is apparent from an inspection of the statute as now amended; that the last act of the legislature will amend section 21, *supra,* by implication, if it is given the legitimate scope which its language suggests, is also apparent. It therefore seems to us that the legislation in question violates that part of section 11, art. III of the constitution, which reads as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." *Smails v. White,* 4 Neb. 353; *City of Tecumseh v. Phillips,* 5 Neb. 305; *Sovereign v. State,* 7 Neb. 409; *State v. Board of County Commissioners,* 10 Neb. 476; *State v. Board of County Commissioners,* 17 Neb. 85; *State v. Corner,* 22 Neb. 265; *Sheasley v. Keens,* 48 Neb. 57.

It may be said that the new board and the superintendent can act in harmony under the law. But, if they do not, who will prevail? The law gives the superintendent possession and custody of all things other than money necessary for the operation of the junior normal schools, and he is responsible to the respective school districts for the buildings, books and apparatus. To properly discharge his duties he may make all reasonable rules for the use by the students and teachers of such property. If his

rules do not comport with the views of the normal board and the teachers it has employed, whose will shall control? The law certainly does not contemplate, and should not tolerate, any such division of authority. It is apparent, however, that the intention of the legislature was to take from the state superintendent all authority over those schools. To make the legislation effective it must be held to amend by implication section 21, *supra*. The act being amendatory, it seems to us that it is void unless we are prepared to say that the provisions relating to junior normal schools may be separated from the rest of the amendatory act and the remainder held good. That is to say, that the amendment to section 1, ch. 79, may be separated from the amendment to section 22, subd. XIII thereof, and that the last named amendment was not an inducement to the passage of the act. This we are unable to do. It is with the utmost reluctance that we are compelled to hold that the amendatory act in question is void; but we can see no way to avoid such a holding unless we are prepared to overrule all of our decisions last above cited, together with many others upon the same subject. This we decline to do.

Again, in another material respect the act violates the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11. The state normal school at Peru and the state normal school at Kearney were created and are governed by two separate and independent acts passed at different sessions of the legislature. By means of the act in question the legislature has attempted to amend both of these independent acts by the amendment of one of them alone. In other words, by a single bill purporting to amend only one section of the act creating and governing the state normal school at Peru, the legislature has attempted to amend the other independent act creating and governing the state normal school at Kearney. The statute demonstrates this prop-

osition. In 1901, as shown by section 1, subd. XIII, ch. 79 of the Compiled Statutes of that year, the state normal school at Peru was governed by the following provisions of an independent act (laws 1881, ch. 78, subd. XIII): "The state normal school shall be under the direction of a board of education consisting of seven members, five of whom shall be appointed by the governor for a term of five years each, and the state treasurer and the state superintendent of public instruction shall by virtue of their office be members of said board: *Provided,* that the present appointed members of the board shall continue to hold their several offices till the limit of the time for which they were appointed. All vacancies occurring in the board shall be filled by appointment by the governor." Comp. St. 1901, ch. 79, subd. XIII, sec. 1. The state normal school at Kearney is not governed and was not created by an amendment of the foregoing section, but by an independent act entitled "An act to locate and establish one (1) additional state normal school and to provide for the erection of buildings, payment, maintenance and receiving donations for the same." Laws 1903, ch. 90. Under the foregoing title the independent act of 1903 was passed, which contains the following provisions: "That the said school herein before provided for shall be in all respects under the direction and control of the board of education of the present state normal school, as provided by section one, subdivision thirteen, chapter seventy-nine of the Compiled Statutes of Nebraska for 1901, and that said school shall be for the same purpose and governed in all respects by the provisions of the statutes now in force regulating and governing the present state normal school at Peru, Nemaha county, Nebraska." Comp. St. 1903, ch. 79, subd. XIII, sec. 19. The effect of this enactment by reference therein to section 1, subd. XIII, ch. 79, Comp. St. 1901, was to insert bodily in the Kearney normal school act the following provisions for the control and government of that school: "The state normal school shall be under the direction of a board of education, con-

sisting of seven members, five of whom shall be appointed by the governor for a term of five years each, and the state treasurer and the state superintendent of public instruction shall by virtue of their office be members of said board: *Provided,* that the present appointed members of the board shall continue to hold their several offices till the limit of the time for which they were appointed. All vacancies occurring in the board shall be filled by appointment by the governor." Comp. St. 1901, ch. 79, subd. XIII, sec. 1.

It thus appears that the Peru and Kearney normal schools are governed by independent acts, each containing the foregoing provision, and neither is dependent on the other. The legislature in passing the Kearney normal school act inserted bodily therein by reference the provisions governing the normal school at Peru. In other words, the foregoing section is the statute governing the Peru normal, and by reference or construction is also the independent, governing statute of the Kearney normal. The two statutes are separate and apply to different institutions, and the repeal or amendment of one does not repeal or amend the other. The law establishing this proposition is universal. This court in *Shull v. Barton,* 58 Neb. 741, approved the following language from Endlich, Interpretation of Statutes, sec. 492: "Where the provisions of a statute are incorporated, by reference, in another; where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute obviously continue in force, so far as they form part of the second enactment." When the legislature convened in 1909, therefore, the Kearney normal school, by an independent statute governing that institution, was controlled by a

board consisting of seven members, five of whom were appointed for a term of five years under the statutes as they existed in 1901. It follows that it was not within the power of the legislature by an act for the sole purpose of repealing or amending that part of the Peru normal act which created the governing board to repeal or amend also the same provision in the independent act creating and governing the state normal school at Kearney. The repeal of part of the Peru normal school act did not repeal the same provision in the Kearney normal school act. The rule of this court is: "Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned." *Shull v. Barton*, 58 Neb. 741.

The legislature of 1909 repealing the governing section of the Peru normal did not therefore repeal the independent, governing section of the Kearney normal. It is just as certain that the attempt to amend the Kearney normal school act by an amendment of the Peru normal school act was equally futile. The rule applicable has been stated as follows: "An act which declares that the provisions of a special act shall apply to another city than that for which it was passed has not the effect of making subsequent amendments to the original act applicable to the second city. * * * *Knapp v. City of Brooklyn*, 97 N. Y. 520." Black, Interpretation of Laws, ch. 13, sec. 132. For example, if the amendatory act of 1909 be sustained, it will be possible for the legislature in passing a charter for the city of Lincoln to insert therein by reference the governing provisions of the Omaha charter and by a subsequent amendment of the last named charter change the form of government of the city of Lincoln and abolish its offices, without making any reference whatever to the Lincoln charter. Such amendments are surreptitious legislation, which the constitution condemns, and they cannot be sanctioned. The act in question is a plain, direct and unmistakable violation of the constitu-

tion. The necessity of upholding acts of the legislature is never so urgent as to require the courts to destroy the constitution which is the permanent foundation on which the government rests. It may be suggested that the sanctity of legislative acts requires us to eliminate that part of the amendatory statute which is clearly in conflict with section 21 above mentioned, and uphold the remainder of it. We freely concede that this may be done in certain cases. But in the present case we cannot pursue such a course, because the point last above mentioned is a complete bar to the adoption of that rule. The amendatory act contains an attempt to amend and repeal the governing statute of the Kearney normal school by amendment of an independent statute relating to the state normal school at Peru, and for that reason contravenes the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

It was suggested in consultation that the point last above mentioned was not presented on the argument or in the brief of the relator, and therefore should not be considered. The answer to the suggestion is that this is an action on behalf of the state brought by the attorney general to test and determine the question of the validity of the statute in order to further the educational interests of the state, and, if for any reason we are convinced that the statute is unconstitutional, we ought to so determine; for, if the courts can, under such a pretext, nullify the constitution, we will soon find ourselves openly defying the provisions of the fundamental law which we have solemnly sworn to uphold.

For the foregoing reasons, we are constrained to hold that the amendatory act in question is void; the demurrer of the respondents is therefore overruled, and the writ of *quo warranto* prayed for by the relator will issue.

JUDGMENT ACCORDINGLY.

ROSE, J., concurring.

To my mind Judge BARNES demonstrates that the legislature could not change the provisions of the act governing the state normal school at Kearney by a bill limited to the sole purpose of amending the act governing the state normal school at Peru, without violating the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11. That the legislature of 1909 attempted to change the management of the state normal school at Kearney in the manner stated is in my judgment shown in unmistakable terms on the face of the amendatory act itself. By amendment of a single section of the Peru normal school act there is an attempt to wrest from the present board of education and transfer to a newly created "Normal Board of Education" the entire control and management of the Kearney normal school. The act purporting to amend only the Peru normal school act declares: "There is hereby created a board to be known as 'The Normal Board of Education,' which board *shall have control and direction of the normal education of the state, including normal schools* and junior normals, and which board *shall succeed to and take the place of and exercise the powers of the present 'Board of Education.'*" Comp. St. 1909, ch. 79, subd. XIII, sec. 1. It was therefore the intention of the lawmakers, as declared by their language, to change the management of the Kearney normal school by an amendment of the Peru normal school act. The members of the normal board of education appointed under that amendment of the Peru normal school act understand by it that they have authority under it to take charge of the school at Kearney, and are attempting to do so. One of the purposes of this suit is to prevent them from managing and controlling that school. The opinion prepared by Judge BARNES shows conclusively that the amendatory act is void in so

far as it attempts to confer on defendants the power to manage the Kearney normal school, and I concur in his conclusion that the entire amendatory act is condemned by the constitution. The language which confers on the new board the power to control the school at Kearney is the identical language giving it control of the Peru normal school. How can the language be separated? When the unlawful provision is smitten by the constitution, nothing remains. The words employed to amend the Peru normal school act are the words which contain the unlawful amendment of the Kearney normal school act. How is it possible to strike out the words forbidden by the supreme law and leave any expression of legislative will? When the void part is eliminated, nothing remains. The intention to amend the Peru normal school act is found in the language which discloses the intention to amend the Kearney normal school act. With the void provision eliminated, where is the expression of an intention on the part of the legislature to amend the Peru normal school act? It has no existence. These questions are all answered by the following language of Chief Justice HOLCOMB: "Where a part of an act is unconstitutional, because contravening some provision of the fundamental law, the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever." *State v. Insurance Co.*, 71 Neb. 335.

I am unable to discover in the amendment any valid provision, and I agree that the writ should issue.

REESE, C. J., concurring in part, and dissenting in part.

In most respects I agree with the holdings in the opinion of the majority of the court. While I think the act of 1909 is defective, and in some respects vicious and reprehensible legislation, I am not fully convinced that the legislature has gone beyond its power under the constitution. I agree that under the authorities cited in *Shull v. Barton*, 58 Neb. 741, and in *Sika v. Chicago &*

N. W. R. Co., 21 Wis. 370, "a statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of such other statute," and which affirms *Crosby v. Smith*, 19 Wis. *449. In 1 Sutherland, Statutory Construction (Lewis, 2d ed.), sec. 257, it is said: "A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the original statute adopted, but the provisions adopted continue in force so far as the new statute is concerned"—citing a number of cases. In *Phœnix Assurance Co. v. Fire Department*, 117 Ala. 631, the court, in referring to the class of statutes to which the act of 1903 creating the Kearney normal school belongs, say: "It belongs to a distinctive class of statutes, known or termed as reference statutes, not of infrequent enactment, constitutional limitation not forbidding. Statutes which refer to, and by reference adopted wholly, or partially, preexisting statutes. In the construction of such statutes, the statute referred to, is treated and considered, as if it were incorporated into, and formed part of that which makes the reference. (Citing cases and authorities.) The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one, does not operate upon or affect the other." In *Queen v. Stock*, 3 Nev. & P. (Eng.) 420, decided in 1838, in the course of argument, counsel propounded the question whether the repeal of an earlier act which had been referred to and adopted in a later one did not also repeal the later referring and adopting act. Lord Denman, C. J., responded: "That point clearly cannot be maintained." The same rule is stated and adopted with the citation of a number of cases in *Wick v. Ft. Plain & R. S. R. Co.*, 27 App. Div. (N. Y.) 577; *Schwenke v. Union Depot & R. Co.*, 7 Colo. 512, and in *People v. Webster*, 28 N. Y. Supp. 646. In *State v. Leich*, 166 Ind. 680, it is said: "When a statute adopts a part or all of another statute by a specific and descriptive reference thereto, such adoption

takes the statute as it exists at the time of the adoption and does not include subsequent additions or modifications of the statute unless it does so by express intent." This decision is annotated in 9 Am. & Eng. Ann. Cas. 302. In the note it is said: "It is a generally accepted rule of statutory construction that when a statute adopts a part or all of another statute by a specific and descriptive reference thereto by its title or otherwise, such adoption takes the statute as it exists at the time of the adoption and does not include subsequent additions to or modifications of the statute so adopted, unless it does so by express or necessarily implied intent"—citing cases from England, United States supreme court, Arizona, California, Colorado, Illinois, Kentucky, Maine, Michigan, Missouri, Nebraska, New York, Pennsylvania, South Carolina, Texas, Vermont, Washington and Wisconsin. And in the same note it is said: "The two statutes exist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one does not operate upon or affect the other"—citing cases.

This rule being the established and well-recognized law of this country and of this state, it remains for us to inquire as to its applicability to the acts of the legislature under consideration. The act creating the state normal school at Peru was passed in 1867, and took effect June 20 of that year. The title of the act was "An act to locate, establish, and endow a state normal school." The first section provides: "That a state normal school be established at Peru, in Nemaha county, Nebraska, the exclusive purpose of which shall be the instruction of persons, both male and female, in the arts of teaching," etc. Further provisions of this section need not be here noticed. Section 2 is as follows: "The said normal school shall be under the direction of a board of education, and shall be governed and supported as hereinafter provided." The third section provides for appointment of the board of education, and, together with subsequent sections, the

duties of the members thereof. In 1881 the law was amended, and section 1 of subdivision XIII, was enacted and remained unchanged until the passage of the act of 1909, now under consideration. It will be observed that all enactments hereinbefore cited referred to the normal school at Peru. There were no others in existence, and all references in the act were to it and it alone. In 1903 the legislature, by the act which took effect July 9 of that year, established and provided for the location of an additional state normal school. The title of the act is "An act to locate and establish one (1) additional state normal school and to provide for the erection of buildings, payment, maintenance and receiving donations for the same." Without referring to the body of the act in detail, it is sufficient to say that the act is not amendatory of any other law in any respect and contains no reference to the law establishing and governing the normal school at Peru, except in the particular hereafter named, but is an independent act depending on no other for its existence and enforcement. The fourth section is as follows: "(Management.) That the said school hereinbefore provided for shall be in all respects under the direction and control of the board of education of the present state normal school, as provided by section one, subdivision thirteen, chapter seventy-nine of the Compiled Statutes of Nebraska for 1901, and that said school shall be for the same purpose and governed in all respects by the provisions of the statutes now in force regulating and governing the present state normal school at Peru, Nemaha county, Nebraska." Laws 1903, ch. 90. I call attention to the peculiar wording of the section. That school "shall be in *all respects* under the direction and control of the board of education of the *present state normal school, as provided by section one,* subdivision thirteen, chapter seventy-nine of the Compiled Statutes of Nebraska for 1901, and that said school shall be for the same purpose and governed in all respects by the provisions of the statutes *now* in force regulating and gov-

erning the present state normal school at Peru, Nemaha county, Nebraska." There is no provision in the act which by any stretch of reasoning can be construed as rendering the act liable to any change by amendment or repeal of the prior law. The "additional" normal school is to be governed by the law as it *then* existed with reference to the Peru school. In other words, section 1 of the earlier act was ingrafted in and made a part of the new law to the same extent as if it had been copied therein. Now, by the numerous holdings above cited, the amendment, change, or modification of section 1 for the government of the Peru school could have no possible effect upon the act of 1903, which created and established the Kearney school. It is as clear as the noonday sun that the act of 1903 remains unchanged, and is in existence and in force as it would have been had the act of 1909 not been passed. The inevitable result is that the Peru school is governed by the law of 1909, if valid, and the Kearney school by that of 1903, a most anomalous condition, but for which the lawmaking power is alone responsible. It may be argued that, by the growth of the state and the laws passed by the different sessions of the legislature, the normal schools of the state have grown into a system or chain of such schools, and that all were governed by the amended section at the time of the enactment of the act of 1909, but such is clearly not the case. As held in the opinion of the majority of the court, each of the two schools have their existence under and depend upon entirely separate and distinct laws. There is no normal school system in, on, or about it, so far as the statutes are concerned.

The question now arises: Is any part of the act of 1909 valid? It must be conceded that the matter of the existence, government and control of the normal schools is in the first instance with the lawmaking power, the legislature, subject only to the provisions of the constitution. As the Peru normal is a creature of the legislature by the one act establishing it, that act may be amended,

modified or repealed, according to the will of that body. I think the act is effective in so far as it relates to that school, but not to the school at Kearney. There seems to have been no effort made to reach that institution or in any way to molest it, and therefore it will be managed, controlled and governed as heretofore. This state of things, if true, is to be deplored, but we must accept the law and the constitution as we find them.

In this discussion I have not deemed it necessary to refer to any acts of the legislature passed subsequent to the act under consideration, for the reason that none of them could have any effect or bearing upon the question involved in this case.

DEAN, J., dissenting separately.

I dissent from the majority opinion. The importance of the subject under consideration and the high esteem in which my associates are held impel me to submit at some length the reasons for this dissent. On some features of the present case the views set forth in the dissenting opinion in *State v. Junkin, ante,* p. 1, with the authorities there cited, so far as applicable to the present case, are here reaffirmed. The majority opinion holds that the amendatory act in question violates that part of section 11, art. III of the constitution, which reads: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." This language seems to embrace two closely related subjects, the first relating to the contents of a bill and its title as related thereto, the second relating to the amendment of an existing law. What is the purpose of the constitutional provision relating to an amendment of an existing law? What is the reason for the rule? Clearly its purpose is that an amendment to an existing statute may not be given the form and the force of law

which contains a meaning that is not distinctly revealed by the language used. It is to prevent surreptitious legislation that might result either from striking out or adding a word here or a paragraph there without setting forth the section in full as amended. It is to prevent surprise to the legislator and to prevent the public from being deceived as to proposed legislation. The rule is salutary and these are some of the reasons for its adoption. No complaint has been made of any deception in the respects noted and none appear upon the face of the amendatory act nor from the record before us. It is true the act does not refer by section number to one of the sections sought to be amended, but its language so clearly refers to the subject of that section that no one can be misled as to the legislative intent. The purpose, the intent and the spirit of the fundamental law are fulfilled when the subject of the section sought to be repealed is fairly and clearly identified and referred to by the language of the amendatory act, even though the section number may be omitted. The constitution is not to be construed so as to destroy legislation that is not clearly inhibited by its language. A grave peril lies in the direction of a judicial annulment of the legislative will that is not clearly and beyond question warranted by a reasonable interpretation of that instrument. It has been well said by a great advocate: "The letter killeth but the spirit giveth life."

The normal schools and the normal training schools of the state in their origin and development and in practical operation and in contemplation of the law governing them comprise a complete and harmonious normal school system. In this sense they have heretofore been treated by the legislature and in this sense they are contemplated by the amendatory act in question. In pursuance of this policy the act authorizing the creation of the Kearney normal school in 1903 appears in the Compiled Statutes as sections 17, 18, 19, subd. XIII, ch. 79, in the compilations of 1903, 1905, 1907 and 1909. The act creating the

Wayne normal school in 1909 follows the Kearney normal school act as section 19*a*.

Black, Interpretation of Laws, sec. 86, says: "In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaptation of the original design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject, and to have shaped its new enactment with reference thereto." See, also, Cooley, Constitutional Limitations (7th ed.), p. 241, and note 1; *People v. Mahaney,* 13 Mich. 481; *Mok v. Detroit Building & Savings Ass'n,* 30 Mich. 511; *Bush v. City of Indianapolis,* 120 Ind. 476; *Fenton v. Yule,* 27 Neb. 758; *People v. Judge,* 39 Mich. 195.

Referring to the provisions relating to junior normal schools, the majority opinion holds, in substance, that the act as amended is not only repugnant to the constitution but that it may lead to a conflict of authority between the newly created board and the state superintendent, and, while this is not assigned as a reason for holding the act invalid, the inference is that it probably has some bearing upon and is perhaps in part one of the reasons that lead to the conclusion reached in the opinion. A conflict of authority that exists only in anticipation should not be thrown into the balance to weigh against the validity of a legislative act. Until the conflict impends or until it appears full fledged, clothed with destructive force, it is not ordinarily a proper subject for judicial inquiry.

The normal school system is a creature of the legislature and that branch of government alone is charged with the responsibility of enacting legislation for its government. The judiciary is not called upon to share this responsibility. Entertaining the views herein announced, it is my judgment the writ prayed for by the relator

should not issue, but that a time should be fixed for hearing that feature of the case that is involved in the appointment of respondent Majors, who was a member of the legislature when appointed by the governor to a position on the normal board.

PAPILLION TIMES PRINTING COMPANY, APPELLEE, V. SARPY COUNTY, APPELLANT.*

FILED NOVEMBER 19, 1909. No. 15,832.

Pleading: DEMURRER: WAIVER OF ERROR. Where, after a demurrer to an answer has been sustained, the defendant takes leave to file, and does file, an amended answer, the ruling upon the former cannot be reviewed in this court, the filing of the amended answer being a waiver of the exception.

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

Ernest R. Ringo, for appellant.

Carl E. Herring, contra.

REESE, C. J.

An action for the foreclosure of tax liens was instituted in the district court under the provisions of what is known as the "Scavenger Law." The county board having failed to name a paper in which the notice should be published, the treasurer designated the Papillion Times, a newspaper published by plaintiff. The notice was published and plaintiff presented its account to the county board of allowance. The claim was allowed in part only, and from the action of the board plaintiff appealed to the district court where the full claim for four publications at the statutory rate was allowed. The county appeals.

It appears from the record that there was some error

* Rehearing denied. See opinion, 86 Neb. ——.

in the first "copy" furnished plaintiff, and before said error was discovered the erroneous notice had been published one time. The corrected copy was then furnished and printed four times as required by law. The notice in each case occupied 557 squares. Plaintiff's demand was based on the whole five insertions, but the district court only allowed for the four, to wit, the printing of the corrected notice. As there is no cross-appeal, this need not be further noticed.

After the cause was removed to the district court, plaintiff filed its petition, alleging the corporate capacity of both plaintiff and defendant, the selection of plaintiff's paper for the publication of the notice, its publication, the presentation of the account to the county board, the board's action thereon in allowing less than was claimed to be due, and the appeal. The defendant answered, admitting the corporate capacity of the parties, the publication of the notice under the designation of the county treasurer, and denied all other averments. The fifth paragraph of the answer was as follows: "Affirmatively answering said petition defendant alleges at the time of said publication and at all times complained of in said petition various county officers of the defendant county, to wit, George P. Miller, county superintendent of public schools, P. D. McCormick, county clerk, Edward C. McEvoy, county sheriff, I. H. McDaniel, clerk of the district court, and others were stockholders in the plaintiff corporation, and as such were pecuniarily interested in the publication of said notice." The plaintiff demurred to this paragraph upon the ground that the facts stated therein did not constitute a defense. The demurrer was sustained. Defendant excepted to the ruling of the court and was given leave to file an amended answer by a date named. An amended answer was subsequently filed, which was practically the same as the original, with the exception of the fifth paragraph which was wholly omitted and another averment substituted as the fifth, as follows: "Further and affirmatively answering said petition, this

defendant alleges that said plaintiff is not the real party in interest in said action, and in that particular alleges that at the time of the publication of the notice aforesaid there were only three newspapers published in whole or in part of Sarpy county which were legally qualified to publish said notice; that those newspapers were called and known as 'The Springfield Monitor,' published at Springfield, Nebraska, 'The Gretna Breeze,' published at Gretna, Nebraska, and 'The Papillion Times,' published by plaintiff; that in order to prevent competition against each other in bidding for the publication of said notice the publishers of said newspapers unlawfully, corruptly and fraudulently entered into an agreement that the publishers of said 'Springfield Monitor' and 'Gretna Breeze' should not compete with plaintiff in the bidding for the publication of said notice, and that thereby said plaintiff would secure the publication of said notice at the maximum amount allowed by law for the publication of such notices, and in consideration therefor said plaintiff agreed to give to the publishers of the last mentioned papers one-third of the amount derived from said publication; that whatever judgment, if any, said plaintiff recovers herein will all, except one-third thereof, be for the benefit of said publishers of said 'Springfield Monitor' and said 'Gretna Breeze' or his or their assignees." This fifth paragraph was also demurred to by plaintiff upon the ground that the facts stated did not constitute a defense, and that the facts pleaded did not constitute "a subject matter for a conspiracy or an unlawful, corrupt or fraudulent agreement to prevent competition," and that "the compensation to be paid for the admitted services is fixed by law and is not a subject matter for competitive bidding." This demurrer was also sustained, and to which defendant excepted and took thirty days "in which to file a second amended answer." Within the limited time defendant filed its second amended answer, which was like the two former ones, with the exception that it ended with the fourth paragraph, the fifth being entirely omitted.

The finding and judgment being in favor of plaintiff, defendant filed its motion for a new trial, containing a number of grounds, but, as only two are contended for in this court, all reference to the others will be omitted. The two grounds referred to call in question the action of the court in sustaining the demurrers to the fifth clause in each of the two answers mentioned.

An important question presented at the threshold of this case is as to whether the right to a review of the rulings of the court was not waived by the filing of the amended answers? If such is the case, we cannot legally decide as to the merits of the paragraphs referred to. In Maxwell, Code Pleading, p. 380, it is said: "When a demurrer is sustained, and the pleader desires to amend, it has been held that he thereby waives his exception to the ruling of the court." In *Pottinger v. Garrison,* 3 Neb. 221, we said: "The rule of law seems to be well settled that, in order to obtain a review of the decision of the district court, in sustaining or overruling a demurrer, in an appellate court, the party must suffer a judgment in chief to be rendered on the demurrer; and that, if he answers over and goes to trial upon the merits, he waives his demurrer to the pleading demurred to, and error cannot be assigned upon the judgment of the district court sustaining or overruling the demurrer." This is doubtless the well-settled law of this country. *Brown v. Brown,* 71 Neb. 200; *Worrall Grain Co. v. Johnson,* 83 Neb. 349; *Citizens State Bank v. Pence,* 59 Neb. 579; *Bankers Reserve Life Ass'n v. Finn,* 64 Neb. 105; *Palmer v. Caywood,* 64 Neb. 372; *First Nat. Bank v. Farmers & Merchants Bank,* 2 Neb. (Unof.) 104; *Hurd v. Smith,* 5 Colo. 233; *Heman v. Glann,* 129 Mo. 325; *MacLachlan v. Pease,* 171 Ill. 527; *People v. Core,* 85 Ill. 248; *Bremen Mining & Milling Co. v. Bremen,* 13 N. M. 111, 79 Pac. 806; *Perkins v. Davis,* 2 Mont. 474; *Shamokin Bank v. Street,* 16 Ohio St. 1; *St. John v. Hardwick,* 17 Ind. 180; *Kennedy v. Anderson,* 98 Ind. 151; *Marshall v. Vicksburg,* 15 Wall. (U. S. 146; *United States v. Boyd,* 5 How. (U. S.) 29; *Rosa v.*

Missouri, K. & T. R. Co., 18 Kan. 124; *Walker v. Wills*, 5 Pike (Ark.) 166; *Ganceart v. Henry*, 98 Cal. 281; 1 Bates, Pleading, Practice, Parties and Forms, p. 423. Had counsel desired to save his exceptions to the rulings of the court in sustaining the demurrers, he should have presented both of his alleged defenses in one answer, and, if either were successfully demurred to, taken his exceptions and gone to trial on the remaining portion of his answer. By this means the questions would have been in condition for presentation to this court.

No reversible question being presented by the record, it follows that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

FRED SKILES V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1909. No. 16,253.

1. **Intoxicating Liquors: SALES.** A vendor of intoxicating liquors at McCook, Nebraska, shipped one gallon of whiskey consigned to himself at Holdrege in this state. The bill of lading was made to F. A. Reed and sent to a bank at Holdrege with a draft for $4.25 attached. Frank A. Freed was the party for whom the whiskey was intended, but he declined to pay the draft and take up the bill of lading. Plaintiff in error procured the delivery of the bill of lading to himself on Freed's order, which was signed F. A. Reed. He also paid the storage charges and received the whiskey from the railroad company through which the shipment had been made. Under an agreement previously made, he divided the whiskey into four equal parts, receiving from each of three other persons one-fourth of the money paid, and delivered to each the proportion paid for, to wit, one quart. He had procured no license to sell intoxicating liquors. *Held*, That his act constituted a sale of the whiskey.

2. **Criminal Law: INSTRUCTIONS.** An instruction to a trial jury, fully covering the facts proved and admitted, that such facts, if proved beyond a reasonable doubt, would constitute the offense charged and would justify a verdict of guilty, *held* not erroneous.

3. ———: ———. "The failure of the trial court to number consecutively the instructions is not reversible error if no exception was specifically taken on that point at the time the charge was given to the jury." *Kastner v. State*, 58 Neb. 767.

4. ———: ACCESSORIES. "In misdemeanors there are no accessories. Those whose conduct is such that it would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals." *Wagner v. State*, 43 Neb. 1.

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

S. A. Dravo and *James I. Rhea,* for plaintiff in error.

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

REESE, C. J.

Plaintiff in error was indicted by the grand jury of Phelps county at the June, 1909, term of the district court for the crime of selling intoxicating liquors in violation of law and without first having procured a license therefor. The record discloses that a plea in abatement was filed by him, alleging that before the return of the indictment an information had been filed charging him with the same offense. At the hearing it was disclosed that the information had been dismissed prior to the filing of the plea in abatement, and therefore there was no real question presented by the plea. However, had that not been the case, the provision of section 435 of the criminal code doubtless covers the point sought to be made by plaintiff in error, and the plea would have been unavailing.

A trial upon the indictment resulted in a verdict of guilty, and plaintiff in error was fined in the sum of $200, and ordered committed until the fine and costs were paid. After the verdict, and prior to the judgment, a motion for a new trial was filed, in which a number of questions were raised, and which will be noticed only so far as

presented by the briefs and arguments; there appearing to be no merit in those not referred to. It is claimed that the evidence was insufficient to sustain the verdict. The undisputed evidence shows the following facts: Frank A. Freed was approached by a person claiming to represent a saloon or liquor dealing establishment at McCook, with the proposition that a quantity of whiskey should be shipped to him from McCook upon his order. Freed refused to make the order, saying that he did not want the whiskey. The quantity proposed for shipment was one gallon. The party claiming to be the agent of the McCook house informed Freed that he would send the whiskey, and, if he (Freed) did not want it, some one else would. It appears that Freed never consented to the purchase. However, the whiskey was shipped by the McCook house to itself at Holdrege, the bill of lading being made in the name of F. A. Reed, and sent to a bank in Holdrege, in this state, with a draft for $4.25 attached. Freed paid little, if any, attention to the receipt by the agent at Holdrege of the consignment, and the liquor was permitted to remain for some time in the railroad office. Plaintiff in error, upon learning that the whiskey was in the railroad office, procured from Freed an order on the bank for the bill of lading and also an order on the railroad company for the liquor. He collected from each of three persons, substantially, one-fourth of the amount of money necessary to procure the surrender of the bill of lading and redeem the whiskey from the railroad company; a charge for storage having accumulated during its remainder in the office of the railroad company. He procured the whiskey, took it to a business house in Holdrege, and divided it between himself and those contributing their money, and delivered the liquor. It is claimed that this fact does not constitute an offense under the laws of this state. We cannot agree to this conclusion. It may be suggested that all persons in any way participating in the transaction under consideration, including the McCook house which shipped the liquor to

Holdrege consigned to itself, were guilty of a violation of the law to the same extent as plaintiff in error. This question is not now before us and we express no opinion thereon. It is perhaps immaterial as to whether the title to the whiskey ever vested in Freed. He had not ordered it and declined to accept it. The consignment was made to the vendors. Freed gave the orders above referred to, signing the name of F. A. Reed. If the title did not vest in him, it passed immediately from the McCook dealers to plaintiff in error, as he paid the purchase price, received the delivery, obtained the money from those who each agreed to purchase one-fourth of the liquor, and delivered the same to them. This, under the provisions of our statute, as well as the general principles of law, would be considered a sale.

The court in instructing the jury appears to have given two instructions numbered 4. This probably was an inadvertence and a clerical error on the part of the court and to some extent, at least, in violation of section 55, ch. 19, Comp. St. 1909. We find no record of any objections upon this ground at the time of the giving of the instruction and the attention of the court was probably not called to the error. Under the rule laid down in *Kastner v. State*, 58 Neb. 767, the error can avail nothing if no exception was specifically taken on that point at the time the charge was given to the jury.

The charge in the indictment was that plaintiff in error had sold one quart of the intoxicating liquor to J. A. Anderson. The court gave the jury instruction numbered 6, which is as follows: "The court instructs you, gentlemen of the jury, that if from all the evidence in this case you believe, beyond a reasonable doubt, that certain whiskey was shipped to one F. A. Freed, under the name of F. A. Reed, and a bill of lading was forwarded with draft attached, and you also believe from the evidence that the said F. A. Freed refused to take said whiskey, and that he told the defendant that he might have it, and that he gave him an order for it, and

you further believe from all the evidence that J. A. Anderson paid the defendant money with which to pay for said whiskey, and that such payment was made with the understanding between Anderson and the defendant that said Anderson was to have said whiskey or a part thereof, and you also believe from all the evidence that with said money the defendant paid for the said whiskey or a part thereof, and that he secured said whiskey from the railroad company and delivered the same or a part thereof to J. A. Anderson, then the court instructs you that such transactions would constitute a sale of said whiskey by the defendant to Anderson, and if you should so find, and that beyond a reasonable doubt, you shall return a verdict of guilty." Plaintiff in error excepted. The instruction covers substantially the facts of the case, and we are unable to see that plaintiff in error was prejudiced by any part thereof.

The second instruction numbered 4 is complained of in connection with the one numbered 6, and was excepted to in the following language: "To the giving of this instruction No. 4 the defendant excepts, this being the second No. 4 given by the court." There is nothing to show that this exception was taken before the reading of the instruction to the jury. As above suggested, had the attention of the court been called to the error before the instruction was given, it would doubtless have been corrected. Assuming that the exception would reach the body of the instruction, we must still hold that there was no error.

If plaintiff in error can be held to have purchased the whiskey from the vendors, the house at McCook, and sold it to Anderson, he was guilty of a violation of the statute in making the sale. If such were not the case, and he simply acted as a go-between in the transfer of the whiskey, he would still be guilty as an aider and abettor in the violation of the law; but, as was held in *Wagner v. State*, 43 Neb. 1, there are no accessories in misdemeanors. "Those whose conduct is such that it

would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals."

No reversible error being found in the case, the judgment of the district court is

AFFIRMED.

MAY P. MCKINNON, APPELLEE, V. WINFIELD S. HOLDEN, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,817.

1. **Appeal:** NEW ISSUES. A prayer for judgment in the district court for a less sum than was demanded by plaintiff in the county court, where the action originated, does not constitute a variance, or amount to a change of issue; and, where the defendant on appeal sets forth in his answer other defenses than those presented by him in the county court, he will not be permitted to assail plaintiff's reply to such new defenses as creating new and different issues from those tried in the court below.

2. **Accord and Satisfaction.** A check for a less amount than the contract price of a certain lot of corn sold and delivered was sent by the debtor to the creditor without any condition as to its acceptance. It was accompanied by a statement in the nature of a set-off which, if allowed, would balance the account. The check was accepted, deposited with a bank for collection, and suit was brought by the creditor against the debtor to recover the price of the corn on the same day the check was received. *Held*, That the acceptance of the check was not a bar to an action to recover the balance of the debt, and did not constitute an accord and satisfaction.

3. ———: BURDEN OF PROOF: DIRECTING VERDICT. The defendant has the burden of proof to maintain the defense of accord and satisfaction; and, if he fails to establish all of the facts necessary to constitute such a defense, it is proper for the court to direct the jury to return a verdict for the plaintiff.

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

Greene & Greene, for appellant.

T. F. A. Williams and *M. M. Starr, contra.*

BARNES, J.

This was an action to recover the purchase price of a certain lot of corn alleged to have been sold and delivered by plaintiff to defendant. It appears that at the conclusion of the evidence in the district court the jury were directed to return a verdict for the plaintiff. Judgment was entered on the verdict, and the defendant has brought the case here by appeal.

Two principal grounds are urged for a reversal of the judgment, which are: (1) The court erred in overruling defendant's motion to strike the plaintiff's petition from the files because of a variance or change of issues from those tried in the county court; (2) the court erred in directing the jury to return a verdict for the plaintiff. These contentions will be considered in the order of their presentation.

1. The record discloses that the action was commenced in the county court of Lancaster county, where the plaintiff prayed judgment for $773.30 with interest from April 12, 1906, for corn sold and delivered by plaintiff to defendant at that date. The defendant by his answer denied that he ever had any business transaction of any kind with the plaintiff, and alleged that he purchased the corn in question from J. T. McKinnon, the plaintiff's husband, to whom full payment had been made. The reply was a general denial. A trial resulted in a judgment for the defendant, and the plaintiff appealed. In the district court plaintiff set forth the same cause of action in her petition, and alleged that she had, since the commencement of the action, collected a part of the amount sued for, and demanded judgment for only $389.75. For this defendant moved to strike the plaintiff's petition from the files. His motion was overruled, and this ruling is assigned as error. This assignment does not seem to merit our serious consideration. The petition sets forth the identical cause of action sued on in the county court, and the defendant has no reason to com-

plain because the amount for which judgment was demanded in the district court was less than the sum prayed for in the court below. Therefore there was no variance of which the defendant could complain. After his motion was overruled defendant filed an answer which contained the defense pleaded in the county court, a plea of accord and satisfaction, and other new matter by way of an estoppel. To this answer plaintiff replied by a general denial, and an allegation that J. T. McKinnon, in the sale of the corn, acted as the agent of the plaintiff, as the defendant well knew. It thus appears that the defendant was responsible for the introduction of the new issues, if any such there were, and of course is in no position to complain of the result of his own departure.

2. The evidence discloses that plaintiff was the owner of a farm situated a short distance from the village of Burr in Otoe county, Nebraska, which was rented to one Phelps for a part of the crop; that plaintiff's share of the corn raised thereon was 2,090 bushels; that defendant, a short time before this action was commenced, called J. T. McKinnon, who it appears transacted all of the plaintiff's business, by telephone at their home in Lincoln, and in a conversation then had with him purchased the corn in question at an agreed price per bushel, which amounted to $773.30; that the corn was thereupon delivered by Phelps to defendant at Burr, and was received by him; that shortly after defendant wrote J. T. McKinnon the following letter: "Office of W. S. Holden. Real Estate and Long Time Loans. Dealer in Grain. Burr, Neb., April 28, 1906. Mr. J. T. McKinnon, Lincoln, Neb. Dear Sir: Mr. Phelps asked me to pay for the shelling of your corn which I agreed to do. If this is not satisfactory to you please let me know, and I will make it satisfactory. You had 2,090 bushels of corn, which amounted to $773.30; bill for shelling, $17.75; commission on sale of farm, $372.00; leaving you a balance of $383.55. Inclosed please find check for same. Yours respectfully,

W. S. Holden." The letter was received by McKinnon, the check was at once deposited by him in one of the city banks for collection, and on the same day plaintiff, finding the defendant in Lincoln, commenced this action against him. So far there is no conflict in the evidence. It further appears that the plaintiff's husband had given the defendant a description of some land which he owned, as well as the farm owned by plaintiff, with a view to listing the same with defendant for sale; and, although it is not claimed that any contract was ever entered into between them which would meet the requirements of our statute, yet defendant sought, in the manner set forth in the letter above quoted, to collect from J. T. McKinnon a real estate broker's commission of $372 for an alleged sale of his land. Upon this state of facts the defendant has attempted to predicate a defense of accord and satisfaction.

Now, it is apparent that, if this was not an accord and satisfaction within the meaning of the law, then it was the plain duty of the trial court to direct a verdict for the plaintiff. It must be noted that there was no dispute whatever at any time between the parties as to the cause of action sued on by the plaintiff. There was no controversy over the number of bushels of corn delivered to the defendant, and none whatever as to the total price for which it was sold. Defendant conceded the amount due for the corn, but sought to reduce the sum of his indebtedness by the items set forth in his letter, which he had charged to McKinnon, and after deducting those amounts he forwarded the check for $383.55. There had never been any compromise and settlement of the claim of plaintiff for the price of the corn; there had never been anything in that transaction to compromise; there had never been any compromise or settlement of the claim of Holden against J. T. McKinnon for the real estate broker's commission, and the evidence discloses that this matter had never proceeded further than an assertion of it by defendant and a questioning of the charge by Mc-

Kinnon. It will be further noted that defendant's remittance letter above quoted does not make the acceptance of the check conditional on the allowance of the claim for commission. In fact the tenor of the letter indicates the contrary, and shows a desire to make satisfactory anything that should not be found so by McKinnon.

This case is similar in its facts to the case of *Cartan & Jeffrey v. Thackaberry Co.*, 139 Ia. 586. There the defendant conceded the correctness of the plaintiffs' claim for services, but asserted that it had a cause of action against them for damages on another transaction. The defendant sent them a check for the amount of the claim less $500, in a letter stating it to be the full indebtedness of the plaintiffs. Plaintiffs retained the money sent, and acknowledged the receipt of the check, but denied liability for the sum of $500, or any other sum, and proposed an arbitration, stating that, if no arrangement for arbitration or settlement could be made, they would bring suit for the remaining $500 as due on the account. In the *Cartan & Jeffrey* case a protest was in writing, while in the case at bar no acknowledgment in writing was sent, but suit for the balance was commenced on the same day that the check was received. In the opinion of the Iowa court we find the following: "The claim that defendant paid and plaintiffs accepted $403.80, remitted by check, in full satisfaction of a disputed claim for $903.80, is easily disposed of. There was no dispute between the parties as to the indebtedness of defendant to plaintiffs in the full sum of $903.80 on the account. Defendant insisted that plaintiffs owed defendant $500 by way of damages in a transaction having no relation to the account, and remitted the balance, which plaintiffs accepted, not in full satisfaction, but as part payment. Now, it may be true that where a debtor questions the validity of an account, and remits a less amount than that claimed by way of compromise, and the creditor receives and retains the amount thus remitted, the latter

precludes himself from making further claim under that account; but it is equally true that, where the debtor remits an amount less than the amount of an undisputed account, the creditor may retain the money and apply it on the account, and subsequently insist on the payment of the balance. Even though the creditor agrees to accept a sum less than the amount of an undisputed claim in full payment, and to release the balance, and does so receive the less amount agreed upon, his agreement to remit the balance is without consideration and invalid, unless there is some circumstance, such as the insolvency of the debtor, the giving of security, or other matter, rendering the arrangement presumably advantageous to the creditor to serve as a consideration for the release of the portion of the indebtedness not paid. *Engbretson v. Seiberling,* 122 Ia. 522; *Stoutenberg v. Huisman,* 93 Ia. 213; *Myers v. Byington,* 34 Ia. 205; *Eldred v. Peterson,* 80 Ia. 264; *Rea v. Owens,* 37 Ia. 262; *Bender v. Been,* 78 Ia. 283."

This court had occasion to pass upon this question in *Fremont Foundry & Machine Co. v. Norton,* 3 Neb. (Unof.) 804. It was there held that the acceptance by the creditor of a debtor's check for less than the whole amount of a past due liquidated account will not operate as an accord and satisfaction, unless such check is accompanied by the condition that such acceptance shall be a full satisfaction and payment of the whole debt. See, also, *Canadian Fish Co. v. McShane,* 80 Neb. 551.

In *Sampson v. Northwestern National Life Ins. Co., ante,* p. 319, we held that the receipt of money by a creditor, when accompanied by a letter giving the debtor's views as to the amount of his liability, and its application on the amount the creditor claims to be due, without the creditor in any manner assenting to the debtor's claim, is not an accord and satisfaction. This is our latest expression on this question. To make the receipt of a part of the debt a discharge of the whole there must be a new

consideration, or a voluntary compromise of a disputable or disputed demand by which each party yields something, or an accord and satisfaction by which a new contract is substituted. Indeed, it may be said that it is this yielding of something by the parties that constitutes the consideration that will support an accord and satisfaction. We think that the rule adopted by this court is supported by the great weight of authority in this country, and it seems quite apparent that the facts of this case do not bring it within that rule.

3. Defendant assigns error for the refusal of the trial court to sustain his objection to plaintiff's deposition. It appears that no exceptions were filed to this deposition prior to the day of the trial in the district court; that when it was offered in evidence defendant objected to its admission on the ground that no notice had ever been served on the defendant or his agent, or attorney of record, of the taking of such deposition. We find, however, attached to the notice to take the deposition is the affidavit of one Milton M. Starr, who is one of the attorneys for the plaintiff, setting forth that on October 3, 1906, he served a true and correct copy of such notice upon the law firm of Billingsley & Greene, attorneys for defendant, by delivering to said Billingsley & Greene a true copy of said notice. The fact of such service is not controverted by the defendant. The record shows that Billingsley & Greene appeared as attorneys for the defendant in the county court, and that they filed the answer for the defendant in the district court shortly after they were served by Mr. Starr with the notice to take the deposition in question. It thus appears that the objection to the deposition was without merit.

Finally, we are satisfied from an examination of the record that no other judgment than one for the plaintiff could have been rendered by the district court. This being so, it was the duty of the trial judge to direct the jury to return a verdict for the plaintiff.

For the foregoing reasons, the judgment of the district court is in all things

AFFIRMED.

JOHN TOBLER, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,821.

1. **Appeal:** EVIDENCE: HARMLESS ERROR. The admission of immaterial evidence is not a ground for reversal unless it appears to have influenced the jury to the prejudice of the complaining party.
2. **Interest:** MISTAKE OF CLERK: REMEDY. In entering judgment on a verdict, the clerk should compute interest thereon from the date of its rendition, and not from the first day of the term. A mistake in computation of interest should be corrected by the district court on motion, and is not a ground for reversal of the judgment.
3. **Appeal:** INSTRUCTIONS. Stating the issues to the jury by copying the pleadings in the instructions is a practice not to be commended, but, where it appears that such a course has not resulted in prejudice to the rights of the complaining party, it is not a sufficient ground for reversal.
4. **Master and Servant:** APPLIANCES: ASSUMPTION OF RISK: QUESTIONS FOR JURY. An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location of a structure in dangerous proximity to a railroad track will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location; and, unless from the undisputed facts the court can declare, as a matter of law, that the employee actually had or was chargeable with such knowledge and thereby assumed the risk, those questions should be submitted to the jury.

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

Greene, Breckenridge & Matters, for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

Action in the district court for Douglas county against the Union Stock Yards Company, Limited, for damages on account of personal injuries sustained by John Tobler while working as a switchman on defendant's cars. Plaintiff recovered a judgment for $1,712, and the defendant has appealed.

It appears that at the time of the injury complained of defendant operated a railroad which connected its stock yards and the packing houses in South Omaha with the railroads centering there; that the plaintiff was employed by the defendant, and was a member of the crew engaged in switching cars from the stock yards to the packing houses; that he commenced work for defendant in September, 1906, and continued in its service until the 28th day of January, 1907, at which time he was injured; that until about a week before the accident he worked in what is known as the "North Yard," which is located about one-half a mile from the place where his injury occurred. It further appears that he was then transferred to the vicinity of the Cudahy packing plant, where he worked with what was known as the "Cudahy engine crew," which was engaged in switching cars to that plant. The record shows that there were several tracks leading from the yard into the icing sheds of the Cudahy company, one of which was called the "main icing track," or "track No. 1," and in close proximity thereto was another track designated as "track No. 2." These tracks run east and west, and on the north side of and close to track No. 2 the defendant had erected and maintained a watchman's shanty. At the time of the injury the switching crew, of which defendant was one, was engaged in placing a number of cars in the icing sheds. They kicked or shunted one car onto the main or lead track toward the shed above mentioned, on which the plaintiff, when it reached its proper position, set the brake. While he was performing that duty, the rest of the crew switched three cars onto track

No. 2, and plaintiff descended from the car on which he had set the brake, went rapidly to the cars which were coming in on track No. 2, met them at a point about 50 feet east of the watchman's shanty, caught hold of the ladder upon the side of the first car, and began to climb to the top of that car in order to set the brake thereon when it reached the icing shed. While he was rapidly ascending the ladder, but before he succeeded in reaching the top of the car, he struck the watchman's shanty, was knocked to the ground, and received the injuries complained of. With this summary statement of facts, we now proceed to the consideration of the assignments of error.

1. Defendant contends that the court erred in permitting plaintiff to testify that he was married, over its objections; and it is argued that the fact that he was a married man would naturally excite the sympathy of the jury and cause them to render an excessive verdict, while counsel for the plaintiff insist that the inquiry was a proper one. Without deciding this question, it is sufficient to say that we find nothing in the record which in any way indicates that the bare statement that the plaintiff was married had any prejudicial effect upon the rights of the defendant. That fact does not seem to have been again referred to in any part of the evidence, and the record contains nothing in relation to plaintiff's financial ability, or the condition of his family. If the evidence was improper, which we do not decide, it was not prejudicial, and therefore affords no ground for a reversal of the judgment. *Missouri P. R. Co. v. Fox,* 60 Neb. 531.

2. It is also urged that the judgment is excessive; that the clerk of the district court entered a judgment for the amount of the verdict, together with interest thereon, from the first day of the term, and thus violated section 6752, Ann. St. 1909, which provides as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof."

It seems that this contention is a meritorious one, but the error of the clerk affords no ground for a reversal of the judgment, because that matter could be, and doubtless will be, corrected, upon motion, by the district court. Considering the amount of the verdict, the only testimony as to the extent and result of the plaintiff's injury was his own and that of a physician called in his behalf. It appears beyond question that at the time he was injured he was working every day, Sundays included, and was earning $3.52 a day. That for four months thereafter he was unable to do any work, and was then unable to continue in the service of the company because of the weakened condition of his arm, which had been fractured by the accident. Because of this, he sought and obtained employment from the Swift Packing Company, where he earned, on an average, $10 a week. That at the time of the trial his hand and arm were still in such a weakened condition that he could not perform severe manual labor, and, according to the testimony of the physician, that condition was likely to remain for at least six months or a year longer. We are therefore unable to say that the amount of the verdict was excessive.

3. Defendant further contends that the district court erred in its statement of the case to the jury as found in the instruction given by that court upon his own motion. One point in support of this contention is that the trial court in stating the issues to the jury included in his instructions the allegations of the pleadings, and then stated: "In order to recover in this case, the plaintiff must show, first, that he was injured at the time and place substantially as alleged in his petition." The argument to sustain this contention is that there was no evidence introduced by the plaintiff to prove certain matters set forth in his petition. For instance, that no order was given by the defendant with respect to the placing of the cars that were being shunted upon the side tracks; that there was no testimony that the plaintiff was required, in the performance of his duties, to climb upon the car while

it was in motion; that there was no evidence that the work in which the plaintiff was engaged required him to ride freight cars by hanging on the side thereof when passing the watchman's shanty. We have carefully examined the plaintiff's petition, and fail to find therein any of the statements above set forth. We are therefore constrained to hold that this objection is not well taken. While we have in some instances condemned the practice of copying the pleadings in the instructions to the jury, and believe that such a method of giving instructions should not be used by our district courts, we have never reversed a judgment for that reason, and we are satisfied from a careful examination of all of the instructions that defendant was not prejudiced by the use of that method in the case at bar.

4. Defendant's principal contention, as stated by counsel, is "that the plaintiff assumed the identical risk of injury which he encountered in the course of his employment, and therefore cannot recover in this action." This point has been argued by counsel at great length, in able and exhaustive briefs, and orally upon the hearing before the court. As we view the record, this is the only question presented by this appeal which merits our serious consideration. It appears from a careful examination of the bill of exceptions that at the conclusion of the plaintiff's testimony counsel requested the court to direct the jury to return a verdict for the defendant. The request was refused, an exception was noted, and the defendant elected to stand upon the motion and declined to introduce any evidence in support of the defenses set forth by its answer. We find that the evidence fairly shows that the watchman's shanty, which was the cause of the plaintiff's injury, was situated on the north side of track No. 2, and so close thereto as to leave a space of a trifle less than 17 inches between its projecting eaves and the ladder on the side of an ordinary box car; that a man of ordinary size, while clinging to the ladder on the side of such a car,

could not pass the shanty without being struck thereby. No reason is shown for placing the shanty in the situation where it stood, while, on the contrary, the record contains at least some evidence which tends to show that it might have been erected at a safe distance from any of the defendant's switching tracks. It is quite apparent therefore that the defendant was negligent in erecting and maintaining the structure in the manner and at the place above described. It is contended, however, that the danger caused thereby was so obvious and so apparent that the plaintiff was charged, as a matter of law, with notice of it, and that by continuing in the defendant's service he assumed the risk, was guilty of contributory negligence, and therefore cannot recover. To support this contention defendant has directed our attention to *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649; *Anderson v. Union Stock Yards Co.*, 77 Neb. 196; *Obermeyer v. Logeman Chair Mfg. Co.*, 120 Mo. App. 59, 96 S. W. 673; *Narramore v. Cleveland, C., C. & St. L. R. Co.*, 96 Fed. 298; *Evans Laundry Co. v. Crawford*, 67 Neb. 153; and other like cases. We think those cases are clearly distinguishable from the one at bar. In the *McGinnis* case the plaintiff was injured by being struck by a structure called an "oil-house," which was situated too close to the defendant's railroad track at Broken Bow, Nebraska. There the jury, in answer to certain questions submitted to them, found that the plaintiff had been employed as a brakeman on the defendant's freight train about 14 months; that he had passed the oil-house in question prior to the time of the accident from two to six times a day for three days in each week during the time he had been working for the company; that he knew of the existence and location of the oil-house prior to the accident, and could have known of its existence and location from the early part of his services as brakeman; that at the time of the accident he did not look to see if he was approaching the oil-house or any other structure located near the track. It also appeared from the evidence of one of the defendant's wit-

nesses that while the witness was working for the company as a brakeman on the same train with plaintiff prior to the accident, and on the spur track where the injury occurred, he stood down on the end of the car and let his foot hang over; that plaintiff called to him to "look out for the shed," referring to the oil-house in question. On those facts we held that the special findings were inconsistent with the general verdict for the plaintiff; that by observing the operation of familiar and natural laws plaintiff would have been aware of the injury which would probably result from his attempt to ride past the oil-house while clinging to the side of the car; and that, being aware of the danger, he voluntarily accepted the risk and could not recover for his injury.

In *Anderson v. Union Stock Yards Co., supra,* it appeared that the plaintiff had been in the service of the defendant company, and engaged in switching, coupling and uncoupling cars at the point where the accident happened, for several months; that the roadbed of the company at that point was, and had been during all of the time of plaintiff's service, illy constructed, badly out of repair, and obviously hazardous to the company's employees; that the tracks were winding and uneven, and continuously overflowed, or partly submerged by water from a nearby sewer; that there were holes and irregularities of the surface more or less filled with mud; that the cross-ties, or some of them, were above the surface at some places, and at others correspondingly depressed below the surface; that the defects were so great that, when the cars moved over the tracks, they swayed and rocked from side to side to a degree rendering it dangerous for the plaintiff to walk along the tops of them, as he was frequently obliged to do in the discharge of his duties. The plaintiff was injured by stepping between the cars, one of which was moving, for the purpose of making a coupling, and, while attempting to retreat from that position, lost his balance, swayed around, and was caught between the side of the car and a nearby platform, re-

ceiving the injuries for which he sought to recover. We held that the plaintiff, under those facts, and with the knowledge of them, by remaining in the service of the company, assumed the risk of his injury.

In *Obermeyer v. Logeman Chair Mfg. Co., supra,* the supreme court of Missouri held, in substance, that, where the master is negligent in furnishing a servant an unsafe place to work, the servant does not assume the risk of injury, caused by such negligence, although he knows, or by the exercise of ordinary care could know, that the place is unsafe; that, if the place provided for the servant to work is so obviously dangerous that a reasonably prudent man would not attempt to work in it, the servant by remaining there is guilty of such contributory negligence as to prevent a recovery in case he is injured. That case, however, was submitted to the jury on the question of assumption of risk, and a judgment for the plaintiff was affirmed.

Narramore v. Cleveland, C., C. & St. L. R. Co., supra, appears to be one which was governed by the Ohio statute, and therefore cannot be considered as authority in this case.

In *Evans Laundry Co. v. Crawford, supra,* a judgment for the plaintiff was reversed because the court failed to properly instruct the jury on the law of assumption of risk.

In the case at bar, however, it appears, without dispute, that the plaintiff had never been warned or notified by the defendant company that the watchman's shanty was dangerously close to the switching track, and that fact had never been called to his attention by any one. It further appears that he had never seen a car standing in close proximity to the shanty, and had never been afforded an opportunity to estimate or observe the distance between the shanty and a passing car; that he had never ridden or attempted to ride on the side of a car when passing the shanty during the short time he had been working at that point, but had at all times been on

the top of the cars, where he was required to be in order to set the brakes when they should reach their destination; that he had seen the shanty, it is true, and knew in a general way where it was situated, yet it had never occurred to him that it was an element of danger. It was also shown that his attention at the time he received the injury was directed to another member of the crew, from whom he was receiving, and through whom he was transmitting, signals to and from the engineer, and his attention was thus diverted from the shanty.

Considering the foregoing facts, we are of opinion that this case should be ruled by *Texas & P. R. Co. v. Swearingen,* 196 U. S. 51, where it was said: "An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location in dangerous proximity to a railroad track of a structure will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location. It is for the jury to determine from all of the evidence whether he had actual knowledge of the danger."

It seems clear to us that in the case at bar the question of assumption of risk was properly submitted to the jury; that their verdict is sustained by the evidence. This requires an affirmance of the judgment, unless we declare, as a matter of law, that the plaintiff assumed the risk, and was therefore guilty of contributory negligence. Considering the nature of the evidence, we cannot so hold.

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

AFFIRMED.