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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1911—JANUARY TERM, 1912.

VOLUME XC.

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 Hamer succeeded Judge Root January 4, 1911.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
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		Alexander C. Troup..	Omaha.
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		Edward E. Good....	Wahoo.
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Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
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Thirteenth ..	Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and McPherson.	Hanson M. Grimes.	North Platte.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1911.

SAMUEL W. HOCKETT, APPELLEE, V. LEVI BURNS ET AL., APPELLANTS.

FILED OCTOBER 6, 1911. No. 16,908.

1. **Mortgages:** CONDITIONS: VALIDITY. "A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt, if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute, nor contrary to public policy, and may be enforced." *Plummer v. Park*, 62 Neb. 665.

2. ———: DEFAULT: RIGHTS OF MORTGAGEE. "And the payment of such delinquent taxes after the commencement of an action to foreclose the mortgage does not deprive the mortgagee of the right secured by the exercise of his option." *Plummer v. Park*, 62 Neb. 665.

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

Ambrose C. Epperson, for appellants.

Paul E. Boslaugh, contra.

REESE, C. J.

This is an action to foreclose a mortgage on real estate. The mortgage was executed on the 18th day of November, 1908, to secure a debt of $3,500, due November 1, 1912, with interest at the rate of 6 per cent. per annum. The exact provision of the mortgage over which the contention in this case arises is not set out in the abstract of the

petition, as should have been done, but it is sufficiently shown by the abstract and briefs that the mortgage contained a stipulation that, if the taxes on the property were not paid before they became delinquent, the debt secured by the mortgage should become due and collectible at once. It is alleged in the petition that the taxes of 1909, amounting to the sum of $32.06, had not been paid, and had become delinquent. For that reason the suit was instituted to foreclose the mortgage.

The answer admitted the execution of the note and mortgage declared upon, but alleged that the mortgage contained the further provision that upon the nonpayment of the taxes by the mortgagors the "mortgagee may pay taxes, and the same, with interest at 10 per cent., shall be repaid by said mortgagor, and this mortgage shall stand as security for the same; that a failure to pay any of said money, either principal or interest, when the same becomes due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectible at once." After the filing of the answer, plaintiff moved the court for a judgment and decree in his favor, on the ground that the answer did not present a defense to the suit. The motion was sustained, and a decree of foreclosure entered. Defendants appeal.

The contention of defendants is that the clause in the mortgage, that the "mortgagee may pay taxes" and add the amount paid to the principal debt, created a duty on the part of the mortgagee to pay the delinquent taxes; that, having failed to do so, he cannot maintain the suit to foreclose, and that the district court erred in entering the decree.

In our view of the case, every phase of the question involved has been decided by this court in *Hartsuff v. Hall*, 58 Neb. 417; *National Life Ins. Co. v. Butler*, 61 Neb. 449; *Plummer v. Park*, 62 Neb. 665; and that the clause permitting plaintiff to pay the taxes simply conferred an option upon him to do so if he so desired, provided he was

willing to increase the amount of his investment in the security to that extent, but imposed no obligation upon him so to do. In *National Life Ins. Co. v. Butler, supra,* we said: "We think by the plain terms of the contracts between the parties the creditor was given not only the right to make the payments which the debtor, in violation of his contract, failed to make, but also the further right, at its option, to declare the entire debt due and proceed immediately to collect it by suit." In *Plummer v. Park, supra,* we held: "A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt, if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute, nor contrary to public policy, and may be enforced." Nor is the plaintiff's right to foreclose defeated by the payment of the delinquent taxes by the mortgagor after the commencement of the suit to foreclose, but before decree. *Plummer v. Park, supra.*

We find no error in the ruling and decision of the district court, and its decree is

AFFIRMED.

FERDINAND J. O'CHANDER, APPELLEE, V. DAKOTA COUNTY, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,531.

1. **Bridges:** REPAIRS. It is the duty of a county, when repairing a bridge situated upon and constituting a part of one of its public roads or highways, to make it safe and suitable for the uses to which it is ordinarily exposed prior to and at the time the repairs are made, and render it sufficient to meet the present ordinary necessities of the public. *Kovarik v. Saline County,* 86 Neb. 440.

2. **Appeal:** CONFLICTING EVIDENCE. In an action at law, the judgment of the district court, rendered upon conflicting evidence, will not be set aside by a reviewing court, unless it can be said that it is unsupported by the evidence and is clearly wrong.

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

J. J. McAllister, for appellant.

R. E. Evans, contra.

BARNES, J.

Action in the district court for Dakota county to recover damages sustained by the plaintiff by reason of the defective condition of a bridge situated upon, and which was a part of, one of the defendant's roads or highways. The record discloses that by agreement of the parties the cause was tried to the court without the intervention of a jury. The plaintiff had the judgment, and the defendant has appealed.

The facts as disclosed by the record are in substance that the bridge in question was built a number of years ago; that in November, 1907, it was repaired under the direction of the defendant's board of county commissioners; that the contractor who repaired it at that time informed the board that he had repaired it according to their directions but that further repairs were needed, and asked the board for permission to drive three piles at the north end of the bridge and place a new cap thereon, and that such repairs were needed to put the bridge in a safe and suitable condition. This additional work the board refused to authorize, and so the bridge was not properly repaired. The person who made the repairs was a witness in this case, and testified that the bridge appeared to be in good condition.

It further appears that on the day when the accident occurred the plaintiff was moving his threshing outfit, which consisted of an ordinary traction engine and separator, together with another wagon, which carried the tools and was used as a water tank, along the defendant's road and across the bridge in question; that, on arriving

at the bridge where the accident occurred, the threshing crew planked it in the usual manner, and ran the engine upon the bridge until it rested about the middle of the structure; that the separator was attached, and when it was pulled up over the approach and onto the bridge proper the engine was stopped; that it was then the purpose of the plaintiff to uncouple the engine from the separator, after which it was to be run the rest of the way across the bridge without the separator; that, in attempting to move the engine for that purpose, it caused some vibration of the bridge, and the defective or rotten cap upon which the further end of the bridge rested split off or gave way; that the end of the bridge fell, and the engine and separator ran into the creek, thus causing the damages of which plaintiff complained.

It therefore appears that the defective condition of the bridge, of which the defendant county had received notice at the time the repairs were made, was the cause of the accident. This state of facts seems to bring the case squarely within the rule announced in *City of Central City v. Marquis*, 75 Neb. 233, and *Kovarik v. Saline County*, 86 Neb. 440. In the *Kovarik* case it was said: "The sufficiency and state of repairs of bridges upon public highways referred to in section 117, ch. 78, Comp. St. 1909, must be applied to the uses to which a bridge is ordinarily exposed prior to and at the time of the accident by which it may be claimed injury to person or property was suffered. It should be sufficient to meet the present ordinary necessities of the public."

It seems clear that when the bridge in question was repaired it should have been made safe and suitable for the then ordinary uses of the public, which may include the moving of ordinary threshing outfits, which were no doubt known to be in common use at that time. We therefore think it clearly appears that the plaintiff established such a state of facts as entitled him to recover, unless he was himself guilty of contributory negligence, which appears to be the main defense interposed to pre-

vent a recovery. Upon that question the evidence is somewhat conflicting, but, as we view it, it preponderates in favor of the plaintiff, and fails to sustain the defendant's contention. The rule is well established that where, as in the case at bar, there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of a trial court.

We find ourselves unable to say that the evidence in this case is insufficient to sustain the judgment of the district court, and it is therefore

AFFIRMED.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED OCTOBER 6, 1911. No. 16,541.

1. **Injunction: MUNICIPAL CORPORATIONS: INTERFERENCE WITH CORPORATE PROPERTY.** Where a city by the affirmative acts of its officers and agents has for a long series of years authorized and acquiesced in the expenditure of large sums of money and in the acquisition of valuable property by a corporation in establishing and conducting a business enterprise under a claim or color of right and contract to and with persons, companies and corporations to furnish them with valuable and indispensable services to enable them to carry on their business enterprises therein, a court of equity will restrain the city authorities from ousting the corporation by destroying its property and business without compensation.

2. **Evidence** examined and found to require a modification and affirmance of the judgment of the district court.

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

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

John Lee Webster and *Myron L. Learned, contra.*

BARNES, J.

Action brought by the Omaha & Council Bluffs Street Railway Company in the district court for Douglas county to restrain the city of Omaha and Waldemar Michaelsen, as city electrician, from removing or causing to be removed all of the plaintiff's conduits, wires and poles located in, under, upon or over the streets, alleys, thoroughfares or public places of the defendant city, maintained and used by the plaintiff for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes.

It appears that when the issues were made up the Burkley Printing Company, the Omaha Structural Steel Works, the McCord-Brady Company, Hayden Brothers, the Klopp & Bartlett Company, the Wilson Steam Boiler Company, the Williams & Mount Company, Frederick J. Wearne (doing business as Wearne Bros.) and Thomas F. Stroud (doing business under the name of T. F. Stroud & Company), persons, companies and corporations to whom the plaintiff for many years had been and was then furnishing electricity for those purposes, intervened and joined the plaintiff in its prayer for equitable relief. The cause was tried, and the district court found the facts generally in favor of the plaintiff and the interveners, decreed to them a permanent injunction, and from that judgment the defendants have appealed.

The contention of the parties may be briefly summarized as follows: The defendants claim that the plaintiff company had no franchise or right to occupy the streets, alleys and public places of the defendant city, but was a trespasser thereon; that, if it had any such right, the business of furnishing electricity to private parties or

premises for light, heat or power purposes is outside of and beyond its corporate powers as a street railway company; that if the plaintiff had, by ordinance or otherwise, acquired any right to engage in that business within the defendant city, the right or power so obtained was a mere privilege or license, which could be revoked by the mayor and council of the defendant city at any time, and therefore the judgment of the district court was wrong and should be reversed. On the other hand, the plaintiff contends that it had a franchise as a street railway to conduct its business within the city of Omaha, which extends at least until the year 1917, and therefore it was not a trespasser upon the streets, alleys and public places of the defendant; that furnishing electricity for power, heat and light purposes to private persons, including the interveners, is incidental to and might be properly exercised as a part of its corporate powers; that the city had for some 20 years recognized the fact that the plaintiff had such incidental right and power, had in fact granted the same to the plaintiff by ordinance duly enacted by the mayor and city council in that behalf; had regulated the manner of the use of such power, and had ordered the plaintiff to separate its electric current and wires used for that purpose from those used for propelling its street cars, and place the same underground and in conduits; that the plaintiff had complied with such order at an expense of about $140,000; that the threatened destruction of its property used for that purpose without compensation would result in great and irreparable loss and damage to the plaintiff, as well as to the interveners, and therefore the city was estopped to claim that it had the right to destroy plaintiff's property and business without compensation; that the judgment of the district court was right, and should be affirmed.

It appears from the bill of exceptions that in the year 1866 the territorial legislature granted to certain persons a corporate franchise, and authorized them to construct and operate a horse railway in the city of Omaha for the

period of 50 years; that in 1868 the city council passed an ordinance granting to the Omaha Horse Railway Company the right to maintain and operate a single or double-track railway over and along such streets within the limits of the city of Omaha as the company might thereafter select, providing the company should conform to the provisions of the act of the legislature incorporating it; that in May, 1888, there was submitted to a vote of the people of the city of Omaha an ordinance purporting to grant to the Omaha Cable Tramway Company a franchise to construct and operate a cable tramway in the city of Omaha; that the question was submitted to a vote of the people, and the city clerk thereafter certified that the proposed franchise had been carried or adopted; that the Omaha Cable Tramway Company was incorporated for the purpose of building and operating a cable tramway in the city of Omaha, in April, 1888; that in 1889 the legislature of this state passed a law (laws 1889, ch. 38) authorizing any street railway company existing in pursuance of law in this state, or which might thereafter be organized, whose road had been located and constructed so as to conform with the road of any other street railway company theretofore organized, thus making connected or continuous lines or routes of travel or transportation, to consolidate its railway property and appurtenances with such other street railway and convert its property and appurtenances into a single corporation; that after such consolidation should be completed the corporation resulting therefrom should by operation of law succeed to and hold in perpetuity all of the property, rights, powers and franchises conferred upon said constituent companies; that in March, 1889, the Omaha Cable Tramway Company and the Omaha Horse Railway Company, the two corporations which at that time claimed to own and possess franchises in the city of Omaha for the operation of street railways, and which were actually operating street railways in said city, consolidated by adopting and filing articles of incorporation and comply-

ing with the requirements of that law; that in 1887 there was submitted to and adopted by a vote of the people of Omaha an ordinance, called No. 1434, proposing to grant to a corporation called the Omaha Motor Railway Company a franchise for a period of 30 years, covering a number of streets in said city (which need not here be further described); that on November 1, 1889, the Omaha Motor Railway Company gave a deed of conveyance to the Omaha Street Railway Company, transferring to that company all of its rights, title and interest in and to its franchise and street railway interests in the city of Omaha; that on December 5, 1889, the first amendment to what was called the charter of the Omaha Street Railway Company, being the ordinance of consolidation between the Omaha Cable Tramway Company and the Omaha Horse Railway Company, was adopted; that on January 9, 1902, the second amendment to the articles of incorporation or charter of the Omaha Street Railway Company was also adopted; that on the 7th day of October, 1902, the stockholders of a corporation, called the Omaha & Florence Street Railway Company, amended its articles of incorporation, changing the name of that company to the Omaha & Council Bluffs Street Railway Company, and increasing its capital stock from $200,000 to $15,000,000; that on the 22d day of November, 1902, the Omaha Street Railway Company by deed conveyed to the Omaha & Council Bluffs Street Railway Company, the plaintiff herein, all of its properties, rights and franchises, and it is under the foregoing acts, ordinances and transfers that the plaintiff company claims the right to conduct the business of a street railway in the defendant city.

It will thus be seen that it cannot be said that the plaintiff has no color of right to operate its street railway within the defendant city. It appears, however, that neither the validity of plaintiff's franchise nor the length of its duration was considered or determined by the district court, and defendants in their brief concede that in justice to all the parties this court should at this time re-

frain from passing upon those questions. We therefore decline to definitely pass judgment upon them.

It further appears that as early as September, 1882, the city of Omaha, by its mayor and council, recognized the right of any person, company or corporation to erect and maintain poles upon and along the streets of the city of Omaha for the purpose of transmitting electric current, and by ordinance granted to the Northwestern Electric Light & Power Company authority to erect poles and conduct wires along the streets of the city for transmitting electric current, by which it was also provided that "the mayor and council may authorize any other company or person to use the wires and poles that may be erected, upon just compensation;" that in May, 1884, the city council passed ordinance No. 756, which was approved by the mayor, regulating the construction and maintenance of wires and conductors for transmitting electric current in the city of Omaha, which was a general regulation applying to the business of transmitting electric current by wires which by its terms applied to any person, company or corporation that elected or chose to transmit electric current for power purposes and thereby the city of Omaha recognized the right of an electric street railway company, if it chose to do so, to transmit electricity upon wires or conductors for general electric purposes; that in April, 1886, the city council passed ordinance No. 1031, which was duly approved, and the right of electric street railway companies or of any other person or company to transmit electric current by wires upon poles or other conduits for any legitimate business was thereby recognized, and to that end the ordinance provided, in substance, that any person or corporation, before making any excavation in any street or alley, or erecting poles for the placing of electric wires therein, should first obtain authority in writing so to do from the chief engineer of the fire department, and any person or company obtaining such permit was thereby authorized, empowered and entitled to either erect poles or construct

conduits for the transmission of electric current for power and other purposes; that an ordinance was passed and approved in December, 1892, defining the duties of the city electrician of the defendant city, and establishing rules and regulations concerning electric wires and poles, which provided for the procuring of a license from the city electrician, and gave him the power over and control of all wires that might be used to carry an electric current for either light, heat or power. It appears that this ordinance applied to all persons or companies generating electric current for light, heat or power, and recognized the right of any person, company or corporation to furnish electricity for those purposes to whom permits should be granted under the terms of that ordinance; that under its terms permits were granted to the plaintiff company and its predecessor, the Omaha Street Railway Company, for the transmission of electric current for light, heat and power purposes; that the Omaha Street Railway Company began the sale of electric current for power purposes in February, 1892, and for lighting purposes in June, 1892, and the Omaha Street Railway Company and its successor, the Omaha & Council Bluffs Street Railway Company (the plaintiff herein), continued to furnish electric current for light, heat and power purposes to its customers from 1892 to the present time; that as early as 1893 the Omaha Street Railway Company began selling electric current to the board of education of the city of Omaha, to be used for power purposes, and the plaintiff company has continued so to do until a recent date; that under and by the terms of the ordinances above mentioned the plaintiff has contracted with, and has furnished electric current to, the interveners and others, by and with the consent of the city, and under the direction of the city electrician, and has complied with the regulations and ordinances of the city in that behalf.

It further appears that the city by ordinance required the plaintiff company to place its wires used for carrying electric current for power, light and heat purposes in

conduits underground; that by section 1 of an ordinance passed and approved in March, 1902, it was provided: "That all persons and companies owning, maintaining or operating electric wires or other wires in the city of Omaha and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall, on or before the 1st day of October, 1906, place underground all such wires, and after said date no person or companies shall be permitted to maintain in said district in any streets, alleys or public grounds of said city, any electric or other wires, without first complying with the provisions of this ordinance, excepting, however, such feeder and trolley wires as may be used for propelling street cars, and telephone and telegraph wires;" that the ordinance above quoted was intended and did apply to the plaintiff herein, and that thereafter the plaintiff complied with its terms by separating its wires used for the purpose of transmitting electricity for power, heat and light purposes from those used for propelling its street cars, purchased and installed machinery to that end, and placed its wires in conduits underground at a large expense, approximating $140,000; that the plaintiff in furnishing electricity to the interveners and others has since complied with all of the rules and regulations adopted by the defendant city and its electrician; that the interveners, relying upon existing conditions and the facts above stated, have for many years obtained the electric power necessary to conduct and carry on their several lines of business in the city of Omaha, and under present existing conditions are unable to obtain such electric power from any other source.

We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage

in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business, which it has thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein.

A like question was before us in the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, where it was said: "The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter." This is a well-recognized rule of equity, and is supported by *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224; *Chicago & N. W. R. Co. v. West Chicago Park Commissioners*, 151 Ill. 204; *Village of Winnetka v. Chicago & M. E. R. Co.*, 204 Ill. 297; *City of DeKalb v. Luney*, 193 Ill. 185; *Spokane Street R. Co. v. City of Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Town of New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18; *City of Sioux City v. Chicago & N. W. R. Co.*, 129 Ia. 694; *Gregsten v. City of Chicago*, 145 Ill. 451; *People v. City of Rock Island*, 215 Ill. 488. We deem further citation of authorities in support of this rule unnecessary. We are of opinion that the facts of this case bring the defendants within the rule of *State v. Lincoln Street R. Co., supra*, and therefore the judgment of the district court should be affirmed.

Finally, it is suggested by the defendants that, if the

judgment of the district court should be affirmed, the injunction awarded should be modified. We think there is much force in this contention. It appears that the injunction by its terms was made perpetual, and, if not modified, may be at some future time construed so as to forever prevent the city from ousting the plaintiff from its streets and alleys under any circumstances. It seems clear that the operation of the order of injunction should not extend beyond the date of the expiration of the plaintiff's franchise, and that the defendant should only be restrained from interfering with or destroying the plaintiff's conduits, poles, wires and other property without compensation while the present conditions exist, and until the expiration of the plaintiff's alleged or colorable franchise.

It is therefore ordered that the injunction be so modified, and as thus modified the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

SEDGWICK, J., concurs in affirming the judgment of the district court.

ALEXANDER D. GWIN ET AL., APPELLANTS, V. T. HENRY FREESE ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,977.

1. **Taxation**: FORECLOSURE OF LIEN: JURISDICTION. In an action to foreclose a lien for taxes, when the action is against the land itself, and the petition, duly verified, contains the allegation that the owner of the land is unknown, the court will not be without jurisdiction for want of such allegation in the affidavit for service by publication.

2. ———: TAX SALE: COLLATERAL ATTACK. The sheriff's sale, based on such a decree of foreclosure, after it has been examined and confirmed by the court which rendered the decree, is not subject to collateral attack for irregularity.

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

M. F. Harrington, for appellants.

Charles H. Kelsey and *J. W. Rice, contra.*

BARNES, J.

Action in the district court for Antelope county to set aside a sheriff's deed based on a tax foreclosure decree against a quarter section of land situated in that county, and to redeem from the tax lien upon which the decree was based. The defendants had the judgment, and the plaintiffs have appealed.

The plaintiffs' petition in this action sets forth the following facts: That one Charles A. Gwin obtained a receiver's receipt for the quarter section of land in question on the 12th day of July, 1887; that thereafter, and on the 31st day of January, 1890, a patent was issued to him therefor by the United States government, and that he thereby became the owner of the land in fee simple; that he was the owner thereof at the time of his death, which occurred in Antelope county, Nebraska, on the 4th day of December, 1887; that he died intestate, and that plaintiffs are his heirs; that on the 5th day of December, 1900, the county of Antelope commenced an action to foreclose its tax lien, and named Charles A. Gwin, Mrs. Gwin, his wife (name unknown), and the land in question as defendants.

The petition further sets forth the facts relating to the tax lien, together with all of the foreclosure proceedings, including the service, the decree, sale, confirmation and sheriff's deed; and alleged that the district court which rendered the tax foreclosure decree had no jurisdiction of the parties to, or the subject matter of, that action. Plaintiffs also attacked the manner in which the sheriff's sale was conducted. To this petition the defendants filed a

general demurrer, which the trial court sustained. The plaintiffs elected to stand upon their petition, judgment was rendered dismissing their action, and they now contend that the judgment of the district court was erroneous for the reasons above stated.

It is argued that the land in question was not made a party defendant in the tax foreclosure proceeding, and that the affidavit for service by publication was insufficient to confer jurisdiction upon the court to pronounce the decree of foreclosure. It appears from the abstract that the land was named as a party defendant in the title and petition in the foreclosure suit, and in the notice published for service. It was also alleged in the petition that the owner of the real estate in question was unknown to the plaintiff, and the petition was duly verified. By section 1, art. V, ch. 77, Comp. St. 1899, which was in force at the time the foreclosure proceedings were had, it was provided, among other things, that any person might bring an action to foreclose a tax lien; and in the case of *Lancaster County v. Trimble,* 34 Neb. 752, it was held that in a legal sense a county was a person, and that the provisions of article V applied to counties. By section 3, art. V, provided: "All petitions for foreclosure or satisfaction of any such tax lien shall be filed in the district court in chancery, where the lands are situated." By section 4 it was further provided: "Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a nonresident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of the court for the defendant, and the action continued for publication."

The land in question was made a defendant in the foreclosure suit, and the fact that the land was named as a defendant in the plaintiff's petition in that case and in the

published notice for service, together with the allegation contained therein, which was duly sworn to, "that the owner of said real estate is unknown to the plaintiff," was sufficient upon that point to give the court jurisdiction of the cause of action.

It also appears that the usual affidavit for service by publication was filed; that thereupon such substituted service was had, which was regular in all respects; but it is contended that the failure to allege in the affidavit for service by publication that the owner of the land was to the plaintiff unknown rendered such publication void, and therefore the court was without jurisdiction to pronounce the decree of foreclosure. On the other hand, the defendants contend that the statute nowhere provided for the filing of an affidavit in order to procure service by publication where the owner of the land was unknown to the plaintiff.

As far as we are able to ascertain, this question is before us for the first time. The parties have cited no authorities which directly determine this point, and after a somewhat extended research we have failed to find any; but in some of our former decisions, and in tax foreclosure cases determined in other jurisdictions, we find expressions which are of some assistance in disposing of this question. The case of *Leigh v. Green*, 62 Neb. 344, was one attacking a tax foreclosure decree for want of jurisdiction. In that case it appeared that the land was made a party defendant in the foreclosure suit; service was had by publication only; there was an affidavit, alleged to be fatally defective, which contained a statement that the owner of the land was unknown; the decree was held valid and not subject to collateral attack; and it was said, among other things: "One of the grounds urged against the sufficiency of the affidavits is that the object of the action is not set forth. Each affidavit contains the following statement: 'This case is one of those named in section 77, title V, of the code of civil procedure of the state of Nebraska.' In *Majors v. Edwards*, 36 Neb. 56,

this court held that such a statement of the object was sufficient, although at the same time it intimated that the better practice would be to set out the object of the action more fully. But it will be observed that the language above quoted is followed by the further statement, 'and is an action relating to real property in said state, in which the defendants have or claim a lien or interest, actual or contingent, and the relief demanded consists, wholly or partially, in excluding the defendants from any interest therein.' Plaintiff contends that, assuming that the object is sufficiently stated by saying that the action is one of those named in said section 77, the subsequent statement renders the affidavit invalid, for the reason that the object thereby stated is different than that sought in the actions, and that such statement being specific must prevail over the general statement. It must be kept in mind that an affidavit for service by publication is not required for the information of the defendant as to the nature and object of the action. The sole purpose of such an affidavit is to enable the court upon inspection to determine whether the action is one in which jurisdiction may be obtained by service by publication; when it is sufficient for that purpose, it serves the only purpose for which it is intended. The affidavits under consideration, fairly construed, mean that the actions, wherein they were respectively filed, were those named in section 77, title V, of the code of civil procedure, and that the relief demanded consisted in part of excluding the defendant Root from any interest in the lands described. The relief sought by those actions was the foreclosure of certain tax liens on the several subdivisions of the land, and the sale thereof, for the satisfaction of the amount found due. In the petitions filed in the several cases it is alleged 'that the owner of said land is not known, and the defendant Henry A. Root has, or claims, some interest therein.' The prayer of each, in part, is for the adjudication that plaintiff's tax lien is a first lien on the land, and that the deed issued in pursuance of such proceedings be an absolute

bar against each and all of the defendants, and for such other and further relief as may be deemed equitable in the premises. In our opinion, the affidavits were sufficient to advise the court of the nature of the actions, and that the actions were of such a character that it could acquire jurisdiction by service by publication. It follows, therefore, that the affidavits were sufficient for all purposes, especially when assailed in a collateral proceeding."

That case was again before this court, and our former judgment was adhered to. See *Leigh v. Green*, 64 Neb. 533, where it was said: "When the owner of the land is not known to the holder of a tax-certificate, and cannot be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings; and in such case allegations in the petition and an affidavit for service by publication on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack." It was further said: "Whether or not, in such case, the plaintiff may join as defendants persons claiming some interest in the land, if the land is properly made a party, such joinder could at most be an irregularity only, and would not affect the validity of the proceedings when attacked collaterally." It was also held: "If the land is properly made a party, and jurisdiction over it is duly acquired by publication of notice, a sale under decree of foreclosure creates a new and independent title, and bars all pre-existing interests or liens." The petition attacked in that case and the one in the case at bar are alike; and in view of the foregoing, when we take into consideration the fact that our statute, at the time the foreclosure proceeding was had, made no direct provision for the filing of an affidavit in order to obtain service by publication when the owner of the land was unknown, and contained no statement as to what such an affidavit, if it were filed, should contain, together with the fact that the plaintiffs' petition in the foreclosure case contained a positive and direct statement that the owner of the land embraced in the tax lien sought to be

foreclosed was unknown, we are of opinion that the court had jurisdiction in that case, and that the decree of foreclosure which was rendered therein is not subject to collateral attack. Therefore the plaintiffs' contention upon this point cannot be sustained. We are confirmed in this view of the question by Black, Tax Titles (2d ed.) sec. 170; *Payne v. Lott,* 90 Mo. 676; *Goldworthy v. Thompson,* 87 Mo. 233; *Coombs v. Crabtree,* 105 Mo. 292; *Eitel v. Foote,* 39 Cal. 439; and *Truman v. Robinson,* 44 Cal. 623. In the California cases it was held that, where, as in the case at bar, the findings in the decrees were that due and legal service had been made upon all of the defendants, the decrees could not be collaterally attacked on the ground of defective service.

As to the plaintiffs' contention that the sale was void, it may be said that there is no allegation in the petition that it was not necessary to sell the entire tract of land to satisfy the decree; or that any less than the amount sold would have brought enough to discharge the tax lien and costs of foreclosure suit. Again, where it appears, as it does in this case, that the sale was examined and confirmed by the court rendering the decree, that question is not an open one in a collateral attack upon the proceedings in the foreclosure suit.

For the foregoing reasons, we are of opinion that the judgment of the district court was right, and it is therefore

AFFIRMED.

VILLAGE OF SCRIBNER, APPELLANT, V. WILLIAM MOHR ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,538.

1. Hawkers: LICENSES. A grocer who takes orders for goods, fills them at his store and delivers them by wagon to customers in a neighboring village, is not "a hawker of goods by retail, by sample or by taking orders or otherwise," so as to be within

the provision of an ordinance of the village imposing a license tax on such hawkers.

2. Licenses: CANVASSERS. Where such grocer maintains a delivery wagon, and an employee delivers goods previously ordered from him when making a former delivery or which have been ordered by letter or telephone from the customer direct to the store, the fact that a patron receiving goods orders others from the person delivering, not being asked, solicited or requested so to do by him, does not establish the fact of "canvassing or soliciting orders for any article, goods or merchandise," under the provisions of an ordinance imposing a license tax on such occupation, so as to render either the agent or his principal liable for the tax.

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

A. H. Briggs, for appellant.

Courtright & Sidner, contra.

LETTON, J.

The village of Scribner is an incorporated village with less than 5,000 inhabitants. An ordinance of the village provided that a license tax upon each occupation and business therein named was levied "on each hawker of goods by retail, by sample, or by taking orders or otherwise, per day $2.00. This does not include commercial travelers selling only to dealers." Another provision is "on each person engaged in canvassing or soliciting orders for any article, goods or merchandise, except books or printed matter, per day $2.00."

This action is brought to recover the penalty for a violation of these provisions by the defendants. The amended petition charges that the defendant, the Moyune Tea Company, carried on within the village, and on certain specified dates in 1906 and 1907, the business "of a hawker of goods by retail, by sample, or by taking orders or otherwise." Another count is that on the dates specified the defendant, in the village of Scribner, did "engage in

and conduct the business of canvassing or soliciting orders for articles, goods and merchandise, not including books or printed matter, * * * and did so take and receive from divers persons, within said village, orders for such articles * * * without paying the license tax therefor as in said ordinance provided." A verdict was returned for defendants, and from a judgment of dismissal the village of Scribner has appealed.

A number of defenses are pleaded in the answer, but as the case stands we think it unnecessary to do more than refer to two points in order to dispose of appellant's contentions.

The district court instructed the jury that there was no evidence that the defendant or its agent was hawking or peddling goods, and that upon that claim the verdict should be for the defendant, and that the only question for their consideration was whether the defendant, through its agent, was engaged in the soliciting of orders for the sale of goods at retail in the village at any time in the months charged. The plaintiff assigns as error the refusal of the court to give each of instructions Nos. 6, 7 and 8, requested by it. We think the gist of the sixth instruction was given by the court in the second one given upon its own motion. We are also of the opinion that instruction No. 7 was an erroneous statement of the law, and therefore was properly refused. This was the view taken by the district court when it directed the jury that under the evidence in the case the defendant or its agent was not guilty of hawking or peddling goods. The substance of instruction No. 8 was given by the court on its own motion, hence it was not error to refuse it.

The evidence shows that the Moyune Tea Company carries on a grocery business in the city of Fremont, Dodge county, in which county the village of Scribner is situated, that it maintained a delivery wagon and employed William Mohr to deliver groceries, teas and flavoring extracts; that he made periodical visits to the village of Scribner, and that on these visits he would deliver

groceries which had been previously ordered and would receive orders to be delivered later. It also shows that some of the goods delivered by Mohr were ordered by mail or telephone by customers in Scribner. The testimony as to what Mohr actually did in Scribner is meager; but it is to the effect that Mohr delivered goods there at stated periods to fill orders, and that when he did so customers needing other articles would give him orders to be filled at the next delivery. There is no proof that new customers were sought, or that Mohr ever asked for, solicited or requested orders from any person or did any soliciting or canvassing whatever, and there is no evidence of hawking or peddling. We are convinced that the defendant was not a hawker or peddler, so as to be subject to the provisions of the ordinance imposing a tax on hawkers. Webster's New International Dictionary defines "hawker": "One who sells wares from place to place or by crying them in the street;" and under the definition of "peddler" says: "In the United States *peddler* and *hawker* are used as synonymous in statutes regulating the vending of goods." That this is the generally accepted definition in this country, see *City of Davenport v. Rice,* 75 Ia. 74, 9 Am. St. Rep. 454; *Commonwealth v. Farnum,* 114 Mass. 267; *State v. Bristow,* 131 Ia. 664; *State v. Gibbs,* 115 N. Car. 700, 20 S. E. 172; *Village of Stamford v. Fisher,* 140 N. Y. 187.

The jury found that the defendant was not guilty of canvassing or soliciting orders under the other provision of the ordinance. Under the evidence, we cannot see how any other verdict would have been proper. Mohr was not soliciting or canvassing, as these words are usually defined. Webster's New International Dictionary defines the word "canvass": "(2) To solicit or seek orders, contributions, support, subscriptions, votes, or political support before an election, etc.; to solicit, commonly followed by *for,* as to *canvass* for a seat in Parliament; to *canvass* for a book, a publisher, or in behalf of a charity," and defines "solicit": "To ask earnestly; to make petition to;

to appeal to (for something), as, to *solicit* a man for alms. (2) To endeavor to obtain by asking or pleading; to plead for, as to *solicit* an office, a favor, alms." This is the meaning applied in the case of *Ex parte Siebenhauer,* 14 Nev. 365. We are of opinion that under the language of the ordinance the acts of the defendant, so far as the evidence shows, were not in violation thereof.

The judgment of the district court was correct, and is

AFFIRMED.

ANNA KAST, APPELLEE, V. JACOB LINK, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,708.

1. **Assault and Battery:** EVIDENCE. Evidence examined, and *held* to support the verdict.
2. ———: DAMAGES. Instruction set forth in the opinion approved.

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

W. D. Oldham, for appellant.

E. C. Calkins, contra.

LETTON, J.

This is an action to recover damages for assault and battery. The petition alleged that the plaintiff, before the assault, was a strong and healthy woman, earning from $500 to $600 per annum, and that the assault resulted in a permanent injury to her head and nervous system, and has greatly impaired and diminished her ability to work. The answer practically admitted the assault, and pleaded self-defense. The evidence showed that plaintiff and defendant were neighbors, and that as the plaintiff was passing along the highway, looking for some strayed cattle, she met the defendant. Some words passed between them

with reference to the cattle The plaintiff walked on, and afterwards the defendant caught up with her, and after a few words struck her a blow upon the side of the head and also upon the shoulder. The defendant in his testimony admits striking her upon the head, so that the blow "spun her around," but denies a second blow, and says that he did not strike her until she made a threatening movement as if to strike him. The jury returned a verdict for the plaintiff in the sum of $2,000.

Defendant assigns as error that the judgment of the district court is not supported by sufficient evidence; that the damages awarded are excessive; and that the court erred in giving paragraph 8 of the instructions.

It is clear that the first assignment is untenable. Upon the oral argument, the latter two assignments only were discussed.

If the jury believed the testimony of Dr. Smith, the family physician, who attended the plaintiff, the damages are not excessive. He testified that he was called to attend the plaintiff immediately after the assault, and found she had sustained injuries to the right side of the head and on the right shoulder near the shoulder blade, which produced extreme pain; that she was in an apparently prostrated condition, and that the symptoms indicated that she had received a nervous shock, as well as sustaining an injury to the tissues. He was again called to attend her on the 10th, 14th and 28th of April, and one day in May, and medicine was procured from him at intervals until the latter part of October. He testified that as the case progressed there were indications of neuritis and inflammation of the nerves; that she is still suffering from the injury, and that it will take a long time for her to recover. There was some testimony on behalf of the defendant tending to show that the plaintiff was able to perform farm work of a nature sometimes performed by women, such as feeding hogs, and raking hay, although this testimony was contradicted by the plaintiff. There is no substantial conflict in the tes-

timony as to the nature and extent of plaintiff's injuries, and we are satisfied that the evidence amply sustains the award of damages made by the jury. Instruction No. 8 is as follows: "You are instructed that, if from the evidence and instructions in the case you find for the plaintiff, you will then allow the plaintiff damages in such sum as you believe, from all the evidence in the case, will actually compensate her for the injuries sustained by her, if any. You will take into consideration the nature, location and extent of the injury. You will allow plaintiff the fair and reasonable amount of necessary medical services for which plaintiff may have become obligated, if any, and for her loss of time from her occupation, if any. You will also allow plaintiff damages for her mental and physical suffering, if any such has been proved. Mental suffering and physical pain are incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of the particular case. You cannot allow damages by way of punishment. That is for the criminal law, and not for the jury in a civil case. The damages, if any allowed, must be compensatory only." This instruction is complained of on the ground that "it lets in every remote and speculative damage that the excited imagination of the triers of fact might conjecture, whether it be the direct and proximate cause of the injury or not." We think, when considered as a whole, it is not subject to this criticism. It is substantially the same as one which was approved in *McClure v. Shelton*, 29 Neb. 370.

One of the contentions of the defendant, and we think that on which he really relies, is that the verdict is larger than it would have been if the injured person had been a man, instead of a woman, and that the instruction permits the jury to take this fact into account. We are not aware of any distinction in law with reference to the measure of damages in cases where the assaulted person happens to be a woman. It may be true that a gallant

jury may naturally be inclined to award heavier damages where the assailant is a man and the injured person is a member of the gentler sex; but, if the evidence sustains the recovery, a reviewing court can take no account of this tendency.

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

AFFIRMED.

ALBERT W. BRADLEY, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLEE.

FILED OCTOBER 6, 1911. No. 16,471.

1. **Appeal:** INSTRUCTIONS. If a defeated litigant tendered no requests to instruct the jury, a failure by the trial court to include in its charge some principle of law proper to have been mentioned will not justify reversing the case, where the issues are stated and the charge contains no prejudicial misstatements of law.
2. **Railroads:** FIRES: EQUIPMENT. It is the duty of a railroad company to equip its locomotive engines with such appliances for the control of sparks as the progress of science and improvement demonstrate are the best for that purpose, and which are generally known, or should be known, by those in control of the construction and repair of its engines.
3. ———: ———: INSTRUCTIONS: NEGLIGENCE. The plaintiff, in an action against a railroad company to recover damages for an alleged negligent setting out of a fire, has no just ground for complaint because the trial court instructed the jury that the carrier was not guilty of negligence in using lignite coal as a fuel, unless thereby the hazard of fire was so materially increased that a reasonably prudent man would not ordinarily have used the coal for that purpose.
4. ———: ———: EXCLUSION OF EVIDENCE. In an action for negligently setting out a fire, where the particular engine from which the fire escaped is fully identified, it is not error for the court to exclude evidence that on other occasions fire escaped from the defendant's other engines.
5. **Appeal:** INSTRUCTIONS. Where, upon a consideration of the entire record, it is evident that the defendant was not liable, a verdict in its favor should not be disturbed because the instructions in immaterial matters do not accurately state the law.

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

R. A. Batty, T. A. Hollister and *H. F. Favinger*, for appellant.

James E. Kelby and *Frank E. Bishop, contra.*

ROOT, J.

This is an action for damages for the destruction of the plaintiff's barn by a fire kindled, as alleged, by reason of the defendant's negligence. The defendant prevailed, and the plaintiff appeals.

There is practically no conflict in the evidence. The plaintiff principally complains that the instructions are erroneous. Since the plaintiff did not assist the trial court by requests to charge, the instructions should be sustained, unless, when considered together, they are prejudicially erroneous.

The fourth subdivision of the second paragraph of the charge is criticised because the jurors were not told that the defendant was required to equip its locomotive engines "with the best-known appliances for the prevention of the escape of fire." No such burden is by law imposed upon the defendant. If, at the time the fire escaped from the engine, the locomotive was equipped with the best or most improved appliances that were known, or that should have been known, by the defendant, and in general practical use under such circumstances as surrounded the particular locomotive, and these appliances were in good repair, the defendant was not guilty of negligence in the matter of that equipment. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110; *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 86 Mich. 615; *Southern R. Co. v. Thompson*, 129 Ga. 367. The evidence is uncontradicted that at the time the plaintiff's barn was destroyed the locomotive was thus equipped. The assignment must, therefore, be overruled.

Instructions numbered 3 and 4, which relate to contributory negligence, are assailed as not applicable to the evidence. If these instructions were in no manner aided by other parts of the charge, the plaintiff might have cause for complaint; but in the tenth paragraph the jurors were told that contributory negligence could not be predicated upon the plaintiff's proper use of his property, nor was he required to take unusual precautions to protect it; and in the eleventh paragraph the jury were told in precise language that, although the plaintiff failed to use ordinary care to protect his property, he might recover if it "was destroyed as the result of the negligence and carelessness of the defendant company." So, while there seems to be some confusion in the instructions on this subject, and the evidence tending to prove contributory negligence is slight indeed, we do not believe the jury were misled by these instructions.

Instruction numbered 6 is criticised. It informed the the jury that the defendant should not be held negligent in using lignite coal for fuel in its locomotive engines, unless that use so materially increased the hazard of fire that a reasonably prudent man would not ordinarily have used the fuel. We find no allegation in the petition that the defendant was negligent in using lignite coal; but evidence was received without objection on this point, and it may be considered as an issue tried by the parties. Without deciding whether the plaintiff might predicate a right of recovery upon the particular kind of fuel consumed in the locomotive engine, we are of opinion that in any event the instruction is as radical as the plaintiff had a right to demand. *Raleigh Hosiery Co. v. Raleigh & G. R. Co.*, 131 N. Car. 238, 42 S. E. 602.

The district court was right in excluding evidence tending to prove that on other occasions sparks emitted from the defendant's locomotive engines kindled fires in the town of Juniata. The evidence definitely identified the particular locomotive responsible for the fire, if it was caused by sparks emitted from the defendant's engine,

and the evidence was properly confined to the condition of that machine. *Abbott v. Chicago, B. & Q. R. Co.*, 88 Neb. 727.

The plaintiff's brief contained an admission that the spark arrestors in the defendant's locomotive were in no manner defective. The evidence is uncontradicted that none better were then in use and known to those in charge of the construction and repair of the defendant's engines, and there is no evidence tending to prove that those officials should have known of superior devices for that purpose. The evidence is also uncontradicted that there was nothing unusual in the management of the locomotive at the time the fire was set out. The engineer and fireman were skilled mechanics, accustomed to the particular run, and exercised care in controlling the engine and the fire therein. If it be conceded that the defendant's witnesses told the truth, and we detect nothing unreasonable or improbable in their testimony, the defendant was not liable for the destruction of the plaintiff's property. We do not approve all of the court's charge, but we are convinced there is nothing therein that could have misled the jury.

Finding no error prejudicial to the plaintiff, the judgment of the district court is

AFFIRMED.

ALGERNON S. PATRICK, APPELLEE, V. GEORGE E. BARKER, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,472.

1. **Appeal:** PETITION: SUFFICIENCY: CONCLUSIVENESS OF FORMER DECISION. "A decision of this court holding that a petition states a cause of action is an adjudication that the facts pleaded will, if admitted or proved, entitle the plaintiff to the relief demanded." *Smith v. Neufeld*, 61 Neb. 699.

2. ———: VARIANCE. "A judgment will not be reversed for a variance between plaintiff's allegations and his proof, unless it is

clearly shown to be material and that the defendant has been misled thereby to his prejudice in making his defense." *Westing v. Chicago, B. & Q. R. Co.*, 87 Neb. 655.

3. ———: EXCLUSION OF EVIDENCE. Where excluded evidence is not material, unless other proof is made, and no evidence is received or offered to establish that proof, such exclusion will not justify reversing a judgment of the district court.

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

W. J. Connell and *Walter P. Thomas*, for appellant.

John L. Webster and *Robert W. Patrick*, *contra.*

ROOT, J.

This is the second appeal in this action. In our first opinion, reported in 78 Neb. 823, we held that the facts stated in the petition stated a cause of action in the plaintiff's favor; that the defendant's promise was several; and that the judgment in the foreclosure suit, prosecuted by the National Bank of Commerce against Grossman and the plaintiff, did not bar the instant action. It follows that, if the proof sustains the allegations in the petition, and the defendant has not by plea and proof avoided the effect thereof, the judgment must be affirmed, unless prejudicial error was committed during the trial. *Smith v. Neufeld*, 61 Neb. 699.

The testimony is in sharp conflict, but if the jury believed the plaintiff and his witnesses the evidence sustains the verdict. The argument that the evidence definitely establishes a contract within the statute of frauds cannot be accepted to overturn the decision of this court on the former appeal, because the evidence does not refer to a contract, other than the one pleaded by the plaintiff. Upon the authority of our former decision, the contract is held not to be within the statute of frauds. Likewise that decision disposes of the contention that the contract is not several, and the defense of *res adjudicata.*

The argument that there is a fatal variance between the pleading and the proof does not appeal to us. It is true that the evidence tends strongly to prove that Messrs. Barker and Johnson did not contemplate organizing the National Bank of Commerce at the time the plaintiff and his brother were solicited to subscribe to the stock of the state bank; but there is some evidence to the contrary, and the variance, if it exists, is not material. The consideration would exist in either event. *Trenholm v. Kloepper,* 88 Neb. 236. The variance, if any, is controlled by section 138 of the code, which provides, in effect, that a variance will not be deemed material, unless the adverse party has been thereby actually misled to his prejudice in a material matter. *Westing v. Chicago, B. & Q. R. Co.,* 87 Neb. 655.

The defendant further contends that in the settlement made by the plaintiff with the National Bank of Commerce the stock of that bank was received as a credit in the sum of $3,000, and that the court erred in not permitting the defendant to testify to the value of the stock—that it was valueless. The testimony of the plaintiff that he sold the stock to Mr. Evans, president of the bank, for $3,000 before the settlement of the deficiency judgment and the claim against the estate of M. T. Patrick, and that by this sale and the delivery of the plaintiff's check these judgments were paid, is uncontradicted; and while it may be, as the defendant contends, that Mr. Evans purchased for the bank, and that no money was paid or credits transferred by Evans to it, those facts do not appear from a consideration of the evidence. In the state of the record, we are inclined to the belief that no prejudicial error was committed by this ruling. The other errors assigned do not seem of sufficient importance to justify extending this opinion by specific reference thereto.

Not having found in the record error prejudicial to the defendant, the judgment of the district court is

AFFIRMED.

FAWCETT, J., concurring.

I am not entirely in harmony with our former opinion (78 Neb. 823); but, under the well-settled rule, that opinion has become the law of the case. For that reason alone, I concur.

WILLIAM A. MARTIN, APPELLEE, V. GEORGE W. HUTTON, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,500.

1. **Action:** MONEY HAD AND RECEIVED. An action for money had and received will lie to recover money secured from the plaintiff, without consideration, in reliance upon fraudulent representations made by the defendant.

2. **Fraud:** FALSE REPRESENTATIONS. "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Perry v. Rogers*, 62 Neb. 898.

3. **Action:** MONEY HAD AND RECEIVED: FALSE REPRESENTATIONS. Where a defendant by the use of fraudulent representations induces a proposed entryman of government land to believe that the land he desires has been entered, but that the defendant will secure a reliquishment of that entry if paid a sum of money, and the money is paid in good faith upon the strength of those representations, the entryman, upon discovering the truth, may maintain a suit in the nature of an action for money had and received, and will not be required to abandon the land as a condition precedent to maintaining the action.

4. **Principal and Agent:** PROOF OF AGENCY. The fact of agency may be proved by circumstantial evidence.

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

J. E. Porter and *A. W. Crites*, for appellant.

A. M. Morrissey and *A. G. Fisher, contra.*

ROOT, J.

This is an action for money had and received. The plaintiff prevailed, and the defendant appeals.

The plaintiff formerly resided in Iowa; the defendant, a real estate agent, resides in Dawes county, Nebraska. October 2, 1906, Shell Woodard, a resident of Iowa, accompanied the plaintiff and one or more other persons from Iowa to Nebraska and introduced them to the defendant. Mr. Hutton, while exhibiting several tracts of land to the land seekers, represented to the plaintiff that a certain quarter section was not subject to entry because of a homestead filing thereon, but that he (Hutton) would secure a relinquishment of that filing for $2 an acre, or $320 all told. The defendant denies making the statement, but the proof, including his own letters, contradicts him. Hutton prepared a written contract, which was signed by both parties, by the terms whereof he agreed, for the consideration of $320, to secure for the plaintiff "homestead papers in legal form on the southeast quarter of section 18," etc. The plaintiff paid Mr. Hutton $65 in cash, gave two promissory notes for $80 each, and agreed to pay the remaining $95 shortly after returning home. The plaintiff then went before a United States commissioner and executed a proper affidavit for a homestead entry of the quarter section, and it was transmitted by Mr. Hutton to the land office. Subsequently the plaintiff paid the $95 to Shell Woodard's father. The defendant prayed for a judgment on the notes and for no other affirmative relief.

The court instructed the jury, in substance, that the burden was on the plaintiff to prove by a preponderance of the evidence that the false representations were made by the defendant and relied on by the plaintiff, and, if made, the plaintiff should recover the $65, with interest; and, if they further found by a preponderance of the evidence that Woodard had authority to collect the $95, the plaintiff should recover that further sum, with interest;

but, on the other hand, if the plaintiff failed to establish his right to recover, they should return a verdict for the defendant for the sum of the notes, plus interest thereon.

It is first complained that the plaintiff's right of action was upon the written contract, and that certain allegations in the reply were a departure therefrom. The action is not upon the written contract, but upon the implied promise of the defendant to return the money which he secured by fraud and without consideration.

It was admitted during the trial that the quarter section was subject to entry at the time the contract was made. There was therefore no consideration for an agreement to pay for a relinquishment, nor to support the payment when made. Money thus paid may be recovered back in an action of this character. *Rogers v. Walsh & Putnam*, 12 Neb. 28; *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15. The plaintiff was not required, as a condition precedent to prosecuting this action, to rescind the contract. The defendant did not own the land, was not the government's agent, and gave the plaintiff nothing except information concerning the location of the real estate.

The defendant is in no position to assert that, because the government records were open to inspection, the representation was immaterial. It is enough that the plaintiff believed the statement, that inquiry was necessary to discover the truth, and that he parted with his money on the strength of the representation. Nor does the defendant's liability depend upon his knowledge that the representations were false. *Gerner v. Mosher*, 58 Neb. 135; *Omaha E. L. & P. Co. v. Union Fuel Co.*, 88 Neb. 423.

The defendant argues that there is no proof of Woodard's authority to collect the $95. There is no direct proof of the fact; but there is evidence tending to prove that there was an agreement between the defendant and each of the Woodards, by the terms of which they divided profits made from customers sent to the defendant or by him to either of them. It is true that Shell Woodard, and

not his father, who collected the $95, accompanied the plaintiff to the defendant's office; but it is also true that the elder Woodard had possession of the notes from November, 1906, until his death, and that the defendant, in suing for the balance due him on the contract, did not include the $95. Omitting this item from his demand was a practical admission by the defendant that it had been satisfied by the payment to Woodard, and this admission included a concession that Woodard had authority to collect. Agency, like any other condition or fact, may be established by circumstantial evidence. *Stewart v. Cowles,* 67 Minn. 184; 31 Cyc. 1661. We think there is sufficient evidence to justify submitting the fact to a jury.

The defendant's contention that he should be paid the reasonable value of his services as a locator cannot be considered, because no demand is made therefor. The defendant relies solely upon his contract, which makes no reference to such services.

Some irrelevant evidence was received during the trial, but it could not have misled the jury. The defendant's liability is plain, the only doubtful question being Woodard's agency, and upon that issue the irrelevant evidence could not have influenced the verdict.

The judgment of the district court, therefore, is

AFFIRMED.

FURNAS COUNTY, APPELLANT, V. CHARLES M. EVANS ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,544.

1. Counties and County Officers: COUNTY TREASURER: LIABILITY ON BOND. A county treasurer who receives money or anything of value in consideration for the use of the county funds is liable upon his bond for that profit.

2. ———: ———: ACTION ON BOND: PETITION: SUFFICIENCY. In an action upon a county treasurer's official bond, a petition states

facts sufficient to constitute a cause of action if the pleading, considered as a whole, in substance charges that subsequent to the enactment of chapter 50, laws 1891, the treasurer received interest upon county funds deposited by him in various banks, and did not account therefor.

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

R. J. Harper and *Adams & Adams*, for appellant.

Perry, Lambe & Butler, W. S. Morlan and *J. F. Fults, contra.*

ROOT, J.

This is an action upon the official bond of a former treasurer of Furnas county. The defendants' general demurrer to the petition was sustained, and the plaintiff appeals.

The pleader alleged the plaintiff's corporate character; that the defendant Evans was elected as county treasurer for the years 1902 and 1903, and executed the bond in suit, which is conditioned as follows: "The condition of the above obligation is that, whereas the above bound C. M. Evans has been elected county treasurer in and for Furnas county, Nebraska: Now if said C. M. Evans shall render a true account of his office, and of the doings therein, to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officers entitled thereto all moneys which may come into his hands by virtue of his said office, and shall faithfully account for all the balances of money remaining in his hands at the termination of his office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers and sureties or other property appertaining to his said office and deliver them to his successor, or to any person authorized to receive the same, and he shall faithfully and impartially without fear, favor, fraud or oppression, dis-

charge all other duties now or hereafter required of his office by law, then this bond to be void, otherwise in full force."

The plaintiff also alleged that the bond was accepted and approved and the treasurer inducted into office. The pleader also charges: "That during the term aforesaid for which the said defendant had been elected to said office, pursuant to the laws of the state of Nebraska, many banks in said county, among which were the Citizens State Bank, First State Bank, Wilsonville State Bank, applied to the county commissioners of the plaintiff county for the privilege of becoming depositories of the county's funds, and each and all of said banks entered into obligations which were approved by the county commissioners, the amounts of said obligations and dates of approval being as shown by exhibit A, hereto attached and made a part of this petition, whereby they became depositories of said county, the plaintiff herein, from the date of the approval of said bonds, and entitled to receive on deposit from the said county treasurer the surplus funds of the said county, thereby obligating themselves and agreeing to pay as interest for the privilege of keeping said moneys interest at a rate of not less than 3 per cent. per annum, to be computed on the average daily balances of such deposits, for each quarter of the year, and to be paid to said defendant Charles M. Evans, as county treasurer, and as agent of the plaintiff county, quarterly.

"The plaintiff further alleges and represents to the court: That, by virtue of the foregoing premises, the defendant Charles M. Evans, from the commencement of his said term of office and during the whole of said term, deposited large sums of the county's money in the above mentioned banks, and in other banks, the names of which and the amounts deposited therein being unknown to this plaintiff, and the plaintiff charges the fact to be that the average daily balances for the term so deposited by him in said depository banks and other banks were as follows:

For the first quarter of the year 1902, ending March 31, $30,831; for the second quarter of the year, ending June 30, $36,509; for the third quarter, ending September 30, $31,767; for the fourth quarter of said year, $26,066; for the first quarter of the year 1903, $28,472; for the second quarter, $34,592; for the third quarter of the year 1903, $26,964; for the fourth and last quarter, $29,685; that the amount of interest so earned and the reasonable value thereof, by reason of said deposits in the various banks wherein it was kept during his said term of office, was the sum of $1,836.65. Of said interest so earned, the said defendant has accounted for and paid to the county, plaintiff herein, and received credit for, the sum of $540, and no more, thereby leaving a balance due plaintiff from said defendant in the sum of $1,296.65.

"The plaintiff alleges that the said defendant, Charles M. Evans, in violation of his oath of office, of his bond, and of the laws of the state of Nebraska, regulating the safe keeping, the depositing, the management and control of the county's funds, has carelessly, negligently and wilfully failed and refused to account to this plaintiff for the amount so received and collected by him, and which he was in duty bound to collect, or he has collected the same and converted it to his own use, wrongfully and wilfully, to the plaintiff's damage in the amount above stated, and, although often requested, still refuses to pay the same to this plaintiff."

During the hearing on the demurrer, counsel for the plaintiff admitted in open court "that the defendant Charles M. Evans, as county treasurer, duly deposited and kept in the depositories mentioned in the plaintiff's petition the full amount as prescribed by law that he might deposit under the bonds set forth in said petition, and that on the deposits as made he collected and accounted for all interest earned on the amounts of money so deposited up to the amount prescribed by law that he ought to have deposited under the bonds as filed and approved by the county board." The transcript does not

contain a copy of the exhibits which are part of the petition, but the admissions in the defendants' briefs demonstrate that the penalty in all of the depository bonds aggregated but $20,000; $10,000, therefore, was the maximum amount that could lawfully have been deposited in those banks at any one time. It follows from a consideration of the petition that the treasurer's deposits at times were $26,500 in excess of the amount he could lawfully have deposited, unless he was within the exception noted in *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280. The treasurer accounted to the county for interest on not to exceed $10,000.

The allegations in the seventh paragraph of the petition that the treasurer "has carelessly, negligently and wilfully failed and refused to account to this plaintiff for the amount so received and collected by him, and which he was in duty bound to collect, or he has collected the same and converted it to his own use, wrongfully and wilfully, to the plaintiff's damage in the amount above stated," etc., are indefinite, but when taken in connection with the other parts of the petition, as against a general demurrer, should be construed at least to charge that the treasurer collected $1,296.65 as interest on these deposits, and did not account therefor, but converted it to his own use. Since the code does not permit a demurrer for uncertainty, a litigant's remedy for alternative or otherwise indefinite statements is by motion. The defendants elected to test the pleading by demurring thereto, and, having thereby admitted the verity of all of the allegations of fact well pleaded therein, must abide the legal consequences flowing therefrom.

During all of the time the treasurer held his office, section 21, art. III, ch. 18, Comp. St. 1901, was in force, and by its terms the treasurer and his bondsmen were held for any profit realized by him for the unlawful use of the county funds. Section 21, *supra*, in concise terms forbids the treasurer loaning, depositing or otherwise using or disposing of those funds, except by placing them

in a depository or by paying warrants lawfully drawn thereon. *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280, construes this section to contain an exception which permits the treasurer to lawfully deposit money in non-depository banks in case the maximum deposits have been made in the depositories, if the place provided by the county for safe keeping its funds is insecure, and the treasurer in good faith deposits the surplus funds without directly or indirectly receiving any profit therefrom. In this case the treasurer is not within the exception established by the *Hamilton County* case, *supra*.

It is argued that the statute does not hold the treasurer responsible for interest, but for profits realized for the use of the county funds; that "profit is the acquisition beyond expenditure, excess of value received for producing, keeping or selling over cost," and that the plaintiff does not allege that the treasurer profited by the transaction. In other words, that he may have been compelled to make good out of his private funds some of the principal of the deposits, and therefore it does not appear that he profited by the transaction pleaded. We do not think it necessary to consider abstract definitions of the word profit. The statute contains satisfactory internal evidence that the legislature intended the word to describe interest collected by the treasurer. "The making of profit, directly or indirectly, by the county treasurer out of any money in the county treasury belonging to the county, the custody of which the treasurer is charged with, by *loaning* or depositing or otherwise using or depositing the same in any manner, * * * except * * * shall be deemed guilty of felony, * * * and * * * shall also be liable under and upon his official bond for all profits realized from *such* unlawful using of such funds." Comp. St. 1901, ch. 18, art. III, sec. 21. Plainly the unlawful use may be accomplished by loaning the funds, depositing them, or by any use whereby, directly or indirectly, the treasurer profits by the transaction. If, as charged in the petition, the treas-

urer did collect and convert to his own use interest for the use of the plaintiff's funds, the defendants are liable to the plaintiff for that profit. The petition states a cause of action, and the district court erred in sustaining the demurrer.

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

REVERSED.

JAMES H. HILL, APPELLEE, V. JOHN W. HILL, JR., TRUSTEE, APPELLANT; SARAH E. HILL ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 17,079.

1. Wills: CONSTRUCTION: "HEIRS." A devise to the testator's "lawful heirs" should be construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will.

2. ———: ———: VESTED AND CONTINGENT DEVISES. If a future time for the enjoyment of a devise is fixed by the will of a testator, the devise will be vested or contingent according as, upon a consideration of the entire will in the light of the circumstances surrounding the testator at the time it was made, it is evident he intended to annex the time to the enjoyment of the devise, or to the gift of it.

3. Trusts: CONSTRUCTION. A bequest to A to hold personal property, or a devise to hold the title to real estate, in trust for B, but with no duties to perform and no estate in remainder or gift over, vests in the trustee a naked, legal title, and none other.

4. ———: ENFORCEMENT: EQUITY. In that event, if B is of full age and competent, not a spendthrift, and there is no restraint upon his right to sell or incumber his estate, a court of equity at his suit may lawfully require A to yield possession and control of the estate to B, and may compel the trustee to convey the estate to whomsoever B directs.

5. ———: APPEAL: DECREE: HARMLESS ERROR. If the court in such an action requires the trustee to convey to B, the error, if any, is without prejudice to A.

6. Wills: CONSTRUCTION. It is the duty of the courts in construing a will to carry into effect the true intent of the testator, so far as that intent can be collected from the whole instrument, if not inconsistent with the rules of law; but the law imputes to the testator a knowledge of those rules, and he will be presumed to have executed his will with an understanding that the objects of his bounty may demand their portions in accordance therewith.

7. Trusts: ENFORCEMENT: EQUITY. An order by a county court directing an administrator with the will annexed to deliver to a testamentary trustee possession of all property affected by that trust, but in no manner defining the rights of the *cestuis que trustent*, presents no bar to an action in equity by the *cestuis que trustent* against the trustee to compel him to deliver possession of the property, and in effect to dissolve the trust.

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

Frank T. Ransom and *Ellery H. Westerfield,* for appellant.

O'Harra & O'Harra, Isaac E. Congdon and *Henry E. Maxwell, contra.*

ROOT, J.

This is an action to require a trustee to pay to the plaintiff the net income of his alleged share of an estate; those defendants, who also contend that they are beneficial owners of shares of that estate, pray that the trustee be required to convey the entire estate to the equitable owners thereof. The cross-complainants prevailed, and the trustee appeals.

The instrument involved in this controversy is the last will and testament of Lew W. Hill, deceased, and is as follows: "I, Lew W. Hill, hereby make and declare this my last will: I will and bequeath to my nephew, John W. Hill, Jr., in trust for my lawful heirs, all my estate, both real and personal, of every kind and nature, to be held by said trustee for the term of five years, and to be

distributed among my lawful heirs at the end of such period. Dated this 13th day of July, 1908."

The testator, a wealthy bachelor residing in Omaha, executed the will during his last illness and three days before his death. After the estate was administered, the county court ordered the administrator with the will annexed to deliver to himself as trustee all of the estate, and he complied with the order. At the time the will was executed, Lew W. Hill's heirs presumptive were the plaintiff, then 73 years of age, the defendant John W. Hill, Sr., then 70 years of age, and two sons and a daughter, sole children of the testator's deceased sister, Mary Wilson, each of whom was past 30 years of age. All of those heirs survived the testator, and were parties to this action. The niece died after this suit was commenced, and the action has been revived in the name of her legal representatives.

The evidence is meager, but it appears therefrom that all of the testator's heirs were, and that the survivors are, competent to transact business, and that none of them are spendthrifts. The plaintiff is a man of but little means, and works at his trade as a painter. There is no proof to so much as suggest that the testator entertained unkind feelings towards any of his relatives.

If we understand the argument in the trustee's brief, his contention is that the will devises the estate to a class to be ascertained five years subsequent to the testator's death, at which time, and not before, the devisees, other than the trustee, take a vested estate; that preceding this event the trustee has the sole right to manage and control the estate; that the decree of the county court is a bar to any action having for its purpose the diversion of that estate from the possession of the trustee, and that in any event an action in equity will not lie.

We discover nothing in the will to suggest that the devisees did not take a vested present estate. The testator does not say that the devise is to those of his heirs who shall survive five years subsequent to his decease, nor

does he by any condition, precedent or subsequent, restrict the distribution of his estate to his heirs in being at that time. The will contains but one sentence, and, by the identical words which devise a legal estate to the trustee, an equitable estate is devised to the testator's lawful heirs.

The general rule seems to obtain that a devise or bequest to "heirs at law" or "heirs" of a testator should be construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will. *Abbott v. Bradstreet,* 3 Allen (Mass.) 587; *Minot v. Tappan,* 122 Mass. 535; *Dove v. Torr,* 128 Mass. 38; *Cummings v. Cummings,* 146 Mass. 501; *Boston Safe Deposit & Trust Co. v. Parker,* 197 Mass. 70; *Allison v. Allison's Exr's,* 101 Va. 537; *In re Tucker's Will,* 63 Vt. 104.

No special significance should be given to the fact that the testator did not name his heirs presumptive; the document evidences either extreme haste in preparation or a desire for such brevity that details were sacrificed to comprehensive terms. There is nothing in the record, other than the will, to suggest that the testator did not intend to permit his elder brother, who had outlived the scriptural span of life, to receive a part of the testator's estate, unless that brother survived his seventy-eighth birthday. The estate is of such magnitude that it is not necessary to take from the portion of one devisee for the benefit of another in order that the latter may be supported in reasonable comfort upon the income from the devise. There is nothing in the terms of the will or in the circumstances of the case to convince us that the testator did not intend to benefit every person who at the time of the testator's death was one of his heirs. It is argued, however, that time was annexed to the substance of the gift, and therefore the estate will only vest in those of the class who survive at the time fixed for distribution.

We may safely accept the rule quoted by the trustee from 2 Williams, Executors (7th Am. ed.) p. 515: "When

a future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent, according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it." So, if the gift be independent of the direction to pay, the estate will ordinarily vest. As we have seen, the gifts in the instant case do not depend upon directions to pay or transfer at a future date, but are given by direct language in the present tense in a clause in nowise dependent upon the directions to distribute. The estates therefore are not contingent, but certain. 2 Jarman (Sweet) Wills (6th ed.) p. 1358; Theobald, Wills, p. 583; Kales, Future Interests, sec. 210; *Ruffin v. Farmer, Adm'r,* 72 Ill. 615; *Marsh v. Wheeler,* 2 Edw. Ch. (N. Y.) *156; *Goddard v. Johnson,* 31 Mass. 352; *Andrews v. Russell,* 127 Ala. 195.

The trustee contends that in any event he is entitled to the possession and control of the estate for five years subsequent to the testator's death, and that in the meantime none of the devisees should receive any part of the rents and profits growing out of the estate. There is some inconsistency in the attitude of the devisees; the plaintiff announces in his petition that he is content to receive a third of the net increase of the estate; the defendant, John W. Hill, Sr., in substance states in his answer that he is willing the trustee should continue in possession of the trust estate; whereas the nephews and the niece, who by representation contend for one-third of the estate, insist that the trust shall be dissolved and the entire estate delivered to the *cestuis que trustent.* The trustee is the son of John W. Hill, Sr., and it is more than probable that no serious conflict will arise between them, should it be determined that the decree of the district court should be affirmed. The plaintiff, while contending in his petition for the net income of his portion of the estate, in this court defends the decree of the district court. It will be observed that the will vests the trustee with no power and defines no duty which he is to per-

form, save that he is to "hold" the estate. It may be suggested that he is charged with the duty of distributing the estate, but such construction must be by implication. The major part of the estate consists of farms and city lots; there is no direction to the trustee to convert this real estate into cash and distribute the proceeds. The distributive shares of the personal estate may readily be paid therefrom, and the devisees will take the real estate as tenants in common. The trust created, therefore, was passive, vesting in the trustee a dry, naked title. The effect being, so far as the real estate is concerned, if the statute of uses were part of the law of this state, to vest immediately the legal title as well as the beneficial use in the *cestuis que trustent.* 1 Perry, Trusts (6th ed.) sec. 298; 2 Jarman (Sweet) Wills (6th ed.) p. 1813; *In re Jacob's Will,* 29 Beav. (Eng.) 402; *Gosling v. Gosling,* Johns. (Eng.) 265; *Woolley v. Preston,* 82 Ky. 415; *Henderson v. Adams,* 15 Utah, 30; *Wellford v. Snyder,* 137 U. S. 521; *Martin v. Fort,* 27 C. C. A. 428. But it is said this principle does not apply because this court, in *Farmers & Merchants Ins. Co. v. Jensen,* 58 Neb. 522, held that the statute of uses had not been adopted as part of our system of conveyancing. Granting this to be true, and giving the cited opinion the scope contended for by the trustee, the law should be considered as though parliament had not enacted the statute, 27 Henry VIII, ch. 10. In that event, the power of the chancellor to compel the trustee to account for, and, if he had no duty other than to hold the legal title to the estate, to require him to deliver over, that estate to his *cestuis que trustent,* would be unquestioned. Lewin, Trusts (11th ed.) pp. 16, 849.

Section 9, art. VI of the constitution, among other things, provides that the district courts shall have chancery jurisdiction. The district court, therefore, had authority in the premises. In the instant case the testator did not provide that the devisees should not alienate their interests in his estate; did not provide that upon a contingency any portion of the estate should go over by way of an executory devise or otherwise; did not direct the

trustee to lease the land or collect the rents and profits; did not direct him to pay taxes or insure the buildings, loan money, collect the principal or interest, due or to become due, upon the certificates of deposit, promissory notes or land contracts, which form the bulk of the personal estate. The trustee is not charged with the duty of paying any of the heirs' debts nor is he required to pay for their support, nor to expend money for any purpose whatsoever, nor to distribute the estate. The *cestuis que trustent,* therefore, by long-established and well-known rules of law, are entitled to not only the enjoyment, but the immediate possession, of their portions of the estate. *Atkins v. Atkins,* 70 Vt. 565; *Jasper v. Maxwell,* 1 Dev. Eq. (N. Car.) 361; *Rector v. Dalby,* 98 Mo. App. 189, 71 S. W. 1078; *Rife v. Geyer,* 59 Pa. St. 393, 98 Am. Dec. 351; 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 988. The *cestuis que trustent* may also lawfully require the trustee to execute such conveyances of the legal estate as they may direct. 2 Perry, Trusts (6th ed.) sec. 520. It may be that the district court would have more nearly conformed to the law, had it not ordered the trustee to convey to the various *cestuis que trustent* the legal title to the property in controversy, but had directed him to convey to third persons during the five years, if so requested by the beneficiaries. If there is any error in this regard, it is without prejudice.

It is argued that the district court ignored the expressed intent of the testator that his estate should not be distributed for five years, and thereby the will was destroyed. But the law imputes to the testator a knowledge of its rules; he will be presumed to have known that it was optional with the devisees to permit the trustee to exercise dominion over the estate or to call upon him to convey, and that they would have a lawful right to call a court of equity to their aid to compel him to deliver possession of the estate or to convey the legal title. The district court therefore did not disregard the testator's intent.

The contention that the plaintiff had an adequate remedy at law by an action in replevin or of conversion for his portion of the personal estate, and by an action in ejectment for his share of the real estate, is not well taken. Having held that the statute of uses is not in force in Nebraska, a court of equity is the proper forum to call the trustee to account and to make such orders as justice and equity demand with respect to the trust estate. 2 Story, Equity Jurisprudence (13th ed.) sec. 1058.

But it is said that the decree of the county court is a bar to this action. The county court did not determine or attempt to decide that the trustee was seized of any particular estate in the property of the deceased, or to adjudicate the rights of the *cestuis que trustent*. The administrator with the will annexed was permitted to exonerate himself and his bondsmen from further liability by delivering the estate to himself as trustee. The fact that the trustee, at the suggestion of the parties interested, executed a bond to the county judge and to his successors in office to account for the choses in action and the personal estate of the deceased at the end of the five year period was not a determination of the rights of any devisee under the will. Section 16, art. VI of the constitution, withholds from the county courts jurisdiction to determine actions where the title to real estate is sought to be recovered or is drawn in question; and while that court might lawfully make an order upon proper notice, which when obeyed by the administrator with the will annexed would protect him in delivering possession of the real estate owned by the testator at the time of his decease, it would not estop those devisees from litigating their rights in the district court in a proper action with respect to that title. The county court did not attempt to construe the trust, so far as it affected the personal estate, and the decree of the district court, in the instant case, reserved for further determination the distribution of that property. The construction given by this court to

the trust will, however, control the parties, not only in the disposition of the real, but also with respect to the personal, estate.

Finding no prejudical error in the record, the decree of the district court is

AFFIRMED.

WILLIAM WERGER, APPELLEE, V. JOHN B. STEFFENS, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,504.

Damages: EVIDENCE. In a suit for injury to realty and for conversion of personalty transferred therewith by defendant to plaintiff, it is error to permit the latter, over the former's objections, to show the entire damage by answering a question calling for the difference in value of the farm before and after the injury and conversion.

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

George W. Berge, for appellant.

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

ROSE, J.

Plaintiff bought from defendant an improved farm in Lancaster county and went into possession under a warranty deed. This is a suit to recover from defendant damages for digging up and carrying away rosebushes, tearing down and removing fences, detaching clock-shelves and other fixtures from the buildings, and converting to his own use a pile of fence posts, a roll of wire, a few movable hen nests, a lot of loose lumber and other property. The petition states that defendant sold the converted personalty to plaintiff with the farm, and that he injured the realty after the sale. Under the pleadings

plaintiff was required to make proof of the damages sustained and of defendant's liability. The jury rendered a verdict in his favor for $700, and from a judgment for that sum defendant has appealed.

As a witness in his own behalf plaintiff was asked this question: "Well, now will you say, if you know, what was the difference in value of that farm as you bought it with all those various things on it that you say the defendant had removed prior to or immediately following his deeding it to you and the condition of the farm at the time those things were removed by the defendant; what is the difference in value, if any?" Over the objections of defendant it was answered as follows: "I should judge for my part somewheres like $700 or $800. It looked all of that to me bad, all of that." The overruling of the objections is assigned as error, and the answer of the witness is the only evidence of the amount of damages sustained. A considerable portion of the property in controversy was personalty. The measure of damages for the conversion of chattels is their market value at the time of the conversion. This value can only "be properly ascertained by the testimony of witnesses possessed of sufficient information to enable them to give intelligent opinions upon the subject." *Peckinbaugh v. Quillin*, 12 Neb. 586. To permit the witness, in proving the damages for the loss of the personalty, to state the difference in the value of the farm before and after the conversion is, of course, erroneous. The question was not in proper form, had it related alone to realty. The answer quoted being the only proof of the value of the converted chattels, was the error prejudicial to defendant? In testifying, the witness had described to some extent the personal property in controversy, but in a number of instances he did not pretend to give the quantity or quality with any degree of accuracy. He did not testify to the value of any separate item or state that he knew the value thereof. He did testify, however, that he had lived on a farm for 40 years, but when asked, "You know something about the value of con-

veniences on the farm, do you?" he answered, "I can tell a good-looking farm from a poor one." There is no better evidence of his qualifications to testify to the value of the converted personalty than that mentioned. In addition, most of the witnesses who heard the conversation between plaintiff and defendant in relation to the property purchased testified to statements indicating that plaintiff bought nothing but the real estate and what was attached to it. On the face of the record the error was clearly prejudicial. A similar mistake was made in the charge to the jury and should not recur in the further proceedings.

REVERSED AND REMANDED.

HERBERT M. ANDERSON ET AL., APPELLANTS, V. R. C. NOLEMAN ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,514.

Evidence. Where the evidence relating to an issue of fact in an equity case is in direct conflict, the finding should be in favor of the party whose proofs are the more convincing, after all of the competent testimony and the credibility of the witnesses have been considered.

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

William Mitchell and *Eugene Burton,* for appellants.

Boyd & Barker, contra.

ROSE, J.

This is an action to quiet title to a quarter section of land in Box Butte county. The district court rendered a decree in favor of defendants, and plaintiffs have appealed.

Plaintiff Herbert M. Anderson became the patentee January 13, 1894. To secure a 200-dollar note, he and his wife had mortgaged their interest in the land to the Bank of Commerce of Grand Island May 19, 1893, and subsequently Daniel Richey by assignment became the owner of the security. Anderson neither paid the amount due on the note nor the taxes levied against the land. At private tax sale T. M. Lawler purchased the property from the county treasurer, and commenced a suit to foreclose his tax lien October 1, 1903. By cross-petition therein, Richey demanded a foreclosure of his mortgage. Both liens were foreclosed; the sheriff selling the land to R. C. Noleman, July 12, 1904.

Anderson alleged and offered proof tending to show, in substance, these facts: He furnished Noleman $400, and borrowed from him $161. With these sums Noleman purchased the land at sheriff's sale in his own name for the benefit of Anderson, under an agreement to reconvey the title upon receiving payment of his loan of $161. Afterward Anderson paid the amount due, and Noleman and wife gave him a quitclaim deed November 15, 1905, which he immediately offered for record, but which, for want of an acknowledgment, was not recorded. December 7, 1904, it was returned to and acknowledged by grantors and delivered to Anderson, who, without having it recorded, deposited it in a trunk in his house in Box Butte county. Before he had time to record it he was arrested for cattle-stealing and taken to Cheyenne county for trial, where he remained until imprisoned in the penitentiary for that offense. During his imprisonment, between December 10 and December 24, 1904, Noleman went to Anderson's house and procured the deed, saying to S. H. Wirts, the person in charge, that it was in Anderson's trunk. Before the latter date Noleman obtained from Anderson's father, Ole K. Anderson, a quitclaim deed to the land, stating it had been deeded to him after the sheriff's sale, and promising to act as attorney for the son in the prosecution for cattle-stealing. March 23, 1905, Noleman and

wife executed and delivered to W. P. Miles, who was also attorney for the defendant in the criminal prosecution, a quitclaim deed to an undivided half of the land. Later both of the attorneys conveyed their interests to defendant George W. Zoble. On proof tending to show the facts to be as thus narrated, plaintiffs contend that Anderson owns the land, that Noleman acquired no title or interest under the quitclaim deed executed by the senior Anderson, and that it and all of the subsequent conveyances described should be canceled.

In defense Zoble pleaded, and adduced evidence tending to show, that Ole K. Anderson, father of plaintiff Herbert M. Anderson, was the *bona fide* grantee in the unrecorded quitclaim deed executed and acknowledged by Noleman and wife December 7, 1904, and that they never made a conveyance to the son, who lost his title through the sheriff's sale.

On the issue of fact outlined, the evidence is conflicting. There is direct proof on both sides, but no principle of law or rule of evidence would be developed by a discussion of the testimony in detail. It would be unprofitable to extend the opinion to a length necessary for that purpose. The entire bill of exceptions, however, has been carefully considered with a view to arriving at the truth. The proofs in favor of the defense are the more convincing. Incidents outside of the direct evidence, when considered therewith, lead to a finding that the senior Anderson, and not his son, furnished the money received by Noleman, and that he was in fact Noleman's *bona fide* grantee. This conclusion is in harmony with the finding of the trial court. With the issue defined thus determined, other questions presented need not be considered.

The decree below is without error, and is

AFFIRMED.

LAURA ADLER, GUARDIAN, APPELLEE, V. ROYAL NEIGHBORS OF AMERICA, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,528.

Evidence: AGE: PRESUMPTIONS. It will be presumed a husband knows the age of his wife and is qualified to testify thereto, unless the contrary is shown, where they lived together 30 years.

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

Benjamin D. Smith and *Nelson C. Pratt,* for appellant.

Weaver & Giller, contra.

ROSE, J.

This is a suit on a 1,000-dollar fraternal beneficiary certificate issued by defendant to Mari Schlank January 9, 1905. Assured died September 1, 1907. Plaintiff, Isadore Schlank, her son, is the beneficiary, and recovered a judgment for the full amount of the insurance and interest, amounting to $1,116.65. Defendant has appealed.

The substance of the defense interposed is: Assured was over 45 years of age when she applied for membership, and was for that reason ineligible. She procured her insurance by falsely stating and warranting in her application that she was under the age limit. On these facts there is no liability on the part of defendant under its laws and the terms of its contract.

After the proofs had been adduced, each party requested a peremptory instruction, and the trial court directed a verdict in favor of plaintiff, thereby finding that assured did not misrepresent her age in her application for the purpose of procuring insurance. Each party having thus invited the judgment of the court on the contested issue of fact, the direction in plaintiff's favor has on appeal the same force as the verdict of a jury. *Dorsey v. Wellman,* 85 Neb. 262. The only question now for

determination, therefore, is the sufficiency of the evidence to sustain the judgment.

Assured's application for membership is in the record. It is dated December 17, 1904, and gives the date of her birth as July 15, 1860. The husband of assured testified that they lived together as husband and wife from 1876 to the time of her death, September 1, 1907, and raised a family of six children; that he knew how old she was when they were married, her mother having told him, and that assured was then 16; that she was born in 1860; that he did not know of the mother's death, but that, if living, she was in Austria. If assured was born in 1860, she was not 45 when she made her application, December 17, 1904. Defendant argues, however, that the testimony of the husband cannot be considered for the following reasons: His information came from assured's mother, whose death was not shown. His evidence was hearsay, and he had not qualified himself to testify to his wife's age. Under the rules of evidence announced in a former decision, a husband is presumptively competent to speak on that subject, and may do so, though his knowledge is founded on hearsay derived from family tradition. *Grand Lodge, A. O. U. W., v. Bartes,* 69 Neb. 636. In that it was held: "A wife who has lived for 20 years with her husband will be presumed to know his age and to be qualified to testify thereto, unless the contrary clearly appears from the record." In the present case it does not clearly appear that the husband was disqualified. If he told the truth, he had lived with his wife more than 30 years, and they had raised a family of six children. His statement that he knew how old she was when they were married, because her mother told him, does not require the rejection of his testimony that she was born in 1860. He made no statement sufficient to overcome the presumption that he knew his wife's age, nor does the record contain such proof. Under the principles announced in the case cited, the evidence is sufficient to sustain the judgment.

AFFIRMED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLANT, V. CLYDE S. MUSSELMAN, APPELLEE.

FILED OCTOBER 6, 1911. No. 16,547.

1. **Trial:** DIRECTING VERDICT. Where the evidence is sufficient to sustain a verdict for plaintiff, but would not support a finding for the defendant, it is the duty of the trial court to relieve the case of all uncertainty by directing a verdict for the plaintiff.
2. **Principal and Surety:** SURETY COMPANY: LIABILITY FOR PREMIUMS. Evidence examined and referred to in the opinion *held* not sufficient to warrant the submission of the case to the jury.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

Montgomery & Hall, for appellant.

Thomas & Shelburn, contra.

FAWCETT, J.

On September 22, 1905, defendant, who had been appointed receiver for the firm of Gould Brothers, insolvent, made a written application to plaintiff for a surety bond for himself as such assignee. In the application he agreed to pay for such bond $40, and a like sum on the 22d day of September in each year thereafter until plaintiff should be notified of its release as surety in the manner prescribed in such application. The bond was secured, approved, and defendant entered upon the discharge of his duties as such assignee. Defendant paid the first instalment of $40, but failed and refused to pay the subsequent annual instalments. This action was brought to recover the instalments for the years 1906 and 1907.

The answer admits the execution of the bond, and denies all other allegations in plaintiff's petition. It further alleges that, within three months after his appointment as assignee, defendant purchased all of the accounts owing by Gould Brothers, thereby becoming the

sole creditor of such bankrupt firm, and immediately notified John Everson, who, it is alleged, was the attorney and agent for plaintiff, of what he had done, and that he did not desire any renewal or extension of the bond; that Everson then informed him that all liability on the bond had ceased, and that by purchasing the claims as stated defendant would not be required to obtain any discharge from the county court or to give plaintiff any further notice of the disposition of the matter; that defendant filed his final report as assignee in the county court within six months from the time he was appointed, and asked to be discharged; that by reason of the facts above stated there was no further liability on the bond, no object or reason for obtaining a discharge, and no necessity or consideration for the extension or renewal of the bond after the first year; that plaintiff had full knowledge of all of the facts recited, and that Everson informed the defendant that the bond would not be extended and defendant would not be required to pay any further sum by reason of the giving of said bond.

The reply is a general denial. Trial to the court and a jury. Verdict for defendant, and from a judgment thereon plaintiff appeals.

The written application of defendant, which contained the agreement on his part and upon which plaintiff issued the bond, contained the following: "Should the American Surety Company of New York, hereinafter called the surety, execute the bond hereinbefore applied for, the undersigned, hereinafter called the indemnitor, do undertake and agree:

"I. That the statements contained in the foregoing application are true.

"II. That the indemnitor will immediately pay the surety at its office, 100 Broadway, New York City, $40 and $40 on the 22 day of Sep. in each year hereafter and until the indemnitor shall serve upon the surety at said office competent written legal evidence of its discharge from such suretyship and all liability by reason thereof.

"III. That the indemnitor will perform all the conditions of said bond on the part of the indemnitor to be performed and will at all times indemnify and save the surety harmless from and against every claim," etc.

The theory upon which defendant seeks to escape payment of the premiums for the two years covered by plaintiff's petition, succinctly stated, is that, because defendant claimed to have purchased all of the outstanding debts of Gould Brothers, and made that statement to Mr. Everson, who was what was termed the local attorney of plaintiff at Alma, and because Mr. Everson took his word upon that point, and told him that by reason thereof it would not be necessary for him to pay any further premiums because there no longer existed any liability on the part of the surety, and that it was not necessary for him to obtain any discharge from the county court, plaintiff has waived its right to rely upon the stipulations in defendant's application. The trouble with this contention is that the testimony of the officers of plaintiff, which was received without objection, shows that Mr. Everson had no authority to make any such statements to defendant or to give him any such assurances; that in fact he had no authority beyond that of taking applications, forwarding them to the company, receiving from the company the bonds and delivering the same to the applicants; and Mr. Everson's own testimony is substantially to the same effect. An effort was made by defendant to show that he had prepared and filed with the county court a final report asking for his discharge, but it is not claimed, either by defendant or by Mr. Everson, who was acting as defendant's attorney in that behalf, that the county court ever acted upon such a report or entered any order discharging defendant as assignee and releasing his surety. That any such report was ever filed is left in grave doubt by the testimony of Mr. Miller, who was county judge at that time, that no such report was ever filed with or handed to him, and by the further fact, which strongly corroborates Mr.

Miller, that no such report, nor any record thereof, can be found among the files or upon the records of the court. It being conceded that no action was ever taken upon such a report by the court, and no order of discharge entered, the fact as to whether or not one was ever handed to the judge becomes immaterial. It is conceded by defendant that no attempt was ever made to furnish plaintiff with any written legal evidence of its discharge from its suretyship; hence the liability under the bond being a continuing liability, unlimited as to time, plaintiff had not, when this action was begun, been released therefrom. Sections 3525, 3526, Ann. St. 1911, provide for the final order of distribution and the manner in which an assignee and his sureties can be discharged. These statutory provisions were not complied with. We think it would be establishing a dangerous precedent to hold that an assignee of an insolvent estate, after obtaining a surety bond for the faithful discharge of his duties, may disregard the stipulations of his written agreement upon which the bond was obtained, and also the plain provisions of statute, and escape liability for the payment of the consideration due to the surety, with nothing more to support him than his naked statement to a local attorney and soliciting agent of the surety that he had purchased all of the oustanding claims against the bankrupt, and an assurance from such local attorney of the surety, who is also the assignee's counsel, that he need not comply with the terms of his contract with the surety and may ignore the plain provisions of the statute.

It is shown by the uncontradicted testimony of Mr. Potter, who is manager of plaintiff for Nebraska, that he had tried to get defendant to take the necessary legal steps to wind up the business of the assignment and obtain a legal discharge as assignee, and thus exonerate the surety, but that defendant failed and refused to do so. Some explanation of defendant's failure and refusal to properly close up the business and obtain his discharge is found in the testimony and letters of Mr. Everson that

a controversy had arisen between defendant, on one side, and the county judge and sheriff, on the other, over fees charged by the sheriff for a custodian of the bankrupt estate during some period of the proceedings.

No attempt was made to show to the county court by competent proof that defendant had purchased all the claims of the bankrupt. Defendant has never been discharged as assignee, and plaintiff is still liable upon his bond, in the event that his statement that he purchased all of the claims against the bankrupt should prove to be untrue. It is also liable for all costs that may be taxed against defendant as assignee upon his final account.

When both sides had rested, plaintiff moved for a directed verdict in its favor. The motion was overruled. In this ruling the district court erred.

Defendant relies upon *Fidelity & Deposit Co. v. Libby*, 72 Neb. 850, but we do not think that case is in point. There, a county treasurer and his deputy each furnished a surety company bond, executed by the plaintiff in that suit. The deputy made a written application for his bond, reciting that it was to be executed in consideration of an annual premium of $50, payable annually in advance, which was to be paid by the treasurer, and the latter paid the first year's premium. At the expiration of the first year the deputy executed another official bond with personal sureties. This bond was approved by the board and an order entered reciting its approval and purporting to release and discharge the plaintiff from liability because of any future liability of the deputy. There was a judgment for defendant, which we affirmed, and rightly so. If, in the case at bar, defendant had ever obtained an order from the county court discharging plaintiff from further liability as his surety, we would unhesitatingly hold that no premiums could thereafter be collected by plaintiff.

As the record before us shows that there is no theory upon which defendant can ever escape liability for the premiums sued for in this action, it is our duty to end the

litigation. The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment for plaintiff in accordance with the prayer of its petition. *Robertson v. Brooks,* 65 Neb. 799.

REVERSED.

JOE MCKAY V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1911. No. 16,975.

1. **Information:** SUFFICIENCY. An information is fatally defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date.

2. **Criminal Law:** INFORMATION: AMENDMENT: TRIAL. And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which to plead thereto, and before a jury which had been impaneled under a void information.

3. ———: FORMER JEOPARDY. Where one accused of a felony is put upon trial under an information void upon its face, and, after trial begun, the information is amended and the trial proceeded with, *held,* that the accused is not thereby placed in jeopardy a second time.

4. ———: PRIVATE COUNSEL. Under the provisions of section 20, ch. 7, Comp. St. 1911, private counsel can only be permitted to assist in the prosecution of a person charged with the crime of felony, when procured by the county attorney, under the direction of the district court.

5. ———: ———. And an order by the district court, at the opening of the trial, that an attorney appearing as private prosecutor, under the employment of outside parties, is "permitted" to assist in the prosecution, is not a compliance with the statutory provision.

6. ———: ———. And when timely objection is made by the accused to the participation of such private prosecutor in the prosecution of the case, it is error to overrule such objection.

7. ———: IRRELEVANT EVIDENCE. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted.

ERROR to the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

William V. Allen, O. A. Williams and *William L. Dowling,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

FAWCETT, J.

The plaintiff in error, whom we will hereinafter designate as defendant, was convicted of murder in the first degree in the district court for Antelope county. A motion for a new trial was overruled and a sentence of life imprisonment imposed.

Defendant was prosecuted under an information filed April 28, 1910, which, omitting the formal part, alleged: "That Joe McKay, late of the county aforesaid, on the 7th day of December, A. D. 1910, in the county of Antelope, and the state of Nebraska, aforesaid, then and there being, in and upon one Albert Brown, then and there being, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did make an assault with the intent then and there of him, the said Joe McKay, him, the said Albert Brown, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice to kill and murder," etc. On the next day, defendant assailed this information with a motion to quash and a demurrer, both of which were overruled in the order named. Defendant was thereupon arraigned and pleaded not guilty, and the case was assigned for trial May 2, 1910. On May 2 the case was called for trial and the impaneling

of the jury begun. May 3 the jury was finally selected and sworn. The opening statements were made to the jury by counsel for the state and defendant, respectively. W. L. Staples, a witness for the state, was then called. After being interrogated as to his name, residence and official position, he was asked whether or not he had made a trip to Brunswick, whereupon the defendant objected to the introduction of any evidence upon the grounds: "(4) Because said complaint does not state an offense punishable by the laws of the state of Nebraska;" and "(6) because the information charges the commission of the crime on an impossible date, to wit, the 7th day of December, A. D. 1910, which has not yet arrived, and not on a date at any time prior to the filing of the information." Thereupon the court took a recess until the next morning, May 4, on which day, at the opening of court, the county attorney filed a motion for "leave of this court to correct the clerical error appearing near the end of line seven in the body of said information by striking out the numerals, to wit, 1910, there appearing, and inserting in their stead the numerals, to wit, 1909." Defendant objected to the proposed amendment upon the grounds that the defendant was prepared to go to trial on the information as it stood, but was wholly unprepared to proceed to trial under the proposed change in the information; that no copy of the information as it was proposed to be amended had been served upon defendant or his counsel, as required by statute; and that defendant had a statutory and constitutional right to 24 hours, after service upon him of the information as amended, within which to plead thereto. These objections were overruled. The court then, over defendant's objection, permitted the state to introduce the clerk of the court and the county attorney as witnesses for the purpose of laying the foundation for the state's motion to amend the information, at the conclusion of which the court sustained the motion to amend the information, and permitted the same to be amended by drawing a line

through the figures "1910" without obliterating them, and by placing over them the figures "1909," and ordered that the defendant be served with a copy of the information as corrected. The information was thereupon amended as directed by the court, reverified and refiled. The information as amended was served upon defendant at 8:49 in the evening of that day. On the next morning, May 5, on the convening of court, defendant tendered a plea in abatement or plea in bar "to the further proceeding of the court in this case," and also moved the court to exclude the Honorable M. F. Harrington, attorney at law, from participating in the prosecution of the case, upon the grounds that he had not been appointed by the court, as provided by statute, to assist in the prosecution; that he is not a deputy county attorney of Antelope county, or acting officially or under the solemnity of official oath in connection with the case; and, third, because his employment and payment are by private parties. All of defendant's objections and his motion were overruled, and at 10 o'clock A. M. of that day the jury were called into the box, and defendant's objection to the introduction of any evidence was then overruled, and, over the objection of defendant, the trial proceeded.

The objections of defendant to the information upon which he was arraigned, and under which the trial was entered upon, were well taken and should have been sustained. It charged the commission of the crime upon an impossible date, viz., a date nearly eight months in the future. Joyce, Indictments, sec. 319, announces the rule thus: "It is a general rule that an indictment is fatally defective if it charges the commission of the offense as subsequent to the date upon which the indictment is found, or on an otherwise impossible date." A large number of cases are cited by the author in support of the rule. Maxwell, Criminal Procedure (2d ed.) p. 67, says: "Time and place must be alleged as to every material fact in an indictment;" and on page 69 he says that time "should be stated with certainty. It must not be an impossible date,

such as a date after the indictment is found, and such defect is bad, even after verdict." In *State v. Smith,* 88 Ia. 178, it was held: "An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad; the provisions of the code, sec. 4306, that no indictment is insufficient for want of an allegation of the time of any material fact when the time has once been stated, and of section 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable." (55 N. W. 198.) In the opinion the court say: "This is not an omission to state the time when it had once been stated, but stating an impossible time. * * * It cannot be so understood from this indictment. It states but one date; a date not prior, but subsequent, to the finding of the indictment. * * * No indictment is sufficient that does not state the time at or about which the offense was committed, and, if it states an impossible time, it fails to charge an offense. We are in no doubt but that the first indictment was insufficient." In *Terrell v. State,* 165 Ind. 443, 2 L. R. A. n. s. 251, the supreme court of Indiana, in the opinion, and the annotator, in his notes, both exhaustively review the authorities on this point, which to our minds conclusively show that the original information was void, and hence did not state any offense.

Indeed, we do not understand the attorney general to contend that a conviction in this case could have been sustained under the information as originally filed, his contention throughout his brief being in support of the amendment permitted by the court. Upon that question we think the law must be taken as settled in this state. Section 436 of the criminal code provides: "And within twenty-four (24) hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant, or his counsel a copy of the indictment, and the sheriff on receiving

such copy shall serve the same upon the defendant; and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

In *Zink v. State*, 34 Neb. 37, the syllabus holds: "(2) The right conferred upon the accused in a prosecution for a felony by section 436 of the criminal code, to a copy of the indictment or information, and one day to prepare for trial, is a substantial right, to deny which is error. (3) When an information for a felony is insufficient for want of a material averment, it is error for the trial court to permit an amendment supplying such deficiency, and require the accused, over his objection, to proceed with the trial immediately, refusing him a copy of the amended information, and the statutory time to plead thereto." In the opinion by POST, J., we have a very lucid discussion of this point. Among other things, it is said: "This right to be furnished with a copy of the indictment or information, and one day to prepare for trial, is a substantial right which cannot be denied the accused in a prosecution for a felony. It is no answer to say that the information as filed contains sufficient matter to indicate the crime and the person charged. We do not agree with the attorney general that there was no substantial defense the accused could make before the amendment that was not equally available after. He had before the amendment this most potent of defenses, that he was not charged with a crime and might object to being put on trial; or, if tried and found guilty, that a motion in arrest of judgment would be available." In *Barker v. State*, 54 Neb. 53, *Zink v. State* is cited and followed, and the same rule again announced. In *Zink v. State, supra*, it appears that the amendment was made before the trial was actually entered upon, but after it was made, and on the same day, the court refused defendant's demand for the statutory time in which to prepare for trial, and immediately put

him upon trial without further arraignment or plea to the information as amended. The case at bar is stronger. Here the court permitted the amendment, and deprived defendant of his statutory rights, after the trial had been entered upon and the examination of witnesses had begun. We do not agree with counsel for defendant that a trial under the amended information would be placing defendant in jeopardy a second time. The original information being void upon its face was no information at all. Hence, nothing under it could in any manner place the defendant in jeopardy. The court did right in permitting the amendment, but erred in forcing the defendant to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which to plead thereto, and before a jury which had been impaneled under a void information.

Defendant strongly insists that the court erred in permitting private counsel to conduct the case for the state. When counsel for the defendant moved the court to exclude Mr. Harrington from participating in the prosecution, as hereinbefore set out, the record contains this: "By Mr. Harrington: The parties agree that M. F. Harrington is not the deputy county attorney of Antelope county, has not been appointed by the court to prosecute this case, but has been permitted by the court to prosecute the same, and that he is employed and is paid by the brothers and sisters of the deceased, Albert Brown, and that he has not taken an oath as an officer or deputy county attorney or prosecutor of Antelope county. By the Court: The order of the court having been made at the commencement of the impanelment of the jury herein that M. F. Harrington is permitted to assist the county attorney in the prosecution of this case, and made a matter of record in this case, said order having been made in the presence of the defendant and his counsel; objection overruled by the court, to which ruling the defendant excepts."

It must be remembered that, at the time the court announced Mr. Harrington's permission to assist in the prosecution of the case, there was, as counsel for defendant well knew, no information on file under which defendant could be convicted of any crime. Hence, it was immaterial to him who conducted the prosecution; but, immediately upon the resumption of the trial on the amended information, counsel objected to the participation of Mr. Harrington in the case. If, therefore, the objection was good, we think it was timely. The bill of exceptions shows that all of the most important witnesses for the state were examined, and the principal witnesses for the defense, including the defendant himself, cross-examined by Mr. Harrington. It also appears that, over the objection of defendant, he made the closing argument to the jury. Section 16, ch. 7, Comp. St. 1911, makes it the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend on behalf of the state and county all actions, civil or criminal. Section 20 provides: "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; provided, that the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to services rendered by such assistant or assistants." The stipulation of Mr. Harrington, which we have given above, does not state that the county attorney had, under the direction of the district court, procured his assistance, but, on the contrary, states that he had been employed and was being paid by the brothers and sisters of the deceased; that he had not been ap-

pointed by the court to prosecute the case, "but has been permitted by the court to prosecute the same." When placed upon the witness stand and examined by counsel for defendant, Mr. Harrington testified as follows: "Q. Now, have you ever been appointed under the statutes of this state, the method of which you understand well, to assist the county attorney in the prosecution of this case? A. No; not at public expense. Q. You have simply been permitted to appear? A. I don't know; I have been employed by relatives of the deceased, his brothers and sisters. Q. These relatives live in Bremer county, Iowa? A. I don't know what county. Q. Live near Gritole, in Iowa? A. Some of them, I think. Q. Any of them residents of this section? A. Not that I know of. Q. They employed you and are paying you? A. Yes, sir. Q. And you are appearing here in the capacity of private prosecutor? A. Yes, sir."

The question of the right of private counsel to appear in the prosecution of a criminal action has been before this court a number of times. The first reported case is *Polin v. State,* 14 Neb. 540. That case was decided in 1883. We there held, under the statute as it then existed, that the district attorney in a criminal trial may have the assistance of counsel employed on private account. The next case is *Bradshaw v. State,* 17 Neb. 147, where the rule in *Polin v. State* was reannounced. In that case, however, it appears from the opinion (p. 151), that "the record shows that before any evidence was introduced the district attorney stated to the court that he desired the assistance of Mr. Ashby in the trial of the cause on account of the magnitude of the case; that he had before that time requested his aid," etc. It will be observed that the facts in that case are very different from those in the case at bar. The next case was *Gandy v. State,* 27 Neb. 707, where the rule in *Polin v. State* was again announced. In that case it was insisted by counsel that *Polin v. State* and *Bradshaw v. State, supra,* arose under the statute existing prior to the passage of the act of

March 10, 1885 (laws 1885, ch. 40). The opinion then sets out the sections of the statute referred to, which are substantially the same as those now in force. In commenting thereon, COBB, J. (p. 723), said: "But it by no means appears that Martin and Falloon were deputies of the district attorney, appointed under the provisions of the twentieth section, but were his assistants procured by him under the direction of the district court in accordance with the proviso of said section, and were not required to take an official oath other than that as attorneys of the court." It appears from this statement in the opinion that the appearance of Messrs. Martin and Falloon in that case was strictly in accordance with the requirements of statute. The next case is *Blair v. State*, 72 Neb. 501. In that case the syllabus holds: "(10) An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose. (11) *Held*, That a general objection to the appearance of such counsel made during the trial in connection with the examination of a witness, and without any showing to support it, was properly overruled." In the opinion, BARNES, J. (p. 515), said: "No statement was made, or evidence offered, showing, or tending to show, that the prosecution had not requested the assistance of counsel, or that the court had not properly appointed them to render such assistance." Under those facts the decision in that case was clearly right. It is urged by the state that the question of employment of private counsel in the prosecution of a criminal case has been very recently discussed by this court in *Burnett v. State*, 88 Neb. 638. In that case the question was not raised at any time during the trial. Moreover, it could not have been raised under the statute above quoted, for the reason that that

case was a misdemeanor simply, and not a felony. To such a case the statute has no application. The only other authority cited by the state upon this point is the note to *State v. Bartlett,* 24 L. R. A. n. s. 564 (105 Me. 212). There the principal case was simply a misdemeanor. An examination of the copious notes will show that there is a conflict in the holdings of the different states upon this point. In his brief the attorney general says: "I cannot see that the statute of 1893, quoted by counsel, provides for any change of this general rule." In *Biemel v. State,* 71 Wis. 444, and *Bird v. State,* 77 Wis. 276, it is held that a statute very similar to ours does change the rule, and that under it an unofficial member of the bar may not assist in the prosecution for a fee to be paid by private persons. In support of his contention defendant cites *Biemel v. State,* 71 Wis. 444; *Meister v. People,* 31 Mich. 99; *People v. Bussy,* 82 Mich. 49, and other cases. We are impressed with and prefer to follow the rule announced by the supreme court of Wisconsin and the other states that are in harmony therewith. We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are ofttimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. In such cases it is to the interest of the state that such a county attorney should have the assistance of outside counsel; and, if there were nothing in the statute providing therefor, as was the case when *Polin v. State, supra,* was decided, we would adhere to the rule there announced; but our legislature, by the statute under consideration, has wisely provided for just such emergencies. In doing so, however, it has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by

sordid motives. He will enter upon the discharge of his duties in the same spirit that any honorable county attorney would enter upon the same, viz., with the desire simply to see that justice is done. It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the guilty receive their just deserts. As said by Mr. Chief Justice Christiancy, in *Hurd v. People*, 25 Mich. 405, 416: "The only legitimate object of the prosecution is 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success." Counsel called to assist in the prosecution should govern his actions in like manner; and, when procured in the manner and for the compensation contemplated by the statute quoted, would doubtless do so; while counsel employed by outside parties, and, in the case of a homicide, by relatives of the deceased, would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes, prejudice and animosities of his clients; to secure a conviction at all hazards. Such is not the policy of the law as indicated by the legislature, and we must decline to give it our sanction. In the case at bar there is nothing to show that the county attorney, who is a lawyer of known ability, requested the assistance of Mr. Harrington, nor that he had been in any manner previously consulted in reference thereto. The mere fact that the court permitted Mr. Harrington to assist in the prosecution cannot be held to be a compliance with the statute which provides that private counsel may be procured by the county attorney under the direction of the court. This provision of the statute calls for affirmative action by the county attorney and the court. Mere acquiescence in or assent to the appearance of private counsel does not constitute the affirmative action required by the statute and is not sufficient. If in the further

prosecution of this case the court and county attorney deem it necessary to have the assistance of outside counsel, it is their duty to follow the plain provisions of the statute in procuring the same.

As the case will have to be tried again, we will refrain from expressing any opinion as to the weight of the evidence, and will only consider one of the errors complained of in connection therewith. It is urged that the court erred in admitting in evidence exhibits 6, 7, 18, 19 and 22. Exhibits 6 and 7 were two shirts, stained with blood, 18 was the coat, 19 the vest, and 22 the cap of the deceased. The testimony of the coroner, who was also a practicing physician and surgeon, showed conclusively that the deceased had received three blows on the side of his head, each of which fractured his skull, and two of which penetrated the brain, either of which the doctor said was sufficient to have proved fatal. It was thus clearly established that the deceased had been murdered. There was no room for contention that his injuries had been self-inflicted, and the only question before the jury was: Did the defendant commit the murder? The admission of these blood-stained garments and the flaunting of them before the jury could in no manner identify, or even tend to identify, the prisoner at the bar as the murderer. We can conceive of no other purpose which these exhibits could subserve than to excite the passions and inflame the minds of the jury. A defendant who is being tried for any offense, and particularly one involving the possible taking of his life, is entitled to a trial upon competent evidence, evidence which tends to show his guilt or innocence, and not upon evidence which has no tendency in that direction, but which can only serve the purpose of distracting the minds of the jury from the real issue to gruesome exhibits which may easily lead them to a wrong conclusion.

For the errors above indicated, the judgment of the district court is reversed and the case remanded for further proceedings in harmony herewith.

REVERSED.

LETTON, J., dissenting in part.

I am unable to concur in that portion of the opinion holding it was reversible error to permit other counsel to assist the county attorney.

We held in *Rickley v. State,* 65 Neb. 841, that the county attorney has complete control of criminal prosecutions, and that he may exclude other counsel if he so desires, even if the complainant desires to employ such counsel. Of course, this is subject to the direction and control of the court. When the county attorney allows private counsel to appear with him and assist him in the trial without objection, it is clear that he desires his assistance, otherwise he could summarily dismiss him from the case, and when the fact that such counsel is employed and his assistance is desired by the county attorney is known and expressly permitted by the court, as the record shows, the defendant cannot complain.

The statutory provisions (Comp. St. 1911, ch. 7, sec. 16) are intended to limit the liability of the several counties to pay for assistance to the county attorney, and are not intended to deprive him of assistance which he believes to be necessary, and which is furnished with the consent of the court without expense to the county. It is true counsel paid by private persons are apt to err by excess of zeal, but this is entirely within the control of the official prosecutor, and he has the undoubted right to refuse to allow counsel to appear further if they go beyond the limits proper to an official prosecutor.

I think the opinion on this point is opposed to our former decisions and is against the weight of authority. See note to *State v. Bartlett,* 24 L. R. A. n. s. 564 (105 Me. 212).

AMEL H. KOOP ET AL., APPELLANTS, V. LIZZIE ACKEN, APPELLEE.

FILED OCTOBER 6, 1911. No. 16,529.

1. Judgment: VACATION: PERJURY. To require vacation of a judgment because of perjury on the part of the one obtaining it, it must be shown by clear and satisfactory evidence that the alleged false testimony was wilfully and purposely given; that it was material to the issue being tried, and was not merely cumulative, but probably controlled the result.

2. ———: ———: EVIDENCE. Evidence found to be insufficient to require the vacation of the judgment complained of.

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

E. C. Strode and *Coy Burnett,* for appellants.

George W. Berge and *Morning & Ledwith, contra.*

SEDGWICK, J.

This defendant recovered a judgment against these plaintiffs, as saloonkeepers, and their bondsmen for damages caused by selling intoxicating drinks to her husband. Upon appeal to this court her judgment was affirmed. *Acken v. Tinglehoff,* 83 Neb. 296. These plaintiffs began this action in the district court for Lancaster county to vacate that judgment on the ground that this defendant procured it by perjury. Upon trial that court found in favor of this defendant and dismissed the suit. The plaintiffs have appealed to this court. They contend that this defendant committed perjury in obtaining her judgment with reference to three matters: First, in regard to her having obtained pecuniary aid prior to the time that she alleged that the intoxicating liquors were sold to her husband; second, with reference to the condition of her husband before that time; and, third, with reference to

whether she had ordered one of the plaintiffs to sell liquor to her husband.

1. Upon the first of these assignments in the brief, it appears that in obtaining her judgment she was a witness in her own behalf, and testified that her husband, prior to the wrongs complained of in her petition, was a strong man and able to make a good living, and did make a good living; was never sick, and that she did not get anything from any charity organization, but did get her support from her husband's earnings, and that her husband, while he drank a little, did not drink enough to interfere with his business or work, or with supporting her and her children, but earned from $100 to $125 a month for each year during the eight years next prior to the time when she alleged that these plaintiffs were selling him intoxicating liquors. They allege in their brief that this testimony was untrue, and that in so testifying she committed wilful perjury. To support this allegation, they refer to their petition in the case and an affidavit filed therewith, but the case was tried upon issues regularly formed and oral testimony given in open court, and the plaintiffs' petition and affidavit would not be conclusive proof that the testimony referred to was false. No other evidence is referred to in the brief tending to show that the testimony complained of was false, and this part of the case seems to be wholly unsupported.

2. As to the second assignment of the brief, they allege that in obtaining her judgment, in answer to a question whether her husband bought liquors of one of these plaintiffs "right along" after her action was begun, she answered, "No," and also testified that she did not go to one of these plaintiffs and request him to let her husband have liquors, and never told one of these plaintiffs to let him have liquor to drink since the commencement of her suit; whereas, in fact, she signed a written order asking one of these plaintiffs to let her husband have liquor. She testified upon the trial of this case in the court below that she did sign a paper of that character at the request of

her husband; that her husband presented the paper to her, and said: "Sign this paper." And she further testified: "I told him there, I did not want to sign it. When I signed it, I said I did not want to sign this, and he says, 'It will never go farther than me.' That is what he said." If it should be thought that the signing of this paper, under the circumstances and in the condition that this defendant then found herself, would be so material in the trial of her action against the saloon-keepers that her denial of so doing would constitute such fraud and perjury as to require that her judgment should be vacated, it does not appear from the record that she purposely and wilfully denied having signed such paper.

In *Barr v. Post*, 59 Neb. 361, it was held that the giving of false testimony in relation to matters that tended only to affect the amount of the recovery, when there was sufficient evidence of other witnesses to assist the jury in estimating the damage, would not furnish sufficient ground for vacating the judgment. The evidence complained of in this case is all of that character. It is not proved with any certainty that the husband was an habitual drunkard before the plaintiffs furnished him the liquors complained of, and if this defendant, *after her suit for damages was begun*, authorized one of these plaintiffs to furnish her husband with liquor, such action would not furnish a defense; if it was competent in evidence at all, it would only be as tending to show that she consented to the injuries which she complained of, and, in the absence of any other evidence of consent to the sale of which she complained, would be wholly ineffectual for that purpose. In *City Savings Bank v. Carlon*, 87 Neb. 266, it was held that "evidence tending to show that the prevailing party upon the former trial testified falsely upon a vital issue in the case, which false testimony, if believed, might have controlled the decision, is material; and if it appears that the defeated party was without fault or negligence in not producing such evidence, and that the same can be produced on another trial, and might probably change

the result, a new trial should be granted." The evidence comes far short of bringing this case within that rule. It was said in *Barr v. Post, supra,* that "actions of this character are not to be encouraged." The reasons there given for so holding need not be repeated here.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. JOHN J. DONAHUE, CHIEF OF POLICE OF THE CITY OF OMAHA, RESPONDENT.

FILED OCTOBER 21, 1911. No. 16,802.

Quo warranto. Rule as to time within which to file briefs.

Grant G. Martin, Attorney General, and *A. F. Mullen, for relator.*

W. J. Connell, contra.

PER CURIAM.

Counsel for the state contend that our rules are inapplicable to the instant case, and therefore request a special rule fixing the time within which the litigants shall file their respective briefs. Counsel also request us to set a day for the hearing of this case. This action is prosecuted agreeably to the provisions of sections 1731*a*, 1731*b*, Ann. St. 1909. The statute does not give the action preference over other cases upon our docket. Section 5 of the rules of this court (80 Neb. vii) provides that criminal cases will be advanced for hearing without a motion, and that upon motion cases will be advanced which have previously been regularly upon the docket of the court, or, being within the original concurrent jurisdiction of the court, have been prosecuted in the district court and brought to this court by appeal; that

the court may also, in its discretion, advance other cases if they involve questions of public interest. By the terms of subdivision *c* of rule 9, the rule day, in advanced cases, is the thirtieth day after the order of advancement is entered, unless the court shall othewise order, by which day the appellant shall serve his brief. The appellee shall serve his brief in 30 days thereafter.

Rule 16 (89 Neb. vii) provides that in all cases the party bringing a cause into this court shall print and furnish a complete abstract or abridgment of the record, with references to the pages of the record abstracted. Rule 17 provides that the rules established for printing abstracts shall apply to all cases wherein the court is called on to exercise original jurisdiction. In such cases the plaintiff must print the abstract and serve it on the defendant or his attorney within 30 days after issue joined, or, if the evidence is taken, within 30 days after the evidence is returned to this court. The evidence in this case was returned to this court July 8, 1911. No abstract was filed until the 9th of October, 1911. No motion has yet been filed to advance the case. Unless an application is made to advance, cases are heard in their regular order. If the case is advanced, the briefs should be filed in accordance with paragraph *c* of rule 9.

CUMING COUNTY, APPELLANT, V. BANCROFT DRAINAGE DISTRICT ET AL., APPELLEES.

FILED OCTOBER 21, 1911. No. 16,768.

1. **Drainage Districts:** APPORTIONMENT OF BENEFITS. Under the provisions of the act of 1907 (laws 1907, ch. 153) implied authority is given to apportion to the highways within a drainage district their due proportion of the cost of drainage.
2. ———: ———. The fact that the units of cost are apportioned to a whole road by its record number, instead of to that portion only of the road to be benefited, would not render the apportionment void, so long as it is limited to actual benefits.

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

S. S. Krake and *A. R. Oleson,* for appellant.

O. C. Anderson and *Moodie & Burke, contra.*

Courtright & Sidner, amici curiæ.

REESE, C. J.

In the year 1909, the landowners in the northeastern part of Cuming county, together with others in Thurston and Burt counties, organized a drainage district known as the "Bancroft Drainage District," under the provisions of the act of 1907 (laws 1907, ch. 153). The board of directors made their detailed report of the apportionment of benefits, and filed the same with the county clerk. This report appears to have been made in due form, and no objection is made to it in that regard. Due notice of the filing of the report was given. The report contained the apportionment of benefits to certain roads and highways with the number of units apportioned to each road by its record number. The county of Cuming (by its representatives) appeared on the day set for the hearing, and objected to any apportionment of benefits to the public highways, as being an unconstitutional tax thereon. The total apportionment to the public highways was 800 units. The cause was certified to the district court, when it appeared that a number of the supposed roads against which units were charged were not legally established highways, and all such were excluded; the total number of units being reduced to 276. The apportionment was affirmed to that extent. The county appeals to this court.

Two questions upon the merits are here presented and argued: First, that there was no warrant of law for the apportionment of any units of benefit to the public high-

ways within the district; second, that, in case it should be held that there was such power, the benefits were improperly apportioned to the whole road, instead of the tracts of land occupied thereby and benefited by the drainage.

As to the first proposition, it is argued by counsel for the county that there is no provision in the act under which the organization of the district was perfected for the assessment of benefits to public highways; that such assessment could only be made under special statutory authority, and therefore the whole apportionment to the highways was and is void. We have been unable to find any direct authority in the act for the apportionment of benefits to highways as in the act of 1909 (Comp. St. 1909, ch. 89, art. IV), under which the case of *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, was decided; and, if such authority exists in this case, it must be drawn from some other source.

The provisions for the levy of taxes are contained in section 18 of the act of 1907 (laws 1907, ch. 153). It is enacted that the board of directors shall, each year, determine the amount of money to be raised for the payment of bonds and interest, as well as the amount to be raised for other purposes, "and shall apportion the same in dollars and cents to each tract benefited, according to the units of assessment" previously established. The levy is then certified to the county clerk, who extends the same upon the tax lists, to be collected in the same manner as other taxes. It is further enacted that "said drainage district may file claims against any county, city, village, railroad company, or other corporation, private or public, for the share of any annual apportionment to be paid by any such corporation, and, if the same is not paid, the same may be recovered by action in court." It is contended by appellant that no tax can be levied except by statutory authority, and that the foregoing does not confer such authority. We think it is true that legislative authority, express or necessarily implied, is a pre-existing

requirement for levying a tax. There can be no doubt but that a public highway through or over land where drainage is necessary would be benefited by such drainage. It is equally true that the whole traveling public, as well as a county, is interested in the maintenance of such highways in a passable condition. A public road is a unit for practically its whole length, and a limited number of impassable places therein may render it of little, if any, value to the public. The duty of maintaining the public highways in a usable condition is, in effect, imposed upon a county, notwithstanding that duty may be distributed to specific divisions or departments of such county. The public—the county—has an easement over the right of way which the law will protect, and which cannot be destroyed except by a relinquishment of that right by the public authority. So far as the right to the use of the easement is concerned, it is perpetual, except when so relinquished, and is, for all practical purposes, equivalent to a title. Hence, it is provided in section 7 of the act (laws 1907, ch. 153), referring to elections, that "any corporation, public, private or municipal, owning or having an easement in any land or lot may vote at said election, the same as an individual may." A public highway is an easement which may be benefited by the construction of the ditch. None but the owners of lands or easements within the district and subject to taxation are entitled to vote at the election, but all such owners are. Why? It must be that the legislature intended that all who were given the right to vote were given such right because their property would be subject to taxation, and hence they should have a voice in the question of the formation of the district. No other reason can be assigned. It follows as a necessary conclusion that it was the purpose of the legislature that easements, when benefited, should be subject to taxation, and that public corporations should be no execption to the rule, although a different method of collecting the taxes imposed upon them was provided. By a clear implication it is manifest

that it was the purpose of the legislature that easements held by the public should bear their proper share of the expense of the district in proportion to the benefits received.

As above stated, it is contended that there is error in the apportionment of units of benefit to the different highways within the district. This contention is partially met by what we have said above. The language of the statute (laws 1907, ch. 153, sec. 11), is that the board "shall apportion the benefits thereof to the tracts within said district which will be benefited thereby, on a system of units," etc. It is said in appellant's brief that the assessment "is inequitable and unjust, and does not conform to the standard of assessment made against the lands." From this it is argued that, as there is no provision in the law prescribing the method of assessing highways, the standard fixed for the assessment of the lands (tracts) should be applied, and the assessment upon the road by number is without authority. We are not aware that any specific definition of what shall constitute a "tract" is given in the law. We find none. Government descriptions need not necessarily be followed, although they may be if the benefits accrue to such descriptions as a whole. This being true, there is no hard and fast rule as to what should be included in a tract. If it is thought the better plan to assess each road by its recorded number, we can see no legal objection to doing so, since a number of units placed against each must conform substantially to the actual benefits which the road will receive. It can make no difference to the county whether the apportionment is made to the whole road or only a part thereof, so long as actual benefits only are thus apportioned. Hence, if the apportionment were actually erroneous in the matter complained of, it could not possibly work any prejudice to the county. Absolute and exact equality in such cases can never be attained. An approximation is all that is expected or required. It is sufficient if each tract or parcel of land bears approxi-

mately its share of the burden. *State v. Several Parcels of Land,* 79 Neb. 638; *Allen v. Drew,* 44 Vt. 174; *Findlay v. Frey,* 51 Ohio St. 390.

Finding no reversible error in the proceedings, the judgment of the district court is

AFFIRMED.

PETER FREDERICK, SR., APPELLEE, V. HANNAH C. MORAN, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,917.

1. Accord and Satisfaction: PLEADING. "To a petition upon a cause of action not controverted, where there is attempted to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged." *Goble v. American Nat. Bank,* 46 Neb. 891.
2. Evidence examined, and it is found that an accord and satisfaction is not proved.

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

Clarence Gillespie and *Edwin Falloon,* for appellant.

Reavis & Reavis, contra.

REESE, C. J.

This is an action to foreclose a mortgage on lots 21, 22, 23 and 24, in block 135, in the city of Falls City, Richardson county. The petition may be said to be in the usual form, although unnecessarily elaborate, and seeks the foreclosure of a mortgage given by the defendant to secure two promissory notes of $666.67 each, one due January 8, 1908, the other due January 8, 1909; they and the mortgage bearing date January 30, 1907. As no question is raised upon the petition, it need not be further

noticed. The defendant filed a pleading, denominated by her as an "answer and cross-petition," in which she admits the execution of the notes and mortgage, alleges that since their execution, but without giving the date, she intermarried with one Albert Sherwood, and under that name she answers the petition. No change was made in the title of the cause, and, as she prosecutes her appeal in the name of Moran, the cause will stand as presented.

In order to an understanding of the matter presented as a defense, we here copy the remainder of the answer in full: "As a defense to said action, this defendant alleges: That she is a physician and surgeon, and has been engaged in the practice of her profession at Falls City, Nebraska, for 17 years; that some time prior to about the 1st day of June, 1909, the plaintiff employed this defendant to treat him for impotence, agreeing at the time that, if she cured him of this malady, he would give her the notes described in said petition, but in any event defendant was to be paid for her time and medicine; that after this defendant had treated the plaintiff for a long time, had furnished him medicine, and had also treated his wife for other ailments, on or about the 1st day of June, 1909, the plaintiff expressed to the defendant the opinion that he was cured, and he then agreed that if this defendant would cancel her bill that she had against him for treating him for this malady, as well as the bill that this defendant had for treating his wife, he would surrender to her the notes described in said mortgage and release said mortgage, to all of which this defendant assented; that plaintiff gave this defendant at that time said notes, and agreed to release said mortgage, but that the plaintiff has failed, neglected and refused to comply with all of the terms of his agreement, in that he has not released said mortgage as agreed. Defendant here pleads the above agreement as an accord and satisfaction of said notes and mortgage. Wherefore, this defendant prays that it may be adjudged that there has been an accord and satisfaction of said notes and mortgage de-

scribed in petition of plaintiff; that the plaintiff be ordered to release the mortgage of record described in petition, according to his agreement, and, in case he refuses to do so, that a decree of this court be entered to this effect; that defendant be granted such other and further relief as may be just and equitable in the premises, and that she recover her costs herein expended." The reply is a general denial.

When the cause was called for trial, defendant demanded that the trial be had to a jury. The request was overruled, to which exceptions was taken, and the ruling having been presented in the motion for a new trial as one of the grounds therefor is now assigned for error. For the purposes of this decision, we may assume that, had the answer presented a legal defense to the action, a jury trial should have been awarded, but that question is not decided, as it is contended by plaintiff that no defense was presented, and that question requires our attention. It is to be observed that the facts set up in the answer and cross-petition are pleaded as "an accord and satisfaction of said notes and mortgage;" but that fact need not be given special attention, as under the code, if the facts stated entitle a party to relief, it may be granted, if sustained by the evidence, without reference to what name may be given the defense by the pleader. The averments of the answer may be fairly summarized to be that, prior to the transactions set up, she was a practicing physician and surgeon in the city of Falls City, and was employed by plaintiff to treat him; he agreeing that, if she effected a cure, he would give her the notes sued upon, but in any event she was to be paid for her time and medicine; that subsequently plaintiff expressed the opinion that he was cured, and then agreed that, if defendant would cancel the bill she had against him for the treatment of himself and wife, he would surrender to her the notes and release the mortgage, and to which she assented; that he gave her the notes, but refused to cancel the mortgage. There is no averment that

defendant ever canceled her bill which she held against plaintiff, or offered so to do, and hence there was no execution of any such contract on her part, and, until she has complied with her alleged contract, there was no satisfaction of the mortgage debt. The notes, being only the evidence of the debt, even if voluntarily surrendered to her, would not cancel the obligation without a performance by her. This is elementary. *Van Housen v. Broehl*, 58 Neb. 348; *Goble v. American Nat. Bank*, 46 Neb. 891; 1 Cyc. 311 *et seq.* The district court did not err in refusing a jury trial.

It is next contended by defendant that the decree of the district court foreclosing the mortgage is not supported by the evidence. This contention cannot avail. If defendant upon the trial produced her full account against plaintiff, the whole amount thereof was about $225. The amount due upon the mortgage debt, including taxes paid, was not far from $1,500. After a careful reading of the evidence, we are wholly unable to see that defendant supported her defense of accord and satisfaction, even by her own testimony. It is not deemed necessary to review the evidence, as defendant made no effort to prove the satisfaction.

The decree of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

SCHOOL DISTRICT, APPELLANT, V. J. K. ELLIOTT, APPELLEE.

FILED OCTOBER 21, 1911. No. 16,965.

School Districts: CHANGE OF BOUNDARIES: APPEAL. A petition was presented to a board consisting of the county clerk, treasurer and superintendent, under the provisions of section 11503, Ann. St. 1909, asking that certain land be detached from one school district and attached to another. The board found the petition "correct," and entered a "request that the change in the district

boundaries be made as asked for in petition," but took no action making the change, the district boundaries remaining as they then existed. *Held*, That, as there was no final order making the change in the boundary lines, there was nothing which could be reviewed on appellate proceedings.

APPEAL from the district court for Cedar County: GUY T. GRAVES, JUDGE. *Dismissed.*

Wilbur F. Bryant and *R. J. Millard*, for appellant.

P. F. O'Gara, contra.

REESE, C. J.

The second clause of section 11503, Ann. St. 1909, provides, in substance, that upon the petition of any freeholder to a board consisting of the county superintendent, county clerk and county treasurer, asking to have any land described therein set off from the district in which it is situated and attached to another to which it adjoins, that board may act thereon and make the change in the district boundaries. It is provided that the petition shall state the reasons for the change, and no change shall be made unless the territory to be attached has children of school age residing thereon, that they are more than two miles from the schoolhouse in their own district and at least one-half mile nearer to the schoolhouse in the adjoining district, and that the "board may thereupon change the boundaries of the districts so as to set off the land described in said petition and attach it to such adjoining district, as is called for in the petition, whenever they shall deem it just and proper and for the best interest of the petitioner or petitioners so to do."

As shown by the abstract, the following proceedings were had by and before the board designated in the act: "Hartington, Nebraska, March 23d, 1910. To the Board consisting of the County Clerk, Treasurer and Superintendent: Desiring that my renter avail himself of school privileges as set forth in section 4, subd. I, of the school

laws of Nebraska, 1909, I hereby make the following statement: There are living on my farm four children of school age desiring school privileges. This land is southeast quarter of section 11, township 30, range 1 west, in Cedar county, in school district No. 84. I desire this land to be detached from school district 84 and to be annexed to school district No. 98. The distance from the schoolhouse in district No. 84 is two and one-half miles, and from the schoolhouse in district No. 98 is one-fourth of a mile. I certify the statement(s) above are all true and correct, and respectfully request you to make the change indicated. J. K. Elliott, Owner of said land. Signed and sworn to before me this 25th day of March, 1910. (Seal) M. H. Dodge, County Judge. We, the above named board, have examined this petition and find it correct. We request that the change in the district boundaries be made as asked for in petition. W. E. Miller, County Superintendent; G. N. Champion, County Clerk; E. B. Hirschman, County Treasurer. I certify that the above is a correct copy. W. E. Miller, County Superintendent." From this a petition in error was filed in the district court. Upon a hearing in that court, the court found that "no error appears of record," and the petition in error was dismissed at plaintiff's costs. The case is brought to this court by appellate proceedings.

Upon an examination of the record, we are satisfied that no action was taken, either by the board or by the county superintendent, which could, or did, change the status of the land of Elliott. Assuming that the petition was a sufficient compliance with the law to give the board jurisdiction it is very clear that the board took no such action as would lay the foundation for review. The statute says: "The board may thereupon change the boundaries of the districts so as to set off the land described in said petition and attach it to the adjoining district," etc. (Ann. St. 1909, sec. 11503.) Nothing of the kind was done. They found the petition was "correct," and made a "request" that the change in the district be

made, but took no action making it. The relation of the land to the two districts was not changed, and matters in that regard were not molested in any degree. There was no kind of order made from which any appeal or proceeding in error could be taken. No action is shown to have been taken by the superintendent, and the boundary lines of the districts were left as they had before that time existed.

It follows that there was nothing in the action of the board that could be reviewed by the district court, and no action can be taken by this court, except to dismiss the proceeding, leaving the district boundaries as they previously existed, which is done.

DISSMISED.

H. F. STRAIGHT, APPELLEE, V. JOHN COLEMAN, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,936.

1. Sales: EVIDENCE. Evidence examined, and found sufficient to sustain the judgment of the district court.

2. ———: INSTRUCTIONS. Instructions considered and approved.

3. Trial: DIRECTING VERDICT. Where the plaintiff's evidence in an action at law tends to establish every fact which he is required to prove to entitle him to a verdict, and reasonable men might differ, upon a consideration of all of the evidence, as to whether all of the necessary facts were established, the trial court should refuse to direct a verdict for the defendant.

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

Frank A. Berry and *Frederick S. Berry,* for appellant.

W. P. Rooney, C. A. Kingsbury and *C. H. Hendrickson, contra.*

BARNES, J.

Action in the district court for Wayne county to recover the purchase price of a mare, sold by the defendant to the plaintiff, on account of false representations. It was alleged in the plaintiff's petition that, in order to induce him to purchase the animal in question, the defendant represented that it was broke to drive and safe to work, and would not kick in harness if certain precautions were used, upon which representations it was alleged that the plaintiff relied. Defendant, by his answer, admitted the sale of the animal for the price alleged in the petition, and denied all of the other allegations contained therein. The cause was tried to a jury, the plaintiff had the verdict and judgment and the defendant has appealed.

It is contended that the verdict is not sustained by the evidence. It appears from the abstract and bill of exceptions that the defendant, in order to induce the plaintiff to purchase the animal, made the representations to him substantially as stated in his petition. This fact was established by the evidence of the plaintiff and his wife, who was present at the time the representations in question were made. Indeed, the defendant does not seriously dispute the plaintiff's evidence, but insists that it was not shown that his statements were relied upon by the purchaser. On this point, it seems clear that but for those statements the plaintiff would not have made the purchase.

It further appears that on the day following the sale the plaintiff and his son attempted to use the animal in question, with another horse, in running a disc harrow; that he used the precautions specified, as he had been instructed to do by the defendant; that in attempting to use her she kicked over the tongue of the machine, and was so vicious and intractable that the plaintiff was unable to use her at all for that purpose; that on the second day thereafter he attempted to drive her to a double

wagon; that he carried out the defendant's instructions to the letter, but the animal kicked so frequently and violently that he was unable to make use of her for that or any other purpose; that thereupon he immediately returned her to the defendant, and demanded repayment of the purchase price, which was refused; that he left the animal in the defendant's barn, and thereupon commenced this action. It therefore seems clear that the plaintiff's evidence, if believed by the jury, was sufficient to sustain the verdict.

Defendant's second contention is that the court erred in refusing to give instruction No. 1, requested by him, which was, in substance, that there was no evidence before the jury showing that the plaintiff relied upon the representations made by the defendant. This instruction was properly refused, because, as above stated, it seems clear from the evidence describing the entire transaction that plaintiff would not have purchased the horse but for the representations above mentioned.

Defendant's third contention is that the court erred in giving paragraph numbered 3 of his own instructions. By that instruction the court informed the jury, in substance, that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that in making the sale of the horse in question to the plaintiff, and to induce the plaintiff to purchase the same, the defendant made the representations as specified in paragraph one of the instructions (which stated the issues as made by the pleadings); that the plaintiff relied on them, and believed them to be true, and that said representations were false; that plaintiff returned the horse to the defendant; and the jury were further told that if they should find from the preponderance of the evidence that defendant did make such representations to the plaintiff, and the plaintiff relied upon and believed the same to be true, and was thereby induced to purchase said horse, and that said representations were false, and that said horse was not as represented, and that plaintiff returned th

horse to the defendant, then the plaintiff would be entitled to recover, and the fact that the defendant refused to receive the horse and return the money would not defeat the plaintiff's right of action. So far as we are able to ascertain, this instruction was correct, and fairly submitted the matters in controversy to the jury.

Finally, it is contended that the court erred in overruling the defendant's motion to instruct the jury to return a verdict for him at the close of the evidence. From what has heretofore been said, it is apparent that the court properly refused to give this instruction.

After a careful examination of the record, we are of opinion that the defendant had a fair and impartial trial, and, finding no error therein, the judgment of the district court is

AFFIRMED.

GEORGE W. CAMPBELL, APPELLEE, V. MELCHOIR L. LUEBBEN, APPELLANT.

FILED OCTOBER 21, 1911. No. 17,176.

1. **Statute of Frauds:** ORIGINAL CONTRACT. "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default, or misdoings of another person, nor does he agree to purchase goods, wares, merchandise, or things in action." *Trenholm v. Kloepper*, 88 Neb. 236.

2. **Trial:** INSTRUCTIONS. The court should refuse to give an instruction upon the theory of a party to a suit, where such theory is neither admitted by the litigants nor supported by any competent evidence.

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

Mockett & Peterson, for appellant.

Stewart, Williams & Brown, contra.

BARNES, J.

This case is before us on a second appeal. The law of the case was settled by the judgment on the former appeal. *Campbell v. Luebben,* 88 Neb. 214. In the case of *Trenholm v. Kloepper,* 88 Neb. 236, it was said: "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default or misdoings of another person, nor does he agree to purchase goods, wares, merchandise or things in action." We are of opinion that this rule should be applied to the facts in this case.

It appears on the second trial in the district court the issues were recast, and it was alleged in the plaintiff's amended petition, in substance, that on May 23, 1905, plaintiff purchased, through the defendant, 15 shares of the Luebben Baler Company of the par value of $1,500, and received therefor stock certificate No. 14 for $1,000, and stock certificate No. 15 for $500; that on or about the 15th day of September, 1905, defendant orally promised and agreed with plaintiff that, if plaintiff would purchase other and additional stock of the Luebben Baler Company through defendant, he (the defendant), in consideration of such purchase and payment of money therefor, would repay to plaintiff the amount that plaintiff had paid for all such stock at any time plaintiff became dissatisfied, for any reason, with such investment, and desired the money he had paid therefor returned; that, in pursuance of said promise and agreement, plaintiff purchased through defendant at different times further

and additional shares of stock of the Luebben Baler Company at the price of $100 a share, to wit: 30 shares September 25, 1905, certificate No. 17, $3,000, and 9 shares October 19, 1905, certificate No. 18, $900, and 10 shares December 16, 1905, certificate No. 31, $1,000, total $4,900; and it was alleged that the plaintiff took and paid for such stock because of said agreement with the defendant, and relying upon said promise and agreement, and that he would not have purchased said stock but for the agreement. It was alleged that the plaintiff became dissatisfied with the investment and desired the repayment of his money so paid by him to defendant, and, on or about the 1st day of January, 1907, offered to return the shares of stock to defendant, and demanded that he repay plaintiff the sum of $6,400 so paid by plaintiff as aforesaid; but defendant refused to comply with his said contract, and neglected to pay plaintiff said sum or any part thereof. The petition concluded with a prayer for judgment for the sum of $6,400, with interest thereon from January 1, 1907, and costs of suit.

Defendant's answer was a denial of each and every allegation contained in the petition, except such as were specifically admitted. It was admitted that plaintiff purchased 15 shares of the Luebben Baler Company stock on the 23d day of May, 1905. It was further stated in the answer that plaintiff purchased of the defendant 30 shares of stock on the 25th day of September, 1905, as evidenced by certificate No. 17 for $3,000, and that attached to said certificate was a written agreement of the Luebben Baler Company to repurchase said shares of stock when there should have been manufactured and sold 300 of the machines, which the company were to thereafter manufacture and sell. It was also stated that the plaintiff purchased of the Luebben Baler Company 9 shares of stock on the 19th day of October, 1905, as evidenced by certificate No. 18, and that a similar written agreement was attached to said certificate as that above described. It was further stated in the answer that plaintiff pur-

chased of the Luebben Baler Company 10 shares of stock on the 16th day of December, 1905, as evidenced by certificate No. 31, and that a similar written agreement was attached to said certificate; that the total amount of stock so purchased was 54 shares, and the purchase price thereof $5,400.

Other matters not material to the controversy were alleged in the defendant's answer, all of which were controverted by the reply. So that the issue tried in the district court was, whether or not the defendant agreed to and with the plaintiff, on or about the 15th day of September, 1905, that he would repay to the plaintiff the purchase price of such additional stock in the Luebben Baler Company as he should sell to the plaintiff under the terms of said agreement.

It is disclosed by the abstract and bill of exceptions that plaintiff gave his own testimony, and produced in support thereof the evidence of his wife and daughter; that his evidence and their testimony were sufficient, if believed by the jury, to sustain a finding that the defendant made the agreement to and with the plaintiff set forth in his petition. On the other hand, defendant testified that he never made any such agreement with the plaintiff; that the only agreement that ever existed between them was the one which he alleged was made on the 23d day of May, when plaintiff purchased of him the first 15 shares of the Luebben Baler stock, which was in writing. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant has prosecuted this appeal.

It appears that the defendant requested the trial court to instruct the jury, in substance, that it was admitted by the pleadings and the evidence that the plaintiff, George W. Campbell, purchased from the Luebben Baler Company 54 shares of its capital stock of the par value of $5,400; that it was further admitted that the defendant, Melchoir L. Luebben, acted as agent for the Luebben Baler Company in the sale of said stock; and that, if

they found from the evidence that the defendant orally promised to repurchase said stock from the plaintiff in the event that the plaintiff should become dissatisfied with the same, such promise would not be enforceable, for the reason that it would be within the statute of frauds. This instruction was refused, and for such refusal defendant assigns error.

We think that the trial court properly refused this instruction, for the reason that it neither conformed to the issues nor was it supported by the evidence. As above stated, plaintiff's testimony tended to establish the allegations of his petition that the defendant agreed that, if the plaintiff would purchase the stock in question of him, he would repay him the amount of the purchase price at any time the plaintiff became dissatisfied with his investment. The defendant, both in his answer and by his evidence, denied that he ever made any such agreement. It thus appears that it would have been error for the district court to give the instruction requested.

Errors are also assigned for the refusal of the court to give other instructions requested by the defendant, but what has been said as to the request above described applies with equal force to all of the other instructions requested.

It is strenuously contended that the court erred in giving instruction No. 8 on his own motion, which reads as follows: "You are instructed that if an officer of a corporation orally promises a prospective purchaser of stock of such corporation to personally repay the purchase price of such stock at such time as the purchaser may become dissatisfied with the same as an investment and wants his money back, and the stock is bought in reliance upon such promise so made, such oral promise would be legally enforceable against the person making the same in his individual capacity. In such a case it would not be necessary, to entitle the purchaser to recover, that he prove any special reason for his being dissatisfied; it would be enough to show that he was in

fact dissatisfied, and did want and ask such officer for his money back." As we view the record, this instruction was a proper one. It conforms to the issue made by the pleadings and the evidence produced by the plaintiff in support thereof, and follows the rule announced in our former opinion. For those reasons, we feel constrained to hold that this instruction was a proper one.

It is strenuously contended that the trial court erred in refusing, by proper instructions, to submit the defendant's theory of his defense to the jury. On this question, it may be said that the real theory of the defense was that defendant never made the agreement upon which the plaintiff based his cause of action. That theory was properly submitted to the jury by the instructions given by the court on his own motion, and it was not error to refuse to submit defendant's contention to the jury that the agreement was within the statute of frauds, because there was nothing in the pleadings or the evidence tending to establish such a state of facts as would entitle him to have that theory submitted to the jury.

A careful examination of the record discloses no reversible error, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

DAVID C. SNELLER, APPELLEE, V. SAMUEL HALL, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,740.

1. **Landlord and Tenant:** LEASE: BREACH OF COVENANT: DAMAGES. The measure of damages for a breach of covenant in a lease to put in possession is the difference between the rental value of the premises and the rent reserved in the lease. The lessee may also recover such special damages as he pleads and proves to have necessarily resulted from the breach of the agreement.

2. ———: ———: ———: ———. A leased certain premises to B, who took possession. Afterwards he leased the same premises to C for the same term. C attempted to take possession, but failed. B brought an action for damages against C based upon C's acts in attempting to take possession, the nature of which is not disclosed, and recovered a judgment. A was notified by C of the pendency of this suit and requested to assist. *Held*, That the judgment in and attorney's fees, costs and loss of time of C in defending that action are not proper elements of damage in an action against A on the covenants in the lease to put in possession and for quiet enjoyment.

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

J. W. Purinton, for appellant.

W. L. Kirkpatrick and *George M. Spurlock, contra.*

LETTON, J.

This was an action for damages for the breach of two covenants in the lease of a barn, viz., a covenant that the barn should be open to entry by the plaintiff, and one for quiet enjoyment during the term of the lease. The petition pleaded that the defendant had broken both of these covenants, and had leased the barn to one Olmstead, who was then in possession, and that he accepted rent from both the plaintiff and Olmstead for the same term. It pleads that the value of the lease for the unexpired term over rent reserved in the lease was $50. It further alleges that plaintiff attempted to occupy the barn under his lease, and was sued for trespass by Olmstead on this account; that he notified defendant to defend the suit, which he refused to do; that a judgment for $5 damages was rendered against him in this action. It is further averred that the plaintiff has been damaged $100 for judgment, costs and attorney's fees, $100 for mental worry and humiliation and injury to his feelings, $76.80 for time and labor and material destroyed and loss of profits, $20.85 for deterioration in harness, expenses in

attempting to take possession, and rent overpaid. The answer denies the lease of the barn, except from the time that Olmstead would vacate and yield possession, and virtually denies generally all the other allegations in the petition. A trial was had without the intervention of a jury, and judgment rendered in favor of plaintiff for the sum of $102.90. No bill of exceptions was settled, so that the only question presented is whether the pleadings sustain the judgment.

There is no question but that the petition states a cause of action. Several of the items pleaded are not proper elements of damages in such an action. This would be immaterial if the findings of the district court were general. The court, however, made the following special findings: "For breach of contract, $1; amount of judgment in trespass suit, $5; costs of trespass suit, $17.90; attorney's fees in trespass suit, $25; loss of time in trespass suit, $60; barn rent for June, 1908, $1."

Defendant claims the benefit of the principle that, where the evidence is not in the record, the court will only examine the pleadings to ascertain whether they are sufficient to support a judgment. There are exceptions to this rule. If the findings of the court clearly disclose that, while the petition states a cause of action, yet that recovery has been allowed for certain elements of damage not properly cognizable or allowable in such a case, the court will relieve the appellant from a judgment founded upon such erroneous findings.

We are of the opinion that none of the items of damage relating to the so-called trespass suit are proper elements to be considered in this case. The petition shows that the so-called trespass suit was a civil suit brought by Olmstead against the plaintiff to recover damages for a trespass by plaintiff upon the leased property of which Olmstead was lawfully in possession. It was not a possessory action. It is true that the trespass may have been occasioned by the fact that defendant had leased the same property to both parties, but this we think cannot operate

to enlarge the field of recovery of damages for the breach of the covenants. The plaintiff had his remedy at law in order to gain possession. Damages incurred in a suit to obtain possession of the premises after having vouched in the defendant might perhaps be recoverable, but this was not such an action. So far as the petition shows, plaintiff undertook to take possession, and in doing so inflicted damages upon Olmstead, the nature of which is not disclosed, which Olmstead afterwards recovered in a civil action against him for the tort. The costs and expenses, loss of time, and damages which the plaintiff suffered in defending the civil suit brought against him by Olmstead for trespass grew out of his own mistaken act, and was not a natural or necessary consequence likely to follow from a breach of the covenants. Such a controversy is so far removed from the actual covenants in the lease that the covenantor cannot be said to have reasonably contemplated it as a result of the breach.

The general rule for the measure of damages in such a case as this is the difference between the rent reserved and the value of the premises for the term, and any other damages which have resulted as the direct and necessary or natural consequences of the plaintiff's breach of the contract. *Herpolsheimer v. Christopher,* 76 Neb. 355; *Shutt v. Lockner,* 77 Neb. 397; *Rose v. Wynn,* 42 Ark. 257; *Bernhard v. Curtis,* 75 Conn. 476, 54 Atl. 213; *Adair v. Bogle,* 20 Ia. 238; 3 Sutherland, Damages (3d ed.) sec. 865. We have not been cited to any case extending the scope of damages as far as the plaintiff contends, and we are convinced that no such case can be found. To so hold might render parties liable for damages out of all proportion to the benefits derived from a contract, and expose them to dangers arising from wanton acts by the other party to the contract not reasonably to be foreseen or contemplated as one of the consequences following a breach. For these reasons, all the findings with respect to the trespass suit are erroneous and cannot be upheld.

We think the case is distinguishable from that of

Blodgett v. Jensen, 2 Neb. (Unof.) 543, cited by plaintiff. In that case the plaintiff was in possession of the land, and the recovery by a prior lessee of the natural products of the soil was treated by the court as of the nature of an ouster. The plaintiff therein was not the aggressor, but incurred the expense in defending his possessory rights after notifying his landlord of the action against him.

The findings as to damages in the particular mentioned and the judgment are not sustained by the pleadings. The judgment of the district court is therefore erroneous, and is

REVERSED.

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

TACOMA MILL COMPANY, APPELLEE, V. F. H. GILCREST LUMBER COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,656.

1. **Pleading**: CONSTRUCTION. In an action to recover a money judgment, the pleadings should be liberally construed in the interest of justice.

2. **Sales**: BREACH OF CONTRACT: PLEADING. A petition to recover for the buyer's breach of an executory contract of sale will not be held bad on general demurrer because the pleader did not use the words "damages" or "damaged."

3. ———: NONACCEPTANCE: DAMAGES. "Where a buyer wrongfully neglects or refuses to accept and pay for goods under an executory contract for sale, the seller may maintain an action against him for damages, and the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the breach of the contract. Ordinarily it is the difference between the contract price and the market price at the time and place where the goods ought to have been accepted." *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623.

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

Warren Pratt and *John N. Dryden*, for appellant.

Frank E. Beemer, contra.

ROOT, J.

The point of contention in this case is whether the plaintiff is suing for a balance due on a contract of sale or for damages for its breach. The defendant filed a general demurrer to the petition, and, refusing to plead or answer over when its demurrer was overruled, comes here on appeal to reverse a judgment in the plaintiff's favor.

The defendant relies upon *Backes v. Schlick*, 82 Neb. 289, wherein we held that ordinarily either party to an executory contract has the right by explicit notice to the other to stop performance, subjecting himself to such damages as will compensate the other party for being prevented from executing the contract; that an action by the seller will not subsequently lie to recover the contract price, but his sole remedy is an action for damages for a breach of the contract; and that if the petition, in an action to recover the contract price, discloses such notice before the time for performance, it does not state a cause of action.

The plaintiff contends that it states a cause of action for damages. The pleader states the minutest details of the transaction, and pleads some extrinsic facts and various conclusions not necessary to be stated here. The pleader discloses that the plaintiff's place of business is in the state of Washington and the defendant's place of business is at Kearney, Nebraska, and that the defendant on the 17th of October, 1907, purchased three car-loads of shingles from the plaintiff to be delivered f. o. b. cars at Kearney for the agreed price of $3.56 a thousand. The correspondence between the litigants with respect to routing the shingles is pleaded, and the delay incident to following the defendant's directions is explained. The plaintiff also alleges that, during the forenoon of Decem-

ber 2, 1907, it loaded for the defendant two cars with shingles, delivered them to a common carrier, and received bills of lading therefor; that, during the afternoon of the day, it received from the defendant a telegram requesting a cancelation of the contract, to which an answer was sent by telegram that the sale would be canceled as to the one car-load not loaded, but that, since the two car-loads had been shipped, the sale could not be canceled as to them. The plaintiff further alleges that one car-load of the shingles arrived in Kearney December 27, 1907, and the other car-load of the shingles arrived at its destination January 1, 1908; that the defendant refused to accept the shingles, and thereupon, after notice to the defendant, the plaintiff sold them to the best advantage in the market on the defendant's account; that the market price of shingles at Kearney at the time of the resale was $2.50 a thousand, and in Washington $2 a thousand, but that the shingles were sold in Omaha for $3.10 a thousand; that the cars contained 571¼-thousand shingles; that the difference between the contract price and the price received on a resale, $321.77, has not been paid, but is due and unpaid, and judgment for that sum, with interest is prayed for in the petition.

The rights of the parties to a contract of sale of personal property and the remedies for its breach are well settled in this state. If the contract is executory and relates to ordinary commodities which have a general market value, the seller's remedy, where the buyer wrongfully refuses to receive or to pay for the goods, is an action for damages for the loss directly and naturally resulting in the natural course of events from the breach of the contract. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623. Ordinarily the recovery is limited to the difference between the contract price and the market price at the time and place where the goods should have been accepted. Had the contract pleaded in the instant case been executed, the goods would have been accepted at Kearney. No particular time is pleaded for the delivery, so that a

reasonable time will be implied. The delay, if any, in shipping the shingles is explained by the pleader, and, as against a general demurrer, will be considered reasonable. The resale on the defendant's account in no manner indicates an action to recover the purchase price. Rather it indicates an intention to ascertain in the most practical manner the plaintiff's actual damages. *Moore v. Potter*, 155 N. Y. 481. The legal effect of that transaction is immaterial in the instant case, because by taking advantage of favorable circumstances the plaintiff resold the shingles for considerably more than the market price at the point of shipment or of their destination. While the pleader does not use the word "damaged" or the word "damages," it does charge every fact essential to show that the plaintiff was damaged by the defendant's wrongful conduct and the amount of that damage, and thereby states a cause of action for damages. *Weaver v. Mississippi & Rum River Boom Co.*, 28 Minn. 542; *Riser v. Walton*, 78 Cal. 490; *Bank of British Columbia v. City of Port Townsend*, 16 Wash. 450.

Section 121 of the code provides: "In the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties." Substantial justice in the instant case demands that the defendant recompense the plaintiff for its actual loss naturally and necessarily occasioned by the defendant's default. The fact that but two car-loads were shipped is immaterial. It does not appear that the defendant refused to accept the two car-loads because three car-loads were not shipped.

Applying to the instant case the rule announced in section 121 of the code, we hold that the plaintiff's petition states a cause of action for damages for the defendant's breach of contract, and that the demurrer was properly overruled. It follows that the judgment of the district court should be, and is,

AFFIRMED.

FAWCETT, J., not sitting.

LESLIE D. SPENCE, GUARDIAN, APPELLANT, V. HARDIN U. MINER, SHERIFF, ET AL., APPELLEES.

FILED OCTOBER 21, 1911. No. 16,770.

Judgment: RELIEF IN EQUITY: JURISDICTION. Where an insane person is by fraud and without consideration induced to sign a promissory note, upon which a suit is instituted in a county court without disclosing the maker's mental condition, and he does not appear and is not represented by his guardian or a guardian *ad litem*, and, after a transcript of that judgment is filed in the office of the clerk of the district court of another county, an execution issued thereon is levied by the sheriff upon the lands of the incompetent, a court of equity in that county has jurisdiction at the suit of the guardian to enjoin the sale of his ward's real estate and to enjoin the judgment creditor from collecting the judgment.

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

Hugh La Master, for appellant.

L. C. Chapman, contra.

ROOT, J.

This is an action to enjoin the defendant Miner, as sheriff of Johnson county, from selling the interest of William I. Young in a tract of land, and to perpetually enjoin the defendant Boggs from enforcing the judgment upon which the execution was issued. The defendants' general demurrer to the petition was sustained, and the plaintiff's petition dismissed. The plaintiff appeals.

The plaintiff, among other things, in substance, states in his petition: That letters of guardianship were issued by the county court of Johnson county in 1902 to one Duncan as guardian of the person and property of William I. Young, incompetent; that Duncan qualified and subsequently acted as guardian until October 24, 1908,

upon which day like letters were issued to the plaintiff as the successor in office of Duncan, and thereupon the plaintiff accepted the trust and qualified, and is now such guardian. It is also charged that the defendant Boggs in March, 1907, filed a petition in the county court of Lancaster county praying judgment against William I. Young in the sum of $250 and interest upon a certain pretended promissory note. A summons was issued in that action, and subsequently personally served on the incompetent in Lancaster county. May 15, 1907, a judgment for $314.92 and costs was rendered by that court against Young on the cause of action set forth in Boggs' petition. January 19, 1909, a transcript of the judgment was filed in the office of the clerk of the district court for Johnson county, and subsequently the execution referred to was issued and delivered to the sheriff. It is also alleged that at the time the suit was commenced in Lancaster county, and at all times thereafter, Young had a good defense to that action, because there was no consideration for the note, the maker was insane to the extent that he did not and could not comprehend the meaning of the instrument, and his signature thereto was procured by the wrongful and fraudulent acts of the payee; that at the time the summons was served Young did not understand its object or purpose, and had no knowledge that the suit was pending; that, although Boggs knew that Duncan was Young's guardian, summons was not issued for him or other notice given of the pendency of that action, and he had no knowledge thereof until more than twelve months after the judgment was rendered.

The legislature has not provided that summons must be served on the guardian of an insane adult in order to give a court jurisdiction to enter a judgment against the incompetent, but section 23, ch. 34, Comp. St. 1909, provides that the guardian of an insane person or incompetent person "shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend."

It doubtless was considered that suit would not be instituted against an insane person without either making his guardian a party defendant or stating upon the record the ward's condition, so that the court might discharge its full duty by appointing some qualified, disinterested person to protect the incompetent's interests. Otherwise, in such an action the court might, and probably would, be used as an instrument to perpetrate a fraud. The failure to appoint a guardian *ad litem* for an insane defendant personally served with process has been held not to render the judgment void. *McCormick v. Paddock*, 20 Neb. 486. If, however, it is made to appear that the incompetent's guardian was kept in ignorance of the pendency of the suit, that the incompetent's condition does not appear upon the record in the case, and the judgment was rendered upon a fictitious and fraudulent claim, there is error in the record, although it may not appear from an inspection thereof. Section 602 *et seq.* of the code authorize county courts to vacate or modify their judgments after the term at which they were rendered, among other causes, for: "Fifth. For erroneous proceedings against an infant, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Section 609 provides that such proceedings, if commenced under the quoted subdivision, must be commenced within two years after the judgment was rendered, unless the party entitled to relief be an infant or of unsound mind, and, in that event, within two years after the disability is removed.

The plaintiff does not allege that the judgment attacked was rendered by default, but the defendants in their brief concede that the action is brought to set aside a judgment which does not disclose the judgment debtor's condition, so we shall consider this case on the theory that the judgment was not defended by a guardian *ad litem*, and it is admitted that the general guardian had no notice of the pendency of the action.

In the circumstances of this case as they now appear, it was error to render judgment against the incompetent upon this fraudulent claim, but, since the record is fair, the wrong cannot be corrected by appellate proceedings. The guardian had a right at any time during his ward's incompetency to appear in the county court and have the judgment set aside. *Martin v. Long*, 53 Neb. 694. But is he limited to that forum in applying for relief? In *Radzuweit v. Watkins*, 53 Neb. 412, we held that where a judgment was rendered in a county court upon a cause of action predicated upon forged promissory notes, and the sole notice to the judgment debtor was by leaving a copy of the summons at his residence, which process did not come to his notice until after a transcript of the judgment had been filed in district court and an execution issued thereon had been levied upon his property, an action might be maintained by him in the district court to enjoin the collection of the judgment. There was no question concerning the jurisdiction of the county court to render the judgment, but we held that a court of equity should grant relief where the suitor, without fault on his part, and by the fraud of his adversary or through accident or mistake, is called upon to satisfy an unconscionable judgment. We also held that section 602 *et seq.* of the code would not afford the judgment defendant adequate relief, because the county court could not prevent the sale of his real estate while he was litigating his application for a new trial. The same reasons exist in the instant case, and should entitle the plaintiff to relief, unless he is guilty of laches in failing to move for relief in the county court. It is true that equity rewards the vigilant, and not those who slumber upon their rights; but the judgment creditor was taking no steps to enforce the judgment, and the plaintiff might in reason have believed none would be taken. If Boggs had not filed the transcript in the office of the clerk of the district court for Johnson county and had not issued execution thereon, there would have been no necessity for this action, and

no necessity to incur costs by moving in the county court to set aside the judgment.

In *Wirth v. Weigand*, 85 Neb. 115, we held that the laches of a guardian *ad litem* will not be imputed to the insane person whom he is supposed to represent, and we are of opinion that, under the facts in the instant case, no laches should be imputed to Young, the incompetent, nor to his guardian, the plaintiff herein. In *Wirth v. Weigand, supra*, we held that, where the plaintiff in an action against an insane defendant prevails by fraud or perjury, the defendant's guardian may subsequently by an original suit in equity impeach the decree, and secure leave to answer or defend the original action. In that case the judgment attacked was rendered in the same court where the action in equity was instituted, but in the instant case the transcript of the judgment, which is an apparent if not an actual lien upon the ward's real estate, is part of the records of the court where this action was instituted. The sheriff of Johnson county is attempting to execute that judgment, and complete relief cannot be granted in any court other than the forum selected by the plaintiff. We therefore conclude that the petition, while indefinite in some particulars and possibly deficient in others which should appear, states facts sufficient to resist a general demurrer. What we have said with respect to the fraud of Mr. Boggs is predicated solely on the allegations in the petition.

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

REVERSED.

JOHN KANE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,889.

1. **Master and Servant: SICK BENEFITS: DISABILITY.** A railway night switchman becoming color-blind during his employment is thereby

disabled by sickness within the meaning of his employer's contract that it will pay him sick benefits for a limited period while he is disabled by sickness or accidental injury, provided the fact be established by proof of acute or constitutional disease.

2. ———: RESIGNATION OF SERVANT: EVIDENCE. A statement in a letter written and sent to the plaintiff by the defendant's superintendent of employment that the plaintiff resigned from the defendant's service is not of itself competent evidence against the plaintiff of such resignation.

3. ———: DISABILITY OF SERVANT: EVIDENCE. Nor is the trainmaster's statement that had the medical examiner found the plaintiff to have been afflicted with color-blindness, the physician would have reported that fact to the witness, competent evidence to disprove the plaintiff's contention that he is color-blind.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

James E. Kelby and *Arthur R. Wells*, for appellant.

Smyth, Smith & Schall, contra.

ROOT, J.

This is an action to recover sick benefits. The plaintiff prevailed, and the defendant appeals.

At the time the plaintiff entered the defendant's employ as a switchman in 1891, he also became a member of its relief department. In 1907 the plaintiff, as he contends, was discharged or suspended from his employment because of color-blindness. The litigants' stipulation that the plaintiff should recover a definite sum, should it be determined that the defendant is liable, renders unnecessary a consideration of such errors as are assigned upon the rejection of the evidence offered for the purpose of proving that the plaintiff might have worked for the defendant at a reduced compensation. The only instruction presented for our consideration is a request for a directed verdict in the defendant's favor which the court refused to give. The important question, therefore, is whether the evidence sustains the verdict.

There is sufficient evidence to sustain findings to the effect that the plaintiff became color-blind while in the defendant's employ, that he was discharged because of that defect, and that his condition incapacitated him from following his vocation or any other equally as remunerative. The by-laws of the relief department, among other things, provide: "Wherever used in these regulations the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work;" and "to establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability." In *Keith, Adm'x, v. Chicago, B. & Q. R. Co.*, 82 Neb. 12, following *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559, it was held that, as used in these by-laws, the words "physical inability to work" mean "inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured." As we have said, the evidence establishes that condition. If, therefore, this condition was the result of sickness within the meaning of the by-laws, the plaintiff was entitled to recover. "Sickness" is defined in the Century Dictionary as: "(1) The state of being sick or suffering from disease; a diseased condition of the system; illness; ill health. (2) A disease; a malady; a particular kind of disorder * * * (4) A disordered, distracted or enfeebled state of anything." In the same book we find a definition of color-blindness as "Incapacity for perceiving colors, or certain colors." In commenting upon that condition the author says: "It is not a mere incapacity for distinguishing colors (for this might be due to want of training), but an absence or great weakness of the sensations upon which the power of distinguishing colors must be founded." There is no direct evidence concerning the cause of this defect in the plaintiff's vision, and the defendant's counsel argue that the court cannot take judicial notice that color-blindness

uniformly is caused by sickness, and that without evidence to explain the cause of the plaintiff's condition the jury could not lawfully or logically find that cause to have been sickness. Counsel say that this defect may have resulted from the plaintiff's advancing years, and, if so, the defendant is not liable. It does appear, however, that the plaintiff became color-blind while in the defendant's employ. There is little, if any, evidence to justify a finding that this color-blindness is the result of acute sickness; but could not the jury lawfully have found that it was caused by constitutional disease? The by-laws, as we have seen, recognize constitutional, as well as acute, disease as a satisfactory cause for a disability which will entitle the employee to the benefits of the relief department. We may take judicial notice of the fact that this defect in vision occurs in about 5 per cent. of all human males in civilized countries, and that it is discovered in every period of life from infancy to advanced senility. The jury knew these facts, and were justified in finding that the plaintiff's optical weakness was inbred, but for some reason did not become evident during his earlier years. We do not doubt that the learned trial judge exhaustively and clearly instructed the jury concerning these phases of the case.

Incurable blindness has been judicially determined to be sickness. *Regina v. Inhabitants of Bucknell,* 28 Eng. Law & Eq. 176. The plaintiff for the purposes of his vocation is blind, and, being blind, he is sick, within the meaning of the defendant's regulations. We conclude, therefore, that the verdict is sustained by sufficient evidence.

The defendant attempted to prove by its trainmaster at Wymore, where the plaintiff worked, that, if the department's medical examiner had found from an examination of the plaintiff that he was color-blind, the witness would have received that report. The evidence was excluded, and in this there was no error. Argument and citation are not necessary to emphasize that fact. The court also

refused to permit this witness to testify that, had the plaintiff offered to work, he would have been given his usual employment. The plaintiff was not requested to return to work, nor was work offered to him by the defendant. It is taxing the credulity of the court to argue that the defendant would have continued the plaintiff as a night switchman, with full knowledge that he was color-blind. No such criminal carelessness will be imputed to the defendant or to its trainmaster.

It is customary for the defendant's superintendent of its employment department to issue a service letter upon request of an employee. In response to the plaintiff's request, such a letter was sent to him. This document contained a statement that the plaintiff had resigned, and was excluded when offered in evidence by the defendant. The evident purpose of this proof was to sustain a contention that the plaintiff had not been discharged or suspended. There is no evidence that the letter was a copy of any record kept by the defendant or that the plaintiff was responsible for the statement of alleged facts. The document was time-serving, and, under the circumstances of this case, was properly excluded. Some incompetent evidence was received, but we do not believe it could, or did, mislead the jury. There is no conflict in the evidence that the plaintiff is color-blind, and the incompetent evidence had no bearing on the disputed issue as to whether the plaintiff voluntarily or involuntarily ceased working for the defendant.

We find no error prejudicial to the defendant, and the judgment of the district court therefore is

AFFIRMED.

BARNES and FAWCETT, JJ., dissent.

NORA PENDERGAST, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,833.

Insurance: BENEFIT INSURANCE: ENGAGING IN PROHIBITED OCCUPATION: WAIVER. Where a member of a fraternal beneficiary association forfeits his right to participate in the benefit funds of the fraternity by engaging in a prohibited occupation, assurer does not assume the hazards thereof by accepting dues upon the condition that the insurance, if restored, shall extend only to the risks originally assumed.

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

Hainer & Smith, for appellant.

L. B. Stiner and *A. C. Epperson, contra.*

ROSE, J.

This is a suit on a 1,000-dollar fraternal beneficiary certificate issued by defendant January 9, 1904. Emmet Pendergast was the assured. His mother was the beneficiary and is plaintiff herein. From a judgment in her favor for her claim and interest, amounting in all to $1,100.50, defendant has appealed.

The answer of defendant contains a plea that assured, who was a farmer when admitted to membership, afterward entered the prohibited occupation of railroad brakeman, was killed as a result of such employment, and that in consequence defendant's liability on assured's certificate was extinguished according to its own terms. In reply to this defense a waiver was pleaded; plaintiff alleging that, after assured became a brakeman, defendant, with full knowledge that he had thus changed his occupation, continued to accept the monthly assessments or dues which, according to the laws of the fraternity, he was required to pay to keep his insurance in force.

The sufficiency of the evidence to establish the waiver pleaded is assailed by defendant, but there is now no controversy over other facts. When assured made his application and received his certificate, he was a farmer. The edicts or laws in force during the entire period of his membership included railroad brakemen in the list of prohibited occupations, and provided that a member by engaging therein terminated his membership and his right to participate in defendant's benefit funds. In the oral argument it was conceded by counsel for plaintiff that the edicts were binding on assured and his beneficiary. Assured, nevertheless, when he was a member, became a railroad brakeman October 9, 1908, was struck by a train December 19, 1908, when so employed, and died a few hours later. To establish the waiver pleaded, plaintiff called as a witness assured's brother, who testified in substance: William Reuter was secretary and treasurer of the local castle of which assured was a member. Late in November, or early in December, 1908, witness paid assured's dues to Reuter, but before doing so told him that assured was in the railroad service, that his policy was not in force, that his dues should not be paid, and that the secretary should not take the dues. The same witness also testified that during the conversation the secretary said he thought assured would quit railroading in a few days, that his dues in that event would be good, and were accepted on that plan. There is nothing in the record to change the import of this evidence. It thus appears that assured's brother, when he paid the dues, understood that the insurance did not include the hazards of the prohibited employment. That it was extended thereto by the acceptance of the dues or by the statements of the secretary is clearly refuted by the testimony mentioned. The conditions under which the payment was accepted limited the insurance to the risks originally assumed, and protected assured to that extent only. Beyond that any waiver proved did not go. In this view of the proofs, the waiver pleaded in plaintiff's reply has not been established.

There is no other foundation for the judgment, and therefore it is not supported by the evidence. For this reason, it is reversed and the cause remanded for further proceedings.

REVERSED.

LEWIS E. WALKER ET AL., APPELLANTS, V. ANDERS ANDERSON, APPELLEE.

FILED OCTOBER 21, 1911. No. 16,532.

1. **Waters:** IRRIGATION DITCHES: RIGHT TO CONSTRUCT. In a suit to enjoin proceedings instituted by one landowner to construct a ditch for irrigation purposes across the lands of an adjoining owner, which are already traversed by another ditch, the question is not whether the first ditch is then in a sufficient state of repair or in a condition to answer the purpose for which the second ditch is desired or intended; the question is: Can the first ditch be made to answer such purpose? If so, no right exists to construct the second ditch.

2. ———: ———: ———. Nor, in such a case, can any such right be given by the state board of irrigation, or be acquired in any other manner than that pointed out in section 3, art. I, ch. 93*a*, Comp. St. 1909, viz., by the written consent and agreement of the owner of the land.

3. ———: ———: INJUNCTION: BURDEN OF PROOF. Where A institutes proceedings to condemn the lands of B for the purpose of constructing an irrigation ditch over lands of B, which are already traversed by a prior ditch which has been extended to the line of A's land, injunction is the proper remedy for B; and in such a suit the burden is upon A to show that the first ditch cannot be made to answer the purpose for which the second ditch is desired or intended.

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

C. E. Eldred, for appellants.

Perry, Lambe & Butler and *R. D. Druliner, contra.*

FAWCETT, J.

Plaintiffs and defendant are the owners of adjoining lands in Dundy county, lying south of the Republican river. Defendant's lands are located in range 36, and the bulk of plaintiffs' lands in range 37, immediately west. About the year 1891 an irrigation ditch, known as the "Delaware-Hickman ditch," was constructed across plaintiffs' lands. About 1894 defendant constructed a ditch, commencing about 20 rods west of the N. E. corner of section 1, on the lands of plaintiffs, and extending in an easterly direction across the lands of plaintiffs to and over the land of defendant. On May 15, 1908, defendant instituted proceedings before the county judge to condemn a right of way across plaintiffs' lands, about three-quarters of a mile in length and 20 feet in width, and, in addition thereto, a tract of land 50 feet square, at the head and western extremity of said proposed right of way, for the purpose of constructing a head-gate. The point where it is proposed to relocate the head-gate is on the south bank of the Republican river, the purpose being to divert water from that stream. This suit was brought to enjoin the prosecution of such condemnation proceedings. A temporary injunction was issued by the county judge, which, at the hearing in district court, was vacated, and the suit of plaintiffs dismissed. From this judgment, plaintiffs appeal.

Plaintiffs contend that section 3, art. I, ch. 93*a*, Comp. St. 1909, entitles them to the injunction prayed for. That section reads: "No tract of land shall be crossed by more than one ditch, canal, or lateral, without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended."

There is no controversy over the fact that the construction of the ditch for which condemnation is sought by defendant will cross plaintiffs' lands some distance north of and nearly parallel with the Hickman ditch, so that

the lands of plaintiffs will be burdened with two ditches. It is admitted by the defendant that he has no intention of changing the existing ditch upon his own land; the only change intended being upon the lands of plaintiffs. The only question, therefore, upon this branch of the case is whether the first, or Hickman, ditch can be made to answer the purpose for which the second is desired or intended. If it can be made to answer such purpose, the plaintiffs are entitled to an injunction as prayed.

There is very little conflict in the evidence, a careful examination of which shows the following facts: All of the land of defendant is under the Hickman ditch, which is extended to defendant's land. There is no claim that the ditch is not of sufficient dimensions to carry water sufficient to irrigate all of defendant's land, nor is it shown that the Hickman ditch could not be made to answer the purpose for which his proposed ditch is desired or intended, as contemplated by the section of statute above quoted. The most that can be said for the testimony offered by defendant is that it shows that for several years there was not a sufficient quantity of water running through the Hickman ditch to irrigate his land. But his own witness, Roberts, shows that as soon as he desired more water than he had been receiving through the ditch he was able to obtain it without any serious difficulty, and after he had done the work upon it, about which he testified, he says it had plenty of water in it. Defendant seeks to escape the force of Mr. Roberts' testimony by showing that the change he had made in the ditch was since the commencement of this suit, but that is immaterial. If Mr. Roberts could make the ditch answer the purpose for which it was constructed, defendant or anyone else could have done so. When a person undertakes to construct a second ditch across another's land, the question is not whether the first ditch is then in a sufficient state of repair or in a condition to answer the purpose for which the second ditch is desired or intended; the question is: Can the first ditch be made to answer

such purpose. If so, no right exists to construct the second ditch; nor can any such right be given by the state board of irrigation, or acquired by condemnation proceedings. The statute points out the only way by which such right can be obtained, viz., the written consent and agreement of the owner of the land. No such written consent was obtained in this case. The statute is a prohibition against running a second irrigation ditch across another's land, with a proviso; and he who seeks to avoid the prohibition has the burden of proving that he is within the terms of the proviso. This the defendant has failed to do. On the contrary, we are satisfied from the evidence that the Hickman ditch not only can be made, but is probably at this time, sufficient to answer the purpose for which defendant's proposed ditch "is desired or intended." Such being the case, the district court erred in vacating the injunction and dismissing plaintiffs' suit. This conclusion renders it unnecessary to consider the other questions argued in the briefs and at the bar.

The judgment is therefore reversed and the cause remanded, with directions to the district court to enter a decree granting a perpetual injunction as prayed in plaintiffs' petition.

REVERSED.

ROOT, J., dissents.

DESSIE H. GARFIELD, ADMINISTRATRIX, APPELLEE, V. HODGES & BALDWIN, APPELLANTS.

FILED OCTOBER 21, 1911. No. 16,540.

1. **Appeal:** REVERSAL. A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded.

2. **Master and Servant:** INJURY: EVIDENCE. Evidence examined and discussed in the opinion *held* insufficient to sustain the judgment.

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

Edgar M. Morsman, Jr., and *C. E. Abbott*, for appellants.

Courtright & Sidner, contra.

FAWCETT, J.

This action was brought by plaintiff, as administratrix of the estate of Penial J. Garfield, deceased, for damages by reason of the death of her husband, caused, as she alleges, by the negligence of defendants. Plaintiff recovered judgment below, and defendants appeal.

Defendants were engaged in the business of manufacturing and selling tombstones and monuments. In the course of their business, they handled large quantities of heavy stones, many of them weighing several tons each. These stones were purchased in carload lots, hauled by wagon from the cars, and piled in the yard adjacent to their shop. When the stones were brought to the yard, they were handled with a traveling crane. The business was under the charge of defendants themselves. No superintendent or boss of any kind was employed in or about their yards. When defendants were both away, every man in the shop was his own boss. When any of the workmen in the shop desired a stone from the yard, he would himself go to the yard, select the stone desired, and convey the same by use of the traveling crane into the shop. If any assistance was needed or desired, he would call some other employee to assist him. When the stones were placed in the yard, each stone would be elevated above the ground two inches or so by placing under it what are termed "chips of stone"; that is to say, pieces of stone which had been broken or chipped off of the larger slabs. This was done so that the chain could be slipped out at the time the stone was deposited, and in-

serted again when it was desired to move it, with the aid of the crane, into the shop. When getting in a car-load of stone, if it became necessary to place one stone upon another, a similar space of about two inches and similar blocking was used, so as to permit free use of the chain. The negligence charged against the defendants is: That on or about January 20, 1909, there was a large stone, about 9 feet long, resting upon two triangular stones, which, in turn, rested upon the ground; that these smaller stones were about 35 inches long north and south, each of the three sides being about 9 inches; the upper edge of the east base stone was about 19 inches west of one of the large posts of the crane track, and the other about 6 feet west of such post; that on that date the large stone was, by order of the defendants, cut in two, and the west portion removed; that the remnant of the stone was allowed to remain with one of the base stones above referred to as its sole support, which left the large stone, which is denominated A, nearly evenly balanced upon its supporting stone, extending about 18 inches east and west from the point of said base or fulcrum stone, and touching and being steadied against the west side of said large post, which post was about 19 inches from the center of the fulcrum; that it was left in that condition for five or six weeks, and until the injury complained of; that shortly after said date "the defendants placed on said stone A another stone, herein denominated as B, said upper stone B being about 36 inches long east and west, 18 inches high, and 31 inches wide north and south, and weighing about one ton. Said A and B thereupon were, and continued to be, supported only by said sharp edge fulcrum stone, and in an almost evenly balanced condition, with nothing to prevent them from toppling and falling to the west, and in such condition that they would necessarily topple and fall to the west if only a small amount of weight was placed on the west half of either of said stones. Said condition remained until the happening of the injury herein mentioned. * * *

During all of said time the regular course of conducting the said business of defendants was such as to necessitate and require the frequent and repeated passing and being of the various employees of defendant at a point immediately west of said balanced stones A and B, and said premises so left in said condition were at said point extremely dangerous, and said dangerous condition would have been easily and naturally noticed and observed by defendants and each of them in the exercise of ordinary care with reference to the providing a reasonably safe place for their workmen." That on March 4, 1909, the deceased, who was in the employ of the defendants, in the course of his duties, went to the yard for the purpose of getting a stone weighing several tons, and denominated C, which was at said time to be polished by him, "and which stone at said time was lying immediately south and adjacent to the two stones A and B." That deceased and another employee named Solomon Garfield (brother of deceased) were lifting stone C by means of the traveling crane, and to do so had a chain around stone C and attached to the traveling crane, and a rope running over a pulley, and together were hoisting stone C for the purpose of taking it into the shop; that both of said parties were standing on the north side of stone C, and immediately west of stones A and B; that after stone C had been raised to a certain height, the exact distance being unknown, Solomon Garfield, for the purpose of obtaining a better hold upon the rope and to facilitate the hoisting of stone C, "stepped over and upon said two stones A and B, and said stones A and B, being in a balanced condition, were by his weight tipped downward to the west and the upper stone, sliding off its blocks, fell over and upon said Penial J. Garfield, crushing his leg and inflicting injuries upon him which caused his death. It was customary for employees of the defendants to stand upon or walk upon the stones under said traveling crane, and had been for a long while, and said defendants well knew that it was necessary for and customary for

said employees to walk and step upon stones lying about and under said crane. Notwithstanding said fact, said defendants permitted said two stones to be and remain in a dangerous condition, the said portion of said large stone having been left in a balanced condition where any weight upon one side of it would cause it to tip, and said stone had been in that condition for about five or six weeks. Said Penial J. Garfield, through no fault of his own, was injured by and through the negligence of the defendant, hereinbefore more specifically set out, which said injury caused his death."

The answer admits the partnership and the business in which defendants were engaged; admits that the deceased, together with Solomon Garfield, was on March 4, 1909, raising a large stone; that Solomon Garfield stepped upon two adjacent stones and caused the upper one of said two stones to slide off, fall upon deceased, and injure his leg. Defendants aver that Solomon Garfield was at that time an employee of defendants and a fellow servant with the deceased; that the stone B was placed upon the stone A either by the deceased or by Solomon Garfield, or some other employee of defendants, a fellow servant of deceased, all without the consent or knowledge of defendants; that the accident happened in broad daylight; that deceased had been employed by defendants for many years, and was more familiar with the condition and situation of the various stones in the yard than defendants; that deceased, by the exercise of ordinary and reasonable care, could have known, and, as a matter of fact, did know, prior to the time of the accident, the exact condition and situation of the stones A and B; that it was the duty of deceased to attend to bringing into defendants' shop stone C; that in the performance of said duty deceased was the sole judge of the method and means of getting said stone into the shop; that it was likewise his duty to take all precautions necessary to ascertain and learn that the place where he was working was perfectly safe, not only for himself, but likewise for his fellow serv-

ants whom he might request to assist him in moving said stone; that, had deceased used ordinary care and diligence, stone C could have been moved into the shop with perfect safety, not only to deceased, but likewise to the other employees of defendants whom he might request to assist him in moving the stone; that in moving stone C into the shop it was entirely unnecessary for the deceased to stand in close proximity to stones A and B; that the situations and conditions of stones A and B were well known to deceased at the time that he stood immediately to the west thereof; that the injuries suffered by deceased and the accident which happened to him on said date were caused by, owing to, and the result of, his own carelessness and negligence, or of his fellow servants, or of both, which carelessness or negligence on the part of deceased or of his fellow servants, or of both, contributed to or resulted in said accident and the injury to deceased, and without which carelessness and negligence the accident and injury would not have happened. The reply was a general denial.

It will be observed that the issue of negligence on the part of defendants, as tendered by the petition, is clean cut. Succinctly stated, it is that defendants were negligent in permitting the stone A to remain in a nearly balanced condition after the other portion of it had been removed on January 20, and negligent in putting stone B on top of stone A shortly after January 20, and permitting the two stones A and B to remain in that condition for five or six weeks, and until the time of the accident on March 4. No other acts of negligence, either general or specific, are alleged. A careful examination of the record shows that plaintiff failed to prove either of the acts of negligence alleged. Solomon Garfield, the brother of deceased, who was present with him at the time of the accident, when called as a witness for plaintiff, testified: "Q. Did you at any time see any one set that top stone? A. No, sir. Q. Do you know when that top stone was set up there? A. No, sir; I do not." No witness produced by

plaintiff gave any testimony whatever as to when stone B was placed on top of stone A.

For the defendants, it was shown by the witness Whitenack that he was the employee who cut stone A and removed the west two-thirds thereof, and that after he had broken the stone and removed the west portion he thought the portion which he left was perfectly safe. At least one other witness testified that stone A, in the condition in which it was left by Whitenack, was perfectly safe. The testimony of at least two witnesses shows that as late as two days prior to the accident there was no stone resting on top of stone A, and that stone B was still, at that late date, resting on stone C. Not a single witness is produced to prove that defendants or any of their employees placed stone B on top of stone A, or that it was ever seen on top of stone A prior to the time that Solomon Garfield went into the yard to help his brother elevate stone C a few moments before the accident. Mr. Whitenack testified that when an employee would go to the yard to obtain a stone, if he found another stone resting upon it, he would have the upper stone removed. The testimony of other witnesses is that when the deceased went into the yard that morning, if he found stone B resting upon stone C and desired to take the latter stone into the shop, there was plenty of room to have deposited stone B upon the ground without putting it on top of stone A. It was also shown by the testimony of Solomon Garfield that whoever placed stone B on top of stone A placed between the two, as supports for stone B, four car-stakes, three inches thick, with tapered ends. All of the testimony above noted stands in the record uncontradicted. In the light of this clear and undisputed testimony, we do not see how unbiased minds could fail to reach any other conclusion than that, when the deceased went into the yard that morning to select a stone, and selected stone C, he found stone B resting upon it, and that he himself (which he could easily do with the use of the crane) removed stone B from stone C and placed it upon stone A. But

whether so or not, we are still confronted with the fact that the record before us is entirely barren of any evidence showing that defendants placed stone B on top of stone A shortly after January 20, and permitted it to so remain for five or six weeks, and until the time of the accident on March 4, or that defendants or any of their employees (unless deceased himself) ever placed stone B on top of stone A. It is clear, therefore, that plaintiff's allegation that defendants placed these stones together, and permitted them to so remain for five or six weeks, utterly fails for want of proof.

We are unable to agree with counsel that the failure of Whitenack or the defendants to place any additional blocking stones under stone A after Whitenack had removed the west two-thirds thereof, left that stone in a dangerous condition. Conceding that stone A was thereafter in a nearly balanced condition, and giving the benefit of every doubt against the testimony of Mr. Whitenack that when he removed the other portion the portion remaining tipped back against the post, and giving no weight to the testimony of Mr. Baldwin that it would have taken five or six hundred pounds to tip it the way in which it was tipped at the time of the accident, the fact would still remain that the stone in its then condition was not dangerous, for it could not tip more than about two inches, so that, if it had been so nearly balanced that the weight of a man stepping upon the west end would have tilted it, the tilt would have been so slight that it could not have caused any injury to the one who stepped upon it. The fact, therefore, that the defendants, or either of them, may have seen stone A in that condition prior to the injury, and did nothing to change its condition, would not be negligence on their part, for the reason that there was nothing to cause them to suspect that any one would place another stone on top of it, or that, if they did so, they would place between the two, as supports for the second stone, car-stakes with tapered ends. The evidence also shows that the deceased had worked for the defend-

ants about seven years; that his work was that of polishing; that in the discharge of his duties during all of those years he handled one-third of all of the stones that went into the shop; that when a stone was required he went out into the yard, selected such stone as he deemed suitable, and, with the aid of the crane, took it into the shop; that he would do this without direction of, or supervision by, any one; that he was his own boss and exercised his own judgment in that behalf; that if he desired assistance he would call some one from the shop, just as he did on the morning of the injury. When he went out that morning to get stone C, he went on his own initiative; he was right beside and had a plain view of stone A; and, if stone B was then resting upon stone A, the dangerous condition of the two stones could be plainly seen by him. His brother Solomon, when asked, "How do you know what support there was between the two stones?" answered, "It showed it plainly." "Q. You noticed them before you started to pull? A. Yes, sir; of course, I did not get down and examine them." If their condition showed so plainly that Solomon saw it without getting down and examining them, the deceased was in duty bound to have noted their dangerous condition and to have guarded against it. He not only owed that duty to the defendants and to his fellow servant, his brother, but he owed it to himself. He could not carelessly and negligently shut his eyes to or ignore the dangerous situation which confronted him, and charge the defendants with his own negligent act. Having elected to proceed with his work in the face of the dangerous situation or conditions from which his injury almost immediately resulted, we know of no theory upon which his administratrix can recover. The situation of the plaintiff is unfortunate, but the defendants were, upon the evidence in the record before us, in no manner responsible therefor. The conclusion here reached renders a consideration of the other points urged unnecessary. The rule is well settled in this state that, where a verdict is so clearly wrong as to induce the belief on the

part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted. The evidence in the case at bar comes strictly within that rule. In our judgment, the verdict is so clearly wrong that it cannot be sustained upon any principle of justice.

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

REVERSED.

REESE, C. J., dissents.

VILLAGE OF WINSIDE, APPELLEE, V. CURTIS E. BENSHOOF, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,921.

Appeal: AFFIRMANCE. Upon appeal all presumptions are in favor of the correctness of the judgment of the district court. If the issues and the evidence as contained in the abstract do not show affirmatively that the judgment is wrong, it will ordinarily be affirmed.

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

Berry & Berry, for appellant.

H. E. Siman, contra.

SEDGWICK, J.

The plaintiff, the village of Winside, brought this action in the district court for Wayne county to enjoin the defendant from inclosing with fence certain tracts of land which the plaintiff alleged were parts of the public streets in the village. Upon the trial the court entered a decree for plaintiff as prayed and the defendant has appealed.

The appeal was docketed in this court before the 7th day of April, 1911, and an abstract has been filed under

rule 20 of this court (89 Neb. vii) pursuant to the recent statute. Code, secs. 675*f*, 675*g*. This abstract is not as complete as it might be, and the parties in briefing their cause have apparently overlooked that part of rule 16, which is as follows: "The abstract must be sufficient to fully present every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part." No further abstract has been filed. It appears from the abstract that the streets in question are part of Bressler & Patterson's second addition to Winside, and are within and a part of the village. It is the duty of the village to keep its streets open for public use. It devolved upon the defendant to show his right to fence in these streets. He has failed to do so. The defendant claimed to own the whole of certain blocks in that addition, and alleges that he has vacated those blocks. There is no evidence in the abstract as to who platted this addition, nor how this defendant became the owner of these blocks. The defendant fails to bring himself within the provision of the statute. Comp. St. 1909, ch. 14, art. I, sec. 110, which is construed in *Hart v. Village of Ainsworth*, 89 Neb. 418. It appears from the abstract that the defendant claimed that he had leased these tracts of land which are in dispute from the village, and there appears to be some evidence to that effect, and also conflicting evidence. Upon this evidence the court found the issues in favor of the plaintiff, and there is not sufficient shown to enable us to say that the defendant has any right to obstruct these streets.

The issues that were tried are not clearly shown in the abstract, and all presumptions are in favor of the judgment of the district court, which is therefore

AFFIRMED.

CHARLES B. MODESITT ET AL., APPELLEES, V. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 17,004.

1. Appeal: ABSTRACT. Under the statute of 1911 relating to abstracts in this court (code, sec. 675f) and rules 16 and 20 (89 Neb. vii), either party may abstract a cause docketed in this court on or before April 7, 1911, and if such abstract "is incomplete or inaccurate in any substantial part" the opposite party may file a further abstract making necessary corrections or additions. The abstract filed "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision," unless a further abstract is filed.

2. Carriers: INJURY TO LIVE STOCK: EVIDENCE. Evidence examined and found to support the verdict.

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

Robert A. Brown and *James H. Wooley*, for appellant.

Harrison & Prince, contra.

SEDGWICK, J.

1. The appeal in this case was docketed in this court before the 7th day of April, 1911. An abstract was made and filed by appellant under rule 20 (89 Neb. vii). This abstract is criticised by the appellee in the brief, but no further abstract making corrections or additions has been filed, as provided by rule 16, therefore the abstract as filed "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision."

2. It appears from the abstract that plaintiffs alleged in their petition that they delivered to the defendant railroad company at Grand Island, Nebraska, five car-loads of sheep "to be shipped to St. Joseph for said Monday morning market, and were to be stopped at the yards and pastures owned, held, controlled or operated by defend-

ant on its line of road at Stouts, Kansas, 22 miles from St. Joseph, until Sunday evening or night, September 5, 1909. The sheep were taken to Stouts, put in the pastures, with the request and agreement that they be properly cared for until Sunday evening or night, September 5, 1909, and then shipped to St. Joseph and delivered to plaintiffs Monday morning, September 6, 1909; that defendant negligently loaded the sheep about noon Sunday, September 5, deprived them of the rest and feed they would have had, and they arrived at St. Joseph about 6 that evening, where they had to remain in the cars or yards until Monday, September 6; that they were damaged by shrinkage and lessened in value, $353.85." Afterwards the petition was amended, striking out the words "evening or," leaving the allegation that they were to be cared for by the defendant until Sunday night, and then shipped to St. Joseph.

The answer admits that the sheep were shipped to Stouts, Kansas, and "were to be and were unloaded in pastures September 4, and alleges it understood plaintiffs desired the sheep reloaded for said Monday morning's market; that it reloaded about 5 P. M. Sunday, September 5, and duly forwarded the sheep to St. Joseph on an extra train, the only one available on said evening and night of September 5, 1909; * * * that the plaintiff Dryer, who accompanied the sheep to Stouts, informed the man in charge of the Stouts yards that he would have the stock commissionmen tell him when to send the sheep on to St. Joseph; that on Sunday, September 5, 1909, said stock commissionmen did duly, and in the usual manner, request the defendant to forward the sheep to St. Joseph that day; that, in pursuance of said request, it reloaded about 4 P. M. and forwarded the sheep to St. Joseph, delivered said cars to the St. Joseph Terminal Company about 6:40 P. M., which delivered them to Union Stock Yards Company about 8:10 Sunday, September 5, 1909, as was customary; that it duly and timely performed its entire contract in reference to said shipment; and

denies all negligence on its part." The reply alleged that "there was a regular train during the evening and night of September 5, 1909, later than the said extra, when the sheep should have been conveyed from Stouts to St. Joseph." It also contains a general denial.

The defendant complains of the ruling of the court in allowing the amendment to the petition, and in refusing a continuance made necessary, as it claims, by said amendment, and also complains of a similar ruling of the court upon the trial, and instructions given and refused. There is, however, nothing in the abstract to show that any exception was taken to the ruling of the court upon the amendment of the petition, and, while it appears that an affidavit was filed for a continuance, the abstract does not show the contents of the affidavit. No instructions are contained in the abstract, and none of these questions suggested by the defendant are presented in the abstract. The plaintiffs also assume that there is evidence that is not shown in the abstract, but, as before stated, no further abstract making corrections or additions has been filed by the plaintiffs, and it will not be presumed that the abstract which we have is "incomplete or inaccurate in any substantial part."

The question, then, presented upon this appeal is as to the sufficiency of the evidence to support the verdict. One of plaintiffs, who testifies that he has "handled sheep for 25 years," went with this shipment of sheep to Stouts, and they arrived there soon after daylight on Saturday morning, September 4, 1909. Stouts is about 230 miles from Grand Island and 22 miles from St. Joseph. The sheep were watered and put out in blue grass pastures, and the witness remained there until the afternoon or evening, and paid the defendant for "two days' feed," and then went to St. Joseph. It appears from the evidence that the defendant company maintained pastures at Stouts, a station some 22 miles from St. Joseph, for convenience of its shippers, and the custom is to unload stock at these pastures and allow them to feed and rest

before being shipped on to market in St. Joseph. These sheep arrived at Stouts soon after daylight on Saturday morning, and it was the desire and expectation of the plaintiffs that they be kept on feed in these pastures, and shipped so as to arrive at St. Joseph for the market on the following Monday morning. The sheep were unloaded and put in the pastures on Saturday morning, and on the following Sunday, soon after noon, the defendant began reloading them, and they were shipped from Stouts at, or perhaps a little before, 4 o'clock in the afternoon. It required from one to two hours to run from Stouts to St. Joseph, and the sheep arrived there early Sunday evening. The evidence is that on the next morning they were found to be in bad condition to go upon market, and that the shrinkage was greater than it would have been if they had been loaded and shipped during the night, so as to have arrived at St. Joseph early Monday morning. The regular local train from Stouts to St. Joseph did not run on Sunday. There was a regular through train (No. 26) which regularly left Stouts between 5 and 6 o'clock in the morning, and was due to arrive in St. Joseph at a little before 7. There were two extra trains on the Sunday afternoon in question, one leaving soon after noon and another about 4 o'clock in the afternoon. The sheep were shipped on this later train. The regular train (No. 26) left Stouts on Monday morning at about 5:15, and if the sheep had been loaded during the night and shipped on this train they would have arrived at St. Joseph in time for the Monday morning market, and in better condition, so that the damages complained of would have been avoided.

The question was whether the defendant was negligent in shipping as they did on the extra at 4 o'clock rather than on the regular train (No. 26). The evidence upon this point, as shown by the abstract, is somewhat conflicting. One of the plaintiffs testified that he informed the defendant's agent that the commissionmen at St. Joseph would notify them when to ship the stock, and there is

evidence to show that the commissionmen did notify the defendant during the forenoon of Sunday to ship the stock, and that, in pursuance of this order, the defendant did proceed at once to ship the sheep upon the last train that left during Sunday. It must, however, be remembered that the petition alleges that the sheep were originally shipped to be upon the Monday morning market at St. Joseph. This allegation is not denied in the answer. There is evidence that these pastures at Stouts were maintained by the defendant for the express purpose of putting such animals in condition before they are placed upon the market, and that to load these sheep between 12 o'clock noon and 4 o'clock in the afternoon of a warm day was contrary to the understanding of the parties when they were shipped. There is also evidence that train No. 26 is also a stock train, and on some occasions stops at Stouts to take stock to St. Joseph; that these plaintiffs had before that time shipped sheep from Stouts on that train to St. Joseph. Under these and other circumstances disclosed by the evidence in the abstract, it would seem that the jury might have found that, if the commissionman was to notify the defendant when to take the stock to St. Joseph, such an arrangement had no reference to the hour of shipment, as to whether it should be in the daytime or nighttime, it being understood by both parties that they were to be so shipped as to arrive for the morning market. If, however, it should be thought better to make the shipment for the Tuesday morning or Wednesday morning market, the commissionman might instruct the defendant to hold the shipment accordingly. Whether the fault of making the shipment at this time was upon the defendant company, or upon the plaintiffs themselves or their commission agent, is a difficult question to determine from the evidence shown by the abstract, and it is not so certain that defendant was free from negligence in the matter as to justify the court in setting aside the verdict of the jury and the judgment of the lower court.

This being the only question presented, the judgment of the district court is

AFFIRMED.

KATE O'GRADY, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 17,099.

1. Master and Servant: INJURY: QUESTIONS FOR JURY. There are three principal questions of fact in this case which were by the trial court submitted to the jury. The evidence is examined and found to justify this action of the trial court.
2. Witnesses: COMPETENCY. A witness who is accustomed to handling all kinds of domestic animals may be permitted by the trial court to testify to the appearance and actions of a certain animal; it being a question for the jury to determine whether the animal was at the time specified "infuriated and dangerous."
3. Trial: INSTRUCTIONS. An instruction given by the trial court is found not to be erroneous, and requested instructions are found to have been properly refused.
4. Death: DAMAGES. In an action by a widow as administratrix in behalf of herself and five children to recover damages caused by the death of her husband, who was an active man in good health, 53 years of age, in regular employment at $60 a month, a verdict for $5,450 is not so excessive as to require a reversal of the judgment for that reason.

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

Frank T. Ransom and *Greene & Breckenridge*, for appellant.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

John O'Grady, while in the employ of the defendant company, was killed by an animal in the defendant's

yards, and the plaintiff, his widow, as administratrix of his estate, brought this action in the district court for Douglas county to recover damages on the alleged ground that the negligence of the defendant was the proximate cause of her husband's death. From a verdict in her favor, the defendant has appealed.

The principal question in the case is whether the verdict and judgment are supported by the evidence. It is insisted by the defendant that none of the issues of fact is supported by the evidence, unless it is the fifth and last one stated by the court. There is a main alley running east and west through the yards of the defendant company, and there are "chutes or alleys that run off the main alley north and south." The defendant received animals of all kinds from the railroad companies and others, and handled them in these yards. On the morning of the accident Bodell, who was in the employ of the defendant, and Wilson, who was an employee of a commission firm, were driving a number of hogs towards the west through this main alley. They were stopped by a gate which closed the alley, and saw on the other side of the gate the animal which afterwards killed O'Grady. These large gates are placed at intervals along the main alley. Their purpose seems to be to close the alley so as to turn animals into the side chutes which lead to the different pens. These side chutes also have gates which shut them off from the main alley. After they reached this gate Mrs. Jones, the foreman of the stock yards, came along this alley from the east, and inquired of Bodell why he stopped with the hogs. He was told by one of the men that the reason they stopped was because there was a cow on the other side of the gate. Jones thereupon said, "Open the gate and get her behind the gate," and was told by one of the men: "Do it yourself." Jones then attempted to open the gate so as to allow the men to pass with the hogs and at the same time to confine the cow behind the gate to keep her from passing also. He was unsuccessful in restraining the cow, which rushed through the gate and struck O'Grady, who

was in the alley on the east side of the gate. He was a "yardman." His general duties were in connection with "yarding stock from the chutes." The evidence does not show what, if anything, he was doing at the time, nor how he came to be at the scene of the accident. It appears that the employees of the company usually passed along this alley, and it seems to be conceded that O'Grady was in line of his duty at the time. He seems to have been attempting to pass through the gate, and just as he was opposite the gatepost was struck in the breast by the animal and crushed against the post. He was fatally injured and died a few days afterwards. It is conceded that there is no presumption that a domestic animal of this kind is vicious or dangerous, and that in order to hold the keeper of such an animal liable for negligence it must be shown both that the animal was dangerous and that the keeper knew it. The plaintiff's contention in this regard is that this animal had become infuriated for the time being and was dangerous on that account.

Both parties in their brief have quoted the third instruction given by the trial court as a correct statement of the questions of fact submitted to the jury upon which they were to find their verdict. That instruction is as follows: "You are instructed that under the pleadings and evidence in this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the following propositions: (1) That the cow which caused the injury to said John O'Grady was at the time of said injury infuriated and dangerous to men on foot; (2) that the defendant's foreman Jones, at the time he opened the gate described in evidence, knew or ought to have known that said cow was at that time infuriated and dangerous to men on foot; (3) that the act of said Jones in opening said gate and striking said cow in attempting to imprison said cow behind said gate was, under all the circumstances as you find from the evidence they existed at that time, a negligent act; that is, such an act as a reasonably prudent person would not ordinarily have

performed under like circumstances; (4) that such negligence was the proximate cause of the injury and death of said O'Grady; and (5) that plaintiff was damaged thereby, and the extent of such damages. Accordingly, if you find that the plaintiff has established by a preponderance of the evidence each and every of the matters set forth in paragraphs 1, 2, 3 and 4, then your verdict should be for the plaintiff in an amount to be determined by you in accordance with instruction numbered 12 hereof, unless you further find that the injury to the decedent was in consequence of an assumed risk of his employment, as hereinafter explained. If, however, you find that the evidence on either of the foregoing propositions numbered 1, 2, 3, and 4 is evenly balanced or proponderates in favor of the defendant, or if you find that the injury to the decedent was in consequence of a risk assumed by him by virtue of his employment, then, in either of such events, your verdict should be for the defendant."

In considering the sufficiency of the evidence, it must of course be borne in mind that these five propositions of facts were properly stated by the court in its instructions, and that they and each of them are peculiarly questions for determination by the jury.

1. We think upon the first and second propositions submitted there can be no doubt that the evidence was sufficient to justify their submission to the jury. The witness Bodell, in company with Jones, the foreman of the yards, and another, passed along the alley a short time before Bodell returned with the hogs. They observed this animal at that time, and were both witnesses upon the trial. Bodell was called by the plaintiff and Jones by the defendant. Bodell had had experience in the yards; he had "handled lots of them." He described the animal as "nervous and fire in her eyes, and ready to make for you at any old time she would get a chance, or anybody." When these three men passed the animal in the alley, Bodell says: "I walked along close to the fence, and the cow stood on the south side of the alley, and I

hugged the fence on the north side. * * * She was then on the south side of the alley, and Jones and myself were on the north side. Ed Mohler was with us as we came east in the alley. * * * When Jones and Mohler and I came past the cow, we did not do anything except get out of her road." Mr. Jones testified: "As I came up, I did not think the cow appeared very bad, and was willing to take a risk of getting within 3 or 4 feet of her. I did not hit the cow hard enough to hurt anything, but I did strike the cow. * * * She started for me as if she had made up her mind she was coming, and I got out of the road. I made up my mind she was coming for me from the way she looked. Her appearance was just like all of them that are in that shape. Any downers, their eyes are not normal." The animal had fallen while being driven with others along the alley, and this appears to explain why she was alone in the alley at the time of the accident, and why the witness speaks of her as a "downer." Wilson, who was with Bodell and Jones when they passed the cow shortly before the accident, testified: "She was what I term a mad cow." While this evidence, and some other similar evidence found in the record, is not conclusive that the animal was infuriated and dangerous to men on foot, who might approach her in the alley, nor that the defendant's yard foreman knew, or that circumstances were such that he should know, that she was a dangerous animal, and is perhaps not very certain nor satisfactory upon either of those points, still it cannot be said that there is such an entire failure of evidence in those particulars as to require the court to determine them as questions of law. The jury having found for the plaintiff, we think it must be considered that the animal was dangerous and that the defendant had notice of that fact.

2. The third proposition submitted to the jury is more difficult. If Mr. Jones, acting for the defendant company, did what a reasonably prudent man having due regard for the safety of others would have done under the circum-

stances, the company is not chargeable with negligence. O'Grady was properly in the alley to the east of the gate. The opening of the gate by Jones gave opportunity for the animal to go through and attack O'Grady. There can be no doubt that this act in opening the gate was the proximate cause of the injury. Was this negligence on the part of Jones? He knew that the employees of the company were accustomed to travel through the alley, but it was not uncommon that an animal in a herd being driven along this alley should be thrown down or otherwise injured and become unmanageable and more or less dangerous. Such accidents were anticipated, a walk was constructed on the fence at the side of the alley, and employees were supposed to be able to keep out of the way of dangerous animals. When Jones began to open the gate, he did not know that O'Grady was near. The evidence is that this was not a "western animal," but what is called a "native," and native cattle are accustomed to men on foot, and as a rule "do not run at a man on foot. Once in a great while they do, but it is not usual. * * * There are 10 chutes between the place where the cow was unloaded and where the accident happened. The chutes are about 34 feet each, so that would be about 340 feet. * * * This cow * * * dropped behind the load at chute '17' and went down in the alley. * * * A man was trying to get her up, was off his horse and trying to get her up, and could not do so; that was at chute '17.' After that we yarded hogs right by her, passed her in the alley, and about 30 or 40 minutes after that the accident to O'Grady happened." The abstract shows this to be a part of Mr. Jones' evidence, and he further testified without contradiction: "This cow had not been out of the car more than a minute until I saw her fall, and I passed by her when she was lying there on the ground. The next time I saw her on her feet was when I opened the gate. This would be 30 or 40 minutes from the time she was unloaded, and I had passed the cow, I should say, two or three times. When she was

lying down she lay as quiet as could be. When I came to open the gate I came from the east, going toward the northwest. My attention had not been directed to this animal before coming to the gate. When I got up there the alley was blockaded, could not go any farther. The hogs were all shut off, one behind the other, and I went up to see what was the matter. I found the cow on the opposite side of the gate. She was then on her feet. I had not seen her between the time she was lying down and the time I got to the gate. * * * Just before the accident I had been down east in the alley and had come up the alley. I passed through this drove of hogs that Bodell was driving. I saw Bodell in the alley, and saw Wilson. Wilson was ahead of the hogs, and when I came up the alley I found for some reason that the hogs could not proceed any farther, and I went to see why. When I got up to this gate it was thrown across the alley, and I found Wilson there at the gate. On the opposite side of the gate was this critter. West of the cow there were other chutes opening into this main alley. Wilson got to the gate before I did, and I borrowed Wilson's whip. I borrowed his whip so as to get this cow behind the 14-foot gate and let the hogs go by. * * * I didn't figure on her being very bad, or I would not have taken the risk I did. I must have been within 3 or 4 feet of her myself. Q. What did you do? A. I borrowed a whip from this man Wilson that testified the other day, a short whip, probably 3 feet long. Q. Do animals of that breed and nativity as a rule submit to human control with a whip? A. Yes. Q. You may state whether or not the use of the whip upon animals in that situation is a common incident of the business there. A. It is the way we handle them all. * * * As I got the gate around, I might say, 5 feet from the post, she whirled at me. Of course, then I climbed up onto the gate, and the gate swung back to the fence. Q. State whether or not you had seen this animal run at anybody before that time. A. No, sir. Q. Do you remember coming down that alley 30 or

40 minutes before the accident, with Bodell and Mohler? A. No; I have no recollection of that; might have done it. Q. Do you recall any talk with Mohler wherein you said, in substance, to him, 'Look out for that cow, she will run at you'? A. No; I have no recollection of making that remark."

The plaintiff insists in the brief that it was "highly negligent for him to open the gate without any notice to those in the alley behind him. * * * If he had driven her west, he could have found a chute to the right or the left of him, within a few feet, to put her in, locked her up, opened the main artery of travel—the alley—and endangered nobody." The defendant contends that "if she was then or had been infuriated and dangerous to men on foot, Jones did not know O'Grady was around. Jones was responsible for delays in the work. It was his business to get that animal out of the way, and his attempt to do it was in the ordinary course of business and performed in the usual method."

We cannot say as a matter of law that reasonable men might not, from a consideration of the whole situation as disclosed by the evidence, reach different conclusions as to whether the defendants should have confined this animal, or should have given warning to those who might be endangered by opening the gate, or should have taken other precautionary measures for the safety of its employees. In this condition of the record, the law will not permit us to act upon our own conclusion as to the weight of the evidence. If the question is properly submitted, we must abide by the conclusion of the jury.

3. The defendant complains of the evidence of the witnesses Bodell and Wilson as to the appearance of the animal. It will be remembered that these two men, together with Jones, the yard foreman, passed by the animal shortly before the accident. Jones had an opportunity then and, as is clearly shown, at other times to observe the animal. Bodell was asked: "Describe, Mr. Bodell, her condition, as to her disposition, as to being mild,

fierce, untamed, or otherwise, as you saw it." The question was objected to as incompetent. The court ruled that the witness "might describe her appearance and actions." The witness answered: "Why, she looked nervous looking." The court refused to strike out the answer, and the witness was told to "go ahead," and answered: "Looked nervous looking, and in my way of describing it, I could tell you, because I have handled lots of them. Q. Describe her as you saw her. A. She was nervous and fire in her eyes, and ready to make for you at any old time she would get a chance, or anybody." This witness had been employed in these yards for some time. He was accustomed to handle all kinds of animals. The ruling of the court, of course, was correct that witness should be allowed to describe her appearance and actions. This apparently the witness attempted in good faith to do. We cannot say that the witness would be unable to determine from the appearance of the animal whether it was excited or "nervous" and ready to make an attack upon any one who came in its way. Whether the animal was in a condition to be controlled by ordinary means and whether there was reason to suppose that it would attack any person who came within its reach were matters of difficult investigation. If the witness' description of the appearance of the animal was incomplete and unsatisfactory, he might have been questioned further by either party. We cannot say, under the circumstances, that it was an abuse of discretion on the part of the trial court to refuse to strike out this evidence.

4. The defendant complains of the fourth paragraph of the instruction quoted, but there is no ground for this criticism. The jury could not have supposed that this instruction expressed the opinion of the court as to whether negligence had been established. The instruction criticised in *Olson v. Nebraska Telephone Co.*, 83 Neb. 735, was thought to be capable of such construction, and was therefore condemned. The last part of the fourth instruction given by the court appears to imply that "an

injury arising from a danger which was the result of negligence on the part of the defendant" would "be assumed by the plaintiff" if he knew and appreciated, or should have known and appreciated, the danger occasioned by such negligence. This language was prejudicial to the plaintiff, rather than the defendant, and would not therefore furnish ground for reversal in this case.

5. The defendant complains that the court refused to give instruction No. 2, asked by the defendant. This instruction, among other things, contained the statement that the defendant would not be liable, unless the foreman Jones at the time he opened the gate and allowed the animal to pass through knew "that O'Grady was there." This would be equivalent to an instruction for the defendant, since there was positive evidence that Jones did not at that time know that O'Grady was there, and there was no evidence to the contrary. If Jones knew that the employees frequently passed along this alley, and that there was a probability that some one or more of them were so situated as to be endangered by his act, it would not be necessary that he should also know that O'Grady, the man injured, was at that particular place at the time he opened the gate and permitted the animal to escape.

6. Instructions 3 and 4, requested by the defendant, were also properly refused by the court. It was not necessary that the jury should find that animals "of the breed and nativity of the one in question would not ordinarily submit to control by men on foot" in order to find for the plaintiff, as stated in the third request, nor that Jones knew where O'Grady was at the time, as stated in the fourth.

It is complained that the verdict is excessive. The verdict, as rendered by the jury, was for $9,164.17. The trial court required the plaintiff to remit $3,714.17, and, that having been done, entered a judgment upon the verdict for $5,450. The deceased was 53 years of age; his expectancy was nearly 19 years; he was earning $60 a

month; he left a wife and five children. If we say that he would probably devote two-thirds of his earnings to the support of his wife and children, they would in 19 years receive $9,120. The present value would be more than $5,000 at 6 per cent. We are required by our law to restrict the recovery to the pecuniary value lost to the family. This, however, is not necessarily limited to the dollars and cents which the deceased would probably have expended upon his family if he had lived. Care and maintenance of children mean more than this. The jury may properly consider "his services * * * in the superintendence and attention to, and care of, his family and the education of his chilren." *Chicago, R. I. & P. R. Co. v. Zerneeke,* 59 Neb. 689. The question of damages is for the jury, and the court will interfere with their discretion only when their finding is clearly wrong.

The action of the trial court in determining the limitation of the discretion of the jury in fixing the amount of the recovery is approved, and the judgment is

AFFIRMED.

BARNES, J., dissents.

IDA D. GOINGS, APPELLANT, V. JOSEPH G. GOINGS, APPELLEE.

FILED NOVEMBER 14, 1911. No. 16,539.

1. Divorce: DISMISSAL. In an action for a divorce, where an answer and cross-petition of recrimination is filed by which a divorce is sought by the defendant, if it be shown by the evidence that neither party is blameless, and the decree of the district court denied a divorce to either, dismissing both the petition and cross-petition, the decree will to that extent be affirmed.

2. ———: DECREE OF SEPARATION. In an action by the wife for an absolute decree of divorce, in which the defendant presents a cross-petition seeking a similar decree, the question as to whether such decree should be granted to either party, or a decree from bed and board granted to the wife, requires the ex-

ercise of the discretion of the court; and, if the case demands it, a decree of divorce from bed and board, but without dissolving the marriage relation, will be granted to the wife, the evidence showing her to be the less guilty of the two.

3. ———: ———: MAINTENANCE. In such case, when property has been accumulated by the joint labor and frugality of both, but is all held by the husband, a proper provision will be made for the maintenance of the wife.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

J. L. McPheely and *Coleman & Williams,* for appellant.

Adams & Adams and *L. C. Paulson, contra.*

REESE, C. J.

This is an action by the plaintiff, Ida D. Goings, against her husband, Joseph G. Goings, for a divorce. It is alleged in the amended petition as a ground for such a divorce that defendant was guilty of extreme cruelty, by assaulting and striking plaintiff, and by accusing her of the crime of adultery. The custody of their one minor child is also prayed for. Defendant answered, denying the wrongdoing on his part, but alleging that quarrels were of frequent occurrence between himself and plaintiff, and at which times the plaintiff, "who is of an ungovernable temperament, would fly into a passion, would curse, swear and abuse this defendant, and would grab a butcher knife, rolling pin, or any weapon that was convenient, and make for the defendant, and in a vicious manner assault him, at which times the defendant would take hold of her, grab her or restrain her in any way he could; but he denies that he ever struck her with the fist or in any other manner." A number of allegations are contained in the answer, by which it is sought to explain the cause of the "quarrels" referred to, but which should not be set out here. He also presented his cross-petition seeking a divorce from plaintiff on the ground of adultery

committed by her with persons named, extreme cruelty by cursing him in the most profane language, accusing him of impotency, of having contracted venereal diseases at different times, of having committed adultery, and other equally disgusting conditions and acts; that because of the differences between them she had left his home and refused to return, notwithstanding his efforts to induce her so to do. Plaintiff's right to the custody of the child—a daughter, nine years of age—is denied, and it is alleged that plaintiff is not a fit person to rear said child. The averments of the answer and cross-petition are denied by the reply. A trial was had, which resulted in a finding that "plaintiff's and defendant's conduct toward each other has been such that neither is entitled to the relief prayed for." The petition and cross-petition were both dismissed, and the costs were taxed to defendant. Plaintiff appeals.

Elaborate briefs and printed arguments have been filed upon each side of this controversy, and the cause was ably argued at the bar. No important question of law is raised, and but few citations of authority are made. The main, and, indeed, the exclusive, discussion has consisted of a review of the evidence and the presentation of that part which, uncontradicted, would sustain the views of the party making the presentation. The bill of exceptions is voluminous, and abounds in charges and counter charges of the most disgusting character, followed by denials, excuses and explanations, little of which could properly be stated in this opinion. If one-half of the testimony offered by plaintiff is true, and no recrimination offered, she would be entitled to a divorce. If one-half of the testimony offered by defendant is true, and he is not guilty of the acts charged against him, he is entitled to a divorce. We have gone through the whole record and bill of exceptions with care, and are persuaded that a worse condition of domestic discord, and possibly of crime, could hardly be presented on paper. That false swearing—not only by the parties to the suit, but by

other witnesses—has been indulged in almost without limit would seem to be shown on the face of the record. That acts of lasciviousness, cruelty, and inhumanity have been perpetrated by each of the parties toward the other, if any belief is to be given to their testimony, is without doubt. Each is charged with having violated the marriage covenant in more ways than one—in very many ways. All are denied, and the opposite party is denounced as the sinner. The parties were married in 1884, and at that time neither possessed any means. Both have labored hard during the whole time from the date of their marriage to the time of their separation in 1909, and have practiced economy and frugality in all things, until they amassed a fortune of the value of about $75,000. But apparently at no time has there been that mutual confidence or forbearance which should characterize the family relation. That defendant has been harsh and inconsiderate of plaintiff's feelings during practically the whole period of their married life is apparent. That plaintiff has been possessed of a quick and almost ungovernable temper is equally apparent. Each has unhesitatingly accused the other of infidelity in the most positive and offensive terms, and each now contends that the other is guilty.

In *Conant v. Conant*, 10 Cal. 249, it is said by the late Judge Field: "The statute says divorces may be granted from bed and board, or from the bonds of matrimony, but it was never intended that either should be indifferently granted according as the prayer of the applicant asked for one or the other modes of relief. It was intended that a certain discretion should be exercised by the courts, according to the special circumstances of each suit, acting upon the settled principles of the common law as applicable to this class of cases. And the true rule which should govern the courts in the exercise of its discretion in this respect is this: That, to entitle to a decree for an absolute divorce from the bonds of matrimony, the applicant must be an innocent party—one who has

faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other." Cited and quoted in *McKnight v. McKnight*, 5 Neb. (Unof.) 260. If this rule be applied, it must be apparent that no divorce from the bonds of matrimony can be granted to either party.

Defendant is in the exclusive possession of all the property which has been amassed by their joint labor. Five children have been born to them, four of whom died at birth. The one surviving child—a girl, now about 12 years of age—is with plaintiff. It is admitted that defendant indulged in gross profanity, and no doubt much obscenity, within the household and in the presence of wife and child; and that plaintiff exercised the same high (?) privilege is also charged and to some extent substantiated. Prior to the separation in 1909, and for some time thereafter, the child indulged in the same habits of profanity, but at the time of the trial, through the influence and teachings of plaintiff and others, the habit had well nigh, if not entirely, disappeared. Considering the church and school advantages to which she could and does have access, it is to her advantage to remain with plaintiff for the present at least, but with the right of defendant to visit her at all seasonable times and occasions. Under the evidence, the decision of the district court in refusing an absolute divorce to either of the parties was right. Neither one should be relieved from the restraint of the marriage relation and permitted to contract new alliances. As matters now stand between them, neither seems inclined to yield, nor to exercise that degree of consideration or charity for the other which domestic felicity demands. Defendant being in possession of all their property—enough to supply the comforts and necessities of both—common fairness would seem to indicate that each should have the use and benefit of a portion of the results of their joint labor and frugality.

This cause is in this court for a trial *de novo*. We are

convinced that neither party should receive an absolute divorce, but are of opinion that plaintiff is entitled to a divorce from bed and board, but without dissolving the marriage relation existing between the parties. The custody, control and education of the child, Hazel, should be, and is, given to plaintiff, but with the right of defendant to visit the child on reasonable and suitable occasions. The plaintiff's industry, frugality and good judgment having contributed so much to the accumulation of the property held by defendant, and not having any separate estate, she should receive a liberal allowance from defendant for her support, and he should also pay the expense of supporting and educating their child. An annual allowance of $1,500 for the support of plaintiff, and the sum of $300 per annum to be paid to her for the support, maintenance and education of the child, but subject to the future orders of the district court, are ordered to be paid into the district court by defendant in quarterly instalments of $450 each on the first days of January, April, July and October of each year, the first payment to be made as of the date of the entry of this decree, or within 30 days thereafter. If plaintiff elects, the payment of these charges may be secured by the appointment of a receiver of sufficient of defendant's property to insure a compliance with the decree in her favor. The plaintiff is allowed the sum of $200 attorneys' fees to be paid into court for the use of her attorneys. All costs to be taxed to defendant.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree in conformity with this opinion.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. AMERICAN SURETY COMPANY, APPELLEE.

FILED NOVEMBER 14, 1911. No. 16,559.

Insurance: FOREIGN COMPANIES: FILING STATEMENTS. Insurance companies are not included in the title of article II, ch. 91*a*, Comp. St. 1911, and are not required to comply with the requirements of that act by filing in the office of the attorney general the statement described therein.

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

Grant G. Martin, Attorney General, and *George W. Ayres,* for appellant.

Montgomery & Hall and *Hall, Woods & Bishop, contra.*

REESE, C. J.

This action was commenced in the district court for Lancaster county by the attorney general, on behalf of the state, to enjoin the defendant from transacting or carrying on the business of a surety company within the state, the averment of the petition being that it had failed and refused to file in the office of the attorney general the statement required by section 4, art. II, ch. 91*a*, Comp. St. 1911. It is alleged in the petition, in substance, that the defendant is a corporation, incorporated under the laws of the state of New York, and is engaged in the transaction of the business of a surety company in this state, having established agents throughout the state; that it is not a Nebraska corporation nor a corporation whose stockholders are personally liable for its debts, and is not engaged in any of the lines of business named in the exception contained in section 4 of the anti-trust laws of this state; that, as the defendant corporation is engaged in business in this state, it is its duty to file the statement in the office of the attorney general as required

by said act, but that it has refused so to do, and that, by reason of its failure to comply with the law, it is unlawfully engaged in business in this state. The prayer is that it be enjoined from further carrying on its business within the state. The defendant demurred upon the ground that said petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the district court, and the cause dismissed. Plaintiff stood upon its petition and appeals, assigning as error the ruling in sustaining the demurrer.

A wide range is taken in the briefs, and many questions are therein presented and were also discussed in the oral arguments. The principal and underlying question involved is as to the construction to be given to what is known as the "Anti-Trust Law" of this state. An act, commonly known as the "Junkin Act," was passed by the legislature in 1905 (laws 1905, ch. 162), the title to which is, "An act to protect trade and commerce against unlawful restraints and monopolies, and to prohibit the giving or receiving of rebates on the transportation of property, and to provide a penalty for the violation thereof." Section 4 of the act is as follows: "That from and after the 30th day of June, in the year 1906, no corporation, joint stock company, or other association, whose stockholders are not personally liable for their debts, except corporations incorporated under the laws of the state of Nebraska, and common carriers and corporations owning or using property exclusively in connection with the business of transportation, and corporations engaged in furnishing additional accommodations to passengers as such while being carried by such carriers, shall engage in business within this state, or continue to carry on such business, unless it shall comply with the following conditions." The conditions imposed are too long to be here copied, and it is only necessary to say that the corporations included within the provisions of the act are required to file a statement in the office of the attorney general making quite a complete showing of the organi-

zation and financial status of the corporation or association. This statement the defendant did not file, and claims that it, being an insurance company, is not required so to do by the act. As will be observed, the title to the act is to protect "trade and commerce" against unlawful restraints and monopolies. It is insisted by defendant that the insurance business cannot be held to be included within those two words; that, if it cannot be so included, the provisions of section 4 are not to be applied to it. This last proposition is conceded by the attorney general's department, but it is strenuously insisted that that business is included, and that foreign insurance companies are required to file the statement, and hence that duty is devolved upon defendant. The demurrer admits all well-pleaded, issuable material facts alleged, and hence it is taken as true that the defendant is a foreign corporation doing business in this state, that its stockholders are not personally liable for its debts, and that it is not within the exception contained in section 4 of the act. The sole question to be here decided is: Is defendant engaged in "trade" or "commerce" within the meaning of the title to the act. The terms "trade" and "commerce" have received a great number of definitions by the courts, but cannot all be applied to this case. We should keep in view the sense and connection in which they occur in the act under consideration.

One of the cases cited by the attorney general is *In re Pinkney,* 47 Kan. 89, 27 Pac. 179. The title to the act under consideration in that case was, "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." In a section of the act it was provided that all contracts or arrangements to control the cost or rate of insurance was prohibited. The supreme court of Kansas held, correctly we think, that the title to the act was sufficiently comprehensive to include "trusts and combinations" in restraint of insurance; that, in the sense in which the

word "trade" was used in the title, it would include business, occupation, employment, etc.; and that a "combination" in restraint of the business of insurance could be prohibited under the title to the act. When we compare the titles to the two acts and the purposes of the legislature in the two instances, we are unable to derive much benefit from a consideration of the Kansas case. The decision was rendered by two of the three judges, and they say: "We reach the conclusion, not without some doubt, however, that the provision of the act with reference to insurance is not foreign to the title of the act," nor violative of the constitution. One member of the court dissented. In the majority opinion it is said: "The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title"—citing *Woodruff v. Baldwin,* 23 Kan. 491. It is to be observed, as we have shown, that the title to the act then under consideration was to declare unlawful trusts and combinations in restraint of trade and products. In the majority opinion it is held that the language of the title is of doubtful meaning, whether in an extended or limited sense, and that the provision of the first section of the act, which declares that "all arrangements, contracts, agreements, trusts or combinations between persons or corporations * * * which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance * * * are hereby declared to be against public policy, unlawful, and void," shows an interpretation or

meaning given to the word "trade" in its extended sense, and that the act was thereby brought within the protection of the constitution. In the act now under consideration we have no such aid, but are limited to the words "trade and commerce" in the sense in which they are used in the title, unaided by legislative interpretation, as in the Kansas case.

In *Queen Ins. Co. v. State,* 86 Tex. 250, 24 S. W. 397, the title to the act under which the suit was brought was, "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas." The suit was against some 57 insurance companies, and it was alleged that they had combined together to fix the rate of commissions of local insurance agents, and to fix and establish uniform rates of insurance throughout the state, and which they were enforcing to the detriment of the public, and the relief sought was an injunction restraining the accused companies from doing business within the state. Under this title the act defined trusts to be a combination of capital, skill, or acts by two or more persons to create or carry out restrictions in trade; to fix any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption, to the public should be controlled or established; or to enter into any contract by which they shall bind themselves not to sell or dispose of any article or commodity, or article of trade, merchandise, use, commerce or consumption below a common standard figure, or settle the price thereof between themselves and others. The supreme court of that state held that insurance did not come within the terms of the act, holding, in effect, that it was neither "trade," "commerce" nor "commodity," and the injunction was denied.

The case of *Beechley v. Mulville,* 102 Ia. 602, is cited by the attorney general. In that case the statute under consideration provided that if any corporation organized

for transacting or conducting any kind of business in the state, or any partnership or individual shall create, enter into, become a member of or party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever, such persons should be guilty of a conspiracy, etc. A number of persons entered into a conspiracy to fix insurance rates, imposing penalties and a loss of business upon any agent who should deviate from the standard of prices and rates fixed. The action was for damages by one of the conspirators against the others, upon the ground that he had refused to continue to be governed by the "compact," and for such refusal his business had been destroyed by his co-conspirators. It was contended by the defense that the business of insurance was not within the provisions of the act, and that their compact or agreement was lawful. But the court held otherwise, basing its decision on the sweeping language of the act. It was also held that the plaintiff could not recover, as the action of the defendants was but carrying out the written compact between themselves and plaintiff.

The case of *Betz v. Maier,* 12 Tex. Civ. App. 219, cited by plaintiff, affords little, if any, light upon the question before us. The appellee in that case had levied an attachment upon an iron safe belonging to the appellant, who was an insurance agent; the safe being used by him in his business as a receptacle for the safe keeping of his policies and other papers in use in his business. He claimed the safe was exempt under the statute which exempted all tools, apparatus and books belonging to any trade or profession. It was held that under the rule requiring a liberal construction of exemption laws the safe was exempt, the business of an insurance agent being a trade or profession.

As applicable to the statute now under consideration, we can gather but little light from the decided cases.

This is not a case involving the question of the legality or illegality of any trust agreement or combination. It may be that had the legislature in specific terms, as in the Kansas case (*In re Pinkney, supra*), included the subject of insurance in the section requiring the filing of the statement, that fact might have furnished a legislative construction or interpretation of the words "trade and commerce" as used in the title and thus brought the provision within it. But such is not the case. The whole trend of the title seems to be to "protect trade and commerce from unlawful restraints and monopolies" in the traffic and transportation of property. Such seems to be the purpose of the whole act, with nothing to show a different intent. It is true that the words might have been used in a different sense, but the context seems to limit their meaning. This being true, it must be apparent that the requirement of the annual statement, as provided for in the fourth section of the act, applies only to the quality of "trade and commerce" referred to in the title, and that insurance companies are not included.

The judgment of the district court is

AFFIRMED.

ROSE, J., took no part in this decision.

HERMAN HAAS ET AL., APPELLANTS, V. GUSTAVE WELLNER, ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 17,049.

Deeds: DELIVERY. The delivery of a deed by the grantor to a third person to be delivered to the grantee will be equivalent to a delivery to the grantee, if the existing equities required such delivery and it is apparent that the grantor so intended it.

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

Wilcox & Halligan and *O. A. Torgerson,* for appellants.

W. P. Miles and *J. L. McIntosh, contra.*

REESE, C. J.

This is an action to partition section 11, in township 16 north, of range 51 west, in Cheyenne county. The suit is prosecuted by heirs at law of Joseph Haas, late of the city of Nauvoo, in the state of Illinois, who died testate September 20, 1898. His will was executed on the 1st day of August, 1876, by which he devised and bequeathed to his wife, Catherine Haas, all his real estate and personal property during her natural life, without further specification or identification. The will was admitted to probate in Hancock county, in that state, on the 17th day of October, 1898. Joseph and Catherine had each been married prior to their intermarriage, and each had children living. Other children were born to them after their marriage. The children of Joseph Haas, born before and after his marriage to Catherine, are the plaintiffs in this case. Gustave Wellner, one of the defendants, is the son of Catherine, born before her marriage to Joseph, and the defendant "Mrs. Gustave Wellner," known in the record as "Belle Wellner," is his wife. There are other parties to the suit, but they need not be here referred to. In the year 1885, and a long time prior to the death of Joseph Haas, the defendant Gustave Wellner purchased the east half of section 3, township 16, range 51, and the north half of section 11, in the same township and range, from the Union Pacific Railroad Company, under the usual ten-year instalment contract. Belle Wellner, his wife, with her own means and under a like contract, purchased the south half of said section 11. They met the payments as they matured for some time, but unfavorable climatic and financial conditions rendered it impossible for them to keep up the payments, and they assigned their contracts to Joseph Haas, who completed the payments and received a deed of conveyance from the rail-

road company. After the completion of the payments, but before receiving a deed, Joseph Haas and wife, Catherine, executed to defendant Gustave Wellner a bond for a deed to the north half, and to Belle Wellner a similar bond for the south half, of said section 11. The bonds each provided for the payment of $633 by the obligees on or before the 1st day of May, 1895. They were executed on the 5th day of March, 1889. The east half of section 3 is not referred to in the bonds. It appears that in the early spring of 1893 defendant Gustave Wellner wrote Joseph to meet him in Lincoln at a time named, when he would pay the amount due Haas and receive the deed of conveyance. On the 21st day of March of that year, and before leaving for Lincoln, Joseph Haas and wife, Catherine, made and acknowledged a deed to Gustave of all of said section 11, and Haas brought it with him to Lincoln for delivery upon the receipt of the payments due. Gustave failed to meet him in Lincoln, and he returned home in an angry mood, and declared that, if Gustave should desire to redeem the land by paying the amount due, he could come to Nauvoo to do so. The deed was laid aside, but never destroyed. Later he gave the deed to his wife, the mother of Gustave, and directed her to give it to Gustave, or to Belle, if she should come to Nauvoo. Belle did not go to Nauvoo, and the deed appears to have been forgotten by Catherine, who was then in advanced old age. The proof of the giving of the deed to Catherine and the instruction to her to give it to the grantee, or his wife, depends upon the testimony of Catherine, whose deposition was taken when she was 83 years of age, somewhat advanced in senility, and possessing but indifferent knowledge of the English language. Her memory and other faculties appear to have been impaired to a considerable extent. After the death of Joseph and the appointment of Catherine as executrix, she inventoried this land as a part of the assets of the estate of Joseph, and at that time the deed was seen among the papers of the estate. Later, she having only

a life estate in the land, as she supposed, and it being unproductive, she made a quitclaim deed thereof to the heirs of Joseph Haas. During the lifetime of Joseph Haas, defendants Gustave and Belle Wellner assigned their bonds to S. C. Ingraham, and by their deed conveyed to him all of section 11, and he subsequently made a similar transfer to A. L. Green. These instruments having been placed of record, Joseph Haas instituted a suit in the district court for Cheyenne county to remove the cloud thereby cast upon his title. That suit appears to have been adjusted, and his title was quieted by conveyances. It appears that that suit was to some extent under the direction of defendant Gustave, and the costs were paid by him. Louis Haas, one of the sons of Joseph Haas, died, and Gustave purchased the interest which he was supposed to own in the land (being one-eighth) of his heirs, and his title to that interest is conceded by plaintiffs. The title to the east half of section 3 is not involved in this suit. In the year 1906 defendant Gustave Wellner was in Nauvoo, when he and his brother were looking through a lot of discarded papers which had been left in a garret of the former home of Joseph and Catherine Haas, when the deed to Gustave of section 11, executed in 1893 by Joseph and Catherine, was found. This was the first knowledge he had of its existence. He and his brother took the deed to their mother, Catherine, and inquired of her what it meant, etc. She took it and examined it carefully. Then, holding up her hands, declared that she had forgotten all about it; that it had been given to her by Joseph in his lifetime for Gustave, with instructions to give it to him, which she then did, and Gustave caused it to be recorded in Cheyenne county. This suit is brought by the heirs upon the theory that the deed of 1893 was never delivered to Gustave by Joseph Haas, nor by any one for him, and that it conveyed no title; that by the conveyance of Gustave and Belle to Ingraham they had divested themselves of all interest in the property.

Some correspondence between Joseph Haas and Gustave is shown in the abstract. The letters from Joseph were in the German language; those from Gustave in broken English. At one time, the date not given, but some years before the trial, defendant received a letter from Joseph Haas written in the German language, the translation of which was procured by a Mr. Solomon. The letter had been lost, and could not be introduced in evidence upon the trial, but Mr. Solomon testified that he had read it so often he knew it "nearly by heart;" that in that letter "Mr. Haas made a proposition to Gustave Wellner. He said he owed him $1,100, and, if he turned over section 3 to him, he should have section 11 and get a receipt for the $1,100 besides." The letter is described as being in the handwriting of Joseph Haas and written with red ink. A Mr. Gates testified that he was present on the occasion when Mr. Solomon translated the letter described by Solomon; that he could speak the German language, and he and defendant "tried to read the letter, tried to make it out by ourselves," when Solomon came along, and he being proficient in the use of the German language was called in and translated the letter; that it contained some reference to some land, but witness could not remember the numbers, nor anything further, except that "it was some land transaction between the two," Joseph and Gustave. Defendant Gustave testified to an agreement between himself and Joseph Haas by which he was to surrender to Joseph the east half of section 3, and he and his wife were to have section 11; that in the purchase of the whole section and a half he and his wife, Belle, paid something like $3,200, and Joseph had paid $1,100, and the matter was adjusted by the division of the land, above indicated; that he had sought to redeem the whole section and a half, but, being unable to do so, he had surrendered the half section in section 3, and accepted section 11, thus canceling the indebtedness to Joseph for the money he had advanced. Some force is given to this contention by reason of the

execution of the deed of 1893 conveying section 11 alone and the retention of the land in section 3 by Joseph Haas. The parties to this transaction were all of German nationality, unacquainted with the usual formalities of real estate transactions, and much appears to have been left to memory.

The cause was tried to the district court, which resulted in a finding and judgment in favor of defendants Gustave and Belle Wellner that they were the owners of said section 11, and that plaintiffs had no interest therein. Judgment of dismissal of plaintiffs' petition and quieting the title of defendants was entered. Plaintiffs appeal.

It must be conceded that the evidence is not so clear and decisive in many particulars as could be desired, but, from as careful an examination and consideration as we are able to give it, we are led to the conclusion that the material facts are substantially as above stated.

It is contended by plaintiffs that the evidence does not show a delivery of the deed of 1893, and, as delivery is necessary to pass title, the deed is therefore of no validity; that, even if Catherine Haas was made the agent of her husband, Joseph, to make the delivery, as alleged in defendants' answer, the death of Joseph terminated that agency, and there could be no such delivery thereafter as would pass title. It may be conceded that such is the general rule upon both propositions, and yet, under the peculiar circumstances of this case, as disclosed from the evidence, we are of the opinion that it should not be applied here. Defendant Gustave was the stepson of Joseph Haas. He had been reared in the family and served his step-father until he was 23 years of age. Their relations appear to have been much the same as between father and son. Gustave and Belle had purchased the whole of the land and made a large number of the payments as they matured. We can discover no purpose on the part of Joseph Haas to deprive defendants of the money they had put into the purchase of the land. The person to whom he gave the deed for defendant was defendant's

mother, and from her testimony, unsatisfactory as it may be, we think it more than probable that he considered the delivery to her the equivalent of a delivery to her son, or to the son's wife, should she come to Nauvoo. It sufficiently appears that, from motives of peace perhaps, he requested her to say nothing about the deed to the other children until later on, to our mind excluding the idea that he considered he had further dominion over it. The fact that Mrs. Haas should forget the transaction and omit to send the deed to the defendant is not surprising, nor that the presence of the deed in the papers of the estate failed to recall the matter to her memory, when we consider her age and almost absolute absence of knowledge of business affairs. In respect to the delivery, there appears to be a distinction between this case and those cited by plaintiffs. There also appears to be an element of equity in the case which should not be overlooked. If it is true, as suggested by the evidence, that Joseph Haas withheld and accepted the east half of section 3 as full compensation for the money advanced by him, a strong circumstance is added in favor of the contention that the delivery of the deed to defendant's mother was intended as a delivery to defendant, and neither he nor his heirs could successfully question defendant's title thereafter.

As we view the case upon the facts, which though somewhat dimly set forth in the record, we are persuaded that no serious question of law is involved, and the cases cited will not be noticed.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissenting.

I dissent for the reason that in my opinion the evidence is insufficient to show a delivery of the deed dated March 21, 1893, in which Gustave Wellner is named as grantee.

LIZZIE O'DONNELL KULP, APPELLANT, V. BERNARD HEIMANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,554.

Guardian and Ward: SALE OF LAND: RATIFICATION. A final settlement between a guardian and his ward, after the ward has attended his majority, in the absence of fraud or misrepresentation, if made in a proper court, after investigation, and with knowledge on the part of the ward that a portion of the distributive share which he receives of his father's estate is the proceeds of a sale of his land, will amount to a ratification and affirmance of such sale, and the ward is thereby estopped to question its validity. *Borcher v. McGuire*, 85 Neb. 646.

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

T. J. Mahoney and *J. A. C. Kennedy*, for appellant.

A. R. Oleson and *Baldrige, De Bord & Fradenburg, contra.*

BARNES, J.

Action in ejectment to obtain possession of an undivided one-fourth of the northeast quarter of section 3, township 21 north, of range 5 east of the sixth P. M., situated in Cuming county, Nebraska. The cause was tried to the district court without the intervention of a jury. The trial resulted in a judgment for the defendants, and the plaintiff has appealed.

The errors assigned and relied on for a reversal are, in substance, as follows: The findings and judgment of the district court are contrary to law; the findings and judgment of the district court are not sustained by the evidence.

It appears that one James O'Donnell, on or about July 1, 1893, died testate in Cuming county, Nebraska, leaving a widow and three children surviving him, one of whom is the plaintiff in this action; that at the time of his death

O'Donnell left some land in Kansas, a timber claim in Garfield county, Nebraska, both of doubtful value, and two tracts of land in Cuming county, which are referred to in the record as the Monterey land and the Bancroft land. He also left personal property of the value of $850. The Monterey land, which is the matter in dispute, consisted of 160 acres, and had been the homestead where O'Donnell and his wife and children had formerly lived for a number of years. A few years prior to his death O'Donnell purchased from the government of the United States an 80-acre tract, known as the Bancroft land, and moved his family, including the plaintiff, from the Monterey farm to the Bancroft land, which thereafter became the family homestead. At the time of his death there was due from him to the government upon the Bancroft land $1,008, which constituted a personal obligation; and it may be further stated that a failure to pay this obligation would have resulted in the loss of the homestead, for upon such failure it would have reverted to the government. O'Donnell's will contained a bequest of $200 to the church of Monterey, and a legacy to his sister of $2,500, and devised, subject to other conditions, the testator's real property in four equal parts, giving to his wife and to his children each one-fourth thereof. The will also directed his executor to pay his funeral charges, the expenses of administration, and all of his debts out of his personal property; and further expressly provided that, if his personal property was insufficient, the executor should sell so much of his real estate as might be found necessary to accomplish that purpose. The will was admitted to probate, and one M. J. Hughes was appointed executor thereof. It appears from the evidence that the claims filed against the estate and the costs of administration amounted to $563.13. There were some taxes due upon the land belonging to the estate, certain allowances were made to the widow for her support and the maintenance and support of the children, which, in addition to the legacies referred to in the will, amounted to about

$4,300. The personal estate was sold for $850.27. It appears that it became necessary for the executor to pay the $1,008 due to the government in order to save the homestead known as the Bancroft land. Therefore the personal property left by the testator was insufficient to pay his debts and the charges against his estate. It further appears that it was impracticable to sell either the land in Kansas or the Garfield county timber claim; that the Bancroft land was occupied as a homestead, and it was deemed necessary to sell at least part of the Monterey land, which is the subject of this action, to pay the testator's debts. It is shown by the evidence that the executor thought it advisable not to rely wholly upon the power obtained in the will to sell the land in question, and an application was made to the district court for Cuming county for an order to sell so much of the Monterey land as should be found necessary to pay the testator's debts. The court found that the Monterey land could not well be divided, and made an order for the sale of the entire tract. The land was sold thereunder to one J. F. Losch for $5,600, which the record shows was its full value at that time. The proceedings were examined, the sale was confirmed by the district court, and a deed was executed and delivered to the purchaser, who shortly thereafter sold and conveyed the land to the defendant Bernard Heimann, who immediately took possession of it, has made valuable and permanent improvements thereon, and has occupied it as his home for more than 17 years.

The plaintiff's main contention is that the district court, by reason of certain defects or irregularities in its proceedings, had no jurisdiction to make the order for the sale of the land in question; that the sale through which the defendants derived their title was void, and therefore she should have had the judgment. We may say, in passing, that it is probable that the matters upon which plaintiff relies to deprive the district court of jurisdiction to make the order were mere irregularities; but we are not required to pass upon that question, for we are of opinion

that our decision must be ruled by *Borcher v. McGuire*, 85 Neb. 646, where practically the same questions were involved as those now presented for our determination. It appears that the plaintiff and the other heirs of the testator, after they attained their majority, with the consent and aid of the county court of Cuming county, settled with their guardian, accepted that portion of the proceeds of the sale of their land then in his hands, and consented to his discharge. The record in this case contains the following finding or conclusion made by the trial court. "The court further concludes, as a matter of law, that plaintiff, by reason of her knowledge at the time of her final settlement with her guardian that the money she received at said time was part of the proceeds of the sale of the land in controversy, and having elected to accept the money, is now estopped from claiming the land." The rule is well settled that in an action at law the findings of facts made by the trial court will be sustained, unless it appears from the evidence that they are clearly wrong. It is shown by the evidence in this case, beyond question, that plaintiff settled with her guardian, and accepted her share of the proceeds of the sale of the land which is now the subject of this controversy. She was a well-educated person and was possessed of more than average intelligence. She testified, among other things, that she knew, in a general way, what land her father had when he died, that she thought of it at the time she got her money, and that she knew the land in question had been sold. She also testified that she knew about her father's will, and of his bequest of $2,500 to his sister, and that she knew what was left to her mother and the three children. She said: "I think I heard afterwards he left $200 to the Monterey church. I think I heard it through my aunt." When asked when she first learned that the Monterey land was sold, she said: "I don't remember." She admitted, however, that it was before she made her settlement with the guardian. The other heirs testified that when they settled with the guardian they knew that

the money which they received was a part of the proceeds of the sale of the Monterey land. It further appears that they, together with the plaintiff, questioned the amount, and insisted that they ought to have more money from their father's estate; that Judge Krake, who was then the county judge of Cuming county, assisted in making the settlement. He testified that, together with the plaintiff and the other heirs, he went over the guardian's reports and the records in his office in relation to the matter, in order to satisfy them as to the correctness of the amount which they ought to receive; that they talked about the sale of the property, and that they were then referring to the property that executor Hughes sold; that after the examination they accepted the money from their guardian and consented to his discharge.

Without quoting any more of the evidence, we think it may be said that it was sufficient to support the findings of the district court. This brings the case clearly within the rule announced in *Borcher v. McGuire, supra,* where it was held that the acceptance of his distributive share, by a ward from his guardian, of an estate, and a request for his discharge, in the absence of fraud or misrepresentation, amounts to a ratification of the guardian's acts; that, if the ward has knowledge that a portion of the fund received by him was the proceeds of the sale of his land, this would be a ratification and affirmance of such sale, and it would make no difference whether the sale proceedings were regular, voidable, or void.

Counsel for the plaintiff have challenged the soundness of that opinion; but, after a careful review of it, we are unable to see how we could have decided the question otherwise. That was an action to recover another part of the real estate owned by James O'Donnell at the time of his death, and practically the same questions were involved in that case as those which are before us on this appeal. The record in this case contains practically the same evidence presented in that one, together with some additional testimony tending strongly to support the findings and judgment of the trial court.

For the foregoing reasons, plaintiff's contention must fail, and the judgment of the district court is

AFFIRMED.

JOHN O'DONNELL, APPELLANT, V. BERNARD HEIMANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,555.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

A. R. Oleson and *Baldrige, De Bord & Fradenburg, contra.*

BARNES, J.

This was an action in ejectment to recover possession of an undivided one-fourth of the same tract of land which was in controversy in *Kulp v. Heimann, ante,* p. 167. The pleadings were similar to those in that case, with the exception of a plea of the statute of limitations, which was there interposed. The evidence in both cases was practically the same. Defendants had the judgment, and the plaintiff has appealed.

Following the decision in that case, and for the reasons therein stated, the judgment of the district court is

AFFIRMED.

MARY O'DONNELL WEEKES, APPELLANT, V. BERNARD HEIMANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,556.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

A. R. Oleson and *Baldrige, De Bord & Fradenburg, contra.*

BARNES, J.

This was an action in ejectment to recover possession of an undivided one-fourth of the same tract of land which was in controversy in *Kulp v. Heimann, ante,* p. 167. The pleadings were similar to those in that case, with the exception of a plea of the statute of limitations, which was there interposed. The evidence in both cases was practically the same. Defendants had the judgment, and the plaintiff has appealed.

Following the decision in that case, and for the reasons therein stated, the judgment of the district court is

AFFIRMED.

ELMER A. JOHNSON, APPELLEE, V. JAMES C. ISH, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,925.

1. Appeal: INSTRUCTIONS. It is not reversible error to give to the jury an unnecessary instruction, which is a correct statement of a proposition of law, unless the complaining party appears to have been prejudiced thereby.

2. Trial: REFUSAL OF INSTRUCTIONS. Where the district court has fully and fairly instructed the jury upon a particular point, it is not error to refuse to give further instructions thereon.

3. **Assault and Battery:** EXCLUSION OF EVIDENCE. Assignment of error for the exclusion of certain evidence commented on, and found to be without merit.

4. ———: DAMAGES. In an action for damages for assault and battery, where the testimony was conflicting as to the nature and extent of the plaintiff's injuries, a judgment should not be held excessive if the record contains substantial evidence supporting it.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Byron G. Burbank, for appellant.

W. W. Slabaugh and *J. W. Battin, contra.*

BARNES, J.

Action in the district court for Douglas county to recover damages sustained by the plaintiff from an assault and battery alleged to have been committed upon him by the defendant. The plaintiff had a verdict for $1,000. The court required him to remit therefrom the sum of $400. A remittitur was filed, and the court thereupon rendered a judgment for the plaintiff for $600 and costs. The defendant has appealed.

Defendant contends that the court erred in giving instruction numbered 7, which reads as follows: "Plaintiff claimed that the defendant assaulted him maliciously. The law infers malice where an act is done without legal excuse, and where in itself it amounts to an unwarranted assault upon another. An act done with legal excuse is without malice." The argument is that, because malice was not alleged in the petition, it was error for the court to instruct the jury upon that question. While the word "malice" is not found in the plaintiff's petition, still the facts alleged therein, and which were established by the evidence, were sufficient to constitute malice in its legal sense, and while it is probable that the instruction was unnecessary, still, as an abstract proposition of law, it was correct and affords the defendant no ground for a new trial.

Defendant assigns error for the refusal of the court to give the jury paragraph 6 of the instructions requested by him. This instruction was, in substance, that in no event could the plaintiff recover punitive damages under the laws of this state, and the damages recoverable were only those actually flowing from the blow inflicted upon the plaintiff's head. Of this argument, it is sufficient to say that the trial court fully covered that point by paragraph 10 of the instructions given on his own motion, and therefore was not required to further instruct the jury upon that question. *Bush v. State,* 47 Neb. 642; *Brumback v. German Nat. Bank,* 46 Neb. 540; *Beavers v. Missouri P. R. Co.,* 47 Neb. 761.

Defendant further contends that the district court erred in instructing the jury that, although they should find from the evidence that the defendant was fire reporter, and was wearing a policeman's star, such position and star gave him no other and further rights to remove persons from the pasture in controversy than that possessed by any individual in possession or under control of said pasture. It appears that defendant, at the time the assault was committed, was a fire reporter of the city of Omaha; and, it is claimed by defendant's counsel, was a special policeman. It further appears that plaintiff, with others, was engaged in playing base ball in a pasture lot in the city of Omaha, of which the defendant's mother was the lessee; that when the defendant was informed that the game was in progress he put on his uniform, also a policeman's badge, took a policeman's club, and, accompanied by his wife, went to the pasture, as he stated, to order the players to leave the inclosure. It appears that when he arrived there he seized a boy of the name of Kennedy by the collar and started to take him to the patrol station; that plaintiff and others (who were grown men) remonstrated with defendant, and asked him to let the boy go, and stated that, if he desired to arrest any one, to arrest one of them; that defendant's wife seized the ball bats used by the players,

and proceeded to carry them away; that one Powell, who was behind Mrs. Ish, pulled his bat from under her arm and threw it out of the field. She made an outcry, and thereupon the defendant released the boy and started for the other players, and struck, or struck at, them with his club; that they left the field, and the plaintiff said to defendant, in substance: I have known you for a number of years. We did not mean anything wrong. I do not like to see you act this way. To which defendant replied: "Get out of here." Plaintiff then said: "I will; just give me time," and walked towards the fence. Defendant followed him, and struck him on the head with his club, and this is the assault which was the foundation of this action. We think, that under this state of facts, the instruction complained of was correct, for it cannot be seriously contended that either the boy (Kennedy) or the plaintiff was found in the overt act of committing such a crime as would authorize the defendant, even if he was a special policeman, to arrest either of them without a warrant from some competent authority. Therefore the jury were properly told that the defendant had no further or greater right to remove the persons from the inclosure than was possessed by any individual in possession or control of the pasture.

It is further contended that the court erred in refusing to instruct the jury that they should disregard all of the testimony relating to any alleged assault by the defendant upon two of the other players, named Powell and Dart. An examination of the abstract discloses that this point was fully and explicity covered by a similar instruction given by the court upon his own motion, and therefore the request was properly refused.

Error is assigned for the refusal of the court to allow Mrs. Ish to testify of her physical condition at the time when the transaction above described took place; and it is argued that the plaintiff was justified in going to her assistance; but it is not claimed that the plaintiff had assaulted her, or had even spoken to her, and the fact

that Powell had taken his ball bat from her and thrown it into the street afforded the defendant no excuse for afterwards assaulting and striking the plaintiff while he was in the act of leaving the pasture. We are therefore of opinion that the court did not err in excluding this evidence.

Finally, it is contended that the judgment is excessive. It appears that the evidence as to the nature and extent of plaintiff's injuries was somewhat conflicting. It was clearly shown, however, that the blow from defendant's club knocked the plaintiff down and cut a gash in his scalp deep enough to reach the bone; that it rendered him at least partially unconscious; that he bled profusely, and was compelled to wear a bandage upon his head for some time; that since then he has suffered from attacks of dizziness, and at the time of the trial was still suffering from the effects of his injuries. The jury, upon consideration of all of the evidence, returned a verdict in plaintiff's favor for $1,000, which upon due consideration the trial court reduced to $600. From a careful review of all of the evidence, we are unable to say that the judgment is excessive.

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

AFFIRMED.

JOSEPH TIERNEY ET AL., APPELLEES, V. ANDREW R. OLESON ET AL, APPELLANTS.

FILED NOVEMBER 14, 1911. No. 17,048.

1. **Mortgages:** FORECLOSURE: CONFIRMATION OF SALE: SUIT TO SET ASIDE: BURDEN OF PROOF. In a collateral action to set aside an order confirming a sheriff's sale under a decree of foreclosure and the deed executed in compliance with such order, for the reason that the order was obtained fraudulently in violation of the plaintiff's rights, and contrary to a verbal agreement not to ask for such confirmation, if the allegations of plaintiff's petition are

denied by the answer, the burden is upon the plaintiff to prove the allegations of his petition by a preponderance of the evidence.

2. Evidence examined, its substance stated in the opinion, and *held* insufficient to sustain a judgment for the plaintiff.

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

A. R. Oleson and *John A. Ehrhardt*, for appellants.

Clinton Brome and *O. C. Anderson, contra.*

BARNES, J.

Action in the district court for Cuming county to vacate and set aside an order confirming a sale of real estate made under a mortgage foreclosure decree, and to cancel the sheriff's deed made to the purchaser. The plaintiffs had the judgment, the defendants have appealed, and the case is now before this court for a trial *de novo* upon the record and bill of exceptions.

It sufficiently appears that on or about the 21st day of May, 1904, one John Tierney, Sr., conveyed by warranty deed to his daughter, Anna Cunningham, the south half of the southeast quarter of section 25, and the northeast quarter of the northeast quarter of section 36, township 24, range 6 east, in Cuming county, Nebraska, which he then owned in fee simple, subject to a mortgage to the Security Mutual Life Insurance Company for $3,000, reserving to himself an annuity therein of $300 a year during the remainder of his life; that Anna Cunningham and her husband, Martin, went into possession of the land and performed their part of the agreement; that they mortgaged the premises to John Tierney, Sr., for the sum of $300; that the plaintiffs in this action, who are children of John Tierney, Sr., were dissatisfied with their father's disposition of his property, and in June, 1906, commenced an action in the county court of Cuming county to have their father declared incompetent, and for the appointment of a guard-

ian of his person and estate, in order to lay a foundation for setting aside his deed to the Cunninghams; that a long and tedious period of litigation ensued, in which Andrew R. Oleson, the principal defendant herein, acted as attorney for John Tierney, Sr., and the Cunninghams, and, to pay him for his services, they gave him their two promissory notes, aggregating $750, secured by a mortgage upon the land above described; that, for a failure to pay the mortgage above mentioned, Oleson commenced an action in the district court for Cuming county, and in November, 1908, obtained his decree of foreclosure; that thereafter the land was duly appraised, advertised and sold by the sheriff of Cuming county to defendant Oleson; that the proceedings in that action were regular and valid in all respects, and thereafter Oleson was entitled to an order confirming the sale at any time he should make application therefor. It further appears that while the action for the appointment of a guardian of the person and estate of John Tierney, Sr., was still pending upon an appeal to the district court for Cuming county, and on the 25th day of January, 1909, one H. C. Brome, acting as attorney for the plaintiffs herein, who were the plaintiffs in the proceeding for the appointment of a guardian, as above stated, went to Wisner and entered into an agreement with Martin and Anna Cunningham, which provided, in substance, that the Cunninghams were to sell the land in question, and out of the proceeds were first to pay the mortgage liens above mentioned, and, second, to the plaintiffs herein the sum of $3,125, and the balance, if any arising from such sale, was to be retained by the Cunninghams; that 60 days were given Cunningham in which to make the sale, and, if he should fail to do so, then the plaintiffs were to have an opportunity to sell the premises upon the same conditions, and, as a consideration for the agreement, plaintiffs were to dismiss the proceeding for the appointment of a guardian for John Tierney, Sr. The above mentioned agreement was afterwards typewritten by

defendant Oleson at the request of the parties thereto, but it seems clear that Oleson took no other part in that transaction.

It was alleged by the plaintiffs, as a basis of their right of action in this case, that, when the agreement above described was concluded, it was further agreed between H. C. Brome (as attorney for the plaintiffs) and the defendant Andrew R. Oleson that Oleson would not ask for a confirmation of sale until after the February term of court; that the defendant Oleson, in violation of his agreement, and in fraud of the rights of plaintiffs, and without notice to them, obtained a decree of confirmation and a sheriff's deed to the premises in question, which the plaintiffs in this action ask to have set aside, declared void and canceled. On the other hand, defendant Oleson, by his answer, denied that he ever made any agreement in relation to the matter with the plaintiffs by and through their attorney, H. C. Brome, and alleged that at the time when the agreement first above mentioned was concluded he informed the parties thereto that he would not postpone his application for a confirmation of sale indefinitely, but, in order to accommodate his former clients, the Cunninghams, he would not ask for a confirmation of sale at the February sitting of the court, which was to begin immediately thereafter, and on the 1st day of February, 1909; that he positively declared that he would make no arrangement whatever with attorney Brome or the plaintiffs herein; that, according to his promise made to the Cunninghams, he refrained from asking for a confirmation of sale at the February sitting of the district court, and made no application therefor until more than 60 days had elapsed, in order to give his former clients an opportunity to sell the premises and carry out the terms of their agreement with the plaintiffs.

It appears that the district court adjourned at the conclusion of its February sitting, which was of short duration, until the 10th day of May, 1909; that in the

latter part of March, and more than 60 days after the agreement between the plaintiffs and the Cunninghams was entered into, Oleson saw the Cunninghams, who were the only persons who had the right to redeem the land in question from the foreclosure sale, and inquired how the matter of sale was progressing; that Martin Cunningham then informed the defendant Oleson that he had been unable to sell the land, that his time limit had expired, and he had nothing further to do with the matter; that Oleson then informed him that he should ask for a confirmation of sale at his first opportunity; that, when court convened on the 10th day of May following, defendant Oleson obtained the first order of confirmation, and on the following day the sale was confirmed, a deed was ordered, which was made by the sheriff, and was thereafter placed on record by the defendant Oleson.

It thus appears that the only question for determination in this case is whether or not the defendant Oleson made the agreement with plaintiffs' attorney, H. C. Brome, as alleged in their petition, and upon this issue the burden of proof rests upon the plaintiffs to establish the making of that agreement by a preponderance of the evidence.

It appears from the record and bill of exceptions that upon that issue the plaintiffs produced Mr. Brome as a witness, who testified, in substance, that, when the agreement between his clients and the Cunninghams was completed, he said to Mr. Oleson: "Now, I understand you have a mortgage decree, and sale has been made and not confirmed on this property. Mr. Cunningham tells me that you are perfectly willing to wait until we sell this property for your money; that the sale won't be confirmed until we make this arrangement, and I want this understood between us," that Mr. Oleson said, "that would be all right." He further stated that there was no other conversation between them about the confirmation.

On the other hand, it appears that, by his testimony,

Mr. Oleson positively denied that he ever had any such conversation with, or made any such statement to, Mr. Brome. He further testified that he had no conversation or agreement of any kind with Mr. Brome relative to the confirmation at all. He further stated, in substance, that, when the printing of the contract was completed, Mr. McGuire, who was present, asked him to withhold confirmation of sale for Mr. Cunningham, and that he told McGuire and Cunningham, who was also present, that he would withhold confirmation in abeyance over the February sitting of the court. That he said to Cunningham: "Martin, if you ask it, I will for you, but I will not, under any circumstances, for the other parties. * * * I want you to understand that this is not going to be indefinite." That Cunningham said to him: "It won't be long, because I think we will close the sale up inside of 30 days." That he then said to him: "I will pass it over the February sitting of the court, so you will have your opportunity to make arrangements that you are now contemplating." That the February term of court convened on the 1st day of February, 1909; that he did pass the confirmation over that sitting of the court. He further stated that about the latter part of March, somewhere about the expiration of the 60-day period mentioned in the contract, he saw Mr. Cunningham in town, and asked him how he was getting along with the sale of that land; that Cunningham said: "I haven't been able to sell it. We have tried and have had a number of buyers for it, but for some reason or another they won't buy or close the deal." That he then said to Martin: "If that is the way it is going to hang on, I am not going to wait much longer for the confirmation of that sale." That Cunningham replied: "I have done everything I can. Now, my time is up, and I have nothing more I can do with it. It goes over to the other parties." That he then said to Cunningham: "Martin, I shall ask for confirmation at the first opportunity." Cunningham said: "I can't help it. It has

gone beyond me. I was unable to sell it, and I have tried very hard." That he then said to Cunningham: "I don't intend to wait until somebody or other gets * * * into the matter. I made arrangements with you, and I want to carry them out." That Cunningham said: "You have done everything I asked you. I can't do anything further. I am out of it. * * * That is the substance of the conversation."

Mr. McGuire, by his testimony, corroborated the testimony of Mr. Oleson. It also appears that the plaintiffs took the deposition of Martin Cunningham to maintain the issues on their part, but did not offer it in evidence on the trial. It was read in evidence by the defendants to support their view of the case, and it fully corroborates the testimony of Mr. Oleson. It appears, without dispute, that, when the district court convened again on the 10th day of May, 1909, Oleson moved for a confirmation of the sale, and the court made the first order to show cause by the following morning why the sale should not be confirmed. No cause was shown, the sale was confirmed, and the deed ordered. It further appears, without dispute, that no notice of the motion to confirm the sale other than that of the first order was given to the plaintiffs, and that, as a matter of fact, they did not know until some time after the order of confirmation was entered that the sale had been confirmed.

There was other testimony in the case upon other questions, but the foregoing comprises the substance of all of the evidence introduced by either party upon the main issue. As we view the record, the plaintiffs failed to sustain the allegations of their petition by a preponderance of the evidence, and therefore the judgment of the district court was wrong and should be reversed.

It may be further said that the record discloses that the land was sold subject to the mortgages of the Security Mutual Life Insurance Company and John Tierney, Sr.; that, after the order of confirmation was entered the

proceeds of the sale were distributed, and, after the payment of costs, there remained a surplus in the hands of the court amounting to $1,468.70, which was paid to and receipted for by the defendants Martin and Anna Cunningham.

It may be further said that there is nothing in the record to show that the land was sold for an inadequate price; and, while some evidence was produced which tended to show that the land at the time of the trial was worth about $12,000, still there was no offer on the part of the plaintiffs to pay that sum for it. Neither was it shown that there was any reasonable prospect of their selling the land for any amount in excess of the sum bid for it at the sheriff's sale.

We gather from the record that it would be useless to send this case back to the district court for a new trial, for it seems clear that no other or further evidence can be produced by either party.

For the foregoing reasons, the judgment of the district court is reversed, and the plaintiffs' action as against the defendants Andrew R. Oleson, Helen Oleson, Martin Cunningham and Anna Cunningham is hereby dismissed; and it appearing that the defendant the Security Mutual Life Insurance Company has prayed that its mortgage be not foreclosed, but that it only be declared a first lien upon the land in question, it is so found, and the action is dismissed without prejudice to any of its future rights. It further appearing that defendant John Tierney, Sr., has not asked for a foreclosure of his mortgage, the action as to him is dismissed without prejudice to the right to maintain a future foreclosure suit.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., dissenting.

John Tierney, Sr., had a farm in Cuming county, which is said by one of the witnesses to be worth $12,000, and he also had several lots in Scribner. There was a mortgage on the farm of $3,000, so that Tierney's in-

terest in it was not worth more than $8,000 or $9,000. Tierney had several children. One of them, Anna, was the wife of Martin Cunningham. In May, 1904, Tierney deeded the farm to his daughter, Anna Cunningham, and reserved an annuity of $300 to himself. This would be about one-third of 10 per cent. of the value of Mr. Tierney's interest in the farm. This annuity was to be continued only during the life of Mr. Tierney, who was quite an aged man, so that the transaction was virtually a gift of the farm to Anna, to the exclusion of his other children. His other children then filed a petition in the county court to have a guardian appointed for Mr. Tierney. This proceeding was evidently with the view of testing the validity of the deed to Anna and their exclusion from their father's property. It was eventually before this court, and was remanded to the district court for Cuming county for trial, and had been tried in the district court for Cuming county before a jury, when the contract that is involved in this litigation was made. The jury apparently found that Mr. Tierney was competent to take care of himself, but did not find that he was competent to take care of his property, and it appears that this question was about to be tried again, when this contract was made. Mr. Oleson acted for Anna and Martin Cunningham in their litigation, and, of course, in their interest appeared for Tierney to prevent his being held incompetent. On the 25th day of January, 1909, Mr. Brome, who was attorney for the other children of Tierney, went out there, and the parties appear to have gotten together, and a settlement of the whole matter was entered into. Mr. Oleson claims that he took no part in making the settlement but he does not claim that it was made clandestinely. He was notified of it; in fact, he wrote the contract on the typewriter, so that he knew just exactly what settlement they were making. The contract they made was to the effect that Cunningham should pay the other heirs $3,125 as their interest in the land, and the other heirs were to dismiss the pro-

ceedings in the district court, where the matter was being contested, and release all their claims to the land. The Cunninghams were to sell the land, and the contract provided that they should do so within 60 days, and pay the other claims against the land, the $3,125 to their brothers and sisters, and that they, the Cunninghams, should have the remainder. If the Cunninghams did not sell the farm within 60 days, the contract provided that the other children should have the right to sell the land for the sum of $12,000, and out of the proceeds pay the liens and their $3,125, and the balance to the Cunninghams. The next term of the district court, after this agreement, was to take place within ten days or two weeks. Mr. Oleson testified that at the time this contract was written by him on the typewriter, and before it was executed, while the parties were there in his office together, Mr. Cunningham told him (Oleson) what they had agreed to do. He had conversation with Mr. Cunningham and Mr. McGuire, who was present. Mr. Oleson had obtained a decree of foreclosure of his mortgage for attorney's fees against this farm given by the Cunninghams, and the farm had been sold a few days before this contract at sheriff's sale, but the sale was not yet confirmed. Mr. Oleson testified that McGuire mentioned to him the matter of holding the decree of confirmation in abeyance when they were making this contract in Oleson's office, and Oleson says: "I stated that, if Mr. Cunningham wished it, I would hold the confirmation in abeyance over the February sitting of the court." Mr. Cunningham said: "Well, I guess I will ask it." And Oleson said: "Martin, if you ask it, I will for you, but I will not, under any circumstances, for the other parties; but Martin, I want you to understand that this is not going to be indefinite." Mr. Oleson's case depends upon this transaction. It will be remembered that the contract of settlement provided that Cunningham should have 60 days in which to make the sale, and afterwards his brothers and sisters might sell the land for $12,000.

and that this settlement was impossible unless Oleson would forbear to insist upon the confirmation, and that Cunningham might make this contract and settlement. Oleson agreed that he would forbear, but not indefinitely, to ask for a confirmation. Oleson's construction of it is that he would wait for Cunningham to see if he could sell it, and, if Cunningham could not sell it, then he would be at liberty, with Cunningham's consent, to have his sale confirmed. Acting upon this understanding, and about the time the 60 days expired, Oleson asks Cunningham if he has made the sale, and Cunningham tells him he has not, and that he cannot do so, and Oleson has his sale confirmed and pays to Cunningham $1,400. When this contract was made, and in pursuance of it, Oleson applied to the district court and had the proceedings for the guardianship against Tierney dismissed on the ground that the contract which the parties had entered into was a complete settlement of the whole matter. Thus Oleson and Cunningham get the proceedings against them dismissed. They get the entire farm. Cunningham gets $1,400 out of it, Oleson gets the farm, and the other heirs get nothing.

Evidently Oleson is mistaken in supposing that by his agreement to delay the confirmation he placed himself under obligation to his client Cunningham only. He knew what the parties were agreeing to do, and that those who were contesting with his clients would not enter into this contract if the sale was to be confirmed without their knowledge, and so as to give the entire property to Oleson and his client, without giving them an opportunity to avail themselves of that part of the agreement that was in their interest, Oleson agreed to the entire contract and so became a party to it; and whether it was at the request and for the benefit of his client, Cunningham, or for his own benefit, or both, would make no difference. His mortgage was given by the Cunninghams. Oleson's interest in the property depended upon the validity of the deed from Tierney to

Anna Cunningham. That deed was being contested, and it was a part of the contract of settlement, to which Oleson agreed, that this contest should be dismissed and the title perfected so that the terms of the contract of settlement might be carried out. Oleson procured the dismissal of this contest, which he could not have done except under the terms of the contract of settlement, and then proceeded upon a secret agreement between himself and his client, and without any notice to the other parties to the settlement, to confirm his foreclosure sale and procure the whole property for himself and his client. Cunningham, he says, told him that he could not find a purchaser for the farm; but Cunningham had never notified the other parties to the agreement of settlement of this fact. By the terms of the agreement the other parties were to have an opportunity to sell the farm after Cunningham had failed to make such sale. Oleson and Cunningham should have frankly told the other parties that Cunningham could not make the desired sale of the property, and so give them an opportunity to make such sale. The contract of settlement expressly provided for this, and Oleson and his client violated the contract by depriving the other party of an opportunity to sell the farm as the contract provided.

I think the judgment of the trial court was right.

S. H. KYNER, APPELLEE, V. FREDERICK WHITTEMORE, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,083.

1. **Pleading: ANSWER: WAIVER OF DEMURRER.** By answering to the merits, a defendant waives his right to demur to the plaintiff's petition, and that part of his answer which in form amounts to a general demurrer will be treated as surplusage.

2. **Taxation: FORECLOSURE OF LIEN: ANSWER: DEMURRER.** Where a defendant seeks to defeat the foreclosure of a tax lien on the

ground that the real estate in question consisted of two separate and distinct tracts which were the property of different owners, and were assessed and taxed as one tract, if his answer fails to clearly set forth facts sufficient to warrant such a conclusion, and contains no definite description of each separate tract, it is vulnerable to a general demurrer.

3. ———: ———: ———. An allegation in an answer that defendant has at all times been ready and willing to pay his proportion of the tax, but has been unable to agree with another alleged owner as to the amount he should be required to pay, does not constitute a defense to an action to foreclose a tax lien.

APPEAL from the district court for Brown county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

William M. Ely, for appellant.

J. S. Davisson, contra.

BARNES, J.

Action in the district court for Brown county to foreclose a tax lien upon the northwest quarter of the northwest quarter of section 31, township 30 north, range 20 west of the sixth P. M. The petition was in the usual form, and alleged, in substance, that the land in question (describing it) was duly assessed for taxation for the year 1887; that taxes were duly levied thereon for that year; that the taxes were not paid; that the land was advertised according to law, and was finally sold at private sale to one W. A. Bucklin on the 12th day of August, 1902, for the taxes above mentioned, interest, penalties and costs, amounting to $78.20, and a certificate of sale was duly issued to the purchaser therefor; that the certificate was assigned to the plaintiff on the 12th day of January, 1905, and that he is the holder and owner thereof; that the land has never been redeemed from said tax sale, and no part of said tax has been paid; that a treasurer's deed cannot be lawfully issued at this time upon said certificate; that the plaintiff has paid subsequent taxes upon said land for the years 1901, 1902 and

1903, in the sum of $10.46; that the defendants Lizzie M. Kyner and Frederick Whittemore have, or claim to have, some interest in the said premises, but whatever right or claim they may have therein is junior and inferior to the claim of the plaintiff; that there is now due and unpaid on the tax certificate and subsequent taxes paid the sum of $184.49. The petition concluded with a prayer for a foreclosure of the tax lien, for an attorney's fee as provided by law, and other and further just and equitable relief.

To this petition the defendant Frederick Whittemore filed an answer, alleging, in substance: First, that the facts stated in the petition were not sufficient to constitute a cause of action; second, that on the 1st day of April, 1887, the land in question consisted of two separate and distinct tracts, and that they both were assessed together as one tract; but the answer failed to give any particular or definite description of each of the alleged separate tracts by metes and bounds, or otherwise, sufficient to enable the court to distinguish or describe them.

It was further alleged that on the 1st day of April, 1887, one of said tracts was owned by one W. L. Whittemore, and the other was owned jointly by C. R. Glover and W. L. Whittemore, and that on one of said tracts, consisting of about five acres, was located a flour and grist-mill, known as the Glover mill; that on the 30th day of July, 1887, C. R. Glover and W. L. Whittemore conveyed all of the land in question as one entire tract to the Northwest Christian Assembly and Chautauqua; that on the 12th day of August, 1887, the Northwest Christian Assembly and Chautauqua conveyed back to said Glover and Whittemore that part of said premises upon which Glover's mill was located, consisting of about 2.90 acres; that ever since said last mentioned date said 44 acres of land has comprised two separate and distinct tracts, the one consisting of 2.90 acres, and known as the Glover millsite, and the other consisting of

about 41 acres, known as the Chautauqua grounds; that the answering defendant is now the owner in fee simple of that portion of the northwest quarter of the northwest quarter of section 31, township 30, last above mentioned.

It was also alleged that, through some error or mistake on the part of the officers whose duty it was to list and assess the land for taxation, the two parcels of land were assessed and listed together as one tract in the year 1887, and were described as the northwest quarter of the northwest quarter of section 31, township 30, range 20, containing 44 acres; that the tax which the millsite should bear would amount to $27.64, and the Chautauqua ground share thereof would amount to $4.61. It was also stated in the answer that, at all times since learning that the said 1887 tax on said land was unpaid, the answering defendant has stood ready and willing to pay his just proportion of the same, with legal interest and penalties thereon, and that he is still ready and willing to pay the same, but that he has been prevented from paying the taxes by reason of his inability to reach any agreement with the owners of the remainder of said land as to the proportion of the tax which each should pay.

The answer concluded with a prayer that the court ascertain the proportion of the taxes justly chargeable to the defendant's 41 acres, known as the Chautauqua grounds, and that, if the court should find that the plaintiff's tax sale certificate is a lien upon the answering defendant's portion of the said real estate, the court ascertain and determine the amount thereof, together with the amount of costs chargeable against said tract.

To this answer the plaintiff filed a general demurrer, which was sustained. The answering defendant refused to further plead, and the court, after entering a default against the non-answering defendants, rendered a decree of foreclosure in accordance with the prayer of the petition, and the defendant has appealed.

It is contended that the answer contained two defenses, and that both of them were not vulnerable to a

general demurrer, therefore the demurrer should have been overruled. In this we think the appellant is mistaken. While the answer to the petition contains language usually employed in a general demurrer, still the defendant answered to the merits, and thereby waived his demurrer. It is well settled that a general demurrer and an answer to the merits are so inconsistent that they cannot be both considered as constituting a single pleading in the form of an answer.

It is argued that the appellant has shown by his answer that the land described in the petition was in fact two tracts owned by different parties, but was listed, assessed and taxed as one; and he asks the court to ascertain and determine the amount of taxes, interest and costs chargeable to each particular tract decreed, and therefore his answer stated a defense to the plaintiff's petition, and it was error for the district court to hold that it was vulnerable to a demurrer.

An examination of the answer satisfies us that it is insufficient in both form and substance to bring this case within the rule announced in *Spiech v. Tierney,* 56 Neb. 514, or enable the court to ascertain the amount of the lien justly chargeable to each of the alleged separate portions of the 40-acre tract of land upon which the tax was levied. In contains no definite description of either of the alleged separate tracts. It is not shown that the conveyances mentioned in the answer were recorded, or that the taxing authorities had any means of ascertaining that the land was divided into two separate tracts, or that it was owned by more than one person; and the answer fails to disclose any reason why the taxing officers should not assess the entire tract in the usual manner as the smallest governmental subdivision, and levy taxes thereon accordingly. It is conceded by the answer that the tax has not been paid, and the only reason assigned for the non-payment is the alleged inability of the answering defendant to agree with the alleged owner of the other part of the 40 acres as to the

amount of the tax that each should pay. We think it will not be seriously contended that such an allegation is sufficient to constitute a defense to an action to foreclose the tax lien.

As we view the pleadings in this case, the demurrer to the answer was properly sustained, and the decree of the district court is

AFFIRMED.

ORPHA A. CLAYPOOL, APPELLEE, V. WILLIAM ROBB, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,944.

1. **Taxation**: FORECLOSURE OF LIEN: PUBLICATION OF NOTICE. The provision of section 79 of the code that "the publication must be made four consecutive weeks" is satisfied by a publication in a weekly newspaper once in each week for four weeks successively. *Davis v. Huston*, 15 Neb. 28.

2. ———: ———: ———. But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week.

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

John A. Sheean, for appellant.

John N. Dryden and *Albert Muldoon, contra.*

LETTON, J.

This is an action to set aside a deed to a tract of land, which is based upon certain tax foreclosure proceedings, and to be permitted to redeem from the lien of the taxes. The jurisdiction of the court in the foreclosure suit is attacked upon several grounds, only one of which is

necessary to be considered. The service upon the defendant in that action was by publication. The notice was published in a semi-weekly paper, which was issued on Tuesdays and Fridays. The first notice was published on Friday, February 14, 1902, and the last on Friday, March 7, 1902, and it was published in each issue of the paper in the intervening time.

The district court found that the publication of the notice was not continued for the requisite length of time, and that the court acquired no jurisdiction to foreclose the tax lien. The question involved is not free from doubt. Section 79 of the code requires that "the publication must be made four consecutive weeks." Section 80, so far as applicable, is as follows: "Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section." Speaking of these provisions in *Davis v. Huston,* 15 Neb. 28, it is said by COBB, J.: "It is well known to the profession that it has uniformly been understood in this state the same as though the language were that the notice should be printed or inserted in a weekly newspaper once in each week for four weeks successively, etc., and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion." In *Alexander v. Alexander,* 26 Neb. 68, we construed "three weeks successively" to mean once each week for three successive weeks. Where, however, the statute requires a publication to be made "for" a certain number of days or weeks, the court has uniformly construed this to mean "during" the time specified. In *State v. Hanson,* 80 Neb. 724, 737, the previous cases are reviewed, and it is said: "Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned." *Lawson v. Gibson,* 18

Neb. 137; *State v. Cornell,* 54 Neb. 647; *State v. Cherry County,* 58 Neb. 734.

It is clear that, if the paper in which the publication was made had been published weekly, a notice published on four Fridays would have been sufficient. We think, however, that, while the statutory requirement is satisfied by publication in four successive issues of a weekly newspaper, publication in the entire number of issues for each week is necessary to constitute a weekly publication in a paper having more than one issue in each week. In other words, publication in all the regular issues of the paper during the week, whether daily, semi-weekly or weekly, is necessary to the complete publication of the notice for that particular week. *Stevens v. Naylor,* 75 Neb. 325; *Union P. R. Co. v. Montgomery,* 49 Neb. 429; *Union P. R. Co. v. McNally,* 54 Neb. 112. In the cases cited the publication was required to be "for" the time specified, but we think the decision in this case does not rest upon that distinction, but on the thought that a publication is not complete for any week, unless inserted in every issue of the paper for that week. If we consider each week as beginning on Sunday, the publication for the first week was insufficient, since it did not appear in the two issues of the paper; while, if we consider that each week consists of seven days, beginning with the date of the first publication, the notice is equally insufficient, since there was a later issue of the paper in the last week of publication in which the notice did not appear.

Under this rule, it is apparent that the notice was not published four successive weeks. We are not unmindful of the fact that a number of courts have held that under a similar statute a publication in a daily or semi-weekly newspaper once in each week is sufficient, but this court has always been inclined to construe with strictness the provisions of the statute allowing constructive service. We are satisfied with the conclusion arrived at by the district court, and its judgment is

AFFIRMED.

RODMAN W. FISKE, TRUSTEE, APPELLEE, V. EDWARD F. MAYHEW ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,953.

1. **Mortgages**: DEED OF TRUST: DISTINCTION. "A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person, instead of a creditor." *Hurley v. Estes*, 6 Neb. 386.
2. ———. "When an instrument is given as security for the payment of money, or the performance of some collateral act, it is a mortgage, whatever may be its form." *Hurley v. Estes*, 6 Neb. 386.

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

J. H. Grosvenor, for appellants.

T. J. Doyle, G. L. De Lacy, R. M. Proudfit and *R. R. Horth, contra.*

LETTON, J.

Edward F. Mayhew, a dealer in agricultural implements at Friend, Nebraska, being indebted to a number of creditors, on February 23, 1907, executed a conveyance to Rodman W. Fiske, trustee. The first portion of this conveyance is in form a warranty deed, then follows a provision that the trustee shall have immediate possession of the land and the right to the crops, a recital that "this conveyance is made for the use and benefit of all parties hereinafter named; and said Edward F. Mayhew being indebted to the said parties in the respective sums set forth, as follows, to wit: Moon Brothers Carriage Company $702," etc., setting forth the names of each creditor and the amounts due each severally. It is next provided that the trustee "shall place the premises upon the market for sale, use due diligence to sell the same to the best possible advantage and to obtain the best price he can therefor,

hereby giving to him full power to sell the same at public or private sale at such time as he shall deem best, and from the proceeds" he shall pay the creditors in proportion to their claims, and the residue, if any, shall be paid to Mayhew. Next follows the following provision: "This instrument shall not be construed as a mere mortgage, it being the design and purpose of the grantors herein to clothe the said Rodman W. Fiske with plenary power to make an absolute sale and conveyance of said premises for the purposes herein expressed, and to that end the said grantors hereby constitute, create and make the said Rodman W. Fiske their attorney in fact, without the power of revocation, to make sale of said premises and deed of conveyance of the same vesting an indefeasible title in the purchaser thereto."

This action was brought to foreclose the trust deed. The plaintiff takes the position that the instrument, though in form a warranty deed with a power of sale, is in fact a mortgage, and that foreclosure is necessary in order to cut off the equities of the defendants and convey a valid title to a purchaser. The defendants insist that the instrument is a warranty deed conveying the legal title to Fiske, and constituting him their attorney in fact, with power to sell the land at public or private sale at such time as he should deem best, and to make a good and sufficient deed to the purchaser conveying in fee simple. They further contend that they are entitled to have the land sold by the trustee at either public or private sale without foreclosure and the resulting loss and expenses.

The evidence discloses that the deed was executed at a meeting between Mayhew and the representatives of some of his creditors at the office of Mr. Haney, in Lincoln; and, while not expressed in the deed of trust, it was agreed that Mayhew might pay the debts at any time. After the conveyance was made the property was advertised in the Lincoln and Omaha papers by Fiske. An offer was received of $10,700, which Fiske submitted to Mayhew, but which was rejected by him. Mayhew testifies that, when the deed

was executed, it was not represented to him as a mortgage; that he still claims an interest in the property, and has ever since the deed was signed; that he has paid none of the interest or principal on these debts; that he has taken possession of the land and collected the rents; that the first year he paid the taxes and interest; and that he claims to be entitled to the surplus proceeds of a sale after the debts are paid, and that he had that understanding when he gave the deed.

The question as to the nature of a mortgage and the essential quality of like instruments to that in consideration here came up at an early date in the legal history of this state. In *Kyger v. Ryley,* 2 Neb. 20, the history and character of mortgages at common law and in equity was considered, and it is said: "A mortgage in this state is a mere pledge, or collateral security, for the payment of money, or the doing of some other thing," and must be foreclosed by an action. In *Webb v. Hoselton,* 4 Neb. 308, a deed which conveyed certain real estate to a trustee, and provided that in default of the payment of a promissory note the trustee was empowered to sell the estate at public auction, but that upon full payment of the same with interest a reconveyance should be made, was held to be in effect a mortgage. The court said: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property." In *Hurley v. Estes,* 6 Neb. 386, it is said in the syllabus: "(1) A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person instead of a creditor. (2) When an instrument is given as security for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form." Judge MAXWELL in the opinion quotes authorities establishing the rule. *Comstock v. Michael,* 17

Neb. 288, and *Staunchfield v. Jeutter,* 4 Neb. (Unof.) 847, are to the same effect. This is the general rule. 27 Cyc. 1004, and cases cited in note 7; 3 Devlin, Deeds (2d ed.) sec. 1126.

While in many, or perhaps the majority, of the states a deed of trust with a power of sale may be foreclosed by a strict foreclosure under the power conferred (27 Cyc. 1450), we consider the law settled to the contrary in this state. There is a difference between the instruments involved in the foregoing cases and that under consideration here, in this: that in each of the former the debt was payable at a future day, and there was a condition that in default thereof the deed should become absolute, while in the present case the power confers the immediate right to sell the property. In this respect, however, the instrument is no different in effect from an ordinary mortgage or deed of trust after condition broken. In such case the fact of default does not in anywise alter the legal relation of the parties, and, under the settled rules in this court, an action to foreclose the mortgage is necessary in order to bar the equity of the mortgagor or grantor and other persons claiming under him. *Wheeler v. Sexton,* 34 Fed. 154 (which is a Nebraska case); *Comstock v. Michael, supra; Hurley v. Estes, supra.* This is the view taken by other courts. *Ogden v. Grant,* 36 Ky. 473; *National Bank v. Lovenberg,* 63 Tex. 506; *Cooper v. Brock,* 41 Mich. 488; 27 Cyc. 1004. There is a full discussion of the general subject in 2 Jones, Mortgages (6th ed.) sec. 1764 *et seq.*

It is true that in the instrument it is provided that "this instrument shall not be construed as a mere mortgage," and that the grantors by the instrument constitute Fiske their attorney in fact "to make sale of said premises and deed of conveyance of the same vesting an indefeasible title in the purchaser thereto," but this language cannot control the whole instrument. The decisive facts in the case are that the instrument was intended to convey the land as security for the payment of certain debts, and not to divest the grantor of all his interest in the land. He still retained

in equity the title to the land. The instrument was intended as a security, under the rule in this state is a mortgage, and must be foreclosed as one.

The judgment of the district court is

AFFIRMED.

HARRY M. HACKETT, APPELLEE, V. ALAMITO SANITARY DAIRY COMPANY, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,009.

1. **Highways:** LAW OF THE ROAD. Prior to the enactment of section 147, ch. 78, Comp. St. 1911, the rule as to the rights of persons driving in the same direction in a public road or street, and seeking to pass each other, was that ordinarily it is the duty of each driver to keep the proper side of the road, but this is not absolute. He is not bound to keep his side, but if he does not do so he must use more care and keep a better lookout to avoid collision than would be necessary were he on the proper side.

2. ———: ———. In a narrow street, he must not unnecessarily block the way or crowd other travelers to one side, and he must use the highway in such a manner as not unreasonably to deprive other travelers of their equal right to the use of the street.

3. ———: ———: NEGLIGENCE: QUESTIONS FOR JURY. These rules, however, are subject to exception. It is impossible to lay down a hard and fast rule applicable to all situations which may arise in the streets of a city, and, even though a deviation from the rule of the road has taken place, the question whether the defendant or his servants have been guilty of negligence, or the plaintiff guilty of contributory negligence, is ordinarily one for the jury.

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

Edgar M. Morsman, Jr., for appellant.

Albert W. Jefferis and *F. S. Howell, contra.*

LETTON, J.

Seventeenth street in the city of Omaha is 60 feet wide

from curb to curb and is paved with asphalt. During the construction of a building on the west side of the street, a high board fence was built at a distance of 40 feet from the west curb, leaving the street at this point accessible for vehicular traffic only 20 feet wide. On June 21, 1909, a wagon belonging to the defendant, loaded with milk cans, was being driven northward on Seventeenth street between Harney and Farnam streets along this 20-foot roadway. The view of the driver to the sides or backward was unobstructed. Two boys, Harry Hackett, 11 years of age, and George Lemon, 14 years old, mounted upon bicycles, were also passing along this street in the same direction. Defendant's team was proceeding at a slow walk, while the boys were riding at a rate of about 8 miles an hour, the Lemon boy being about 5 feet in front of Hackett. They attempted to pass the wagon on the left side. As they were passing between the wagon and the fence, the horses swerved towards the west approaching to within a few feet of the fence. The Lemon boy passed through between the horses and the fence safely; but, when Hackett reached the front part of the wagon or the rear of the horses, the handlebars of his wheel struck the fence and he fell in such a manner that the front wheel of the wagon ran over his arm and crushed it. There was testimony that Lemon called out to the driver, "Look-out," as he passed the horses' heads, that Hackett also called out as he reached the front wheels, but the driver denies hearing any warning, except from Lemon, until after the boy fell. There is also a conflict in the evidence as to the exact position of the wagon before the team approached the fence, but it was nearer the fence than the curb. This action was brought to recover damages for this injury on account of the negligence and carelessness of the driver. The plaintiff recovered a judgment for $5,000, and the defendant has appealed.

The principal allegations of negligence in the petition, divested of circumlocution, are as follows: That the defendant's servant, at the time when plaintiff undertook to

pass its horses and vehicle, negligently suffered the vehicle to be upon part of the 20-foot highway west of the center line thereof, and, as the plaintiff was attempting to pass, negligently caused the horses and vehicle to turn suddenly to the westward toward the immediate path in which plaintiff was traveling, without any warning to the plaintiff, and negligently, carelessly and recklessly drove said team of horses and vehicle so that the same collided with the plaintiff and the bicycle upon which he was riding. It is further charged that there was negligence on the part of the driver, in that, at and before the time of striking the plaintiff, he was not giving his attention to his team, and was not giving his attention to the plaintiff or other travelers who were about to pass the vehicle, when by the exercise of ordinary care he could have discovered the plaintiff and avoided the collision. The answer was a general denial and a plea of contributory negligence.

Defendant contends that the law is that "a person driving along the highway owes no duty to another coming up in the rear, unless he knows that such other person is coming up and desires to pass. If the person in the rear desires to pass to the front, it is his duty to make such desire known to the person in front, and then, if conditions of the road permit, the person in front should pull to one side or the other and give the person in the rear the opportunity to pass. * * * A person traveling on the highway has the absolute right (so far as persons in the rear are concerned) to use any portion of the highway he desires, and this right to use any portion of the highway is not limited because another vehicle comes up in the rear." Defendant's counsel cites a number of cases as supporting these views, most of which we will hereinafter examine. He calls our attention particularly to the case of *Holt v. Cutler,* 185 Mass. 24, where the facts were that a girl riding a bicycle and attempting to pass a wagon ahead of her by going between the wagon and the curb—a distance of five feet—was thrown from the wheel by the wagon swerving toward her, the driver being unaware of her proximity.

The report, however is very meager, and does not indicate whether she tried to pass on the proper side of the wagon, nor whether the street was a narrow one; so it gives no light on the question before us.

The determination of this case requires a consideration of the common law with respect to the rights of one attempting to pass another driving along a road or street in front of him, since at the time of the accident there was no statute in force in this state on this point. The legislature has since acted on this subject by the passage of section 147, ch. 78, Comp. St. 1911, at least with respect to motor vehicles.

The decisions of the various courts are somewhat confusing; some of them being based upon statutes, and others are not in harmony with each other. In England the rule of the road requires persons driving, meeting other vehicles, to keep to the left, and that, in passing, the foremost bears to the left while the other passes on his right; while in the United States and upon the continent of Europe the rule is that persons meeting must keep to the right, and the usual custom is to pass to the left of a vehicle ahead.

In determining the true rule, we will endeavor to discriminate and to confine our examination to cases where accidents have been caused when passing others driving in the same direction. We will first examine the English cases bearing upon the question whether there is any duty to keep on one side of the road, and, if so, how far the obligation extends. In *Wakeman v. Robinson,* 8 Moore (Eng.) 63, the accident was caused by defendant driving an unruly horse between two vehicles on the wrong side of one of them, when the horse plunged and caused an injury to the plaintiff's horses. A judgment for plaintiff in trespass was sustained.

In *Pluckwell v. Wilson,* 5 C. & P. (Eng.) *375, Justice Alderson said: "A person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better lookout, that he might avoid any concussion, than

would be requisite if he would confine himself to his proper side of the road."

Wordsworth v. Willan, 5 Esp. (Eng.) 273: Plaintiff was on horseback on the proper side of the road; defendant's coach drove furiously down the hill which the plaintiff was ascending, and the horse, becoming frightened, became restive and jumped about, when the coach ran against him and broke his thigh. Defendant contended there was ample room left for the horse, and that the accident was caused by defendant's horse's restiveness, and not by neglect of the driver. Plaintiff contended that the carriage should have kept on the proper side of the road, and that even if the restiveness of the horse contributed to the accident the defendant was liable. Mr. Justice Rook said that "he could not lay it down that a carriage driver was under every circumstance to keep exactly to the left, or, as it was called, the proper side of the road; if there was no interruption of any other carriage, or the road was better, public convenience did not require that the driver should adhere to that law of the road; he took the rule of law to be that if a carriage coming in any direction left sufficient room for any other carriage, horse, or passenger, on its side of the way, it was sufficient; but it was a matter of evidence if the defendant had done so. The driver was not to make experiments, he should leave ample room, and, if an accident happened from want of that sufficient room, he was no doubt liable. He, therefore, left it to the jury to say whether the accident had not been occasioned by the defendant's coachman having driven so near to the plaintiff's horse; that the action arose from that cause." But in *Wayde v. Lady Carr*, 2 Dow. & Ry. (Eng.) 255, the facts were that defendant's carriage was on the wrong side of the road, and his coachman tried to pass on the near, instead of the off, side, according to English usage. The court said: "In the crowded streets of a metropolis where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justi-

fiable, but absolutely necessary. The question in this case was a question of negligence. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant." The English courts also hold that the rule as to a carriage being on the proper side of the road does not apply with respect to foot-passengers; for, as regards foot-passengers, a carriage may go on either side. *Cotterell v. Starkey,* 8 C. & P. (Eng.) *691; *Lloyd v. Ogleby,* 5 C. B. n. s. (Eng.) 667.

The rule in America does not seem to be clear and well settled as to the duty of one who is driving a vehicle where others may desire to pass. It may be said that a number of cases based on statutes, and applying to cases of meeting vehicles, have been cited and applied by some writers as establishing a rule where persons were driving in the same direction. This has, no doubt, led to some of the confusion.

Bolton v. Colder, 1 Watts (Pa.) 360, holds that it is not the law that, where carriages are passing in the same direction, the leading carriage should be inclined to the right and the other to the left, but that the law is that "a traveler may use the middle or either side of a public road at his pleasure, and without being bound to turn aside for another traveling in the same direction, provided there be convenient room to pass on the one hand or on the other." The following cases, in the main, hold the same doctrine, but perhaps not all so positively: *Foster v. Goddard,* 40 Me. 64; *Clifford v. Tyman,* 61 N. H. 508; *Elenz v. Conrad,* 123 Ia. 522; *Brennan v. Richardson,* 56 N. Y. Supp. 428; *Altenkirch v. National Biscuit Co.,* 111 N. Y. Supp. 284; *Rand v. Syms,* 162 Mass. 163; *Meservey v. Lockett,* 161 Mass. 332; *Bierbach v. Goodyear Rubber Co.,* 15 Fed. 490. Mr. Thompson (1 Thompson, Negligence, secs. 1289, 1290) seems to be of the opinion that "the 'law of the road' does not apply in the case of teams *going in the same direction*" —citing *Clifford v. Tyman, supra.* He criticises the doctrine of *Bierbach v. Goodyear Rubber Co., supra,* that a

driver is under no obligation to give notice to those behind him when he seeks to turn, and that the rule of reasonable care exacts a greater degree of attention from the driver of the team behind than from the driver that turns out, saying: "More or less doubt attends the foregoing exposition of the law." Mr. Elliott (2 Elliott, Law of Roads and Streets, sec. 1084) says, after stating the doctrine of *Bolton v. Colder, supra,* and citing a number of other cases: "The only rule of general application that can be laid down is that he who attempts to pass another going in the same direction must do so in such manner as may be most convenient under the circumstances of the case, and if negligent, and damage results to the person passed, the former must answer for it, unless the latter by his own recklessness or carelessness brought the disaster upon himself. There are, however, statutes in some jurisdictions regulating the mode of passing, especially in regard to automobiles, and it is believed that both under such statutes and in their absence the usual mode under ordinary circumstances is for the traveler in the rear to pass on the left of the vehicle in advance."

In Massachusetts, it was first held that if a person driving left the proper side of the street and interfered with others, he was responsible as a matter of law for the consequences. *Fales v. Dearborn,* 1 Pick. (Mass.) 345. But it was afterwards settled in that state that a person is not negligent, as a matter of law, by driving on the wrong side of the street. *Wood v. Boston Elevated R. Co.,* 188 Mass. 161; *Galbraith v. West End Street R. Co.,* 165 Mass. 572. On the other hand, in *Avegno v. Hart,* 25 La. Ann. 235, 13 Am. Rep. 133, it was held that it was the duty of the driver, seeking to pass another, to go to the left, and it was proper for the leading driver to pull his horse to the right, in order to allow the one attempting to pass him to pass on the left side.

In *Lonergan v. Martin,* 23 N. Y. Supp. 968, the facts were that, while driving along a street behind defendant, plaintiff turned out where there was sufficient room for

the purpose of passing; defendant then, without warning, suddenly turned his horse against the plaintiff's horses, forcing them against an engine which was standing near the curb, then drove ahead, his hind wheel passing over a hoof of plaintiff's horse and injuring him. The trial justice dismissed the complaint, but on appeal to the general term it was held that the questions of negligence and contributory negligence should have been submitted to the jury.

From a consideration of all these cases, it seems that no definite rule as to the respective duties of persons passing or seeking to pass each other with vehicles has been adopted by all courts. We are inclined, however, to adopt the rule, which seems to be based upon sound reasons, that it is ordinarily the duty of each party to keep the proper side of the road, but this is not absolute. He is not bound to keep his side, but, if he does not, he must use more care and keep a better lookout to avoid collision than would be necessary, were he on the proper side. In a narrow street he must not unnecessarily block the way or crowd other travelers to one side, and he must use the highway in such manner as not unreasonably to deprive other travelers of their equal right to the use of the street. *Pigott v. Engle,* 60 Mich. 221. In a busy city it is impossible to lay down a hard and fast rule, and whether negligence existed under the circumstances of the case is ordinarily a question for the jury. The instructions given by the trial court were fully as favorable to the defendant as it was entitled to as to the driver's right to occupy any part of the street, and we find no error in giving them, or in refusing those requested. The proof shows that when the accident happened defendant's wagon was nearer the left side of the very narrow street than the right, that there was nothing to prevent it from being driven farther to the right, and thus leaving plenty of room for other vehicles to pass between it and the fence; that, without any apparent reason, the driver either drove, or allowed the horses to swerve, to the west in such manner as to come close to the

fence and prevent any person driving or riding behind him from passing on their proper side of the street and of his vehicle. We think it was for the jury to say whether the act was negligent or not, considering all the circumstances.

And so as to the question of contributory negligence, the streets are intended to be used by children as well as adults, and the question of whether, under all the circumstances, the plaintiff at the time he started between the wagon and the fence was justly chargeable with knowledge of the fact that the driver might swing his horses toward the fence, and thus bar a passageway on the proper side, was also a question for the jury. *Foote v. American Product Co.*, 195 Pa. St. 190, 49 L. R. A. 764. The law upon this point was laid down in the instructions as favorably to defendant as it was entitled to.

We find no error in the record of which defendant is entitled to complain, and the judgment of the district court is

AFFIRMED.

BARNES and FAWCETT, J. J., dissenting.

We are unable to give our assent to the conclusion reached by the majority of our associates. As we view the record in this case, the evidence fails to establish negligence on the part of the defendant. It appears that the driver of defendant's team was proceeding north on Twentieth street in the city of Omaha at the time of the accident in a reasonable and proper manner; that he had no knowledge of the presence of the injured boy in the rear of his wagon, or that the boy was attempting to pass between the wagon and the fence, until he was opposite the front wheels of the wagon; that when the driver first saw the boy it was then too late for him to avoid the accident, and the proximate cause of the injury complained of was the attempt of the boy to pass between the defendant's wagon and the fence, when there was ample room to pass in safety on the other side of the wagon. We are therefore of opinion that the evidence does not support the verdict, and the judgment of the district court should be reversed.

COOPER & COLE BROTHERS, APPELLEE, V. GILBERT COOPER ET AL., APPELLEES; GEORGE P. WHITHAM, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,295.

1. **Parties.** Persons not jointly liable to the plaintiff, or who do not claim some right in the subject matter of the action, may not, over their objections, lawfully be joined as defendants.

2. **Principal and Agent:** AUTHORITY OF AGENT. "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Creighton v. Finlayson*, 46 Neb. 457.

3. ———: ———. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.

4. ———: ———. Where a wholesale dealer in plumbing supplies, furnaces and water plants knows that one of its salesmen has, upon a promise of compensation to be paid, solicited retail merchants in another city to secure customers for it, and, in response to a letter from them to the effect that the time is ripe to get hold of some business and to send a salesman, sends an employee who assumes in its name to make contracts with householders for the installation of heating plants and water plants, and agrees for his principal to pay the local merchants for material furnished and money advanced while the plants are being installed and to pay a commission, and before the work is completed the wholesale merchant is told the facts about the contracts, and it makes no objection thereto, but sends mechanics to install the plumbing and furnaces, and avails itself of the services rendered and money furnished by the retail merchants, it will be held to have at least granted the agent ostensible authority to make the contracts.

5. **Trover:** TRANSACTIONS WITH AGENTS. In such a case the principal cannot maintain an action in conversion against the householders or the retail merchants.

6. **Principal and Agent:** UNAUTHORIZED ACTS OF AGENTS: LIABILITY. If, as a matter of fact, the agent was not authorized to make the contracts, and, because of his assumption of power to do so, his principal is damaged, he will be liable in damages to it.

7. ———: ACTION: PARTIES. But the purchasers and the retail merchants cannot, over their objections, be sued jointly with the agent because of the transactions.

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

Charles H. Epperson, George E. Hager and *Ambrose C. Epperson,* for appellant.

Walter J. Lamb and *F. M. Tyrrell, contra.*

ROOT, J.

This is an action in equity to hold the defendant Whitham, as surviving member of the firm of Whitham & Wilkins, and the defendant Gilbert Cooper liable as trustees for the use of the plaintiff. The plaintiff prevailed, and the defendant Whitham appeals.

The first chapter of the litigation between the plaintiff and the defendant Whitham is reported in *Cooper & Cole Bros. v. Whitham,* 81 Neb. 511. Reference is made to that case for many of the facts testified to in this one. Subsequent to the judgment of affirmance in the cited case, the plaintiff commenced this action.

In the petition the plaintiff alleges that during the period of time involved in this inquiry Gilbert Cooper was its traveling salesman, with no power or authority other than to take and forward orders for the goods and wares in which the plaintiff dealt, and that Whitham & Wilkins had actual knowledge of this fact. The plaintiff further alleges that, notwithstanding the premises, Whitham & Wilkins for their own profit, by deceitfully causing Gilbert Cooper to believe they were purchasing goods from the plaintiff, induced him to join with them in ordering merchandise and plumbing supplies for water systems to complete certain contracts with four designated individuals, all of whom are impleaded as defendants in this action. The plaintiff further says that, pursuant to the orders transmitted by the defendants, it shipped to Whitham & Wilkins merchandise of the aggregate value of $1,745.11, which was duly charged to Whitham & Wilkins on the

plaintiff's books, and which was fully described in invoices sent to those defendants and in monthly statements transmitted to them; that those invoices, bills and statements were kept without objections by Whitham & Wilkins, and frequent promises were made by them to pay therefor; that, although Gilbert Cooper and Whitham & Wilkins knew that the plaintiff at all times believed and understood that the merchandise was sold to Whitham & Wilkins, it afterwards appeared that no such sale had been made, but the goods were actually used in part execution of unauthorized contracts made by Gilbert Cooper for the plaintiff with the defendants MacCashland, Fowler, Kissinger and Lewis, wherein the plaintiff apparently agreed to furnish material and install certain heating plants and air pressure systems for definite sums pleaded in the petition, and the defendant Whitham & Wilkins were to guarantee to the purchasers that the material and work would be first class, were to employ laborers, pay freight on materials shipped, superintend the work, collect the contract price, and remit the same to plaintiff less money paid out and compensation for services rendered, but the contracts were utterly void; that the defendants, other than Cooper and Whitham & Wilkins, were contending that the contracts were not performed, and therefore they were not liable for the contract price; that Whitham & Wilkins have remitted to the plaintiff $862.47, which the plaintiff, in ignorance of the facts, credited upon its book account against those defendants; that, by reason of the premises, all of the defendants became trustees of the plaintiff for the goods delivered. An accounting and judgment are demanded.

The defendants, other than Gilbert Cooper, having been summoned, and all of them residing without Lancaster county, by special appearance challenged the jurisdiction of the court over their persons, because of the alleged fact that there is no joint liability in point of fact of Gilbert Cooper and the objecting defendants to the plaintiff. These objections were overruled, and thereupon those de-

fendants demurred, averring as grounds of demurrer, among other things, that the petition did not state a cause of action, that there was a misjoinder of parties defendant and of causes of action. The demurrers were overruled, and thereupon those defendants answered separately. We find nothing in the transcript to advise us whether Gilbert Cooper answered or made default.

The answering defendants interposed in their several answers the defenses included in the special appearances in the demurrers, and also stated the facts from their standpoint, to wit: That the contracts were made in good faith with the plaintiff, and that Gilbert Cooper had actual or apparent authority to make them, and, in any event, the plaintiff with knowledge of the facts neglected to disaffirm what its agent had done, but continued to perform, and is estopped from repudiating the contract. All of the defendants deny the allegation that they knew of Gilbert Cooper's lack of authority, and Whitham & Wilkins plead the facts as stated in *Cooper & Cole Bros. v. Whitham, supra.* The court found generally in favor of the plaintiff, except that nothing was due it from Kissinger or Lewis, and the action was dismissed as to them. Several judgments for $110.33 and $63.73, respectively, were rendered against the defendants MacCashland and Fowler, and a joint judgment for $1,042 was entered against Whitham, surviving partner, etc., and Gilbert Cooper, with a proviso that the avails of the judgment against MacCashland and Fowler, if collected, should be credited on the judgment against Whitham and Cooper. Cooper, Fowler and MacCashland did not appeal.

We have discovered no evidence in the record to sustain the averments in the petition that any of the defendants, other than Gilbert Cooper, had actual knowledge of the pleaded restrictions on his authority, or that Whitham & Wilkins in any manner deceived Gilbert Cooper, or that they joined with him in ordering any of the merchandise the subject of this suit. The answering defendants must therefore in the inception of the transaction be held bound

solely by such notice as the law from the known facts gave them of Gilbert Cooper's authority.

We have no quarrel with the argument of the plaintiff's counsel that, as a general proposition, a drummer is not authorized to appoint agents or enter into special contracts, but this proposition has so many exceptions and qualifications, depending upon the usages of the trade and the facts in the particular case, it is not necessarily controlling in the instant one in arriving at a just conclusion as to the legal rights of the parties to this suit. It appears without contradiction that the plaintiff's salesman, Williams, after making an independent investigation in Fairfield, requested Whitham & Wilkins to assist the plaintiff in a campaign to be prosecuted for the purpose of securing contracts for the installation of heating plants and water plants in that city, told them that they might as well make something out of that work as not, that the plaintiff employed a man whose special duty it was to go about and make contracts for such work, and requested them to advise the plaintiff whenever opportunity occurred to secure such contracts. There is no contention that Williams was not acting in the line of his duty, but, on the contrary, the evidence proves that he was acting within the scope of his employment. It therefore must be presumed that this agent advised his principal, the plaintiff, of his conversation with Whitham & Wilkins.

May 20, 1905, subsequent to this conversation, Whitham & Wilkins wrote and transmitted to the plaintiff a letter as follows: "The time is about ripe to get hold of some business in bath outfits. We have a number of good prospects. Have your salesman G. G. W. make it a point to get around here soon." In answer to this letter, Gilbert Cooper appeared in Fairfield, and informed Whitham & Wilkins that "he had been sent there by the house;" and the contracts pleaded in the petition were made by him in the name of the plaintiff. Thereupon material was billed to Whitham & Wilkins, and the work of installing the water plants and the heating plants was commenced.

Although Gilbert Cooper was in Fairfield several times while the work was progressing, Whitham & Wilkins superintended the work. About August 17, 1905, Whitham complained to the plaintiff's Mr. Williams about delays in the work, told him the details of the contracts, and requested him to take the matter up with the plaintiff. Upon Williams' suggestion that he would deliver a letter if it were written, Whitham & Wilkins wrote as follows: "Cooper & Cole Bros., Lincoln, Neb. Gentlemen: Mr. Williams called on us this evening. We are not in position to do any business with him. Mr. Gilbert Cooper has a lot of work here uncompleted. It is in a mixed shape. One pressure job working, but lacks some finishing details. Another pressure job has been hanging fire for a long time, and a hot water heating job for the same man has not been begun, material has been sent here partly for one job and partly for another on same invoices. We are unable to tell how matters stand until these jobs are completed and material checked up. We are ready to make settlement when matters are straightened out. We have lost some business on account of these delays. The steam heating contract on our public school building is liable to hinge somewhat on the satisfactory completion of the work in progress. The estimate on the above job is about $1,800. Yours truly, Whitham & Wilkins. As appears to us now the material is far in excess of Mr. Cooper's figures and will mean a loss to some one on these contracts. Who is to stand the loss?"

To this communication the plaintiff answered as follows: "Aug. 23, '05. Messrs. Whitham & Wilkins, Fairfield, Neb. Gentlemen: Mr. Williams sent us in your letter of the 17th, and we note what you say regarding the material which had been sent out on the work at Fairfield and sending out a man to do this work. This is a personal matter of Mr. Gilbert Cooper's as the house has no men in their employ who can do the work; but we wish to say that he has used his best endeavors to try to get a good man for you to finish up the work. It seems all men who are

employed to do this kind of work have more than they can do. He has a party working at Fairmont who will probably be able to go out there after he finishes the work there. One of our local plumbers thinks he can find a man during the day that can do the work. We are very sorry that it has caused you a lot of trouble, and the loss of some business. We will make an effort to get somebody to go out there and finish the work as soon as possible. Yours truly, Cooper & Cole Bros."

It will be noticed that the plaintiff does not discuss Gilbert Cooper's estimates, nor answer the inquiry concerning upon whom the anticipated loss will fall. The proof is undisputed that Gilbert Cooper contracted with other individuals at other places in the name of the firm for the installation of heating and water plants. In so far as the evidence establishes usage in the trade, it clearly indicates that the plaintiff did permit its traveling salesmen to make contracts such as Gilbert Cooper made in their name. Furthermore, at least three of the defendants with whom Cooper contracted came to Lincoln while the work was in progress, and complained to the plaintiff's general manager about the work, and at least one of them testifies that he told the manager about the contract, and all of them testify to having received assurances that, if they would be patient, the work would be completed to their satisfaction, and that the manager complained about Gilbert Cooper having exceeded his authority. At least two-thirds of the material was shipped subsequent to the time Williams delivered to the plaintiff Whitham & Wilkins' letter of August 17. It is elementary law that, if the real owner of goods has so acted as to clothe his agent with apparent authority to sell, he will be precluded from denying, as against those who have acted *bona fide* on the faith of that apparent authority, that he has given such authority, and the result of the transaction is as if the authority had been given. 1 Clark & Skyle, Agency, sec. 236; Mechem, Agency, sec. 278.

This case does not, as contended for by the plaintiff, involve a sale by a mere drummer. After having been informed by Williams, as we must presume, that he had enlisted Whitham & Wilkins to assist in procuring business in Fairfield, and after Whitham & Wilkins had written the letter, Gilbert Cooper was sent for the specific purpose of selling the plaintiff's merchandise to the persons referred to in a general way in that letter. From all that had been said and done by Williams and by Whitham & Wilkins, MacCashland and the other purchasers had a right to believe that Gilbert Cooper had authority to make the contracts, and Whitham & Wilkins also had a right to believe that Gilbert Cooper was acting within the limitation of his authority in doing what he did. *Faulkner v. Simms,* 68 Neb. 295; *Northwest Thresher Co. v. Eddyville State Bank,* 80 Neb. 377.

This being true, Whitham & Wilkins may be liable to the plaintiff upon the contract, but not for a conversion of its goods. Gilbert Cooper may also be liable to his principal for all the damages it may have sustained by reason of his acts in excess of his authority. If liable, the liability of each of these defendants is several, and they cannot, over their objections, be jointly sued therefor. Gilbert Cooper has not appealed and makes no complaint, so that the judgment will not be disturbed as to him. Neither will it be reversed as to the defendants Lewis and MacCashland, who have not appealed. The fact that Whitham was not jointly liable with Gilbert Cooper, or that he made no claim of right to the subject matter of the action, did not appear on the face of the petition, so that the defense was properly made, by answer, as a separate defense in connection with a defense to the merits. The defense having been maintained, the action should be dismissed as to this defendant, but without prejudice to an action on the contract made by Gilbert Cooper for his principal. *Stewart v. Rosengren,* 66 Neb. 445; *Penney v. Bryant,* 70 Neb. 127; *Stull Bros. v. Powell,* 70 Neb. 152.

The judgment of the district court, therefore, is affirmed as to the defendants Cooper, MacCashland, and Fowler, but is reversed and dismissed as to the defendant Whitham without prejudice to an action upon the contract made for the plaintiff by Gilbert Cooper; no costs to be taxed to the defendants MacCashland and Fowler.

JUDGMENT ACCORDINGLY.

HELMER JOHNSON, APPELLEE, V. MATHILDA RISEBERG ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,816.

1. **Specific Performance: AGREEMENT TO DEVISE: EVIDENCE.** Clear, direct and uncontradicted testimony given by a disinterested witness that a woman, having no lineal descendants, orally promised her stepson that if he would remain on her farm, live in her house during her natural life, and treat her as a son should treat his mother, he should have the farm at her death, corroborated by the evidence of disinterested witnesses concerning her declaration to the effect that her stepson had an interest in the farm and would have it after her death, if believed by the court, will sustain a finding that the contract was made.

2. **Statute of Frauds: PART PERFORMANCE.** Acts of performance relied on to remove the bar of the statute of frauds to an oral contract to transfer the title to real estate must be unequivocal, and of such a nature that, if stated, an inference will reasonably arise that an agreement of some nature existed between the parties with reference to the real estate.

3. **Specific Performance: REMEDIES.** If the acts of performance relate to service of such character that their value cannot be estimated by a pecuniary standard, the claimant does not have an adequate remedy in pressing a demand for a money judgment for a breach of the contract.

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

F. D. Williams, H. C. Vail and *J. H. Leahy,* for appellants.

C. E. Spear, F. J. Mack and *Albert & Wagner, contra.*

ROOT, J.

This is an action for specific performance of an alleged oral contract for the transfer of title to a farm in Boone county. The plaintiff prevailed, and the defendants appeal.

As we understand the argument of defendants' counsel, their contention is that the evidence is insufficient to establish a contract, or one which may not be satisfied by the payment of money, or to prove such performance as will remove the bar of the statute of frauds. There is no contention in the answer or in the arguments that an oral contract to sell or convey this real estate might not be enforced under some circumstances, so we shall approach the case in the attitude assumed by counsel for both sides.

There is no evidence directly contradicting that adduced to prove the statements made by Mrs. Johnson and relied on to establish the contract, and but little proof to discredit by inference the evidence that those statements were made, nor is there any conflict in the evidence concerning the acts of performance. The plaintiff's mother died after his birth in 1875; in 1881 his father, after marrying Gustafva Bergstrom, entered as a federal homestead the land in dispute, but subsequently, within four years, departed this life, leaving the plaintiff, two other children and his widow him surviving. She subsequently availed herself of the federal statute, and in 1889 secured a patent for the land in controversy. There are no children the issue of the second marriage, nor did Mrs. Johnson have any lineal descendants.

In 1885 or 1886 the widow sent a letter to a married sister residing in Chicago to induce her to come to

Nebraska and live with Mrs. Johnson, but the request was denied. Thereupon Mrs. Johnson, in substance, said to the plaintiff and his brother that, since her relatives would not help them, they must help themselves; that the boys needed assistance at the time, and later she would need help; that if they would stay with her and treat her like a mother she would treat them as her sons, and whatever property she had they "will get when I leave." The boys remained with her, improving and cultivating the farm and caring for her while she cared for them, until Richard, the elder, was about to marry in 1897. At this time the plaintiff was 22 years of age, and Richard three years older. The plaintiff and Richard intended to leave the farm, but when Mrs. Johnson was informed of that intention she stated, in substance, to her stepsons that she did not care about Richard leaving, but that she wanted the plaintiff to remain, look after the farm, and treat her as a mother, and if he would do so she would treat him as a son, "and whatever I have at the time of my death you are going to get it." Thereupon the plaintiff abandoned his purpose to leave, and remained with his stepmother until her death in 1909. The plaintiff has remained unmarried, and the evidence is uncontradicted that, although Mrs. Johnson was an irritable scold, he treated her with kindness and respect.

In corroboration of the direct and certain testimony of Richard Johnson concerning the promise, the plaintiff offered his neighbors' testimony relative to her declarations, many of which may be considered testamentary in character, yet some of them indicating her understanding that Helmer had a present interest in the land. In substance, she said to Mrs. Hildebrand that she wanted Helmer to have her property; to Mr. Nelson, about a year before her death, she said, in response to his solicitation that she purchase lightning rods for the buildings on the farm, that she did not believe in them, "but Helmer could put them up if he wanted to, that it would be his place anyway after she died;" to Mr. Postle, an insurance

agent, she said in 1898, in answer to his inquiry concerning whom the loss should be payable to if the property insured should be destroyed by fire: "The property is in my name, but as soon as I get through with it it will go to Helmer." She said "Helmer was caring for her, and living with her, and when she died the property would go to him because he was taking care of it. * * * She says, 'The property is mine, but it is Helmer's when I die.'" To Milford Nelson, Mrs. Johnson said, about a month before her decease: "When she was done with her property, it would belong to Helmer." There is also proof of her declarations made shortly before her death to the effect that she intended to give the farm to her relatives, and that Helmer had been paid for everything he had done for her. It will be noticed that the statements were made to Postle the year the contract was made, and recognize most clearly his interest in the land, and that the declarations evidencing testamentary intent, rather than an admission of his absolute right, were made many years thereafter.

Parents, or those sustaining the relation of parents, not infrequently regard contracts with their children less seriously than if made with third persons, and it is not unnatural that Mrs. Johnson, as the farm increased many fold in value, and her stepson by industry and frugality acquired other valuable real estate, considered that he had enough of this world's goods, and that the thought should come to her that her relatives by consanguinity should receive some benefit from her hands. The fact that Mrs. Johnson had no lineal descendants and that her collateral kindred refused to come to her assistance at the time her husband died, and that so recent as 1897 the land was not worth to exceed $1,600, tends to prove that the promise was natural and reasonable.

The evidence to sustain the plaintiff's allegations that the contract was made is as certain and convincing as was the evidence adduced in *Peterson v. Bauer,* 83 Neb. 405, in *Hespin v. Wendeln,* 85 Neb. 172, or in *Cobb v.*

Macfarland, 87 Neb. 408. It is argued, however, that a letter written by the plaintiff to Mrs. Riseberg a few days after Mrs. Johnson's death is an admission that he had no contract with his stepmother. In that communication the plaintiff in effect states that, since the deceased left no will, her relatives were her heirs; that, by the time his claim for caring for her shall have been satisfied, there will be little left of the estate, and that he will pay them each $3.50 for their interests therein. The plaintiff explains that he understood when the letter was written that, since there was no written evidence of the contract, he could not enforce it, but must depend on a money demand against the dead woman's estate to recompense him for his performance of the oral contract. If this case depended upon the plaintiff's evidence for its support, the defendants' argument would be persuasive; but the proof to establish the promise is furnished by other and disinterested witnesses, upon whose statements this letter reflects little, if any, discredit. The plaintiff's explanation is reasonable and in accordance with the common experience of men.

It is further argued that the acts of performance are not solely referable to the contract, and hence are insufficient to take it without the statute of frauds. No attempt was made during the trial to compel the plaintiff to marshal his evidence so as to first prove performance, so that the district judge considered all of the evidence to satisfy himself whether there was proof of an act unequivocally referring to and resulting from the agreement. The act need not necessarily refer to the terms of the contract, but, as stated by the Master of the Rolls in *Frame v. Dawson,* 14 Ves. Jr. (Eng.) 385: "The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is." While the evidence of performance is not so definite as we should prefer, yet we think that the proof that, when Richard departed from

his stepmother's premises, Helmer, then only a year past his majority, remained and continued unmarried to reside with his stepmother, caring for her in sickness and in health notwithstanding her nagging and ill temper, establishes the existence of facts which we may in reason refer to something more than the relation of stepmother and stepson, or of landlady and tenant, and that an inference fairly arises that this childless woman had made some arrangements with her stepson whereby he acquired an interest in her estate.

Upon the entire record, there is proof of the contract and of such performance as to remove the bar of the statute of frauds. We do not think a money judgment will compensate the plaintiff for a breach of his contract. We cannot well measure by any pecuniary standard the value of his services, nor the value of the privileges and opportunities he renounced in the faith that his stepmother would convey or devise to him the farm in question.

Some questions of practice are argued, but they are immaterial for a consideration of the case on its merits, and in nowise prejudiced the defendants.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., dissenting.

While it is true that the homestead was taken by plaintiff's father in the first instance, and by reason of his death the patent was issued to his widow, and that the farm was improved by the joint labors of the decedent and her stepsons—probably largely by those of the stepsons—yet the title was in the widow, and it was her right to make such disposition of the land as she might desire, or none at all. She had the right to make a contract, upon sufficient consideration, to convey it to plaintiff, if she so desired. However, it strikes me that no such contract was ever made. After making the declaration attributed to her, that whatever she had at the time of

her death plaintiff was going to get, plaintiff continued to reside on the farm as a renter, taking two-thirds of the products, the widow, his stepmother, reserving one-third, and providing him a home as a member of the family, as she had done during practically his whole life. So far as is shown, this relation between them continued until the time of her death. I can find no promise ever made on her part to convey the land to plaintiff, either by will or deed. I can find no evidence that plaintiff ever relied on a supposed or believed promise. I think the most that can be said is that the decedent expressed a desire and willingness that after her decease plaintiff should have the land, but she took no steps to render such purpose effective. I do not believe that such desire or willingness was based upon any legal or binding contract. I do not base this dissent upon the provisions of the statute of frauds, but upon my belief that no contract was proved, nor was there any consideration therefor, had one been proved. I need not refer to our uniform holdings, in line with all authorities, that in an action for specific performance the proof of the contract must be clear and convincing, as that is the settled law.

LETTON, J., concurs in this dissent.

NATIONAL BANK OF NORTH BEND ET AL., APPELLEES, V. LEWIS THOMPSON, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,929.

1. **Usury**: NOTES: ATTORNEY'S FEE. A provision in a promissory note, executed subsequent to June 1, 1879, that the maker will pay the plaintiff an attorney's fee if suit be instituted upon the note, is invalid and will not render the instrument usurious.

2. ———: ———: SEPARATE NOTES FOR INTEREST. Separate notes, executed for past due interest upon a promissory note, will not taint the original contract with usury.

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

Williams & Williams and *G. J. Hunt,* for appellant.

C. E. Abbott and *William Morrow, contra.*

ROOT, J.

The plaintiffs joined in an action to foreclose the defendant's interest in, and to sell, a tract of land, and for a deficiency judgment in favor of each plaintiff. The plaintiffs prevailed, and the defendant appeals.

The first proposition, that the notes evidencing the debts are usurious because of a promise to pay an attorney's fee, is not well taken. The notes were made in 1907. The provisions are invalid. No attempt was made to enforce them. *Weyrich v. Hobelman,* 14 Neb. 432; *Security Co. v. Eyer,* 36 Neb. 507.

The second contention, that the note given to the Schuyler National Bank is usurious for the further reason that when the debt matured a second note was given for the same amount as the first one, and two notes for $40 each were executed to evidence the accrued interest, is also not well taken. The court computed simple interest at the rate of 8 per cent. per annum on the original debt. By no correct method of computation or method or reasoning can it be deduced that either note is tainted with usury.

There is no merit in the appeal, and the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK, APPELLEE, V. EXCHANGE BANK OF ONG, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,970.

Corporations: LIABILITY FOR ACTS OF AGENTS. Where a corporation accepts and retains the fruits of a transaction induced by the fraudulent representations of its agent, made by him while acting within the scope of his authority, it is liable to the party injured thereby.

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

S. W. Christy, L. E. Cottle, Samuel Rinaker and *A. H. Kidd,* for appellant.

A. C. Epperson and *Culver, Phillip & Spencer, contra.*

ROOT, J.

This is an action to recover the purchase price of a negotiable promissory note bought by the plaintiff from the defendant in reliance upon alleged false and fraudulent representations made by its cashier. The plaintiff prevailed, and the defendant appeals.

The plaintiff, a national bank, maintains its principal place of business at St. Joseph, Missouri, and the defendant, a state bank, maintains its principal place of business at Ong, Nebraska. In September, 1908, the plaintiff was one of the defendant's correspondents. During the times hereinafter mentioned, Messrs. J. O. Walker, J. A. Walker, M. Bolton and R. Tweed were the defendant's directors. J. O. Walker was the son of J. A. Walker, and was the cashier and general manager of the bank; J. A. Walker was the president of the corporation. Neither Bolton nor Tweed resided in Ong.

Eugene McCann, hereinafter referred to as McCann, was a grain dealer in the village of Western. The deposition of Mr. McCann was introduced in evidence, but he, as well as the Walkers, departed this life before this case

was tried. The Walkers' depositions were not taken. In 1908 McCann, to the knowledge of J. O. Walker, was insolvent, and had been for years previously. In March, 1908, the defendant's directors instructed J. O. Walker not to permit McCann to overdraw his account, and to "wipe out his overdraft on the book." The amount of this overdraft does not appear in the evidence. At a subsequent meeting of the directors in August, like instructions were repeated to the cashier. September 1, 1908, the president and cashier interviewed McCann at Western, and urged him to borrow money from whomsoever he could, so as to pay the bank and yet continue business, and he was requested to give his note to take up his overdraft. It is not clear whether a note was given at that time, but four days later, September 5, 1908, McCann received a letter written upon one of the defendant's letter-heads, signed "J. O. Walker, Cashier," inclosing a note for $7,500, payable to J. O. Walker, with a request that he sign and return it. The note was signed by McCann and by his wife and returned to the cashier. According to the defendant's books, McCann's account, on August 22, was overdrawn $5,170.82; by September 1 the overdraft was reduced to $1,270.82, and the overdraft was further reduced to $500.82 by the 7th of the month. September 9 and 10 the account was credited $1,250, and charged $6,000, leaving an overdraft of $5,250.82; $2,000 at least of this $6,000 represented McCann's checks presented to the defendant for payment, in the absence of J. O. Walker, and protested by the assistant cashier. McCann's pass-book is credited with his note September 9, 1908, but the defendant's books show no credits on that account until September 11, on which day McCann was credited $7,500, and the plaintiff charged the same amount. The note, however, was not offered to the plaintiff until the 19th of September, on which day it was received in a letter dated September 18, 1908, which is as follows: "The Exchange Bank of Ong. Capital, $25,000. Surplus and profits, $50,000. Ong,

Neb., Sept. 18th, 1908. First National Bank, St. Joseph, Mo. Gentlemen: I have had some quite large land deals on hand recently, and I will be required to need some money, and I enclose you a note that I hold well secured, that I have guaranteed payment thereon bearing date September 5th, 1908, and due January 1st, 1909, this is A1 paper, and I think that my indorsement on same will make it secure, if you can handle this note for me, you can credit the Exchange Bank of Ong, Nebr., for my use. Most of these land deals will be closed up by the middle of Dec. and the note will be taken up by the time same matures. Please let me hear from you in regard to this matter. Would like to attend your tournament, & will if business will permit me to be absent for a few days. We are very busy, at present. Hoping that you can grant this request, I am, Yours truly, J. O. Walker, Cashier."

The plaintiff purchased the note, and gave the defendant credit for $7,500, which was subsequently withdrawn by drafts drawn by the defendant on the plaintiff in the usual course of business. The evidence fairly establishes the fact that J. O. Walker, in September, 1908, although possessed of considerable property, was insolvent, and the McCanns were entirely so. Subsequent to J. O. Walker's death, the plaintiff discovered that the note was of but little value, and after an investigation offered to return it to the defendant, and requested the repayment of the $7,500, with interest.

The defendant, among other things, contends that the transaction was between J. O. Walker, on his personal account, and the plaintiff; that he had no authority to purchase or negotiate the note for it, nor any authority to make false representations to the plaintiff; that it is not a party to the instrument, and cannot be held liable thereon, and that no false representations were made by Walker. Without specific reference to the evidence, we are content to say that the proof is clear that the note was not A1 or well secured, and that, had the plaintiff known the truth concerning the financial condition of the

McCanns and of J. O. Walker, it would not have purchased the paper.

This is not an action upon the note, and therefore the cases cited to sustain the argument that one not a party to a negotiable instrument cannot be sued thereon are not in point. While the right to recover is predicated upon the cashier's alleged fraud, the action is to recover back the consideration paid, and is in the nature of an action for money had and received.

The evidence, as we understand it, is uncontradicted that the defendant owned the note before it was transmitted to St. Joseph. It was made and delivered in response to the request of both the president and the cashier that McCann give a note to take up his overdraft, and McCann testifies that, while it was his custom at times to execute notes payable to J. O. Walker, the bills were uniformly for the benefit of the defendant bank, and that the note involved in this inquiry was given to the payee for the bank. Negotiable notes are used as money, and the particular note was credited to McCann's account on the defendant's books before it was negotiated. It is true that on September 5, McCann's overdraft was but $500, but there is no proof that he knew that fact; his checks and drafts upon the bank had been issued and were outstanding for a much greater sum; in fact, the assistant cashier testifies that while the Walkers were in Western he protested two of McCann's checks for $1,000 each. McCann's pass-book shows a credit of $7,500 September 9, but he says that he was entitled to credit on a much earlier day. The credit was not given on the defendant's ledger until September 11, on which day it was charged to the plaintiff's account. The note was not entered on the defendant's discount register, but it was accepted by the cashier in payment for McCann's debt to the bank, and as a basis for credit which was subsequently exhausted by checks drawn in the usual course of business. McCann was not credited with the proceeds of the sale of this note, but with the note itself. We are

of opinion that the evidence sustains the district court in its finding that the note, when negotiated, was the defendant's property.

This brings us to the defendant's argument that it did not authorize J. O. Walker to make any false representations, and that it should not be held liable for what he wrote. It is true that the cashier's office did not carry with it authority for its occupant to make fraudulent representations, and that the defendant did not authorize him to make them; but, if those representations were made while he was acting for his principal and for its benefit, it cannot escape responsibility while retaining the fruits of his unlawful conduct. *Mackay v. Colonial Bank,* 22 Weekly Rep. (Eng.) 473; *Nevada Bank v. Portland Nat. Bank,* 59 Fed. 338; *Merchants Bank v. State Bank,* 10 Wall. (U. S.) 604, 645; *Fairchild v. McMahon,* 139 N. Y. 290. So it seems to us the inquiry is not so much into the authority vested by law and the by-laws of the defendant in, or the instructions of its directors to, J. O. Walker, as it is concerning for whom he acted when he wrote the letter of September 18 to the plaintiff; whether the plaintiff had a right to and did rely on the statements therein contained; whether they were false; and whether the defendant received and retains the fruits of that transaction. All of these issues were by the district court found against the defendant, and the record amply sustains its action. The defendant's liability follows as an inevitable conclusion of law. What has been said renders unnecessary a discussion of the other points argued in the briefs and at the bar.

The judgment of the district court, therefore, is

AFFIRMED.

SEDGWICK, J., dissenting.

1. When Walker took this note, as between himself and the Bank of Ong, the note clearly belonged to Walker, and not to the Bank of Ong. He had been instructed by the directors to take McCann's note for the balance he

owed the bank. McCann owed the bank only $500. Contrary to those instructions, and without the knowledge or consent of the bank, Walker took McCann's note for 15 times that amount, and gave McCann an additional credit for the full amount. This was in violation of the direct and positive instructions of the bank. He never had authority to take a note from McCann for anything more than McCann owed the bank upon the books. His action in giving McCann credit for the amount of the note for his own purposes, and without the knowledge or consent of any of the directors, would not change the right of the thing as between him and the Bank of Ong. Walker was named as payee in the note in his personal, individual capacity, and not as cashier. As the payee in the note, his unrestricted indorsement was on the back. Therefore the form of the contract, as well as the conduct of Walker, would enable the Bank of Ong to insist that as between Walker and the bank, the note was the property of Walker, and not of the bank. His letter transmitting the note for sale declares himself to be the owner of the note, and would certainly estop him to deny that fact in any controversy between himself and the Bank of Ong. Certainly, if the controversy was between Walker and the Bank of Ong, the note belonged to Walker, and he cannot claim that it belonged to the Bank of Ong.

2. The question in this case, therefore, is whether the St. Joseph bank had notice of the real ownership of the note, or whether that bank had just grounds to believe, and did believe, that the note was the property of the Ong bank, and that when it was negotiating with Walker it was negotiating with the Bank of Ong. Without doubt, the decision of this case depends upon that question. The reasons for saying that the St. Joseph bank understood that it was dealing with the Ong bank, and not with Walker personally, appear to be two: First, that the letter transferring the note was written upon the stationery of the bank; second, that the letter was signed "J. O. Walker, Cashier." I think it will not be considered that

the fact that the letter was written on the stationery of the bank is entitled to very much consideration. Walker undoubtedly did use the stationery of the bank in transacting his personal and individual business. Everybody would expect that. Is the fact that the letter was signed "J. O. Walker, Cashier" sufficient to justify the bank in concluding that it was dealing with the Ong bank, and in concluding that the note was the property of the bank, and not the property of Walker? If we remember that the payee named in the note was J. O. Walker, and that it was indorsed "J. O. Walker," and nothing on the note indicated that anyone else was interested in it, and then read the letter in which the note was transmitted to the St. Joseph bank, it would seem that there is no difficulty in determining whether the St. Joseph bank supposed that the note belonged to the Ong bank, or supposed that it belonged to Walker, and that they were dealing with Walker personally. The letter seems to me to be as plain and positive notification that the note did not belong to the bank, and was the property of Walker personally as our language could make it. The pivotal sentence in the letter is, "If you can handle this note for me (J. O. Walker), you can credit the Exchange Bank of Ong, Nebr., for my (J. O. Walker's) use;" that is, if you buy this note of me, you can transmit me the proceeds by crediting it to the Exchange Bank of Ong, and I will take the money from the bank and use it. Note, also: "I think that my indorsement on same will make it secure." Would the Bank of St. Joseph understand from that that the Bank of Ong was to be responsible for it, or was it the indorsement of J. O. Walker that they relied upon? The letter is a series of similar positive statements that the note belonged to him personally, and was not the property of the bank. If I sell a note to the bank, I instruct them how to send me the money. This Walker did. "If you can handle this note *for me,* you can credit the Exchange Bank of Ong, Nebr., *for my use.*" He distinguishes between himself and the Bank of Ong, and

tells them that they are handling the note for him and the money is his, the Bank of Ong being merely the conduit for transferring his money to "my (Walker's) use." If the St. Joseph bank had not been satisfied to take the note from Walker, relying upon his indorsement and his representations as to his purchases of real estate and as to his personal responsibility, it should, and no doubt would, have required something to indicate that the Bank of Ong was interested in the transaction. If, as between Walker and the Bank of Ong, the note belonged to Walker and not to the bank, and the St. Joseph bank had notice of that fact, I do not see how they can now hold the Bank of Ong for the loss.

FAWCETT, J., concurs in this dissent.

DAVID H. HARDING, APPELLEE, V. BOARD OF EQUALIZATION, APPELLEE; C. E. FIELDS, INTERVENER, APPELLANT.

FILED NOVEMBER 14, 1911. NO. 17,080.

Taxation: LIQUOR LICENSES. The privilege granted a licensee to sell intoxicating liquors is not subject to assessment for taxation under the provisions of chapter 77, Comp. St. 1911, which in substance provide for *ad valorem* taxation.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

James B. Kelkenney, for appellant.

James P. English, Thomas F. Lee and *Benjamin S. Baker, contra.*

ROOT, J.

But one question is presented in this case, and that is whether a privilege granted by a license to sell intoxicating liquors is subject to *ad valorem* taxation. The dis-

trict court held that it is not. Such licenses are but mere temporary permits to the licensee to do that which without it would be unlawful. The licensee does not thereby become vested with any property right, within the meaning of section 3, art. I of the constitution, which provides: "No person shall be deprived of life, liberty or property without due process of law." *Pleuler v. State,* 11 Neb. 547; *Martin v. State,* 23 Neb. 371; *Dinuzzo v. State,* 85 Neb. 351. The privilege is purely personal; it may not be transferred by the act of the licensee or by operation of law; it may be canceled by a repeal of the statute authorizing the granting of licenses, or by an amendment thereto requiring the payment of a greater sum than formerly, and it may be summarily revoked for any cause provided by statute or by the ordinance under which it was used.

In *City and County of San Francisco v. Anderson,* 103 Cal. 69, it was held that the right to a seat in a voluntary association, known as the "Stock Exchange," does not contain such elements of property as to be subject to taxation. To the same effect is *Baltimore City v. Johnson,* 96 Md. 737. The reasons underlying the district court's decision that the privilege granted by the license is not taxable by valuation are stronger than those sustaining the last cited cases. There is no statute specifically authorizing the levy of a tax by value in addition to the payment of the license money, and we are of opinion that no such right exists.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. JEAN MCKEE, APPELLEE, V. ROBERT W. PORTER, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,149.

1. **Mandamus.** "A mandamus proceeding in Nebraska is an action at law." *State v. Farrington,* 86 Neb. 653.

2. ———: REVIEW. A motion for a new trial in the district court is necessary in mandamus proceedings to entitle the defeated litigant to be heard on questions of fact in this court.

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

John Everson, for appellant.

Keester & Strout, Thomas & Shelburn and *J. G. Thompson, contra.*

ROOT, J.

This is a proceeding in mandamus, instituted in the district court, to compel the respondent to deliver to the relator the books, money, stationery, receipts, furniture and other articles belonging to the office of city treasurer of the city of Alma. The relator prevailed, and the respondent appeals.

The record does not disclose whether the judgment has been executed, but since the district court refused to grant a supersedeas, and we have not been requested to supersede the judgment, it is reasonable to presume that the relator has possession of the money, records and all other indicia of the office referred to in the writ.

The respondent pleaded in his return that the relator is a woman, and therefore ineligible to hold the office. The affidavit for the writ does not disclose the relator's sex, unless the fact is established by the form of the relator's first name. The word is the French form of John. Webster's New International Dictionary, p. 2517. It is, however, used as an abbreviation of the word Jennie. Testimony was received, over the relator's objection, on this point. We find no motion for a new trial in the transcript, hence we are not required to examine the sufficiency of the evidence to sustain the findings. Such a question must have been raised by the filing of a motion for a new trial in the district court in order to entitle

the respondent to be heard here. *State v. Farrington*, 86 Neb. 653.

We are induced to hold the respondent to a strict compliance with the rules of practice, because he has attempted to hold an office beyond the term to which he was elected, and in opposition to the relator who holds a certificate of election therefor, and in this we are convinced he is in no manner attempting to vindicate the public right. If he is serious in his contention that the public welfare, rather than his private interests, impels him to litigate the relator's right to the office, he may accomplish his purpose by prosecuting the *quo warranto* action which he has instituted against the relator. We do not find it necessary to pass upon the relator's eligibility to hold the office of city treasurer.

The judgment of the district court is

AFFIRMED.

LETTON, J., concurring.

I concur in the conclusion. It is shown that an action in *quo warranto* to try the title to the office is pending. The issue sought to be tried here ought to be determined in that, which is the proper action. There is no reason to import such an issue into this case when it has previously been presented in the proper manner.

SEDGWICK, J., dissenting.

The statute governing cities of this class provides: "All officers shall be qualified electors and taxpayers and reside within the limits of the city." Comp. St. 1911, ch. 14, art. I, sec. 9. The real question in this case is whether, under this statute, a woman can be qualified to hold this office. The majority opinion does not pass upon or recognize this question, and gives technical reasons for not doing so. Those reasons to my mind are wholly unsound. It is said that whether this relator is a woman is a fact to be tried by the court, and, as no motion for a new trial was filed in the court below, this court cannot

review the evidence and determine whether the relator is a woman. This reason for the decision was discovered by this court; it is not mentioned in relator's brief, and was not suggested upon the oral argument. The opinion departs from the established rule of this court, in determining the case upon a technicality not presented in the brief.

The case was tried below upon a stipulation of facts, in which it is stated that the relator is a woman. She is described in the stipulation as Miss McKee, and was so described in her certificate of election. "Jean" McKee could deceive the trial court, and cause that court and this to believe that there was a question of fact to try whether or not she was a woman. If the letters of her first name had been arranged in different order, "Jane" McKee would have failed to compel this office to be turned over to one who, the law says, cannot hold it. In her petition and alternative writ she refers to the respondent by the use of a masculine pronoun 13 times, and refers to herself 30 times, but she never refers to herself by the use of a pronoun.

Upon the argument in this court, it was stated by counsel for relator that the relator is a woman. The whole record shows that no such question was tried below. Relator's brief occupies a dozen pages in an attempt to prove that a woman can hold the office of treasurer in such a city. It is not intimated that any such question has been tried in the court below, or that any one ever claimed that relator is not a woman, and yet this court on its own motion makes the objection that there was no motion in the court below asking that the court again try the question whether the relator is a woman, and because no such motion was filed the court here will conclude that she was not a woman.

It is not necessary to justify the action of the legislature in disqualifying women to hold this office. No good reason is apparent for such legislation. Women can hold the office of treasurer in larger cities, and can hold other more onerous offices. The legislature, when its attention

is called to the matter, may change the statute which controls in this case; the court cannot change it. I feel constrained to dissent from the principle announced in the majority opinion, because of the application that can be made. If the relator were an infant of ten years, or were confined in the penitentiary for a long term under sentence for embezzlement, or in the asylum for incurable insane, the principle would be the same. Under this decision we would install her in the office until in *quo warranto* proceedings she could be removed therefrom.

The position and conduct of the respondent have nothing to do with the matter. It is the relator's application that we are adjudicating. No investigation of fact is necessary. The whole case depends upon one question of law. Is a woman qualified to hold this office under the statute? That question of law can be determined in this action as well as in any. There is no reason to install her in the office first, and then determine afterwards, as a matter of law upon the undisputed facts, whether she can hold the office.

I think the decision is wrong, because no motion for new trial is necessary in the court below when the record shows that the case was tried and presented there upon a question of law, and no matter of fact was in dispute; because this court has always held that it will not determine a case upon a point not presented in the briefs, and it is not suggested by relator in the brief nor upon the oral argument that any motion for new trial was necessary in the court below; because the point upon which the case is decided is extremely technical, is not raised by either party, and is incorrectly determined in the opinion; because this decision, if followed as a precedent, will enable a child of tender years, a convict, or one incurably insane to obtain possession of any office and hold the same until removed by another action, which appears to be absurd, and is a very dangerous doctrine.

FAWCETT, J., concurs in this dissent.

LOUIS KEEZER ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1911. No. 17,179.

1. **Homicide:** INFORMATION: REQUISITES. In charging murder while the accused is attempting to perpetrate a robbery, it is not necessary to allege that the act was committed deliberately and with premeditation.

2. ———: ———: PROOF. These allegations not being essential in stating the offense, if made, may be rejected as surplusage, and need not be proved separate and apart from proof of the killing while the accused is in the perpetration of the robbery.

3. ———: EVIDENCE. In the case at bar, since the jury might well find from the evidence beyond all reasonable doubt that the accused planned to waylay, assault and rob two men, and did carry their plan into execution by assaulting the men, robbing one of them and beating the other so that he died, the triers of fact might logically find that the last described victim was assaulted with the intent on the part of the accused to rob him, although they denied the intent and there is no direct evidence that his person was searched or any property taken therefrom.

4. ———: INSTRUCTIONS. In that state of the proof, the court having instructed the jury that the accused were presumed to be innocent, they were not entitled to a further instruction that the presumption is that no such intent existed and no attempt was made.

5. **Criminal Law:** INSTRUCTIONS: CREDIBILITY OF WITNESSES. The rule announced in *Preuit v. People*, 5 Neb. 377, that "where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested," will not ordinarily apply to a county attorney, a sheriff, or to his deputy.

ERROR to the district court for Cass county. HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Benjamin S. Baker, for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROOT, J.

The plaintiffs in error prosecute a joint petition to secure the reversal of a judgment of life imprisonment upon a conviction of murder while attempting to rob Mike Geno.

Briefly stated, the facts are that Geno, Martin and Sanders, about 8 o'clock P. M., were by the accused waylaid in a secluded place, and Sanders and Geno beaten with clubs into insensibility, and Sanders robbed. Martin escaped, and Sanders survived the assault, while Geno did not recover consciousness, but died the succeeding day. The accused admitted to the sheriff and to the county attorney that they assaulted the men and robbed Sanders, and that the robbery was planned during the day, but each charged the other with being the controlling factor in the transaction. Sitzman signed a written statement in substance as we have stated, but did not therein admit that the assault was premeditated. During the trial the accused testified, in substance, that, while searching for a cow, they were reviled and assaulted by Sanders and Geno, and the injuries to these men were inflicted by the accused in self-defense, and that Sanders' pocket-book having fallen from his pocket during the affray was taken by the accused, and its contents divided between them; that they were induced to make statements to the officers by a promise that it would be better for them to do so, as thereby they would escape with a light sentence; and each denied having admitted that they planned the assault, or that they intended to take the money stolen until incidentally they noticed the pocket-book on the ground.

It is argued by counsel for the accused that the court did not instruct as to venue, but in this he is in error. In instruction numbered 1, the jury were told that the material allegations were, among other things, that the assault and attempt occurred in Cass county, Nebraska, and in instruction numbered 2, they were further informed that the burden of proof was upon the state to prove by

the evidence beyond a reasonable doubt every material allegation in the information.

The information contained four counts. The first charged deliberate, wilful and premeditated murder; the second charged the killing of Mike Geno while the accused were attempting to rob and while robbing Geno and Sanders; the third count charged Keezer with striking the fatal blow, and that Sitzman was present, aiding and abetting; while the fourth count charged that Sitzman inflicted the fatal wounds, and that Keezer was present aiding and abetting. Before any testimony was taken, counsel for the accused requested the court to compel the county attorney to elect whether to prosecute upon the charge in the second count that the murder occurred while the accused were attempting to rob or while they were robbing Geno, and also to elect whether he would prosecute for the murder of Geno while the alleged felonies were being perpetrated on Geno or on Sanders. Thereupon the prosecutor, with the court's permission, struck from this count all reference to Sanders, and elected to prosecute on the charge of murder while the accused were attempting to rob Geno. In this count the pleader in charging the assault stated that the accused "did, then and there purposely and of their deliberate and premeditated malice, strike, beat," etc. The accused requested the court to instruct the jury that, although the prosecutor was not compelled to charge premeditation or deliberation, yet, having done so, it was incumbent upon the state to prove those elements beyond all reasonable doubt to justify a verdict of guilty. This request was refused, and in no part of the court's charge with reference to the second count were the jury told that they could not convict unless they were satisfied that the accused acted deliberately and with premeditation.

Section 3 of the criminal code is as follows: "If any person shall purposely and of deliberate and premediated malice or in the preparation or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering

poison, or causing the same to be done, kill another; or, if any person by wilful or corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

The allegations essential to charge murder in the first degree when the accused takes human life while committing any of the felonies enumerated in this section have been fully considered by this court, and, while some of its members have refused to concur in the majority opinions, it has uniformly been determined that it is not necessary to charge deliberation or premeditation or a purpose to kill. *Morgan v. State,* 51 Neb. 672; *Rhea v. State,* 63 Neb. 461; *Taylor v. State,* 86 Neb. 795. For the purposes of this case, we shall only discuss the presence and effect of the words "deliberate and premeditated." Counsel for the accused is correct in admitting that these words need not be included in a charge of murder in the first degree where the accused is charged with murder while perpetrating or attempting to perpetrate a robbery. Bishop, Directions and Forms (2d ed.) sec. 532; Archibold, Criminal Pleading (24th ed.) p. 890; *State v. Van Tassel,* 103 Ia. 6.

The general rule concerning the effect of nonessential allegations in an indictment is stated in Archibold, Criminal Pleading (24th ed.) p. 363: "Allegations which are not essential to constitute the offense, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage." See, also, Joyce, Indictments, sec. 265. In *Morgan v. State, supra,* it was held that the mental condition present when murder in the first degree is committed is "incontrovertibly presumed from the crime of rape, in the perpetration of which the homicide is alleged to have been committed," and this principle is sustained by many authorities. *State v. Van Tassel, supra; Washing-*

ton v. State, 25 Tex. App. 387; *Moynihan v. State*, 70 Ind. 126; *State v. Brown*, 7 Or. 186; *People v. Mooney*, 2 Idaho, 17; McClain, Criminal Law, sec. 355. In the instant case the same result flows from proof that Geno was killed while the accused were attempting to rob him.

Counsel for the accused also argue that, since no intervening cause prevented them from robbing Geno and they did not do so, his requested instruction, that the presumption is that no such an intention existed, should have been given, and that there is no proof to sustain the charge of an attempted robbery of this man. No one other than the accused actually knows whether Geno was robbed or whether they intended to rob him, Sanders was insensible, Martin had fled, and Geno did not recover consciousness, so his statement was not before the jury. For some reason, the state made no proof of the condition of Geno's pockets when he was first discovered after the assault, nor did it prove whether there was any valuable property on his person before or after the assault. However, the accused admitted in their separate confessions that they planned robbing Geno as well as Sanders, that both men were assaulted at the same time, and that Sanders was robbed. From all of the facts and circumstances proved by the evidence, the jury were justified in finding that the accused intended to rob Geno at the time they assaulted him. The court did instruct the jury generally that the accused were presumed to be innocent, and that this presumption continued until the state proved their guilt beyond all reasonable doubt. In this condition of the record, the accused were not entitled to the instruction requested. The proof is also sufficient to sustain the charge.

Counsel for the accused finally complain that the court did not give his requested instruction that the jury should scrutinize with greater care the testimony of witnesses engaged in hunting up evidence than the testimony of the other witnesses. The witnesses to whom this instruction was intended to apply are the county

attorney, the sheriff and the deputy sheriff of Cass county. In *Preuit v. People,* 5 Neb. 377, the rule was announced that "where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested." This decision was followed in *Heldt v. State,* 20 Neb. 492, and in *Sandage v. State,* 61 Neb. 240. This is an exception to the general rule that the credibility of witnesses is solely for the jury to determine, and that the court should not attempt to influence the jury by discrediting the testimony of any witness, and does not find universal support in the decisions of other courts, nor in the books written upon this subject. Rapalje, Law of Witnesses, sec. 189; Underhill, Criminal Evidence (2d ed.) sec. 280*a*, and authorities there cited. The county attorney, the sheriff and the deputy sheriff are not spies, informers or detectives dependent upon a conviction for a pecuniary reward, and in the circumstances of this case we shall not extend the rule to include them within its ban.

Some other immaterial matters are referred to in the briefs, but we find nothing in the record prejudicial to the accused.

The judgment of the district court is

AFFIRMED.

M. S. MCININCH, APPELLANT, V. DAVID W. EVANS ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,974.

1. Sales: BONA FIDE PURCHASERS. A verbal lien on personal property is void as to subsequent purchasers in good faith.
2. ———: ———: PRESUMPTIONS. There is no presumption that a stranger to an oral agreement creating a verbal lien has knowledge of its existence.

3. ———: ———: BURDEN OF PROOF. As a general rule the burden of proving that a stranger to an oral agreement creating a verbal lien on personalty has knowledge thereof is on lienor, where that fact is material to his protection.

4. Replevin: POSSESSION AS EVIDENCE OF OWNERSHIP. While defendant's possession of a chattel, when replevied, is presumptive evidence of ownership, such possession loses its presumptive character when plaintiff adduces evidence showing that he bought the chattel from the owner, that he paid for it, and that he is entitled to possession.

5. ———: DEFENSES: SECRET LIENS: BURDEN OF PROOF. After plaintiff in replevin has adduced proof showing that he bought the chattel in controversy from the owner, that he paid for it, and that he is entitled to possession under his purchase, the burden is on defendant, where he attempts to defeat the case thus made and to establish his own right of possession by proof of a verbal lien to which plaintiff was a stranger, to show that plaintiff, before completing his purchase, had notice of such lien.

6. Trial: INSTRUCTIONS: BURDEN OF PROOF. Where the law imposes on defendant the burden of proving a material fact on which he relies, the plaintiff is entitled to an instruction so advising the jury.

APPEAL from the district court for Nemaha county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

M. S. McIninch and *William G. Rutledge,* for appellant.

Kelligar & Ferneau and *Fred G. Hawxby, contra.*

ROSE, J.

M. S. McIninch, plaintiff, replevied from David W. Evans, defendant, May 19, 1909, a red Oakland automobile. The answer of defendant was a general denial. Harry W. Moore appeared as intervener, answered plaintiff's petition by a general denial, and in addition pleaded these facts: May 6, 1909, intervener negotiated with the Lininger Implement Company of Omaha for the purchase of two automobiles—the red Oakland replevied and a white Oakland. Not having the funds to make advance payments on the purchase price, defendant furnished the

Lininger Implement Company $1,500 for that purpose, and, to secure payment thereof, both cars, with intervener's consent, were delivered to defendant, who has since held them as security. No part of the sum thus secured has been repaid. Subject to defendant's interest, intervener is the owner of the red car. When suit was commenced, intervener was engaged in buying, selling and repairing automobiles in Auburn, where the cars described were kept in his garage for defendant under the latter's directions. The trial court was asked to determine that defendant was entitled to possession of the red car, that he had a lien thereon for $1,500 and interest, that intervener was the owner thereof and entitled to possession, subject to defendant's lien, that the red car was wrongfully seized by plaintiff under the writ, that it be returned to defendant, and that intervener recover from plaintiff damages in the sum of $1,500. The reply was a general denial.

The proof on behalf of defendant and intervener tended to support the allegations in the latter's answer. Plaintiff adduced proof tending to show: May 1, 1909, plaintiff agreed to buy and intervener to procure in Omaha, and sell at cost, an automobile like the one replevied. At the time, plaintiff paid $400 on the purchase price. A few days later he was in the garage of intervener at Auburn, looking at a new automobile, and the latter told him that was his car. Part of the equipment not yet having been furnished, plaintiff stated to intervener that he would leave the car there, awaiting the equipment. Plaintiff returned May 8, 1909, found his car covered with mud, and ordered intervener to clean it and leave it in the garage. It remained there a week. May 15, 1909, it was taken to another garage and kept in the possession of defendant until seized by plaintiff in this suit. When it was in the garage of intervener, the latter told plaintiff he was going to Omaha for the white car, and for the purpose of raising money to get it he asked plaintiff to pay the balance due on the purchase price of the red one, saying he would

bring the missing equipment back with him. Plaintiff told him he could send his own check to the Nemaha County Bank for about $1,200 and that plaintiff would take it up. May 12, 1909, the bank received and plaintiff paid intervener's check for $1,406. The same day intervener credited plaintiff's account at the bank $200, and the former owed him $40 for supplies. The net result of the transactions, according to plaintiff's evidence, is that he purchased from intervener the identical automobile replevied, that he paid therefor the sum of $1,566, the purchase price in full, and that the property was delivered to him.

The jury found that defendant was entitled to possession and fixed the value thereof at $400. As between plaintiff and intervener, the right of property and the right of possession were found to be in plaintiff. From a judgment on the verdict plaintiff has appealed.

Plaintiff requested, and the trial court refused, the following instruction: "The court instructs the jury that the burden is upon the defendant Evans to establish his lien upon the automobile in question, and that unless you believe from a preponderance of the evidence that said Evans had a lien upon said automobile, and that said McIninch had knowledge of such lien before said McIninch purchased the same, then in that event you will find for the plaintiff as against the claims of said defendant Evans."

This instruction was not only refused, but there was nothing in the entire charge to advise the jury that the burden of proof was on defendant to show plaintiff had notice or knowledge of the verbal lien. Did the trial court err in failing to give the requested instruction? Defendant's lien was not evidenced by any writing or public record of which plaintiff was required to take notice. It was a mere verbal or secret lien, binding only on the parties who created it and on those having actual notice or knowledge of its existence. It was void as to subsequent purchasers in good faith. *Ostertag v. Galbraith*, 23 Neb. 730. When defendant accepted security in the form of a secret agreement, he allowed the automobiles to be kept

by his debtor for sale. It should not be presumed that strangers to the oral agreement had knowledge of its terms, when negotiating for the purchase of the automobiles. As a general rule, the burden of proving that a stranger had knowledge of such an agreement rests on the lienor, who is acquainted with its provisions, if that fact is material to his protection. *Rogers v. Pierce,* 12 Neb. 48. Plaintiff's proofs showed that he bought the red car from intervener, that it was delivered to him, that he paid the purchase price, and that he was entitled to possession. The testimony showing the purchase and payment by plaintiff was not successfully refuted. The burden was on him to show his right of possession at the commencement of the suit. His proof was sufficient for that purpose, but in making a *prima facie* case he was not in addition required to go further and assume the burden of proving that defendant had no verbal lien entitling him to possession, or, if he did have such security, that plaintiff had no knowledge or notice of its existence. The law, of course, is that at the commencement of the trial defendant's possession was presumptive evidence of ownership, but it lost its presumptive character when plaintiff proved by direct testimony that he bought the red car, owned it, and was entitled to possession. *First Nat. Bank v. Adams,* 82 Neb. 801.

To defeat plaintiff's case, as made by the evidence already outlined, defendant offered proof of a verbal lien, which was void as to subsequent purchasers in good faith. As to plaintiff, this lien was no justification whatever for defendant's possession, the right to which had already been disproved, without evidence of notice to plaintiff. Having relied on his verbal lien to defeat the right of plaintiff to possession, as shown by his evidence, the burden was on defendant to prove that plaintiff had actual notice or knowledge of the oral agreement before completing his purchase. Since plaintiff was right on his theory of the law, he was entitled to an instruction that the burden of proving such notice rested on defendant. *Omaha Bottling Co. v. Theiler,* 59 Neb. 257.

If the instruction requested, when standing alone, is open to criticism as assuming the fact that plaintiff bought the red car, that feature would not have prejudiced defendant, because other parts of the charge made it clear that plaintiff could not recover, unless the jury found from the evidence that plaintiff was the absolute owner.

Under the peculiar circumstances disclosed by the evidence and the nature of the controversy, it is clear, on the whole record, that plaintiff's case was prejudiced by the failure to give an instruction advising the jury where the burden of proving notice belonged. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

LETTON, J., concurs in the conclusion.

MARGARET MAY KIDDLE, APPELLEE, V. ELMER J KIDDLE, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,545.

1. **Husband and Wife: SUIT FOR MAINTENANCE: ALLOWANCE OF ATTORNEY'S FEES.** It is the settled rule in this court that in a suit by a wife for separate maintenance, or for alimony alone, the court may at any time during the pendency of the suit make allowance to the wife of a reasonable sum as suit money, including attorney's fees, to be paid by the husband as the court may direct.

2. ———: ———: ———: **PENDENCY OF SUIT.** And by the term "during the pendency of the suit" is meant any time from the commencement of the suit until and including the final order of dismissal of the same.

3. ———: ———: ———. And the fact that after the employment of counsel and the commencement by them of such suit, and prior to the entry of such allowance, the parties to such suit become reconciled does not oust the court of its authority to make such allowance.

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

McKenzie, Howell & Cox, for appellant.

H. S. Daniel and *John A. Moore, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county for separate maintenance for herself and the minor children of plaintiff and defendant, and for the custody of such children; and from an order allowing her $200 as attorney's fees, to be taxed as costs in the case, defendant appeals.

The petition was filed June 17, 1909. On the same day an application for the allowance of the attorney's fees in question was filed, and on the next day notice was given defendant that the same would be called for hearing on June 22. At the request of defendant the hearing was continued and was not had until July 22. After defendant obtained the continuance, and before the hearing, he and his wife became reconciled and resumed their marital relations. Notwithstanding such reconciliation the court made the allowance above noted. The suit was not dismissed until January 12, 1910, when, upon the motion of defendant, it was dismissed *nunc pro tunc* as of July 31, 1909, the date of entry of the order of July 22, 1909. Defendant now urges that such reconciliation deprived the court of authority to make the allowance complained of. To permit the defendant to obtain a continuance of the hearing upon the application for attorney's fees until he could bring about a reconciliation with his wife, and then interpose such reconciliation as a ground for defeating the application, would be so contrary to every dictate of justice that such permission would never be granted by a court of equity, unless compelled to do so by some statute or rule from which

there is no escape. Fortunately, no such statute or rule exists in the present case.

Upon the general proposition that no allowance can be made for past services, nor after a reconciliation, counsel cite *Beadleston v. Beadleston*, 103 N. Y. 402; *McCarthy v. McCarthy*, 137 N. Y. 500; *Reynolds v. Reynolds*, 67 Cal. 176; *Loveren v. Loveren*, 100 Cal. 493; *Lacey v. Lacey*, 108 Cal. 45; and *McCulloch v. Murphy*, 45 Ill. 256. In the Illinois case it is said: "Moreover, although in our state divorces are easy of attainment, yet it is the duty of the courts to promote, as far as possible, a peaceful adjustment of these difficulties." We think it is just as much the duty of the courts to compel honesty and fair dealing on the part of a man who has had trouble with his wife, as it is to promote a peaceful adjustment of his marital difficulties. We think the reasoning of Mr. Chief Justice Cole in *Sumner v. Sumner*, 54 Wis. 642, is probably nearer the mark, viz.: "It may be a salutary admonition to him to govern himself and regulate his conduct in future, if he is required to pay the amount adjudged by the court below."

As opposed to the authorities cited by defendant, we have *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914; *Sprayberry v. Merk*, 30 Ga. 81; *Langbein v. Schneider*, 16 N. Y. Supp. 943; and *Davis v. Davis*, 141 Ind. 367. In *Sprayberry v. Merk, supra*, the closing paragraph of the opinion reads: "As to the settlement which took place in this case between the husband and wife, after she had got the services of her counsel, it is scarcely necessary to remark that the counsel, after having acquired a right to compensation for his services by rendering them at the request of the wife, could not be *settled* out of that right by arrangement to which he was no party." In *Courtney v. Courtney, supra*, it is held: "Under Rev. St. 1881, sec. 1042, which vests in the court, 'pending a petition for divorce,' power in its discretion to require the husband to pay such sum as will enable the wife to prepare her

case for trial, an order may be made requiring him to pay her attorneys for services already rendered, although the parties become reconciled, and the action is dismissed." (30 N. E. 914.) In *Fullhart v. Fullhart, supra,* it is held: "Where a wife instituted a suit for divorce, and, prior to the hearing of a motion for temporary alimony and attorney's fees, became reconciled to her husband, and resumed matrimonial relations, she was nevertheless entitled to suit money to compensate the attorney whom she had employed for the services rendered." (83 S. W. 541.) In the opinion, it is said: "We know of no principle of law by which a woman, who has a meritorious cause of action for divorce employs an attorney to institute and prosecute such an action, can, after it has been instituted and carried on for some time, deprive him of his right to compensation for the services so rendered in that action by a reconciliation with her husband, followed by a resumption of cohabitation. It would seem that upon the clearest principles of common honesty, as well as law, an attorney in such a predicament ought to be compensated for the services rendered, and that the wife should be allowed suit money for that purpose." The reasoning of the cases above cited appeals to us as eminently sound, and more in harmony with the holdings of this court upon questions of divorce and separate maintenance than that contained in the New York, California and Illinois cases above cited.

Counsel for defendant urge that in an action like the one at bar "the court does not act as a court exercising general chancery jurisdiction, but derives such powers as it has solely from the statute," and cite *Aldrich v. Steen,* 71 Neb. 57, and *Cizek v. Cizek,* 69 Neb. 800. We do not see how that question arises in this case. The question involved here is the power of the court to make an allowance in favor of the wife for attorney's fees after there has been a reconciliation, or to make such an allowance for services which have been already rendered.

Section 12, ch. 25, Comp. St. 1911, provides: "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency." By the term "during its pendency" is meant any time from the commencement of the suit until and including the final order of dismissal. *Brasch v. Brasch,* 50 Neb. 73. The order in this case having been made before, or at least at the time, and as a part of, the final order of dismissal, the fact that the allowance was for services which had theretofore been rendered in the case, and the further fact that there had been a reconciliation of the parties, are alike immaterial. The power of the court to order the payment of suit money in the suit of a wife for separate maintenance is fully sustained in *Earle v. Earle,* 27 Neb. 277; *Cochran v. Cochran,* 42 Neb. 612; *Rhoades v. Rhoades,* 78 Neb. 495; *Brewer v. Brewer,* 79 Neb. 726; *Sample v. Sample,* 82 Neb. 37; and *Hoon v. Hoon,* 82 Neb. 688. That the sum allowed was reasonable is not denied.

The question discussed in the last paragraph of appellee's brief is not before us, and cannot be considered.

AFFIRMED.

VILLAGE OF WAKEFIELD, APPELLEE, V. FRED W. UTECHT ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,947.

1. **Municipal Corporations:** ANNEXATION OF TERRITORY. Section 8977, Ann. St. 1909, construed, and *held* broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county.

2. ———: ———: BURDEN OF PROOF. In an action to annex additional territory to a village, the burden is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed.

3. Evidence examined and set out in the opinion *held* not sufficient to sustain the decree.

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

Frank A. Berry and *Frederick S. Berry,* for appellants.

J. M. Paul and *A. R. Davis, contra.*

FAWCETT, J.

The village of Wakefield, incorporated and lying in Dixon county, and bordering on Wayne county, presented its petition to the district court of the latter county for the annexation of certain territory within that county to the corporate limits of said village. From a decree annexing such lands defendants have appealed.

The grounds urged for a reversal are (*a*) that the evidence is insufficient to support the findings and decree; and (*b*) that the court was without authority to annex to a village in one county contiguous territory lying in another county. We will consider these two assignments in reverse order.

Defendants contend that there is no law in this state which authorizes a village situated in one county to annex contiguous territory lying in another county; that "section 9034 of the same statute (Ann. St. 1909) gives to a village the authority to annex territory of an adjoining county when the said village is located in two or more counties. This act was passed in 1903, and the legislature recognized the fact that under the law a village incorporated such as Wakefield had no authority to annex contiguous territory of another county, but the legislature has not yet passed a law that authorizes annexation of the territory in another county where the village is wholly located within one county." They cite *Tabor & N. R. Co. v. Dyson,* 86 Ia. 310, in support of their contention. An examination of the case shows that the statute under

which the town of Tabor was incorporated provides, "The inhabitants of any part of any county" may incorporate; and the court say: "The act permitting original incorporation limits the organization to 'the inhabitants of any part of any county,' and we think a fair construction of the provisions for annexation means that extensions may be made within the county. No reason exists, to our minds, why there should be a limitation at the original organization of an incorporation to a part of one county, and then permit it, by annexation, to embrace parts of two or more counties. The reasons against such an organization are as actual and manifest in one case, as in the other." When the Iowa statute is compared with section 8881, Ann. St. 1909, under which it is conceded plaintiff village was incorporated, it will be seen that the above authority is not in point. The Iowa statute limits a village, when incorporating, to "the inhabitants of any part of any county," showing that such incorporation is clearly limited to the inhabitants of the county within which the village is situated; while our statute (section 8881) contains no such limitation. It reads: "Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this act, * * * shall be a village, and shall have the rights, powers and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision," etc.

As will be seen, there is nothing in section 8881 which in terms forbids the incorporation of a village situated in two or more counties. Section 8881 down to the "star" was enacted in 1879. Laws 1879, p. 202. In 1881 (laws 1881, ch. 22) the other portion of the section was added, and at the same time section 99 of the act of 1879 was amended so as to read as it now appears as section 8977, Ann. St. 1909. That section provides for the an-

nexation of contiguous territory. It reads: "When any city or village shall desire to annex to its corporate limits any contiguous territory, whether such territory be in fact subdivided into tracts or parcels of ten acres or less, or be not so subdivided, the council or board of trustees of said corporation shall vote upon the question of such annexation, and if a resolution to annex such territory, describing the same in general terms, be adopted by two-thirds vote of all the members elect of such council or board of trustees, said resolution, and the vote thereon, shall be spread upon the records of said council or board. Said city or village may thereupon present to the district court of the county in which such territory lies, a petition praying for the annexation of such territory, together with an accurate plat or map of the same. * * * If the court find the allegations of the petition to be true, and that such territory, or any part thereof, would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of said territory, or any part thereof, a decree shall be entered accordingly; and a copy of the decree of said court, duly certified under the seal thereof, together with a plat of the territory with a proper description thereof, so decreed to be annexed * * * shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies; and from the time of filing of such decree and plat, the territory therein described shall be included in and become a part of such city or village, and the inhabitants thereof shall receive the benefits of and be subject to the ordinances and regulations of such city or village." That the legislature, in passing this act, intended thereby to authorize a village situated upon the border of a county to annex adjacent territory lying in an adjoining county seems clear. If not, why does the act provide that the petition for the annexation of such territory shall be presented to the district court "of the county in which such territory lies," and why does it further require that a copy of the decree

of the court entered in that proceeding "shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies"? In 1893, ten years prior to the passage of section 9034, *supra*, the legislature enacted sections 9026 to 9032, inclusive. Laws 1893, ch. 9. Section 9026 was passed for the purpose of enabling the inhabitants of any village situated in two or more counties, and which had not theretofore been incorporated, to become incorporated, and prescribed the course to be pursued in securing such incorporation. After such incorporation was effected, such village would then stand upon the same footing with other villages which had been originally incorporated under section 8881, and sections 9027 to 9032 would apply to all of such villages. Section 9027 provided for the jurisdiction of justices in such villages; section 9029, that such village could use the county jail of either county; section 9030, how the tax levy should be certified; and section 9032, that all notices and other publications required by law to be published in any county in which any part of such village is situated may be published in any newspaper published in such village, and that such publication should have the same force and effect as if published in each and every county in which any part of such village is situated. Section 9033, enacted with 9034 in 1903, provides the steps to be taken by the owners of contiguous territory who might desire to have the same annexed. Section 9034 provides: "When any city or village situated in two or more counties shall desire to annex to its corporate limits any contiguous territory, whether within the counties within which said city or village is situated or otherwise, such territory may be annexed in the manner provided by section 99 of article I, of chapter 14 of the Compiled Statutes of 1901 (8977), provided that the district court of the county in which the territory sought to be annexed is situated shall have jurisdiction, and if the territory sought to be annexed is situated in more than

one county actions shall be brought in each county in which is situated any territory which it is desired to annex."

It is, in effect, argued that that section was either unnecessary or else it should be treated as a legislative construction of the former acts, to the effect that theretofore there had existed no authority for a village to annex adjacent territory situated in an adjoining county. While this argument is not without force, it is not entirely convincing. The reference in that section to section 8977, which was enacted in 1881, and which, as we have already shown, authorized a village on the border of one county to annex adjacent territory situated in an adjoining county, shows, we think, that section 9034 was intended to apply to the law generally upon that subject, and not especially to section 9026, *supra*. The intention of the legislature evidently was to relieve the question of all uncertainty by expressly extending the power of a village situated in two counties, and which borders upon still a third county, to annex territory of such third county in the same manner which section 8977 permitted a village in one county to annex territory in a second county. We therefore hold that the provisions of section 8977, *supra*, are broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county. The district court for Wayne county, therefore, did not err in taking jurisdiction in the instant case.

The contention that the decree is not sustained by the evidence is not so easily disposed of. The grounds upon which adjacent territory may be annexed by a village are well defined in *Village of Hartington v. Luge*, 33 Neb. 623, as follows: "In an action to annex certain territory to a village, it must appear from the facts stated in the petition that some portion of the territory sought to be annexed will be benefited from the annexation, or that justice and equity require its annexation, and the par-

ticular facts showing such benefits, or the justice and equity of the relief sought, must be alleged." If alleged, the allegation must, of course, be sustained by evidence. The rule above announced is reiterated in *Village of Syracuse v. Mapes,* 55 Neb. 738, and in *Bisenius v. City of Randolph,* 82 Neb. 520, and has become the settled rule in this court. These are the tests by which the right of a village to annex adjacent territory must be determined. The evidence in the record before us shows that, if the property of defendants is annexed, it will be done over their protest; will subject their property to materially increased taxation, and will fasten upon such property a lien for its proportion of $7,000 in water bonds, $4,500 in light bonds, all bearing interest at 5 per cent., and $1,976.75 registered, valid warrants bearing 7 per cent. interest, which remain unpaid for want of funds in the village treasury for their payment. The effect of all this (defendants in effect testified) would be to decrease the value of their real estate, and would be a damage to each of the defendants greater than the benefit to be derived by them if annexed to the village. It is clear, therefore, that under the first test alone their property should not be annexed. The court, by its decree, found the second test in favor of the village; that is to say, it found that "justice and equity require" that the territory be annexed. The case was submitted upon the testimony of one witness and a stipulation of facts. The witness referred to is the village attorney. He testified that he is acquainted with the village, with the adjacent territory, and with all of the defendants; that the defendants all live south of the corporate limits of the village, and within 500 feet of the south boundary thereof; that he knows of one water hydrant being located "pretty near the south boundary of the city limits;" that to his personal knowledge one of the defendants uses gas and water from the village plants and pays the village therefor; that the property of defendants is occupied by them for residence purposes. The stipulation admits that plaintiff is a cor-

poration wholly in Dixon county; that the lands sought to be annexed are all located in Wayne county; that the village has a system of waterworks "ample for the supply and protection of said village;" that it has a gas lighting plant; that both the water and light plants belong to the village, that the residents of the territory sought to be annexed do not pay any taxes into the village treasury; that the plats attached to plaintiff's petition are accurate; that the village has the indebtedness that we have already set out; states the levy of taxes for the years 1907, 1908 and 1909; that, if the trustees of the village were present, they would testify that the village is compactly built, and has within its corporate limits numerous churches, school buildings, merchandise and other establishments; that the object in seeking the annexation of the territory is for the purpose "of making room for expansion of said village, and for the revenue that will be derived from taxes collected on property sought to be annexed." That is all. It is not shown that defendants have not adequate school facilities within their own outlying additions; that they make use of the numerous churches in the village; that the village streets have been opened up to the addition with sidewalks and other conveniences which defendants are using; that the gas and water plants are ample in capacity to supply the needs of the defendants, as well as those of the village; that the village has any facilities for guarding against fire or furnishing police protection to the defendants should their property be annexed. In fact, we are unable to discover anywhere in the record evidence sufficient to sustain the finding of the court that justice and equity require the annexation of the property of defendants. We think the village has failed to meet the second test above outlined.

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

REVERSED.

CLAUS H. BONGE, APPELLANT, V. VILLAGE OF WINNETOON, APPELLEE.

FILED NOVEMBER 14, 1911. No. 16,546.

Eminent Domain: ACTION FOR DAMAGES: PLEADING. Upon examination of the petition, it is found that a general demurrer thereto was properly sustained.

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

J. H. Berryman and *Calvin Keller,* for appellant.

O. W. Rice and *W. A. Meserve, contra.*

SEDGWICK, J.

In the district court a general demurrer was filed to the plaintiff's petition, which was sustained by the court, and, the plaintiff not desiring to plead further, the action was dismissed, and he has appealed.

In his brief the plaintiff gives the following summary of his petition: "The petition alleges that the defendant, without plaintiff's consent, and against his will, in the fall of 1908, negligently, unlawfully, and wrongfully erected a standpipe of iron and steel, about 75 feet high, with a capacity of about 1,000 barrels of water, near plaintiff's lots, and about 25 feet from his dwelling-house, by reason whereof his tenant refused to live in the house, and plaintiff thereby lost $24 rent; that immediately before the erection of said standpipe said lots were worth $125 each, and that the erection of said standpipe was so dangerous to life and property that its existence in that place rendered said lots practically worthless; that the defendant removed said dwelling-house to another location on one of the said lots, and by such removal damaged it in the sum of $300 and plaintiff was damaged in the aggregate in the amount of $700." There is also an allegation in the petition that the plaintiff's property

consists of "five residence lots of about 50 feet frontage and about 150 feet deep, and said lots are so situated and located that they are desirable and valuable for residence purposes."

The plaintiff contends that he is entitled to damages under section 21, art. I of the constitution: "The property of no person shall be taken or damaged for public use without just compensation therefor." The words negligently, unlawfully, and wrongfully have no place in the petition. There are no facts alleged tending to show that the village authorities were in any respect negligent in erecting the standpipe complained of. To furnish the village and its inhabitants with water for public use and fire protection is a laudable purpose on the part of the village, and it will be presumed that the standpipe in question was properly constructed and suitable to the purpose, unless facts are alleged which show the contrary. No objection is made to the petition in the defendant's brief on account of these allegations, and we think that the pleadings should be treated as though they alleged that the standpipe in question was a public necessity and was properly constructed.

There are two questions, perhaps, presented by this demurrer: First, Is a village liable for damages that may be caused to property by the location of a structure of this kind in close proximity thereto? Second, Does the petition sufficiently allege that the plaintiff's property has been damaged?

The first question is not much discussed in the briefs. No authorities in point are cited. There are so many interesting and difficult questions connected with it that we prefer to place our decision upon the second proposition. The petition alleges that the plaintiff's "tenant refused to live in the house, and plaintiff thereby lost $24 rent." No facts are stated from which it can be determined whether the tenant had any sufficient reason for refusing to live in the house. This is not an allegation that the house became untenantable; that people in gen-

eral would refuse to live in the house. It is rather an allegation of whim or peculiarity on the part of this particular tenant. Again, it is alleged that "the erection of said standpipe was so dangerous to life and property that its existence in that place rendered said lots practically worthless." This is not a direct allegation that it was dangerous at all; it is a recital that it was "so dangerous." And, again, there are no allegations of fact from which it could be determined that this improvement created any conditions that rendered it in fact dangerous to life and property. How it did or could endanger either is a matter of conjecture, so far as the allegations of this petition go.

The plaintiff, for a second cause of action, alleged that the city authorities had removed the residence from one of the lots to another lot more distant from the standpipe. No facts are alleged tending to show that this was a proper and necessary part of the construction of the improvement by the city authorities. It appears to be an attempt to allege a simple trespass on the part of the officers. In such case the municipality would not be liable for the wrongful acts of its agents.

The demurrer to the petition was properly sustained, and the judgment is

AFFIRMED.

FORD SMITH, APPELLEE, V. EDWARD A. ROEHRIG ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,896.

1. **Intoxicating Liquors: CONSTITUTIONALITY OF ACT.** Section 15 of the act of 1881 (Comp. St. 1881, ch. 50), commonly known as the "Slocumb law," substantially re-enacts section 340 of the criminal code of 1866. In many cases since its first enactment this court has assumed its validity, and, being satisfied that it is constitutional upon re-examination, it is so held without further discussion.

2. Appeal: INSTRUCTIONS. This court will not reverse a judgment of the trial court for an erroneous instruction, when it appears from the whole record that the party complaining has not been prejudiced thereby. *Aultman & Co. v. Reams*, 9 Neb. 487, *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, *Standiford v. Green & Co.*, 54 Neb. 10, and *Shoemaker v. Commercial Union Assurance Co.*, 75 Neb. 587, distinguished.

3. ———: EXCLUSION OF EVIDENCE. When, in an action for damages caused by an assault, evidence is offered as to statements made by one of the parties to the assault, it is for the trial court to determine whether such statements were a part of the *res gestæ*; and if the circumstances indicate that the statements were self-serving, and made with deliberation, it will not be held to be an abuse of discretion to exclude such statements.

4. Principal and Surety: TRIAL: PROVINCE OF JURY. It is not the duty of the jury to find which of the defendants is principal and which are sureties, under section 511 of the code. It is not error to refuse to submit that matter to the jury to guard against prejudice when the surety is a foreign corporation.

5. Intoxicating Liquors: ACTION FOR DAMAGES: EVIDENCE. Evidence examined, and found sufficient to support the verdict, and that the damages are not so excessive as to require a reversal.

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

C. W. Britt and *A. G. Ellick*, for appellants.

John M. Macfarland and *Albert W. Jefferis, contra.*

SEDGWICK, J.

The defendant Roehrig was a licensed saloon-keeper in the city of Omaha, and the defendant the Title Guaranty & Surety Company of Scranton, Pennsylvania, was the surety on his bond as such saloon-keeper. The plaintiff began this action to recover damages for personal injuries inflicted upon him in or about the saloon of defendant, and caused, as he alleges, by the intoxication of George Weatherford and Bud Weatherford, who assaulted and injured him, alleging that the defendant sold the liquor that caused the intoxication of the said

George Weatherford and Bud Weatherford. The plaintiff recovered a judgment for $2,000 damages, and the defendants have appealed.

1. The principal part of the brief of the defendants is devoted to an attack upon the constitutionality of the statute known as the "Slocumb law." Comp. St. 1909, ch. 50. Many reasons are given for considering this law unconstitutional. They are quite fully presented, and urged with earnestness and ability. It is maintained that the whole act is unconstitutional, but the principal attack is upon section 15, which is the basis of this action. The so-called Slocumb law was enacted in 1881, and section 15 substantially re-enacts section 576 of the criminal code as it then existed (Gen. St. 1873), which was a part of the criminal code of 1866 (sec. 340), so that this particular section has been upon the statute books for 45 years. During this time this court has considered a very large number of cases, both civil and criminal, under the various provisions of this statute, and the Slocumb law very soon after its enactment was challenged as unconstitutional. In *Pleuler v. State,* 11 Neb. 547, the question of the constitutionality of the act in general was presented by very able counsel and thoroughly considered in the opinion by Mr. Justice LAKE, and the act was held to be constitutional. This was a criminal prosecution, and did not specifically involve the provision of section 15 of the act. Again, in *Hunzinger v. State,* 39 Neb. 653, the proviso of section 1 of the act was considered, and held to be constitutional, and the court declared itself to be entirely satisfied "with the reasoning and the conclusion" in *Pleuler v. State, supra.* In cases almost innumerable this court has considered various parts of this act, and has assumed that the act as a whole is within the power of the legislature, and valid. For these reasons, while we have examined the brief in this case upon these constitutional questions with interest, we do not feel called upon to enter into an extensive discussion of the questions so presented.

2. The petition alleges that "George Weatherford and Bud Weatherford assaulted and beat this plaintiff with their fists, feet, and with hard instruments, and said George Weatherford, whilst intoxicated from the liquors sold him by the said Edward A. Roehrig, and from no other cause, and without any fault on the part of this plaintiff, struck the plaintiff in the left eye, and injured same, so that this plaintiff has lost the use of said eye, and suffered great pain in said eye until about the 30th day of September, 1908, when said left eye of this plaintiff, which before this assault was in perfect condition, and owing to the injury received, was removed from his head by a surgeon; that it became necessary to remove this eye by reason of the injury; and that owing to this injury the other eye of this plaintiff is now defective." The evidence tended to show that the plaintiff and both of the Weatherfords were drinking at the bar of the defendant, and became involved in a quarrel, and that the plaintiff was assaulted and severely beaten by the Weatherfords, and that the plaintiff's eye was injured substantially as he alleged in the petition. When the evidence was complete, the plaintiff asked leave to strike from the petition the following words: "Said George Weatherford, whilst intoxicated from the liquors sold him by the said Edward A. Roehrig, and from no other cause, and without any fault on the part of this plaintiff." The court refused to allow these words to be stricken from the petition, on the ground "that said amendment presents a theory of this case other and different from that presented in the pleadings, and upon which the case was tried, and creates a new and different issue in this case than was presented by the original petition." Under the directions of the court, the jury made special findings of fact, and found specially that George Weatherford was under the influence of liquor at the time the plaintiff was injured, and that one of the Weatherfords struck the blow that caused the injury to the plaintiff's eye which resulted in its removal, but that they were unable to determine which

one of the Weatherfords struck the blow. The general verdict of the jury was in favor of the plaintiff, assessing his damage at the sum of $2,000. The court instructed the jury that, unless they found that George Weatherford struck the blow that caused the injury to plaintiff's eye, they could not allow the plaintiff any damages caused by that particular injury. It is now insisted that the damages allowed by the jury in their general verdict are excessive, because under the instruction of the court the loss of the plaintiff's eye is not to be considered in estimating the damages, and the other injuries suffered by the plaintiff were not serious, and not sufficient to justify the damages allowed. It seems clear that the court should have allowed the plaintiff's request to strike out the allegation specifying which one of the Weatherfords struck the blow that caused the injury to the plaintiff's eye. That allegation, however, was immaterial, and might properly be treated as surplusage. The two Weatherfords joined in the assault upon the plaintiff, and each of them was responsible for the actions of the other in committing a joint assault. The difficulty in the case arises from the instruction of the court to disregard the injury to the eye, unless the jury could determine that George Weatherford caused that injury. The instruction was incomplete and inaccurate, if not erroneous, and should not have been given. It seems probable that the jury disregarded the instruction, since the evidence shows that the loss of his eye was the principal injury suffered by the plaintiff, and the other injuries suffered were so inconsiderable as not to justify the general verdict of the jury.

The defendants suggest in their brief that "it is a well-settled rule of law in this state that it is the duty of the jury to follow the instructions of the court, whether said instructions are right or wrong, and if they fail to do so their verdict is contrary to law, and should be set aside, and a new trial ordered." They assume that this rule is absolute and applies in the broad terms in which it is

stated to all cases under all circumstances. Mr. Thompson in his work on Trials (vol. 2, sec. 2402) says: "Of course, it can never be said that the jury were misled by the giving of erroneous instructions, where they have reached the correct result by their verdict. Accordingly, it is the practice of most of the courts, before passing upon exceptions to instructions, to look into the evidence and see if the verdict was right, and, if it is found to be so, the court will look no further." In *Tilman v. Stringer,* 26 Ga. 171, it is held that, "although the court charge the law erroneously, still, if the verdict of the jury be right, no new trial will be granted." See, also, *Pratte & Cobanne v. Judge of Court of Common Pleas,* 12 Mo. 194; *Hannum v. Belchertown,* 19 Pick. (Mass.) 311; *Potter v. Hopkins,* 25 Wend. (N. Y.) 417. These and other early cases hold that when the court can see from the whole record that the party complaining has not been prejudiced by the erroneous instruction, and justice has been done in the case, the error will be disregarded, and the judgment affirmed. Later cases in the several states have generally followed this rule. We think that this rule is sound, and that the decisions of this court, when carefully examined, are not necessarily inconsistent with it.

In *Aultman & Co. v. Reams,* 9 Neb. 487, in an opinion by Mr. Justice COBB, this court said: "Whether right or wrong, it was the duty of the jury to respect and obey the instructions of the court, and for their failure to do so the verdict should have been set aside; and it was error for the district court to refuse to do so." He cites as authority for this statement the case of *Jewett & Root v. Smart & Gillett,* 11 Ia. 505. In that case the trial court granted a new trial, "upon the ground that the verdict was contrary to the evidence and the instructions of the court." The appeal was taken from this order of the trial court granting a new trial. The supreme court refused to reverse the order, remarking that, "whether right or wrong, it was the duty of the jury to regard them

as the law." In this state no appeal is allowed from an order granting a new trial until after the new trial is had and the case finally disposed of in the trial court. The Iowa decision might very well be cited as authority in a case where the instruction of the trial court was right, and the jury disregarded both the instruction and the evidence, but it is not authority for the proposition that the judgment of the trial court must be reversed in all cases where the jury has disregarded an erroneous statement of the trial court upon an immaterial point. *Aultman & Co. v. Reams, supra,* was an action on a promissory note. On the trial the plaintiff called the defendant as witness to prove his signature to the note, and the defendant denied the signature, whereupon the plaintiff asked the court to dismiss the action without prejudice, which the court refused to do. This was the principal error complained of, and for this reason the judgment of the district court was properly reversed. The cause was submited to the jury, and the verdict was rendered for $35 damages. The court instructed the jury "that upon the evidence in this case, in any event, you can only find nominal damages, as no actual damages are proved." The opinion shows that there was no evidence supporting this finding of the jury. The instruction of the court was correct. When the evidence entirely fails to sustain a cause of action or a counterclaim, it is the duty of the court to so instruct the jury and to enforce that instruction. This the trial court had failed to do, and there is no doubt of the correctness of the conclusion of this court upon this point. If the statement of the court in the opinion is to be construed that in all cases and under all circumstances the judgment must be reversed if the jury disregards an immaterial or erroneous instruction of the trial court, it was dictum merely, and should not be regarded.

In *Omaha & R. V. R. Co. v. Hall,* 33 Neb. 229, the first paragraph of the syllabus is as follows: "It is the duty of a jury to find its verdict in accordance with the law

as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so upon proper application is reversible error." This was an action for damages for personal injury. It appeared that after the injury the surgeon of the defendant company had, at the company's request, treated the plaintiff's injury. It was insisted by the plaintiff that this surgeon did not use ordinary care, skill and diligence in treating him. The jury rendered a general verdict for the plaintiff, with a special finding that the surgeon did use ordinary care, skill and diligence in treating the plaintiff. The trial court, it appears, gave general instructions in regard to the assumption of risk and the negligence of fellow servants. These instructions, as quoted in the opinion, appear to be substantially correct, but the court said that it was not necessary to decide whether they correctly stated the law, because under those instructions there was no evidence that could support the verdict on the ground of negligence of the defendant company, unless it was because the surgeon had improperly treated the injuries of the plaintiff, and as the jury had found in a special verdict that the surgeon did not improperly treat the plaintiff the verdict was wholly unsupported by the evidence. The petition alleged that in unloading coal from one of the defendant's cars the fellow servant "carelessly and negligently threw a large and heavy lump of coal upon plaintiff's right hand, crushing the same." The evidence followed the petition, so that there was no doubt that the negligence of a fellow servant was the primary cause of the injury. The substance of the court's instruction to the jury was to the effect that under such circumstances the plaintiff could not recover. There was therefore total failure of evidence to support the plaintiff's case, and the judgment was rightly reversed. It is manifest that, although the rule of law in regard to the duty of the jury to follow the instructions of the court is somewhat broadly stated, yet it was

intended to apply only under the peculiar circumstances of that case. The earlier case of *Meyer v. Midland P. R. Co.*, 2 Neb. 319, is cited as authority for this statement of the law. In the *Meyer* case the law is stated in the syllabus as follows: "If the jury disregard the testimony and the instructions of the court, and return a verdict not supported by the former, nor in obediance to the latter, their finding should be promptly set aside, and a new trial ordered." And the opinion shows that the instruction given by the court was a correct statement of the law, and that it appeared from the evidence that the jury had disregarded both the instruction of the court and the evidence in the case.

In *Standiford v. Green & Co.*, 54 Neb. 10, the question was as to the validity of a chattel mortgage. The court instructed the jury that "if at the time the mortgage was given the plaintiffs and Westfall secretly agreed that possession was to be taken of the goods, that plaintiffs should sell sufficient to satisfy their own claim, and thereafter continue to sell and apply the proceeds to the payment of other debts of Westfall * * * then the mortgage was void, and the jury should find for the defendant." The undisputed evidence showed "that the mortgage was given in pursuance of such an agreement as was outlined in the instruction." The instruction submitted the only question involved in the case. There was nothing for the jury to determine except the question of fact covered by this instruction. The court, by IRVINE, C., said: "We need not inquire whether the instruction was correct in law. It was given, and it was the duty of the jury to obey it. The verdict was rendered in manifest disregard of the instruction, and is for that reason contrary to law." The opinion quotes from *Aultman & Co. v. Reams* and *Omaha & R. V. R. Co. v. Hall, supra.* The decision is manifestly right, and it is not necessary to inquire whether the language used is so general that it might be applied improperly under other circumstances.

Shoemaker v. Commercial Union Assurance Co., 75 Neb.

587, was an action upon an alleged agreement to insure; no policy having been issued. The trial court instructed the jury that the burden was upon the plaintiff to establish "that the plaintiff agreed to pay, and did pay, the premium to the defendant, the Commercial Union Assurance Company." The court said that "the case was brought and tried on the theory that, the defendant having offered to insure the property for a certain premium, and the plaintiff having accepted such offer and paid the premium, the defendant is bound by a contract of insurance," and that there was no competent evidence tending to establish the fact of payment of the premium. The action being brought upon an offer to insure, and an acceptance thereof and payment of premium, it was necessary to prove that such payment was made. The evidence failed upon that point, and the judgment was properly reversed. We do not find it necessary to overrule, or even criticise, the decisions of this court in the cases cited. We are satisfied that the language used in these opinions should not be extended to cases like the one at bar.

In this case the instruction of the court relied upon is inaccurate and incomplete, if not erroneous. If, while the two men were jointly assaulting the plaintiff, one of them struck the blow which caused the injury, both would be equally responsible, and in that sense it may be said the finding of the jury that one of these two men struck the blow is equivalent to finding that George Weatherford struck the blow, as originally alleged in the petition. If this view is taken, the instruction is inaccurate and incomplete. If the instruction is to be construed to mean that plaintiff could not recover unless George Weatherford personally and individually struck the blow, it is erroneous, and, as before stated, the jury has manifestly disregarded it. Unless it appears from a consideration of the whole record that this action of the jury in disregarding this statement of the court was without prejudice to the defendant, or if it appears that the verdict might probably have been different

if the erroneous instruction had been omitted, a new trial would be necessary, and the judgment should be reversed. We find from the whole record that this instruction could not have influenced the verdict prejudicially to the rights of the defendants.

3. After the assault complained of, and George Weatherford had gone out of the saloon upon the sidewalk, he met an officer, who appears to have asked him some questions. Upon the trial the defendant offered to prove that at that time George Weatherford told the officer that the plaintiff "had tried to cut him with a razor." The court refused to allow this testimony, and it is now insisted that this was part of the *res gestæ,* and should have been allowed. We do not think that the court improperly exercised its discretion in this matter. The conversation with the officer was no doubt very soon after the assault, and possibly while the witness Weatherford was somewhat under the excitement caused by the difficulty in the saloon, but the inclination to justify one's self before an officer of the law might lead to self-serving statements, and it is not so clear that these statements of the witness were competent as to require a reversal for abuse of discretion on the part of the trial court.

4. The defendants requested the following instruction: "You are instructed that, should you return a verdict in this case against the defendants, the liability of the Title Guaranty & Surety Company herein would be that of a surety merely, and that, before plaintiff would be permitted to call upon said surety for the payment of any part of a judgment rendered upon said verdict, the law of this state requires him to first exhaust all of the property of the defendant Roehrig, both real and personal, within the jurisdiction of this court." So far as the rights of the plaintiff are concerned, the statute appears to make the principal defendant and his surety jointly and severally liable, and if, as between the principal defendant and his surety, the surety was entitled to the benefit of the provision of section 511 of the code, the jury has nothing

to do with that matter. It is the duty of the clerk, under the directions of the court, "in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail." No error of the clerk in that regard is suggested in the motion for new trial, and this court cannot now consider the point. It is, however, urged in the brief that the surety company was entitled to this instruction, "because of the well-known prejudice that exists in the minds of the ordinary juror against corporations, and particularly against foreign corporations." We cannot, however, presume that jurors will so far disregard their oaths as to be influenced by such conditions. It is the duty of the trial court, so far as practicable, to see that the jury is not improperly prejudiced or influenced in the trial of the case; and the jury should render the verdict without prejudice or favor, and without regard to the character or condition of the respective parties. This court must assume that the trial court and the jury have done their duty, unless it affirmatively appears otherwise. We cannot say from this record that the jury were prejudiced against either of the defendants, or that the giving of the requested instruction is a proper method of guarding against such prejudice.

5. It is insisted in the briefs that the damages allowed by the jury are excessive. It is said that it is not established by the evidence that George Weatherford struck the plaintiff at all; but the plaintiff, and at least one of the other witnesses, testified that he did, and that question was for the jury, And, further, as we have already pointed out, the evidence shows clearly that these two parties together, with perhaps another, attacked and assaulted the plaintiff, and that before and at the time of the attack these parties were all drinking at the bar of the principal defendant. Under this evidence, it was a question of fact for the jury as to whether the plaintiff sustained damages "in consequence of such traffic * * * in intoxicating drinks," within the meaning of section 15 of the Slocumb

law, as explained to them in the instructions of the court. The argument upon the theory that no damages should be allowed for the loss of the plaintiff's eye is disposed of by the discussion of that question.

The judgment of the district court is

AFFIRMED.

ROSEL P. SCOTT, APPELLEE, V. GEORGE DEGRAW, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,935.

1. **Limitation of Actions:** PLEADING AND PROOF. In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action upon a promissory note sets out the note which shows upon its face that it is barred by the statute, and partial payments are also alleged in the petition which would remove the bar of the statute, and such payments are denied in the answer, with the allegation that the note is barred, the plaintiff cannot recover without evidence of such payments.

2. ———: NOTES: PAYMENTS ON COLLATERALS. When collaterals are transferred by the maker of a note as security therefor, payment on such collaterals will be considered as payment on the principal note by the maker thereof, in the absence of any agreement to the contrary, as of the time that such payments were actually made upon the collaterals, and not of the time that they may have been received by the holder of the principal note from one in whose hands he has placed the collaterals for collection.

3. ———: EVIDENCE. The evidence in this case fails to prove that any payment was made upon the note in suit within the five years next before the action was begun.

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

G. J. Hunt, for appellant.

Williams & Williams, contra.

SEDGWICK, J.

The defendant executed and delivered to one J. W. Harper his promissory note for $750, dated March 11, 1901, and due on the 11th day of December, 1901. The plaintiff brought this action upon this note, alleging that the said Harper had assigned the note to him without recourse, and that two several payments, one of June 14, 1901, and the other July 15, 1901, were indorsed on the note, and alleging 13 other credits by cash paid to the plaintiff. The allegation was that 11 of these payments to the plaintiff were made in the years 1901, 1902, and 1903, one payment in 1904, and another payment of $6 on the 7th day of February, 1905. The action was begun on the 31st day of December, 1909. The note sued upon appeared upon its face, as alleged in the petition, to be barred by the statute of limitations. It was not alleged in the petition that any payment had been made to the plaintiff within the five years prior to the commencement of the action, except a payment of $6 on the 7th day of February, 1905. The petition would have been demurrable as showing upon its face that the action was barred by the statute of limitations, but for this allegation of the payment of $6 in February, 1905. These allegations of payment were denied in the answer.

In an action upon a promissory note, if the note upon the face appears to be barred by the statute of limitations, the petition fails to state a cause of action, unless it also contains allegations of fact which show affirmatively that the statute has not run against the note. *Hedges v. Roach,* 16 Neb. 673. The statute of limitations in this state is a statute of repose; it is not to be construed as merely raising a presumption of payment; it destroys the right of action. *Mayberry v. Willoughby,* 5 Neb. 368, 25 Am. Rep. 491; *Chapman v. Kimball,* 7 Neb. 399; *Gatling v. Lane,* 17 Neb. 80. When it does not appear upon the face of the petition, the defendant must plead it, and the party pleading the facts must prove them. *Van Burg v. Van Engen,* 76 Neb. 816. When the plaintiff, as in this

case, brings his action upon a promissory note which shows upon its face that more than five years elapsed after the maturity of the note before the commencement of the action, and then to remove the bar of the statute pleads payments on the note within the five years, and these allegations of payment are denied in the answer, with an allegation that the action is barred, the plaintiff must prove the alleged payments in order to remove the apparent bar of the statute. This is the precise point determined in *Hedges v. Roach, supra.*

The answer also alleged that at the time of the execution of the note the defendant "transferred and delivered to said Harper, as collateral security for the payment thereof, a number of notes payable to defendant, all dated February 25, 1901, and running for one year, payable at Sidney, Nebraska, with 6 per cent. interest from date, the total of the face of which said notes exceeded in the aggregate the amount of the note herein sued upon." This allegation is supported by the evidence, and is not disputed. The evidence further shows that the said Harper and this plaintiff were both interested in the note and entitled to the proceeds thereof, although the note was taken in the name of Harper only as payee, and also shows that it was agreed between the parties to the note that the collateral notes should be left with the Bank of Nebraska of Sidney, of which one Martin was cashier, for collection.

When notes are transferred as collateral to the principal note, in the absence of any agreement to the contrary, the law implies that payments upon the collaterals are payments upon the principal note, and the notes having been left at the bank by agreement of the parties without any evidence of any agreement as to the application of the proceeds of the collaterals, these proceeds must be considered as paid upon the principal note when they were received by the cashier, Martin. The evidence shows that before the note sued upon had been indorsed to this plaintiff, which was some six years after it is dated, payments made upon the collateral notes to Martin were by him for-

warded to Harper, the original payee in the note, and by him, in turn, paid to this plaintiff. None of the payments received by the plaintiff, Scott, were indorsed upon the note.

A paper was offered in evidence entitled "Credits by cash paid to R. T. Scott." Then followed a statement of dates and payments corresponding to those alleged in the petition, showing the one credit of $6 on the 7th of February, 1905, and no other credits within the five years prior to the commencement of the action. This paper was objected to as incompetent and immaterial, but, the cause being tried to the court without a jury, the objection was overruled and the paper was received in evidence. It is now insisted that this was error, but, as the trial court will not be presumed to have based its decision upon incompetent evidence, it is only necessary for us now to consider whether upon the whole competent evidence before the court it sufficiently appears that any payment was made upon this note within the five years before the commencement of the action. We think the evidence entirely fails in this respect. There is nothing in the record to show how much time elapsed after the payment of the $6 to Martin, the cashier of the bank, if indeed the evidence sufficiently shows that such payment was made at all, before the money was paid over to the plaintiff. If this $6 was paid to the bank before the 31st day of December, 1904, more than five years elapsed from that time before the commencement of the action. Martin, it appears, as before stated, turned over these payments to Harper, and Harper paid them to Scott. The fact, if it is a fact, that Scott received it February 7, 1905, does not prove that it was paid to Martin at that time or at any time within the 38 days prior thereto. The allegation of the plaintiff's petition that these payments were made within the five years next before the commencement of the action is wholly unsupported by the evidence.

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

REVERSED.

LETTON, J., concurring in conclusion.

The petition pleads the note and credits thereon, which on the face of the pleading show that the action was not barred. All that is said in the answer with reference to the statute of limitations is as follows: "Nor did he ever hear from said Harper or the plaintiff, until long after the statute of limitations had run against said note, that any balance was claimed to be due thereon; that, if any of the notes so transferred to said Harper were not paid and paid promptly, it was the fault of said Harper, and not by reason of any extension granted or permitted by this defendant, and any pretended claim of any balance due thereon would be and is barred by the statute of limitations." The general rule is that a plea of the statute which merely avers the pleader's conclusion of law is bad. 13 Ency. Pl. & Pr. 214. This is the rule that has been adopted by this court in every case that has been presented to it before the present one. *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Dufrene v. Anderson*, 67 Neb. 136; *Pinkham v. Pinkham*, 61 Neb. 336. It seems to me the opinion as it now stands is directly opposed to these authorities, and overrules them without saying so.

I am inclined to think, however, that the case should be reversed on the other points mentioned in the opinion.

ROOT, J., concurs in the opinion of LETTON, J.

THEODORE STANISICS V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,059.

ERROR to the district court for Lancaster county: EDWARD J. CORNISH, JUDGE. Opinion on application for conditional order of revivor. *Application denied.*

E. P. Holmes and *G. L. DeLacy,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

PER CURIAM.

Theodore Stanisics, after being convicted of the crime of arson, sentenced to seven years' imprisonment in the penitentiary, and adjudged to pay the costs of prosecution, appealed to this court. Pending the appeal Stanisics departed this life, and the administrator of his estate moves to revive the cause in the administrator's name, to the end that he may contest the validity of the conviction and thereby relieve the estate of his decedent from any liability to pay those costs.

Section XV of the Bill of Rights provides, among other things, that "no conviction shall work corruption of blood or forfeiture of estate." The judgment of conviction, therefore, will not prevent the convicted man's legal representatives from succeeding to his property rights, and they are not prejudiced by the judgment, except in so far as it may impose a liability on the dead man's estate to pay the costs of prosecution and of the appeal. This fact was held sufficient in *State v. Ellvin,* 51 Kan. 784, to authorize a revivor in the name of the representatives of a deceased convict.

This case, so far as we are advised, stands alone, and is in conflict with many other cases where the principles of law involved in the Kansas case were considered. In the well-considered case of *O'Sullivan v. People,* 144 Ill. 604, 20 L. R. A. 143, the subject is clearly and exhaustively discussed, and the conclusion is announced that the convict's death abated the appeal.

The real issue in a criminal prosecution is the defendant's guilt or innocence. A judgment for costs following a conviction is but an incident to the judgment of conviction. If the judgment of conviction cannot be

reviewed, the incident cannot be considered. *State v. Martin*, 30 Or. 108. The cases on this subject are collated in 12 Cyc. 825.

It will serve no good purpose to extend this opinion by further discussion. The appeal abated with the convict's death. The application for a conditional order of revivor is therefore

DENIED.

C. M. GRUENTHER, APPELLEE, V. BANK OF MONROE, APPELLANT.

FILED NOVEMBER 28, 1911. No. 17,030.

1. **Justice of the Peace: APPEAL: AMENDMENT OF PETITION.** In an action instituted before a justice of the peace, plaintiff alleged that, upon the representation of defendant bank that the drawer of a check had money on deposit to pay the check, the check was received, but when presented at the bank payment was refused, the defendant falsely claiming that the drawer had no funds wherewith to pay the same. On appeal to the district court, where the cause was tried upon the original pleadings, plaintiff was allowed to amend by inserting in the bill of particulars that, prior to the presentation of the check, the drawer had left with defendant the sum named in the check for the express purpose of paying it and which sum the bank retained. *Held*, That the amendment did not change the cause of action.

2. **Appeal: REPLY.** "Where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat it so notwithstanding no reply appears in the record." *Loan & Trust Savings Bank v. Stoddard*, 2 Neb. (Unof.) 486.

3. **Pleading.** "Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action, will not necessitate a reply." *Peaks v. Lord*, 42 Neb. 15.

4. **Banks and Banking: CHECKS: ACCEPTANCE.** Where a check is issued upon a deposit in a bank, and the payee notifies the bank of the receipt of the check, and the drawer subsequently withdraws his deposit, but leaves with the bank the exact amount required to pay the check, with instructions to pay it when

presented, and the money is accepted and retained for that purpose, the bank will be liable to the payee of the check without reference to section 9330, Ann. St. 1911, which requires an acceptance of a check to be in writing.

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

A. M. Post and *M. Whitmoyer,* for appellant.

Reeder & Lightner, contra.

REESE, C. J.

This action was commenced before a justice of the peace in Platte county. The cause was appealed to the district court, where judgment was rendered in favor of plaintiff. Defendant appeals.

As the pleadings in the justice court were, by agreement, adopted in the district court, it will be necessary to notice the bill of particulars and answer thereto as filed in the inferior court. It is alleged by plaintiff, in substance, that defendant is a bank incorporated under and by virtue of the laws of this state; that on the 7th day of March, 1910, A. J. Beckwith, a customer of defendant, who had an account with it, made his check thereon for the sum of $129.60; that before the delivery and acceptance by plaintiff of said check plaintiff informed defendant that Beckwith desired him to accept the check, and inquired if the same was good, and was informed by defendant that the check was good and would be paid on presentation, whereupon plaintiff accepted the check, relying on the representations of defendant, paying Beckwith the said sum of $129.60; that afterward, in the regular course of business, the check was presented, payment demanded, and refused by defendant, defendant falsely claiming that Beckwith had no funds in its hands wherewith to pay the same, but that it retained the check; that Beckwith was insolvent, having no property other than his account in said bank,

as defendant well knew, and that Beckwith has since left this state. Judgment was demanded for the $129.60, with interest and costs.

Defendant answered by admitting its corporate character; alleging that no note or memorandum was made by it, or any one authorized so to do, of the promises alleged in the bill of particulars; that the action was not prosecuted by the real party in interest, but in behalf and for the benefit of said Beckwith. A general denial of all unadmitted allegations of the bill of particulars was made. No other pleadings were filed in the district court.

At the close of the evidence plaintiff was permitted to amend the bill of particulars by inserting therein the averment that, "prior to the presentation of said check to the defendant, said defendant received from said Beckwith the sum of $129.60 for the express purpose of paying his said indebtedness to plaintiff, and still retains said money in its possession notwithstanding said fact." A proper exception was taken by defendant.

It is insisted that this amendment changed the cause of action from that upon which the suit was brought before the court of original jurisdiction. It is true that the facts stated in the bill of particulars in the justice court were that the check was accepted upon defendant's representations that it was good and would be paid on presentation, but, when presented, it was falsely claimed that Beckwith had no funds wherewith to pay the same. This was equivalent to a charge that it had the funds. It may be doubted if the amendment added anything to these averments, but it is clear that the suit during the whole history of the case was for the $129.60 involved in the transaction, and for nothing else, and therefore the "cause of action" was not changed.

It is also insisted that, as it was distinctly alleged in the answer that the suit was not prosecuted in the name of the real party in interest and was not denied by a reply, the allegation must be taken as true, and is a com-

plete defense to the action. We are unable to find that this question was raised upon the trial by objections to evidence or otherwise, but that the case was as fully tried upon all issues permissible as though a reply had been filed. It is the settled law of this state that, if such is the case, no prejudicial error is committed. *Western Horse & Cattle Ins. Co. v. Timm,* 23 Neb. 526; *Missouri P. R. Co. v. Palmer,* 55 Neb. 559; *Loan & Trust Savings Bank v. Stoddard,* 2 Neb. (Unof.) 486; *Minzer v. Willman Mercantile Co.,* 59 Neb. 410; *Gross v. Scheel,* 67 Neb. 223. However, it is doubtful if this averment was anything more in its effect than a denial of that fact would have been, and, if so, no reply was necessary. *Peaks v. Lord,* 42 Neb. 15.

This suit is what has been heretofore designated as an action at law, and is not triable *de novo* in this court, and the finding of the district court upon questions of fact cannot be disturbed unless clearly wrong. If the case turned on the matter of the acceptance of the check, the provisions of section 9330, Ann. St. 1911, that the acceptance of a bill must be in writing in order to bind the drawee, might be applied, and the evidence of such acceptance would be wanting. But under the evidence that is not this case. There was evidence that after the conversation between plaintiff and defendant, which was by telephone, but before the check was presented, the drawer withdrew his deposit from the bank, but directed it to withhold the sum of $129.60 to meet and pay a check for that sum which he had given, and which was done. This would obviate the application of the statute above referred to, as well as other cited sections upon the same or cognate subjects.

The evidence shows that plaintiff was the clerk of the district court; that Beckwith had been convicted of a misdemeanor, the fine and costs amounting to $129.60. He was taken into custody and brought to the office of the clerk, when he inquired as to the amount of money it would take to pay what was charged against him. On

being informed that it was $129.60, he proposed giving his check on the defendant bank, located at Monroe, in that county, when plaintiff called the bank by telephone and made the inquiry above mentioned, and was informed that Beckwith had funds on deposit to protect the check, and plaintiff stated that he would accept the check, which was agreed to by the bank. Plaintiff accepted the check and receipted the judgment, and, when the money was withdrawn, Beckwith left $129.60 to pay an outstanding check. After the withdrawal of the money the bank officers re-examined the account, there being two—one known as the "sale account," the other as his check account; that the check account had been overdrawn, which was not observed at the time of the payment of the money to Beckwith. In the meantime Beckwith started to leave the state. The president of the bank followed him to Columbus and received from him the sum of $80, which with the $129.60 a little more than paid the overdraft. Beckwith immediately left the state, leaving no property.

It is insisted that plaintiff was not a holder of the check in question for value, having parted with nothing in exchange therefor. This contention is based upon the claim that the judgment against Beckwith was not satisfied of record and could yet be enforced. The evidence shows without contradiction that, after having received the response from defendant that there was money on deposit with which the check could be paid, plaintiff accepted the check, gave Beckwith a receipt in full for the amount of the fine and costs, and noted the receipt on the criminal docket. Beckwith immediately left the jurisdiction of the court and of the state. We are impressed with the belief that it would be quite difficult for plaintiff to avoid having to report the $129.60 as collected and account for it. In that event the contention would have to fail. The receipt to Beckwith and the entry on the record would be against plaintiff. But as Beckwith left the money in the hands of defendant to pay the particular

check, the bank knowing beforehand that it was out, we are at loss to see how defendant can maintain that contention. The money left with defendant was devoted to that specific purpose, so accepted and held. The bank had a plain duty to perform, which was to pay it over.

We find no prejudicial error in the finding and judgment of the district court. The judgment is therefore

AFFIRMED.

ROOT, J., dissenting.

For the following reasons, I cannot concur in the majority opinion: The plaintiff testifies that before accepting the check he talked over the telephone with the defendant's cashier, a Mr. Hill, and told him that Beckwith was about to give a check on the defendant, and asked if it was good, to which Hill, after an interval, responded that Beckwith had sufficient credit to protect the check, and that Hill, in response to the plaintiff's statement that he would take the check, responded, "All right," or something to that effect. This conversation was plainly insufficient to create any liability on the part of the defendant to the plaintiff. "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Comp. St. 1911, ch. 41, sec. 188. "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee," etc. Chapter 41, *supra*, sec. 131. "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." Chapter 41, *supra*, sec. 134. "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

Chapter 41, *supra,* sec. 184. If the statute controls the legal status of the parties to this case, a recovery in the plaintiff's favor cannot be sustained. *Van Buskirk v. State Bank,* 35 Colo. 142, 117 Am. St. Rep. 182; *Lewin v. Greig, Jones & Wood,* 115 Ga. 127; *Erickson v. Inman,* 34 Or. 44; *Baltimore & O. R. Co. v. First Nat. Bank,* 102 Va. 753; *National Bank v. Berrall,* 70 N. J. Law, 757; *Tibby Bros. Glass Co. v. Farmers & Mechanics Bank,* 220 Pa. St. 1; *Pease & Dwyer v. State Nat. Bank,* 114 Tenn. 693.

The majority opinion refuses to apply the statute for the alleged reason "that after the conversation between plaintiff and defendant, which was by telephone, but before the check was presented, the drawer withdrew his deposit from the bank, but directed it to withhold the sum of $129.60 to meet and pay a check for that sum which he had given, and which was done." The fact is that the defendant did not withhold $129.60 or any other sum.

The evidence is uncontradicted that shortly before the check was drawn Beckwith sold his personal property at a public sale at which the defendant's cashier acted as clerk. The proceeds of the sale were deposited in the bank, and as a matter of convenience were credited under the designation of a sale account. At the same time Beckwith carried another account, which was overdrawn, in the defendant's bank. Beckwith had no special deposit nor a deposit for a special purpose, so the defendant was his debtor for the net credit in his favor after deducting the overdraft in the one account from the credit in the other. 1 Morse, Banks and Banking (4th ed.) sec. 327; *Pedder v. Preston,* 9 Jur. (Eng.) n. s. 496, 10 Weekly Rep. (Eng.) 773. Hill, the cashier, with whom the plaintiff talked over the telephone, was absent at the time Beckwith stated to Mr. Webster, the officer of the defendant in charge of the bank, that he wanted to withdraw his balance, less $129.60, the amount of a check outstanding which he desired paid. Mr. Webster inspected the

sales account, but did not know of and did not inspect the other account, and stated to Beckwith the amount of the sales account less $129.60. Beckwith drew his check for that balance, and, when it was paid, received more than the amount of his net credit with the defendant. Mr. Webster testifies that Beckwith said that the check had been given in part payment of the purchase price of a tract of land, but the plaintiff testifies that Mr. Webster admitted to him that Beckwith said the check had been given to the plaintiff. It is immaterial which statement is the more accurate. Mr. Webster did not promise that the bank would pay the $129.60; no credit was given the plaintiff or any other person by the defendant for that sum; the defendant received nothing from Beckwith as the result of the transaction; the outstanding check was an ordinary check not payable out of any particular fund, and the bank was guilty of no fraud.

If it be conceded that the transaction amounted to an assignment of $129.60 of Beckwith's credit with the bank to the plaintiff, and upon no other ground can the majority opinion be upheld, it should be remembered that, unless the plaintiff thereafter in reliance thereon so acted that the defendant should be estopped to deny the scope of that assignment, the assignee will stand in the shoes of the assignor, and can exact from the defendant no more than Beckwith could have demanded had the assignment not been made. 2 Story, Equity Jurisprudence (13th ed.) sec. 1047. No one will presume to say that the defendant by its mistake became liable to Beckwith for the $129.60, and it seems reasonable to say that the plaintiff in the circumstances of this case should not be permitted to recover if Beckwith could not. Beckwith's conversation with the defendant's officer, that individual's examination of Beckwith's account, the computation made and announced, and the drawing and payment of the check for the supposed balance, were all parts of the same transaction, which should be considered together in the light of the facts, and when this is done it

will be understood that the defendant did not owe Beckwith and nothing was transferred to the plaintiff.

This inquiry does not involve any question of negligence. The bank was not the plaintiff's agent or trustee. There was no privity between them, and it owed him no duty not to make a mistake in ascertaining Beckwith's balance. The plaintiff did not rely on that computation because he did not know of the transaction until the trial of this case, at which time he amended his petition as stated in the majority opinion.

It seems to me there is nothing in the facts of this case to deprive the defendant of the protection of the statute quoted, *supra*, and that the majority are insensibly controlled by the former decisions of this court with respect to the rights of a check-holder.

The judgment of the district court should be reversed and the action dismissed.

BARNES and ROSE, JJ., concur in this dissenting opinion.

IN RE NICHOLAS A. SHUE.

NICHOLAS A. SHUE, APPELLEE, V. C. H. LEE ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 17,323.

1. **Intoxicating Liquors: LICENSES: APPLICANTS.** A license to deal in intoxicating liquors is in the nature of a personal trust, and if it be shown that the applicant for such license has violated the law by engaging in the sale of liquors without a license therefor, and has also permitted others to carry on the business in his name, but in which he had no interest, although he may have a license, he is not a proper person to whom a license should be granted.

2. ———: ———: **TRANSFER.** A village board has no authority to permit the transfer of a license to sell intoxicating liquors.

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

Martin & Bockes, for appellants.

D. F. Davis and *Reeder & Lightner, contra.*

REESE, C. J.

An application was made to the village board of Silver Creek by Nicholas A. Shue for a license to sell intoxicating liquors. A remonstrance was filed, which contained a general denial of the averments of the petition, and an affirmative allegation that the applicant had violated the provisions of the Slocumb liquor law within the past year. The petition alleged that the applicant was a "man of good moral character," and the denial of this averment cast the burden of proof of this issue upon the party alleging it. The license was granted by the board, and the remonstrants appealed to the district court, where the decision of the board was affirmed. Remonstrants appealed to this court.

A number of questions are presented as to the qualifications of the signers of the petition, but as the question of the fitness of Shue to be the repository of the trust imposed by the law will, of necessity, be a controlling one, no attention need be given to the others.

It is shown that for the year ending May 1, 1910, one Cachmark had a license to sell liquors in Richland, Colfax county, and that about the 1st of March, of that year, Shue purchased Cachmark's saloon, and without authority engaged and continued in the business under Cachmark's name until the close of the license year. Then he procured a license in his own name which would terminate May 1, 1911, and during that year he resold the business to Cachmark, and allowed the buyer to conduct the business in his (Shue's) name from March 1 to May 1 without any new license having been procured. It goes without saying that both these transactions were fraudu-

lent and in direct violation of law. A license must be issued, if at all, to the real party. *In re Tierney*, 71 Neb. 704. "A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out such trust, and not delegate it entirely to others." *In re Krug*, 72 Neb. 576. The burden of proof is upon an applicant for liquor license to prove that he is a man of respectable character and standing, when such fact is denied by the remonstrance. *Brinkworth v. Shembeck*, 77 Neb. 71. In this case the applicant showed by his own testimony that at least in the two instances he has violated the law, and is not a proper person to be entrusted with the responsibility of a licensed seller of liquors.

On the hearing before the village board, the applicant offered to prove that he obtained the permission of the village board of Richland to continue the business under Cachmark's license. An objection to this offer was sustained. In this the board at Silver Creek did not err. The Richland board had no authority to permit a clear violation of law.

The decision of the district court is reversed, and the cause is remanded to that court, with directions to reverse the order of the village board granting the license, and, if a license has been issued, that it be revoked and canceled.

REVERSED.

IN RE CHARLES M. SOKOL.

CHARLES M. SOKOL, APPELLEE, V. C. H. LEE ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 17,325.

Intoxicating Liquors: LICENSES: APPLICANTS. Where a bartender in charge of a saloon is shown to have sold whiskey and beer to a minor, knowing him to be such, and permitted him to drink

the liquors at the bar, within less than one year prior to the application for a license to sell intoxicating liquors, he is not a proper person to receive such license, and his application should be denied.

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

Martin & Bockes, for appellants.

D. F. Davis and *Reeder & Lightner, contra.*

REESE, C. J.

An application was made to the village board of Silver Creek by Charles M. Sokol for a license to sell intoxicating liquors in said village. A remonstrance was filed by which a number of objections were presented, among which was the allegation that on or about the 24th day of May, 1911, the applicant sold intoxicating liquors to one Pete Newman, he being a minor of the age of 19 years. A hearing was had before the board, when a license was granted. The remonstrants appealed to the district court, where the action of the board was affirmed. They now appeal to this court.

A number of questions are presented by the briefs and were discussed upon the oral argument, but we do not find it necessary to notice any except the one above referred to, as it must control our decision.

W. J. Robinson was called as a witness by the remonstrants. He testified that on the 24th day of May, 1911, he, with one Pete Newman, went to a saloon in the village of Duncan, where he purchased liquors, and saw Newman buy from the applicant (who was then tending bar) both beer and whiskey; that Newman purchased whiskey twice and "beer several times"; that with him and Newman were two other boys, who did not go into the saloon, but remained outside the door in front. Newman was examined as a witness, and testified that he was 19 years of age; that he was in the saloon referred to with

Robinson on the date named, and purchased from the applicant and paid him for "about seven beers and two whiskies." Elmer Carlson, one of the boys referred to as accompanying Robinson and Newman, testified that he was 16 years of age; that he remained outside and in front of the saloon at the time Robinson and Newman were within; that he saw Newman drinking both beer and whiskey in the saloon. On cross-examination he testified that he had never drunk any whiskey nor beer, but had seen them, and by seeing them in this instance he could tell what they were. He also testified that from where he stood he could not see who was behind the bar, and therefore could not identify Sokol. For the purpose of rebutting this, Sokol, the applicant, took the stand, and testified that Robinson and Newman were in the saloon on the date named; that he was tending bar for his brother, who owned the saloon; that Robinson ordered a whiskey and a bottle of pop; that he filled the order, placing the whiskey in front of Robinson and the pop in front of Newman; that he did not know the whiskey was for Newman, but saw him drink it after he (Sokol) "had turned around" to put the money in the cash drawer; that he did not sell either of them any beer, and the two drinks were paid for by Robinson.

Should we assume that the testimony of Sokol is true, and that of the other witnesses false, we are yet confronted with the fact that he saw Newman in the saloon of which he had charge; that he knew Newman was a minor, for, on being asked by his attorney if he would have served liquor to him, he answered: "I guess not, because he is not of age;" that he saw Newman drinking the whiskey at the bar, but offered no objection or word of disapproval. The testimony submitted to the district court was in writing, being a transcript of the evidence taken before the board, and, so far as is shown, the court saw none of the witnesses and had no better opportunity to weigh their testimony than this court. The witnesses Robinson, Newman and Carlson were all disinterested, financially,

and we can see no reason why their testimony should be ignored. It is conceded that Newman drank whiskey at the bar; that Sokol knew of the fact at the time and made no objection. We can have no doubt of the truth of the testimony of the other three witnesses. It is true that the applicant is little more than a boy himself, being but 22 years of age, and, had he been of more mature years, his conduct might have been different, but this does not constitute any very cogent reason why he should be placed in sole charge of the trust which has been placed in his hands by the judgment of the board and district court. In making the sale to Newman he violated the law, and his license should have been denied.

The judgment of the district court is reversed, and the cause is remanded to that court, with directions to reverse the decision of the board of trustees, and ordering them to revoke and cancel the license, if issued.

REVERSED.

H. F. CADY LUMBER COMPANY, APPELLANT, V. GEORGE E. REED ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 16,548.

1. Appeal: PRESUMPTIONS. In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined.

2. Mechanics' Liens: TIME FOR FILING. A subcontractor whose only agreement is with the contractor cannot extend the time within which he may file a mechanic's lien by substituting proper material for defective material theretofore furnished and charged to the contractor. *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561.

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

Baldrige, De Bord & Fradenburg, for appellant.

W. W. Slabaugh, William F. Wappich and *L. R. Slonecker, contra.*

BARNES, J.

Appeal from a judgment of the district court for Douglas county in an action to foreclose a mechanic's lien upon a house and lot situated in the city of Omaha. The case is here without any bill of exceptions, and has been submitted upon a transcript which contains the pleadings, findings, and judgment of the trial court.

It appears that in the spring of 1908 one Andrew J. Johnson, as contractor, and George E. Reed, the owner, entered into a contract for the erection of a dwelling upon the lot in question. The appellant, H. F. Cady Lumber Company, sold and delivered the material for the erection of the building to the contractor, and after its completion filed in the office of the register of deeds of Douglas county a statement to obtain a lien for the balance alleged to be due from the contractor for such materials, amounting to $393.34. It sufficiently appears from the record that the last item of material furnished to the contractor, except the one which is now in question, was delivered to him on the 15th day of October, 1908.

The district court made the following findings: "First. The court finds that on the 21st day of December, 1908, the plaintiff made an account in writing of the items set forth in said petition, and after having made oath thereto filed the same in the office of the register of deeds, Douglas county, Nebraska, and the same is duly recorded therein as a claim of mechanic's lien upon the premises hereinbefore described.

"Second. The court finds that the first item of material delivered by the said plaintiff as aforesaid was furnished at said premises for said improvement on June 4, 1908, and the several items mentioned in said petition were furnished at said premises by the said plaintiff on the

respective dates named in the petition and in said mechanic's lien.

"Third. The court finds, however, that the item 'Nov. 6th, 3 lights glass 36 by 40½ D. S. and box,' for which a charge of $3.23 is made in said lien and petition, was furnished by the said plaintiff, H. F. Cady Lumber Company, on the order and demand of the said Andrew J. Johnson, who was the contractor for the construction of the said improvements under and by virtue of a contract between the said Johnson, contractor, and the said George E. Reed, owner of said premises, and that in the matter of furnishing of said materials the said H. F. Cady Lumber Company was a subcontractor of the said Andrew J. Johnson, principal contractor. The court further finds that the said George E. Reed, demanded that the contractor, Johnson, should furnish said three lights of glass upon the original contract between the said Reed and Johnson for the erection of said building, and the court finds that the defendant, Johnson, in compliance with the demand of said Reed, demanded the same of plaintiff, and the plaintiff in compliance with the order of said Johnson furnished the same. The court further finds that the said three lights of glass were demanded by the said Reed and ordered by the said Johnson to take the place of three (other) lights of glass 36 by 40 inches on the claim made by said Reed that the original lights 36 by 40 inches did not fit the sashes which had been installed in said building, and the court finds that the three lights as originally installed were defective and did not fit the sashes. The court further finds that on November 18, 1908, the said contractor, Johnson, installed said three lights of glass furnished and delivered by the plaintiff on November 6, into three sashes then forming a part of said improvement, and the said Johnson took out from said three sashes the original three lights 36 by 40 inches. The court finds that the three lights furnished and delivered on November 6 were to take the place of the three lights furnished some months

before by H. F. Cady Lumber Company, for which said three lights a charge was made by plaintiff company, and plaintiff took back said defective lights.

"The court further finds that under the law the plaintiff is not entitled to a lien upon said premises."

The court thereupon rendered a judgment for the plaintiff and against the contractor, Andrew J. Johnson, for $394.74 and costs, and dismissed the action against the defendant Reed to foreclose the alleged mechanic's lien. From that judgment, as above stated, the plaintiff has appealed.

In the absence of the bill of exceptions, it will be presumed that the evidence supports the findings of the trial court, and all other facts which could have been legally proved under the pleadings.

It is contended by the appellant that upon the findings above set forth the district court should have rendered a judgment foreclosing the mechanic's lien. It is argued that the plaintiff had 60 days from and after the 6th day of November, 1908, at which time the lights of glass above mentioned were furnished, in which to file and perfect its mechanic's lien, that the lights of glass were item furnished in pursuance of the original contract; while, on the other hand, it is contended that the lights of glass were simply substituted for those which had been previously furnished and installed in the building at a time long prior to the 6th day of November. The court so found, and upon that finding held, as a matter of law, that the plaintiff's alleged lien was not filed in time, and therefore never became a lien upon the lot in question.

The authorities upon this question in other jurisdictions are conflicting; but, whatever may be the rule in other states, we think this question has been settled by this court adversely to appellant's contention. In *Congdon v. Kendall,* 53 Neb. 282, it was held that the time for perfecting a manufacturer's lien could not be extended by supplying certain brushes in place of defective ones previously furnished and charged for. In that case

it appeared that the defendant had ordered certain mill machinery from the plaintiff, which was to be furnished to them f. o. b. Milwaukee for a specified price; that the machinery was delivered to the defendant on board the cars at their shops in Milwaukee on the 21st day of January, 1893; that the claim for a lien was not filed until May 23, 1893. It also appeared that after the machinery was set up in the mill certain brushes furnished under the contract proved to be defective, and the plaintiff supplied others in lieu thereof without additional charge or cost to the defendants. It was urged that the furnishing of the brushes extended the period for perfecting the lien. It was held that the articles furnished were furnished gratuitously by the plaintiffs for the purpose of making good their contract, and therefore did not operate to extend the time for filing the lien.

In *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561, it was held that "a subcontractor whose only agreement is with the contractor cannot extend the time within which he may file a mechanic's lien by donating material to the owner of the building nor by substituting proper material for defective lumber theretofore furnished the contractor."

We are of opinion that the case at bar should be ruled by those decisions. The trial court found that the lights of glass furnished to the contractor on the 6th day of November, 1908, were furnished as a substitute for the defective lights of glass theretofore furnished and installed in the building, and that this did not operate to extend the time in which the appellant could file its mechanic's lien.

It seems clear that the judgment of the district court was right, and it is therefore

AFFIRMED.

WILLIAM F. SMITH, APPELLEE, V. DAVID G. POTTER ET AL., APPELLEES; WALTER V. HOAGLAND, APPELLANT.

FILED NOVEMBER 28, 1911. No. 16,314.

1. **Mortgages:** FORECLOSURE: OWNERSHIP OF NOTES. If the defendant in an action to enforce a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person. *McCabe v. Reed*, 88 Neb. 457.

2. **Process:** CONSTRUCTIVE SERVICE: PUBLICATION OF NOTICE. Where a notice for constructive service by publication is published in a semiweekly newspaper, insertion of the notice in each of the regular issues during the week is necessary to constitute a legal publication for that week. *Claypool v. Robb*, *ante*, p. 193.

3. **Taxation:** FORECLOSURE OF LIEN: PUBLICATION OF NOTICE. Proof of publication of notice examined, and *held* insufficient to show that the notice was published for the time required by statute.

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

Hoagland & Hoagland and *Henry P. Leavitt,* for appellant.

Wilcox & Halligan and *Albert Muldoon, contra.*

LETTON, J.

This action was brought to quiet title to a tract of land in Lincoln county. The plaintiff, Smith, claims title through a sheriff's deed issued in tax foreclosure proceedings brought by Lincoln county against David G. Potter and others. The plaintiff prevailed, and, from a judgment quieting the title in him, defendant Hoagland appeals.

In 1887 David G. Potter received a patent to the land in controversy from the United States. In 1892 he executed a note and mortgage to one Buckworth to secure the payment of a note for $389, which note was after-

wards indorsed to the North Platte National Bank. Afterwards the bank became insolvent, one Doolittle was appointed receiver, and the note and mortgage were sold by the receiver in winding up the affairs of the bank. Defendant Hoagland claims the right to redeem from the tax lien by virtue of his ownership of this note and mortgage and of a decree of foreclosure based thereupon, and by reason of the invalidity of the tax foreclosure proceedings on which plaintiff's title to the land depends. He also alleged that the fee title to the land rested in one Waples. He filed an answer and cross-petition praying that he be allowed to redeem and that the title to the land be quieted in Waples. In 1900 Lincoln county obtained a decree of foreclosure for the delinquent taxes on the land without making a prior administrative sale. Service was had by publication, and the land was sold to satisfy this decree. In 1902 the land was purchased at sheriff's sale by the defendant Wilcox. The plaintiff, William F. Smith, derives his title by mesne conveyances from Wilcox. Plaintiff denies the ownership of the decree by Hoagland, alleges its abandonment by the receiver, and sets up a number of other defenses to the cross-action. It would unduly lengthen this opinion to set out even the substance of the lengthy and much involved pleadings, or to relate the evidence, except upon one or two points.

1. Upon the issues made as to the ownership by Hoagland of the note and mortgage: We held in the case of *McCabe v. Reed*, 88 Neb. 457: "If the defendant in an action to cancel a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under a claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person." The testimony of the witness Davis we think is not sufficient to overcome that of Hoagland, supported and corroborated as it was by his possession and production of the papers.

2. It is contended that the tax foreclosure proceedings

were void and conveyed no title to Wilcox. This is really the main contention in the case. The validity of these proceedings is attacked upon a number of grounds. One of these is that the notice for constructive service was not published for the proper length of time. The proof of publication filed with the notice was to the effect that the notice was published in the North Platte Telegraph, a semi-weekly newspaper, for four consecutive weeks; the first publication being made on the 24th day of August, 1900, and the last on the 21st day of September, 1900. Defendant Hoagland called the publisher as a witness, who appeared with the files of the newspaper. His evidence disclosed that there was an error in the date line of at least one issue of the paper; but he testifies, and the files disclosed, that the notice did not appear in the paper published on August 21. If we accept the publisher's testimony, the first publication must have been either upon Friday, the 24th day of August, as the affidavit recites, or on Tuesday, the 28th day of August. Whether we take the first publication as having been upon Friday, the 24th, or Tuesday, the 28th, under the rule announced in *Claypool v. Robb, ante*, p. 193, the notice was not published for the length of time required by the statute, and the court acquired no jurisdiction. The tax foreclosure proceedings, therefore, did not bar the equity of redemption, and the sheriff's deed conveyed no title to the premises.

It is unnecessary to discuss other questions raised as to the affidavit and notice and similar matters affecting the validity of the decree.

It appears that an action had been brought by the holder of the note and mortgage under which defendant claims, and that a decree had been entered thereon. The trial court found that the decree had been "abated and dismissed." This finding was procured by plaintiff, and he cannot now complain of it.

It is contended that this defendant has been guilty of laches whereby he has forfeited his right to insist upon

his note and mortgage. Mere delay in foreclosing a mortgage will not have such effect, and, unless continued for the term prescribed in the statute of limitations, will not bar a recovery.

It is contended that there is another outstanding mortgage against the land, and that defendant is not entitled to relief in this case unless he offers to do equity by paying prior incumbrances. The court will determine what liens exist and their priority. Lienholders are not required to pay prior liens unless they desire to do so to protect their own.

The judgment of the district court is reversed and the cause is remanded for such other and further proceedings as may be required to adjust the rights of the parties.

REVERSED.

ARTHUR G. KRAMER, APPELLEE, V. BANKERS SURETY COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,788.

1. **Venue:** ACTION ON BOND: SUMMONS TO ANOTHER COUNTY. The sureties on a bond given under the provisions of section 6, ch. 50, Comp. St. 1909, are not merely nominal parties in an action on the bond, but have such an interest in the action that an action on the bond may be brought against them in any county where they reside or may be found and, under section 65 of the code, a summons properly issued to any other county for service on their principal.

2. **Judgment:** RELIEF IN EQUITY. Where jurisdiction has attached, the fact that there is an error in the amount of recovery or other irregularities will not justify in a collateral action the granting of an injunction to restrain the enforcement of a judgment.

3. **Subrogation:** PRINCIPAL AND SURETY. In equity, a surety paying a judgment against himself and his principal is entitled to be subrogated to the rights of the judgment creditor, and to have the judgment assigned to him or to some one else for his benefit.

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

Pitzer & Hayward, Edwin Zimmerer, D. W. Livingston and *A. G. Ellick,* for appellants.

Andrew P. Moran and *John C. Watson, contra.*

LETTON, J.

This action was brought to restrain the levy of an execution and the collection of a judgment obtained in the district court for Lancaster county against the plaintiff, Kramer, and others. A demurrer was filed to the petition, which was overruled, and, the defendants electing to stand upon their demurrer, a decree was entered for a perpetual injunction.

The judgment, the execution of which was enjoined, was rendered in a suit brought in the district court for Lancaster county by Laura Thompson and others against Kramer (who is a saloon-keeper at Nebraska City) and two other saloon-keepers, as principal defendants, and three corporations who were sureties upon their several bonds. The action was for damages alleged to have resulted by reason of the sale of liquor to the plaintiff's husband by the defendant saloon-keepers during the years 1907, 1908 and 1909. Service in that action was had upon the corporations by serving the state auditor and a general agent in Lancaster county and on the principal defendants by personal service in Otoe and Douglas counties. Default was made by the principal defendants. The surety corporation defendants entered their voluntary appearance, and a stipulation was entered into between the plaintiff and them, waiving trial by jury, and agreeing that the plaintiff might make proof of her cause of action for damages without a contest, and that judgment be rendered in her favor against the defendants in the sum of $2,000. It was also stipulated that the judgment be entered in the following proportions:

Against Louis W. Prenica, one-seventh; Arthur G. Kramer, three-sevenths; and Frank Effenberger, three-sevenths; and against the sureties, the Bankers Surety Company, of Cleveland, Ohio, three-sevenths; the United States Fidelity and Guaranty Company, of Baltimore, Maryland, three-sevenths; and the Lion Bonding and Surety Company, of Omaha, Nebraska, one-seventh. It further stipulated that the judgment should contain a finding that the corporations named are sureties for the principals, as alleged in the petition, and liable as such for the amount adjudged due, and, further, "that the undersigned will at once pay said judgment and shall be entitled to receive from the plaintiff an assignment thereof or satisfaction, as desired or preferred." Judgment was entered in accordance with this stipulation, and was paid by the corporation defendants.

The petition alleges that on the 30th of November, 1909, a transcript of this judgment was filed in the office of the district clerk of Otoe county, and that on or about December 10, 1909, an execution was issued thereon and placed in the hands of the sheriff of that county which he is threatening to levy. The essential allegations are that the district court for Lancaster county had no jurisdiction of the person of the plaintiff nor of the subject matter of the action; that the individual amount of his liability was not within the issues, and was not adjudicated nor determined, nor was any evidence offered or taken bearing upon this question, and the court had no power to apportion the damages; that the principal defendants were residents of other counties than Lancaster; that neither of the corporation defendants were residents of Lancaster county; that the cause of action did not arise in that county; that the service on the corporations was by serving the auditor of state and the general agents of the corporations for Lancaster county; that the plaintiff did not appear in the action, and did not consent to nor authorize any judgment to be rendered against him; that he has a meritorious defense to the cause of action, in that he was not guilty of

any of the wrongs charged against him; and he further pleads that the judgment has been paid and satisfied; that the plaintiff has no interest nor claim in the same, but that the corporation defendants are causing and directing the sheriff to levy the writ.

1. We will first consider the question of jurisdiction of the person. Plaintiff contends that the service of a summons in a county where a suit is brought upon a nominal defendant merely does not confer authority to issue a summons to another county for a real defendant. Several pages of brief are devoted to arguing this proposition. If the facts brought the case within his premises his conclusion would be unassailable. Unfortunately for this contention this court has already decided that the surety upon a saloon-keeper's bond is not merely "a nominal defendant." In *Horst v. Lewis*, 71 Neb. 365, it is held that licensed liquor dealers and their sureties are jointly and severally liable. In that case the action was brought in Madison county, where two of the defendants and their sureties resided and were served, and a summons was issued to Platte county, where one Smith, another defendant, and his sureties were served. Objection was taken to the jurisdiction of the court over Smith and his bondsmen on the ground that the service was unauthorized, and each of the principals and his sureties separately excepted for misjoinder of causes of action and of parties defendant. The court held that "the attitude of licensed liquor dealers toward each other and the public is analogous to that of mutual guarantors, each for all and all for each;" and, speaking of the sureties, said: "But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were

properly served in any county in the state to which a summons was issued." *Penney v. Bryant,* 70 Neb. 127; *Wood v. Carter,* 67 Neb. 133. We think the service on the sureties in one county warranted the service on the other defendants in other counties.

2. As to the contentions that the judgment is void because it apportions the liability of plaintiff, that it was rendered without evidence, and that it exceeds the amount of plaintiff's liability, the proceedings were clearly irregular as to the plaintiff in these respects, but these irregularities he was entitled to object to at the trial and to have reviewed on appeal. This was his proper and legal remedy, and one which was entirely adequate. He had no right to remain quiescent, to allow the judgment to go against him, and then to seek to have the errors reviewed collaterally by attempting to enjoin the enforcement of the judgment. The facts in this case differ materially from those in the cases cited by the plaintiff. Moreover, the mere fact that the plaintiff neglected to appear and defend for the reason that he was under the impression that the court had no jurisdiction cannot relieve him from the consequences of his failure to protect his interest. To hold otherwise would be to open the door to endless litigation.

3. Attached to the petition in the present suit as an exhibit is a paper entitled *"Thompson v. Prenica et al.,"* certifying that the plaintiff therein has received from the three surety companies (naming them) the sum of $2,000, and reciting that, "in consideration whereof, I hereby acknowledge full and complete satisfaction of said judgment, and hereby direct that the clerk of the district court of Lancaster county, Nebraska, enter this satisfaction on record in his office in the proper records. (Signed) Laura Thompson, plaintiff."

The remaining question is whether the payment of the judgment by the sureties without taking an assignment of it extinguishes their right to an execution thereon against the principal. The rule in equity is that, where a surety

pays a judgment on behalf of his principal, the judgment is not thereby extinguished as between the principal and the surety, but the surety is entitled to enforce the same against his principal for his own benefit. The law upon the subject of subrogation has been considered by this court in the case of *Eaton v. Lambert,* 1 Neb. 339; *Wilson v. Burney,* 8 Neb. 39; *Potvin v. Meyers,* 27 Neb. 749; *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685; *Nelson v. Webster,* 72 Neb. 332. In the latter case the surety had paid the judgment, but had taken an assignment of it from the creditor. In a case where an issue has been made as to the relation of principal and surety between the parties, and a judgment establishing such relation has been rendered, does the fact that no assignment of the judgment has been taken by the surety render the payment an absolute extinguishment and satisfaction of the same against his principal? The authorities seem to be almost unanimous that in equity a surety paying a judgment against himself and his principal is entitled to be subrogated to the rights of the original creditor, and to have the judgment assigned to him or to some one else for his benefit. See 37 Cyc. 419, and note, in which cases from many states are collected. This is an action in equity, which regards that as done which ought to be done, hence the greater equities in this matter are with the sureties, and the plaintiff is not entitled to an injunction upon the facts alleged.

We are of opinion that the petition fails to state a cause of action, and that the district court erred in overruling the demurrer to the petition. The judgment of the district court is reversed and the cause remanded.

REVERSED.

STATE OF NEBRASKA, PLAINTIFF, V. WOODRUFF BALL ET AL., DEFENDANTS.

FILED NOVEMBER 28, 1911. No. 16,050.

1. **Public Lands:** SCHOOL LANDS: TITLE. Upon the approval by the federal government of a survey of the interior lines of a township, the state's title to section 36 vests absolutely.

2. **Boundaries:** LOCATION. Monuments erected by the government surveyor to mark the section corners according to his survey will control, although in conflict with his field notes. If the monuments have been obliterated, but their location can be ascertained from a consideration of the testimony of witnesses who know and testify to the fact, the site thus established will control. If the monuments have been destroyed and their original location cannot be established by other proof, recourse may be had to the field notes of the original survey.

3. ———: ———. Where the monuments which marked corners of the original survey are lost or obliterated and their original location cannot be established by other evidence, and the field notes returned by the government surveyor show that he established an interior section corner on a straight line between the exterior lines of the township and determined its location by courses and distances, the notes are to be accepted as presumptively correct, and can only be overcome by clear and satisfactory evidence that the corner was established at a point other than as thus described.

4. ———: ———: EVIDENCE. Proof that the government surveyor was careless or dishonest in the matter of other surveys, and that he probably made an error of one-half a mile in locating other section corners within the township, will not prevail over his field notes of the particular corner, corroborated by the testimony of one witness who testifies that within two years after the survey he discovered the disputed corner near the point where it should be according to the field notes, and that a corner about a half mile eastward, contended for as the section corner, was also discovered by him, but it bore all of the indications of a government quarter corner.

5. **Estoppel:** SCHOOL LANDS. Mere delay on the part of the state in asserting title to a disputed tract of school land will not bar its right to quiet title thereto.

6. ———: ———. Nor will the unauthorized acts of taxing officers in levying and collecting taxes upon such lands estop the state

from asserting its title, even though the sums collected have been appropriated to public use.

7. Boundaries: EVIDENCE. The evidence in this case commented upon in the opinion, and *held* to sustain the state's contention that the land in dispute is part of section 36, in township 30, range 32 west of the sixth P. M., in Cherry county, Nebraska.

ORIGINAL action by the state to quiet title to a certain tract of land. *Decree for plaintiff.*

Grant G. Martin, Attorney General, and *Frank E. Edgerton,* for plaintiff.

Baxter & Van Dusen, F. M. Tyrrell and *F. M. Walcott, contra.*

ROOT, J.

This is an original action to quiet in the plaintiff title to about 134 acres of land lying, as alleged, within the northwest quarter of section 36, in township 30 north, range 32 west of the sixth principal meridian, in Cherry county, Nebraska.

The plaintiff alleges that in November, 1882, the United States caused township 30 to be surveyed, and that on May 5, 1883, the surveyor general for the district of Iowa and Nebraska approved a plat of the survey, which had been theretofore filed in his office, whereby it acquired an absolute title to the land.

The defendant admits in his answer that the township was surveyed and the plat of the survey approved, but alleges that the survey was not in fact made according to the plat, but that by mistake the surveyor actually established the monuments of his survey on the ground so as to locate the west line of section 36, 33 chains and 11 links east of the true line of the section had the survey been correctly made; that the defendant filed on part of section 35 according to that survey, and that Mr. W. W. Ault, a government surveyor, under the authority of a special act of the congress of the United States, resurveyed the

township, and confirmed the McElroy survey, so far as it affected the defendant's land; that this survey was also approved by the surveyor general, and subsequently a patent was issued by the United States government to the defendant for this land.

As we understand the arguments of counsel, there is but little difference of opinion concerning the principles of law that should control the case. Independently of the defense of an alleged estoppel of the plaintiff to reclaim this land, should it be held that title ever vested in it, the parties substantially agree that if the "Ball corner," located 45 chains and 48½ links west of the northeast corner of section 36, is the site of the corner established in 1882 by McElroy, the government surveyor, as the northwest corner of the section, we should find for the defendant. We cannot, within the limits of this opinion, refer to all of the evidence upon this point, but something of its substance will be given.

In 1879 the exterior lines of the township were surveyed for the government by S. C. McElroy. In 1882 McElroy surveyed and subdivided the interior lines of the township, and in May, 1883, his plat of the survey was duly approved by the surveyor general. One witness testified that McElroy's field notes recite that he retraced the exterior lines of the township before commencing to survey the interior lines, but we have not discovered any evidence of this fact. Through sections 6, 5, 4, 3, 2, 11, and 12, the Snake river, a stream about four rods in width, runs eastward in a tortuous course, and across the southern tier of the sections the Boardman creek flows eastward approximately in the center of the Boardman marsh, which is about 23 chains wide, but does not extend to either the south line of the township or the northern boundary of the south tier of sections. Between the Boardman marsh and the Snake river the soil is sandy, and is partially covered with bunch grass, soap plants and other vegetation indigenous to the sandhills, but in many places is bare of all vegetation for spaces of from a few

square inches to much larger areas; the surface of the ground is broken by hills and numerous irregular shaped valleys and pockets.

The testimony of Mr. McElroy was not taken, nor does it appear where he resides, if in life. In 1897 a county surveyor, Mr. Tait, surveyed parts of the township, and came to the conclusion that the point where the Ball corner is located was the northwest corner of section 36, and made a plat demonstrating that all of the interior sections of the township were approximately one-half mile too far east. In 1898 Mr. Estabrook, then county surveyor, came to the conclusion that all of the interior corners were a half mile too far west. Subsequently Mr. Estabrook came to the conclusion that the asserted error of the government surveyor should be corrected in the eastern half of the township, and prepared and filed a plat accordingly. Honorable T. J. Howard accompanied Mr. McElroy at the time the interior lines were surveyed, and testifies in substance that the sections were surveyed in tiers north and south across the township, and monuments erected every mile and half mile; that the surveyors could not cross the Boardman marsh, but went around, first erecting a mound on the edge of the marsh, and then another mound on the other side, and the line was controlled by the surveyor in charge of the transit, who, by placing it on the higher elevations and using the back sight, kept the lines true; that the witness observed pits and mounds within the township, evidently constructed by other surveyors, but by whom he does not know.

Mr. Erickson, in 1884, filed on a homestead in the vicinity of the land in dispute, and within a year thereafter surveyed the north line of section 36 and prolonged the line westward for several miles. At this time, according to his testimony, the point now identified as the Ball corner had all of the indicia of a quarter corner—a stake with one pit to the east and another to the west. He also discovered the northwest corner of section 36 near the top of a hill. A small mound and four pits were there

visible; two of the pits were on top and two on the side of the hill, but those on the hillside were then nearly obliterated. This corner, the witness states, was "a long mile" west of the northeast corner of the section. He also testifies that he discovered government corners to the westward, with pits, mounds and marked stakes. This witness assisted Mr. Tait in making the survey which first recognized the corner, identified by the witness as the quarter corner, as the northwest corner of the section; a mound was raised and pits were dug by the chainman, under Tait's directions. No witness testifies that prior to this time there was any physical evidence that a government section corner had been located at this point. After this controversy arose, the earth was carefully removed for 10 feet in all directions from the stake and to a depth of several inches, and no evidence was obtained to prove that four pits had been dug in the soil. The outlines of a pit about two feet square were observed, but the area and location of this pit refute the conclusion that it could have been constructed by McElroy or by any other government surveyor. Erickson positively identifies this corner as a quarter corner. To accept the conclusion that it is the site of the northwest corner of the section as located by McElroy, we must reject Erickson's testimony, and accept, first, the conclusion that several of the McElroy corners have been located, and, second, that they are a half mile distant from the point where they should have been, and then conclude that this error was uniform throughout the survey of the interior of the township, and in consequence the Ball corner must have been the northwest corner of the section as located by Mr. McElroy.

In 1907 Harvey, the state surveyor, after removing the surface of the soil at a point approximately a mile west of the Ball corner, discovered the outlines of four pits so situated with respect to each other as to indicate that they were dug by a government surveyor, or by some person desiring to imitate the work of a government surveyor; one-half mile further westward the remains of a

red cedar stake was found, but no pits were discovered or other evidence found that pits had been dug; one-half mile further westward the outlines of four pits and an old red cedar stake were found; one-half mile further westward slivers of a red cedar stake were found and the outlines of two pits east and west; one mile further westward the remains of an old red cedar stake and two pits were found; about four miles northward from the point a mile west of the Ball corner, Mr. Ault, a deputy government surveyor, subsequently found what he contends is a government corner. At this point the outlines of four pits were visible and an iron rod protruded from the ground. This point is within a few chains of the corner common to sections 2, 3, 10, and 11 and to a bend in the Snake river, according to the calls in McElroy's field notes. This stream flows where it did in 1882, and, if this corner be accepted as a McElroy corner, it tends strongly to sustain an argument that it was located upon the ground a half mile east of the point where it should have been established. There is also evidence to the effect that, in 1886, a county surveyor, DeBerry, found government corners intact in the southwest part of the township, with stakes marked to indicate the section, town and range, and that settlers locating their claims according to his surveys located a half mile east of the true lines according to McElroy's field notes. There is also testimony of old settlers in the township to the effect that points in the interior of the township contended for by the defendant as government corners, but west of section 36, were such corners, and that they are a half mile east of the points described in McElroy's field notes. On the other hand, a diligent search did not disclose any section corners or evidence of section corners to the north and in line with the Ball corner; no one contends any such corners were ever seen. McElroy's field notes of the survey of the west line of section 36 corresponds closely with the field notes of that line run 18 years thereafter by Ault, and by Sweitzer 7 years after Ault's survey. In

all of these surveys the calls for the Boardman marsh and the Boardman creek create a strong probability that the lines were actually traced by McElroy along the western boundary of the section.

Mr. Sweitzer, government expert, and witness for the state, testifies that in his opinion McElroy did not locate the northwest corner of section 36, but the point where the witness plowed up and removed the surface of the soil, and where he says the McElroy field notes call for the corner, is on a sidehill. Mr. Erickson testifies that the section corner discovered by him was on a sidehill, and it is not unreasonable to believe that, during the 15 years intervening between the McElroy survey and Tait's survey, the action of the wind and the rain beating upon this hillside and the tramping of cattle have obliterated all the pits, so that even an expert might believe, after a careful investigation, that none were dug. The fact that McElroy erroneously located some of the interior section corners in another range of sections does not necessarily nor logically prove that the corner under consideration was erroneously located.

If the monuments erected by the government surveyor have been obliterated, and no witness can fix their original location, and the government surveyor's field notes returned to the surveyor general show that section lines were established on straight lines between the township corners and determine their location by courses and distances, the notes should be accepted as presumptively correct, and should only be overcome by clear and satisfactory evidence that the surveyor established the corners at other points. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 64 C. C. A. 180; *Hanson v. Township of Red Rock*, 4 S. Dak. 358; *Taylor v. Fomby*, 116 Ala. 621. Furthermore, the map returned and approved by the surveyor general gives the area of section 36 as over 638 acres; whereas, if the defendant's theory be accepted, the area will be diminished over 120 acres. In case of doubt or confusion, the quantity actually named in the

grant is entitled to some consideration. *Ely's Administrator v. United States,* 171 U. S. 220. The map, therefore, should be considered in connection with the field notes in fixing the quantity of land segregated as section 36. The line from the northeast corner of section 36 westward to the northwest corner of section 31 is 476.78 chains in length. There is nothing in the record to advise us that the deficiency of 3.22 chains was not allotted by Mr. McElroy to section 30, as the law provides. We do not feel like accepting any alleged corner on that line as the interior corner of any section west of section 36, so that the doctrine of proportionate measurements is not involved, and we feel at liberty to give to the government field notes such credence as we think proper.

From all of the evidence before us, we find that whatever mistake McElroy may have made in locating the interior section corners in township 30, the proof does not show that he made a mistake in locating the northwest corner of section 36; that the field notes returned to and approved by the surveyor general and the plat prepared by him, when considered in connection with the testimony of the witnesses, sustain the allegations in the petition, and require a decree in the plaintiff's favor, unless it is estopped to maintain this action.

We have not discovered any evidence tending to prove that the state induced the defendant to occupy any part of section 36. Before filing on section 35, but taking possession of part of 36, the defendant advised with his lawyer, went to the premises in company with Mr. Tait, and accepted his statement that the Ball corner was the northwest corner of 36. The defendant knew, or should have known, that no part of any deficiency of area in the township would be taken from this section if it were properly surveyed. The northeast, the southeast and the southwest corners of the section are visible in the township lines, and the field notes of Mr. McElroy's survey were of record. Mr. Ball made no inquiry of the commissioner of public lands and buildings, nor did he interview

the state's tenant, who was asserting a right to all of the section, and actually using the hay cut and cured on part of the disputed territory. There is no proof of facts sufficient to create an estoppel between individuals, much less against the sovereign state.

After the United States government issued a patent to the defendant for section 43 (the description given by surveyor Ault for the disputed territory) the taxing officers of Cherry county levied taxes thereon for state, school district and county purposes, and the defendant paid the taxes. These facts the defendant contends estop the state from asserting title to the real estate, and *People v. Hagadorn,* 104 N. Y. 516, is cited by him to sustain his contention. That case was controlled by a finding that a comptroller's deed to the state for lands sold for taxes, which were in part invalid, was void. In answer to an argument that the state might ignore the deed and assert title as the original proprietor, it is said that if the deed were void, the state having assumed to sell the land as the property of a citizen to satisfy his taxes, was precluded from asserting title as the original proprietor.

In this case the state has not sold or attempted to sell the land, nor does the defendant claim under it. The taxing officers are not vested with discretion to tax or refrain from taxing property within their respective jurisdictions. If they fail to levy taxes upon land subject to taxation, the levy may subsequently be made; if they levy taxes upon land not subject to taxation, the levy is void. They are not vested by law with power to perform any act which will estop the state from asserting title to the school lands, which it holds in trust for the benefit of all of the school children within its boundaries. This subject has been discussed and determined adversely to the defendant's contention in the following cases: *Crane v. Reeder,* 25 Mich. 303, 320; *Howard County v Bullis,* 49 Ia. 519; *Reid v. State,* 74 Ind. 252; *State v. Portsmouth Savings Bank,* 106 Ind. 435.

Upon a consideration of the entire record, we find generally for the plaintiff.

DECREE ACCORDINGLY.

FAWCETT, J., dissenting.

While I have been unable to reach the same conclusion as that reached by my associates *in re* the so-called "beer bottle" corner, I pass that point without discussion. The defense of estoppel, however, based upon the laches of the plaintiff, is in my judgment so clearly established that I cannot permit the majority opinion to go down without expressing my views upon that point.

From quite an early date, the corners of section 36 have been uncertain and the correctness of the original survey has been questioned in the neighborhood. Resurveys made by the government failed to relieve the situation of its uncertainty. The question as to whether or not the corners, as established by the original survey, were found by the surveyors making the resurveys is so uncertain that the boundary line between the lands of plaintiff and defendant has never been satisfactorily settled. As a result of the survey and resurveys, section 43 was established, and a patent issued to defendant in 1904 for the land in controversy, which he had entered in 1898. It appears from the undisputed evidence that when defendant made his homestead entry in 1898 he took possession of the land up to the boundary line as he understood and claimed it to be; that he continued in such possession for the full period of five years required by the homestead laws, and in 1904 received from the United States government a patent for the land of which he had been in possession for the prior five years, and which land is the land in controversy. As soon as the patent was issued to him, the land was, by the regular taxing officers of the state, assessed and taxed in his name as owner, and continued to be so assessed and taxed down to the commencement of the present suit. Such taxes were regularly paid by defendant. It appears, therefore, without dispute, that the defendant had been in posses-

sion of the land in controversy, under claim of ownership, for eleven years prior to the commencement of this suit, with full knowledge on the part of the state of his possession and claim of ownership under his homestead entry in 1898 and patent of 1904, and with the further knowledge on the part of the state that the land had, since 1904, been assessed and taxed to defendant as "section 43"; that he had regularly paid his taxes so levied, and that such taxes were annually accepted and used by the state. With knowledge of all of these facts, no attempt was ever made by the state to dispossess defendant of this land until it instituted the present suit in 1909. The mere fact that a lessee of the state may have questioned defendant's right to a portion of the land claimed by him, and one year hauled off and stacked some hay which defendant had cut thereon, cannot, in my judgment, in any manner operate to the advantage of the state, or be construed as an assertion by it of its right to the land claimed by and in the possession of defendant. Nor should the fact that defendant permitted the taking of his hay by such lessee, and thereby possibly avoided litigation over something that was probably of little value, be taken as any relinquishment by defendant of his claim. Nor is it material that, if defendant succeeds in holding the land, section 36 may be "short." The land obtained by the state under its grant from the government was "section 36," as shown by the first approved government survey, and was limited to the number of acres which it actually contained, whether that number were 640 acres or a less quantity. That the government did not at the time regard the land in controversy as a part of section 36 is evidenced by the fact of its establishment of section 43 and the issuance to defendant of a patent therefor. While I freely concede that, as against the state in the exercise of any of its governmental functions, there can be no estoppel, I am unable to see why, in a suit in equity or an action at law for the enforcement or protection of a mere property right, the state is not as

much subject to the doctrine of estoppel as is any other litigant. The authorities so hold. *State v. Lincoln Street R. Co.*, 80 Neb. 333; *United States v. Stinson*, 125 Fed. 907; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25; *Walker v. United States*, 139 Fed. 409; *Bullis v. Noble*, 36 Ia. 618; *City of Peoria v. Central Nat. Bank*, 224 Ill. 43; *United States v. Willamette Valley & C. M. Wagon Road Co.*, 55 Fed. 711; Cooley, Constitutional Limitations (5th ed.) *254; *State v. Flint & P. M. R. Co.*, 89 Mich. 481; *Simplot v. City of Dubuque*, 49 Ia. 630. And this, too, without reference to the statute of limitations. *State v. City of Des Moines*, 96 Ia. 521.

It is urged by the attorney general that defendant knew that the state was leasing "this land" to Rowley and Bachelor, and that the public records at Lincoln and in Cherry county showed it. I do not think so. What those records showed, and what defendant would thereby be bound to know, was that the state had leased to those gentlemen "section 36"; but those records would not advise him that the state was claiming that *his land* was *in* section 36. He certainly would have no reason to think so from those records, when he had in his possession a patent from the United States government which showed that the land he claimed was in section 43.

How long would a similar case stand if the plaintiff were an individual or a private corporation, instead of the state? To illustrate: Smith owns a large tract of land. He donates a portion of it to an irrigation company incorporated under the laws of the state. The company digs its ditches, and has the water flowing therein, through not only the land which it receives from Smith, but also through adjoining lands which still belong to Smith. Subsequently Smith sells the adjoining land to Jones on a five-year contract, which provides, as a condition for Jones' obtaining a deed from Smith, that Jones must pay Smith $14 (the amount which defendant paid for his homestead), and actually reside upon the land for the five years specified in the contract. There is a

dispute as to the boundary line between the land donated to the irrigation company and that conveyed to Jones. Jones immediately takes possession of the land up to the boundary line as he claims it to be. He retains such occupancy of, and maintains his residence upon, the land for the full period of the five years specified in his contract with Smith. Smith thereupon executes and delivers to him a warranty deed for the land. The irrigation company immediately demands of Jones that he pay to the irrigation company a dollar a year for the upkeep of the ditch which goes through the land he is claiming to own. Jones pays the dollar a year to the irrigation company each year for five years thereafter. During all of this period of more than ten years that Jones has been in possession, the irrigation company takes no steps to dispossess him of that portion of the land which it claims is within the limits of its grant from Smith, but after the lapse of those years it brings a suit against Jones to quiet its title to and for the possession of the land in dispute. How long would the case of the irrigation company last in this court? Just long enough for us to write a short opinion dismissing its suit upon the ground that by its own gross laches it is estopped to question either the title or right of possession of Jones. The case thus outlined is in all respects a twin brother of the case decided in the majority opinion.

In *United States v. Chandler-Dunbar Water Power Co., supra* (p. 40) it is said: "Following the ancient common law maxim *'nullum tempus occurrit regi,'* it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But, when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties."

To my mind it would be an act of injustice to take this land from the defendant and give it to the state. If the

state had been prompt in the assertion of its claim in 1898, when defendant entered the land and took possession of it, and had then ousted him, he could have obtained other land by homestead entry, or have purchased the same at a price far less than that at which he could possibly obtain it now, and could have devoted his 13 years of energy and labor to the improvement of the same. I cannot give my consent to such confiscation on the part of the state.

REESE, C. J., concurs in this dissent.

WILLIAM R. BENNETT ET AL., APPELLEES, V. JAMES E. BAUM ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,484.

1. Appeal: PLEADING: MOTION TO MAKE DEFINITE. An order of the district court requiring defendants to make their answer more definite and certain will ordinarily be sustained, unless it clearly appears that thereby the court abused its discretion to the defendants' prejudice.

2. Exceptions, Bill of: SETTLEMENT BY REFEREE. A referee has sole authority to settle and allow a bill of exceptions of the evidence adduced during the trial before him.

3. Reference: POWER OF COURT. Section 299 of the code, among other things, authorizes the district court without the consent of the parties to refer issues of fact or of law in equitable actions where it becomes necessary to examine mutual accounts, or where the account is on one side and it is necessary to examine the party to that side to prove the account, or where the taking of an account is necessary for the information of the court before judgment.

4. ———: PROCEDURE. And in such a case it is not jurisdictional that the court shall first enter an interlocutory order that either party is entitled to an accounting.

5. Corporations: INCREASE OF STOCK: RIGHTS OF STOCKHOLDERS. The power of a corporation to increase its capital stock is held by it in trust for its stockholders and should be exercised so that every

stockholder may, within a reasonable time after notice of such increase, subscribe for the increased issue in proportion to his prior holding.

6. ———: SUITS BETWEEN STOCKHOLDERS: EQUITABLE RELIEF. Where all of the stockholders of a corporation and the corporation are before a court of general jurisdiction in an equitable action involving the rights of the stockholders in the corporation, the law looks to substance rather than to form, and, if the rights of third persons will not be prejudiced thereby, and the pleadings and evidence justify, will apply the rules of equitable estoppel to prevent one stockholder from doing an injustice to another.

7. Contracts: CONSIDERATION. All of the parts of the transaction will be considered to ascertain whether a consideration sustains a contract.

8. Corporations: REINCORPORATION: ESTOPPEL. Where, after A agrees, upon a lawful and sufficient consideration, to organize a corporation, transfer to it definitely described chattels and real estate, and give to B one-fifth part of its capital stock, the attempted incorporation is found to be invalid, or A believes it to be invalid and reincorporates, transferring to the subsequent corporation all of the property held by the first, and B with knowledge of the fact exchanges stock issued by the simulated for that of the second corporation and retains it for two years without question or objection, and A changes his position in reliance upon the validity of the latter corporation, B is estopped from asserting that the first one is legal and the subsequent one illegal.

9. Judgment: PLEADING AND PROOF. Unless the allegations and the proofs agree, or the record discloses that the litigants tried an issue as though it were joined by the pleadings, so much of a decree as does not respond to the admissions in or issues joined by the pleadings cannot be sustained.

10. Appeal: AMENDMENT TO CONFORM TO PROOF. Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on an appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof.

11. Reference: ALLOWANCE TO REFEREE. In an action involving an accounting of the business affairs of a corporation which for four years transacted an annual business of about $2,000,000, and owned net assets of the value of $572,392, where a lawyer of great experience and high standing at the bar acts as referee and the hearing continues eight months, a fee of $7,500, allowed by the

district court upon undisputed evidence that the services were worth $10,000, will not be reduced on appeal.

12. Costs. And in such an action, where the plaintiffs are given partial but substantial relief, and it appears just that the costs should have had been taxed in the district court against the corporation in whose name the title to the property over which the parties are contending is vested, an order to that effect will not be disturbed on appeal.

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

John J. Sullivan and *Baldrige, De Bord & Fradenburg,* for appellants.

John F. Stout, E. C. Strode and *W. S. Summers,* contra.

ROOT, J.

This is an action in equity to compel the defendants Baum to account for the property and profits of a corporation, to declare dividends upon the plaintiffs' stock, for the appointment of a receiver, and for equitable relief. The plaintiffs prevailed in part, and the defendants appeal.

In making up the issues, the district court sustained plaintiffs' motion to make the answer more definite and certain. In this we think no substantial injury was inflicted upon the defendants, and shall give the subject no further consideration.

After the issues were joined, the court, upon the plaintiffs' motion, appointed William Baird, Esquire, a reputable, experienced member of the bar, as a referee to take testimony and to report to the court findings of fact and conclusions of law. This was done. The defendants' exceptions to parts of the report were overruled by the district court and the report was confirmed.

The plaintiffs move to quash the bill of exceptions because it was settled and allowed by the referee, and not

by the judge. It is evident that all of the evidence was introduced before the referee, and that the district court acted solely upon the report of that officer. The referee should settle the bill. Code, sec. 303. The plaintiffs' contention has been repeatedly raised and uniformly overruled in other cases in the same plight as the instant one, and the question should no longer be considered subject to discussion. *Light v. Kennard,* 10 Neb. 330; *Turner v. Turner,* 12 Neb. 161; *State v. Gaslin,* 30 Neb. 651; *Whalen v. Brennan,* 34 Neb. 129; *Carlson v. Beckman,* 35 Neb. 392; *Disbrow & Co. v. McNish,* 52 Neb. 309. The motion is overruled. The other questions of law grow out of the facts, which we shall state and comment upon as concisely as the record will justify. The referee made elaborate findings of fact, many of which are not challanged by the defendants, yet for a proper understanding of the case some of them should be referred to in this opinion.

For 23 years prior to 1901 Samuel F. Bennett and his associates, either as partners or the members of a corporation, were engaged in a profitable retail mercantile business on Capital avenue in the city of Omaha. The business had been advertised consistently and extensively, and the corporation was well and favorably known to its customers. In the spring of 1901 the W. R. Bennett Building Company, a corporation controlled by W. R. Bennett and S. F. Bennett, purchased lots 1 and 2 and the east two-thirds of lot 3, all in block 146 in the city of Omaha, and lot 5 in that block. Upon the first described tract, which is located at the corner of Sixteenth and Harney streets, a substantial five-story building was constructed and prepared for a department store; on the last described lot a barn was built. The W. R. Bennett Company, a corporation which controlled the mercantile establishment on Capital avenue, moved its merchandise into the new building at Sixteenth and Harney streets, and transacted business therein until December, 1902, or January, 1903. During these months, the exact date being immaterial, the W. R. Bennett Company was duly de-

clared a bankrupt by a judgment of the district court of the United States for the district of Nebraska. Either W. R. Bennett or S. F. Bennett, or both of them, interested J. E. Baum and D. A. Baum, wealthy ironmasters of Omaha, in the Bennett business to the extent that the Baums agreed to try and effect a composition with the Bennett creditors so that the business might continue; but these negotiations failed. At the time this cause was tried S. F. Bennett had departed this life. The evidence is not clear concerning the negotiations leading up to the execution of the contract upon which the plaintiffs rest their case. Probably the fact that the agreement is in writing influenced counsel to adopt the theory that inquiry should proceed from the date of its execution. However, there is sufficient evidence to justify the conclusion that Mr. S. F. Bennett, who was also adjudged a bankrupt, desired to save something from the wreck of his fortune, and that he believed the business could be profitably continued by the Baums in company with himself. At any rate, the Baums purchased at trustee's sale for about $80,000 all of the assets of the W. R. Bennett Company, including a stock of merchandise which invoiced at $140,000, and demands against the W. R. Bennett Building Company aggregating $184,000, of which $84,000 was evidenced by an open account, the balance by promissory notes. This sale was confirmed by the court during the forenoon of February 23, 1903, and immediately thereafter a special meeting of the stockholders of the W. R. Bennett Building Company was held in the office of its counsel, all of the stockholders being present in person or by proxy, and the directors were then authorized to transfer all of its assets, which consisted exclusively of real estate, to the defendant J. E. Baum for the alleged consideration that the Baums should cancel the $84,000 book account purchased by them. The deed was thereupon executed and the account canceled. About 6 o'clock P. M. of that day J. E. Baum signed and delivered to S. F. Bennett the following writing: "To S. F. Bennett, N.

E. Bennett, Jennie S. Brown and Mary L. Wade: In consideration of the transfer to the undersigned of all the real estate of the W. R. Bennett Building Company, I hereby agree to form a corporation and transfer to it all of the property rights, assets and claims of every kind and nature of the W. R. Bennett Company which I have acquired by purchase at trustee's sale in bankruptcy proceedings, and of the W. R. Bennett Building Company which I have acquired by conveyance from the said company in exchange for the entire issue of the corporate stock of the new corporation to be formed; and that upon the said stock being issued to me, I will transfer to you the one-fifth part of all the said issue of said corporate stock of the new corporation; the said shares to be issued to you jointly or severally in such proportion as you may in writing designate. J. E. Baum." During the evening of that day, or of some other day in close proximity thereto, the evidence being contradictory as to the precise date, the Baums, the Bennetts and Dr. Brown of Lincoln, husband of Jennie S. Brown, discussed the position that the Bennetts should occupy in the new corporation and the salaries to be paid them. After considerable negotiations, it was agreed that S. F. Bennett should be paid $100 a month, and W. R. Bennett should receive $3,000 per annum and should be the manager of the departments. The term of his employment was not named. W. R. Bennett prepared a written memorandum which he produced at that meeting. It is as follows:

"REORGANIZATION.

Name.—The Bennett Co.
Composed of J. E. Baum, D. A. Baum, W. R. B.
" "
Life of corporation.
Capital Stock (Com.
Made up of—
One-fifth (1-5) of total capital, to W. R. B., or order
fully paid—

Additional Stock issued.
Privilege to W. R. B. or associates to buy 1-5 of new stock & pay for same in cash or note.
No stock to be sold without first giving present stockholders opportunity to buy—
Position W. R. B. to hold
Salary " " have
Length of contract, etc.
Position of S. F. B.
Salary " "
Length of position
Release of lot 5, Reed's 2d to C. S. Bennett estate
Consideration being equity, name, & good will."

The Baums testify that this memorandum, which was not signed, was produced at a meeting held before the contract was made. W. R. Bennett testifies the meeting was held the night of the day the contract was signed. We do not consider the date material, but incline to the view that the memorandum casts some light upon a subject which we shall subsequently discuss. The first of April, 1903, the Baums opened the department store, and thenceforward until the month of October, 1903, continued the business under the name of the Bennett Company. During this month the Baums incorporated, or sought to incorporate, two corporations, under the laws of Delaware. One, under the name of the Bennett Company, had an authorized capital of $80,000, and no provision was made in the articles for amendments. The certificates of stock were not issued until March, 1904. The property purchased at trustee's sale, less so much as had been sold and plus all increments, was transferred to the Bennett Company in consideration for its capital stock, of which one-fifth part was issued to R. S. Hall, as trustee for the Bennetts. We have discovered no evidence to instruct us concerning the nature of this trust. The other corporation was described as the Baum Building & Realty Company. Its capital stock is $20,000, and 40 shares were issued to Mr. Hall, as trustee. The legal

title to the real estate conveyed by the W. R. Bennett Building Company to Mr. Baum was not transferred to the corporation; but a written proposition made by him to it that he would transfer title to the real estate in consideration for all of its capital stock was accepted. Mr. Baum testifies that he retained the title because a debt secured by mortgage on the property having matured, he could not secure a new loan at a reasonable rate of interest in the corporate name, but was compelled to sign the notes and therefore retained title as indemnity should he be compelled to pay any part of the debt.

S. F. Bennett and his associates did not control sufficient capital to stock all of the departments in the store, so they leased many of them to individuals. The Baums, as rapidly as these leases expired and conditions were favorable, purchased in the name of the Bennett Company merchandise and stocked these departments. The Baums reorganized the scheme of business, financial and otherwise, economized in many ways, and increased the gross sales and the net profits so that in 1907, when this suit was commenced, they employed 14 buyers and from 400 to 500 clerks, and the gross annual sales of the combined departments exceeded $2,000,000, upon which a considerable profit was made. The Baums enjoyed high credit and borrowed large sums of money which were used to extend and carry on the business of the Bennett Company. At the same time, they operated the Baum Iron Works and the New Paddock-Hawley Company, corporations owning and controlling valuable properties, and engaged in great business enterprises. The Baums, with the exception of a Mr. Virden, who resided in Delaware and held but one share of stock, were the sole directors and controlled the corporate affairs of the Bennett Company and of the Baum Building & Realty Company as absolutely as though they individually owned all of the assets of those corporations. The Baums maintained no private bank accounts, but all of their bills were paid by the Bennett Company, and their

private funds were deposited in the Bennett Company bank account. Likewise they paid for private investments by checking on that account, but their personal accounts in the books of the Bennett Company were charged for the money thus paid. They also purchased two valuable tracts of Omaha real estate, taking the title in the name of one of the Baums, and paying therefor out of the Bennett Company funds. The entries in the Bennett Company's books tend to prove that the corporation is the beneficial owner of this property. They also carried on the books of the Bennett Company accounts with the several corporations controlled by them. At times these corporations would be creditors of the Bennett Company and at times were its debtors. That is to say, the credits of the several corporations would be massed for the benefit of one at times when that credit was most needed by the debtor company, and at times the Baums individually profited by temporary credits on the books of the Bennett Company. On the other hand, the Bennett Company was indebted at times in large sums to the Baums, and to their several corporations. In the summer of 1904 the Baums submitted to their counsel, Mr. Charlton, the articles of incorporation of the Bennett Company and of the Baum Building & Realty Company, and were advised by him that the incorporations were so defective that it was not safe to continue transacting business in this manner. Whereupon two corporations were formed with names identical with those of the original corporations, or simulated corporations, but the capital stock of the Bennett Company was fixed at $200,000 instead of $80,000, and the amount of capital stock of the Baum Building & Realty Company was also increased. The stock of each corporation was divided into common and preferred. All of the stock of the old corporations was called in and exchanged for an equal amount of the new corporations' common stock. There then remained $120,000 of stock of the Bennett Company, one-half of

which was treated as treasury stock, and the remainder was not issued. We do not consider further consideration of the Building Company stock material, and will devote our attention to that of the Bennett Company.

On August 8, 1905, the directors of the Bennett Company by resolution ordered that $40,000 of preferred and $20,000 of common stock of the Bennett Company should be issued and sold at par, plus 6 per cent. annual interest from January, 1904, and the stockholders were given until August 19 in which to subscribe therefor. August 14 written notice was sent to those interested in the Bennett stock and to the trustee that they had until the 19th of the month to subscribe for their *pro rata* share of this stock. They did not subscribe, and the 600 shares were issued, one-half to J. E. Baum and the other half to D. A. Baum. We are of opinion that the plaintiffs from any standpoint have cause for complaint concerning this conduct of the Baums in giving them so short a time within which to subscribe and pay for this stock. *Jones v. Morrison,* 31 Minn. 140. Moreover, there is evidence tending strongly to prove that the Baums issued all of the stock to themselves before the 19th of August. No attempt was made to ascertain the net worth of the corporation at this time, or to offer for sale or to sell the additional stock at the premium it should bear in order that its contribution might equal the value of property represented by the $80,000 original stock. In April, 1903, the $80,000 purchased not only $140,000 worth of merchandise, but the equity in the real estate formerly owned by the W. R. Bennett Building Company. The proof shows that this real estate increased rapidly in value in the meantime, and that the affairs of the Bennett Company had been prosperous, so that the stock should have been worth, and in all probability was worth, much more than par. By acquiring this stock at a trifle above par, the Baums, controlling directors of the corporation, participated in the surplus which should have been credited to the $80,000 and depreciated the

value of all of the stock held by Hall, trustee. The referee was therefore right in finding that this issue of stock should be canceled. *Jones v. Morrison, supra.*

Although the Baums subscribed for this stock, they paid no money therefor, but it was charged to their account. Subsequently the certificates were canceled and new ones in like amounts issued to the Baum Iron Company and to the New Paddock-Hawley Company. The defendants Baum contend that, since those transferees are not parties to this action, the decree directing the cancelation of this stock is void and should not be sustained. Those corporations are not parties to this record, but the evidence is uncontradicted that the Baums control them and own practically all of their capital stock. The Baums will have no trouble in satisfying any demands that may be made by the other stockholders of those corporations for any profits lost by the cancelation of this stock. The referee, with the assistance of the expert accountants, made findings which cover the state of the accounts between the Bennett Company, on the one hand, and the Baums and their various corporations, on the other. The referee found that there were errors in the accounts in the books of the Bennett Company and corrected them. We do not understand that the experts and counsel for the respective litigants dispute the conclusions of the referee upon this phase of the case, and further consideration will not be given thereto.

It is urged that no account should have been taken, because the books were open for the plaintiffs' inspection, that the Baums were willing to submit a detailed statement of the condition of the corporation's business, that none of the allegations of fraud charged against the defendants were found true, and because no interlocutory order was made that the plaintiffs were entitled to an accounting. Upon the last point the arguments made and the authorities cited would be more relevant in a jurisdiction where the ancient action of account is

recognized and its procedure adhered to; but in Nebraska section 299 of the code authorizes a reference without the consent of the parties in equitable actions where the trial of an issue of fact requires the examination of mutual accounts, where an account on one side must be considered in connection with the testimony of the party to that side, or where the taking of an account is necessary for the information of the court before judgment. The code does not require an interlocutory order that either litigant is entitled to an accounting with the other, as a condition precedent to the reference. The code was enacted to simplify legal procedure and eliminate unnecessary ceremony. Doubtless, if the litigants do not admit a state of facts entitling one or the other to an account, the court might properly try the issues until it appeared from the evidence that an accounting was necessary and then make its order, but such a course is not necessary in every case. In the instant one the defendants were in control as directors of a corporation owning great quantities of personal property and transacting a vast business. Owning 80 per cent. of the capital stock, the Baums could not be ousted from complete control. They had not called or held a stockholders' meeting for years, and in effect refused to inform the plaintiffs, minority stockholders, concerning the condition of the corporation's property and its business affairs. The entries in the corporation's books of account were such that no one other than an expert, aided by an inspection of documents independent of the books and in the defendants' possession, could ascertain the condition of the corporation's business, and the defendants refused to permit the plaintiffs to put an expert at work on the books. Although the defendants at no time absolutely refused to give the plaintiffs a statement of the condition of the corporation's business and property, they did not furnish it. Frequently importuned, they promised, but did not perform, although a monthly trial balance was taken and semiannually a complete inven-

tory of all the assets of the corporation was made. There is some conflict in the testimony concerning what was said and agreed to at the last conference at Mr. Baum's house a few weeks preceding the commencement of the action, and the plaintiffs are charged with bad faith in not abiding by the alleged agreement of their counsel. We are satisfied that Mr. W. R. Bennett was angry at the Baums because he had been supplanted by Mr. Schantz, and that he may be responsible in a way for the commencement of this action. We are also satisfied that the Baums were not preparing the statement, but were pursuing their wonted course. The real estate which Baum agreed to transfer to the corporation was valued on the books of the Bennett Company at $79,291.17, whereas the referee found that in December, 1907, the net value was $340,823. There were errors in the entries in the books aggregating about $150,000, not false entries, but erroneous ones, some of which balanced other errors of like amount. Not all of the accounts were self-explanatory. In short, the condition of the books was such that it was absolutely necessary to interrogate the Baums with regard thereto in order that the district court might enter a judgment which would do justice to all of the parties. We therefore conclude that no error was committed in referring the case.

Complaint is made that the trial was unduly prolonged, whereby great expense was incurred, which should be taxed to the plaintiffs instead of to the Bennett Company. Considerable evidence adduced might have been omitted without depriving the court of knowledge of all of the material facts; many of counsels' suggestions and some of the referee's remarks, all of which are recorded, might have been eliminated without prejudice to the rights of either litigant. The parties seem to have been unduly suspicious of each other and aggressively active in attempting to exclude evidence. As it is, all of the corporation's transactions were minutely examined, and much testimony was given to explain

the entries in the books. We are not inclined to disturb the taxation of costs entered by the district court.

Nor do we consider the referee's fee unduly extravagant. The referee devoted about eight months to the taking of testimony and several other months to a consideration of the evidence. The referee's affidavit that $10,000 is a reasonable fee for his services is not controverted by any evidence, written or oral, so that the allowance of $7,500 will not be disturbed by us.

As we understand the record and arguments, the Baums' most serious contentions are that the district court erred in adopting the referee's recommendation that the corporation organized in the summer of 1904 is illegal and its capital stock should be canceled; that the first incorporation, or attempted incorporation, in 1903 is legal and should control, and in enjoining an increase of its capital stock. To us it seems immaterial whether or not the first corporation was legally organized. Practically all of the stock of these corporations is held or controlled by the plaintiffs and by whomsoever succeeded to the interests of Richard Hall, as trustee, on the one side, and by the defendants Baum, on the other. The litigants are in a court of equity, which looks to substance rather than to form. We incline in part to the view of the defendants' counsel that the plaintiffs and their trustee by long acquiescence in the validity of the second corporation ratified the reincorporation. Mr. Hall testifies that, when requested by the Baums to exchange the stock first issued for that of the second corporation, he consulted with Mr. Bennett, and it was agreed that the exchange should be made on the theory that the first incorporation was defective. No objections were raised and no attack was made upon the validity of the second incorporation until at least subsequent to the commencement of taking testimony in this case. In fact, we find no allegation in the petition to sustain the charges made in the briefs, or the findings of the referee that the second incorporation is invalid

and an attempted amendment of the original incorporation. Assuming that the litigants by the introduction of evidence have imported these subjects into the issues, we do not hesitate to say that the plaintiffs are estopped at this late day to insist that the first incorporation was valid, and the second one invalid, because its articles are amendatory of the former and the articles first adopted do not provide for amendments. It was certainly understood by all of the parties in interest that the first articles of incorporation and the corporation itself should be abandoned and the second articles accepted in substitution of the former. We do not assume to say that the state of Delaware may not by proper action dissolve the second corporation; but we do say that, the parties in interest other than that state being before us, we will apply the well-known rules of equitable estoppel to prevent one litigant from working an injustice to the other. It follows, however, that if, as the defendants argue, the second corporation, whether original or amendatory of the first, was the first compliance with the Baums' agreement to form a corporation, they should transfer to the Bennetts one-fifth part of its capital stock, and the plaintiffs should be permitted to amend their petition so as to sustain a decree for a specific performance of the contract. In that event, the Baums should be permitted to issue to themselves without further consideration the remaining four-fifths of that stock. The assets transferred by them to the corporation are worth more than $200,000, and justice requires they should be thus protected. The proof does not warrant us in holding that Mr. Hall knew before the exchange was made that the capital stock of the second corporation exceeded that of the first. We are unable to agree with the plaintiffs that they should share in every subsequent increase of the capital stock without paying therefor. The contract does not so provide, nor is there anything in the record tending to prove that such an agreement was in the contemplation of the parties.

Rather the written memorandum, prepared by W. R. Bennett and subsequently produced at the dinner when the salaries to be paid to S. F. Bennett and to himself were discussed, contains an item to the effect that the Bennetts should have the privilege of subscribing for a *pro rata* share of any additional stock issued by the corporation, and might pay by note or in cash therefor. While these provisions do not appear in the contract, the memorandum is more convincing than counsels' argument concerning the intent of the parties, if that should be considered a controlling factor. The proof is clear that the Bennett Company incurred a large indebtedness to increase and successfully carry on its business, and that the Baums or the other corporations which they control are also liable for those debts. It is not just to require these sureties to lend their credit gratis to float that indebtedness and at the same time prevent the corporation from increasing and selling to the best advantage its capital stock to raise money wherewith to liquidate that debt or some considerable part thereof. Of course, the existing stockholders should be given a reasonable opportunity to subscribe and pay for their *pro rata* share of this stock before an attempt is made to sell it to outsiders, and five days' notice we do not consider reasonable.

The defendants complain that there is no allegation in the petition to justify so much of the decree as quiets in the Bennett Company title to the real estate acquired by Mr. J. E. Baum from the W. R. Bennett Building Company, and we think there is merit in the contention. There are general charges in the petition that the Baums fraudulently diverted and converted the assets of the Bennett Company, but the referee specifically found that the proof did not sustain these charges. This finding is not excepted to and must be considered unimpeachable evidence of the fact. It seems to us that the Bennett Company should receive the legal title to the real estate described in the referee's findings; but there should be

allegations in the pleadings to sustain this part of the decree. We have not overlooked the principle of law which requires the stockholder, as a condition precedent to prosecuting a suit to reclaim for the benefit of the corporation its assets, to request those in charge of its affairs to commence the suit; but, in the light of all of the facts in this case, we shall not apply it. We have been impressed with the crying necessity of terminating this litigation in such a manner as to dispose of all the contentions of the interested parties, and shall endeavor to do so.

The Baum Building & Realty Company, in consideration for the Baums' agreement to transfer to it all of the real estate acquired by them from the W. R. Bennett Building Company, issued to them all of its capital stock; but the Baums did not transfer the legal title to the real estate. In so far as this stock, or that of its successor, may be in the hands of persons not parties to this litigation, it is controlled by the defendants Baum and was received with full notice of all of the plaintiff's equities, so that if it is lawful and just to sustain the referee's findings and the court's decree, quieting the title to the real estate in the Bennett Company, we should not hesitate to affirm that judgment, because of the alleged nonjoinder of parties defendant. The Bennetts and Mr. Hall, their trustee, accepted the Building & Realty Company's stock under the circumstances surrounding them when Mr. Hall accepted the stock of the Bennett Company; but we do not think the principles of estoppel apply with equal force to both transactions. The Building & Realty Company was created for the sole purpose of holding the title to this real estate for the benefit of the Bennett Company; it did not incur indebtedness on the strength of the reincorporation, nor do we think that the Baums will be prejudiced by consolidating in the Bennett Company title to all of the real estate of which it is the equitable owner. We can understand that it may have been wise to permit Baum and the Building &

Realty Company to hold the naked legal title to the real estate, carrying the net value of those properties on the books of the Bennett Company, as part of its assets, and thereby enable the Bennett Company to make a showing of net worth without exposing its liability for the incumbrances upon the real estate; but, while the net value of this real estate seems to have been and to be constantly and rapidly increasing, the Baums enter only about one-fifth of that value on the Bennett Company books, so that, should the plaintiffs desire to sell their stock, they will be greatly prejudiced by a condition which will create in the mind of an investor doubt concerning the actual interest which the Bennett Company has in that valuable real estate. But, however liberal we may desire to be in affirming a judgment, we cannot sustain a finding which is not responsive to any allegation in the pleadings, nor to a theory mutually adopted by the litigants in the district court. We have the authority to permit amendments in this court. We therefore shall permit the plaintiffs, if they are so advised by counsel, to amend their petition so as to allege such facts as will justify us in sustaining the decree quieting title in the Bennett Company to all of the real estate described in the referee's report, and to a decree for a specific performance of their contract for one-fifth of the $200,000 capital stock of the Bennett Company. Ordinarily such amendments would not be permitted. In the instant case counsel for the defendants strenuously objected to the introduction of all evidence touching title to this real estate. We are confident, however, that the defendants will not be prejudiced by the amendments, because all features of the transactions touching those subjects have been testified to by the only persons having knowledge thereof, and this litigation should cease at as early a day as possible.

The referee's statement of the accounts between the Bennett Company, on the one part, and J. E. Baum, D. A. Baum, the Baum Iron Company and the New Paddock-Hawley Company, on the other part, finds the

true balance in each account on the basis that all of the corporate stock issued by the second corporation is canceled. By reinstating that stock, no change is made in those accounts, nor should the Baums be charged any additional sum for the $160,000 capital stock of the Bennett Company we hold they are entitled to in consideration for the assets transferred, or agreed to be transferred, to it by them; the intention being to hold that the plaintiffs are entitled to one-fifth and the Baums to four-fifths of the capital stock of the Bennett Company as organized in 1904.

The defendants argue that since the Baums acquired title to the real estate theretofore held by the W. R. Bennett Building Company in the forenoon of the day the contract in suit was signed, and it was executed in the evening, no consideration sustains that contract. We find no such issue tendered by the answer, nor would the proof support it, if pleaded. It is evident that the purchase of the assets of the W. R. Bennett Company at trustee's sale, the subsequent transfer of the real estate owned by the W. R. Bennett Building Company, and the signing of the contract were all parts of the same transaction, and that an ample consideration sustains the contract.

Some criticisms are made with respect to the value placed by the referee upon the furniture, fixtures, vehicles and horses owned by the Bennett Company, and also concerning three items aggregating $3,137.77, which the defendants contend should have been charged to profit and loss. The three items we think should have been thus charged. We do not think it necessary to substitute our judgment for that of the referee and the district court concerning the value of the furniture, fixtures, live stock and rigs, because the defendants are not required to pay money or to declare dividends upon the basis of those findings and will be at liberty in the future transactions of the corporation's business to exercise a reasonable judgment concerning these items.

We find that the plaintiffs and the defendants should each pay their costs in this court, unless the plaintiffs refuse to amend their petition; in that event the plaintiffs will be taxed with all the costs in this court.

The judgment of this court is that the plaintiffs are given 40 days from the filing of this opinion to so amend their petition as to sustain the findings of the referee and the judgment of the court quieting in the Bennett Company title to all of the real estate described in those findings and to sustain a decree for a specific performance of their contract for one-fifth of the $200,000 capital stock of the Bennett Company. If those amendments are filed, the judgment of the district court will be modified so as to recognize the validity of the incorporation of the Bennett Company in 1904, and so as not to enjoin the stockholders of that corporation from lawfully amending its articles of incorporation or increasing its capital stock, and to compel the Baums to specifically perform their contract to deliver one-fifth of the capital stock of the Bennett Company to the plaintiffs. In all other things the judgment of the district court will be affirmed. If the plaintiffs fail to amend their petition as aforesaid, the judgment of the district court will be reversed, with directions to modify its judgment so as to conform to this opinion.

JUDGMENT ACCORDINGLY.

WILLIAM O'GRADY ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED NOVEMBER 28, 1911. No. 16,549.

1. **Pleading:** CONSTRUCTION. Section 121 of the code commands the courts to construe with liberality the allegations in pleadings with a view to doing substantial justice between the litigants.

2. **Carriers:** ACTION FOR LOSS OF BAGGAGE: PLEADING. A petition charging, in substance, that a common carrier's porter refused a

passenger for hire, who with her nine infant children, also passengers for hire, were changing cars on the defendant's railway at a point intermediate the commencement and the end of their journey, readmission to the car in which she had been transported, and from which she desired to take her suit case with its contents, of the value of $1,525, although the porter knew that her suit case was in the car and she informed him of her purpose, but that he wilfully refused to admit her, and that although the train thereafter remained for a long time at the station, and she informed the carrier's agents and servants in charge of the train that her suit case was in the car, they refused to deliver the suit case or to permit her to enter the car for the purpose of securing her property, and that it was not delivered to her and she has not received it, states a cause of action against the carrier.

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

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

James E. Kelby, Arthur R. Wells and *W. S. Morlan, contra.*

ROOT, J.

This is an action to recover damages for the loss of a suit case and its contents. The defendant prevailed on its general demurrer to the petition, and the plaintiffs appeal.

In substance, the plaintiffs, after alleging that the defendant is a common carrier for hire of passengers, charge that on April 15, 1908, for a consideration paid, defendant undertook to transport them with their baggage from Superior to Haigler, Nebraska; that they were informed by defendant's servants and agents that its train numbered 15 would convey them without change of cars to their destination, and that in reliance upon this information they entered a car in that train. The pleader also alleges that the youngest plaintiff is one year of age and the eldest infant plaintiff is 15 years old; that the plaintiffs carried with them into the defendant's

car a suit case which contained $1,500 in currency and other articles, not definitely described, of the value of $25, the joint property of all of the plaintiffs; that the train arrived at McCook, a city intermediate the initial and the final point of their journey, after midnight, and while they were asleep, and that the defendant's servants aroused them suddenly and directed them to immediately leave the train, which they did under the impression that they were in Haigler, and because of the defendant's orders; that they were excited, and relied upon the defendant's employees to carry from the car their luggage; "that soon after the plaintiffs reached the platform of the defendant company's station at McCook, Nebraska, the plaintiffs discovered that neither the porter, brakeman, nor other agent or employee of the said defendant company had brought the plaintiffs' said grip or suit case containing the said $1,500 in currency to the station platform, as was the duty of the agents and employees of the defendant company, under the circumstances; that immediately thereafter the plaintiff Maggie O'Grady, having succeeded in getting all of the said nine children upon the depot platform, attempted to board the said train for the purpose of securing the said grip and the money contained therein, but that the defendant company's porter refused the plaintiff Maggie O'Grady admittance to the said train, although the plaintiff Maggie O'Grady informed the said porter, agent and employee of the said defendant company that he and other employees of the defendant company had failed to carry out for her said grip, and also informed the said porter that the said grip was then in a certain car, which the said porter then knew, and which said car plaintiff informed the porter she had just alighted from; that the said agent and employee of the said defendant company knew, and had known during the plaintiffs' entire journey, that said certain grip or suit case was the property of the plaintiffs herein, and had knowledge in reference to the value of the contents thereof; * * *

that the said train remained at the station of McCook thereafter for a long time, and that all of the agents and employees of the defendant company wilfully, negligently, and maliciously refused to deliver said grip or suit case to the plaintiffs herein or to permit the said plaintiffs or any of them to enter the said car in which said grip or suit case and money was left," etc. There are other allegations in the petition to the effect that the porter wilfully, negligently and maliciously prevented the plaintiffs from recovering the suit case; that they immediately reported their loss to the defendant's general office, but that the suit case and its contents were not returned to them; that the defendant was negligent in employing dishonest servants and agents, and that it did maliciously steal, take and carry away this property. Upon the hearing, the plaintiffs admitted in open court that the defendant had no notice or knowledge that there was money in the suit case until its agents discovered the fact after the plaintiffs entered the car at Superior. Some of the allegations in the petition may be surplusage, and the pleader might have been more definite in alleging that the suit case was in the car at the time the plaintiffs departed therefrom, but we cannot agree with the defendant's counsel that this fact may not fairly be inferred from the petition.

Section 121 of the code commands the courts to liberally construe the allegations in all pleadings with a view to substantial justice between the parties. The pleader alleges that the train remained a long time at McCook, and that the porter wilfully and maliciously prevented the plaintiff Mrs. O'Grady from re-entering the car very soon after she departed therefrom, and the demurrer admits the truth of these statements. It should be remembered that the defendant had not then completed its contract to safely transport the plaintiffs and their baggage from Superior to Haigler, but they were passengers in the course of transportation. In view of the fact that the necessity for the change of cars was

occasioned by the misdirection of the defendant's servants, and that Mrs. O'Grady was hampered by her numerous sleepy infant children, the defendant at least owed her the duty of a reasonable opportunity to take her luggage as well as her children from the train. If that opportunity was not given, but absolutely refused without just cause, the defendant should at least be held to have elected to transport the suit case in the car where it reposed, and should be held from that time to at least so high a degree of responsibility as if the luggage were in the custody of its baggageman. Whether under these circumstances the company may be held liable for all of the money in the suit case is not before us for determination and will not be discussed. It is sufficient for this appeal that, if all of the allegations in the petition are true, the defendant is liable to the plaintiffs in some amount. This we hold.

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

REVERSED.

JANE H. W. REYNOLDS ET AL., APPELLANTS, V. JULIA A. ADAMS ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 16,557.

1. Judgment: NUNC PRO TUNC ENTRY. Where it is clear that a judgment was rendered or an order made by the district court in an action then pending, but through the inadvertence or carelessness of the clerk the judgment or order was not entered on its journals, the court may subsequently upon motion, after notice to all persons affected thereby, cause the entry to be made *nunc pro tunc*.
2. ———: ———: NOTICE. In such proceedings it is not necessary to notify persons impleaded as defendants, but dismissed from the action before the judgment was rendered or order made.
3. ———: ———: PROCEDURE. If the person injuriously affected by the fault of the clerk departs this life, his legal representatives may maintain the proceeding in their names to supply the record.

4. ———: ———: NOTICE. If the person benefited by the incomplete condition of the record departs this life without conveying or assigning his interest in the subject matter of the litigation, notice may be served on his legal representatives, and, on satisfactory proof, the record corrected.

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

H. W. Keyes and *J. L. McPheely,* for appellants.

W. S. Morlan and *J. L. White, contra.*

ROOT, J.

This is a proceeding for *nunc pro tunc* entries in an action formerly pending in the district court for Frontier county. The motion was denied, and the aggrieved parties appeal.

The district court refused to receive any of the evidence offered. Most of this evidence is documentary, and appears in the bill of exceptions. All of the objections made in the district court by appellees' counsel are, for practical purposes, identical and amount to this: All of the parties to the action were not notified of the application, the proceeding is barred by the statute of limitations, and the notice did not give warning that oral evidence would be produced. In this court the argument is confined to the alleged failure to notify all parties to the action and a contention that strangers to the record are not entitled to the relief demanded.

The entries requested are of an alleged decree foreclosing a real estate mortgage and an order confirming a sale by the authority of that decree. The applicants are Jane H. W. Reynolds, Estate of J. E. Seeley, deceased, and Paul S. Seeley. They allege that the action was commenced by Jane H. W. Reynolds against John Black, Mary E. Black, Harrison W. Adams, and J. E. Seeley; that Black owned the real estate in 1887, and during that year, after executing a mortgage thereon to

Jane H. W. Reynolds, conveyed the land to one Herrin, who subsequently conveyed it to Harrison W. Adams; that the defendants Adams and Seeley were personally served with summons in the foreclosure suit, which was subsequently dismissed as to the defendants Black, and thereupon a judgment of foreclosure was rendered, by virtue whereof the sheriff advertised and sold the land to Jane H. W. Reynolds; that the sale thereafter was duly confirmed and a deed by order of the court made to the purchaser; that, owing to the inadvertence or carelessness of the clerk of the district court, the decree and the order were not spread upon its journals; that the purchaser, in 1896, sold and conveyed the land to J. E. Seeley, who, in 1902, departed this life testate, devising all of his property to the applicant Paul S. Seeley, and that in 1898 Harrison W. Adams died intestate, leaving a widow, Julia A. Adams, and two adult sons, James W. Adams and Jasper H. Adams, as his sole heirs at law. A copy of the motion, which recites all of these facts, was served on each of the heirs and on the widow of the deceased Adams. No pleadings seem to have been filed in opposition to this motion, but the bill of exceptions recites that the counsel resisting the motion appeared for Harrison W. Adams (deceased), James W. Adams and Jasper H. Adams. We shall consider the record on the theory that Mrs. Reynolds and Paul S. Seeley are the sole applicants.

The law is well settled that the district court has the inherent power upon sufficient showing to enter upon its journal an order or judgment as of a prior date, if that order or judgment was made or rendered on that earlier date, but through the negligence or inadvertence of the clerk was not entered on the journal. *Garrison v People,* 6 Neb. 274; *Phelps v. Wolff,* 74 Neb. 44.

This proposition is not seriously controverted, but counsel for the Adamses say that the district court could not make that order unless all of the parties to the action were before it, and that the Blacks and J. E. Seeley have

not been notified of the filing of this motion. The Blacks are not parties to the judgment because the action was dismissed as to them before the decree was rendered. Mr. Seeley is no longer in life, and Paul S. Seeley has succeeded to his title to this property. Harrison W. Adams, the owner of the equity of redemption at the time the decree is alleged to have been rendered and the order of confirmation made, also subsequently departed this life, but his sole heirs at law have been notified of this application.

Proof was also offered that the estate of Mr. Adams had been administered and his estate distributed among his heirs. Documentary evidence was offered showing a connected chain of title from the United States to Harrison W. Adams. The deed duly executed by Mrs. Reynolds conveying this land to J. E. Seeley was offered in evidence. So that, if the evidence excluded had been received, the proof unexplained would establish that but four persons had any interest in this land—Mrs. Julia A. Adams, doweress by virtue of her husband's seizin and death, and the failure to make her a party to the foreclosure action; James W. Adams and Jasper H. Adams, as sole heirs of Harrison W. Adams, deceased; and Paul S. Seeley, as the sole devisee in the will of J. E. Seeley, deceased. The appellants concede Mrs. Adams a dower interest in the land. So far as the Blacks are concerned, they cannot be affected by the entries requested, and it was not necessary to notify them of this application. *Turner v. Christy,* 50 Mo. 145. If the action were pending for any purpose, James W. Adams and Jasper H. Adams represent their ancestor. *Urlau v. Ruhe*, 63 Neb. 883.

The evidence offered should have been received, and, if the allegations in the motion are proved, the court journals should be made to speak the truth.

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

REVERSED.

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

FILED NOVEMBER 28, 1911. No. 16,863.

1. Appeal: INSTRUCTIONS. Alleged error in giving an instruction will not be considered where no exception was taken thereto and no reference was made to it in the motion for a new trial.

2. Contracts: CONSTRUCTION: QUESTION FOR JURY. "Where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact." *Haskell v. Read*, 68 Neb. 107.

3. ———: ———: QUESTION FOR COURT. But, in the absence of a latent ambiguity, this principle will not ordinarily apply to those terms of a written contract which are plain and unmistakable in their meaning when considered by themselves and in connection with the remainder of the contract.

4. ———: BUILDING CONTRACT: EXTRAS. A builder ordered by the proprietor to do work in some way connected with the original contract, but substantially independent of it, under such circumstances that the owner should know that the execution of her orders will cause extra trouble and expense to the builder not contemplated by the terms of the contract to build, has a just demand for reasonable compensation for the extras if the original contract does not provide to the contrary.

5. Appeal: INSTRUCTIONS. It is prejudicial error to submit to the jury a controverted defense not sustained by any evidence.

6. ———: AFFIRMANCE ON CONDITION. Where a case has been twice tried in the district court and in this court, if by imposing terms as a condition to affirming the judgment substantial justice may be done between the litigants, it is competent for this court to do so.

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

Burkett, Wilson & Brown, for appellant.

Burr, Greene & Greene, contra.

ROOT, J.

This is an action against a contractor to recover for money paid by the plaintiff to relieve her property from the lien of a subcontractor. The defendant pleaded a cross-demand for extras. The plaintiff prevailed, and the defendant appeals.

This is the second appeal of this case. The opinion heretofore filed and reported in 82 Neb. 106, is referred to for a description of the litigant's contentions. Subsequent to the reversal an amended and supplemental petition and an amended reply were filed.

The defendant's first contention, that the evidence is insufficient to sustain the supplemental matter pleaded, will not be considered, for the reasons that he took no exception to instruction numbered 3½, wherein the court peremptorily directed a finding in the plaintiff's favor on her cause of action in the sum returned by the jury, and did not refer to the instruction in his motion for a new trial. *Holloway v. Schooley,* 27 Neb. 553; *Richardson & Boynton Co. v. Winter,* 38 Neb. 288; *Wiseman v. Ziegler,* 41 Neb. 886; *Danforth v. Fowler,* 68 Neb. 452. This leaves for consideration solely the errors assigned with respect to the trial of the defendant's cross-demand. It is contended that the jury should have been instructed that the reply admitted that the defendant furnished the items described in the cross-petition. Neither the pleadings nor the proof raise any such an issue. The instructions fairly construed concede that the items were furnished, but leave it for the jury to determine the defendant's contention that the items were extras, and the plaintiff's theory that all of the items not extras were gratuitously furnished.

The remaining assignments meriting serious consideration are as follows: Permitting the plaintiff to testify over objections that, before the written contract was reduced to writing and signed, she talked with the defendant about all of the items included in his demand for

extras; instructing the jury that they should find from the evidence whether the extras were within the terms of the contract; and submitting to them as an issue of fact whether the extras, if any, were furnished gratuitously and without expectation of reward. The contract is as follows:

"CONTRACT.

"LINCOLN, NEBR., 10-17, 1904.

"Mrs. Sabin.

"The undersigned does agree to do all work described in the above article of agreement, build two bathrooms, one over the other, on east side of kitchen, with window in each room, and cut door from hall to bath on second floor, and cut door in same way on first floor. Board outside and paper and plaster the inside with hard wall and 4 ft. high with Keyn cement, and strike off to make imitation of tile. Give tile and tub three coats of enamel, color to suit owner. Fit the upper bath with closet, tub, and lavatory with old fixtures, put new tub with nickel plated waste and supply all standard or S. Wolff goods. Put in complete hot and cold water. Put in one 18x30 sink.

"This work will be done to comply with the city ordinances. Lay maple floors in bathrooms and finish in yellow pine. Give one coat of filler and two of hard oil, and paint all new work two coats to match old house as near as possible. Cut openings from front room to next room north, and give owner choice of sliding door or one post grill. Take out closet door in front room, and put in hall in same closet. Cut door from dining-room to kitchen. Take out all back stairs and close up door. Make old bathroom and back bedroom in one. Leave windows and doors as they are, and patch the floor in places needed. Put closet in north end of old bedroom, using old door now in hall. Put in one window in kitchen so as to allow a table under it. Fit up sink and pantry on west side of kitchen. Cut back door to porch. Take off all rim locks on all doors on second floor and replace with mortice, No. 23 finish.

"Back Porch.

"Build back porch 12x16 and make room under porch; close porch up to the east and north from lower floor to four feet above upper floor, then cap the inclosure and screen from there to frieze. Make stair from upper porch inside of the inclosure. Lay double floor on upper porch so as not to leak. Put on tin roof of good roofing tin. Move outside cellarway and one window. All the new rooms will be heated by the furnace now in the house with returns where needed. Put stone foundation under both and room under porch and make all work complete.

"Make a way to get to attic after the same plans of Mr. Hardy's is. Gas can be made separate by changing riser pipes it will be changed but if not it can't be changed. Move tank in back hall so as to make room for door. Contractor will take all old sash.

"(Sign) J. J. CAMERON.
"(Sign) M. L. SABIN.

"LINCOLN, NEBR., 10-19, 1904.

"I, the undersigned, will do all the described work and furnish all labor and material to be used for the sum of one thousand and ninety dollars ($1,090.00). If old closet and wash bowl is used 10.00

$1,080.00

"Money shall be paid as the work progresses, and when the final finish shall come the undersigned will furnish receipts for all labor and material and deliver to owner.

"(Signed) J. J. CAMERON."

The contract is not aided by specifications, and several of its terms are ambiguous. Some written contracts are to be construed solely by reference to their terms, but there are undertakings which should be interpreted in the light of extrinsic evidence to ascertain the things upon which the minds of the parties meet. In the first class the proper construction to be given the contract is ordinarily a question of law for the court to decide, but in

the second class the facts which may aid a correct construction, if not admitted or undisputed, should be submitted to the jury under proper instructions, and the interpretation of the contract becomes in a sense a question of fact. *Coquillard v. Hovey,* 23 Neb. 622; *Rosenthal v. Ogden,* 50 Neb. 218; *Meyer v. Shamp,* 51 Neb. 424; *Haskell v. Read,* 68 Neb. 107.

This rule will not apply to those terms of a written contract which have a plain and unmistakable meaning, and are so connected with the remaining parts of the contract that they require no interpretation, but speak plainly for themselves. Nor, in an action to enforce and not to reform the contract, does this rule open the door for the reception of oral evidence to show that, before the contract was signed, the parties talked about items plainly without the terms of the contract as written. We think that some of the terms of the contract under consideration do not carry on their face satisfactory proof of their meaning, but are ambiguous to a degree justifying proof of extrinsic facts to ascertain their import. The extra item, "To gas separate from lower floor and back porch," might come within the clause in the contract "Gas can be made separate by changing riser pipes it will be changed but if not it can't be changed." Whether the glass for the bathroom windows should be plain or chipped is not clear from the contract. Nothing is said in specific language in the contract with relation to steps or lattice work for the porch, but the defendant agreed with respect to the porch to "make all work complete." A porch would be incomplete without steps, and possibly the lattice work might have been within the contemplation of the parties. Concerning the following items, we are satisfied the contract, unless reformed, cannot be construed to include them: Maple floor in kitchen; changing cellar stairs and making cupboard, seven closets in same; closet under stairs in room under porch; moving door three times after plastering; one door, frame, and hardware; stopping old cold air ducts; plate shelf in dining room.

We think the rule with regard to the right of a builder to charge for extras is well stated by Judge Marshall in *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824: "It is well settled that where a builder is ordered to make changes from the original contract plans, which are really extras, or to do work in some way connected with the original contract but substantially independent of it, and the circumstances are such that the proprietor must know that the execution of such orders will cause extra labor and expense to the builder not contemplated by either party in the original contract, he is liable to compensate the builder therefor in the absence of some express provision in such original contract to the contrary." See, also, *McLeod v. Genius*, 31 Neb. 1.

Mrs. Sabin resided in a part of the house while the defendant was making the improvements, and requested him to perform the work for which he is demanding compensation. She must have known that Mr. Cameron could not comply with her requests without expense for material and labor. There is no provision in the written contract forbidding the contractor constructing extras, nor providing conditions precedent to his right to compensation or denying him compensation therefor. Upon the former appeal it was held that there was no competent evidence to prove that the extras were gratuitously furnished, nor any issue to permit the introduction of that proof. The pleadings were amended to present the issue, but the evidence did not justify submitting the issue to the jury. The amount involved in this litigation is not great; the case had been twice tried in the district court and in this court, and, if possible, it should be terminated now. Since the action is at law, we may not try it *de novo*, but we may impose reasonable terms as a condition for an affirmance. While there is error in the matters just referred to, we believe that we are justified in affirming the judgment if the plaintiff will remit such a sum as the defendant is clearly entitled on the evidence to recover for extras that

are clearly without the terms of the written contract. That sum, as we understand the record, is $106.25.

If the plaintiff within 50 days after the filing of this opinion will file a remittitur of $106.25 with 7 per cent. simple annual interest from July 1, 1905, the judgment of the district court will be affirmed, and each party will pay their own costs in this court. Otherwise the judgment of the district court will be reversed and the cause remanded for further proceedings.

AFFIRMED.

ANNA J. WILSON, APPELLANT, V. L. AUGUSTUS WILSON, APPELLEE.*

FILED NOVEMBER 28, 1911. No. 16,930.

1. Insane Persons: GUARDIANSHIP: DUTIES OF GUARDIAN. A husband appointed as guardian of his insane wife's estate sustains a peculiarly close and confidential relation to her, and will not be permitted to use her property or his position for his advantage or to her detriment.
2. ———: ———: ———. The county court may authorize a guardian to invest his ward's funds, and the guardian should apply for directions, in case he holds such funds and a threatened foreclosure of a real estate mortgage may, if prosecuted to a conclusion, result in the sacrifice of her dower and homestead interests in the mortgaged land; and the fact that while sane she proposed to permit the land to be sold at judicial sale, so that she could secure money in lieu of her interest in the real estate, will not justify inaction on his part.
3. ———: ———: LIABILITY OF GUARDIAN. If the husband and guardian of an insane woman purchases at judicial sale real estate wherein she has dower and homestead estates which have not been admeasured, upon becoming sane she may hold him as trustee, without regard to whether there was active fraud in the transaction.
4. Trial: CONSOLIDATION OF ACTIONS. A county court has exclusive original jurisdiction to settle the accounts of guardians appointed by it; but if some features of that accounting are also involved in an action in equity pending in the district court between the guardian and ward, and the contention with respect to the

* Motion to modify opinion overruled. See opinion, p. 360, *post*.

guardian's accounts is pending in that court on appeal, the district court should consolidate the cases for trial, so that the rights of the parties will be fully protected.

5. **Insane Persons: GUARDIANSHIP: LIABILITY OF GUARDIAN.** Where, in an action to foreclose a real estate mortgage, the court appoints a guardian *ad litem* for an insane woman, who has a dower and a homestead estate in the land, and the general guardian fails to protect these estates, the general guardian will not, solely for that reason, be liable in damages.

6. ———: ———: **ACCOUNTING.** A guardian should account to a ward for all profits made by investing or converting her funds, and, if not authorized by the county court to invest the funds, will be held for lawful interest, without regard to the profits made.

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

Francis G. Hamer, R. D. Stearns and *Lafe Burnett*, for appellant.

O. E. Bozarth and *Ritchie & Wolff, contra.*

ROOT, J.

This is an action for a judgment that the defendant holds title to a tract of land as trustee for the plaintiff, and for an accounting. The defendant prevailed in part, and the plaintiff appeals.

There is some conflict in the evidence, but many material facts are proved by undisputed evidence. In October, 1904, the plaintiff, the widow of W. A. Scales, who died in 1902, leaving the plaintiff and an infant daughter, Gladys, him surviving, was married to the defendant. Mr. Scales died seized of the land in dispute, and with his wife and child occupied it as a homestead at the time of his death. Walker Smith was guardian of the property of Gladys Scales. The land was mortgaged by Scales and wife to secure the payment of $900 borrowed money, and several interest payments were unpaid in 1904.

The plaintiff, subsequently to her last marriage, determined to bring about a sale of the land, so that the

proceeds might be divided between the owners in proportion to their interests. Having this purpose in view, the guardian and Mrs. Wilson consulted counsel, and were advised that the guardian might procure a license from the district court and sell the land, provided she would waive her homestead right. Thereupon the guardian made application to the district court for license to sell all of the 320 acres in dispute in this action, but before the proceedings were consummated Mrs. Wilson became insane, and March 27, 1905 was, by the commissioners for the insane in Gosper county, committed to the asylum near Lincoln, where she remained until paroled or discharged in 1908.

July 31, 1905, the mortgagee, at the guardian's request, commenced an action to foreclose the mortgage. There was personal service of summons on all of the parties in interest and upon the superintendent of the hospital for the insane where Mrs. Wilson was confined. Mr. Wilson, having been appointed guardian of his wife's estate, answered for her, contending solely for the value of her dower estate and for the amount of a claim allowed in her favor against the estate of her deceased husband, Scales. A guardian *ad litem* was appointed for the infant and for the insane woman, but the record does not disclose whether he answered for his wards. The decree finds the amount due the mortgagee, the amount of taxes paid, the present value of Mrs. Wilson's dower estate, and that she was entitled to her claim against the Scales' estate. At the sheriff's sale the defendant purchased the land for $5,675, a greater sum than the land was worth, if we should believe the undisputed testimoney on this point. After sale, but before confirmation, Mr. Wilson, having been elected sheriff of Gosper county, assigned his bid to Mrs. Bozarth, wife of his present counsel, and in her name the sale was confirmed, and to her a deed was made. In the order of confirmation the court directed the proceeds of the sale to be distributed as follows: To the mortgagee, $1,201.55; for costs,

$120.65; for taxes, $46.53; for the guardian *ad litem*, $5; to Mrs. Wilson or to her guardian, $500 in lieu of her dower, and $419.73 in satisfaction of her claim against the Scales' estate; the remainder of the $2,500 to Mr. Smith, as guardian for Gladys Scales; and the notes for the remainder of the purchase price were ordered to be made payable to her and delivered to her guardian. All of which was done.

In this action the district court adjudged that the plaintiff should recover her dower and a homestead estate in the land, but burdened with a lien for $1,114.79, of which sum $458.36 was made a lien on the homestead and dower estate, and $656.43 a lien solely upon the dower estate. We are advised by the arguments, but not by the record, that the district court took an accounting for rents and profits and for taxes paid, and carried the balance into the decree. The defendant in his answer, among other things, pleaded that there had been an accounting in the county court in the matter of his guardianship of his wife's estate, and that subsequently that contention was appealed to the district court, where it was pending, and that in those proceedings he was pursued for the money held by him in lieu of his wife's dower interest in the land and for the rents and profits of the land in dispute. It has also been brought to our attention that the record of those proceedings has been lodged here on appeal, and that it is contended that by some chance the bill of exceptions of the evidence adduced during the trial is incomplete, to the prejudice of Mrs. Wilson.

It is, of course, elementary law that the ward may, at her election, accept the price paid by her guardian for her property or recover the property itself, without regard to the motives which impelled him to act or whether there was active fraud in the transaction. *Michoud v. Girod*, 45 U. S. *503; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892; *Kazebeer v. Nunemaker*, 82 Neb. 732. The guardian also will hold as trustee, for the benefit of

his ward, the title to any property he may have purchased with her funds.

There is evidence tending to prove that the plaintiff's money entered into the cash payment of $2,500 at the sheriff's sale, although the defendant denies that fact. The cross-examination on this point was not pressed, and we are not entirely satisfied with the disclosure, but, for the purposes of this case, shall treat the subject as though his funds were solely used for that purpose. Approaching the controversy from this standpoint, we are not satisfied that the defendant should be permitted, over his ward's objections, to retain title to this land. The relations between these parties are the most confidential known to man. The defendant, by virtue of his marital obligations and his duty as the plaintiff's guardian, owed her the highest duty to conserve her property, and the law will not permit him to use either his wife's funds or his position to secure the slightest advantage to her detriment. Her dower and homestead estates had not been admeasured, but were involved with the remainder vested in her infant daughter. The defendant's contention that he owns the land by a title in fee simple makes his interests conflict with those of his ward, and places him in an attitude the law will not permit him to assume. As guardian, the defendant possessed ample funds to redeem the land or to purchase the incumbrance. Of course, he could not thus invest those funds without an order of the county court, made upon formal application, and it is true that his wife, while sane, expressed an aversion to having her estate invested in the land; but the experience of ages has demonstrated that trust funds are rarely so secure as when judiciously invested in well-secured real estate mortgages or in improved farms, and the defendant would be in much better position if he had presented the subject for the determination of that court. Having elected to purchase, rather than to otherwise protect the estate of his ward and wife, we think she has the right, upon equitable terms, to accept

and receive the benefits attendant upon that transaction. 1 Perry, Trusts and Trustees (6th ed.) secs. 427, 428.

The defendant contends that the plaintiff, by pursuing him in the guardianship proceedings for an accounting, elected to recover her funds, and thereby waived any right to recover title to the land. The plaintiff has a right to a strict accounting to ascertain the amount of her property received by the guardian. When the exact amount due her is thus ascertained, should she accept the balance with knowledge of the sources from which the money came, she would be within the rule announced in *Borcher v. McGuire,* 85 Neb. 646.

In the first instance the county court had exclusive jurisdiction to settle that account, but by appeal the subject matter could be presented to the district court. This has been done. When the district court acquired jurisdiction of the controversy, it seems to us that case and the instant one should have been consolidated, to the end that a decree protecting all of the parties in interest should be made. As it is, we are met with contentions that the value of the rents and profits of the farm and the dower estate were considered in both cases, and those contentions are denied. The fragments of the one record offered as evidence in the other do not satisfy us concerning the actual fact, although they are doubtless sufficient for counsel duly advised by other evidence.

It is important that the court should have a complete disclosure of the source of the $2,500 cash payment made by the defendant at sheriff's sale. If it be true that this was his own money, not advanced by some person on the credit of the money in his hands as guardian, he should be credited on the accounting with interest on the sum so paid; but, if any portion of such payment was made up of money or credits of his ward, such portion should be deducted from the $2,500, and he would be entitled on the accounting to interest on the remainder.

We shall sustain the plaintiff's contention that the defendant holds title to this land in trust for her; but,

concerning her contention that he should be held for damages because her homestead exemptions were not preserved in the foreclosure action, we have to say that the mortgage was a lien on every estate in the land, and the sale, had it been made to a third person, would have vested the purchaser with all of the title of all of the parties to the action. The court did not rely on the defendant to protect the plaintiff's interests, but, by appointing a guardian *ad litem* for her, took this matter out of Mr. Wilson's hands. The defendant paid full value for the land; the plaintiff's daughter received the equivalent of the plaintiff's homestead estate, and we find nothing in the record to suggest that he intended to prefer his stepdaughter to his wife in the foreclosure case. We discover no such evidence of bad faith on his part as will justify a court of equity mulcting him in damages for this phase of the foreclosure case.

The case involving the guardian's accounts will be advanced and reversed, without a decision on the merits, to the end that it may be consolidated with this action for trial. The district court will determine from the record, and such other evidence as the litigants may offer, the true state of the accounts between the litigants. The defendant should be credited with all of the money paid by him on the purchase price of the farm, including what he has paid on the mortgage debt and for taxes and improvements, with 7 per cent. simple annual interest on those payments; he should be charged with the fair value of the rents and profits of the farm, with like interest, and the district court should decree that if the plaintiff, within three months thereafter, will pay to the defendant the difference between the aggregate of those credits and debits, the defendant shall execute a deed of conveyance to her for all of the real estate, and if the deed be not made the decree will operate as a conveyance.

In the matter of the guardianship accounting, should it appear that the defendant directly or indirectly profited by the possession or use of his ward's funds,

either by investing them in the land in dispute or by receiving interest thereon, he shall be charged with as high a rate of interest thereon as he has received, but not less than 7 per cent., or, if the money was invested in the land, 7 per cent. simple annual interest, less taxes paid and lawful charges against the fund, whether by payments of accounts, costs, expenses or compensation allowed by law.

JUDGMENT ACCORDINGLY.

The following opinion on motion to modify former opinion was filed January 3, 1912. *Motion overruled:*

PER CURIAM.

The defendant requests a modification of the opinion, so the district court may not require him in the guardianship proceedings to pay the balance of funds due his wife, with interest, and, also, in the instant case give her credit for those funds on the purchase price of the farm. We do not think it possible that the district court will make such orders. It was to prevent any such injustice that the two causes were ordered consolidated. It is suggested that the plaintiff might, by immediately collecting the balance due her from her guardian and by delaying to the last day the exercise of her option to take the farm, secure an advantage over the defendant. We have no doubt that the decree of the district court will fully protect the defendant in these eventualities, none of which can arise if his testimony on the former trial, that he invested none of his wife's money in the land, be true.

The motion is

OVERRULED.

IN RE ESTATE OF WILSON.

ANNA J. WILSON, APPELLANT, V. L. AUGUSTUS WILSON, GUARDIAN, APPELLEE.

FILED NOVEMBER 28, 1911. No. 17,018.

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

R. D. Stearns and *Lafe Burnett,* for appellant.

O. E. Bozarth and *Ritchie & Wolff, contra.*

PER CURIAM.

For the reasons and purposes stated in the opinion in *Wilson v. Wilson, ante,* p. 353, the judgment herein is reversed and the cause remanded to the district court.

REVERSED.

MAGGIE DAVIS V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,263.

1. Homicide: INSTRUCTIONS: MALICE: PRESUMPTIONS. "The law implies malice in cases of homicide if the killing alone is shown; but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing." *Lucas v. State,* 78 Neb. 454.

2. Criminal Law: INSTRUCTIONS: DEFENSE OF INSANITY: EVIDENCE. Jurors, in determining whether an accused at the time of the commission of the alleged crime was mentally competent to distinguish between right and wrong with respect thereto, should consider all of the evidence upon the subject and should not be instructed to only consider the opinions given by experts.

3. ———: DEFENSE OF INSANITY: EVIDENCE: REASONABLE DOUBT. Where, during the trial of a criminal case, evidence is introduced tending to impair the presumption that the prisoner was of sound mind at the time the crime is alleged to have been com-

mitted, it devolves upon the state to prove beyond all reasonable doubt that at the time the crime was committed she was mentally competent to distinguish right from wrong with respect thereto, and she is entitled to the benefit of any reasonable doubt that may arise from a consideration of all of the evidence, or from the lack of evidence, upon this issue.

4. ———: INSTRUCTIONS. "An erroneous instruction is not cured by the mere giving of another on the same subject contradicting it." *Henry v. State*, 51 Neb. 149.

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

R. J. Millard, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROOT, J.

The plaintiff in error prosecutes her petition to reverse a sentence of life imprisonment upon a conviction of murder in the first degree.

There is but little conflict in the testimony, other than that given by the experts. About 8 o'clock P. M., November 2, 1910, the accused, in the presence of a Mr. Hall, fatally wounded Ira M. Churchill. There is considerable evidence tending to show illicit relations between the woman and her victim, induced by a promise of marriage, during the year 1910. The accused produced four physicians, who, in answer to hypothetical questions, testified that at the time of the homicide she did not have sufficient mind and understanding to know and appreciate that the act was wrong, and the state produced five physicians who testified to the contrary. In this state of the evidence, the court, by instruction numbered 11, told the jury: "The jury is instructed that the law presumes that a person intends all the natural, probable and usual consequences of his acts; that when one person assaults another violently with a

dangerous and deadly weapon, likely to kill, not in self-defense, or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the person thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily injury was intended, and in such case the law implies malice and such killing would be murder."

The law is well settled in this state that, where the circumstances attending the homicide are proved by eye-witnesses, it is error to instruct that malice will be implied from the killing. *Vollmer v. State,* 24 Neb. 838; *Lucas v. State,* 78 Neb. 454; *Kennison v. State,* 80 Neb. 688. A majority of the court are of the opinion that, since it is clear from the evidence that the only possible legal excuse for the homicide was insanity, the instruction, while erroneous, was not prejudicially so.

We are of opinion that the court erred in giving its instruction numbered 23, which is as follows: "The opinion of the medical experts are to be considered by you, in connection with all the other evidences in the case, but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, the accused was or was not of sound mind, yielding her the benefit of a reasonable doubt, if such arises from the evidence." The tendency of this instruction is to withdraw from the jury's consideration, in determining the issue of sanity, all evidence, other than the opinions of the experts. Jurors are not necessarily bound by the opinion of experts; such opinions are but evidence to assist the jury in finding an essential fact; they should not be arbitrarily or capriciously rejected, but the other evidence may be of such a character and of such convincing weight that the jury may accept it in preference to the opinions.

Mr. Justice Curtis, in his charge to the jury in *United States v. McGlue,* 1 Curtis (U. S. C. C.) 1, 10, in a

prosecution for felonious homicide on the high seas, well said: "But these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict." See, also, *Davis v. School District,* 84 Neb. 858. This instruction also might lead the jury to believe they should not give the accused the benefit of a reasonable doubt in considering whether she was of unsound mind, unless the evidence of the experts created that doubt.

Insanity is not an issue by itself to be passed on separately from the other issues in a criminal case, but is involved in the plea of not guilty. 2 Bishop, New Criminal Procedure, sec. 673. True it is that the presumption of sanity, not rebutted, sustains that issue in the state's favor, but if at any stage of the trial evidence is introduced, whether by the state or by the defense, tending to impair or weaken that presumption, then the state should not prevail, unless after a consideration of all of the evidence the jury find beyond a reasonable doubt that the accused at the time of the crime had mind and understanding sufficient to know and to understand that the alleged act was wrong. *Knights v. State,* 58 Neb. 225; *Davis v. United States,* 160 U. S. 469; *People v. Garbutt,* 17 Mich. 9, 97 Am. Dec. 162. In such a case a reasonable doubt may arise from a lack of evidence to prove that the accused was mentally responsible within the meaning of the law. It is true that in other instructions the court told the jury that, if after a consideration of all of the evidence they entertained a reasonable doubt of the defendant's guilt, they should acquit, and that, if they found that any of the material facts assumed in the

hypothetical questions to be true were not so, they might reject the opinions based thereon, yet the most that can in reason be said concerning their effect on instruction 23 is that the jury might not have been misled by it.

We have held that the giving of inconsistent and contradictory instructions with respect to a material issue is ordinarily prejudicial error, and we find nothing to take this case without the general rule. *Henry v. State,* 51 Neb. 149.

Since the case must again be tried, we think it proper to say that there is no testimony in this record to the effect that any witness's reputation for truth or veracity is bad in the neighborhood where he resides, and if on the next trial the proof shall be in the same condition it will be the part of prudence to eliminate that feature from the instructions. Neither do we discover any evidence that the accused was laboring under a delusion at the time she killed Churchill. We also think that instructions 30 and 31 should more clearly state the necessity for the state to prove that the accused was of sound mind within the meaning of the law.

Instruction numbered 7, if given, should be made more definite, so there can be no reason to say that the jury might find the accused guilty of murder in the first degree, if they found that the intention to kill and the killing were coincident in point of time.

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

REVERSED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concurring.

We think that the majority opinion is right, also that the instruction first quoted in the opinion and the thirtieth and thirty-first instructions given by the court were erroneous and prejudicial to the defendant. The jury were told that "when one person assaults another violently with a dangerous and deadly weapon, likely to

kill, not in self-defense, or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the person thus assaulted is actually destroyed in consequence of such assault, * * * such killing would be murder." Thus the court recited to the jury precisely the things which this defendant did, and tells the jury that such action "would be murder;" and so the defense of insanity was wholly eliminated. We think this would be prejudicial to the defendant, since her sole defense was insanity. The instruction is absolutely wrong and prejudicial in this case, because all of the circumstances of the killing are admitted, and there was no room for presumption to arise therefrom, and this instruction plainly tells them that the fact of the shooting raises the presumption that it was malicious; that that presumption is a legal presumption, and is so strong that under the existing facts the defendant is guilty of murder in the first degree. This decides for the jury the question of legal malice, which depends upon her sanity, which was the only question involved in the case. This instruction, there being no dispute about the facts accompanying the shooting, is prejudicially erroneous under the decisions in *Vollmer v. State,* 24 Neb. 838; *Lucas v. State,* 78 Neb. 454; *Kennison v. State,* 80 Neb. 688.

The thirtieth instruction given by the court is as follows: "In this case the jury will be warranted in convicting the defendant, Maggie Davis, of murder in the first degree, if you find the following facts from the evidence beyond a reasonable doubt: First. That Ira M. Churchill is dead, and that he died in the county of Cedar, state of Nebraska, on the 2d day of November, A. D. 1910. Second. That the said Ira M. Churchill died from the effect of the pistol-shot wound inflicted on him by the defendant in the manner and by the means specified in the information. Third. That the defendant without legal excuse inflicted the said wound upon the said Ira M. Churchill with the purpose and with the

intent to thereby kill him; and the said wound was so inflicted by the defendant upon the said Ira M. Churchill by her deliberate and premeditated malice. Fourth. That said wound was inflicted by defendant upon the said Ira M. Churchill in the county of Cedar, and state of Nebraska, on the 2d day of November, 1910, or at some time prior to his death. If you have so found these facts, it is your duty to find the defendant guilty of murder in the first degree." There was no question that plaintiff in error shot the deceased. That fact was not disputed. The defense presented was that at the time of the killing she was not of sane mind. It will be observed that this defense was wholly eliminated by the instruction. At the beginning of the instruction the jury were told that they would be warranted in convicting the accused of murder in the first degree, if they found the facts stated therein to have been proved beyond a reasonable doubt, and, at the close, they were informed that if they found these facts it was their duty to find the defendant guilty of murder in the first degree. This closed the door upon the only defense offered, for there is not one word in that instruction directing the jury that they must find beyond a reasonable doubt that the accused was sane at the time of the killing, which the law clearly requires, and which is the settled law of this state.

It may be said that the use of the words "without legal excuse," as found in the third clause of the instruction, was sufficient to cure the vice of the instruction. But such could not be the case, for in the twenty-first instruction the subject of "legal excuse" is presented, and the jury were informed that "the law recognizes no such rule in criminal law, popularly known as the 'unwritten law'; that, even if you believe from the evidence that the deceased, Ira M. Churchill, had wronged the defendant and deceived her, this would not afford her *a legal excuse* to take his life," provided she was able to distinguish right from wrong as to the particular act complained of. Here the jury were told that the fact she had been

wronged furnished no "legal excuse" for killing the deceased. With this direction as to what constituted a "legal excuse," nothing would be more natural than that the jury should adopt as their guide this definition, and thus the defense of insanity would be entirely excluded. It is universally held by all courts that the giving of an erroneous instruction upon a material issue cannot be cured by other inconsistent instructions which correctly state the law. It is also a well-known rule that, if by an instruction an effort is made to cover the whole case, all the elements necessary to the commission of the crime must be included, or the instruction will be bad. It is also so well settled as to be elementary that instructions should be so formed as to be applicable to the evidence as presented in the case on trial, and to that evidence alone. The same vice occurs in the thirty-first instruction, which directs the jury to find the accused guilty of murder in the second degree, if they find that the killing was done without premeditation and deliberation.

We think these instructions were clearly erroneous, prejudicial, and constitute reversible error.

BARNES, J., dissenting.

I cannot concur in the majority opinion. As I read the bill of exceptions, the fact that the defendant actually formed the purpose to kill the deceased, Ira M. Churchill, and deliberated and premeditated upon it for a long time before she committed the offense, is clear; that thereafter she deliberately killed her victim by shooting him with a revolver, which she declared was purchased for that purpose. To such a state of facts the rule announced in *Lucas v. State*, 78 Neb. 454, has, to my mind, no application. It clearly appears that the only defense relied on by the accused was that of insanity, and upon that question the verdict of the jury was amply sustained by the evidence. In fact, I am unable to see how they could have arrived at a different conclusion. As I understand the majority opinion, the

reversal is predicated upon an alleged inconsistency in the charge to the jury, and a failure to mention the matter of insanity in one of the main paragraphs of the instructions. Upon those questions, it may be said that if each paragraph of the instructions is considered separately, and without reference to the other paragraphs, it is possible that they may appear to be slightly inconsistent; but when they are considered together they fairly state the law. It is an easy matter to select an isolated portion of a lengthy charge to the jury and find that, standing alone, it does not state the law. The whole charge must be considered together. Again, it is impossible to introduce qualifying phrases into every sentence containing the statement of a general legal proposition. If the instructions as a whole inform the jury what the law is with reference to a crime, and also give the defendant the benefit of a correct statement of the law regarding his defense, it is sufficient. The jury in this case were repeatedly told in varying phraseology that, if at the time of doing the act the accused was not of sound mind, she should be acquitted; and if the evidence whether she was sane or insane was evenly balanced, or if they entertained a reasonable doubt as to her sanity, she should be acquitted.

From reading the whole charge, it seems clear that the jury were not misled in any manner, and clearly understood that the instructions criticised were to be considered in connection with the other instructions given with reference to the defense of insanity. To believe otherwise is to presume that the jury were not composed of men of ordinary intelligence.

Where a judgment is based on a correct verdict, it should not be reversed, unless it appears that the instructions were clearly misleading. While the instructions in this case are not so clear and concise as they should have been, still I am unable to see how they could have resulted in any prejudice to the substantial rights of the accused.

The record as a whole reflects a fair trial and a just verdict, and I am of opinion that the judgment should be affirmed.

LETTON, J., concurs in the foregoing dissent.

CHARLES F. DOLL ET AL., APPELLEES, V. BERTHA GETZSCHMANN ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,991.

1. Vendor and Purchaser: CONSTRUCTION OF CONTRACT: INDORSEMENT ON NOTE. Where a vendor of real estate takes a series of notes for deferred payments, and at the time they are executed indorses one of the notes "paid" and surrenders it to the purchaser pursuant to the contract of purchase, the indorsement is a substantive part of the note.
2. Evidence: NOTES: INDORSEMENT: PAROL EVIDENCE. Facts showing that an indorsement on a note when executed is a substantive part of the note may be proved by parol evidence.

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

Charles W. Haller, for appellants.

George W. Shields, contra.

ROSE, J.

This is a suit by vendors to foreclose a contract for the sale of real estate. Defendants are the purchasers. According to the petition, the purchase price was $6,005, defendants agreeing to pay $5 down and $1,000 annually for six years with interest on the entire debt, each of the six deferred payments being evidenced by a separate promissory note executed by the purchasers. The contract is set out in the petition, and refers to the notes in these words: "Said sum of $6,000 is further evidenced by six

certain promissory notes each bearing even date herewith and payable on or before one, two, three, four, five and six years after date, respectively." The first note was paid, and defendants are resisting payment of the last one only, the entire debt having been declared due for nonpayment of interest. Charles F. Doll and Amelia Doll, plaintiffs, are named in the contract as vendors, but August Doll acted for them in selling the real estate and in making the contract. The answer of defendants contains the following averments:

"(3) On or about June 11, 1907, the date of the contract set out in the petition, said August Doll and defendants had numerous matters of dispute and controversy growing out of their prior dealings just referred to, some pending in suit brought in the name of said Charles F. Doll; and said August Doll, always acting with the fullest authority and consent of said Charles F. Doll, made and effected with the defendants a compromise or settlement according to which the defendants were to pay, in full for all the lots described in the contract set out in the petition, a balance of $5,000 only in yearly payments of $1,000 each. Said August Doll insisted, however, that the contract should be drawn for $6,005, as set out in the petition, accompanied by six notes, and that the $1,000 note last falling due according to its terms should be kept and not delivered by the defendants and he would mark and indorse it paid.

"(4) Thereupon, the defendants and said August Doll carried out said arrangement, the one $1,000 note not being delivered, and being marked and indorsed by said August Doll: 'Paid July 12, 1907. August Doll.'"

Allegations of new matter in the answer are denied by a reply containing this plea: "These plaintiffs further deny the allegations and each of them in paragraph three in said answer, except that these plaintiffs admit that the said August Doll was acting for them as their agent in and about the transfer of and sale of said property to the defendants, but the plaintiffs allege the fact to be that

the said August Doll never had any authority to sell said land for less than the sum of $6,005, and never had any authority to give to the said defendants or either of them any credit upon said sale except for actual cash; and the said August Doll had no authority to make any such contract with the said defendants as is set forth in said third paragraph of said answer."

After a full hearing, the trial court found that "August Doll, as agent of said Charles F. Doll, made with the defendants the agreement set out in paragraphs three and four of the said answer, and that the $1,000 promissory note last maturing, to wit, on July 1, 1913, was pursuant to said agreement never delivered by defendants, and was pursuant to said agreement indorsed by said August Doll: 'Paid July 12, 1907. August Doll.' The court finds as a matter of law, however, that all evidence admitted to prove the agreement set out in paragraphs three and four of the said answer was incompetent, irrelevant and immaterial, for the reason that said evidence tended to vary and modify a written contract." From a decree foreclosing plaintiffs' lien, including the note in controversy, defendants have appealed.

Under the proofs admitted in evidence by the trial court, the findings of fact quoted are clearly correct. The conclusions of law, however, cannot be adopted. The reply admits that August Doll acted for plaintiffs in selling the real estate and in making the contract pleaded in the petition. That contract refers directly to the notes and they are all parts of one transaction. The last note of the series was indorsed "paid." The indorsement was made at the time of the execution of the note, which was never in fact delivered. The indorsement was an inducement to defendants to sign the contract of sale. Plaintiffs' agent made the indorsement for the purpose of selling his principals' property. It was clearly a part of the contract and note. The parties had a right to transact business in that manner though it is not the usual method. The general rule is that a memorandum or indorsement

on the back of a note when it is executed is a substantive part of the contract. *Kurth v. Farmers & Merchants State Bank,* 77 Kan. 475, 15 L. R. A. n. s. 612; *Grimison v. Russell,* 14 Neb. 521; *Polo Mfg. Co. v. Parr,* 8 Neb. 379; *Bay v. Shrader,* 50 Miss. 326; *Kalamazoo Nat. Bank v. Clark,* 52 Mo. App. 593; *Hughes v. Fisher,* 10 Colo. 383. The principle was stated in an early Massachusetts case as follows: "Where the payee of a note, at the time it was signed by the maker, and as a part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it, it was held that the indorsement must be taken as part of the instrument, and that the payee could never maintain an action thereon." *Barnard v. Cushing,* 45 Mass. 230. The doctrine is the same, though the indorsement is unsigned. *Hartley v. Wilkinson,* 4 Camp. (Eng.) 127; *Leeds v. Lancashire,* 2 Camp. (Eng.) 205. By signing the indorsement, August Doll did not invalidate it or detach it from the instrument of which it was a part. It was under the contract made by the agent for his principals that the note in controversy was marked "paid." They cannot be allowed to ratify the part beneficial to them and repudiate the rest. The agent conducted for plaintiffs the negotiations resulting in the contract of purchase. To consummate the deal, he marked the last note "paid," and allowed the makers to retain it. His principals, without possession of the sixth note, are now seeking to foreclose the contract of which it is a part. They have thus ratified the contract in its entirety, and are chargeable with the means employed by their agent to induce defendants to sign it, including the indorsement. Parol evidence is admissible to show that an indorsement on the back of a note was there when the note was executed. *Blake v. Coleman,* 22 Wis. 415. The trial court properly admitted proof of facts showing that the indorsement was part of the note.

It follows that the vendor's lien does not include the amount of the note marked "paid," and that defendants

are not liable for the payment thereof. The judgment is therefore reversed and the cause remanded to the district court, with directions to enter a decree of foreclosure protecting defendants' rights as fixed by the indorsement on the note in controversy.

REVERSED.

N. J. MAXWELL ET AL., APPELLANTS, V. JAMES REISDORF, APPELLEE.

FILED NOVEMBER 28, 1911. No. 17,212.

1. **Intoxicating Liquors: LICENSES: RECORDS OF VILLAGE BOARD.** The record of a village board granting a license to sell intoxicating liquors must show all of the jurisdictional facts.

2. ———: ———: **PETITION.** The filing of a petition signed by the number of resident freeholders required by statute is essential to a village board's jurisdiction to grant a license for the sale of intoxicating liquors.

3. ———: ———: **NOTICE.** Two weeks' notice of the filing of a petition for a license to sell intoxicating liquors is essential to the licensing board's jurisdiction to grant a license.

4. ———: ———: ———. A new notice must be given before a valid license can be granted, where the names of the full number of qualified petitioners first appear on the petition at the time set for the hearing of a remonstrance.

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

A. M. Post and *R. P. Drake,* for appellants.

Albert & Wagner, contra.

ROSE, J.

The validity of a license to sell intoxicating liquors in the village of Creston is the subject of the controversy. James Reisdorf is licensee. N. J. Maxwell and others are

remonstrators. After the license had been granted, remonstrators presented the record of the village board to the district court, and there asked to have the license revoked. From an adverse judgment they have apppealed to this court.

The license is challenged on the ground that licensee failed to give legal notice of the filing of the petition on which the village board acted. The facts material to the determination of this question may be summarized as follows: For the purposes of this appeal, a petition signed by 30 resident freeholders was essential to the jurisdiction of the board. When the petition was filed with the city clerk, April 14, 1911, it bore 30 names, but only 29 genuine signatures, the use of one of the names having been unauthorized. Beginning with that date notice of the application was published for three consecutive weeks. April 26, 1911, the city clerk appended to the petition the following note: "Comes now Louise Lueschen, whose name appears as one of the petitioners on petition of James Reisdorf for liquor license, and asks that her name be taken from said petition, as she herself had not signed such petition, nor authorized any one else to sign her name to such petition." At a meeting of the board May 1, 1911, the remonstrance was read. It is in this form: "We, the undersigned, hereby remonstrate against the issuing of a liquor license to one James Reisdorf, on petition now on file with the village clerk of said village. The reason we object to the issuing of such license is that there are not enough signatures of legal resident freeholders on said petition." The hearing of the remonstrance was set for May 2, 1911, when the board allowed three additional petitioners to sign the petition, and directed the clerk to issue the license; the record of the proceedings, showing, among other things: "It is admitted to the board that the signature of Louise Lueschen on said petition is not her signature, and that she did not authorize any one to sign her name to said petition." It thus appears that, when the petition was

filed and the notice published, it bore the authorized signatures of 29 qualified petitioners only, and remained in that condition until the time set for the hearing of the remonstrance. No further notice of the application was given after the number of authorized signatures had been increased.

On this record remonstrators contend: The petition as originally filed was not a legal one. It bore the names of 29 petitioners only, and was wholly insufficient for jurisdictional purposes. If it was made sufficient by the additional signatures, it became so for the first time May 2, 1911. Legal notice of the filing of the petition not having been published after it was made sufficient by additional petitioners, the board issued the license without jurisdiction, and its action is for that reason void.

Was the petition as originally filed sufficient to give the village board jurisdiction over the matter of granting a license? Was the notice of the filing of the petition containing the names of 29 petitioners only sufficient to meet the requirements of the statute? The law prohibits the sale of intoxicating liquors, except upon statutory conditions. Those conditions cannot lawfully be relaxed or modified by licensing boards or courts. Whether they impose a hardship upon an applicant for a license is not an executive or a judicial question. To procure a valid license, an applicant must comply with such conditions, and it is not within the power of those who administer the law to excuse him from doing so. The language of the law is: "No action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication." Comp. St. 1911, ch. 50, sec. 2. The terms, "application" and "the filing of the same" refer to the statutory petition signed by at least 30 resident freeholders, and do not apply to a petition bearing 29 signatures only. For the purpose of giving notice, the statute makes no reference to a petition which appears on its face to have 30 petitioners, and neither the licensing board nor the court

has any authority to interpolate such a provision. The statute requires the applicant to file the petition and to give the notice. The requirements of both are definitely stated. Where a village board issues a license, its record must show all of the jurisdictional facts. One of those facts is the filing of a petition signed by the requisite number of freeholders. It is not shown by the record of the proceedings before the board that there are less than 60 resident freeholders in the village. There is as good reason for asserting that a petition, to which all the names were signed without authority, is sufficient for the purpose of publication, though the use of such names has never been ratified, as there is for the contention that 29 genuine signatures and one unauthorized name meet the requirements of the statute, if they happen to appear upon the face of the petition. Prior to May 2, 1911, the board did not have before it the petition contemplated by statute. Within the meaning of the law, the document filed by the applicant April 14, 1911, was not a petition or application, and the filing thereof could not be made the basis of a legal notice. Not having had a sufficient petition until May 2, 1911, two weeks' notice of the filing thereof was essential to confer jurisdiction on the board to issue a license. *Zielke v. State,* 42 Neb. 750; *Pisar v. State,* 56 Neb. 455; *Pelton v. Drummond.* 21 Neb. 492.

Licensee, however, takes a different view of the law, and argues that the filing of the petition, the giving of the notice and the signing of the additional names with the permission of the board meet the requirements of the statute and make further publication unnecessary. To sustain this point he cites *Livingston v. Corey,* 33 Neb. 366, and *Thompson v. Eagan,* 70 Neb. 169. In the first of these cases the writer of the opinion was particular to make it clear that the petition as originally filed was signed by the requisite number of qualified petitioners. In the last of the cases cited by licensee the first is followed, and for the reason stated neither is in point.

For want of legal notice of the filing of the petition on which the board acted, the license was granted without jurisdiction, and is therefore void.

It follows that the judgment is reversed and the cause remanded to the district court, with a direction to cancel the license.

REVERSED.

SEDGWICK, J., dissenting.

The licensing board is not a court. It acts in an administrative and only quasi-judicial capacity. It is necessary for it to take some ministerial and administrative actions in order to get the matter ready for hearing. In every case in which this court has spoken of the jurisdiction of this board, it has plainly referred to its power to grant the license, and not to its method of obtaining, as we would say of a court, jurisdiction of the subject matter. The law does not require the board to give notice that there will be an application for license heard at a certain time. The party himself generally gives the notice without any action of the board whatever. The statute (Comp. St. 1911, ch. 50, sec. 2) provides that no action shall be taken upon said application until notice is given, and that is all the limitation that the law makes. There is no provision of the statute that can by any construction be made to mean that the board must give notice of the application, and that before it gives such notice it must be shown that it has genuine signatures on the petition. There is nothing of that kind in the law. In *State v. Weber,* 20 Neb. 467, the court said: "There was a petition before the board which on its face complied with such provision. In the absence of objection made within the time limited by other provisions of the same section, it would probably be sufficient." See, also, *Zielke v. State,* 42 Neb. 750. I am not aware that there has ever been a decision to the contrary. If the petition on its face appears to be all right and the board acts thereon without objection, the petition is sufficient. Louise Leuschen's name was upon the peti-

tion. She asked that her name be taken from the petition, and stated that she had not authorized any one to sign her name. It was admitted upon the record by the parties that she did not authorize any one to sign her name. For the purpose of withdrawing her name from the petition, it was immaterial whether she did or not, as she had a right to withdraw her name, even if she had signed it herself; but the question whether she authorized someone to sign her name or not is not a question of forgery. The law would presume that the person who signed her name supposed he had authority to do so, and that if he did not it was an innocent mistake. Whether he had or not was a question of fact, and if she had not requested her name to be withdrawn, and it had been objected by the remonstrants that her signature was unauthorized, it would have presented a question of fact for the board to have determined. Again, if she knew that her name was upon the petition, she would be bound by it unless she raised objection; that is, it was her signature until she objected, and the board would be justified in so considering it. If we apply the same rule to these proceedings that we would to ordinary proceedings, we would say that the purpose of the statute was to give all parties interested an opportunity to be heard upon an application for the license, and that this was the reason for requiring notice, and that notice that an application would be heard at a specified time was a full compliance with the statute whether some names should afterwards be withdrawn from the petition and others substituted in their places or not. The board would not have power (jurisdiction) to grant a license until a petition was before it, as the law requires, and in this case there was such petition before it, and it had power to grant the license. There seems to be no reason for supposing that this is a question of jurisdiction, and that all the signatures on the petition must be genuine signatures when the applicant publishes his notice. The board has no power even to decide in what newspaper

the notice shall be published. This court has so decided. *Feil v. Kitchen Bros. Hotel Co.*, 57 Neb. 22. There is no reason why an application for license should not be treated, by the courts at least, the same as any other application before an administrative body. It is not the duty of the court to add technical restrictions any more than in any other proceeding. It is for the legislature, acting under the force of public opinion, to add additional technical restrictions if it is thought advisable to do so.

The majority opinion does not say anything about the above quotation from *State v. Weber*, 20 Neb. 467, one of the earlier cases and a leading case, a case that has been many times cited by this court and supposed to be followed as a precedent. In *Livingston v. Corey*, 33 Neb. 366, the names of three disqualified persons were upon the petition. If these were excluded, there remained 31. Three other petitioners withdrew their names, leaving 28. It does not appear when they withdrew their names. The indication is that they withdrew them before the publication of the notice was completed. It will seem quite clear from the opinion that this was the fact, although it is not definitely stated. If that was the case, the notice was not published while there was a valid petition before the board, and under the holding in the case at bar, as soon as these three men withdrew their names from the petition, the board was without jurisdiction. When these three men had withdrawn their names from the petition and before others were added, the board was without power to grant the license. There was no question of jurisdiction as we ordinarily apply the term to courts. It had power to allow others to sign the petition if desired, and allow still others to withdraw if they desired; in other words, it had power to make preliminary arrangements for a fair hearing, but no power to grant the license until the petition was completed. The court in that case said: "After a petition for a liquor license was filed with the city clerk and

notice thereof was given, the city council permitted other freeholders to sign the petition. *Held,* No error, and that it was not necessary to republish the notice after such amendment." In the case at bar, unless we overrule the proposition in *State v. Weber, supra,* the petition was sufficient until the objection was made that Louise Leuschen's name should not be counted. Until that time, the publication of the notice being complete, the board had power to grant the license. Undoubtedly the petitioner may appear before the board and withdraw his name from the petition or show that his signature was unauthorized, and so prevent the board from granting the license, unless the petition is amended, but the petitioners cannot play fast and loose with the power of the board to allow amendments, in that way. The notice was published while the board had the petition before it with Louise Leuschen's name and without the question of fact determined as to whether or not she had authorized it; there having been no such objection made and no such question raised. Notice published under such circumstances is a good publication, and the effect of it is not destroyed by the substitution of one name for another upon the petition.

Under the holding of the majority opinion, the board is entirely without jurisdiction to take any action whatever, and the applicant has no jurisdiction to publish notice of the application, if it can afterwards be shown that the signatures to the petition, or a sufficient number of them (in this case one), was placed upon the petition without authority. If the person who placed the name upon the petition acted in perfectly good faith, supposing he was duly authorized, and upon due publication of the notice no objection is made to the petition, the result is the same, there was no jurisdiction and the whole proceedings are void. The consequences are remarkable. After the applicant has received his license and has conducted his business legally and properly, as he supposes, one of the petitioners raises the question whether his sig-

nature was duly authorized. The licensee is prosecuted, and his defense depends upon being able to show that the signature to the petition was authorized. If not, he has no license, and is guilty. The decision in *State v. Weber* and *Zielke v. State, supra,* if followed, would save us from such an absurdity.

STATE, EX REL. JOHN J. G. GRAHAM, APPELLEE, V. ALCINOUS T. BRATTON, APPELLANT.

FILED NOVEMBER 28, 1911. No. 17,385.

1. Statutes: REPEAL. An act to amend subdivision 27, sec. 48, ch. 13, art. III, Comp. St. 1909, and repealing said section as it had previously existed, was passed with an emergency clause and approved April 7, 1911 (laws 1911, ch. 13.) Three days later an act to amend the same section, under the designation of section 8573 of Cobbey's Annotated Statutes, 1909, was passed with an emergency clause and approved (laws 1911, ch. 14). The repealing clause in the later act repealed the section sought to be amended by both acts, "as it now exists." *Held*, That the later act repealed the section as amended by the former act.

2. ———: CONSTRUCTION. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning.

3. ———: ———: PROVINCE OF COURT. It is not within the province of the court to set aside, or nullify by construction, an act of the legislature which is free from ambiguity, and clear and explicit in its terms, upon the ground that to do so would appear to be equitable; nor upon the theory that, in the judgment of the court, the legislature made a mistake and did not intend to do that which its language clearly imports.

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

John M. Ragan, for appellant.

Tibbets, Morey & Fuller, contra.

FAWCETT, J.

We have in this state two different statutes; one published by Mr. Wheeler and known as "Compiled Statutes of Nebraska," and the other edited by the late Judge Cobbey, and generally known as "Cobbey's Annotated Statutes of Nebraska." In the introduction of bills proposing amendments to the statutes, some members of the legislature refer to the Compiled and others to the Annotated Statutes. In 1909 the section of the statute in controversy here appeared in the Compiled Statutes as subdivision 27, sec. 48, ch. 13, art. III, and in Cobbey's Annotated Statutes as section 8573. On February 17, 1911, senate file No. 294 was introduced and read the first time. This bill, which will hereinafter be referred to as 294, was passed with an emergency clause and approved April 7, 1911. On February 6, 1911, senate file No. 204 was introduced and read the first time. This bill, which will hereinafter be designated as 204, was passed with an emergency clause and approved April 10, 1911. The sole question involved here is: Was 294 repealed by 204? It will be observed that both bills sought to amend the same section. The section sought to be amended had theretofore applied only to sewer districts in cities having more than 5,000 and less than 25,000 inhabitants. The amendment proposed by 294 was to make the section also apply to water districts. The amendment proposed by 204 was designed simply to change the rate of interest upon instalments of special taxes from 7 to 5 per cent. Section 2 of 294 provided: "Said subdivision 27 of section 48, chapter 13, article 3, Compiled Statutes of Nebraska (1909) (Ann. St., sec. 8753) be and the same is hereby repealed." It will be seen that the adoption and approval of 294, with an emergency clause, on April 7, with the repealing section above set out, operated as a repeal of section 8573, Cobbey's Annotated Statutes, so that the same no longer existed as it appeared in the statutes of 1909, but thereafter existed

as amended by 294. Section 2 of 204 provided: "Said section 8573 of Cobbey's Annotated Statutes of Nebraska for the year 1909 (Comp. St., ch. 13, art. III, sec. 48, subd. 27) as it now exists is hereby repealed."

Some time after 204 became effective, the relator and others petitioned the mayor and council of the city of Hastings to create a water district, under the provisions of 294. A water district was created, and the city clerk ordered to advertise for bids for furnishing material and labor for the construction of the proposed improvements. The clerk, under the advice of the city attorney, refused to so advertise. The city attorney based his advice upon the ground that 294 had been repealed by 204. The present action in mandamus was then instituted by relator, and upon hearing the district court sustained 294, and ordered that a peremptory writ issue, commanding the clerk to proceed in accordance with the commands of the mayor and city council. The respondent, the city clerk, appeals.

It is argued that section 2 of 204, in repealing section 8573, Cobbey's Annotated Statutes, referred to that section as it appeared at the time of the introduction of 204 on February 6. If that construction were put upon this repealing section, it would render it meaningless, for the reason that at the time it was passed and approved it would have had nothing to operate upon, as section 8573, as it appeared on February 6, had been repealed by 294 on April 7. We think the rule is too well established to require citation of authorities that, where a statute is plain and unambiguous in its language, it is the duty of the court in construing it to give the language used by the legislature its plain and ordinary meaning. The language used in the repealing section of 204 is plain and free from any ambiguity. Giving it its plain and ordinary meaning, it did not assume to repeal section 8573 of Cobbey's Annotated Statutes, as the same appeared on February 6, but, on the contrary, it plainly and explicitly repealed said section "as it now exists";

that is to say, as it then existed upon the day and hour when 204 was passed and approved. Neither amendment has any application whatever to the other. Both might have been included in one bill, as they do not in any manner conflict; or, at the time of its passage, 204, by an amendment setting out the section as it then existed—that is to say, as it had been amended by 294—would have accomplished what it would seem the legislature intended to do, viz., amend the section in the two particulars named.

The relator contends, in effect, that we should either hold, in harmony with *Hall v. Craig,* 125 Ind. 523, that the two acts of the legislature referred to should be considered *in pari materia,* and both acts sustained, or that 204 is void, for the reason that it attempted to amend a section of the statute which had already been repealed by 294. The respondent contends that the repealing clause in 204, which recites that section 8573 of Cobbey's Annotated Statutes of Nebraska for the year 1909 "as it now exists is hereby repealed," means exactly what it says; that there is no ambiguity in the language used; that section 8573, as it then existed, was as it had been amended three days prior thereto by 294. While the equities of the case seem to be with the relator, it is not within our power to set aside or amend by construction an act of the legislature which is free from all ambiguity and clear and explicit in its terms, simply because to do so would appear to be equitable; nor can we do so upon the theory that, in our judgment, the legislature made a mistake and did not intend to do that which its language clearly imports. To adopt such a course would be establishing a dangerous precedent. If the legislature has blundered, it is simply proof of its fallibility, and it is for it to make the correction. The court sometimes blunders, but, when it does, it is for the court to correct the same. We have no more right to correct the mistakes of the legislature than it would have to correct ours. In the present case, therefore,

we must hold that, by the passage of 204, the legislature repealed 294, and that whether such repeal was intentional or by mistake is immaterial here. We do not think this holding will leave the city in the hopeless condition pictured by counsel at the bar. Our legislature meets with at least sufficient frequency. It may be appealed to at its next session, and we have no doubt it will then adjust the matter in accordance with its own sound judgment. Moreover, we think this case is fairly ruled by *State v. Babcock*, 23 Neb. 128.

The judgment of the district court is reversed and the action dismissed at relator's costs.

REVERSED AND DISMISSED.

MICHAEL H. MCCARTHY, APPELLEE, V. EDMOND H. BENEDICT ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,421.

1. **Mortgages: FORECLOSURE: FRAUD.** An assignee of a mortgage which has not been recorded, who brings an action to foreclose the same after a decree has been entered against the original mortgagee canceling the mortgage in an action to which the assignee was not a party, is not necessarily chargeable with fraud in so doing.

2. **Judgment: VALIDITY: PETITION.** The fact that a petition in district court fails to state a cause of action as against a general demurrer will not render the judgment of the court thereon void for want of jurisdiction, if it shows that the plaintiff has or claims a cause of action which is so identified in the petition as to enable the court to determine whether it is of such a nature as to be within the jurisdiction of the court.

3. **Trial: STIPULATIONS: APPEAL: REHEARING.** When stipulations of fact in an action are improvidently made by mistake of the parties, the court has discretion to relieve the parties from the consequences thereof. The court cannot limit the right of the parties in a civil action to dispose of their interests as they see fit, and when, after issue joined, they agree upon the facts that

shall be submitted to the court for its judgment, and submit the case to the trial court thereon, and again upon appeal submit the cause to this court upon the same record, no attempt having been made to correct the stipulation, this court will ordinarily upon motion for rehearing consider such stipulation as containing the true facts in the case for the purpose of determining the motion.

4. **Quieting Title: DECREE: RECORDING ACT.** The party obtaining a decree quieting title to real estate may cause an exemplification of that decree to be recorded in the office of register of deeds, and, if he fails to do so, he cannot claim the benefits of the recording act as against one whose instrument of title is first recorded.

OPINION on motion for rehearing of case reported in 89 Neb. 293. *Rehearing denied.*

SEDGWICK, J.

A statement of the case may be found in the former opinion of this court in 89 Neb. 293. A motion for rehearing was filed accompanied by brief, and argument was had upon the motion.

1. It is stated in the brief that this action is predicated upon the fraud of the defendant Benedict. We do not so regard it. The defendant brought his action in the district court to foreclose the mortgage which he claimed to own by virtue of an assignment from the original mortgagee. If his rights as assignee of the mortgage were not barred by the prior action to quiet title, he was entitled to a decree of foreclosure. He began his foreclosure proceedings, making the parties in whose name the title appears of record defendants, and, if the mortgage which he held by assignment was a lien upon the land, he cannot be charged with fraud in attempting to assert that lien.

2. In our former opinion it was said that, if the district court acquired jurisdiction over the parties to the suit (to quiet title), the decree would be binding and final as to them, "provided the petition stated a cause of action." It is argued strenuously in the brief that the decree would be binding whether the petition

stated a cause of action or not. This contention is immaterial in this case because the decree to quiet title is in the opinion assumed to be binding upon the parties to that decree, and, because the defendant in the case at bar was not a party to that action, the decree therein is held not to bar his action to foreclose the mortgage. We might, however, suggest that it was not intended to say in the opinion that a petition, in order to give the court jurisdiction, must state a cause of action as against a general demurrer or motion, but it must state sufficient at least to show that the plaintiff has or claims a cause of action which is sufficiently identified in the petition to enable the court to determine whether it has jurisdiction of such a proceeding.

3. The plaintiff now contends that we erred in our former opinion in considering the stipulation of facts upon which the case was tried and submitted in the court below, and in not taking judicial notice that some of the facts stipulated by the parties are inconsistent with the record of this court in another action in which these parties were interested and which involved the same subject matter. There is no doubt that, when stipulations of fact in an action are improvidently made by mistake of the parties, the court has discretion to relieve the parties from the consequences thereof. In such case the parties should act promptly and call the attention of the trial court to the mistake of fact in the stipulation, and, when that mistake is clearly found with a proper showing of diligence, the courts generally correct such mistake. The parties have a right to dispose of their interest as they see fit, and when, after the issues are joined in the case, they agree upon the facts that shall be submitted to the court for its judgment, and make that agreement a part of the record in the case, and so submit the case to the trial court for its decision, they ought ordinarily to be bound by the decision that is made in accordance with those facts. If afterwards, without making any attempt to correct

their stipulation of facts, they bring their case to this court upon appeal and again submit the case upon the same stipulation of facts, they cannot complain of a decision that is made in accordance with that stipulation.

4. The final and most important question presented in this motion and brief is as to the rights of the assignee of a mortgage whose assignment is not recorded. It is held in our former opinion that a decree in an action to quiet title, in which the original mortgagee was a party defendant, would not be binding upon the holder of a note and mortgage by assignment "unless he were made a party to the suit and jurisdiction obtained over him." Upon further consideration of the matter we are satisfied that this holding is right in this case. Our recording act has been many times construed by this court, and it has been uniformly held that instruments affecting real estate that are required to be recorded are void as to subsequent purchasers in good faith without notice "whose deeds, mortgages, and other instruments, shall be first recorded." Comp. St. 1911, ch. 73, sec. 16. One who seeks to bar outstanding interests in real estate that are not recorded must himself comply with the recording act, and, unless he records evidence of title, he cannot avail himself of the provisions of the act. This would appear to apply as well to one whose interest in real estate is evidenced by a judgment or decree of court. Comp. St. 1911, ch. 73, sec. 23: "Any exemplification of any decree, or judgment in partition on final decree in chancery affecting real estate, may in like manner be recorded in the office of the register of deeds in any county in which any real estate described therein may be situated." It does not appear that any exemplification of the decree in the action to quiet title was recorded in the office of the register of deeds before the defendant's assignment of his mortgage was recorded, and therefore this plaintiff is not in a position to avail himself of the provisions of the recording act as against the assignee of the

mortgage who was not a party to the action to quiet title.

For these reasons, the motion for rehearing is

OVERRULED.

WILHELM FLEGE V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,136.

1. **Evidence:** SUFFICIENCY. Some of the evidence in the case is referred to in the opinion in the discussion of the errors complained of, but the objection that the evidence is not sufficient to support the verdict is not determined, it appearing that another trial will be necessary.

2. **Criminal Law:** INSTRUCTIONS: APPLICABILITY. The instructions of the court should be applicable to the precise question being tried. If an instruction is given defining what may generally be considered as a sufficient motive for crime, its application to the case in hand should be explained.

3. ———: ———: ASSUMPTION OF FACTS. In a prosecution for murder, when it is proved without doubt that a homicide was committed by pistol-shot wounds, an instruction which refers to the cause of the death of the deceased as "the pistol-shot wounds inflicted by the defendant" is incorrect, as assuming that the defendant inflicted the wounds.

4. ———: ———: MALICE: QUESTION FOR JURY. In a prosecution for murder, when the circumstances of the killing are all established by the evidence, it is erroneous to instruct the jury that the law implies malice from such circumstances. It is for the jury to determine whether the act was purposely and maliciously done.

5. ———: ———: ———: APPLICABILITY. In such case, if the homicide was committed by shooting, there being no attempt to justify the shooting, but the question is whether the defendant committed the act, such an instruction as to the circumstances under which the law will imply malice has no application and may be misleading.

6. ———: ———: REASONABLE DOUBT. Instructions attempting to define "reasonable doubt," *held* erroneous and prejudicial.

7. ———: ———: ALIBI: APPLICABILITY. In a prosecution for murder, when the precise time that the murder was committed is in

dispute, but there is no question as to the whereabouts of the defendant at any time, it is erroneous to instruct the jury that the defendant relies upon proof of alibi.

8. ———: ———: QUESTIONS FOR COURT AND JURY: WITNESSES: CREDIBILITY. If a witness upon a former hearing has testified to a different state of facts than those testified to by him at the trial, it is erroneous to instruct the jury that, if they are satisfied that such statements were made "through an honest fear of personal violence, such statements would not be the voluntary act of the witness and would not operate as impeaching statements." It is for the jury to determine whether the witness was actuated solely by an honest fear of personal violence, and whether there was sufficient apparent cause for such fear, and how much reliance could be placed upon his evidence in view of such contradictory statements.

9. ———: ———: DEGREES OF HOMICIDE. In a prosecution for murder in the first degree, it is not reversible error to define the different grades of homicide, including murder in the first degree, although that charge is afterwards withdrawn from the consideration of the jury and the cause submitted upon the charges of murder in the second degree and manslaughter only.

10. ———: ———: GOOD CHARACTER: QUESTION FOR JURY. A request for instruction that evidence of good character "may be relied upon to raise a doubt of his guilt sufficient to acquit him" is properly denied. It is true that good character counts for much in a prosecution for murder, but whether it should be relied upon in a given case to turn the scale in favor of defendant is a question for the jury.

11. ———: PRESUMPTION OF INNOCENCE. In a criminal prosecution, the presumption of innocence continues in favor of defendant through the trial until overcome by evidence establishing guilt beyond a reasonable doubt.

12. Erroneous rulings of the court in excluding evidence are stated and considered in the opinion.

ERROR to the district court for Dixon county: GUY T. GRAVES, JUDGE, *Reversed.*

J. J. McCarthy, Frank A. Berry and *Frederick S. Berry,* for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and *C. A. Kingsbury, contra.*

SEDGWICK, J.

On the 30th day of June, 1910, Louise Flege was shot and killed at her home in Dixon county. She was then residing with, and keeping house for, her brother, the defendant, and he was afterwards charged with her murder. Upon trial in the district court for Dixon county he was found guilty of murder in the second degree, and has brought the record of the proceedings here for review by petition in error.

1. He insists that the evidence is not sufficient to justify his conviction. One Eichtenkamp, a young man of about 18 years of age, was working for the defendant, and had been living with the defendant and his sister for a little more than two months. He had been there for a short time in the preceding year. He continued to stay there for about three weeks after the murder, and about that time he told the officers that the defendant had committed the crime. He was the principal witness for the prosecution, and his testimony is substantially all of the evidence that there is in the record tending to prove the guilt of the defendant. Immediately after the murder this young man told a very different story. His evidence was taken under oath at the coroner's inquest, and he there testified to circumstances which, if true, would prove conclusively that the defendant is not guilty of the crime with which he is charged. He testified upon the trial that he was plowing corn on the defendant's farm during the forenoon of the day of the murder, and that the defendant was painting his automobile house, and that they both went to the house for dinner at about half past 11 o'clock. The deceased had prepared the meal, and they all sat down to dinner about 12 o'clock. After they had eaten their dinner, which he thought took about 20 or 30 minutes' time, he and the defendant smoked, and then took a nap, the defendant lying upon the couch and the witness lying upon the porch, near the front door.

While they were sleeping, which he thinks might have been 20 or 30 minutes, the defendant was awakened by his sister, and was told that the defendant's brother wanted to talk with the defendant at the telephone. It appears from the uncontradicted evidence that the defendant and his brother, Fred Flege, who lived on an adjoining farm, had contemplated going to town with the defendant's automobile, and that Fred at this time called for the defendant to ask him to go then. The deceased went to the telephone, and told Fred that the defendant was asleep, and was by him told to awaken the defendant and have him come to the telephone. This she did, and the defendant and Fred then completed their arrangements to go immediately to town. This young man further testified that, when the deceased awakened the defendant, he was awakened also, and that they immediately went out to the automobile. The defendant drove the machine up toward the house, and went into the house to make some preparations for his trip, telling the witness to put some water in the automobile. The witness put some water in the automobile, and then went to the barn, where his team was, intending to go to the field to plow corn. In his testimony at the coroner's inquest he testified that he went and got a milk pail with which to put the water in the automobile. This would have made it necessary for him to go to the house, as the milk pails were kept in the kitchen. If he had gone to the house, he would have undoubtedly known more about what took place there than he afterwards testified that he knew. In his testimony at the trial he said that he used the slop pail that was standing at the well to put the water in the automobile, and did not go to the house. According to his further testimony at the trial, while he was putting the water in the automobile, he heard some talk in the house between the defendant and the deceased. He could not understand anything that was being said, but testified that they were quarreling, and just as he got

to the barn he heard the defendant and his sister coming out of the house. The defendant was assaulting her at that time; she was walking backwards to get away from him, and the witness said he heard the deceased say: "Leave me alone, leave me alone. What did I do to you?" The witness went to them, and asked the defendant what he was going to do, and the defendant told him: "That is none of your business. You hurry up and get out of here." The witness then went back to the barn, and just as he arrived there he heard a shot and saw the deceased on her knees, the defendant before her, or a little to one side, with a revolver in his hand pointed at her. The witness then went on preparing his team to go to work and heard another shot. The deceased was then lying on the ground in the yard, and the witness saw the defendant leave her and drive away with his automobile. As the defendant passed the witness, he threatened the witness, and told him to keep still about it, and then drove on. It appears from the uncontradicted evidence that the defendant went immediately to the home of his brother Fred, arriving there soon after 1 o'clock, and that the two men went to town with the automobile, as they had arranged to do, and returned to Fred's place at about 4 o'clock in the afternoon. The defendant was a young man about 29 years of age. When he left his brother's place, he stopped at a neighbor's, and talked with the girls there. He took one of the girls, with whom he seems to have been somewhat interested, for a ride, and then arranged with them to wash his machine, which they had done on former occasions. He stayed there some little time, and then stopped in the field where some of his neighbors were at work, and invited the young men to spend the evening with him at his brother Fred's. He did not arrive home until about 6:30 o'clock. This witness testifies that immediately after the defendant left home that afternoon the witness went into the field to work. He saw the deceased lying in the yard. Hogs were

running loose in an adjoining yard, and the gate between the two yards was left open. At the preliminary examination he testified that he did not shut the gate to keep the hogs out from the deceased because he was afraid of the defendant. On the trial of the case he testified that the gate was broken and he couldn't shut it, and that when he came home the gate was still open, but the dog was in the gate keeping the hogs from going through. He further testified that soon after he went into the field he saw an acquaintance, and they had some conversation, in which it appears that the acquaintance asked him some questions about the deceased, and whether the witness liked her, etc. He testified that he told the acquaintance that he saw the deceased on the porch after the defendant went away, and that she was all right. The witness' home, where his father and mother and their younger children resided, was about two miles from the defendant's home. The witness testified that he was at home several times with his father's family after the murder, and they talked about the murder, but the witness never told them what he had seen, but told them circumstances tending to show that some one other than himself or the defendant was guilty of the crime. When the witness went home from his work in the evening of the murder, he saw the body of the deceased still lying in the yard, and went into the house to the telephone to call the defendant at his brother Fred's. The defendant was not there, but he (the witness) informed Fred that the deceased was lying in the yard, and asked him to come over, which Fred immediately did. Fred brought a neighbor with him, and soon after they arrived the defendant also arrived.

It was at first supposed that a tramp that had been seen in the neighborhood had committed the crime. The defendant and his brother employed a detective, and the defendant took the detective from place to place, as the detective dictated, searching for evidence as to who had committed the crime. After this had gone on for about

three weeks, and the sheriff and others interested in the matter were unable to find any satisfactory evidence as to who was the guilty party, the sheriff saw this witness, and told him that other officers were coming out there, and that something had to be done. The witness was then given to understand that the officers and others interested had reached the conclusion that either this witness or the defendant had committed the crime. The witness then for the first time declared that the defendant was guilty.

The evidence covers about 2,000 pages of the record. We have not attempted to state all of the circumstances tending to indicate who was the guilty party. An outline of the principal facts appears to be necessary to an understanding of the questions presented. The defendant had lived at this place since his infancy. Many respectable witnesses testified to his good character and correct life. There was an attempt made by the prosecution to show a motive for the crime of which the defendant was charged. A neighbor testified to a trifling conversation that took place some time before. The time and circumstances were not stated, and afterwards this evidence was stricken from the record. The evidence, then, in this record which is supposed to show a motive for this crime comes wholly from the witness Eichtenkamp. He testified that the deceased objected to the defendant using his automobile so much as he did. The evidence upon that point is very meager, and relates principally to the time when the defendant went into the house on the day of this murder to prepare for his trip with his brother. The witness did not hear the conversation, but he appears to have inferred that they were quarreling about the defendant's leaving his work to go to town with his automobile. The witness also testified to a former occasion when the deceased told the defendant that the house was on fire, and they went out and found that the chimney was burning out, and the defendant, he says, made some severe remarks about

the women folks burning up houses. This, it is thought, tends to show that the defendant and the deceased did not live peaceably together. The defendant's two brothers and his sister and others testify that the relations between the defendant and the deceased were always pleasant, and that there was never any difficulty between them. If there was any motive for the defendant to commit this crime, it was anger caused by the remarks of his sister during the few minutes that the defendant was in the house immediately before the crime was committed. Unless the defendant or the witness Eichtenkamp committed this crime, there seems to be no explanation in the evidence as to how it occurred. Unfortunately it sometimes appears that, when a terrible crime like this is committed, it is impossible, for a time at least, to ascertain with any degree of certainty who is the guilty party. Under such circumstances all good citizens are aroused and inspired with a determination to punish the murderer. Their righteous zeal and earnestness may mislead them and divert their attention from the real criminal. The problem presented was whether this defendant, or the witness Eichtenkamp, or some unknown parties, committed the crime. It appears to have been difficult of solution. It must finally be resolved by a jury under the careful instructions of the court, using all of the safeguards furnished by the rules of law in such cases to guard against a wrongful conviction. Many things that took place during the course of this trial are complained of by the defendant. Some of the objections are quite technical and relate to matters apparently not prejudicial to the defendant, but some of them are substantial and require us to reverse the judgment.

2. After discussing the sufficiency of the evidence to support the verdict and judgment, the brief of the defendant calls attention to the instruction of the court as to the motive for the crime. That instruction was in the following words: "By motive is meant the force

behind the will which prompts the act. It may be love of gain, lust, selfish desire, hatred, sudden heat of passion, or any of the various causes which move the will power." There was no evidence in the record of the existence of any of these recited motives, unless it should be thought that the evidence tended to show "sudden heat of passion." The instruction that we are considering correctly states an abstract proposition of law, and would not be prejudicial if given in connection with other instructions which pointed out its applicaton to the case.

3. The twenty-seventh instruction given by the court to the jury was as follows: "If, however, the jury should find from the evidence beyond a reasonable doubt, first, that Louise Flege is dead, and that she died in the county of Dixon, state of Nebraska, on the 30th day of June, 1910; second, that said Louise Flege died from the effects of the pistol-shot wounds inflicted upon her by the defendant in the manner and by the means specified in the information; third, that the defendant without legal excuse and maliciously inflicted said wounds upon the said Louise Flege with the purpose and intent thereby to kill her, but without premeditation and deliberation; fourth, that said wounds were inflicted by the defendant upon the said Louise Flege in the county of Dixon, and state of Nebraska, on the 30th day of June, 1910, or at some time prior to her death, then it is your duty to find the defendant guilty of murder in the second degree." We think under the circumstances in this case this instruction, when considered with the whole charge to the jury, might have been misleading. There was but one question to be tried in this case. There was no doubt about the murder. The deceased was killed by two pistol-shot wounds, one entering the breast and another through the brain. The only question was whether the defendant fired those shots. There was no doubt that Louise Flege died from the effects of these shots. The second paragraph of the instruction

submits the question whether the deceased "died from the effects of the pistol-shot wounds inflicted upon her by the defendant." There was danger from this wording of the instruction that the jury would understand that the court considered and assumed that the wounds were inflicted by the defendant.

4. The fourteenth instruction given to the jury was as follows: "The jury are instructed that the law presumes that a person intends all the natural, probable and usual consequences of his act; that when one person assaults another violently with a dangerous and deadly weapon, likely to kill, not in self-defense or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the party thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily injury was intended, and in such case the law implies malice and such killing would be murder." This instruction was erroneous and prejudicial in this case. There was no room for any implication of law as to malice. Such an instruction is sometimes proper, as when the killing by the person charged is admitted, and the question is as to whether it was intentionally or purposely done. If the fact of the killing is established and the circumstances surrounding the killing are not fully shown, so that the jury can judge from the circumstances whether it was intentional, the law will imply legal malice; but, where the circumstances of the killing are all established by evidence or are manifest and not controverted, the law raises no implication as to malice, but leaves that as a fact to be determined by the jury from all of the circumstances surrounding the killing. In this case the question was whether the defendant did the shooting. If he did, he was guilty. In such case an instruction of this kind is misleading and erroneous. It has been several times decided by this court that the giving of this instruction when not applicable to the facts in the case is such an

error as to require a reversal. *Vollmer v. State,* 24 Neb. 838; *Lucas v. State,* 78 Neb. 454; *Kennison v. State,* 80 Neb. 688.

5. Instructions 24 and 25 are as follows: "(24) The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one, who is, in fact, guilty, to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and, unless it is such that were the same kind of a doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If after considering all the evidence you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

"(25) The court instructs the jury, as a matter of law, that the doubt which a juror is allowed to retain in his mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of a juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible state of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes upon you no obligation to doubt where no doubt would exist if no such oath had been administered. You are instructed that, if after a careful, impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the

defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."

Instruction No. 25 was prejudicially erroneous in this case. This court has had occasion more than once to criticise this instruction, and under some circumstances has held it to be so prejudicial as to require a reversal. *Brown v. State,* 88 Neb. 411. In *Blue v. State,* 86 Neb. 189, this court quoted from a decision of the supreme court of California, severely criticising some of the trial courts of that state who persisted in giving this instruction which has many times been declared erroneous, and in some cases is so prejudicial as to require a reversal.

The writer considers instruction No. 24 as also erroneous and prejudicial, especially in connection with No. 25. A jury in such a case ought not to be told that they must "justify an acquittal," or that they must find something in the case "to authorize a verdict of not guilty." It is not necessary, however, to repeat the views expressed in *Blue v. State, supra,* and in the opinion of the supreme court of California, therein referred to. The majority of this court, however, considers that instruction No. 24 is not prejudicially erroneous in this case.

6. The court instructed the jury that there was evidence tending to show an alibi, and describing the nature and effect of such evidence. It is objected that there was no evidence upon which to predicate such an instruction, and we think that the objection is well taken. The dispute was as to whether the defendant committed this act, and incidentally as to the time when the act was committed, but there was no dispute in the evidence as to the location of the defendant. It is plainly shown when he left his home and when he returned. There was no attempt to maintain that he was at any time in any different place than as alleged by the state. The instruction therefore has no application to the facts in the case. The danger is that by the

giving of such instructions the attention of the jury will be diverted from the real issue, and that they may be led to suppose that in some respects at least the defense is fictitious.

7. The court instructed the jury that if they were satisfied from the evidence that a witness had made conflicting statements under oath, or otherwise, "through an honest fear of personal violence, such statements would not be the voluntary act of the witness and would not operate as impeaching statements." If the witness was actuated solely by an honest fear of personal violence when there was sufficient apparent cause for such fear, his statements under such circumstances might not be voluntary. The language of the instruction as given is not accurate and might have been misleading.

8. It is complained that the court stated in its instructions the elements of the crime of murder in the first degree, and then withdrew that charge from the consideration of the jury, and submitted only the charges of murder in the second degree and of manslaughter. We do not find that there was any error of the court in this instruction. Each of the three several degrees of homicide was correctly defined by the court, and then the jury were told that there was not sufficient evidence to convict of murder in the first degree. We do not see that the defendant could have been prejudiced by this action on the part of the court.

9. The coroner was a witness for the defense, and was asked this question: "Now, Doctor, assuming that Louise Flege was shot in the breast first, assuming that Louise Flege was on her knees after the first shot, would it have been possible for her to have fallen in the position in which you found her after receiving the second shot?" The question was objected to, and the court remarked: "It looks to me like a pretty thin slice of expert there, but you may answer." The witness said: "It would have been impossible." The evidence showed without contradiction that the shot in the breast passed through

the body in a downward course, and that the second shot entered just back of the ear and passed directly through the brain. It would have been competent to show by the expert what the immediate effect of these wounds would be, and allow the jury to determine from all of the evidence whether it was possible that, the murder being committed as the witness Eichtenkamp testified, the deceased could have fallen in the position in which she was found. It may be considered that the objection might have been sustained on account of the form of the question, still, the witness being allowed to answer, the remark of the court might be prejudicial to the defendant as tending to lessen the force of this evidence which under the circumstances in the case appears to have been quite important.

10. After the court, on its own motion, had instructed the jury in regard to the evidence of the previous good character of the defendant, the defendant requested the following instruction, which was not embraced in that given by the court: "You are instructed that the accused has called witnesses to prove his good character and that he is a peaceable and law-abiding citizen; the same is before you pertinent and proper. And the evidence that the prisoner possessed a good character for being a peaceable and law-abiding citizen may be relied on to raise a doubt of his guilt sufficient to acquit him, which, without such proof, would not have existed. And if, after you have carefully examined the evidence in this case, you shall be able to reconcile it with the innocence of the prisoner, it will be your duty to acquit him." It would have been improper for the court to tell the jury that evidence of good character "may be relied on to raise a doubt of his guilt sufficient to acquit him," and this instruction was properly refused. It is true that good character counts for much in a prosecution of this kind, and a defendant may often very safely rely upon his good character to obtain an acquittal, but whether it should be relied upon by the jury in a particular case

as sufficient to acquit him is wholly a question for the jury, and not for the court.

11. The defendant requested the following instruction: "You are instructed that the presumption of innocence continues with the accused until his guilt is established by the evidence beyond a reasonable doubt." It is usual to embrace the idea of this request in instructions as to the presumption of innocence, and it is ordinarily better to do so. The instruction as given by the court has been frequently given, and has not ordinarily been considered as of itself sufficient ground for reversal. It is not clear that the defendant was prejudiced in this case by the omission complained of.

12. Many rulings of the court in the admission and exclusion of evidence are complained of. The witness Eichtenkamp was cross-examined by different attorneys for the defendant, and much of the ground was gone over with more than once and many immaterial and unnecessary questions were asked the witness. This fact may have led to the exclusion of some of the evidence that ought to have been admitted.

The witness Eichtenkamp, as we have seen, testified at the coroner's inquest, and his evidence there was wholly inconsistent with his evidence given upon the trial. He attempted to explain this fact by stating that, when he testified at the inquest, he was actuated wholly by fear of the defendant. Upon his cross-examination he was asked: "You were around to parties and beer drinks with your friends yourself, and never told any of them, did you?" The question was objected to as improper cross-examination, and immaterial, and assuming a state of facts not in the evidence. The objection was sustained and the evidence excluded. The evidence seems to be material and proper in cross-examination, and ought not to have been excluded for the reason given in the objection. Other similar questions were also erroneously excluded. Also the witness was not allowed to answer whether he had during the intermission of

the court been talking with a detective who was interested in the prosecution, and whether the detective was not then talking to him in regard to the evidence in the case.

There was some evidence tending to show that, after the defendant left home on the afternoon of the murder, the deceased had been working in the garden, and had there been criminally assaulted by some person, and afterwards murdered, and that the deceased was accustomed to taking care of and working in the garden. The defendant produced a witness who testified that some hoeing had recently been done in the garden, and the defendant offered to prove that early the next morning the weeds and grass that had been hoed in the garden indicated that the work had been done during the afternoon previous. This evidence ought to have been received, but it was excluded by the court. The weather was warm and the sun was bright on the afternoon of the murder, and the evidence strongly indicates, if it does not show, that if this work was done during that afternoon it must have been done by the deceased, and that none of the work was done in the garden during the forenoon of that day.

The witness Eichtenkamp was asked if he was "pretty badly scared" by the defendant, and whether he could run faster than the defendant, and whether he could have run down to one of the neighbors and told them about the murder; whether he said anything about the murder until after he knew that he himself was suspected; whether he knew that he himself was suspected at the time he told the sheriff about it; how badly the gate between the hog lot and the yard where the deceased lay was broken; how long it would have taken him to repair the gate; whether he made certain statements at the preliminary examination as to the condition of the gate, and why he did not close it; whether, when the witness was with his family immediately after the murder, anything was said about the murder; whether

he talked with his father about the case immediately after the murder; whether the defendant and the deceased "got along pretty well as brother and sister," and whether their relations were pleasant and agreeable so far as he knew, and other questions of like character; whether the deceased made outcries when she was assaulted by the defendant, and whether she knew that the witness was in the yard at the time or not. These questions were excluded upon objection of prosecution, and the witness was not allowed to answer. Possibly some of these questions had already been sufficiently answered, and the court excluded them for that reason. Some of them had not been answered by the witness. They were material and proper in cross-examination, and should have been allowed. The cross-examination at some points was too much restricted, and in some respects too much latitude was allowed.

Other matters are discussed in the briefs, but it is not thought that their discussion would be of assistance in another trial, and we do not consider it necessary to further extend this opinion, already, perhaps, too long.

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

REVERSED.

BENJAMIN F. MOREHOUSE, APPELLEE AND CROSS-APPELLANT, V. ELKHORN RIVER DRAINAGE DISTRICT, APPELLANT; RUDOLPH B. SCHNEIDER ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 17,191.

Drains: ASSESSMENT: SALES: SCHOOL LANDS: RIGHTS OF STATE. School lands that have been sold by the state under contract are properly included in a drainage district, and are assessable for benefit therein. If such lands are sold for such special assessments, section 223, ch. 77, art. I, Comp. St. 1911, applies, and only the interest of the original purchaser from the state or his

assigns can be sold; the rights of the state in the land will not be affected by such sale.

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

Courtright & Sidner, for appellant.

Grant G. Martin, Attorney General, J. W. Graham, F. Dolezal and *Nye F. Morehouse, contra.*

SEDGWICK, J.

This plaintiff purchased from the state a tract of school land, and has made some improvements thereon. The land is now worth $65 an acre, and the state has not been paid therefor in full. The payments hereafter to be made to the state amount to $20 an acre. This land has been included in the defendant drainage district. The proper officers of the district made an apportionment of benefits against the land amounting to $1,016.60. The plaintiff began this action to enjoin the defendant from proceeding further to make this apportionment a charge against the land. The state afterwards became a party, and joined with the plaintiff in contesting the right of the defendant to proceed further in the matter of the assessment. The district court held that the land was not assessable for benefits, and that the plaintiff had no such interest in the controversy as to enable him to maintain the action, and assessed costs against plaintiff. The plaintiff and the defendant drainage district have appealed.

1. It is contended that the school lands of the state are not assessable by drainage districts. By section 3, art. VIII of the constitution, "The proceeds of all lands that have been, or may hereafter be, granted to this state, where, by the terms and conditions of such grant, the same are not to be otherwise appropriated," are declared to be "perpetual funds for common school

purposes of which the annual interest or income only can be appropriated." Section 9 of the same article provides: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished." It seems at least doubtful that the interest of the state in school lands can be divested for such purposes without the consent of the state, acting through its legislature, even if the state could so consent under the provision of the constitution. We do not think that this question is involved in this case. It was suggested in *Von Steen v. City of Beatrice,* 36 Neb. 421, that section 13 (Comp. St. 1891, ch. 77, art. I, sec. 2) of our revenue law (Comp. St. 1911, ch. 77, art. I, sec. 13), exempting the property of the state from taxation, might be intended to apply to and include assessments for public improvements. It is said that the authorities construing similar provisions are conflicting, and it was not found necessary to decide the point. There seems to be much more reason to so construe sections 34 and 223, ch. 77, art. I, Comp. St. 1911, which are as follows: Section 34: "School lands sold under the provisions of any law of this state, or such as have been heretofore sold, shall not be taxable until the right to a deed shall have become absolute, but the value of the interest of such purchaser shall be taxable, which interest shall be determined by the value of the land and improvements, less the amount due the state." Section 223: "Whenever any school or university land bought on credit is sold for taxes, the purchaser at such tax sale shall acquire only the interest of the original purchaser in such land, and no sale of such lands for taxes shall prejudice the rights of the state therein, or preclude the recovery of the purchase money or interest due thereon; and in all cases where the real estate is mortgaged or otherwise encumbered to the school or uni-

versity fund, the interest of the person who holds the fee shall alone be sold for taxes and in no case shall the lien or interest of the state be affected by any sale of such encumbered real estate made for taxes."

These sections are definite, and apparently justly dispose of this whole matter. The interest of this plaintiff in this land is $45 an acre. It is a real estate interest under the contract which he holds with the state. *Mauzy v. Hinrichs,* 89 Neb. 280. His interest in the land has been benefited by this drainage in at least the amount apportioned to it. If this assessment is not paid, and the land is sold pursuant to the statute above quoted, the rights of the state will not be affected thereby. They will be amply protected. Section 34, ch. 74, laws 1883, provided that school lands that had been sold under the provisions of that act should not be taxable until the right to a deed had become absolute, "except for the value of the interest of such purchasers." In the act of 1899 (laws 1899) ch. 69, sec. 13, a proviso is added to this section, making such lands, when situated within any city or village and subdivided into lots, subject to special assessments, "except that a sale of such school lots to collect such assessment or asessments shall only pass the interest or title of the purchaser from the state." This section was afterwards amended, so as to apply also to saline lands. Comp. St. 1911, ch. 80, sec. 13. Section 35 of the revenue act (Comp. St. 1911, ch. 77, art. I) provides that improvements on leased public lands shall be assessed as personal property. Section 13, ch. 80, *supra,* declares that "the value of the interest of such purchaser shall be taxable." This is a part of the act relating to school lands and funds; it is not a provision for raising revenue, and there would seem to be no reason for restricting its application to taxation for general revenue, unless such construction is made necessary by the proviso. This proviso allows the sale of city or village lots, but such sale shall only pass the title of the purchaser from the state. None of the statutes above referred to is mentioned in this

proviso. They all exist together and must be construed together. So construing them, we think that section 223, art. I, ch. 77, Comp. St. 1911, applies in this case. The benefits were properly apportioned to this land, and if a sale is necessary to collect the assessment the purchaser at such sale will acquire only the interest of the original purchaser and his assigns, and such sale will not prejudice the rights of the state therein. If the conditions were different, and it was found by the legislature that the interest of the state was substantially benefited, it is to be presumed that the state would not be willing to accept such benefits without sharing in the burden, and that, if necessary, an appropriation would be made by the legislature for that purpose.

2. Questions of estoppel and other questions are raised and discussed in the brief, but if we are correct in the above reasoning it disposes of the case, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF WHITFIELD SANFORD.

CHARLES W. SANFORD ET AL., EXECUTORS, APPELLANTS, V. SAUNDERS COUNTY, APPELLEE.

FILED DECEMBER 14, 1911. No. 16,458.

1. **Taxation**: POWER OF LEGISLATURE: INHERITANCES. "The enumeration of subjects of taxation in section 1, art. IX of the constitution, is not exclusive. The legislature has power to provide for taxation upon inheritances." *State v. Vinsonhaler*, 74 Neb. 675.

2. ———: INHERITANCE TAX. The widow of a testator who takes real estate devised to her by his will in lieu of dower is not in a position to require the taxing authorities to exempt so much of such real estate as equals the value of her dower interest from the payment of an inheritance tax.

3. ———: ———. By the provisions of chapter 13, Ann. St. 1909, the personal property of a decedent is primarily liable for the pay-

ment of claims against his estate; and those to whom he has devised his real estate cannot avoid paying an inheritance tax thereon by agreeing to satisfy a claim of one of them against the estate out of such real estate.

4. ———: ———. Real estate devised by will passes to the devisee at the death of the testator, and its status under the law taxing inheritances is fixed at that time. An agreement between devisees to satisfy a claim against the estate in favor of one of them by a conveyance of a portion of such real estate to the claimant will not exempt it from liability for an inheritance tax.

5. ———: ———: INTEREST. By the provisions of section 11203, Ann. St. 1909, an inheritance tax bears interest from the death of the decedent, unless it is ascertained and paid within six months thereafter; and where his devisees have neglected to take any steps to ascertain or pay the same for more than two years after his death, they are not in a position to contest the payment of interest thereon.

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

H. A. Reese, for appellants.

Jesse M. Galloway and *Joseph F. Berggren, contra.*

BARNES, J.

Whitfield Sanford, a resident of Cass county, Iowa, departed this life in the month of August, 1905, leaving him surviving Hetta A. Sanford, his widow, and Charles W. Sanford, his son, who were his only heirs at law. By his will the bulk of his property was left to said widow and son, who were therein named as executors. Probate of the will was had in Cass county, Iowa, and the executors duly qualified and proceeded to administer the estate. At the time of the death of the testator he was the owner of a large amount of real estate and personal property situated in the state of Nebraska. The executors took no steps to ascertain the amount of the inheritance tax which the state was entitled to receive upon that portion of the estate, and about two

years after the death of the testator the county attorney of Saunders county, Nebraska, filed an application in the county court of said county for the appointment of appraisers to ascertain the value of said estate, so that the amount of the inheritance tax due thereon might be determined and collected. The county judge of Saunders county thereupon appointed appraisers, as provided by law, who qualified and made appraisements in the counties of Saunders, York, Butler, Lancaster, Seward, and Franklin, in which counties the real estate, which passed by the provisions of the will above mentioned, was situated. The value of said real estate was found to be $182,320, while the personal property was appraised at the sum of $40,657.85. On the request of the executors, the county court deducted the value of the personal property from the total value of said estate, and held that the same was not subject to an inheritance tax because its *situs* was in Cass county, Iowa, where the testator resided at the time of his death. There was also deducted from the value of the real estate the amount of $20,000, being the sum of $10,000 to each of the devisees under the will which was exempt from the levy of an inheritance tax under the laws of this state. After the above reductions were made there remained the sum of $162,320, which was held by the county court to be subject to and liable for an inheritance tax under the provisions of sections 11201-11220, Ann. St. 1909, known as the "inheritance tax law," and the amount of such inheritance tax was fixed at the sum of $1,623.20, upon which interest was charged from the date of the death of the testator, amounting to $333.30. The executors were ordered to pay said sum to the county treasurers of the aforesaid counties in proportion to the appraisements made therein, and to file receipts for such payments. It appears that on or about the 17th day of January, 1908, the executors paid into court the sum of $1,044.44, which they claimed was sufficient to discharge the inheritance tax for which the estate was liable, and appealed from the order of the

county court. They thereafter filed their petition in the district court for Saunders county, setting forth the facts above stated, and assigned four distinct grounds therein for the reversal of the order of the county court.

It was first alleged that there is no valid law in the state of Nebraska requiring the payment of an inheritance tax. The second allegation was, in substance, that Hetta A. Sanford as the widow of the testator was entitled to dower in the lands devised by his will, and that her dower interest was not subject to the levy of an inheritance tax. It was further alleged that Charles W. Sanford, the son of the testator, had a claim against the estate of his father amounting to $35,524.95 for services rendered as clerk during the last 11 years of his father's life, and that it had been agreed between the executors that the claim should be fully paid by transferring to said Charles W. Sanford from the said estate certain real estate situated within the state of Nebraska in excess of the amount of property which said Charles W. Sanford should have received under the provisions of his father's will, and that therefore that sum was not subject to the inheritance tax imposed by the county court, and that it should be deducted from the appraised value of said real estate situated in Nebraska. And, finally, it was alleged that the computation of interest from the date of the death of the testator was void, and was made without authority of law.

To this petition, and each of the four grounds mentioned therein, the county attorney of Saunders county demurred, for the reason that the petition failed to state facts sufficient to constitute a defense to the order of the county court finding the amount and directing the payment of the inheritance tax above mentioned. Upon a hearing in the district court, the demurrer was sustained and the order of the county court was affirmed, and from that judgment the devisees, who are the executors above mentioned, have brought the case to this court by appeal.

The contention that the law requiring the payment of

an inheritance tax is void was settled by the decision in *State v. Vinsonhaler,* 74 Neb. 675, where the law was upheld; and as the appellants seem to have abandoned that assignment, it will receive no further consideration.

The first question to be determined by us is the claim that appellants should have been allowed to deduct from the gross value of the real estate situated within this state the amount of the widow's dower. On this question there seems to be some conflict in the authorities. The courts of New York and Pennsylvania, in construing the inheritance tax laws of those states, have held that the dower interest of the widow is not taxable. *In re Weiler's Estate,* 122 N. Y. Supp. 608; *Commonwealth's Appeal,* 34 Pa. St. 204. In *Estate of Kennedy,* 157 Cal. 517, 108 Pac. 280, the supreme court of California held that the homestead and statutory allowances pending the settlement of the estate of the deceased were exempt from the succession taxes.

The supreme court of Illinois, however, construing the provisions of its inheritance tax law, of which our own is almost a literal copy, held in *Billings v. People,* 189 Ill. 472, 59 L. R. A. 807, that dower was subject to the payment of the inheritance tax. That was a case where the widow renounced the provisions of the will of her deceased husband and took dower. On appeal to the supreme court of the United States the judgment of the state court was affirmed. *Billings v. Illinois,* 188 U. S. 97.

As we view the record, we are not required to determine that question, for it appears in the instant case that the widow did not renounce the will, but took her share of the real estate under and according to its provisions. By that course she brought herself squarely within section 11201, Ann. St. 1909, which reads, in part, as follows: "All property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a

resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainor, or intended to take effect, in possession or enjoyment, after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." We are therefore of opinion that the widow, by taking under the will, instead of asserting her right to dower, is not in a position to claim the exemption for which she now contends.

Appellants also strenuously insist that they should have been allowed to deduct the claim of Charles W. Sanford for $35,524.95 against his father's estate from the gross value of the real estate as returned by the appraisers before estimating the amount of the inheritance tax. There seems to be two good and sufficient reasons for denying this relief. It appears that at the time of his death the testator was the owner of more than $40,000 worth of personal property in this state, which, under the provisions of chapter 13, Ann. St. 1909, was primarily liable for the payment of this claim. The district court held that appellants were entitled to withdraw this property from taxation because of their claim that its *situs* was in the state of Iowa where the testator resided at the time of his death; but by so doing, they will not be permitted to make their claim payable out of the real estate, and thus, to that extent, escape the payment of the inheritance tax. The other reason for a denial of

this claim is that at the time of the death of the testator the real estate situated in this state, the value of which is now sought to be taxed, passed by the terms of the will to the appellants. Its status, so far as the inheritance tax law was concerned, was at that time fixed and determined, and no agreement which the devisees, as executors, should thereafter make between themselves in regard to the satisfaction of this claim could in any way affect the right of the state to ascertain and collect its inheritance tax. The district court was therefore right in its determination of this question.

Finally, it is contended that the taxing authorities were not entitled to interest on the amount of the inheritance tax from and after the death of the testator, and before such amount was ascertained. It is urged as a reason for this contention that it was not possible at that time to ascertain the value of the estate, and that interest should only be computed after such value was in fact ascertained. This contention is in direct conflict with section 11203, Ann. St. 1911, which provides: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of seven per cent. per annum shall be charged and collected therefrom for such time as such taxes are not paid; provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, and in all cases where the executors and administrators or trustees do not pay such tax within one year from the death of the decedent they shall be required to give a bond, in the form and to the effect prescribed in section two of this act, for the payment of said tax together with interest." It cannot be successfully contended that the appellants could not have ascertained the value of the taxable estate within six months after the testator's death. By so doing, and by the payment of the tax within that time, they could have avoided the payment of any interest whatsoever. It appears from their peti-

tion that they took no steps to that end, and that by their delay they compelled the county attorney of Saunders county to institute proceedings, as late as two years after the death of the testator, to ascertain and collect the amount of the inheritance tax. Therefore, they are in no position to claim exemption from the payment of interest, as provided by the section of the statute above quoted.

A careful examination of the record satisfies us that the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., being disqualified, took no part in the decision.

FAWCETT, J., dissenting.

This case was heard in the court below upon a general demurrer to a pleading filed by the executors, which has been designated by both parties and by the trial court as a "petition." As they have seen fit to so designate it, I will do likewise.

The petition alleges: That Whitfield Sanford, at the time of his death, was a resident of Cass county, Iowa; that he died August 4, 1905, testate; that the district court for Cass county, Iowa, took jurisdiction to administer said estate; that the administration thereof is still pending and said court still retains full and exclusive jurisdiction of all matters connected with the settlement of the estate.

That the deceased kept the control and management of his business; that all of his personal property was held in said Cass county; that he had no agent in Nebraska with authority to control or reinvest money; that the will left the bulk of his estate to the appellants, his wife and son.

That the county court of Saunders county without authority, upon suggestion of the county attorney, ap-

pointed appraisers for the purpose of levying the inheritance tax; that the appraisers duly filed their report, from which appellants appealed, first, to the county court, and then to the district court.

That the estate is not liable, for the reason that no valid law gives authority or jurisdiction to the county court of Saunders county, or to any court in Nebraska, to levy an inheritance tax.

That, in ascertaining the value of the real estate in Nebraska, the appraisers and the courts below refused to deduct from such appraisement the dower interest of the appellant widow; that to the extent of her dower, under the law in existence at the time of the death of Mr. Sanford, the estate was not subject to tax.

That at the time of Mr. Sanford's decease, and for eleven years prior thereto, the appellant Charles W. Sanford, one of the executors of said will, and a legatee thereunder, was in the employ of deceased as his clerk, under an agreement that Charles should be compensated therefor by the deceased; that it was agreed between Charles and the deceased, during the life of the latter, that, in case Charles should not demand or withdraw from the business of the deceased money due him for such services, the amounts due him were to be allowed to draw interest until the final settlement should be made; that after the death of Mr. Sanford the widow, who was one of the executors, and Charles had a settlement and adjustment of the claim of Charles against deceased, with the result that it was ascertained and agreed that the estate was indebted to Charles, a resident of Nebraska, in the sum of $35,524.95, which amount it was agreed Charles should receive from said estate; that by the said agreement it was stipulated and agreed that the claim of Charles should be paid by transferring to him from the estate of deceased real estate in Nebraska in excess of the property that Charles should receive from the estate as one of the beneficiaries of the will; that, in determining what portion of the real estate in Nebraska

Charles should receive, there was set over to him certain real estate of the value of the agreed claim in excess of the amount of property Charles would have been entitled to receive under the law; "this being in full settlement and satisfaction of said claim of Charles W. Sanford, and so accepted by him."

That the county court wrongfully included in the valuation the said sum of $35,524.95, and levied a tax thereon and included it in the amount found due from the estate.

That the agreement and settlement of the claim of Charles against the estate were made and entered into with the full consent and understanding of the executors of the estate, and were made for the benefit of the estate; that the county court had no authority or jurisdiction to include said amount in ascertaining the amount of inheritance tax to be paid, for the reason that the claim was a just and proper claim against said estate, and was properly paid, settled and satisfied, and the amount thereof should have been deducted from the value of the real estate in Nebraska; said real estate not having been received by Charles "by virtue or reason of any inheritance or bequest or under the intestate laws of the State of Nebraska."

That at the time of the death of Mr. Sanford, and at all times thereafter until the appraisement of the real estate, the amount of inheritance tax due from the estate was unknown and unascertainable; that the only method or manner of ascertaining the value of the real estate in Nebraska was through the appraisement so made as ordered by the county court; that appellants had no knowledge of and no way of ascertaining the amount which could be claimed due as an inheritance tax until such appraisement had been filed; that, in determining the amount to be paid, the county court wrongfully and without authority of law ordered payment of interest from August 4, 1905, until the same should be paid; that said computation of interest was wrongful, without

authority of law, and that the estate should not be subject to the payment of any interest prior to the time of finally ascertaining and determining the amount or value of the taxable estate in Nebraska.

The prayer of the petition is: (1) That the dower interest of the widow be deducted from the total value of the estate. (2) That the amount of the claim of Charles be deducted. (3) That the amount of the tax due from the estate should not draw interest until the final determination thereof. (4) That the assessment of an inheritance tax against the estate may be decreed as without authority of law, and as null and void, and of no force; and for general relief.

The record before us contains nothing more than the petition above set out, the general demurrer of defendant, and the journal entry of the judgment below. At first blush it might seem that the judgment would have to be affirmed for want of a sufficient transcript; but on more careful consideration it is apparent that both sides thought that the petition presented everything necessary to settle the questions of law involved, and thereby determine the rights of the parties. With that purpose in view, it evidently was not thought necessary to encumber the record with the transcript of the proceedings in the county court. In this I think counsel were right. Very few of the important facts and figures referred to in the majority opinion appear in the record, as will be observed by the most casual reading of the petition. They were, in my judgment, improperly gleaned from the brief of counsel for appellee. As he has seen fit to rest upon his demurrer to the petition, he should be held to the admitted facts averred in the latter. Upon the face of the record, therefore, the judgment should be reversed. Passing that, it will be seen that three important questions are presented. They will be considered in the order in which they appear in the petition.

1. Should the value of the widow's dower have been

deducted? I think it should. Our inheritance tax law (laws 1901, ch. 54) was first adopted in 1901. It was approved April 1, in that year. The title of the act is, "An Act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." The right of dower cannot by any reasonable process of construction be held to be a gift, a legacy or an inheritance. *Billings v. People,* 189 Ill. 472, under an act from which it is asserted ours was copied, holds that dower is subject to the inheritance tax, and it is insisted that, inasmuch as *Billings v. People* was decided before our act was adopted, we are bound by the holding in that case.

Counsel for the appellee places great stress in his brief upon an assertion that *Billings v. People* was appealed to the United States supreme court (*Billings v. Illinois,* 188 U. S. 97) and affirmed in that court. The majority opinion makes the same statement. In justice to the fairness of counsel, I conclude that he has not read that case as it is reported in the United States supreme court reports. I have before me the lawyer's edition, 47 L. ed. 100. The syllabus (entire) reads: "The equal protection of the laws is not denied by the Illinois inheritance tax law because, under that statute as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood." In the opinion it is stated: "The widow was an appellant in the supreme court of the state, but she is not a party here." That case was taken to the supreme court of the United States by devisees other than the widow, so that the holding of the supreme court of Illinois upon the question of dower was not presented to, or in any manner considered by, the supreme court of the United States. I regret that it was not, as I feel very confident that that eminent court would have declined to follow the reasoning and holding of the Illinois court. I might say here that,

whether our act was copied from the Illinois act or not, that act, as stated by the supreme court of that state in *People v. Griffith*, 245 Ill. 532, 539, was taken from the statute of New York, of 1887. Would it be unreasonable to say, in the absence of *proof* as to which statute was followed, that our legislature followed the older statute, which had been in force for 14 years, and many of its provisions construed by the courts of that state? To my mind the rule that, where one state adopts a statute of another state which has received judicial construction, it is presumed that the legislature intended the statute should receive the same construction by the courts of the state adopting the statute, like all other general rules, has its exceptions. That the case at bar should be held an exception to the rule stated is made clear by the fact that *Billings v. People* made its first appearance in print in 59 N. E. 798, March 29, 1901, and our act under consideration here was approved three days later. The thought that any member of our legislature knew of that decision when the act was passed, or that the governor had ever heard of it when he signed the same, cannot be seriously considered. But, be that as it may, this court has stated how far it will consent to be bound by the construction of a statute of another state which has been adopted in this state. In *Morgan v. State*, 51 Neb. 672, 693, in an opinion by POST, C. J., we said that the decision in such a case must "be regarded as a construction of the statute, to be ignored or rejected only for reasons which would require the overruling thereof had the decision been pronounced by this court, and in that light it will now be examined." I think that is the very extent of the limit to which we should go in holding that we are bound in such a case. In accordance with the rule announced by POST, C. J., I am considering *Billings v. People* as if that decision had been pronounced by this court, and, so considering it, I unhesitatingly assert that the decision is not sound and should not be followed. If we follow *Billings v. People*,

we must not only read into the act that which it does not contain, but we must enlarge the title to the act itself. If Mrs. Sanford had declined to take under the will and had elected to take under the statute, so far as the value of her dower is concerned, there is no theory upon which, under our act, the value of that dower could have been taxed. It really needs no citation of authorities to support the statement that a tax of this character cannot be aided by construction.

"(6) The meaning of section 1 of the inheritance tax law as to what property of nonresident decedents shall be subject to the tax is not entirely clear, and the language thereof should not be extended beyond the clear import of the words used, in order to bring property within the provisions of the act and subject it to the tax." *People v. Griffith,* 245 Ill. 532. It seems to me that if the Illinois court had had that very correct rule in mind at the time it decided *Billings v. People, supra,* the decision in that case would have been the very opposite of what it was.

In *People v. Griffith,* it is further said: "(8) where one state adopts a statute of another state which has received judicial construction, it is presumed that the legislature intended the statute should receive the same construction by the courts of the state adopting the statute, *unless such construction is in conflict with the spirit and policy of its laws.*" (Italics are mine.) Under the rule thus stated, we are not bound by the holding in *Billings v. People,* as in my judgment that case is squarely in conflict with the spirit and policy of the laws of this state, which are that statutes levying taxes of any kind, which are special in their nature, will be strictly construed, and will never be aided by construction so as to extend them beyond the clear import of their terms. While I freely concede that the legislature has the power to pass an act imposing a tax of this character upon a widow's dower, I assert that it has not done so; and, until the legislature has expressly

made dower subject to such a tax, the courts are powerless to do so. In such a case, where the legislature stops the court should stop. A woman does not obtain a dower interest in property by the grace of, or as a gratuity from, her husband. It is hers, absolutely, beyond his control. It is an interest which he cannot alienate, which he cannot encumber, which his creditors cannot reach, which she alone, by deed, can alienate. As said by this court in *Butler v. Fitzgerald,* 43 Neb. 192: "When lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or incumbrance upon the real estate of the husband; and when such right has once attached, it remains and continues a charge or encumbrance upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law, and is consummate upon the death of the husband."

In *Motley v. Motley,* 53 Neb. 375, we held: "The statutes of the state expressly provide how a widow may be lawfully barred of dower in the lands of which her husband died seized, and this bar is made to depend upon her voluntary act."

In *In re Weiler's Estate,* 122 N. Y. Supp. 608 (March, 1910), the syllabus states: "A widow's dower estate in lands of her deceased husband, which became vested on her marriage and consummate on the death of her husband, independent of the husband's will, and not by virtue thereof, was not subject to transfer tax." In the opinion it is stated: "The widow's estate of dower in the lands of the decedent was property, which became vested as an inchoate estate upon her marriage and consummate upon the death of her husband, independent of the will, and not by virtue thereof. (Citing numerous cases.) It was, therefore, not subject to transfer tax, and in assuming it to be so both parties were in error when the order fixing tax was made." In *In re Green's Estate,* 124 N. Y. Supp. 863 (May, 1910), the syllabus

states: "Where a wife, a resident of the state, dies without a will, leaving a husband and no descendants, the husband does not take her property under the intestate laws of the state, and there is no taxable transfer thereof under tax law." The two cases last above cited were decided in surrogate's court in New York county and Kings county, respectively. Neither case, so far as I have been able to find, reached the court of appeals. While they are not decisions of the court of last resort, they are decisions of two surrogate's courts, the judges of which in late years have always been lawyers of high standing.

In *Commonwealth's Appeal,* 34 Pa. St. 204, it is held: "A testator devised his whole estate to his executors, in trust for legatees and devisees; the widow refused to take under the will, but subsequently, by an arrangement with the executors, approved by the orphans' court, accepted the sum of $80,000, which was less than her share of the estate, and relinquished her claim to the residue. *Held,* That she took this sum under her paramount title as widow, and not as a payment out of the fund bequeathed to the executors in trust; and that it was not, therefore, subject to the collateral inheritance tax."

In *Estate of Kennedy,* 157 Cal. 517, it is stated in the syllabus: "A homestead right, or a right to have a homestead, is not a right which vests under the law of succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. Setting apart a probate homestead is a part of the proceeding in the probate court, as much so as the family allowance." There are other matters passed upon in this case. The case is an interesting one, and shows clearly how that court would hold upon the question of the right to tax dower.

I therefore proceed with the further consideration of this point upon the assumption that, upon the death of Mr. Sanford, the dower interest, which Mrs. Sanford had

theretofore held and owned subject to be defeated only by her own deed or the predecease of her husband, became consummate. It then ceased to be an inchoate right, and, *eo instanti,* became a vested interest in all of the lands in Nebraska of which Mr. Sanford died seized; and to the extent of that vested interest she was entitled to a share of his lands without payment of any inheritance tax. If she saw fit to avail herself of an option given her, in the will of her deceased husband or under the statutes, to either take *that* interest in the land or *another and different* interest, and that other and different interest exceeded in value her vested interest *which she was exchanging therefor,* she could only be properly charged with the excess value. To my mind it is precisely the same as if she took by statute, as her dower, a certain specific tract, say section one, and the provision in the will was that she might take, in lieu thereof, sections two and three; in such a case she would be entitled to deduct from the value of sections two and three, which she was to receive under that provision, the value of section one, which she was giving up.

In *Isenhart v. Brown,* 1 Edw. Ch. (N. Y.) *411, it is held: "A bequest in lieu of dower, and the acceptance of the same, amounts to a matter of contract and purchase; and the wife is to be paid the bequest in preference to other legacies and without abatement. But the debts are to be paid first." In the opinion (p. *413) the vice chancellor says: "It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view, she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and, if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to

receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes, and which, consequently, must be paid in preference to other legacies; they being merely voluntary."

In *Blatchford v. Newberry,* 99 Ill. 11, the sixth paragraph of the syllabus holds: "A provision by will in lieu of dower is, in fact and in legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate." That part of the opinion upon which the above syllabus is predicated will be found on pages 55 to 62 inclusive. There are numerous other cases to the same effect as those last above cited, one (which I have misplaced and will not take the trouble to try to find again) from the supreme court of the United States. To my mind these cases clearly show that, to the extent of the value of her dower interest, Mrs. Sanford took nothing by way of "gift, legacy or inheritance" from her husband, and that, if she saw fit to exchange her vested interest of that value for another interest which was tendered her in lieu thereof, it was simply an exchange of one interest for another, and she was entitled to have the value of that which she was giving deducted from that which she was to receive.

2. Should the property conveyed to Charles in satisfaction of his claim have been deducted? The district court held that it should not. In this I think the court erred.

In the light of the view that I take of this branch of the case, the authorities cited on page 17 of brief of appellee are unimportant. The question as to whether or not the rules of law in reference to taxation *of property* are applicable is not involved; nor is the question of the possibility of double taxation; nor is it material for the consideration of this point whether the act of our legislature under consideration constitutes a tax upon property or upon the right of succession. The only question involved by the admitted allegations of this

petition are: Can the amount of a claim of a citizen of this state for services rendered a nonresident in his lifetime, and which, after the death of such nonresident debtor, is ascertained, adjusted and paid by the executors of his will, be taxed as a gift, legacy or inheritance? I say, *No.*

The petition alleges and the demurrer admits the following facts: That the decedent left no personal property in this state, but that all of such property was owned and held by him and taxed in Cass county, Iowa; that Charles W. Sanford was in the employ of the decedent for eleven years prior to his death, under an agreement that he should be paid for his services, and that, in case he should not demand or withdraw from the business of the deceased the amounts due him for such services, such amounts were to draw interest until a final settlement or adjustment should be made; that, after the death of the testator, the widow of the deceased, who was one of the executors, and Charles had a settlement and adjustment of the claim for such services, and that as a result of such settlement and adjustment it was "ascertained and agreed" that the estate was indebted to Charles in the sum of $35,524.95 which amount it was agreed Charles should receive in real estate situated in Nebraska; and that, under such agreement, a sufficient amount of real estate in Nebraska was set over to Charles in full settlement and satisfaction of his claim, and was so accepted by him.

From the above admitted facts I conclude that the law which requires that the personal estate of a decedent be first exhausted before recourse is had to the real estate does not apply. A citizen of this state who has a claim against a nonresident, or against a nonresident estate, is not required to go to the domicile of such nonresident or nonresident estate and litigate his claim in the courts of that jurisdiction, when there is property, either real or personal, situated in this state. It is possible that, if there had been personal property of

the decedent in this state, Charles would have been obliged to first exhaust that personal property before he could proceed against the real estate, but, where there was no personal property in this state, he could proceed at once against the real estate. It perhaps would have been better practice for him to have made application to the county court of some county in this state, in which real estate of the decedent was situated, for the appointment of an administrator with the will annexed, and have filed his claim with, and had it allowed by, that court; but I do not think he was required to do that when the executors of a solvent estate, who were also the sole beneficiaries under the will of decedent, came into this state and, for the purpose of saving expenses of administration here, took the matter up with him, "ascertained" the amount justly due him, and set over to him a sufficient amount of the estate situated in this state to satisfy such claim. In Schouler, Executors, (3d ed.) sec. 176, it is said: "But may not the title and authority of a foreign domiciliary representative be voluntarily recognized and debts paid him, or other assets voluntarily surrendered to him there? The doctrine of the English courts is that such payment or surrender affords no protection against the claim of a local administrator. A preference for the English doctrine seems to be expressed in Justice Story's treatise, though he had judicially affirmed the contrary in a circuit decision. The supreme court of the United States, however, has maintained the validity of such payments or delivery of the assets, as between different states, so as to discharge the local debtor or possessor; and the general current of American authority supports this doctrine; there being, it is assumed, when such payment or delivery was made, no local administration." Where there is no local administration, as in the case at bar, I see no reason why the converse of the above proposition should not be given the same legal sanction. If I, having in my hands assets belonging to a nonresi-

dent at the time of his decease, can voluntarily deliver up those assets to a domiciliary executor, and thereby be absolved from all liability for such assets, why should not the same domiciliary executor be authorized to save his estate costs and expenses by recognizing a claim held against his estate by a nonresident creditor, when said claim is known and admitted to be correct, and satisfy the claim by turning over to such creditor a sufficient amount of property situated in the state where such creditor resides? If he does so, who shall pass upon the question of his authority to make such settlement, or upon the question as to whether or not such settlement was beneficial to the estate? I answer: The court from which such executor's appointment emanated. I do not think that a court of this state can, in any kind of an action where the above facts are alleged and admitted to be true, go behind such settlement, adjustment and satisfaction of such claim.

It is suggested by one of my associates that the act of the executors in allowing this claim was without authority and void. The only theory upon which we could say that is that the district court for Cass county was without power to authorize the executors to make such a settlement; for, if it had such power, then it must be presumed that the executors had first obtained such authority. But, conceding that the Iowa court did not have power to grant such authority, the fact still remains that, under the admitted allegations in the petition, appellee has not been prejudiced by the act of the executors. I think it will not be questioned by any of my associates that, after the death of Mr. Sanford, Charles might have applied for and obtained ancillary administration in this state, and secured the appointment of an administrator with the will annexed, and could have filed his claim and had it allowed; and, there being no personal property in this state, could have obtained leave to sell the real estate to pay the claim. If that course had been pursued and evidence introduced

upon the hearing of the claim establishing the facts admitted in this case to be true, the county court would have had no alternative but to allow the claim precisely as it was "ascertained" and adjusted by the executors in this case; and, upon allowing that claim, the county court would have been compelled to deduct the amount thereof from the value of the real estate situated in this state, and the residue only would have been liable for an inheritance tax.

In *In re Estate of Stone,* 109 N. W. 455 (132 Ia. 136), the third paragraph of the syllabus states: "A contract between the beneficiaries in a will, including a collateral legatee, renouncing the provisions of the will and providing for a division of the property, was valid and enforceable, though its effect was to deprive the state of a collateral inheritance tax otherwise assessable on the legacy to the collateral legatee." The reasoning in that case, applied to the case at bar, renders the fact that appellee, as a result of the adjustment of the claim of Charles by the beneficiaries under the will, may be deprived of an inheritance tax upon the amount of that adjustment immaterial.

3. Should the amount of whatever tax is found due draw interest from the date of the death of a testator, or from the date of the final determination of the amount of such tax?

At the oral argument I was inclined to the latter view; but on careful examination of the question I have reached a different conclusion. The reasoning of Steele, J., in *People v. Rice,* 40 Colo. 508, 91 Pac. 33, covers every phase of the question, and I am inclined to agree with the learned judge that "these are matters which should have appealed to the legislature; but the legislature, having before them the laws of other states containing more liberal provisions with respect to such matters, did not make provisions for a rebate of interest under such conditions, and this department, therefore, cannot grant relief."

The fourth point, that the inheritance tax law is null and void, is without merit.

SEDGWICK, J.

I concur in the view that lands taken by the widow under the will in lieu of dower are not subject to inheritance tax, except as to the excess in value of such lands over the value of the dower interest; and also in the suggestion that the majority opinion recites matters not contained in the pleading demurred to, nor anywhere in the record.

FIRST NATIONAL BANK OF TRENTON, APPELLANT, V. LINK L. BURNEY ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,569.

Evidence: NOTES: PAROL EVIDENCE. A promissory note or other contract in writing, in the absence of fraud or mistake, cannot be varied, qualified or contradicted by evidence of a prior or contemporaneous agreement resting in parol.

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

Perry, Lambe & Butler, H. W. Powell and *F. M. Flansburg,* for appellant.

C. W. Shurtleff, A. A. McCoy and *W. S. Morlan, contra.*

BARNES, J.

Action on a promissory note set forth in the plaintiff's amended petition, as follows: "Trenton, Nebraska, Aug. 6, 1908. No. 6,248. Demand after date, for value received, we jointly and severally promise to pay First Nat'l. Bank, Trenton, Neb., or order, twenty-one hundred forty-six and 80-100 dollars, $2,146.80 at the First

National Bank, Trenton, Nebraska, with interest at 10 per cent. per annum from maturity until paid. The makers and indorsers severally waive presentment for payment, protest, notice of protest and nonpayment, and consent that the time of payment may be extended from time to time without notice, and each hereby pledges his or her separate estate. (Signed) L. L. Burney, W. S. Britton." On the back of the note was the following: "Paid Dec. 1, 1908, $932.08."

The defendants answered separately, each admitting the execution of the note, and set up affirmative matter as a defense, in substance as follows: That at and prior to the date of the note in suit the defendant Burney was indebted to the plaintiff bank in the sum of about $1,000, which indebtedness was secured by chattel mortgages on horses, cattle and hogs owned and in possession of the defendant Burney, who was at that time engaged in the business of buying and selling stock; that a short time before the date of the execution of the note Burney went to the First National Bank and informed the officers that, owing to the dry weather, scarcity of feed, and low prices of live stock in that vicinity, he thought he ought to ship the stuff he then had; that he would like to ship to Clarinda, Iowa, where he believed he would find a good market; that at that time the defendant Burney did not have sufficient live stock on hand to make a two car shipment. The parties then figured the sum of money necessary to purchase the balance of a two car shipment, which, together with the amounts then owing by Burney to the bank, aggregated the sum of $2,146.80. After the note was drawn up and signed, the bank released the chattel mortgages on Burney's live stock, delivered up his old notes, and Burney then used the balance of the money represented by the note to pay for stock he had bought and not paid for, and to purchase enough additional stock to make up a two car shipment.

It was further alleged in the answer of the defendant Britton that there was a parol understanding that the

defendant Burney was to turn over to the plaintiff bank the proceeds of the sale of stock shipped to Clarinda, Iowa, and execute a new note for any balance due on the note in suit with chattel mortgage security, and that all liability upon the note in suit as to the defendant Britton was to then expire. It was also stated in Britton's answer that it was orally agreed between the plaintiff and this defendant and the said Link L. Burney, in order that the said Link L. Burney might secure cattle, horses and hogs sufficient to complete the making of two car loads, the plaintiff should furnish to the said Link. L. Burney the sum of $——, and said last mentioned sum should be used by said Link L. Burney in purchasing cattle, horses and hogs, which should be put with the live stock he then had on hand, so that the same would make two car-loads, and said two car-loads should be shipped to Clarinda, Iowa, and there sold, and the money realized in the sale of the same should be applied to the indebtedness of the said Link L. Burney to the plaintiff; that defendant Britton signed said note merely to guarantee that the defendant Burney would account for and return to the plaintiff bank the proceeds of the Clarinda sale; and that, if the money realized therefrom should be paid by the said Link L. Burney to the plaintiff, Britton's liability on said note should be at an end. It also appears from the answer that the alleged verbal understanding was had prior to the execution of the note. The answer then states that relying upon the honesty of the said Link L. Burney as well as the plaintiff, and the representations and promises hereinbefore set forth, and for no other or different consideration, the defendant Britton signed said note; that the plaintiff, disregarding the agreement with this answering defendant, allowed the defendant Link L. Burney to speculate and squander a large portion of the proceeds of said sale.

The foregoing states the substance of the defense interposed by the defendant Britton. Upon the trial in

the district court for Hitchcock county the plaintiff had a verdict and judgment against the defendant Burney, but the verdict and judgment was against the plaintiff and in favor of the defendant Britton. The plaintiff has appealed.

One of the principal assignments of error upon which the plaintiff relies for a reversal of the judgment as to the defendant Britton is that the trial court, over the objections of the plaintiff, allowed the defendants to introduce evidence tending to show the parol agreement set forth in Britton's answer. The ground of the objection was that the terms of the written instrument itself could not be contradicted or varied by parol evidence. A like question was before this court in *State Bank of Cercsco v. Belk*, 56 Neb. 710. In that case the defendant by his answer admitted the execution of the note sued on, and pleaded as a defense a parol agreement that, prior to the date of the note, one Thomas Stretch had executed a note of a like amount to the plaintiff, with the defendant as surety; that, when the note became due, the defendant refused to sign a renewal thereof, and that it was agreed by and between the defendant and the plaintiff that the defendant should execute the note sued on and deliver it to the plaintiff, who was to hold it until he should secure other securities upon the note of the said Stretch, and then the note in suit should be returned to the defendant, and he should not be held liable thereon. It was further alleged, in substance, that thereafter the plaintiff did secure other sureties upon said new note of said Stretch, being the note referred to in the note sued on, and surrendered the original note and took and accepted the new note of said Stretch, with said sureties, by reason whereof and by reason of said agreement it became the duty of the plaintiff to return the note sued on to the defendant, and the defendant was relieved of liability thereon, and the same was fully paid, discharged and satisfied. On the trial in the district court Belk was permitted to

introduce evidence which sustained the averments of his answer, and the question presented by the record was the correctness of the ruling of the court in admitting that testimony. In consideration of the rule previously announced in *Hamilton v. Thrall,* 7 Neb. 210, *Van Etten v. Howell,* 40 Neb. 850, *Waddle v. Owen,* 43 Neb. 489, *Western Mfg. Co. v. Rogers,* 54 Neb. 456, and *Sylvester v. Carpenter Paper Co.,* 55 Neb. 621, it was held that, in the absence of fraud, mistake or an ambiguity in the writing, the contract constituted the best and only competent evidence, and the judgment of the district court was reversed. The rule there announced has since been adhered to in *Faulkner v. Gilbert,* 61 Neb. 602; *Garneau v. Cohn,* 61 Neb. 500; *Harnett v. Holdrege,* 73 Neb. 570; *Vradenburg v. Johnson,* 3 Neb. (Unof.) 326; *Mallory v. Estate of Fitzgerald,* 69 Neb. 312; *Aultman, Miller & Co. v. Hauk,* 4 Neb. (Unof.) 582. We are of opinion that the case at bar is within the rule announced in the cases above cited.

Counsel for the defendants have directed our attention to *Gifford v. Fox,* 2 Neb. (Unof.) 30, also the same case reported in *Fox v. Gifford,* 5 Neb. (Unof.) 502, and *Davis v. Sterns,* 85 Neb. 121. In those cases it was held that, as between the original parties to a promissory note, parol evidence could be received to show the consideration therefor. We think this has always been the rule, and it in no way conflicts with the principle announced in the cases which support this opinion. The other cases referred to by the defendants appear to have been sufficiently distinguished in *State Bank of Ceresco v. Belk, supra.*

Finally, to maintain certainty, we deem it proper for us to adhere to the long-established and well-settled rule relating to commercial paper, and we are of opinion that the district court erred in receiving the evidence complained of. Having reached this conclusion, the other assignments of error will not be considered.

For the foregoing reason, the judgment of the district

court is reversed and the cause is remanded for further proceedings.

REVERSED.

MERIBA ESSEX, APPELLEE, V. SOL A. KSENSKY ET AL., APPELLANTS.

FILED DECEMBER 14, 1911. No. 16,763.

1. **Depositions, Objections to.** An objection to a deposition, on the ground of a defect in the certificate of the officer before whom it was taken, cannot be considered unless made in writing, and filed before the commencement of the trial. *Yearsley v. Blake*, 85 Neb. 736.
2. **Intoxicating Liquors: ACTION: DAMAGES: REVIEW.** A judgment for damages will not be set aside on the grounds that it is not supported by the evidence and is excessive, if there is competent evidence in the record which supports it, unless a reviewing court can say that it is clearly wrong.

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

E. C. Strode, D. C. Burnett and *M. V. Beghtol,* for appellants.

George W. Berge, contra.

BARNES, J.

Action by a married woman against a licensed saloonkeeper and his bondsman to recover damages alleged to have been sustained by her and her minor children from the effects of intoxicating liquors sold to her husband. On the trial in the district court for Lancaster county, the plaintiff had a verdict for $3,000, which the trial court, in ruling on a motion for a new trial, reduced to $2,000 by requiring a remittitur. Judgment was rendered for that sum, and the defendants have appealed.

The appellants base their demand for a reversal of

the judgment upon two grounds, which will be disposed of in the order in which they were presented.

1. It is contended that the court erred in permitting the plaintiff to read the deposition of one William E. Mohan in evidence over their objections. The record discloses that the deposition was taken under a stipulation entered into for that purpose between the parties; that it was taken as agreed upon, and was returned to and filed by the clerk of the district court as prescribed by law. The deposition appears to be regular in all respects, excepting only the certificate of the officer before whom it was taken, which reads as follows: "Subscribed and sworn to before me this 9th day of November, 1909. Louis J. Conway, Notary Public."

It should be further noted that no seal was attached to the jurat. The deposition was received and filed by the clerk of the district court on the 13th day of November, 1909, and the trial commenced on the 8th day of December, following. No motion was made to suppress the deposition, and no objections or exceptions to it in writing were ever filed, as required by section 389 of the code, which reads as follows: "Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause." Section 390 of the code further provides: "No exceptions other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial."

It appears that, when the plaintiff offered to read the deposition, the defendants interposed an oral objection as follows: "We object to the offer at this time, for the reason there is no proper or sufficient foundation laid, not properly certified, and for the reason that it is immaterial at this stage of the case." The plaintiff read the stipulation under which the deposition was taken, and the court overruled the objection. It is strenuously contended that this was reversible error. The argument in support of this assignment proceeds on the theory that

the deposition was incompetent, although it appears from the record that incompetency was not one of the grounds of the objection. We are of opinion that this contention cannot be upheld.

In *Yearsley v. Blake,* 85 Neb. 736, it was held that "An exception to a deposition, on the ground of a defect in the notice, cannot be considered unless made in writing, and filed before the commencement of the trial." In the opinion in that case it was said: "As to the point that the notice to take depositions was not properly served, this need not be considered, because the alleged defect was known before the trial, but no exceptions were made before its commencement, as required by sections 389 and 390 of the code." The defect in regard to the certificate of the officer in this case was known to the defendants, and the right to object at the proper time and in the proper manner was not exercised. We think the rule in the foregoing case applies to and is decisive of the question at bar, and the court did not err in overruling the objection to the deposition made for the first time upon the trial of the cause.

2. Finally, it is contended that the judgment is excessive and is not sustained by the evidence. We have examined both of the abstracts and the bill of exceptions, and find therein competent evidence tending to establish the fact that for a period of about four years the defendant Ksensky frequently sold intoxicating liquors to plaintiff's husband, by the drink, in his saloon, and by the bottle, which Essex took to his home and drunk upon his own premises; that he thereby became so frequently intoxicated as to cause his employers to discharge him; that his health was impaired, and his earning capacity was practically destroyed thereby. It also appears that Essex was a carpenter by trade, and when not under the influence of intoxicating liquor was a skilled workman, capable of earning from $600 to $800 a year, which he contributed to the support of the plaintiff and their minor children. Disinterested witnesses, who had per-

sonal knowledge of the facts, testified that before Mr. Essex became addicted to the excessive use of intoxicating liquors, and before the sales in question were made to him, his family was in comfortable circumstances; that after that time things gradually grew worse with them, until they actually suffered for the want of suitable food and clothing; that the plaintiff was compelled to go out to menial domestic service in order to furnish food and clothing for herself and children; that thereby she could only purchase cast-off clothing from charitable organizations; that this condition continued until this action was commenced, since which time Essex has been unable to procure liquor from the defendant, has been doing better, and is again able to support his family. In view of this testimony, we cannot say that the verdict is excessive, and is not sustained by the evidence.

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

AFFIRMED.

AUGUST DECK, APPELLANT, V. PETER KAUTZ ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,577.

Intoxicating Liquors: ACTION ON BOND: COSTS. In an action for damages on a saloon-keeper's bond, a plaintiff is not entitled to recover his costs if the verdict in his favor is less than $200. *Rosenbaum v. Dunston*, 16 Neb. 111.

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

William V. Allen and *William L. Dowling*, for appellant.

H. E. Siman and *Sullivan & Rait, contra.*

LETTON, J.

The plaintiff recovered a verdict and judgment for $74.30 in an action on a saloon-keeper's bond. He moved the district court for a judgment for his costs. This motion was overruled, and it was ordered that each party pay his own costs. From this order plaintiff appeals.

The only point we think involved was settled in *Rosenbaum v. Dunston,* 16 Neb. 111. We are content to adhere to the rule announced therein.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

ROTHCHILD & COMPANY, APPELLANT, V. A. M. VAN ALSTINE ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 17,078.

1. Chattel Mortgages: VALIDITY: BONA FIDE PURCHASERS. "When the possession of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed as required by section 14, ch. 32, Comp. St. 1893, the mortgage is absolutely void as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage or not." *Farmers & Merchants Bank v. Anthony,* 39 Neb. 343.

2. ———: ATTACHMENT: PRIORITIES. A purchaser at a sale under attachment proceedings of chattels covered by an unfiled mortgage, without notice of the existence of such mortgage, takes the property discharged of the mortgage lien.

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

Wilbur F. Bryant, C. H. Leech and *Burr, Greene & Greene,* for appellant.

H. E. Burkett, contra.

LETTON, J.

In January, 1909, Rothchild & Company, a corporation doing business in Chicago, sold to defendants Van Alstine, who were residents of Hartington, Nebraska, a Meister piano, the purchase price of which was payable in monthly instalments according to the provisions of a note and chattel mortgage then executed by the purchasers. The mortgagors retained possession of the piano. Afterwards it was seized in attachment proceedings against the Van Alstines, and, with other personal property levied upon, was on March 26, 1910, sold at public auction under the order of sale to defendant Cornelius M. Olsen for the sum of $140. The evidence shows it was worth about $200 at the time. The mortgage was not filed until after the sale. Shortly afterwards this action in replevin was begun by the mortgagee to recover possession of the piano from Olsen. The case was tried to the court without the intervention of a jury. The court found for the defendant Olsen and rendered judgment accordingly.

Plaintiff contends that the finding is contrary to the law and evidence, and that the court erred in refusing to permit proof that the Van Alstines were not nonresidents of the state at the time the attachment proceedings were begun. Plaintiff's theory of the case seems to be that because it had employed Mr. H. E. Burkett to collect instalments due from the Van Alstines on the piano, which employment ceased in October, 1909, the attachment proceedings, which were begun by him in March, 1910, were brought with notice to the attaching creditors of the existence of the mortgage; that actual notice was afterwards given to him by Mrs. Van Alstine, and that, consequently, Olsen was not a purchaser in good faith without notice. There is no force in this contention. Under section 14, ch. 32, Comp. St. 1911, the piano being in the possession of the mortgagor and the mortgage being unrecorded, it was "absolutely void as against the

creditors of the mortgagor, and as against subsequent purchasers and mortgagees, in good faith." Olsen purchased the piano before the mortgage was recorded. He testifies positively that he never talked with Burkett, or with Hoese & Mengshol, the creditors, about it; that he did not know where the Van Alstines procured it or that they owed anything on it, and that he had no knowledge or information that the plaintiff had a chattel mortgage or any other kind of a lien on the piano. Having purchased the piano before the mortgage was recorded, and without notice of the existence of that instrument, he is a *bona fide* purchaser, and the mortgage was absolutely void as to him. The plaintiff's evidence was insufficient to show notice, and the burden of proof of this fact was upon it. *Rogers v. Pierce,* 12 Neb. 48. The case is ruled by *Farmers & Merchants Bank v. Anthony,* 39 Neb. 343; *Spaulding v. Johnson,* 48 Neb. 830; *Meyer & Raapke v. Miller,* 51 Neb. 620; *Vila v. Grand Island E. L., I. & C. S. Co.,* 68 Neb. 222; *Johns v. Kamarad,* 2 Neb. (Unof.) 157.

As to the second point, the court did not err in excluding this proof. The offer was made on the plaintiff's main case. The answer was a general denial. This testimony could only become admissible in case the defendant sought to justify under the attachment proceedings, and until such a defense was made the proof was irrelevant and immaterial. The offer was not renewed in rebuttal to meet this issue.

We find no error in the judgment, and it is therefore

AFFIRMED.

WILL G. WORTH, APPELLANT, V. HARRY B. WARE ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 17,108.

1. **Landlord and Tenant: RIGHTS OF SUBTENANT.** Ordinarily a subtenant has no greater rights in the leased premises than the original tenant.

2. ———: ———: ACTION FOR DAMAGES. A sublessee may not recover damages from his lessor for interference by a third person with his possession and business, when he has not been ousted and no wrongful act of his lessor has been proved.

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

Burr, Greene & Greene, for appellant.

Field, Ricketts & Ricketts, Stewart, Williams & Brown, W. C. Frampton and *Robert A. Moore, contra.*

LETTON, J.

Kellogg and Bratt, who are the owners of a three-story building in the city of Lincoln, executed a lease on the same from May 1, 1907, to April 30, 1912, to Cole-McKenna Company. This controversy is over the possession of a part of the ground floor room. In 1908 Cole-McKenna Company verbally sublet a back room on the premises to C. A. Green, to be used for a barber shop, at a rental of $15 a month. On May 12, 1909,. Cole-McKenna Company subleased to R. A. Moore a part of the front room from June 1, 1909, to the expiration of the Cole-McKenna Company lease, and on May 28, 1909, Moore sublet to Green a portion of this space, extending along one side and to the front of the room, at a rental of $75 a month. This lease was immediately assigned by Green to Worth, the plaintiff in this case. In March, 1909, Green had sold his fixtures, good-will and right to the possession of the back room, which he then occupied, to Worth for $1,750. Afterwards the defendant Ware, with the consent of Kellogg and Bratt, and at an increased rent, procured an assignment from the Cole-McKenna Company of their lease, and took possession under the same; Worth at that time being in possession of the part of the front room which Green had subleased from Moore. A controversy arose between Ware and Worth with reference to the rights of the latter in the premises,

and Ware interfered with Worth's possession and use of the property to the detriment of his business. Worth then filed a petition in equity setting forth the facts of the lease and subleases, the consent of Kellogg and Bratt thereto, his rights in the premises, the interference with his possession and damage to his business by Ware, that a multiplicity of actions would be necessary to determine the several rights of the parties, and the inadequacy of a remedy at law, and prayed that the rights of the parties be determined, his possession protected, and his damages ascertained and adjudged.

The pleadings are too extensive and involved to be set forth in this opinion, the petition alone covering 19 typewritten pages. The district court made detailed and lengthy findings in conformity with the facts herein recited; finding, also, that Ware is in default to Cole-McKenna Company for payments due them under the lease, and that Cole-McKenna Company have a right to take possession of the premises leased to him; that Cole-McKenna Company are in default to Kellogg and Bratt, and that Worth owes two months' rent to Cole-McKenna Company; that plaintiff is entitled to recover $150 against Ware for damages, against which $75 due Ware for rent is offset, leaving $53, for which he is awarded judgment against Ware, but finding, also, he is not entitled to any damages against the other defendants. It is adjudged that, if Cole-McKenna Company fail to comply with the terms of their lease with Kellogg and Bratt, Worth may do so and be subrogated to their rights thereunder. The decree was afterwards modified on plaintiff's motion so as to provide that the rights and liabilities between the plaintiff and defendants Moore and Green on account of any subsequent ouster be reserved for future action, and Ware was perpetually enjoined from further prosecuting an action then pending against the plaintiff for forcible entry and detention. It appears that after the decree plaintiff was ousted on account of default in the payment of the rent due Kellogg and Bratt.

A single point only is presented by the appeal, which is that the court erred in not entering judgment for the plaintiff for his actual damages. The first point argued in the appellant's brief is that the action was of such a nature that a court of equity should take full cognizance of it, and having assumed jurisdiction should retain it and grant complete relief, and, further, that, this being so, it is proper and right that damages be awarded to the full extent shown by the evidence. These propositions are elementary and it is unnecessary to spend time in discussing them. The plaintiff's principal complaint seems to be that the amount of damages awarded is insufficient under the evidence, and that those awarded were only against defendant Ware, while he is entitled to damages against all the other defendants as well.

So far as Kellogg and Bratt are concerned, the court made no mistake in failing to award damages against them. It is clear that Worth was a subtenant of the Cole-McKenna Company through Moore. He paid his rent to them, and after they assigned their lease to the defendant Ware he paid his rent to Ware. Worth was bound to take notice of the existence of the terms and conditions of the lease to Cole-McKenna Company, and his tenure was subject to all the terms and conditions that the original lease imposed upon the lessee. *Blachford v. Frenzer,* 44 Neb. 829. When the rights of Cole-McKenna Company under the lease terminated by a failure to perform the conditions thereof, his rights also terminated. There is no evidence to show that Worth ever acquired any rights to the possession of the premises from Kellogg and Bratt independent of the lease to Cole-McKenna Company, and there is nothing in the fact of his posession or his subtenancy which prevented Kellogg and Bratt from enforcing the terms of the original lease, even though it operated to oust Worth from his subtenancy.

As to the defendant Green: At the time that Green sold the fixtures, good-will and business to Worth he was occupying the back room only. The lease for part of the

front room was not executed for some time afterwards, although it was no doubt understood between Green and Worth that the lease should be procured. Green never took possession under the lease from Moore, but merely assigned it to Worth. At the time this action was begun Worth was in possession. He was still in possession at the time of trial and decree. On what basis then is he entitled to recover damages against Green? He had not been evicted. He was fully aware that Moore was a subtenant, and what has been said before with respect to his relations to Kellogg and Bratt under the Cole-McKenna Company lease applies equally to his relations with Green and Moore. Plaintiff has not pointed out in what respect the assessment of damages against Ware is erroneous. The damages to his business caused by the annoying acts of Ware are difficult of ascertainment, and, in the absence of anything to show wherein the judgment was wrong in this respect, we are inclined to the view that the $150 allowed by the district court is a fair estimate. We have no doubt that the plaintiff has lost a great deal more than the damages awarded to him, but are inclined to think that this has resulted largely from the fact of his paying a good round sum for a business, location, fixtures, and good-will, the stability and permanency of which depended upon the insecure foundation of a sublease from a tenant whose financial standing was uncertain and who was not able to comply with the terms of the lease. A court of equity cannot remedy lack of caution and prudence in business transactions, and, while we regret the unfortunate plight of the plaintiff, we are unable to offer him further relief than that granted by the district court.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.